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.,
Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases raising issues of concern to the Nation's business community.

The Chamber has a strong interest in this case because private litigation under Section 47(b) of the Investment Company Act (ICA) imposes a substantial burden on the business community. Section 47(b) permits the rescission of contracts made in violation of the ICA, a statute that governs "investment companies" with extensive and far-reaching requirements. Many businesses are registered under the ICA and subject to its demands, while others risk inadvertently becoming "investment companies" subject to SEC registration and oversight. The scope of the ICA's regulatory reach is therefore important.

The question in this case is whether Section 47(b) of the ICA confers an implied private right of action.

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[1] No counsel for any party authored this brief in whole or in part, and no party, counsel for a party, or person or entity other than *amicus curiae*, its members, and its counsel made a monetary contribution intended to fund the brief's preparation or submission. Counsel of record for the parties received timely notice of *amicus*'s intent to file this brief.

In answering that question in the affirmative, the Second Circuit—splitting with other circuits—has exposed covered businesses to the threat of abusive private lawsuits aimed at enforcing the ICA's extensive requirements and rescinding vital business contracts. Granting such broad and unchecked authority to private citizens would create significant regulatory uncertainty, while undermining the SEC's own role as the congressionally-delegated enforcer of the ICA. Yet there is no evidence in the text of the statute that Congress intended that result. The Chamber and its members have a strong interest in checking such regulatory overreach and enforcing the terms of the statute that Congress duly enacted.

INTRODUCTION AND SUMMARY OF ARGUMENT

More than four decades ago, this Court "swor[e] off the habit of venturing beyond Congress's intent" to infer private rights of action to enforce federal law, and it has repeatedly rebuffed "invitation[s] to have one last drink" ever since. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Yet, in open conflict with the Third and Ninth Circuits, the Second Circuit has recognized an implied private right of action under Section 47(b) of the Investment Company Act (ICA), 15 U.S.C. § 80a-46(b), based solely on strained inferences from the statutory text and legislative history. *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106-09 (2d Cir. 2019). The Second Circuit's position defies both the text of Section 47(b) and its surrounding provisions and this Court's precedents on private rights of action, which foreclose any recognition of such a right under Section 47(b).

The petition explains why this case readily meets the traditional criteria for certiorari: the circuits are undeniably divided over a significant question of federal law, and the Second Circuit's position is clearly incorrect. *See* Pet. 17-29. This brief emphasizes two key points that underscore the importance of the question presented to the business community and the need for this Court's intervention.

First, the Second Circuit's recognition of an implied private right of action under Section 47(b) has far-reaching consequences for businesses. Because of the ICA's nationwide service of process and broad venue provisions, plaintiffs can almost always bring their ICA claims in the Second Circuit, exploiting its standalone recognition of a private right of action to bring suits against companies from across the country. Armed with that rule, private litigants wield sweeping power: they can seek rescission of a vast array of contracts—including advisory agreements, securities issuances, and even corporate bylaws. This private-enforcement regime injects substantial regulatory uncertainty into the business landscape, allowing for unpredictable enforcement actions driven by individual plaintiffs' whims rather than any consistent enforcement policy. And given the risks posed by these suits and the substantial resources necessary to litigate them, even the most innocent companies can be forced to consider settlement. The question presented requires no further percolation; under the decision below, plaintiffs can bring nearly all ICA litigation in a venue with a favorable rule.

Second, the Second Circuit's erroneous recognition of an implied private right of action contravenes not only the statute that Congress enacted but also fundamental separation-of-powers principles central

to the Constitution's design. These principles are well-rehearsed in this Court's decisions. Crafting a legal remedy is a function reserved exclusively for Congress, which can deliberate through hearings, debate, and a legislative vote before setting the forth the law with the text it enacts. Judges, on the other hand, lack this political accountability and are thus tasked with applying the law as enacted. The enforcement of federal laws, moreover, is the Executive branch's prerogative—not that of private citizens, who can pursue enforcement actions that clash with the Executive branch's goals. By recognizing an implied private cause of action to enforce Section 47(b), the Second Circuit usurped Congress' authority, undermined the delicate balance of powers essential to our constitutional framework, and overstepped its role. Such weighty concerns warrant this Court's attention too.

For these reasons, as well as those laid out in the petition, the Court should grant certiorari.

