No. 24-345

In the Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL., PETITIONERS

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Section 47(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-46(b), gives private plaintiffs a federal cause of action to seek rescission of contracts that are alleged to violate the Act.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

A. Legal Background

1. The Investment Company Act of 1940 (ICA), ch. 686, Tit. I, 54 Stat. 789 (15 U.S.C. 80a-1 *et seq.*), regulates mutual funds and other "investment compan[ies]." 15 U.S.C. 80a-3(a)(1). The investment companies regulated by the ICA include both "open-end" and "closed-end" investment funds. 15 U.S.C. 80a-5(a); see 6 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 20:18, at 453 (8th ed. 2023) (Hazen). An "open-end" fund, including a typical mutual fund, continually issues

new shares to investors who wish to participate in the fund and "stands ready at any time to redeem the securities as to which it is the issuer." *Board of Governors of Fed. Reserve Sys.* v. *Investment Co. Inst.*, 450 U.S. 46, 51 (1981) (citation omitted). A "closed-end" fund, by contrast, typically "does not issue shares after its initial organization except at infrequent intervals and does not stand ready to redeem its shares." *Ibid.* (citation omitted). Shares in a closed-end fund instead are typically traded "as any other corporate stock might be, that is, on the exchanges or over-the-counter at a price established by the market." Hazen § 20:17, at 448.

The distinction between open-end and closed-end funds affects both how those funds invest and how their shares are valued. When an investor redeems shares in an open-end fund, the fund is generally obligated to buy back the shares at a price determined by the market value of the fund's investment portfolio, known as "current net asset value." 17 C.F.R. 270.22c-1(a). To ensure that they can honor redemption requests, open-end funds must keep sufficient capital on hand. *Investment Co. Inst.*, 450 U.S. at 51. Closed-end funds need not do so and therefore have greater flexibility than open-end funds to adopt certain investment strategies. See *Saba Capital CEF Opportunities 1, Ltd.* v. *Nuveen Floating Rate Income Fund*, 88 F.4th 103, 108 (2d Cir. 2023) (*Nuveen*). Closed-end fund investors who wish to leave the fund can sell their shares to other investors. Depending on market demand, shares in a closed-end fund can trade at prices above or below the fund's current per-share net asset value. *Ibid.*

2. Both open-end and closed-end funds are typically "created and managed by a pre-existing external organization known as an investment adviser." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536 (1984). The invest-

ment adviser "selects the fund's directors, manages the fund's investments, and provides other services." *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 338 (2010) (discussing mutual funds). Because the fund "is organized by its investment adviser," and the adviser "provides [the fund] with almost all management services," the fund and the investment adviser cannot feasibly engage in true "arm's-length bargaining." *Burks* v. *Lasker*, 441 U.S. 471, 481 (1979) (citation omitted). To protect investors from the potential conflicts of interest that arise from such arrangements, the ICA "regulates most transactions between investment companies and their advisers; limits the number of persons affiliated with the adviser who may serve on the fund's board of directors; and requires that fees for investment advice and other services be governed by a written contract approved both by the directors and the shareholders of the fund." *Daily Income Fund*, 464 U.S. at 536-537 (citations omitted).

The ICA also requires investment companies to register with the Securities and Exchange Commission (SEC or Commission), 15 U.S.C. 80a-8(b), and vests the SEC with "broad regulatory authority over [their] business practices," *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 704-705 (1975); see *id.* at 705 n.13. The Commission may investigate potential ICA violations and may bring enforcement actions before the agency or in federal court. 15 U.S.C. 80a-41(a). In federal court, the Commission may seek temporary and permanent injunctive relief and civil money penalties. 15 U.S.C. 80a-41(d) and (e). The Commission may also exempt any person, security, or transaction from "any provision" of the ICA. 15 U.S.C. 80a-6(c).

