No. 24-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The courts of appeals have split 2–1 over whether Congress created an implied private right of action in Section 47(b) of the Investment Company Act (ICA), which provides:

> (1) A contract that is made, or whose performance involves, a violation of this subchapter … is unenforceable by either party ….
>
> (2) To the extent that a contract described in paragraph (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 this subchapter.

15 U.S.C. § 80a-46(b)(1)–(2).

The Third and Ninth Circuits, relying on statutory text and structure, hold that Section 47(b) does *not* create an implied private right of action, and a panel of the Fourth Circuit has agreed in an unpublished opinion. Only the Second Circuit—where plaintiffs may be able to sue most investment funds subject to the ICA, given New York's and the New York Stock Exchange's roles in financial operations—holds the opposite based on an "inference": parties may bring a lawsuit under Section 47(b), even though Congress never said so.

The question presented is whether Section 47(b) of the ICA, 15 U.S.C. § 80a-46(b), creates an implied private right of action.

PARTIES TO THE PROCEEDING

Petitioners are FS Credit Opportunities Corp.; Adams Diversified Equity Fund, Inc.; Adams Natural Resources Fund, Inc.; and Royce Global Value Trust, Inc. Petitioners were Defendants-Appellants below.

Respondents Saba Capital Master Fund, Ltd., and Saba Capital Management, L.P., were Plaintiffs-Appellees below. Respondents BlackRock ESG Capital Allocation Trust; BlackRock Municipal Income Fund, Inc.; Tortoise Midstream Energy Fund, Inc.; Tortoise Energy Independence Fund, Inc.; Tortoise Pipeline & Energy Fund, Inc.; and Tortoise Energy Infrastructure Corp.; and Ecofin Sustainable and Social Impact Term Fund were Defendants-Appellants below.

CORPORATE DISCLOSURE STATEMENTS

FS Credit Opportunities Corp., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

Adams Diversified Equity Fund, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

Adams Natural Resources Fund, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

Royce Global Value Trust, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

Saba Capital Master Fund, Ltd. et al. v. BlackRock ESG Capital Allocation Trust et al., Nos. 23-8104, 24-79, 24-80, 24-82, 24-83, 24-116, 24-189 (June 26, 2024)

United States District Court (S.D.N.Y.):

Saba Capital Master Fund, Ltd. et al. v. BlackRock Municipal Income Fund, Inc. et al., No. 23-cv-5568 (Jan. 4, 2024)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

This case presents an acknowledged circuit split over an important issue of federal law: whether Congress *impliedly* created a private right of action in Section 47(b) of the Investment Company Act (ICA), 15 U.S.C. § 80a-46(b). The Third and Ninth Circuits, joined by an unpublished Fourth Circuit decision, say no. But the Second Circuit—where many funds may be sued—has said yes. The Second Circuit's outlier rule is wrong, and it breaches the core constitutional boundaries between judicial decisionmaking and legislating. There is no warrant for further percolation given plaintiffs' ability to select the Second Circuit as their preferred forum. And because the issue controls whether a party can bring a lawsuit in the first place, the split is outcome-determinative. This case is the perfect vehicle for resolving an important question on which the courts are split and for reminding courts that they may not read statutes to mean what they do not say.

1. The ICA regulates "investment companies," like mutual funds and exchange-traded funds. The Securities and Exchange Commission (SEC) has broad authority to enforce "any provision" of the ICA, including by suing for an injunction or civil penalties, 15 U.S.C. § 80a-41(d), and by determining whether (and to what extent) a regulated party is exempt from complying with "any provision," *id.* § 80a-6(c).

In one section of the ICA, Congress created a narrow private right of action. Section 36 provides: "[a]n action may be brought under this subsection by the Commission, *or by a security holder* of [the] registered investment company … for breach of fiduciary duty." *Id.* § 80a-35(b) (emphasis added).

But the provision at issue here, Section 47(b), says nothing about a cause of action. Instead, it simply provides that a contract in violation of the ICA "is unenforceable by either party." *Id.* § 80a-46(b)(1). All that means is that a defendant may defend against a breach-of-contract action on the ground that the contract violates the ICA. And in that case, if the contract "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 this subchapter." *Id.* § 80a-46(b)(2).

The question presented is whether Section 47(b) of the ICA creates an *implied* private right of action, despite (1) the absence of any rights-creating language in the statutory text; (2) Congress's express provisions authorizing the SEC to enforce the ICA; and (3) Congress's express creation of a private right of action in a different section of the ICA.

2. The circuits are split 2–1 over this question. The Third and Ninth Circuits, joined by an unpublished Fourth Circuit decision, hold that the answer is "no." As those courts have explained, neither the language nor the structure of the ICA permits a court to read Section 47(b) as implying a private right of action. *See UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 698-701 (9th Cir. 2018); *Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.)*, 677 F.3d 178, 185-87 (3d Cir. 2012); *Steinberg v. Janus Capital Management, LLC*, 457 F. App'x 261, 267 (4th Cir. 2011) (per curiam).

The Second Circuit alone holds, based on an "inference," that Section 47(b) "provides a party to a contract that violates the ICA … the right to seek rescission of the violative contract." *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106 (2d Cir. 2019). In adopting that outlier rule, the Second Circuit acknowledged it was creating the circuit split. *See id.* at 108-09.