ARGUMENT

I. The Second Circuit's Position That Section 47(b) Implies A Private Right Of Action Has Major Implications For Businesses

The Second Circuit's recognition of an implied private right of action under Section 47(b) has significant consequences for the business community.

1. The ICA applies broadly to "investment compan[ies]," defined to include any company that (1) "is engaged . . . in the business of investing, reinvesting, owning, holding, or trading in securities," and (2) "owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets." 15 U.S.C.

§ 80a-3(a)(1)(C). This "broad definition" covers a wide range of entities—mutual funds, trusts, and hedge funds, to name just a few. *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 697 n.1 (1975).

The ICA's regulatory regime is stringent. The Act imposes "onerous requirements and restrictions" on investment companies, addressing everything from disclosure and governance to asset safekeeping and advertising. Jonathan Baird & Eric Stuart, *The US Investment Company Act: A legal minefield for non-US issuers*, PLC Magazine 1-2 (Mar. 2013).[2] As one former SEC Chairman observed, "[n]o issuer of securities is subject to more detailed regulation than a mutual fund." Letter from Ray Garrett, Jr., SEC Chairman, to the Honorable John Sparkman, Chairman of the Comm. on Banking, Housing, and Urban Affairs, United States Senate at v (Nov. 4, 1974), https://www.sec.gov/divisions/investment/report-mutual-fund-distribution-22d.pdf.

Section 47(b) provides that any "contract that is made, or whose performance involves, a violation of [the Act], or of any rule, regulation or order thereunder" is unenforceable and potentially subject to rescission. 15 U.S.C. § 80a-46(b). Congress tasked the SEC—and only the SEC—with enforcing "any provision" of the ICA, and determining whether, and to what extent, a regulated party is exempt from its requirements. *Id.* §§ 80a-41(d), 80a-6(c). Granting private parties the right to enforce Section 47(b)—as

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[2] https://www.jonesday.com/-/media/files/publications/2013/03/the-us-investment-company-act-a-legal-minefield-fo/files/ereadattachment/fileattachment/ereadattachment.pdf.

the Second Circuit did below—significantly expands the ICA's reach.

And, on this score, a decision from the Second Circuit recognizing a private cause of action under Section 47(b) is hugely significant. The ICA's provisions for nationwide service of process on defendants make personal jurisdiction proper "in any federal district court in the country" as long as the defendant has connections with the United States. *Canaday v. Anthem Cos.*, 9 F.4th 392, 398 (6th Cir. 2021) (citing 15 U.S.C. § 80a-43), *cert. denied*, 142 S. Ct. 2777 (2022); *see* Pet. App. 9a ("[T]he ICA provides for nationwide service of process, *see* 15 U.S.C. § 80a-43—meaning that minimum contacts with the United States suffice[] to establish personal jurisdiction." (citing *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974))). And the ICA's venue requirements are equally accommodating: Venue is proper in any district where the defendant "is an inhabitant or transacts business." 15 U.S.C. § 80a-43.

As the decision below illustrates, given the inextricable connection between New York, its stock exchanges, and the nation's financial system, plaintiffs can almost always establish that an ICA defendant either is located in or transacted some business within the Second Circuit's jurisdiction. *See* Pet. App. 10a-11a (venue was proper in the Southern District of New York when funds listed their shares on the New York Stock Exchange and used New York brokers to carry out investment transactions). Indeed, even if corporate documents specify a forum outside the Second Circuit for claims connected to corporate bylaws or other governing documents, courts have held that the fact that an ICA case "raises a pure question of federal law against [a defendant]

that actively conduct[s] business in New York" is enough to support a plaintiff's choice of a New York forum. *Saba Cap. Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc.*, 694 F. Supp. 3d 394, 401 (S.D.N.Y. 2023).

There is thus no reason to let the issue percolate longer: The acknowledged circuit split may never deepen because plaintiffs now have every incentive to simply file any and all ICA suits in the Second Circuit. In any event, the conflict created by the Second Circuit's decision alone necessitates this Court's intervention now, regardless of how the conflict spreads. There is no basis for a different rule for private actions under the ICA in the Nation's financial center than in other parts of the country.

2. The Second Circuit's position matters greatly to businesses. The ICA's "broad and pervasive" regulations make it easy for plaintiffs to identify purported breaches that can fuel private suits. Harvey Bines & Steve Thel, *The Varieties of Investment Management Law*, 21 Fordham J. Corp. & Fin. L. 71, 91 (2016). And these private actions could lead to rescission of a broad spectrum of contracts, causing significant uncertainty and disruption to the regulated companies.

