No. 24-345

In the Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL., PETITIONERS

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.

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

BRIEF FOR THE INVESTMENT COMPANY INSTITUTE AND THE ASSET MANAGEMENT GROUP OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

AMY D. ROY
ROBERT A. SKINNER
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199

PAUL G. CELLUPICA
KEVIN ERCOLINE
THE INVESTMENT COMPANY INSTITUTE
1401 H Street, NW
Washington, DC 20005

DOUGLAS HALLWARD-DRIEMEIER
Counsel of Record
ROPES & GRAY LLP
2099 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 508-4600
Douglas.Hallward-Driemeier@ropesgray.com

LINDSEY WEBER KELJO
THE ASSET MANAGEMENT GROUP OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION
1099 New York Avenue, NW
6th Floor
Washington, DC 20001

TABLE OF CONTENTS

Table of Contents—Continued Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued: Page(s)

Statutes and rules:

Statutes and rules—Continued: Page(s)

Miscellaneous:

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 24-345

FS CREDIT OPPORTUNITIES CORP., ET AL., PETITIONERS

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.

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

BRIEF FOR THE INVESTMENT COMPANY INSTITUTE AND THE ASSET MANAGEMENT GROUP OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI*

The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts in the United States. ICI seeks to strengthen the foundation of the asset management industry for the ultimate

* All parties have been informed of the filing of this amici curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

benefit of the long-term individual investor. ICI's members manage $37.1 trillion invested in funds registered under the Investment Company Act of 1940 (ICA), serving over 100 million United States investors, and they manage an additional $8.7 trillion in regulated fund assets outside the United States.

ICI works to protect and advance the interests of fund shareholders through advocacy directed at ensuring a sound legal and regulatory framework. ICI's extensive research enhances its advocacy, and its regular research reports include, for example, an annual empirical review of trends and activities in the fund industry. See ICI, 2024 Investment Company Fact Book (2024) https://www.icifactbook.org/.

The Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA AMG) represents a wide range of asset management firms, providing views on U.S. and global policy and creating industry best practices. SIFMA AMG's members represent U.S. and global asset management firms—both independent and broker-dealer affiliated—that manage more than 50% of global assets under management. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, and private funds.

ICI and SIFMA AMG submit this brief as amici curiae to urge the Court to grant the Petition.

SUMMARY OF THE ARGUMENT

The availability of a private right of action under Section 47(b) of the ICA, 15 U.S.C. 80a-46(b), risks upending the long-established regulatory structure

governing the registered fund industry, causing significant regulatory uncertainty and wasteful litigation. Registered funds governed by the ICA—including mutual funds, ETFs, and closed-end funds—are a critical means for tens of millions of U.S. households to meet their financial and retirement savings goals. The regulatory and governance structure created by the ICA is the bedrock of this key sector of the U.S. economy, fostering dramatic growth and innovation of investment products that provide retail investors with low-cost access to market returns through diversified professional portfolio management.

Registered funds are among the most highly regulated financial products in the market. The ICA and rules promulgated thereunder by the SEC set forth detailed requirements for a fund's governance, capital structure, and daily operations.[1] The cornerstone of fund governance is oversight by independent directors who are unaffiliated with the fund's investment adviser. Directors are assigned both plenary supervisory authority and many specific oversight responsibilities—including approving and monitoring the service agreements between funds and their investment advisers (and other services providers). Because fund management and operations are nearly always fully externalized, these service agreements cover essentially every action required to create and operate a fund. The ICA further imposes specific substantive requirements on the operations and management of funds, including limits on the use of

[1] In addition to the ICA, registered funds are also subject to many other provisions of the securities laws, including the extensive registration and disclosure requirements under the Securities Act of 1933.

leverage; strict custody of fund assets separate from the adviser's assets; and prohibitions on transactions with affiliates—all designed to protect fund shareholders.