The split is both outcome-determinative and as deep as it is ever likely to get, because most investment funds are subject to suit in the Second Circuit. This case involves a dispute between investors (Saba) and investment funds (the Funds). Saba seeks short-term profits at the expense of typical, long-term investors; the Funds seek to protect those long-term investors against short-term investors who, like Saba, exert inequitable control to obtain quick profits. Had Saba sued the Funds in the Third or Ninth Circuits (or, likely, the Fourth Circuit), the district court would have dismissed the action. But the district court here allowed the suit to proceed and granted summary judgment for Saba, and the Second Circuit affirmed. The decision underscores that this Court shouldn't let the issue percolate any longer, because plaintiffs will simply sue in the Second Circuit—which they will frequently be able to do given New York's and the New York Stock Exchange's roles in our financial system.

3. The Second Circuit's outlier rule is wrong, and it flouts this Court's repeated guidance about the separation of powers. When Congress intends to create a private right of action, it ordinarily does so explicitly—as it did in Section 36 of the ICA. Following a misguided era of judicially created private rights of action, this Court has made clear that the "decision to

create a private right of action is one better left to legislative judgment." *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018). Thus, courts must identify "'rights-creating' language" in the statute. *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). And courts will look for other clues that Congress didn't intend to open a statute to private enforcement. If Congress explicitly conferred a means of enforcing a statute, or if Congress explicitly provided a private right of action in another part of the statute, that strongly suggests Congress did not intend an implied private right of action that it chose not to create expressly.

All signs point in one direction: The Second Circuit's expansive rule is wrong. Section 47(b) doesn't contain any rights-creating language. The structure of the ICA doesn't support the Second Circuit's rule, either: Congress authorized *the SEC* to enforce the ICA, and Congress provided an explicit private right of action in Section 36, but not Section 47(b).

The Second Circuit whistled past those indicia and fixated on the language in Section 47(b)(2) that "a court may not deny rescission at the instance of any party." 15 U.S.C. § 80a-46(b)(2). The Second Circuit reasoned that "at the instance of any party" presupposed a private right of action. That's incorrect. Parties litigate state-law breach of contract actions all the time (and often in state court), and the "any party" language merely suggests that if the contract violates the ICA, the breach-of-contract defendant can seek defensive rescission of the contract. Or, alternatively, either party might ask a court to deny rescission and enforce the contract. But none of that means any private party has a Section 47(b) right of action. If the Second Circuit thought that a private right of action was necessary to give the "any party" language work

to do, it was simply wrong about the basic operation of breach-of-contract actions and the role of state courts in our federal system. And in any event, Congress's choice to empower the SEC to enforce the ICA and the explicit private right of action in Section 36 show that Congress did not intend for private parties to enforce Section 47.

4. The question presented is critically important. Whether to recognize an implied private right of action implicates separation-of-powers principles that go to the heart of the Constitution's design. That's why this Court has established a high bar for recognizing implied private rights of action: Congress must *unambiguously* create both a private right and a private remedy. *Gonzaga University v. Doe*, 536 U.S. 273, 283-84 (2002). Absent such unambiguous language, courts must presume that Congress "means what it says," *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022), and doesn't mean what it *doesn't* say. The Third and Ninth Circuits (plus a Fourth Circuit panel) have respected the judicial role, taking Congress at its word. But the Second Circuit has undermined Congress and threatened the constitutional design.

The question presented is also critically important for both funds and their shareholders. Indeed, the answer will determine whether a shareholder may sue a fund seeking rescission of an allegedly unlawful contract. And the Second Circuit's outlier rule disturbs the level-of-enforcement and who-enforces balance Congress struck by setting the SEC up as regulator and enforcer, with authority to decide whether to exempt a fund from any ICA requirements, *see* 15 U.S.C. § 80a-6(c)—a requirement in serious tension with a private right of action.

This case is the perfect vehicle for resolving the question presented. The split is clear and outcome-determinative. District courts in the Third and Ninth Circuits (and likely the Fourth) would have dismissed Saba's lawsuit, not granted Saba summary judgment, as the Second Circuit required here. If the Court agrees that Congress did not impliedly create a private right of action in Section 47(b), then the district court must dismiss Saba's claims.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-14a) is unpublished but available at 2024 WL 3174971. The district court's opinion (App. 15a-32a) is unpublished but available at 2024 WL 43344.

JURISDICTION

The court of appeals entered its judgment on June 26, 2024. App. 1a. This petition is timely filed on September 24, 2024. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. §§ 80a-6, 80a-18(i), 80a-29, 80a-35, 80a-41, 80a-46, are reproduced in the appendix. *See* App. 51a-78a.

STATEMENT

A. The Investment Company Act

1. Congress enacted the ICA in 1940 as part of a comprehensive effort "to eliminate certain abuses in the securities industry." *Securities & Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). That comprehensive effort included the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding

Company Act, the Trust Indenture Act, and the Investment Advisors Act of 1940. *See id.*

The ICA regulates "investment compan[ies]," the "most common" of which are mutual funds. *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 698 (1975); *see also Jones v. Harris Associates L. P.*, 559 U.S. 335, 338 (2010). Before the ICA's enactment, arbitrage investors focused on short-term gains would commandeer funds by acquiring 10 percent or more of a fund's shares. They would then leverage their concentrated voting power to alter the funds' investment policies, enabling themselves to cash out at a premium price while leaving the funds' ordinary shareholders holding the bag. *See* H.R. Doc. No. 76-279, at 1019-21 (1940). Fund managers, whose financial incentives had substantially diminished after the stock market crash in 1929, also engaged in practices that hurt ordinary investors, including misleading disclosures, self-dealing, and embezzlement. *See id.* at 1018-26.

2. Congress enacted the ICA to remedy those problems. "Investors are adversely affected," Congress found, by various tactics and practices, including misleading disclosures, unduly concentrated or inequitable control, excessive borrowing, and failing to keep sufficient assets or reserves. 15 U.S.C. § 80a-1(b). To those ends, the ICA imposes safeguards in the fund industry, including the requirement that funds register with the SEC and that they maintain a minimum proportion of disinterested directors on the board. *See* 15 U.S.C. § 80a-10(a).