For instance, Section 47(b) plaintiffs have leveraged purported violations of the ICA to seek rescission of investment companies' agreements with advisors, *Laborers' Loc. 265 Pension Fund v. iShares Tr.*, No. 3:13-CV-00046, 2013 WL 4604183, at *6 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 574 U.S. 1202 (2015), their issuances of securities, *Staniforth v. Total Wealth Mgmt., Inc.*, No. 14-cv-1899, 2023 WL 3805250, at *2 (S.D. Cal. June 2, 2023), and even their corporate

bylaws, Pet. App. 13a. The rescission of such vital contracts would severely disrupt business continuity and stability.

Making matters worse is the uncertainty surrounding the ICA's definition of "investment companies." 15 U.S.C. § 80a-3(a)(1)(C). That definition is not only broad but "extremely . . . complicated," and it can capture companies that are not structured or operated as funds, such as development-stage companies raising capital, holding companies with minority stakes in other entities, and companies with complicated financing operations. Baird & Stuart, *supra*, at 2. Thus, as practitioners have noted, the implications of the Second Circuit's recognition of a private right of action are "most dramatic" for *unregistered* companies that an enterprising plaintiff might argue should be classified as "investment compan[ies]" under the ICA. Rich Lincer et al., *Implied Private Right of Action Under the Investment Company Act*, Harvard Law School Forum on Corporate Governance (Oct. 7, 2019).[3]

If a private plaintiff successfully argues that an unregistered company should have registered with the SEC, the fallout for that company could be catastrophic. Because the ICA "prohibits [unregistered investment] companies from engaging in interstate commerce, almost every contract [an unregistered investment company] enters into (including any issuances of securities) could be subject to rescission" under the Second Circuit's rule—all without the SEC ever having objected to that company's supposed registration failure. *Id.* As

[3] https://corpgov.law.harvard.edu/2019/10/07/implied-private-right-of-action-under-the-investment-company-act/.

the Ninth Circuit has cautioned, this expansive interpretation of Section 47(b) could empower plaintiffs to seek rescission of "every . . . contract [an unregistered company] has entered into" since inadvertently becoming an "'investment company'"—even those inked *decades* ago. *UFCW Loc. 1500 Pension Fund v. Mayer,* 895 F.3d 695, 701 (9th Cir. 2018) (citation omitted).

This threat is not theoretical. Shareholders, investors, and other contracting parties have already leveraged the Second Circuit's implied private right of action to argue that unregistered companies should be subject to ICA requirements, seeking rescission of critical contracts. For instance, shareholders of special purpose acquisition companies (SPACs) have filed a wave of derivative actions in the Second Circuit, claiming these entities are illegally unregistered "investment companies" and demanding rescission of share purchase agreements. One shareholder alone has filed at least three such actions, represented by the same law firm in each. *See Assad v. Pershing Square Tontine Holdings, Ltd.*, No. 21-cv-6907 (S.D.N.Y filed Aug. 17, 2021); *Assad v. E.Merge Technology Acquisition Corp.*, No. 21-cv-7072 (S.D.N.Y. filed Aug. 20, 2021); *Assad v. GO Acquisition Corp.*, No. 21-cv-7076 (S.D.N.Y. filed Aug. 20, 2021). More will undoubtedly follow.

The Second Circuit's interpretation of Section 47(b) also is problematic for businesses because it threatens to dismantle specific ICA exemptions granted by the SEC. Its position allows private plaintiffs to use Section 47(b) to challenge companies' compliance with the terms of their SEC-granted exemptions, even when the SEC itself has not

pursued enforcement—undermining the very protections these exemptions were meant to provide.

The SEC has issued conditional exemptions from the ICA's stringent requirements to hundreds of different companies, many containing complex or vague conditions. *See, e.g.*, Tamar Frankel, *The Scope and Jurisprudence of the Investment Management Regulation*, 83 Wash. U.L.Q. 939, 941-48, 958 (2005) (discussing exemptions issued by the SEC before 2000, and the common investment restrictions included in such exemptions). For example, the SEC has recognized that certain "technology and internet companies" face the problem of becoming inadvertent "investment companies" and has accordingly crafted exemptions for such companies, provided they adhere to limitations on their investments, such as prohibitions against "speculative investing." Christopher P. Healey, *Updating the SEC's Exemptive Order Process Under the Investment Company Act of 1940 to Fit the Modern Era*, 79 Geo. Wash. L. Rev. 1535, 1536, 1552 (2011). The Second Circuit's position threatens to unleash a torrent of claims targeting compliance with those terms, even when the SEC itself has not seen fit to intervene.