Congress granted sole regulatory authority to enforce the ICA to the SEC, which devotes significant resources to the regular examination of registered funds and their advisers to assess compliance, as well as the investigation of potential violations by the SEC's Division of Enforcement. At the same time, the ICA also grants the SEC authority to define exemptions to the statute's requirements, which has resulted in a series of crucial exemptive rules and orders allowing innovative fund products and practices that would otherwise be prohibited by the statute, including such widely utilized products as ETFs and money market funds. In addition to its formal exemptive authority, the SEC and its staff frequently issue informal interpretative guidance to the industry (including via "no-action" letters) regarding compliance with the ICA's provisions. Unsurprisingly, given the central role of the SEC in this framework, the ICA contains only a single express private right of action under Section 36(b), which provides a shareholder claim for excessive fees paid from a fund to its investment adviser. Following *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), courts have consistently declined to read implied private rights of action into the ICA, including under Section 47(b)—until the Second Circuit's decision in *Oxford University Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99 (2019), which created the circuit split addressed in the Petition.

The question posed by the Petition is of vital importance to the millions of households that depend on registered funds to meet their financial goals, as the

availability of a private right of action under Section 47(b) of the ICA threatens to disrupt the stable and well-developed regulatory framework relied upon by funds and their boards and advisers in serving U.S. retail investors. Authorizing fund shareholders—whose interests may diverge from one another—to sue for "rescission" of a contract "whose performance involves * * * a violation of" the ICA would open a back door for private suits alleging violations of the statute's many *other* substantive provisions, whose enforcement is the sole province of the SEC. See, *e.g.*, *Oxford Univ. Bank*, 933 F.3d at 107. Virtually *any* alleged misstep under the ICA might be construed by plaintiffs as being part of the "performance" of a contract, thus giving rise to an ostensible action for rescission of the entire contract. Handing such a skeleton key to shareholders would in effect invite them to assume the role of private attorneys general to enforce the substantive provisions of the ICA alongside the SEC and to second-guess the judgments of the independent directors Congress identified as protectors of shareholder interests. There is no statutory basis to believe Congress intended this result.

One example of this back door scenario is presented by the current litigation. Because the by-laws and other governing documents of a fund are treated by many states' laws as "contracts" between the fund and its shareholders, so-called "activist" investors like respondents Saba Capital Master Fund, Ltd. and Saba Capital Management, L.P. (together, Saba) have in numerous cases since the Second Circuit's decision in *Oxford University Bank* seized upon Section 47(b) as an entry point to challenge closed-end fund by-laws as violating other provisions of the ICA regarding fund capital structure and board elections. Saba's transparent agenda in

asserting these claims is to further its closed-end fund "arbitrage strategy," seeking to dismantle funds to obtain short-term profits at the expense of other shareholders—often retirees with long-term investment goals who desire a steady income stream and are less concerned about short-term price swings. Tellingly, the SEC has not taken any enforcement action to challenge the by-laws in question as violating the ICA.

But the back door threat posed by a Section 47(b) private right of action extends well beyond the closed-end fund "activist" context. Given the fully externalized management of nearly all registered funds, virtually every task involved in managing a fund and distributing its shares is undertaken by the investment adviser or other service providers pursuant to a written agreement with the fund in exchange for a fee. If fund shareholders can assert derivative or direct claims for "rescission" of such service agreements—and disgorgement of the fees—based on alleged violations of other ICA provisions in the "performance" of the contracts (regardless of whether the SEC considers the statute to have been violated), the potential claims contrived by the private plaintiffs' bar are almost limitless in scope. And given the large dollar amounts at stake in many fund agreements, the incentive to assert such claims would be substantial. The extensive history of private litigation involving the registered fund industry bears this out. Funds and their advisers and boards have been targeted for decades by class action plaintiffs' lawyers, motivated by the desire to score a large attorney fee from perceived "deep pocket" defendants. Recognizing a Section 47(b) private right of action could be tantamount to declaring open season on the SEC's interpretation of the ICA's substantive provisions (and funds' reliance on it),

leading the plaintiffs' bar to press its own interpretations in pursuit of a payday. A flood of new litigation could risk contradictory interpretations and regulatory uncertainty, and would certainly impose massive litigation costs and distraction, all to the ultimate detriment of registered fund shareholders.

The Petition should be granted and the Second Circuit's decision reversed.