Unlike its contemporary statutes, which contain express provisions for private civil actions, *see, e.g.*, 15 U.S.C. § 77k(a); 15 U.S.C. § 78i(f); 15 U.S.C. § 79p

(*repealed* Energy Policy Act of 2005, Pub. L. No. 109-58, § 1263, 119 Stat. 594, 974); 15 U.S.C. § 77www, the ICA as enacted in 1940 contained no provision authorizing private civil action. Instead, the Act vested "in the SEC broad regulatory authority over the business practices of the investment companies." *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 52 (1977). Section 42, for example, empowers the SEC to enforce "any provision" of the ICA, including by investigating suspected violations and suing in federal court for an injunction or civil penalties. 15 U.S.C. § 80a-41(d). And Section 6 allows the SEC to determine whether, and to what extent, a regulated party is exempt from complying with "any provision." *Id.* § 80a-6(c).

3. In 1970, Congress amended the 1940 Act to add Section 36(b), providing the ICA's first and only express private right of action. Section 36 provides: "[a]n action may be brought under this subsection by the Commission, *or by a security holder* of [the] registered investment company … for breach of fiduciary duty." *Id.* § 80a-35(b) (emphasis added). In that provision, Congress specifically set forth the parameters of the cause of action, requiring the plaintiff to bear the burden of proving a breach, and limiting damages to actual damages and only to those incurred within one year of the institution of the action. *See id.*

4. Section 47(b), which Congress enacted in 1940, contains none of the private right of action language of Section 36(b). Section 47(b) provides, in relevant part:

> (1) A contract that is made, or whose performance involves, a violation of this

> subchapter … is unenforceable by either party ….
>
> (2) To the extent that a contract described in paragraph (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 this subchapter.

15 U.S.C. § 80a-46(b)(1)–(2). Every circuit that has interpreted Section 47(b) agrees that "Congress did not expressly state that a party to an illegal contract may sue to rescind it." *Oxford University Bank*, 933 F.3d at 105. Two circuits, in published opinions, take Congress at its word (or, more accurately, its silence), and a panel of another circuit has agreed in an unpublished opinion. Only the Second Circuit has inferred that Congress meant what it never said. *Infra* pp. 22-23.

B. Factual and procedural background

The Funds adopted a commonplace measure designed to protect ordinary, long-term investors from opportunistic investors, like Saba in this case, who seek short-term profits by exerting inequitable control over funds. Saba sued the Funds, expressly relying on *Oxford University Bank* and seeking rescission of the protective measure under Section 47(b). The district court granted summary judgment for Saba, and the Second Circuit affirmed.

1. The Funds serve long-term investors that make long-term investments.

a. The Funds are a special kind of investment—called "closed-end" funds—registered under the ICA and organized under Maryland law. App. 17a. The best way to understand the defining features of a closed-end fund is to compare it with an "open-end" fund. An "open-end" fund's shares can be sold back to the fund at any time at a price based on the fund's current net asset value (NAV). A "closed-end" fund whose shares are traded on a stock exchange works differently. A closed-end fund's share price fluctuates based on how much an investor is willing to pay for the share on the open market. Closed-end funds can thus trade at prices well below or above the NAV. *See generally Saba Capital Cef Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 108 (2d Cir. 2023).

Closed-end funds are not required to buy back shares from their shareholders, while open-end funds are. *See id.* In fact, the ICA prohibits shares of a closed-end fund from being redeemable at the option of their holders. Thus, closed-end funds have more leeway in making investment decisions; they need not maintain significant cash reserves, and they can invest in less liquid securities. *See id.* And closed-end funds can leverage their financial position (*i.e.*, borrow money to invest) more than open-end funds. *See* Investment Company Institute, *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses*, at 12 (Mar. 2020) (ICI Report), tinyurl.com/4ekds39x.

These operational differences result in different investment benefits, thus attracting investors with

different priorities. Closed-end funds, for instance, tend to generate higher and more consistent dividends than open-end funds, *see* ICI Report 12, a benefit that is particularly important to "long-term investors," *I. Meyer Pincus & Associates, P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991). Long-term investors choose closed-end funds *because of* their benefits, *see* ICI Report 12 n.37, even though they carry downsides, like "trading at a discount," ICI Report 52. For example, individuals closer to retirement may wish to buy—and hold—shares in closed-end funds given the funds' steady dividends. *See* ICI Report 12 & n.37. But long-term investors can't reap long-term benefits if the closed-end fund is commandeered and forced to implement short-term investment strategies.

b. Just like other closed-end funds, the Funds are designed mainly as long-term investments for long-term investors. And because the Funds seek to protect their long-term investors against concentrated short-term investors that exert inequitable control to obtain short-term profits, they adopted resolutions opting in to the Maryland Control Share Acquisition Act (MCSAA). App. 4a-5a.

The MCSAA provides, in relevant part:

> Holders of control shares of the corporation acquired in a control share acquisition have no voting rights with respect to the control shares except to the extent approved by the stockholders at a meeting held under § 3-704 of this subtitle by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter, excluding all interested shares.

Md. Code Ann., Corps. & Ass'ns § 3-702(a)(1). That provision applies when an individual owns or has the power to direct the voting of certain shares, with the lowest threshold being 10% or more of all voting power. *Id.* § 3-701(d)-(e). Thus, under the MCSAA, shareholders who own a disproportionate amount of shares are presumptively prohibited from voting all their shares. App. 5a. A majority of states have adopted mechanisms like the MCSAA that are designed to protect ordinary investors from concentrated investors exerting inequitable control. *See* App. 49a—50a.

