

No. 25-4978

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRITTANY BOUNTHON, et al.,

Plaintiffs-Appellants,

v.

THE PROCTER & GAMBLE CO.,

Defendant-Appellee.

On Appeal from the United States District
Court for the Northern District of California
(Case No. 23-cv-765-AMO) (Judge Araceli Martinez-Olguín)

**BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS
CURIAE IN SUPPORT OF DEFENDANT-APPELLEE**

Cory L. Andrews

Zac Morgan

Counsel of Record

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave. NW

Washington, DC 20036

(202) 588-0302

zmorgan@wlf.org

March 23, 2026

RULE 26.1 DISCLOSURE STATEMENT

Washington Legal Foundation has no parent company, issues no stock, and no publicly held company owns a 10 percent or greater interest in it.

TABLE OF CONTENTS

Rule 26.1 Disclosure Statement.....	i
Table of Contents	ii
Table of Authorities.....	iii
Interest of Amicus Curiae	1
Introduction and Summary of Argument	1
Argument.....	5
AFFIRMANCE AVOIDS FIRST AMENDMENT PITFALLS	5
a. Vague pleading standards chill speech for the same reason vague laws do.....	7
b. Reversal would impose a direct First Amendment injury on Procter & Gamble	11
Conclusion	13
Certificate of Compliance.....	14

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	1, 6, 7
<i>Austin v. Mich. Chamber of Com.</i> , 494 U.S. 652 (1990).....	9, 12
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960).....	11
<i>Bates v. State Bar of Ariz.</i> , 433 U.S. 350 (1977).....	8
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	4, 7, 11, 12
<i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.</i> , 447 U.S. 557 (1980).....	8
<i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310 (2010).....	3, 6, 8, 9, 11
<i>Dura Pharms. v. Broudo</i> , 544 U.S. 336 (2005).....	4
<i>Eu v. S.F. Cnty. Democratic Cent. Comm.</i> , 489 U.S. 214 (1989).....	8
<i>Fed. Election Comm’n v. Wis. Right to Life</i> , 551 U.S. 449 (2007).....	3, 6, 10, 11
<i>Mahmoud v. Taylor</i> , 606 U.S. 522 (2025).....	4, 12

<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	10
<i>Newcal Indus., Inc. v. Ikon Off. Sol.</i> , 513 F.3d 1038 (9th Cir. 2008).....	6
<i>Nat’l Ass’n of Wheat Growers v. Bonta</i> , 85 F.4th 1263 (9th Cir. 2023)	1
<i>Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.</i> , 413 U.S. 376 (1973).....	3
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995).....	9
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011).....	6, 8, 10
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945).....	3, 10
<i>U.S. Catholic Conf. v. Abortion Rts. Mobilization, Inc.</i> , 487 U.S. 72 (1988).....	2, 7
<i>Va. State Bd. of Pharms. v. Va. Citizens Consumer Council, Inc.</i> , 425 U.S. 748 (1976).....	10
<u>Constitutional Provisions</u>	
U.S. Const., art. III.....	1
U.S. Const., amend. I	<i>passim</i>
<u>Federal Rule of Civil Procedure</u>	
Fed. R. Civ. P. 12(b)(6)	1, 3, 5

Other Authorities

Philip Bobbitt,
Constitutional Fate: Theory of the Constitution
(Oxford Univ. Press 1984) 5

Jeremy Goldman,
US digital ad spend to exceed \$300 billion in 2024,
eMarketer (Dec. 16, 2024) 8

Alan Greenspan & Adrian Wooldridge,
Capitalism in America: A History (2018) 10

OpenSecrets,
“Cost of Election” 8

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears before the U.S. Supreme Court and this Court to advocate for adherence to the Federal Rules of Civil Procedure, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and the First Amendment’s embrace of commercial speech, *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263 (9th Cir. 2023).