ARGUMENT

I. THE ICA HAS PROVIDED A STABLE REGULATORY FRAMEWORK ENABLING THE GROWTH OF REGISTERED FUNDS, GIVING SHAREHOLDERS READY ACCESS TO MARKET RETURNS THROUGH LOW-COST DIVERSIFIED PROFESSIONAL PORTFOLIO MANAGEMENT

"Congress adopted the [ICA] because of its concern with 'the potential for abuse inherent in the structure of investment companies.' Unlike most corporations, an investment company is typically created and managed by a preexisting external organization known as an investment adviser." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536 (1984) (quoting *Burks* v. *Lasker*, 441 U.S. 471, 480 (1979)). "Recognizing that the relationship between a fund and its investment adviser was 'fraught with potential conflicts of interest,' the [ICA] created protections for mutual fund shareholders." *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010) (quoting *Daily Income Fund*, 464 U.S. at 536-538, *Burks*, 441 U.S. at 481-482).

> In order to minimize such conflicts of interests, Congress established a scheme that regulates most transactions between investment companies and

> their advisers, 15 U.S.C. § 80a-17; limits the number of persons affiliated with the adviser who may serve on the fund's board of directors, § 80a-10; and requires that fees for investment advice * * * be governed by a written contract approved by both the directors and the shareholders of the fund, § 80a-15.

Daily Income Fund, 464 U.S. at 536-537.

The ICA provides additional shareholder protections through specific substantive requirements touching virtually every aspect of the structure, governance, and operations of registered funds, including for example: imposing limits on the use of leverage in portfolio management, 15 U.S.C. 80a-18(f); mandating strict custody of fund assets separate from the adviser's assets, 15 U.S.C. 80a-17(f); barring capital structures that concentrate voting power in the hands of selected shareholders, 15 U.S.C. 80a-18(i); requiring shareholder approval of changes to a fund's fundamental investment policies, 15 U.S.C. 80a-13(a); limiting the use of fund assets for purposes of marketing the fund's shares to new investors and thereby increasing the adviser's revenues, 15 U.S.C. 80a-12(b); and prohibiting certain transactions between registered funds and their affiliates, 15 U.S.C. 80a-17.

At the same time, Congress also recognized that the ICA's broad requirements and prohibitions might be unnecessarily rigid in certain situations, potentially stifling shareholder-friendly innovation consistent with the statute's policy goals. Congress thus gave the SEC broad authority to grant exemptions to the statutory provisions "if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes

fairly intended by the policy and provisions of [the ICA]." 15 U.S.C. 80a-6(c). The SEC has exercised this authority to adopt various exemptive rules authorizing transactions and structures that would otherwise be prohibited by the ICA upon the satisfaction of specified conditions—which often include a determination by a fund's board that the action is in the shareholders' best interests. For example, Section 17(a) of the ICA generally prohibits transactions between a registered fund and its affiliated persons (*e.g.*, the adviser) to protect funds and their shareholders from potential self-dealing and overreaching by affiliated persons or entities. 15 U.S.C. 80a-17. However, recognizing that certain transactions with an affiliate may in fact benefit fund shareholders in some circumstances, the SEC has granted express authority to engage in such transactions when certain protective conditions are met (*e.g.*, securities are bought and sold at "current market price"). See 17 C.F.R. 270.17a-7. Similarly, whereas a merger of a fund into an affiliated fund would otherwise be barred by Section 17(a), the SEC has authorized such mergers conditioned on a board finding that the merger is in the best interests of the fund and will not dilute the interests of the merging fund's holders. 17 C.F.R. 270.17a-8.

The SEC also exercises its authority to grant exemptive orders upon the application of a given fund and/or adviser, based upon the applicant's representations in its request and frequently upon conditions set forth in the application or order. Orders are compiled and published on the SEC's website and provide market participants with clarity about the SEC's policy views.

In addition to formal exemptive relief, the SEC staff also provides "no action" guidance where an individual

or entity "is not certain whether a particular product, service or action would constitute a violation of the securities laws." SEC, No Action Letters, https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters. If the staff grants the request for relief, it provides a letter concluding "that the SEC staff would not recommend that the Commission take enforcement action against the requester based on the facts and representations described in the individual's or entity's request." *Ibid.* The SEC publishes a compilation of the no-action letters on its website and explains: "In some cases, the SEC staff may permit parties other than the requestor to rely on the no-action relief to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request." *Ibid.* Industry participants frequently rely on no-action letters issued to others as indicative of what conduct will not result in enforcement proceedings.