2. Saba is an activist investor that seeks short-term profits.

Saba describes itself as an activist investor. *Saba*, 88 F.4th at 108. It invests in closed-end funds whose shares are trading at a discount compared to the funds' NAV. Then, after taking steps to initiate actions to inflate the share price, like a liquidity event, it sells its shares, thus earning a short-term profit, *id.*, typically at the expense of ordinary long-term investors.

Saba captures short-term profits by implementing a specific "business strategy." *Id.* It acquires shares in droves to gain disproportionate control over a fund, and then leverages its concentrated ownership to initiate certain investment or structural actions that typically (and only temporarily) spike a fund's share price. *See* Dist. Ct. Doc. 100 at 14-17. For example, Saba might advocate "for measures authorizing the buyback of shares at or near NAV." *Saba*, 88 F.4th at 108. This forced, large self-tender maneuver lets the short-term concentrated investor squeeze a quick profit from the fund at long-term investors' expense.

See 3 Law Sec. Reg. § 11:52, Westlaw (database updated May 2024). Other actions likewise can lead to similar short-term profits, like "electing new boards of directors" or "converting" a closed-end fund to an open-end fund. *Saba*, 88 F.4th at 108; *see also* Dist. Ct. Doc. 100 at 14-17.

These abusive tactics conflict with the interests of ordinary shareholders. Take self-tenders, for instance. A fund needs cash to satisfy a self-tender offer. But closed-end funds, by design, generally carry significantly less cash on hand. Instead, they increase their potential for long-term returns by *fully* investing their assets—something they can do because, unlike open-end funds, they do not redeem shares daily "at the option of the shareholder." *Green v. Nuveen Advisory Corp.*, 295 F.3d 738, 740 n.1 (7th Cir. 2002); *see also* ICI Report 12. Moreover, closed-end funds are not required to maintain any amount of highly liquid assets, again unlike open-end funds. Thus, if a closed-end fund is forced to satisfy a large self-tender, it must sell portfolio holdings—even, if necessary, at a loss (particularly when the holdings are not liquid). ICI Report 12-13. The consequences are a decreased asset base, reduction in leverage, and potentially unfavorable tax consequences—"all to the detriment of the fund's returns and distributable income." *Id.* With short-term concentrated investors cashing out, it's ordinary shareholders who suffer.

3. Saba brings a private right of action against the Funds, relying on Second Circuit precedent that created and acknowledged the circuit split on the question presented.

a. In June 2023, Saba sued the Funds, alleging that their resolutions adopting the MCSAA violate Section 18(i) of the ICA, which requires that "every share of stock … shall be a voting stock and have equal voting rights with every other outstanding stock." 15 U.S.C. § 80a-18(i); *see* App. 5a.

Saba brought the lawsuit under Section 47(b), asserting that the resolutions should be rescinded. App. 5a. Saba brought the lawsuit even though it had only a nominal interest in many of the Funds—as low as 2% for one Fund, nowhere near the 10% threshold contemplated by the MCSAA. App. 8a-9a. Saba moved for summary judgment on the same day it filed suit. App. 5a.

Saba relied on *Oxford University Bank*, 933 F.3d at 109, which holds that Section 47(b) creates an implied private right of action for a party seeking to rescind a contract that allegedly violates the ICA. *See* App. 36a, 45a. That holding conflicts with the published decisions of the Third and Ninth Circuits—each of which holds that neither the language nor the structure of the ICA permits a court to read Section 47(b) as implying a private right of action. *See infra* pp. 17-23. Given the conflict, and the fact that the district court was bound by *Oxford University Bank*, the Funds expressly reserved their right to argue on appeal that Section 47(b) does *not* create an implied private right of action. *See, e.g.*, Dist. Ct. Docs. 90 at 12-13, & 106 at 14 n.11.

b. Following *Oxford University Bank*, the district court ruled that Saba could sue because Section 47(b) "creates an implied private right of action." App. 18a. It then granted summary judgment for Saba, ruling that under Second Circuit precedent, *see Saba*, 88 F.4th at 117, the Funds' resolutions opting in to the MCSAA violate Section 18(i) of the ICA. *See* App. 29a-31a. The court thus ordered that the resolutions be rescinded. App. 31a-32a.

c. On appeal, because the Second Circuit was also bound by *Oxford University Bank*, the Funds again reserved their right to argue that Section 47(b) does not create an implied private right of action. *See, e.g.*, CA2 Doc. 66 at 5, 21-22, 39-41. The Second Circuit affirmed the district court's judgment, *see* App. 9a-14a, without addressing the implied-private-right-of-action issue.

REASONS FOR GRANTING THE PETITION

The Second, Third, and Ninth Circuits have split over whether Congress impliedly created a private right of action in Section 47(b) of the ICA. Each of those circuits agrees that "Congress did not expressly state that a party to an illegal contract may sue to rescind it." *Oxford University Bank*, 933 F.3d at 105. But they disagree about whether Congress should be taken at its word. The Third and Ninth Circuits, relying on statutory text and structure, have exercised judicial restraint, holding that Section 47(b) does *not* create an implied right of action. A panel of the Fourth Circuit, in an unpublished decision, has held the same. But the Second Circuit reads Section 47(b) to allow parties to sue under Section 47(b) based on a mere "inference." That outlier rule determined the outcome here: Had Saba sued in the Third or Ninth

Circuits (or, likely, the Fourth Circuit), it wouldn't have won summary judgment. Its complaint would have been dismissed.