INTRODUCTION AND SUMMARY OF ARGUMENT

Liberty is safeguarded by procedure. A federal class action complaint is a request to leverage Article III power against another person—not something to be taken lightly. And so the exacting standards of Rule 12(b)(6) force courts to carefully consider whether the complaint runs against “the central principle of a free society that courts have finite bounds of judicial authority, some of constitutional origin, which exist to

* No party’s counsel authored any part of this brief. No one, apart from Amicus and its counsel, contributed money intended to fund the brief’s preparation or submission. All parties have consented to WLF’s filing of this brief.

protect citizens from . . . the excessive use of judicial power.” *U.S. Catholic Conf. v. Abortion Rts. Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

Take Ms. Bounthon’s third amended complaint. She asks a federal court to punish Procter & Gamble (P&G) for its speech—how it talks about, promotes, and advertises its Tampax Pure tampons. Why? She *might* have found below-trace amounts of organic fluorine on that product. So she claims it’s illegal for P&G to say the tampon contains “Tampax pure cotton*,” with a “100% organic cotton core” and a “100% organic cotton outerwrap,” providing users “the best of science [and] nature.” ER-10–11 ¶¶ 5–7. On that basis and that basis alone, she asks for the courthouse door to swing open for her entire class.

The district court justly refused. Even under the most generous reading of Ms. Bounthon’s fourth round of allegations, P&G’s cotton tampons are 999,970 parts per million *not* organic fluorine. Unsurprisingly, women know how to round up to the nearest decimal and grasp the scientific fact that nothing is absolutely 100.0 percent any substance once exposed to air. That’s woefully insufficient ground to convert P&G’s honest, effective product advocacy into illegal speech—the functional equivalent of “a want ad proposing a sale of [illegal] narcotics

or soliciting prostitutes.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Rels.*, 413 U.S. 376, 388 (1973).

The district court’s order didn’t just properly apply the Rules. Dismissal avoided two significant First Amendment harms. First, if the garden-variety advertising captured in the complaint is enough to juke the Rule 12(b)(6) doorstep, it will “blanket[] with uncertainty whatever may be said,” by the Nation’s going concerns to promote the high quality of their products. *Thomas v. Collins*, 323 U.S. 516, 523 (1945). Businesses thrive in a legal regime of certainty and predictability. Allowing speculative complaints to proceed to fact-intensive and expensive discovery on thin reeds will chill commercial speech “for the same reason that vague laws chill speech.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 324 (2010). Company general counsel, compliance personnel, and single proprietors alike all “must necessarily guess at the law’s meaning and differ as to its application.” *Id.* (quoting *Connally v. Gen’l Constr. Co.*, 269 U.S. 385, 391 (1926) (brackets omitted)).

Second, meaningless “costly, fact-dependent litigation” about First Amendment-protected activity is itself prohibited by the First Amendment. *Fed. Election Comm’n v. Wis. Right to Life*, 551 U.S. 449,

468 (2007) (Roberts, C.J., controlling) (internal quotation marks and citation omitted). Should P&G prevail on the merits, it will have been needlessly dragged all the way through discovery, further motions practice, trial, and judgment for its truthful commercial speech. No defendant can be properly compensated for that constitutional violation. *Mahmoud v. Taylor*, 606 U.S. 522, 569 (2025) (“[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”) (internal quotation marks and citation omitted).

“Probably, then, it is only by taking care to require allegations that reach the level suggesting” actual, concrete falsity and deception “that we can hope to avoid the potentially enormous expense of discovery” and trial “in cases with ‘no reasonably founded hope that the [judicial] process will reveal relevant evidence’ to support a [false advertising] claim.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 (2007) (quoting *Dura Pharms. v. Broudo*, 544 U.S. 336, 347 (2005)). That’s exactly what the district court did. It should be affirmed.

ARGUMENT

AFFIRMANCE AVOIDS FIRST AMENDMENT PITFALLS.

Thrice Ms. Bounthon has amended her complaint, and thrice it has been found wanting. This last time, the district court correctly concluded that Bounthon’s “allegations that organic fluorine is present in the tampon products are implausible.” ER-4. That was the right call.