3. This case principally concerns Section 47(b) of the ICA, 15 U.S.C. 80a-46(b). Section 47(b)(1) states that

any contract that violates the ICA, or that violates any rule, regulation, or order issued under the ICA, is generally "unenforceable by either party." 15 U.S.C. 80a-46(b)(1). That general rule is subject to an exception that permits judicial enforcement of such a contract if "a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of" the ICA. *Ibid.*

Section 47(b)(2) states that, "[t]o the extent that a contract described in [Section 47(b)(1)] has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of" the ICA. 15 U.S.C. 80a-46(b)(2). And under Section 47(b)(3), Section 47(b) "shall not apply" to the "lawful portion of a contract to the extent it may be severed from the unlawful portion of the contract," nor does Section 47(b) "preclude recovery against any person for unjust enrichment." 15 U.S.C. 80a-46(b)(3).

B. The Present Controversy

1. Petitioners are four closed-end investment funds organized under Maryland law and registered with the SEC under the ICA. Pet. App. 17a, 41a; see Pet. ii, 10. Respondent Saba Capital Master Fund, Ltd., holds shares in each of the four petitioner funds and is managed by respondent Saba Capital Management, L.P. Pet. App. 21a, 36a-37a. According to the parties, Saba's investment strategy is to acquire shares of closed-end funds that trade at prices below the funds' current per-share net asset values, and then to pressure the funds to make changes that will cause share prices to rise. See

Pet. 12; Br. in Opp. 8-9. Petitioners assert that Saba's practices harm long-term investors in the funds, whereas Saba describes itself as unlocking value for shareholders. See *ibid.*

Among other techniques, activist investors like Saba may seek to force changes at the funds in which they invest by exercising shareholder voting rights. See *Nuveen*, 88 F.4th at 108; cf. Pet. App. 44a. Closed-end funds have responded to such efforts in several ways. Here, when Saba began to acquire substantial stakes in the four petitioner funds, the directors of the funds caused each one to adopt a resolution to opt into a provision of Maryland law designed to make it more difficult for outside investors to gain control of the fund through shareholder voting rights. Pet. App. 4a-5a.

Under the Maryland Control Share Acquisition Act (MCSAA), Md. Code Ann., Corps. & Ass'ns §§ 3-701 to 3-710 (LexisNexis 2014 & Supp. 2024), when a person acquires shares in a Maryland corporation that would entitle that person to control at least ten percent of shareholder voting power, the person lacks voting rights "with respect to the control shares" unless approved by a two-thirds vote of other shareholders. *Id.* § 3-702(a)(1); see *id.* § 3-701(e)(1) (defining "[c]ontrol shares"). MCSAA applies to a closed-end investment fund registered under the ICA only if the fund's board of directors "adopts a resolution to be subject to [MCSAA] on or after June 1, 2000." *Id.* § 3-702(c)(4).

In 2023, Saba brought this action in the United States District Court for the Southern District of New York. Pet. App. 15a. The complaint named as defendants the four petitioner funds, along with several other investment funds that had likewise opted into MCSAA after Saba had begun to acquire a position in the funds. See *id.* at 4a, 16a, 37a-39a.

Saba's suit relied on two provisions of the ICA: Section 47(b) (discussed above) and Section 18(i). See Pet. App. 18a. Section 18(i) provides that, "[e]xcept * * * as otherwise required by law, every share of stock hereafter issued by a registered management company * * * shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. 80a-18(i).[1] The gravamen of Saba's suit was that stripping Saba's shares of the voting rights that come with those shares would violate Section 18(i), and that Section 47(b) "provides a private right of action" for Saba to seek rescission of the resolutions through which the defendant funds had opted into MCSAA. Pet. App. 45a.

2. The district court granted Saba's motion for summary judgment. Pet. App. 15a-32a. The court explained that, under circuit precedent, Section 47(b) "creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract." *Id.* at 18a (quoting *Oxford Univ. Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99, 109 (2d Cir. 2019)). The court also accepted the parties' shared view that, under Maryland law, the bylaws of a corporation "constitute a contract between the corporation * * * and its shareholders." *Ibid.* The court therefore understood Section 47(b) to provide a mechanism through which Saba, as a party to the defendants' bylaws, could seek judicial rescission of the portions of those contracts under which the funds had opted into MCSAA.

