No. 19-1284

IN THE
Supreme Court of the United States

MALWAREBYTES, INC.,
Petitioner,

v.

ENIGMA SOFTWARE GROUP USA, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

TYLER GRIFFIN NEWBY
FENWICK & WEST LLP
555 California Street
12th Floor
San Francisco, CA 94104

NEAL KUMAR KATYAL
Counsel of Record
BENJAMIN A. FIELD
REEDY C. SWANSON
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 19-1284

MALWAREBYTES, INC.,
Petitioner,

v.

ENIGMA SOFTWARE GROUP USA, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

This case is a textbook example of why judges should not allow policy considerations to "override * * * the text and structure of [an] Act." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). Attempting to give effect to the "history and purpose" of the Communications Decency Act (CDA), the Ninth Circuit disregarded the Act's operative text. In the process, the court conflated the provision at issue in this case with a different one. That approach cannot be reconciled with this Court's statutory construction rules. In both reasoning and result, it splits from decisions in numerous lower courts.

Far from defending the decision below, Respondent Enigma Software Group simply recapitulates the decision's policy arguments. Its half-hearted attempts to supplement the Ninth Circuit's reasoning with textual arguments quickly falter. And, in a bid to minimize the disagreement with other courts, Enigma grasps at irrelevant factual limitations that have no basis in the Ninth Circuit's reasoning.

In reality, the decision below upends settled understandings of Section 230 and threatens to embroil the Judiciary in policing the Internet. That is incompatible with the statute Congress wrote; in fact, it is the *opposite* of what Congress intended to accomplish with an Act meant to create expansive *immunity* from judicial interference. Pet. 5. And that is why a broad coalition of amici, ranging from corporate-minded entities such as the Internet Association (IA) to public interest groups such as TechFreedom, have urged this Court to grant certiorari. *See, e.g.*, IA Br. 2-4; TechFreedom Br. 2-5. While ordinarily the Court might be tempted to defer review, the dangerous consequences of the decision below cannot be left to stand without doing significant damage.

The Court should grant the petition.

ARGUMENT

I. THE DECISION BELOW DEFIES THIS COURT'S RULES OF STATUTORY INTERPRETATION AND DEVIATES FROM SETTLED UNDERSTANDINGS OF SECTION 230.

A. The Decision Below Erroneously Relies On Policy Rather Than Text To Interpret Section 230.

1. Enigma does not dispute that the decision below relies exclusively on policy. Indeed, quoting the heart of the Ninth Circuit's reasoning, Enigma admits that the court was "explain[ing], in detail, how Section 230's expressly stated *policies* support-ed" its holding. Opp. 12 (emphasis added).

Enigma defends the Ninth Circuit's approach by pointing out that, in Section 230, Congress included "a series of *express*" policies "underpinning the statute." *Id.* at 11. Enigma contends it was not error for the court to use those policy statements "to inform its understanding of the statutory text." *Id.* at 14.

But that is not what the Ninth Circuit did. The court did not refer to the Act's express policies to understand the ordinary meaning of "otherwise objectionable"—in fact, it never ventured to define those words. Instead, the court treated the express policy provisions as a license to create an exception to the statute's immunity *even when* material is objectionable. *See* Pet. App. 6a ("We hold that the phrase 'otherwise objectionable' does not include software that the provider finds *objectionable* for

anticompetitive reasons." (emphasis added)). That is not reading the text; it is countermanding it.

The plurality opinion in *Gundy* v. *United States*, 139 S. Ct. 2116 (2019) does not sanction such an approach. On the contrary, the plurality considered a "statement of purpose" only as a guide to a statute's "operative provisions." *Id.* at 2127 (internal quotation marks omitted). The treatise from which *Gundy* drew that principle states the rule even more directly: "[A]n expression of specific purpose in the prologue will not limit a more general disposition that the operative text contains." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 219 (2012); *see also Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260 (1994) (refusing to create an exception based on congressional findings not grounded "in the operative sections of [an] Act").

2. Enigma's defense of the Ninth Circuit's policy concerns doubles down on that court's fundamental error: confusing Section 230(c)(2)(B) with the subparagraph immediately preceding it, Section 230(c)(2)(A).

Enigma's argument hinges on its concern, repeatedly expressed, that Malwarebytes's position would allow it to "block" software in an anticompetitive fashion. Opp. 15 & n.6, 17. The Ninth Circuit shared a similar concern. *See* Pet. App. 20a (expressing concern about "unbridled discretion to block online content"). But the provision involved in this case, Section 230(c)(2)(B), does not concern the power to block content. As Malwarebytes explained in the petition (at 14-15): Section 230(c)(2)(B) applies to

developing tools that allow *other* people to block content.[1] Section 230(c)(2)(A), which already contains a "good faith" requirement, would apply to blocking content. Thus, Congress accounted for the policy concerns animating the decision below in the operative provisions of the statute.