The Second Circuit's outlier rule is wrong. Implied private rights of action are disfavored and rarely justifiable, for good reason: It is the role of Congress, not the courts, to create causes of action. Rare is the case where Congress intended a private right of action but didn't say so expressly. And at the very least, courts require rights-creating language before inferring that Congress intended a private cause of action. But Section 47(b) contains no rights-creating language. What's more, the ICA contains two other strong indicators that Congress didn't intend private enforcement of Section 47(b). *First*, Congress delegated enforcement of the ICA *to the SEC*. *Second*, Congress expressly created a private right of action in Section 36 of the ICA. The Second Circuit fixated on the language in Section 47(b)(2) that "a court may not deny rescission at the instance of any party," 15 U.S.C. § 80a-46(b)(2). But that clause makes clear that a party can seek rescission as a *defendant* in a breach-of-contract action, for example, on the grounds that the contract violates the ICA and is unenforceable—in which case the plaintiff could seek denial of rescission on the grounds that "the denial of rescission would produce a more equitable result than its grant." *Id.* The Second Circuit's premise—that recognizing a private right of action is the only way to give meaning to that clause—is wrong. So, too, is its conclusion.

The question presented is important. For one thing, whether a court should imply a private right of action *always* implicates separation-of-powers concerns. For another thing, implying a private right of action will open the floodgates to parties of all kind

who might use litigation to their strategic advantage and to the detriment of ordinary investors—especially in the Second Circuit, where many parties covered by the ICA may be sued. These concerns are particularly important here, because construing Section 47(b) to give private parties a right of action to rescind contracts would open the door to a broad range of attacks vitiating provisions in fund-related documents that affect more than $25 trillion of assets held in registered investment companies. *See 2024 Investment Company Fact Book: Quick Facts Guide*, Investment Company Institute (2024), https://www.ici.org/system/files/2024-07/2024-factbook-quick-facts-guide.pdf. For the same reason, the Court shouldn't let the issue continue to percolate. Lastly, this case is an ideal vehicle for resolving the circuit split. The split is clear: the Second Circuit expressly created it. The split is also outcome-determinative: Saba wouldn't have won had it sued in the Third or Ninth (or Fourth) Circuits, because district courts in those circuits would have dismissed the action.

The Court should grant review.

I. The circuits have split 2–1 over whether Section 47(b) of the ICA creates an implied private right of action.

There is an acknowledged circuit split over whether Congress created an implied private right of action in Section 47(b) of the ICA, 15 U.S.C. § 80a-46(b). In published opinions, the Third and Ninth Circuits say no, because neither the language nor structure of the ICA permits a court to read Section 47(b) to mean what it simply does not say. *See Mayer*, 895 F.3d at 698-701; *Santomenno*, 677 F.3d at 185-87. In an unpublished opinion, a panel of the Fourth

Circuit has also said no. *See Steinberg*, 457 F. App'x at 267. But in the Second Circuit, the answer is yes, because that court construes the text of Section 47(b) as "unambiguously evinc[ing] Congressional intent to authorize a private action." *Oxford University Bank*, 933 F.3d at 105. In so holding, the Second Circuit expressly split from the Third Circuit, *id.* at 108, confirming that the split exists. And because the split concerns whether a party can bring a lawsuit in the first place, the split is outcome-determinative.

A. Two circuits hold that Congress did *not* impliedly create a private right of action in Section 47(b).

The Third and Ninth Circuits hold that private parties cannot sue under Section 47(b) of the ICA. Courts in those circuits would have dismissed Saba's lawsuit, because Congress didn't create an implied private right of action in Section 47(b).

1. The Ninth Circuit holds that "section 47(b) does not establish a private right of action." *Mayer*, 895 F.3d at 700. In *Mayer*, a pension fund sued Yahoo! (among other defendants), "alleging that Yahoo! had violated the conditions of its ICA exemption"—which "came with strings attached" by the SEC—and thus "had 'been operating as an unregistered investment company' in violation of the ICA." *Id.* at 698. Relying on Section 47(b), the pension fund sought rescission of certain contracts and an injunction prohibiting Yahoo! from performing other contracts. *See id.* at 698, 700.

The Ninth Circuit rejected the argument that it could "read section 47(b) as implying a private right of action for any party to any contract allegedly formed in violation of any ICA provision, rule, regulation, or order to sue for rescission of that contract." *Id.* at 700.

"That we cannot do," Judge Owens explained, given the statute's text and context. *Id.*

Start with the text. "Section 47(b) provides that a 'contract that is made, or whose performance involves, a violation of [the ICA], or of any rule, regulation, or order thereunder, is unenforceable by either party' to the contract unless 'a court' makes certain findings." *Id.* As the Ninth Circuit explained, "that language does not expressly establish a private right of action, as 'nothing in the text of the section makes any mention of one.'" *Id.* (alteration adopted). "Instead, section 47(b) on its face merely establishes what it says: that contracts formed in violation of the ICA are usually unenforceable." *Id.* The Ninth Circuit thus concluded that Congress did not "use rights-creating language" in Section 47(b). *Id.* at 699.

The Ninth Circuit confirmed its conclusion about Section 47(b) by looking to "the structure of the ICA." *Id.* at 700. In Sections 6 and 42, for example, Congress expressly 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 (citing 15 U.S.C. §§ 80a-6(c), 80a-41) (alterations adopted). Moreover, in Sections 30 and 36, Congress expressly authorized "private suits for damages against insiders of closed-end investment companies who make short-swing profits" and derivative suits against "an investment company's advisor and its affiliates for breach of certain fiduciary duties." *Id.* (citing 15 U.S.C. §§ 80a-29(h), 80a-35(b)); *see also Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 20 & n.10

(1979) (citing Section 30 and stating that "Congress expressly authorized private suits for damages").