On the merits, the district court viewed the dispute as governed by a prior Second Circuit decision holding "that similar control share resolutions adopted by

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[1] For purposes of the ICA, each of the petitioner funds is a "registered management company." 15 U.S.C. 80a-18(i); see 15 U.S.C. 80a-4(3) (defining "[m]anagement company").

closed-end mutual funds violate the ICA's requirement 'that every share of common stock issued by a regulated fund be "voting stock" and "have equal voting rights" with other shares.'" Pet. App. 29a (quoting *Nuveen*, 88 F.4th at 117). Petitioners argued that, "because the control share resolutions at issue are permissible under Maryland law, they are 'otherwise required by law' and thus safe from Section 18(i)'s mandate of equal voting rights." *Id.* at 30a (quoting 15 U.S.C. 80a-18(i)). The court rejected that argument, observing that although Maryland law "*allows* funds to adopt such control share resolutions," it does not require them to do so. *Ibid.* The court therefore declared that the resolutions at issue violate Section 18(i), and it ordered those resolutions to be "rescinded forthwith." *Id.* at 32a.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-14a. Like the district court, the court of appeals concluded that the challenged resolutions violate Section 18(i) because they render the affected shares not "voting stock" and thereby breach the requirement that every share have "equal voting rights with every other outstanding voting stock." *Id.* at 11a (citation omitted); see *id.* at 11a-12a. The court also found that "the district court did not abuse its discretion by granting rescission" under Section 47(b). *Id.* at 13a. The court of appeals did not otherwise address whether Section 47(b) confers a private right of action.

DISCUSSION

Section 47(b) of the Investment Company Act, 15 U.S.C. 80a-46(b), does not authorize private suits seeking rescission of contracts that allegedly violate the Act. In suits that are otherwise within the purview of a state or federal court, Section 47(b) generally renders such contracts unenforceable and potentially subject to

rescission. But it does not create any freestanding cause of action for the parties to such contracts to invoke the jurisdiction of a federal court. The Second Circuit erred in concluding otherwise in *Oxford University Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99 (2019), and its approach conflicts with precedential Third and Ninth Circuit decisions holding that Section 47(b) does not create any implied private right of action. That conflict on an important question of federal law warrants this Court's review, and this case is a suitable vehicle in which to resolve it. Accordingly, the petition for a writ of certiorari should be granted.

A. The Second Circuit Has Erred In Reading Section 47(b) Of The ICA To Confer An Implied Private Right Of Action

1. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). Because "creating a cause of action is a legislative endeavor," *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022), deciding whether to authorize private enforcement of a federal statute is a task for Congress, not the federal courts. If Congress has not created a cause of action for private parties to enforce a particular federal statute, one "does not exist and courts may not create one, no matter how desirable that might be as a policy matter." *Sandoval*, 532 U.S. at 286-287. That principle is "rooted in the Constitution's separation of powers." *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 230 (2022) (Kavanaugh, J., concurring).

The "determinative" question in a case like this one therefore concerns "[s]tatutory intent." *Sandoval*, 532 U.S. at 286. Several decades ago, this Court was willing to presume that Congress intended to create a private

right of action "not explicit in the statutory text" when that assumption was perceived to be necessary or helpful to effectuate a statute's purposes. *Ziglar* v. *Abbasi*, 582 U.S. 120, 132 (2017) (collecting examples). But in a series of cases beginning in the 1970s, the Court "adopted a far more cautious" approach to implied private rights of action, declining to find such rights on multiple occasions and stressing that Congress should speak in "explicit terms" if it wishes to authorize private suits. *Id.* at 132-133; see, *e.g.*, *Sandoval*, 532 U.S. at 288-289; *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-536 (1984); *Cort* v. *Ash*, 422 U.S. 66, 79-85 (1975). And in the analogous context of evaluating whether particular federal statutes create rights that may be enforced against state and local officials under 42 U.S.C. 1983, this Court recently reiterated that Congress must speak "*unambiguously*" if it wishes to create such judicially enforceable rights. *Health & Hosp. Corp.* v. *Talevski*, 599 U.S. 166, 180 (2023); cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 290 (2002) (requiring "clear and unambiguous terms").