Enigma apparently recognizes the difference between the two subparagraphs. *See* Opp. 22 (acknowledging that (c)(2)(B) applies to providers of the "technical means to restrict access," whereas (c)(2)(A) applies those who "take[] action to restrict access"). Yet Enigma never explains why its concerns about stifling the market apply in the context of entities that merely enable *others* to block or filter content.

3. Unable to defend the decision's policy considerations on its own terms, Enigma falls back on textual arguments nowhere found in the decision below. Those arguments fail.

First, Enigma invokes Section 230(c)'s caption, which is "Protection for 'Good Samaritan' blocking and screening of offensive material." Such a provision, Enigma contends, should not "be read to protect *bad actors*." Opp. 16. That premise comports with Malwarebytes's reading of the statute. Taken together, the Act provides immunity for those who act

---

[1] Enigma complains that some users may find it difficult to continue operating its programs when using Malwarebytes's software. But it never disputes that Malwarebytes is entitled to rely on (c)(2)(B)'s immunity for developing filtering tools, rather than (c)(2)(A)'s immunity for restricting access to content. *See* Opp. 6-7 & n.3.

"in good faith" to "restrict access to" objectionable material, 47 U.S.C. § 230(c)(2)(A), and those who develop the tools for restricting access without regard to their motivation, *id.* § 230(c)(2)(B). As Congress recognized, the "Good Samaritan" protected by Section 230(c)(2)(A) cannot accomplish her function without robust "development" of blocking and filtering "technologies," which (c)(2)(B) encourages. *Id.* § 230(b)(3).

Second, Enigma claims that Malwarebytes renders the adjectives preceding "otherwise objectionable" superfluous. But Enigma offers no definition of "objectionable" that would exclude those terms. In fact, Enigma argued below that "objectionable" could *only* be understood by reference to those terms. *See* Pet. App. 21a (considering, and rejecting, that argument). Under these circumstances, it is "much more likely that Congress employed a belt and suspenders approach" to reach all potentially objectionable content. *Atl. Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1350 n.5 (2020).

B. The Decision Below Splits From The Approach Of Other Courts.

Enigma also attempts to portray this case as one of "first impression" that does not implicate decisions in other jurisdictions. Opp. 17. That characterization masks substantial disagreement with other courts.

1. Within weeks of the original panel opinion in this case, a California trial court found that the decision below "ignore[d] the plain language of the statute by reading a good faith limitation into section 230(c)(2)(B)." *Prager Univ.* v. *Google LLC*, No. 19CV340667, 2019 WL 9640569, at *10 (Cal. Super.

Ct. Nov. 19, 2019). Enigma (at 20) offers factual differences between that case and this one, but no credible explanation for why the California court would find those facts relevant, having expressly "disagree[d]" with the decision in this case and found it contrary to the statutory text. *See Prager Univ.*, 2019 WL 9640569, at *10.

Enigma also notes that the appeal in *Prager* has not yet been resolved. *See* Dkt., *Prager Univ.* v. *Google LLC*, No. H047714 (Cal. Ct. App.). But, as Malwarebytes explained, existing California precedent makes affirmance a foreordained conclusion. *See* Pet. 20. Enigma did not dispute the point.

2. To argue there is no conflict with the D.C. Circuit, Enigma once again turns to irrelevant factual differences. True enough, the case involved a challenge to the scope of the FCC's regulatory authority rather than private litigation. *Comcast Corp.* v. *FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010). But Enigma cannot bring itself to dispute that, in resolving the case, the D.C. Circuit relied on "a general rule of statutory construction," Opp. 19, holding that "statements of policy, by themselves, do not" substitute for operative provisions to "create 'statutorily mandated responsibilities,'" 600 F.3d at 644. Thus, the D.C. Circuit would reject the Ninth Circuit's effort to rely on those same policy statements to create an exception to Section 230's operative provisions. *See* Pet. 19.

3. In a similar vein, Enigma tries to avoid the consensus view that Section 230 immunity is broad because the cited cases involved Section 230(c)(1). Once again, Enigma fails to engage with the *reason-*

ing in those cases, which was not limited to Section 230(c)(1). *See* Pet. 17-18. Indeed, in the critical passages, several of the cited decisions refer expressly to *all* of Section 230. *See, e.g.*, *Jane Doe No. 1* v. *Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016); *Zeran* v. *Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997); *Shiamili* v. *Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (N.Y. 2011).