The explosive growth of the registered fund industry since 1940 is testament to the effectiveness of the ICA's balanced regulatory framework in cultivating investor confidence through shareholder protections, while also allowing sufficient flexibility for innovation to respond to investors' evolving goals. Prime examples of consequential investment innovations that emerged under the SEC's broad powers without the need for legislative amendments to the ICA are the development of money market funds beginning in the 1970s and ETFs in the 1990s. Neither of these products would be legal under a facial reading of the ICA's provisions, and both owe their existence to the SEC's discretionary exercise of its exemptive authority. In each instance, the SEC initially issued a series of exemptive orders allowing individual firms to engage in otherwise-violative conduct

necessary to launch and operate the products, which orders were ultimately replaced by a comprehensive rule setting forth the protective conditions to qualify for the exemption. 17 C.F.R. 270.2a-7 (money market funds), 17 C.F.R. 270.6c-11 (exchange-traded funds).

The success of the ICA's flexible regulatory structure in fostering the registered funds marketplace is manifest. At year-end 2023, there was over $33 trillion invested in US registered funds, held by 71.5 million households (or 54.4% of all US households) and 120.8 million individuals. ICI, 2024 Investment Company Fact Book, *supra*. In 2023, two-thirds of mutual fund-owning households had more than half of their household financial assets invested in mutual funds. ICI, Characteristics of Mutual Fund Investors, 2023, 29(*11*) ICI Rsch. Perspective (Oct. 2023), https://www.ici.org/system/files/2023-10/per29-11.pdf. What's more, the cost of investing in registered funds has consistently declined over the course of decades. See ICI, Trends in the Expenses and Fees of Funds, 2023, 30(*2*) ICI Rsch. Perspective 1 (Mar. 2023), https://www.ici.org/system/files/2024-03/per30-02.pdf ("From 1996 to 2023, average equity mutual fund expense ratios dropped by 60 percent and average bond mutual fund expense ratios dropped by 56 percent.").

A. The ICA's requirements for the governance and operations of registered funds are vigorously examined and enforced by the SEC

In addition to the SEC's exemptive authority, both registered funds and their advisers are subject to regular examination by the staff of the SEC's Division of Examinations. This Division publishes an annual list of its examination priorities, including those provisions of the

ICA of particular focus. The most recent edition explained, "[t]he Division continues to prioritize examinations of registered investment companies (RICs or funds), including mutual funds and [ETFs], due to their importance to retail investors, particularly those saving for retirement." SEC, *Fiscal Year 2025 Examination Priorities* 7, https://www.sec.gov/files/2025-exam-priorities.pdf. Examiners regularly issue "deficiency" letters to funds and/or their advisers, reflecting the staff's finding that provisions of the ICA have not been fully complied with. The staff typically identifies what steps it expects to be taken to address any deficiencies—steps that do not typically include rescission of service agreements.

Moreover, the Examinations staff can and frequently does refer matters to the Division of Enforcement for further investigation and potential formal claims. Section 42 of the ICA empowers the agency to enforce all the provisions of the statute by granting it broad authority to investigate suspected violations and initiate actions in federal court for injunctive relief and civil penalties. See 15 U.S.C. 80a-41; *UFCW Loc. 1500 Pension Fund* v. *Mayer*, 895 F.3d 695, 701 (9th Cir. 2018). The SEC's Enforcement staff deploys significant resources in fulfilling this responsibility, with an extremely active emphasis on investigation of potential violations of the ICA by funds and advisers. See Press Release, SEC, SEC Announces Enforcement Results for Fiscal year 2023, https://www.sec.gov/newsroom /press-releases/2023-234 (reflecting 139 enforcement actions against investment advisers and/or investment companies during FY23).