2. Section 47(b) does not meet the "demanding bar" for finding a private cause of action. *Talevski*, 599 U.S. at 180. As a matter of text and structure, Section 47(b) "provide[s] no indication that Congress intend[ed] to create * * * an implied right of action" to seek either rescission of a contract alleged to violate the ICA or a declaration that the contract is unenforceable. *Gonzaga Univ.*, 536 U.S. at 286.

a. The inquiry "begin[s] with the language of the statute itself." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). As previously explained, Section 47(b)(1) states that a contract that violates the ICA is "unenforceable by either party * * * unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would

not be inconsistent with the purposes" of the ICA. 15 U.S.C. 80a-46(b)(1). That provision contemplates that Section 47(b) may affect the disposition of ongoing court proceedings between private parties. But it lacks any "'rights-creating' language," *Sandoval*, 532 U.S. at 288, to suggest that Congress meant for Section 47(b) itself to be the basis for initiating the suit.

Instead, Section 47(b) simply prescribes a rule of decision for contractual disputes that are otherwise properly before a court. State law may deem a contract unenforceable on public-policy grounds when performance of the contract would violate a statute. See, *e.g.*, Restatement (Second) of Contracts § 179(a) (1981) (explaining that a "public policy against the enforcement of promises" in a contract "may be derived" from, among other things, relevant "legislation"). Section 47(b)(1) tracks the common law in that respect, rendering a contract that violates the ICA generally unenforceable by either party to the contract. Thus, the defendant in a breach-of-contract suit could invoke Section 47(b)(1) defensively to argue that the contract is unenforceable because it violates the ICA. But Section 47(b)(1)'s "unless" clause, 15 U.S.C. 80a-46(b)(1), would still permit enforcement of such a contract under specified circumstances. And because of the supremacy of federal law, a court may order enforcement of the ICA-violative contract under the conditions specified in Section 47(b)(1) even if state law contains no analogous exception. The provision thus may have an outcome-determinative effect in ordinary breach-of-contract litigation implicating the ICA. But it does not create any new, freestanding federal cause of action.

Section 47(b)(2) likewise does not authorize private suits. That provision states that, "[t]o the extent that a contract described in" Section 47(b)(1) "has been per-

formed," the court "may not deny rescission at the instance of any party," unless doing so would be warranted by the equities and consistent with the ICA's purposes. 15 U.S.C. 80a-46(b)(2). Like Section 47(b)(1), Section 47(b)(2) contemplates an ongoing court proceeding between private parties, but it too does not use any rights-creating language.

Rescission is an equitable remedy. See, *e.g.*, *Black's Law Dictionary* 1565 (12th ed. 2024) ("Rescission is generally available as a remedy or defense for a nondefaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions."); cf. *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 324-325 (1999) (discussing a prior case involving a bill in equity that "stated a cause of action for the equitable remedies of rescission * * * and restitution"). Regulating when that remedy may be available does not imply that Congress created a new federal cause of action to seek it—just as a statutory cap on damages would not itself be a source of private rights to sue for damages.

b. The ICA's structure and context reinforce the conclusion that Section 47(b) does not create any private right of action. Other ICA provisions expressly confer private rights of action to enforce specific requirements in the Act. Those provisions demonstrate that, "when Congress wished to provide a private * * * remedy" to enforce the ICA, "it knew how to do so and did so expressly." *Touche Ross & Co.*, 442 U.S. at 572 (drawing a similar negative inference with respect to Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a)); see *Karahalios* v. *National Fed'n of Fed. Emps.*, 489 U.S. 527, 533 (1989) (observing that, "where a statute expressly provides a remedy, courts

must be especially reluctant to provide additional remedies").