Again, this risk of litigation is not merely hypothetical—it is a pressing reality. Take, for instance, *UFCW Loc. 1500 Pension Fund*. In that case, a plaintiff asserted the ability to halt a multi-billion-dollar deal that "the SEC ha[d] not blocked for alleged violations of an ICA exemption the SEC ha[d] not addressed, even though the SEC ha[d] been made fully aware of the facts underlying those alleged violations." 895 F.3d at 701. The plaintiff alleged that Yahoo!'s investment in Alibaba.com violated its SEC-issued ICA exemption, which required that

Yahoo! make investments only "for bona fide business purposes" and "refrain from investing or trading in [securities] for short-term speculative purposes." *Id.* at 698 (alteration in original). The Ninth Circuit dismissed the suit for lack of a cause of action, recognizing that a contrary conclusion could give rise to rescission of "every . . . contract Yahoo! has entered into for the better part of a decade." *Id.* at 701. That risk is now a reality in the Second Circuit.

And that reality is untenable. As the Ninth Circuit explained, allowing private litigants to enforce vague and complicated exemption conditions risks thrusting courts and the SEC into a "tellingly odd game of chicken." *Id.* "Congress contemplated that companies would contravene the conditions of ICA exemptions and concluded that the SEC . . . should decide in the first instance what to do when that happens." *Id.* at 700. But the Second Circuit's position hijacks that authority, putting private citizens in the place of the SEC. This subordinates the SEC—"the body the ICA expressly charges with considering" whether exemptions should be granted, revoked, or enforced "in the first instance"—to lawsuits filed by private plaintiffs and securities lawyers with an entirely different set of priorities, and judicial decisions on matters Congress entrusted to the agency's discretion. *Id.* at 701. Alternatively, when the SEC can simply re-exempt a company after a judicial decision, it renders the court's "diligent efforts . . . wasted," squandering valuable judicial resources. *Id.* Neither outcome is desirable.

Meanwhile, businesses—and American productivity—will pay the price. The financial toll of defending against lawsuits of this "unparalleled magnitude" can be overwhelming for Section 47(b)

defendants. *Id.* Indeed, as in any case involving the securities laws, the costs can be so substantial that they pressure even innocent companies into "staggeringly high settlements," which often "disproportionally benefit" plaintiffs' lawyers. U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims* 14 (July 2019) (*Ill-Suited*).[4] As this Court recognized in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, securities-related private actions pose a particularly heightened threat to companies due to the extensive required discovery and the potential for significant disruption to the company. 552 U.S. 148, 163 (2008). This reality empowers plaintiffs even with "weak claims to extort settlements," *id.*, which only fuels more baseless litigation, *see* U.S. Chamber Institute for Legal Reform, *Containing the Contagion, Proposals to Reform the Broken Securities Class Action System* 14-15 (Feb. 2019) (discussing these concerns, and flagging that private securities claims "brought in recent years are less meritorious than in the past").[5]

For the many businesses facing the looming threat of private Section 47(b) lawsuits, this is a critical issue. The Second Circuit's rule thrusts these companies into the crosshairs of unpredictable and costly legal challenges, all the while creating significant regulatory uncertainty.

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[4] https://instituteforlegalreform.com/wp-content/uploads/2020/10/Ill-Suited_-_Private_RIghts_of_Action_and_Privacy_Claims_Report.pdf.

[5] https://instituteforlegalreform.com/wp-content/uploads/2020/10/Securities-Class-Action-Reform-Proposals.pdf.

II. The Second Circuit's Creation Of A Private Right Of Action Under Section 47(b) Violates Core Separation-Of-Powers Principles

This Court's intervention is crucial for another reason: The Second Circuit's position resurrects a discredited approach to implied private rights of action that this Court has long abandoned, violating core separation-of-powers principles fundamental to the Constitution's design. These weighty concerns demand this Court's attention too.