Even if you give Bounthon a standard far below what Rule 12(b)(6) demands, she would still lose. Let’s presume as irrefutable fact what the district court found “implausible.” *Id.* Maybe there are approximately 30 parts per million of organic fluorine on the tampons—presumably rendering the cotton portions somewhere short of being 99.997 percent cotton. It doesn’t follow that Procter & Gamble can’t festoon its packaging with the pitch that “Tampax pure cotton*” with its “100% organic cotton core” and “100% organic cotton outerwrap,” represents “the best of science and nature.” ER-10–11 ¶¶ 5–7. If “[a]s Dr. Johnson said, it is no answer to a man who says ‘that orchard has no fruit’ to reply that there are two or three apples in it,” Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 107 (Oxford Univ. Press 1984), then the speculation that a scintilla-of-a-scintilla of a Tampax Pure tampon might contain

organic fluorine certainly can't offer "facial plausibility" worth "unlock[ing] the doors of discovery" on Bounthon's claims. *Iqbal*, 556 U.S. at 678; ER-16–22.

Consumers know how to (1) round up to the nearest decimal and (2) understand that nothing is ever 100.0 percent a substance once exposed to air. So P&G's speech is plainly factual, even taken on Bounthon's terms. Meanwhile, P&G's belief that its products wonderfully represent "the best of science and nature" is protected commercial opinion. "That kind of general assertion is classic puffery." *Newcal Indus., Inc. v. Ikon Off. Sol.*, 513 F.3d 1038, 1053 (9th Cir. 2008).

In short, P&G's speech marshals facts to support its opinion that consumers should buy Tampax Pure tampons. The First Amendment precludes the government, including the judiciary, from acting with "purpose and effect . . . to prevent corporations" of any size "from presenting both facts and opinions to the public." *Citizens United*, 558 U.S. at 355. "Commercial speech is no exception" to that rule. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). So this Court must take into consideration the constitutional fallout of reversal here. *Wis. Right to*

Life, 551 U.S. at 474 (Roberts, C.J., controlling) (“Where the First Amendment is implicated, the tie goes to the speaker”).

Two First Amendment injuries loom. First, letting Bounthon’s unwell-pleaded complaint proceed would chill commercial speech just as a vague law would. Second, even when P&G ultimately succeeds on the merits, it would have still endured “costly, fact-dependent litigation” for First Amendment-protected speech. *Id.* at 468 (internal quotation marks and citation omitted). And this Court’s reversal would be the precedent cited in other cases bringing like complaints. In those matters, other, less well-capitalized firms may choose “to settle even anemic cases before reaching” a final judgment. *Twombly*, 550 U.S. at 559. Either outcome is itself prohibited by the First Amendment, which safeguards against “the excessive use of judicial power” to burden speech. *U.S. Catholic Conf.*, 487 U.S. at 77.

a. Vague pleading standards chill speech for the same reason vague laws do.

A First Amendment that didn’t protect effective commercial advocacy would have more substance to it than Ms. Bounthon’s “[t]hreadbare” complaint—but not by much. *Iqbal*, 556 U.S. at 678. While “the First Amendment ‘has its fullest and most urgent application’” to

political advocacy, *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (citation omitted), speech that “only pertain[s] to a commercial transaction,” *Citizens United*, 558 U.S. at 369, still carries robust constitutional protection. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980). Courts of law, like “[l]awmakers, may no more silence unwanted speech by burdening its utterance than by censoring its content.” *Sorrell*, 564 U.S. at 566 (comma supplied).

Assuming otherwise would grant government expansive power over what Americans say and hear. Consider: \$15 billion was spent on federal election advocacy, including spending by civil society groups, in the 2024 cycle (which includes 2023 spending). OpenSecrets, “Cost of Election,” <http://bit.ly/4udJ6QX> (last visited March 23, 2026). By contrast, the *annual* amount of money spent on digital advertising alone tallies at least 20 times that. Jeremy Goldman, *US digital ad spend to exceed \$300 billion in 2024*, eMarketer (Dec. 16, 2024), <https://perma.cc/Y54G-XVF9>. Little wonder that a “consumer’s concern for the free flow of commercial speech may be far keener than [her] concern for urgent political dialogue.” *Sorrell*, 564 U.S. at 566 (quoting *Bates v. State Bar of Ariz.*,

433 U.S. 350, 364 (1977)). That doesn't mean that all commercial speech merits special consideration—but it explains why there's some “artificiality [to] a rigid, commercial/noncommercial distinction.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring).