As originally enacted in 1940, Section 30(f) of the ICA "expressly authorized private suits for damages" against certain investment-company insiders by incorporating the private right of action in Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b). *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 20 (1979) (*TAMA*); see *id.* at 21 n.10; ICA § 30(f), 54 Stat. 837; cf. 15 U.S.C. 80a-29(h). In 1970, Congress also amended the ICA to add Section 36(b), which states that "[a]n action may be brought * * * by a security holder of [a] registered investment company on behalf of such company" for breach of fiduciary duty against the company's investment adviser or certain affiliates. 15 U.S.C. 80a-35(b); see Investment Company Amendments Act of 1970, Pub. L. No. 91-547, § 20, 84 Stat. 1428-1430. That provision not only expressly authorizes private parties to bring an action but also specifies the contours of the right of action—assigning burdens of proof, capping damages, providing for certain defenses, etc. See 15 U.S.C. 80a-35(b)(1)-(6). Section 47(b) lacks any analogous language.[2]

3. In *Oxford University Bank*, the Second Circuit held that Section 47(b) "creates an implied private right

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[2] In an amicus brief filed in 2001, the SEC took the position that Section 47(b) confers an implied private right of action. SEC Amicus Br. at 2, *Olmsted* v. *Pruco Life Ins. Co.*, 283 F.3d 429 (2d Cir. 2002) (No. 00-9511); cf. Br. in Opp. 29. The primary issue in that case was whether *other* ICA provisions created implied private rights of action; the SEC argued that they did not, but that Section 47(b) could provide an alternative basis for private enforcement in some cases. The SEC has since reconsidered its view of Section 47(b) in light of this Court's more recent guidance on implied private rights to enforce federal law.

of action for a party to a contract that violates the ICA to seek rescission of that violative contract." 933 F.3d at 109. The court stated that "[t]he text of § 47(b) unambiguously evinces Congressional intent to authorize a private action" through its references to party enforcement ("'unenforceable by either party'") and rescission "'at the instance of *any party*.'" *Id.* at 105 (quoting 15 U.S.C. 80a-46(b)(1) and (2)). The court understood those provisions to "presuppose[] that a party may seek rescission in court by filing suit," and it described the statutory language as "effectively equivalent to providing an express cause of action." *Ibid.*

That reasoning is unsound. As explained above, Section 47(b)'s language makes clear that the provision may affect the disposition of an ongoing judicial proceeding involving a contract between private parties. It does not follow, however, that Section 47(b) itself authorizes commencement of such a proceeding. The statute is instead best read to establish federal rules of decision governing the enforceability and potential rescission of contracts made in violation of the ICA, which rules will supersede any contrary state-law rules addressing the same subjects. If a state-law breach-of-contract dispute is otherwise properly before a federal court (*e.g.*, under diversity jurisdiction), an allegedly breaching party could assert as a defense to the contract's enforcement that the contract violates the ICA. If such a defense is found to have merit, Section 47(b)(2) would govern the availability of rescission as a remedy. The statute could equally come into play in state-court proceedings. Whatever the forum, Section 47(b)'s language does not suggest that Congress meant to create a new federal cause of action—much less that it did so "unambiguously." *Oxford Univ. Bank*, 933 F.3d at 105.

Contrary to the Second Circuit's view, see *Oxford Univ. Bank*, 933 F.3d at 106-107, this Court's decision in *TAMA*, *supra*, does not suggest that Section 47(b) creates a private right of action. In *TAMA*, the Court addressed a provision of the Investment Advisers Act of 1940 (IAA), ch. 686, Tit. II, 54 Stat. 847 (15 U.S.C. 80b-1 *et seq.*), which was enacted alongside the ICA. The relevant IAA provision states that "[e]very contract made in violation" of the IAA "shall be void" in specified circumstances. 15 U.S.C. 80b-15(b). This Court construed that provision to "fairly impl[y] a right to specific and limited relief in a federal court," because by its terms the IAA provision "necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." *TAMA*, 444 U.S. at 18. The Court observed that "[a] person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution." *Ibid.* The Court inferred from that established rule that Congress, in declaring certain contracts "void," presumably "intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission." *Id.* at 19.