1. Despite the Court's checkered past on implied rights of action, for decades the Court consistently "has been very hostile to implied causes of action." *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.). Indeed, in *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001), the Court declared that it had "sworn off the habit of venturing beyond Congress's intent" when it comes to fashioning implied private rights of action.

The reason for this epiphany is clear: The "judicial creation of a cause of action . . . places great stress on the separation of powers." *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 636 (2021) (plurality opinion). Deciding that "persons … who engage in certain conduct will be liable to [others] is, in every meaningful sense, just like enacting a new law"—a role that belongs exclusively to Congress. *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 282 (2018) (Gorsuch, J., concurring in part and concurring in the judgment); *see Egbert v. Boule*, 596 U.S. 482, 491 (2022) ("At bottom, creating a cause of action is a legislative endeavor."). When courts sanction a new cause of action, they are "invariably" "'weigh[ing] and apprais[ing]'" a host of policy-laden factors, including the potential for abuse,

the predicted impact on the judicial system, and the existence of alternative enforcement mechanisms. *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021) (Thapar, J.) (citation omitted), *cert. denied*, 143 S. Ct. 301 (2022); *see Ziglar v. Abbasi*, 582 U.S. 120, 133-36 (2017) (discussing these concerns). These are precisely the types of policy-focused issues that Congress, not the judiciary, is equipped to address. *See Nestlé*, 593 U.S. at 637 ("[A]ny judicially created cause of action risks 'upset[ting] the careful balance of interests struck by the lawmakers.'" (alteration in original) (citation omitted)).

Recognizing an implied private cause of action not only infringes on Congress's exclusive role in making laws but also encroaches on the Executive's role in administering them. As numerous judges and scholars have highlighted, private enforcers—who are unaccountable to the electorate and typically indifferent to the "social impact of their enforcement decisions"—sometimes pursue enforcement objectives that misalign with, or even oppose, broader regulatory goals. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 114, 119 (2005); *see, e.g.*, *New England Tel. & Tel. Co. v. Public Utils. Comm'n*, 742 F.2d 1, 5-6 (1st Cir. 1984) (Breyer, J.) (implying a private right to enforce FCC regulations would place the FCC's "interpretative function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission," which would "deprive the FCC of necessary flexibility and authority in creating, interpreting, and modifying" a "coherent nationwide communications policy"), *cert. denied*, 476 U.S. 1174 (1986). This lack of

accountability can lead to overzealous and inefficient enforcement.

A private enforcement regime allows plaintiffs' lawyers "to set policy nationwide" rather than permitting regulators to shape and balance policy and protections. *Ill-Suited, supra*, at 14. And it can lead to "inconsistent and dramatically varied district-by-district court rulings," driven by individual plaintiffs' whims rather than an agency regulator's comprehensive enforcement agenda. *Id.*; *see also* Stephenson, *supra*, at 119 (recognizing these concerns).

Agencies are not immune from overreach. But, on balance, agency enforcement is more likely to result in "constructive, consistent decisions" that protect investors while offering a structed framework "for companies aiming to align their practices with existing and developing law." *Ill-Suited*, *supra*, at 14. That enhanced regulatory predictability is crucial for business planning and investment, as it allows companies to focus on growth and innovation rather than diverting resources to fend off unpredictable (and crushing) potential private litigation. Layering the threat of private enforcement actions on top of agency enforcement trades predictability for uncertainty—and the constant threat of litigation.

2. The Second Circuit's decision to recognize an implied private right of action under Section 47(b) of the ICA disregarded these fundamental separation-of-powers considerations, which are "central to the analysis," *Abbasi*, 582 U.S. at 135, and leave to Congress—and Congress alone—the decision of whether or when to create private rights.

As in any other case involving a statute, courts have a duty to enforce the law that Congress enacted, rather than infer new rights. The Second Circuit here disregarded the Act's plain terms and, instead, assumed the role of Congress in creating new rights not expressed in the Act. In particular, the Second Circuit overlooked the importance of the express rights of action Congress explicitly provided for in the ICA. *See Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106 (2d Cir. 2019). For instance, as noted, Congress explicitly empowered the SEC to enforce "any provision" of the ICA, including Section 47(b). 15 U.S.C. § 80a-41(d). The SEC can seek injunctive relief, *id.*, and it can seek monetary penalties under detailed procedures set out by Congress, *id.* § 80a-41(e). These express provisions make clear that Congress knew perfectly well how to create rights of action *when it wanted to do so.*