"This detailed statutory scheme," the Ninth Circuit reasoned, shows that Congress knew how to create enforcement mechanisms "when it wished to do so." *Mayer*, 895 F.3d at 701. Congress's decision *not* to create yet another enforcement mechanism in Section 47(b) necessarily means "that Congress never intended further private enforcement of the ICA." *Id.* "That is because providing for 'one method of enforcing' a private right 'suggests that Congress intended to preclude others.'" *Id.* at 699.

The upshot: in the Ninth Circuit, Section 47(b) provides no path to court. Had Saba sued the Funds in the Ninth Circuit, the district court would have dismissed the action.

2. The Third Circuit likewise holds—as the Second Circuit expressly recognized, *Oxford University Bank*, 933 F.3d at 108—that "neither the language nor the structure of the ICA" supports the conclusion that Congress impliedly created a private right of action in Section 47(b). *Santomenno*, 677 F.3d at 187. In *Santomenno*, plaintiffs sued a life insurance company for allegedly violating certain provisions of the ICA. *See id.* at 181. As relevant here, the plaintiffs argued that they could "seek rescission and restitution" under Section 47(b) for alleged violations of Section 26(f), which requires investment companies to charge reasonable fees. *Id.* at 186.

The Third Circuit disagreed, holding that Congress did not create a private right of action in Section 47(b) and that there are several reasons "not to imply the existence of a cause of action under" that section. *Id.* 186-87. Like the Ninth Circuit, the Third Circuit

observed that Section 47(b) says only that contracts formed in violation of the ICA are "unenforceable," without also saying that a party to such a contract has a cause of action. *Id.* at 187. Also like the Ninth Circuit, the Third Circuit focused on the statutory context—namely, that Congress empowered the SEC "to enforce all ICA provisions through Section 42," and created a "private right of action in Section 36(b)." *Id.* at 186. This statutory context, the Third Circuit explained, counsels reliance on "an elemental canon of statutory construction": "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.*

In short, Section 47(b) provides no path to court for private plaintiffs in the Third Circuit. Had Saba sued the Funds there, the district court would have dismissed the action.

3. In an unpublished opinion after oral argument, a panel of the Fourth Circuit has also held that "there is no private cause of action to enforce Section 47(b)." *Steinberg*, 457 F. App'x at 267. In *Steinberg*, shareholders of certain mutual funds sued defendants under Section 36(b) for allegedly failing to disclose certain information. *See id.* at 265. The shareholders also sought rescission of advisory contracts under Section 47(b). *Id.* at 265, 267.

The panel recognized that "Section 36(b) provides a limited private cause of action." *Id.* at 267. But, consistent with the Third and Ninth Circuits, the panel held that Section 47(b) provides "no private cause of action." *Id.*

B. The Second Circuit is the outlier—but a critical one—holding that Section 47(b) creates an implied private right of action.

Only the Second Circuit holds that 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." *Oxford University Bank*, 933 F.3d at 106. The Second Circuit recognized that it was creating a circuit split in reaching that conclusion. *Id.* at 108. Thus, contrary to the circuits on the other side of the split, which would have dismissed Saba's suit, the Second Circuit affirmed the district court's judgment granting rescission. App. 12a-13a.

Oxford University Bank arose from a dispute over the asset liquidation of "a special purpose investment vehicle" (the trust) 933 F.3d at 101. Junior noteholders, who would receive nothing from the liquidation, intervened in the liquidation proceeding and sought rescission of their notes under Section 47(b) on the grounds that the notes were issued in violation of the ICA. *Id.* at 101-02.

The Second Circuit held that the intervenors could assert their ICA claim because Section 47(b) provides a right of action for the noteholders. *Id.* at 106. While recognizing that "Congress did not expressly state that a party to an illegal contract may sue to rescind it," the court nevertheless divined an implied right of action based on an "inference." *Id.* at 105-106. Despite the plain text of Section 47(b) and the structure of the ICA, the Second Circuit relied on legislative history and its view that the language that "a court may not deny rescission at the instance of any party" presupposes that a "party may seek rescission in court by

filing suit." *Id.* at 105, 107. The Second Circuit expressly rejected the Third Circuit's "opposite result." *Id.* at 108.

II. The Second Circuit's outlier rule is wrong.

A. This Court rarely recognizes an implied private right of action, and does so only when the statute's text and structure clearly call for one.

The Third and Ninth Circuits are correct: Section 47(b) does not create a private right of action. Neither the text of that section nor the structure of the ICA implies a private right of action. Certainly, nothing in Section 47(b) or in the ICA satisfies the Court's requirement for clear, rights-creating language.

"[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander*, 532 U.S. at 286. In most instances where the Court has recognized that Congress has created a private right of action, Congress has expressly created the right to sue. That's because the "'decision to create a private right of action is one better left to legislative judgment in the great majority of cases.'" *Jesner*, 584 U.S. at 264 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

In rare cases, however, the Court has found an implicit private right of action. But given that Congress speaks clearly when it intends to create a private of action, the Court applies a presumption against recognizing an implicit right of action: "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979); *see also In re Wild*, 994 F.3d 1244, 1274 (11th Cir. 2021) (Pryor, C.J., concurring) ("We interpret statutes with

a presumption against, not in favor of, the existence of an implied right of action." (citing A. Scalia & B. Garner, *Reading Law* 313 (2012))).

When courts must decide whether to recognize an implicit private right of action, the "judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Alexander*, 532 U.S. at 286. That task "begins with the text and structure" of the statute; "legal context matters only to the extent it clarifies text." *Id.* at 288 & n.7.