When Congress enacted the ICA in 1940, Section 47(b) of that law likewise declared that contracts made in violation of the ICA were "void." See ICA § 47(b), 54 Stat. 846 ("[e]very contract made in violation of any provision of [the ICA] * * * shall be void"). The ICA still used that language in 1979, when this Court decided *TAMA*. See 15 U.S.C. 80a-46(b) (1976). The decision in *TAMA* thus suggests that the then-current version of Section 47(b) likewise authorized private suits.

In 1980, however, Congress amended Section 47(b) to its present form, eliminating the prior directive that contracts made in violation of the ICA "shall be void,"

and specifying instead the circumstances in which such contracts are "unenforceable" and potentially subject to rescission. Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, Tit. I, § 104, 94 Stat. 2277. For purposes of construing Section 47(b) of the ICA, that change rendered inapposite the *TAMA* Court's construction of the "shall be void" language in the IAA. And a committee report stating that lawmakers "expect[ed] the courts to imply private rights of action" under the 1980 amendments, *Oxford Univ. Bank*, 933 F.3d at 107 (citation omitted), cannot supply a cause of action not found in Section 47(b)'s current text.[3]

B. The Question Presented Has Divided The Courts Of Appeals

The question whether Section 47(b) creates an implied private right of action has divided the courts of appeals. In *Oxford University Bank*, the Second Circuit acknowledged that its recognition of an implied private right of action in Section 47(b) conflicted with the Third Circuit's decision in *Santomenno ex rel. John Hancock Trust* v. *John Hancock Life Ins. Co.*, 677 F.3d 178, cert. denied, 568 U.S. 978, and 568 U.S. 979 (2012). See *Oxford Univ. Bank*, 933 F.3d at 108-109. The Ninth Circuit has also concluded in a precedential decision that

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[3] In any event, the specific discussion of Section 47(b) in the committee report cited in *Oxford University Bank* confirms that legislators were seeking to clarify the availability of the "equitable rescission remedy," including by giving courts a measure of discretion to enforce a contract even when the contract violates the ICA. H.R. Rep. No. 1341, 96th Cong., 2d Sess. 27 (1980); see *id.* at 37. The report's discussion of Section 47(b) contains no reference to implied private rights of action, which the report mentions only in the broader context of a discussion of private enforcement of the securities laws. See *id.* at 28-29.

Section 47(b) does not create any implied private right of action. See *UFCW Local 1500 Pension Fund* v. *Mayer*, 895 F.3d 695, 700 (2018). The Fourth Circuit has likewise concluded, albeit in an unpublished decision, that "there is no private cause of action to enforce Section 47(b)." *Steinberg* v. *Janus Capital Mgmt., LLC*, 457 Fed. Appx. 261, 267 (2011) (per curiam).

1. In *Santomenno*, the plaintiffs contended that a life insurance company had charged retirement plans excessive fees in violation of Section 26(f) of the ICA, 15 U.S.C. 80a-26(f), which requires investment companies to charge reasonable fees. 677 F.3d at 181. The plaintiffs further contended that Section 47(b) created a private right of action under which they could "seek rescission and restitution" based on the alleged Section 26(f) violation. *Id.* at 186. The Third Circuit rejected that contention, explaining that "neither the language [of Section 47(b)] nor the structure of the ICA" indicates that Congress intended to create a private right of action. *Id.* at 187. The court observed that Congress had authorized the Commission "to enforce all ICA provisions" and had created a "private right of action in Section 36(b)." *Id.* at 186. And, consistent with this Court's precedent, the Third Circuit reasoned that the existence of an express private right of action elsewhere in the ICA made it "highly improbable that 'Congress absentmindedly forgot to mention an intended private action'" in Section 47(b). *Ibid.* (citation omitted).