Moreover, as this Court made clear in *Sandoval*, such comprehensive provisions for agency enforcement "*contradict* a congressional intent to create privately enforceable rights through [a statutory provision]." 532 U.S. at 290 (emphasis added). After all, the Court has explained, "[i]t is hard to believe that Congress intended" to provide for an implicit right of action, the contours of which would be entirely subject to judicial creation, when it explicitly provided for a comprehensive remedial scheme based on enforcement by the Federal government. *Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981); *see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94 (1981) (statute's comprehensive provisions for enforcement by the

Federal government "strongly evidence[] an intent not to authorize additional remedies").

On top of that, in Section 36(b), Congress explicitly created a private right of action to enforce certain breaches of fiduciary duties. 15 U.S.C. § 80a-35(b). This further confirms that "when Congress wished to provide" a *private* right of action to enforce the ICA, "it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979). Congress did not do so in Section 47(b)—which means that it did not mean to create such a right. It is highly improbable that "Congress absentmindedly forgot to mention an intended private action" when it explicitly and intentionally provided for enforcement of *other* ICA provisions by private persons—and provided for SEC enforcement of these very same provisions. *Cannon v. University of Chicago*, 441 U.S. 677, 741 (1979) (Powell, J., dissenting). And, in any event, it is not a court's job to complete the job for Congress, even if it believes there was some oversight. Congress has the sole authority to amend, as well as pass, laws.

Moreover, it defies reason to think that Congress intended to leave all the details of this implicit private action under Section 47(b) to judicial creation when Congress meticulously defined the scope of the Section 36(b) cause of action. Section 36(b) allows "a security holder of [a] registered investment company" to bring suit against an "investment adviser" for breach of fiduciary duty, but only under narrowly defined circumstances spelled out in six separate subsections. *See* 15 U.S.C. § 80a-35(b)(1)-(6). Section 36(b) includes detailed rules governing these private actions, like a statute of limitations, *id.* § 80a-35(b)(3), and the burden of proof, *id.* § 80a-35(b)(1). Given this level of specificity, it is inconceivable that Congress

would leave all the details of the Section 47(b) private action to judicial discretion.

Rather than heed these principles, the Second Circuit relied on this Court's half-century-old decision in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (*TAMA*). But in *TAMA*, this Court firmly rejected a private right of action under Section 206 of the Investment Company Act (IAA), which sets fiduciary standards for investment advisers, holding that "[t]he mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action" on their behalf. *Id.* at 23. The Court emphasized that Congress had already "expressly provided both judicial and administrative means for enforcing compliance with [Section] 206": (1) the federal government could prosecute willful violations of the Act as criminal offenses; (2) the SEC could bring civil actions in federal court to enforce compliance with the Act, including Section 206; and (3) the SEC could impose various administrative sanctions on violators of the Act, including Section 206. *Id.* at 20. "In view of these express provisions for enforcing the duties imposed by [Section] 206," *TAMA* explained, "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* (citation omitted).

Those same three considerations apply equally to Section 47(b): (1) the federal government can prosecute willful violations of the ICA as criminal offenses, *see* 15 U.S.C. § 80a-48; (2) the SEC can bring civil actions in federal court to enforce "any [ICA] provision," including Section 47(b), *id.* § 80a-41(d); and (3) the SEC can impose administrative sanctions on violators of the ICA, including of Section 47(b), *id.*

§ 80a-9(b). Far from validating the Second Circuit's position, then, *TAMA* actually undermines it—confirming that the ICA's robust enforcement mechanisms negate any implication that Congress intended to create a private right of action under Section 47(b) without saying so.