As to text, the Court will look for "'rights-creating' language," *id.* at 288, which is language that "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff in [a] case," *Cannon v. University of Chicago*, 441 U.S. 677, 690 n.13 (1979). The text must display "an unmistakable focus" on the individuals protected, not the person or entity being regulated. *Gonzaga University*, 536 U.S. at 287. Thus, the Court has held that language like "[n]o person … shall … be subjected to discrimination" confers a private right of action, *Cannon*, 441 U.S. at 689-95 (analyzing 42 U.S.C. § 2000d), in part because it focuses on the "individuals protected" instead of the "person regulated," *Alexander*, 532 U.S. at 289. By contrast, a statute that authorizes federal agencies to "effectuate the provisions of [the statute] … by issuing rules, regulations, or orders of general applicability," does not imply a private right of action. *Id.* at 288 (analyzing 42 U.S.C. § 2000d-1).

As to structure, the Court has explained that when Congress "explicitly confer[s] means of enforcing compliance with [the statute]," that suggests that Congress did not intend to create a private right of

action. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 331-32 (2015). That's because the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290 (citing cases). Likewise, when Congress explicitly provides a private right of action to enforce one section of a statute, that suggests that the omission of an express private right to enforce other sections was intentional. *See Olmsted v. Pruco Life Insurance Co. of New Jersey*, 283 F.3d 429, 433 (2d Cir. 2002); *see also Russello v. United States*, 464 U.S. 16, 23 (1983).

B. The text of Section 47(b) and the ICA's structure show no congressional intent to create a private right of action.

Section 47(b) does not create a private right of action, either expressly or by implication.

As the Second, Third, and Ninth Circuits all agree, Section 47(b) does not expressly provide for a private right of action. The first subpart provides that a "contract that is made, or whose performance involves, a violation of [the ICA] … is unenforceable by either party." 15 U.S.C. § 80a-46(b)(1). The second subpart applies only if a contract described in the first subpart "has been performed"; if so, a court is prohibited from "deny[ing] 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 this subchapter." *Id.* § 80a-46(b)(2).

Put simply, there is no "rights-creating" language in Section 47(b). That section doesn't explicitly confer a right on a class that includes plaintiffs like Saba.

Instead, Section 47(b) is directed at *courts*, spelling out the relief that a court can order if it finds that a contract violates the ICA. That's not language aimed at any class of parties; the class-of-person that the statute might benefit is not the subject of Section 47(b) at all. *Compare* 42 U.S.C. § 2000d ("[N]o *person* … shall … be subjected to discrimination" (emphasis added)).

The ICA's structure also demonstrates that Congress didn't intend private parties to enforce Section 47(b). To start, Congress expressly empowered *the SEC* to enforce Section 47(b). *See Santomenno*, 677 F.3d at 186. The SEC is authorized to "bring an action in the proper district court of the United States" against any person who "has engaged or is about to engage in any act" in violation of the ICA. 15 U.S.C. § 80a-41(d). The SEC can seek an injunction, *id.*, and it can seek monetary penalties under detailed procedures set out by Congress, *id.* § 80a-41(e). Congress's "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander*, 532 U.S. at 290. As this Court has held time and again, "[t]he statutes make express provision for private enforcement in certain carefully defined circumstances, and provide for enforcement at the instance of the Federal government in other circumstances. The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 93-94 (1981).

Likewise, Congress expressly created a private right of action in Section 36(b) of the ICA, which allows "a security holder of [a] registered investment

company" to bring suit against an "investment advisor" for breach of fiduciary duty. 15 U.S.C. § 80a-35(b). So Congress knew how to provide a private right of action for some sections of the ICA, but chose not to do so for Section 47(b). Section 36(b) indicates that the omission of a private right of action in Section 47(b) "was intentional." *Olmsted*, 283 F.3d at 433.

C. The Second Circuit's contrary rule is wrong.

Despite the lack of any suggestion that Congress intended to create a private right of action in Section 47(b), the Second Circuit split from the Third and Ninth Circuits to hold that Section 47(b) implies a private right of action. *See Oxford University Bank*, 933 F.3d at 108.

In *Oxford*, the Second Circuit reversed a district court decision that ruled, consistent with the Third and Ninth Circuits' decisions, that Section 47(b) does not create a private right of action because (1) the "ICA provides a different enforcement mechanism, through the SEC, of the provisions at issue," (2) "the ICA expressly provides for private enforcement in a different provision, § 36(b)," and (3) there is no rights-creating language in Section 47(b). 933 F.3d at 105. The Second Circuit blew past the first two reasons and concluded that the provision that "a court may not deny rescission at the instance of any party" must presuppose that a private party may seek rescission in court. *Id.*

That was error. To start, even if the Second Circuit's "inference" is plausible, *id.* at 106, it's a slim reed on which to rest a private cause of action. And it's not a reed that can bear the weight of the contrary indications of Congress's intent. But *Oxford* didn't

grapple with those contrary signs or this Court's insistence on clear rights-creating language. Regardless, the premise of the Second Circuit's rule is incorrect in the first place. That's because a party can seek rescission in a defensive posture (or, depending on the circumstances and the party's interests, denial of rescission). For instance, a defendant in a breach-of-contract action may seek rescission of the contract on the grounds that the contract is unenforceable because it violates the ICA. Or a party could argue that rescission should be denied, and the contract enforced, on equitable grounds. Likewise, a third party may seek to intervene in a suit—whether a breach-of-contract suit or an action by the SEC under the ICA—to seek rescission of contracts it had entered into with one of the parties. Section 47(b)(2) governs the court's analysis of rescission in those circumstances. But it doesn't create a private right of action.