The Third Circuit also explained why this Court's decision in *TAMA* does not control the interpretation of Section 47(b). The Third Circuit observed that the difference between the IAA language stating that certain contracts "shall be void," 15 U.S.C. 80b-15(b), and the current ICA language stating that certain contracts are "unenforceable," 15 U.S.C. 80a-46(b)(1), is "seemingly

slight" but "significant." *Santomenno*, 677 F.3d at 187. The court explained that the legal consequences of a contract being "void[]" are not merely "defensive"—*i.e.*, that voidness is not merely a defense to enforcement, but also potentially a basis for affirmatively requesting relief from a court, in the form of rescission or restitution. *Ibid.* (citation omitted). By contrast, the term "'unenforceable' * * * carries no such legal implications" of affirmative relief. *Ibid.* For that reason, the Third Circuit agreed with district courts that had previously construed Section 47(b) to create "a remedy rather than a distinct cause of action or basis of liability." *Ibid.* (citation omitted).

2. The Ninth Circuit reached a similar result in *Mayer*, *supra*. The plaintiffs in *Mayer* alleged that the defendant "had violated the conditions of [an] ICA exemption" issued by the Commission and thus "had been operating as an unregistered investment company in violation of the ICA." 895 F.3d at 698 (internal quotation marks omitted). The plaintiffs argued that Section 47(b) "establishes a private right of action for challenging the continued validity of an ICA exemption," and they sought rescission of certain contracts to which the defendant was a party. *Ibid.*; see *id.* at 699-700.

The Ninth Circuit affirmed the dismissal of the plaintiffs' suit. See *Mayer*, 895 F.3d at 698, 701. The court observed that "'nothing in the text of [Section 47(b)] makes any mention'" of a private right of action and that the provision "on its face merely establishes what it says: that contracts formed in violation of the ICA are usually unenforceable." *Id.* at 700 (citation omitted). In other words, the court explained, Section 47(b) lacks the "rights-creating language" that a statute "must use" to authorize private suits. *Id.* at 699. The court also observed that Congress has empowered "the

SEC to enforce all of the provisions of the statute by granting the SEC broad authority to investigate suspected violations; initiate actions in federal court for injunctive relief or civil penalties; and create exemptions from compliance with any ICA provision." *Id.* at 701 (brackets and citation omitted). And, pointing to Sections 30(h) and 36(b), the court noted that Congress has expressly authorized "private suits for damages against insiders of closed-end investment companies who make short-swing profits," as well as private suits against "an investment company's advisor and its affiliates for breach of certain fiduciary duties." *Ibid.* (citation omitted). Taken together, the court concluded, those other provisions in the "detailed statutory scheme * * * indicate[] that Congress never intended further private enforcement of the ICA." *Ibid.*

3. Respondents acknowledge (Br. in Opp. 14) that the Second Circuit's decision in *Oxford University Bank* squarely conflicts with the Third Circuit's decision in *Santomenno*. Respondents maintain (Br. in Opp. 15-18), however, that the Ninth Circuit's decision in *Mayer* is distinguishable because the plaintiffs in that case invoked Section 47(b) to challenge the validity of an SEC-granted exemption—an issue over which the SEC has exclusive enforcement authority. See 15 U.S.C. 80a-3(b)(2). That proposed distinction does not withstand scrutiny. Although the Ninth Circuit recognized that only the SEC may seek redress when "companies * * * contravene the conditions of ICA exemptions," the court went on to explain "[m]ore fundamentally" that "section 47(b) does not establish a private right of action." *Mayer*, 895 F.3d at 700. In doing so, the Ninth Circuit endorsed the Third Circuit's reasoning in *Santomenno*. See *id.* at 700-701 & n.3.