The Second Circuit relied on *TAMA*'s conclusion that Section 215 of the IAA, which provides that "'contracts whose formation or performance would violate the [IAA] "shall be void . . . as regards the rights of" the violator,'" implies a private right of action to seek rescission. *Oxford Univ. Bank*, 933 F.3d at 106 (alterations in original) (quoting *TAMA*, 444 U.S. at 16-17). But that portion of *TAMA* is inapplicable here. As *TAMA* itself recognized, and as Justice Scalia's opinion for the Court in *Sandoval* reiterated, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA*, 444 U.S. at 19; *see Sandoval*, 532 U.S. at 290. In *TAMA*, that logic did not extend to Section 215 because the IAA offered no other private causes of action. *See TAMA*, 444 U.S. at 14 (emphasizing that the IAA "nowhere expressly provides for a private cause of action"). In stark contrast, Congress explicitly included a private cause of action in the ICA at Section 36(b). *See* 15 U.S.C. § 80a-35(b). And this inclusion affirms that "when Congress wished to provide" a private cause of action in the ICA, "it knew how to do so and did so expressly." *TAMA*, 444 U.S. at 21 (citation omitted); *see also Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 677 F.3d 178, 186 (3d Cir.) (distinguishing *TAMA* on these same grounds), *cert. denied*, 568 U.S. 978 (2012).

In any event, this portion of *TAMA*—which tries to make something out of statutory "silen[ce]," 444 U.S. at 18—reflects the kind of reasoning that this Court has since repudiated. *TAMA* primarily relied on the fact that common-law courts had "ordinarily" recognized a cause of action to rescind void contracts as a matter of contract law. *Id.* But the Court is "[n]ow long past 'the heady days in which [it] assumed common-law powers to create causes of action.'" *Egbert*, 596 U.S. at 491 (citation omitted); *see Sandoval*, 532 U.S. at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (citation omitted)). And while *TAMA* also pointed to cases decided during those heady days, *see* 444 U.S. at 19, those cases should remain relics of that era—not extended here.

Unsurprisingly given its vintage, *TAMA* failed to consider Congress' explicit provision for agency enforcement of Section 215. But *Sandoval* makes clear that such provisions can be so important that they "preclude[] a finding of congressional intent to create a private right of action, even though other aspects of the statute," such as "language making the would-be plaintiff 'a member of the class for whose benefit the statute was enacted'" or language "admittedly creat[ing] substantive private rights" points in the opposite direction. 532 U.S. at 290 (citation omitted). Here, Congress specifically tasked the SEC with enforcing "any provision" of the ICA, 15 U.S.C. § 80a-41(d)—underscoring the absence of a need for a private right of action to enforce Section 47(b).

Despite these differences, the Second Circuit insisted that Congress's amendment of Section 47(b)

one year after *TAMA*, which "distinguished between unperformed and performed contracts" and confirmed that "illegality could be raised as a defense to enforcement," "strongly implied" an intent for courts to interpret Section 47(b) like Section 215 of the IAA. *Oxford Univ. Bank*, 933 F.3d at 107. Not so. For starters, the amended Section 47(b) language does not even align with Section 215 of the IAA—the latter states that "[e]very contract made in violation of any provision of this subchapter . . . *shall be void* . . . as regards the rights of" the violator, 15 U.S.C. § 80b-15(b), while the former stipulates that "[a] contract that is made, or whose performance involves, a violation of this subchapter . . . *is unenforceable*," *id.* § 80a-46(b) (emphasis added). *TAMA*'s analysis was linked closely to the statute's explicit declaration of "voidness," which the Court interpreted as implying an "equitable cause of action." 444 U.S. at 18-19; *see Santomenno*, 677 F.3d at 187 (drawing this distinction). If Congress truly intended to replicate the *TAMA* outcome without explicitly stating it, it would have at least mirrored the relevant statutory language.

Regardless, relying on assumptions from legislative history—particularly post-enactment legislative history that did not change the operative statutory language in any relevant respect—is the antithesis of the textual analysis required by this Court's precedents. Indeed, this Court has "repeatedly stated" that courts cannot "replace the actual [statutory] text with speculation as to Congress' intent." *Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2454 (2024) (citation omitted); *see also Barr v. American Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 624

(2020) (plurality opinion) (rejecting a similar argument in the context of considering whether a statutory provision was severable). Congress easily could amend Section 47(b) to provide for an express private right of action—as it did with Section 36(b) in 1970—but it has not done so. That intentional omission must be given weight, particularly given *Sandoval*'s directive to check for other express rights of action before inferring one. *See Sandoval*, 532 U.S. at 290; *see also Touche Ross*, 442 U.S. at 572.

Perhaps the Second Circuit believed it was simply completing Congress's work. But by recognizing an implied private right of action under Section 47(b), the Second Circuit undermined Congress's exclusive authority to make law and, in the process, overstepped its own judicial role. And, in the process, the Second Circuit split with other circuits, necessitating this Court's intervention now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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