Moreover, the Ninth Circuit has adopted a comparatively restrictive view of Section 230(c)(1), too. *Compare Fair Housing Council of San Fernando Valley* v. *Roommates.com, LLC*, 521 F.3d 1157, 1165-1172 (9th Cir. 2008) (en banc) (holding a website is not immune in part because it "channel[ed] subscribers" based on user-generated content), *with Force* v. *Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (holding a website immune for referrals based on user-generated content). The decision below cements the Ninth Circuit's status as an outlier with respect to all of Section 230 immunities.

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE.

In downplaying the importance of the decision below, Enigma (at 22-28) repeatedly suggests that it is limited to the facts of this case. That is a cramped reading of an opinion whose holding is broadly phrased: "blocking and filtering decisions that are driven by anticompetitive animus are not entitled to immunity." Pet. App. 11a. Even if Enigma were right, that is equally troubling: If courts can imply case-specific atextual exceptions to Section 230 based on judges' views of the "CDA's history and purpose,"

id. at 19a, Section 230's broad immunities become illusory.

Under either interpretation, then, technology firms in the Ninth Circuit can no longer count on Section 230(c)(2)(B). They will have to behave as if mere allegations of anticompetitive motivation—or some other exception based on the CDA's purposes—will expose filtering decisions to enormous litigation costs.

A. The Decision Below Threatens User Choice And Internet Security.

Enigma (at 25) disagrees that malware purveyors will be able to use the Ninth Circuit's decision to plead around Section 230(c)(2)(B), but that will be easy: Simply add putative security features to malicious software, and then allege "anticompetitive animus." *See* Pet. 25-26; ESET, LLC Br. 6-8; Cybersecurity Experts Br. 5-7, 11-12. Enigma says district courts will be able to "see through" such "ploy[s]" (at 24 n.11), but it does not explain how they can do so at the pleading stage.

As a fallback, Enigma suggests (at 26-27) that Rule 8's plausibility pleading standard will prevent abuse. Trying to pick holes in the facts *as alleged by the plaintiff*, though, is a far cry from the immunity from suit that Section 230(c)(2)(B) is supposed to provide. Pet. 24-25. Worse still: The Ninth Circuit did not rely on any specific allegations, but was content with Enigma's bare allegations that "its programs 'pose no security threat'" and that "Mal-

warebytes's justification for blocking * * * was a guise for anticompetitive animus." Pet. App. 23a. That is easy to allege.[2]

Nor is Enigma correct to assert (at 25) that automated algorithms will be spared from the decision below. *See* Pet. 27-28. Unless a plaintiff makes the self-defeating allegation that the challenged filtering decision was based on a neutral algorithm, the defendant faces the specter of discovery about how its proprietary algorithms work before it can prove their neutrality.[3]

Enigma also argues (at 15-16 & n.6) that if Section 230(c)(2)(B) were applied as written, it would let filtering-tool providers "act with impunity." That is an exaggeration, as the statute as written contains numerous exceptions. *See* 47 U.S.C. § 230(e). In any event, Congress's solution to undesirable filtering was user choice in a "competitive free market * * * unfettered by Federal or State regulation." *Id.* § 230(b)(2). Today's competitive cybersecurity mar-

---

[2] Notably, the Ninth Circuit's opinion referred to none of the additional facts allegedly showing animus that appear in Enigma's brief. *Compare* Pet. App. 23a, *with* Opp. 4-8. It thus invites future litigants to rest on bare allegations of animus.

[3] Enigma points (at 27) to one example of a court holding a plaintiff did not sufficiently allege animus. *Asurvio LP* v. *Malwarebytes Inc.*, No. 5:18-CV-05409-EJD, 2020 WL 1478345, at *5 (N.D. Cal. Mar. 26, 2020). Although that court saw the dangers of allowing plaintiffs to "plead around the broad immunity granted by section 230(c)(2)(B) and render [it] meaningless," *id.*, there is no guarantee other courts will exercise such restraint.

ket vindicates Congress's decision and gives users ample alternatives if they find their filtering-software provider self-serving. Pet. 28.

B. The Decision Below Undermines Important Filtering Tools.

Enigma acknowledges (at 25) that services like Facebook, Twitter, Reddit, and YouTube empower users to filter objectionable content with tools covered by Section 230(c)(2)(B). *See* Pet. 29-31; IA Br. 14-18. Contrary to Enigma's argument (at 26), disgruntled content providers whose material is flagged by those tools can easily allege that the decision was driven by animus favoring some competitor's content.