Indeed, the notion that the "any party" language creates a private cause of action is an especially implausible inference given that Congress gave *the SEC* authority to enforce the ICA and created a cause of action for private parties only in Section 36(b). *See supra* pp. 7-9. The Second Circuit's view would render Section 36(b) superfluous. It would also severely undermine the SEC's role in deciding how to enforce the ICA, including whether to "exempt" any person or transaction from particular ICA provisions under Section 6(c), 15 U.S.C. § 80a-6(c).

The Second Circuit's outlier rule rests on an unsupported (and unsupportable) premise: That the "any party" language *must* mean that a private party can bring suit under Section 47(b). That premise is incorrect, so the Second Circuit's rule must fall. And

without that reed, there's *nothing* supporting the Second Circuit's "inference."

The Second Circuit's reliance on *TAMA* (*see Oxford University Bank*, 933 F.3d at 106-07) doesn't support its view. In *TAMA*, a 1979 decision, the Supreme Court relied on the legislative history of the Investment Advisors Act (IAA) in concluding that Congress had impliedly created a private right of action in Section 215 of that Act. 444 U.S. at 18-19. According to *Oxford University Bank*, when Congress amended Section 47(b) in 1980, the year after *TAMA*, it "strongly implied" that it wanted courts to construe Section 47(b) of the ICA like Section 215 of the IAA. 933 F.3d at 107. "That kind of argument may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will." *Barr v. American Ass'n of Political Consultants*, 591 U.S. 610, 624 (2020) (plurality opinion). "But courts today zero in on the precise statutory text," *id.*, particularly when deciding whether to imply a private right of action, because this Court long ago "abandoned" the notion that courts can "provide such remedies as are necessary to make effective the congressional purpose," *Alexander*, 532 U.S. at 287. In short, if Congress wanted to create a right of action in Section 47(b) of the ICA after *TAMA*, it would have said so expressly.

III. The question presented is important, and this case is an ideal vehicle for resolving it.

A. 1. Whether Section 47(b) impliedly authorizes a party to sue in federal court is exceedingly important. For one thing, whether a court should imply a private right of action *always* implicates separation-of-powers concerns. *Ziglar v. Abbasi*, 582

U.S. 120, 135 (2017). Congress enacts, courts interpret. It is courts' duty to presume that Congress "means what it says," *Castro-Huerta*, 597 U.S. at 642—and doesn't mean what it *doesn't* say.

The important boundaries between courts and Congress was the core of Justice Scalia's majority opinion in *Alexander*. Private rights of action, the Court explained, "must be created by Congress." *Alexander*, 532 U.S. at 286. Without clear statutory text and structure creating a private right of action, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87. Expertise plays a role, too: "The decision to bless a cause of action invariably involves 'a host of considerations that must be weighed and appraised,' including an 'assessment of its impact on governmental operations systemwide.' That is not the sort of problem the judiciary is equipped to solve." *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021) (Thapar, J.) (quoting *Abbasi*, 582 U.S. at 135-36).

Those concerns have led this Court to closely scrutinize statutory text to protect the boundary between legislation and judicial decisionmaking. The Court has course-corrected from the 1960s-era cases that divined implied private rights of action from legislative history and abstract Congressional purpose, proclaiming that "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964). That's also true in the *Bivens* context, where the Court has also recognized that "creating a cause of action is a legislative endeavor" and that "Congress is 'far more competent than the

Judiciary' to weigh ... policy considerations." *Egbert v. Boule*, 596 U.S. 482, 491 (2022).

2. The Second Circuit's opinion deviates from the Court's clear command in its recent cases. The court found an implied private right of action in a statute where Congress expressly empowered the SEC to enforce the law. Allowing the Second Circuit's decision to stand uncorrected is an affront to Congress's carefully crafted scheme. The Second Circuit's decision disturbs the balance Congress struck about who enforces the ICA (SEC) and how much (in its expert discretion), purportedly giving private parties the right to sue for any ICA violation whenever they can establish standing. That rule takes ICA enforcement from the expert agency and threatens to nullify the ICA's provisions letting the SEC determine the extent to which the ICA and its implementing regulations' requirements apply or require an exemption in the first place. *See supra* pp. 7-8.

The question presented is important for a practical reason, too. Allowing a private right of action here—and in the Second Circuit in particular, where many regulated parties may be sued—will open the floodgates to parties of all kind who might use litigation to their strategic advantage and to the detriment of ordinary investors. That was the case here, where, contrary to the ICA, Saba sought to extract short-term gains at the expense of long-term investors. *See supra* p. 12. That was likewise the case in *Mayer*, where shareholders brought a derivative suit seeking to enjoin Yahoo! from selling part of its business because they disagreed with the company's decision. The shareholders "assert[ed] the ability to halt a deal the SEC has not blocked for alleged violations of an ICA exemption the SEC has not addressed." *Mayer*, 895

F.3d at 701. And that's "not even the most awesome power" that recognizing a private right of action would confer on shareholders. *Id.* The Second Circuit's reading of Section 47(b) would give shareholders the power "to rescind not just a handful of employment contracts, but also every other contract [the defendant] has entered into for the better part of a decade." *Id.*

B. This case is an ideal vehicle for resolving the question presented. The lopsided split is clear—again, the Second Circuit knowingly created the conflict—and it is outcome-determinative. The Second Circuit affirmed the district court's judgment rescinding the Funds' resolutions opting in to the MCSAA. App. 12a-13a. But if Saba had sued in the Third or Ninth Circuits, then the claim would have been dismissed at the outset. Thus, if the Court holds that Section 47(b) does not create an implied private right of action, then the district court must dismiss Saba's claims.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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