If Bounthon's claims—targeted at non-coercive, non-deceptive, non-misleading, truthful speech—may advance, no company general counsel could be sure how to advise her client how to legally and effectively communicate that products are “pure,” “the best,” or “100%” effective. Since those are bog-standard ways that companies talk up their products, going forward every script, label, and package will merit merciless scrutiny for the possibility that some wording could be seized upon by the plaintiff's bar to fuel an expensive class action on an unfalsifiable claim of underlying harm. *Cf. Austin v. Mich. Chamber of Com.*, 494 U.S. 652, 706 (1990) (Kennedy, J., dissenting), *overruled by Citizens United*, 558 U.S. at 365 (“All censorship is suspect; but censorship based on vague surmise is not permissible in any case”). Companies that can't afford rigorous compliance counsel will have to make an educated guess. If they guess wrong—multi-million-dollar litigation beckons. And of course, even if a company can swing the cost, the most stringent review process is no

panacea. Even highly qualified, high-priced counsel can still make an expensive mistake. “First Amendment freedoms need breathing space to survive.” *Wis. Right to Life*, 551 U.S. at 468–69 (Roberts, C.J., controlling) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Vagueness as to pleading standards “provides none.” *Wis. Right to Life*, 551 U.S. at 469.

Since “[b]usinesspeople crave” regulatory and legal “certainty as much as almost anything,” Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 258 (2018), companies will “hedge and trim” their speech rather than offering the best case for why their products beat out the competition. *Thomas*, 323 U.S. at 535. Effective, truthful advertising—effective advocacy—will be quietly binned to avoid an avalanche of litigation. The result? Less advertising, less branding, and less back-and-forth between buyers and sellers. In short: Less speech. The Constitution precludes that outcome. “The choice, ‘between the dangers of suppressing information, and the dangers of its misuse if it is freely available,’ is one that the ‘the First Amendment makes for us.’” *Sorrell*, 564 U.S. at 578 (quoting *Va. State Bd. of Pharms. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). Even when

corporations are doing the talking, “it is our law and tradition that more speech, not less, is the governing rule.” *Citizens United*, 558 U.S. at 361.

b. Reversal would impose a direct First Amendment injury on Procter & Gamble.

Because Bounthon’s complaint is so speculative and her asserted injury from organic fluorine so unproven, ER-4, she will lose on the merits. Discovery and trial on such a gossamer complaint will impose direct First Amendment harm on P&G.

Commercial speech is “protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference,” *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960), such as unnecessary judicial process. So meaningless “costly, fact-dependent litigation” against First Amendment-protected activity is itself prohibited by the First Amendment. *Wis. Right to Life*, 551 U.S. at 468 (Roberts, C.J., controlling) (internal quotation marks and citation omitted). In that context, the Supreme Court has found the unnecessary deposition of five people and “turn[ing] over many documents related to . . . operations, plans, and finances” imposed “a severe burden on [protected] speech.” *Id.* n.5. No doubt Ms. Bounthon’s class will want far more than that from P&G here. *Twombly*, 550 U.S. at 559 (noting

difficulty for courts to check “discovery abuse” once a complaint has survived a motion to dismiss).

Should P&G prevail on the merits, those First Amendment harms can never be properly recompensed. *Mahmoud*, 606 U.S. at 569. And in the onslaught of new litigation directed at commercial speech that a reversal here would unleash, there’s no guarantee that other targets will be able to wage a righteous defense—“the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before” final judgment. *Twombly*, 550 U.S. at 559. It needn’t be this way. “Commercial corporations may not have a public persona as sympathetic as that of” a lone consumer, “but they are no less entitled to this Court’s” protection from the slow boring away of First Amendment freedom through lengthy, expensive, class actions. *Austin*, 494 U.S. at 682 (Scalia, J., dissenting) (italics omitted).

CONCLUSION

Dismissal staved off a genuine parade of First Amendment horrors. This Court should affirm.

Respectfully submitted,

/s/ Zac Morgan

Cory L. Andrews

Zac Morgan

Counsel of Record

WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave. NW

Washington, DC 20036

(202) 588-0302

zmorgan@wlf.org

March 23, 2026

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,310 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ Zac Morgan
Zac Morgan
Counsel for Amicus Curiae
Washington Legal Foundation

March 23, 2026