Enigma also says (at 26) that content filtered because it is "lewd" or otherwise covered by the specific terms in Section 230(c)(2)(A)'s list would not be subject to the anticompetitive-animus exception, but defendants must litigate that issue based on the plaintiff's characterizations of the content. Moreover, because the Ninth Circuit's reasoning stems from the policy statements that preface all of Section 230, it invites courts to fashion exceptions to the other adjectives too.[4]

---

[4] Enigma points out (at 27 n.17) that some district courts have applied the *ejusdem generis* canon to limit the reach of Section 230(c)(2) immunity by narrowing the term "otherwise objectionable." Although the Ninth Circuit correctly held that the canon does not apply, Pet. App. 21a-22a, its use of the prefatory policy statements is equally inconsistent with the statutory text.

C. The Decision Below Endangers All Of Section 230's Important Immunities.

Enigma offers hardly any rebuttal to the danger posed by courts using the CDA's vague policy statements to infer immunity exceptions. Pet. 31-35.

As for Section 230(c)(2)(A), Engima says its good-faith requirement would already incorporate an anticompetitive-animus exception. That just concedes that the Ninth Circuit's opinion will necessarily infect subsection (c)(2)(A) and effectively acknowledges that the decision below imported an element of the good-faith requirement into subsection (c)(2)(B), where good-faith language is absent.

Enigma also makes a single-sentence argument (at 28) that Section 230(c)(1) will be unaffected because the Ninth Circuit's opinion spoke largely in terms of 'blocking' content, whereas Section 230(c)(1) immunizes leaving content up. The Ninth Circuit's language was often broader, though, for instance "reject[ing] * * * that § 230 immunity applies regardless of anticompetitive purpose." Pet. App. 21a. And its logic is unbounded: If courts can use the CDA's "history and purpose"—which preface the entire statute—to imply exceptions to immunity, they can justify applying them to Section 230(c)(1).

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED, AND OTHER OPPORTUNITIES MAY NOT SOON ARISE.

1. Enigma does not dispute that the petition cleanly presents a purely legal question. Instead, it says (at 29) that review is premature because Malware-

bytes may yet prevail. But this Court regularly reviews threshold legal questions where a district court dismissed and the court of appeals reversed. *See, e.g.*, *Nestlé USA, Inc.* v. *John Doe I*, No. 19-416; *Gabelli* v. *SEC*, 568 U.S. 442 (2013); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007). That is especially appropriate in considering a congressionally conferred immunity from suit, which loses its effectiveness if the case proceeds to discovery. Pet. 24-25.

Moreover, if this Court does not grant review now, plaintiffs that may face a Section 230 defense will flock to federal courts in the Ninth Circuit—which covers the Nation's tech hub—and defendants will face significant incentives to settle and modify their behavior. *Id.* at 35-36. Enigma does not deny that this dynamic may pose significant obstacles to future review of the decision below.

2. Enigma also notes (at 29-31) that Congress and the Executive are considering possible amendments or rulemakings regarding Section 230. Important statutes, like the CDA, are often the focus of lawmakers' and regulators' attention, and this Court does not limit certiorari to neglected laws. In fact, the Court regularly reviews cases based on statutes or regulations that are the subject of proposed amendments. *E.g.*, *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1747 (2020); *Chase Bank USA, N.A.* v. *McCoy*, 562 U.S. 195, 199-200 (2011).[5]

[5] That the Administration has signaled sympathy for the Ninth Circuit's interpretation only illustrates the wide-ranging effects the Ninth Circuit's atextual analysis will have if not corrected

Besides, it is uncertain when, if ever, any of those proposed actions will occur. Meanwhile, as the broad coalition of amici shows, the Ninth Circuit's ruling warrants immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TYLER GRIFFIN NEWBY
FENWICK & WEST LLP
555 California Street
12th Floor
San Francisco, CA 94104

NEAL KUMAR KATYAL
Counsel of Record
BENJAMIN A. FIELD
REEDY C. SWANSON
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

AUGUST 2020

---

by this Court. *See, e.g.*, U.S. Dep't of Justice, *Section 230 – Nurturing Innovation or Fostering Unaccountability?* 20 (June 2020), https://www.justice.gov/file/1286331/download; Petition for Rulemaking of the Nat'l Telecomms. & Info. Admin. 33, *In re Section 230 of the Commc'ns Act of 1934*, No. RM-11862 (F.C.C. July 27, 2020), https://bit.ly/39W5IfS.