C. The Question Presented Warrants Review In This Case

1. The question presented has significant practical importance to investment companies, investment advisers, investors, and the Commission. The Second Circuit's erroneous recognition of an implied private right of action in Section 47(b) has allowed Saba (or Saba-related entities) to bring numerous recent suits seeking to rescind resolutions adopting control-share provisions and other resolutions regarding shareholder rights. See, *e.g.*, *Saba Capital Master Fund, Ltd.* v. *ASA Gold & Precious Metals, Ltd.*, No. 24-cv-690, 2025 WL 951049 (S.D.N.Y. Mar. 28, 2025); *Saba Capital CEF Opportunities 1, Ltd.* v. *Nuveen Floating Rate Income Fund*, No. 21-cv-327, 2022 WL 493554 (S.D.N.Y. Feb. 17, 2022), aff'd, 88 F.4th 103 (2d Cir. 2023); *Eaton Vance Senior Income Trust* v. *Saba Capital Master Fund, Ltd.*, No. 2084CV01533, 2023 WL 1872102 (Mass. Super. Ct. Jan. 21, 2023); cf. Br. in Opp. 30 (stating that, since *Oxford University Bank*, "it appears that Saba is the only party to have obtained relief under Section 47(b)(2)"). And the significance of the question presented is not limited to such suits. If Section 47(b) creates a private right of action, a plaintiff could sue to challenge contractual terms that are alleged to violate *any* ICA provision, not just the Act's provisions regarding voting rights.

Allowing such expansive private enforcement would upset the balance that Congress struck in the ICA. When Congress wished to permit private enforcement, it said so expressly. Congress also authorized the SEC to enforce the statute and to grant case-by-case exemptions from some of its requirements where appropriate. See p. 3, *supra*. If private parties could invoke Section 47(b) as a freestanding cause of action, they could inter-

fere with the SEC's discretionary enforcement and exemption decisions. Indeed, the plaintiffs in *Mayer* invoked Section 47(b) to challenge an investment fund's compliance with the terms of an SEC-granted exemption. See 895 F.3d at 697-698.

Respondents observe that, if Section 47(b) creates a private right of action, rescission would be available only with respect to "illegal contracts." Br. in Opp. 27 (emphasis omitted). It is true that the defendant in such a suit could always argue that no relief is warranted because the contract complies with the ICA. But whenever disputes arise as to whether particular statutes are privately enforceable, it could equally be said that private plaintiffs will (or should) ultimately prevail and obtain relief only if their claims are meritorious. That fact has not led the Court to treat questions concerning the availability of private rights of action as practically insignificant. Moreover, the ICA and its implementing regulations are complex and technical, and the uncertainty created by the threat of litigation can itself be harmful. In the view of the United States, private enforcement suits under Section 47(b) threaten to have an unpredictable impact on the operations and contractual arrangements of investment funds, including the mutual funds on which millions of Americans rely.

2. This case is an appropriate vehicle for resolving the question presented. Although the Second Circuit did not expressly invoke *Oxford University Bank* in its summary order below, the district court correctly treated that circuit precedent as controlling on the question presented here, Pet. App. 18a; respondents' complaint invokes *Oxford University Bank*, *id.* at 36a; and there is no other apparent basis on which this case could have proceeded in the district court if Section 47(b) does not create an implied private right of action.

Respondents contend (Br. in Opp. 19) that review in this case is nonetheless unwarranted because the courts of appeals might "harmonize their approaches if given the chance." But in *Oxford University Bank*, the Second Circuit declined to follow the Third Circuit's *Santomenno* decision. See *Oxford Univ. Bank*, 933 F.3d at 108. Although one of those courts (or the Ninth Circuit) could grant en banc review to change course, the courts of appeals are presently in conflict on a significant question that is squarely presented in this case. And for the reasons explained above, the Second Circuit's answer to that question is incorrect. Respondents' speculation (Br. in Opp. 20, 26) that the Third Circuit and other courts might adopt the Second Circuit's approach in the future is not a compelling reason to deny certiorari.

Respondents also contend (Br. in Opp. 23-24) that the Court should deny review here to permit further consideration of the question presented by the lower courts. But nothing about the "varied factual circumstances" (*id.* at 23) of this case and of *Oxford University Bank*, *Santomenno*, and *Mayer* suggests that judicial experience with future disputes would shed additional light on the proper interpretation of Section 47(b). The courts of appeals that have addressed the question presented have focused primarily on the text and structure of the ICA and on this Court's precedent, particularly *TAMA*. And future plaintiffs who wish to invoke a purported private right of action under Section 47(b) will presumably seek to file in the Second Circuit if at all possible—as may frequently be the case, given New York's significant role in the financial-services industry. There is consequently no sound reason for this Court to defer resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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