Given that Congress delegated comprehensive examination and enforcement authority over the ICA to

the SEC—paired with the power to exercise its judgment to grant exemptions and guidance regarding the statute's many technical provisions—it is hardly a surprise that Congress did not also see fit to deputize shareholders to pursue their own potentially disparate enforcement agendas of the statute's provisions. Congress has adopted only a single express private right of action under Section 36(b), added by amendment in 1970, providing a shareholder claim for allegedly excessive fees. Since *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), courts have consistently declined to read implied private rights of action into the ICA, including under Section 47(b)—until the Second Circuit's decision in *Oxford University Bank* in 2019, which created the circuit split addressed in the Petition.

B. Oversight of registered funds is further strengthened by independent fund directors, who are recognized as having a critical "watch dog" role under the ICA's governance structure

As a further check, the ICA "interposes disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser." *Jones*, 559 U.S. at 348 (quoting *Burks*, 441 U.S. at 484). "The cornerstone of the ICA's effort to control conflicts of interest within mutual funds is the requirement that at least 40% of a fund's board be composed of independent outside directors. 15 U.S.C. § 80a-10(a)." *Burks* v. *Lasker*, 441 U.S. 471, 482 (1979) (footnote omitted). The minimum number of independent directors is for practical purposes 50%, because a majority is required for funds to qualify for the SEC exemptive rules discussed above. 17 C.F.R. 270.0-1. And in practice, independent

directors typically comprise more than 75% of today's fund boards. IDC & ICI, Overview of Fund Governance Practices, 1994-2022 (2023), https://www.ici.org/system/files/2023-10/23-fund-governance-practices.pdf (finding 89% of fund boards are comprised of 75% or more independent directors).

Like directors of operating companies, independent fund directors have a general fiduciary duty to represent the interests of the funds. But they also have specific statutory and regulatory responsibilities under the ICA beyond the duties required of other types of directors. "To these statutorily disinterested directors, the [ICA] assigns a host of special responsibilities involving supervision of management and financial auditing." *Burks*, 441 U.S. at 482-483. For example, they have the statutory duty to review and approve the contracts of the investment adviser and the principal underwriter, 15 U.S.C. 80a-15(c), to appoint other disinterested directors to fill board vacancies, 15 U.S.C. 80a-16(b), and to select the independent public accountants who certify the fund's financial statements, 15 U.S.C. 80a-31(a). SEC rules promulgated pursuant to the ICA likewise require fund board action with respect to various matters, including annual review and approval of the fund's compliance policies and procedures as reasonably designed to prevent violations of the securities laws, 17 C.F.R. 270.38a-1(a)(2); approval of the appointment, compensation and removal of the fund's chief compliance officer, 17 C.F.R. 270.38a-1(a)(4); and valuation oversight, 17 C.F.R. 270.2a-5, among others.

II. A Private Right Of Action Under Section 47(b) Opens A Back Door For Private Suits Over Other Provisions Of The ICA

The question posed by the Petition is of vital importance to the registered fund industry, as the availability of a private right of action under Section 47(b) threatens to disrupt the established regulatory framework that guides the daily actions of funds and their boards and advisers. This framework depends on a series of contracts consistent with the requirements of the ICA, and frequently also exemptive rules and orders thereunder, which are subject to approval by independent directors and review by SEC staff.

Allowing shareholders a claim for "rescission" of contracts whose "performance" the shareholder believes involve a "violation" of the ICA opens a back door to private suits over essentially every other provision of the ICA. Such suits would inevitably involve plaintiffs second-guessing the interlocking judgments of both the SEC and independent directors often required in approval of many common investment actions—for example, the SEC's crafting of an exemptive rule or order, the SEC's guidance for compliance with that rule or order, and the independent directors' approval of the action as complying with the SEC requirements. This litigation back door would promote significant regulatory uncertainty, as well as wasteful litigation expense. This uncertainty could discourage fund sponsors from creating new funds, thereby potentially reducing the types of investments available to prospective investors.

A. "Activist" challenges to closed-end fund governance measures

One example of such back door litigation is presented by the current litigation involving "activist" hedge fund investor Saba. Saba engages in what it calls a closed-end fund "arbitrage strategy," acquiring large numbers of shares of closed-end funds and frequently using its concentrated voting power to force transformational changes in the fund—which in turn provide Saba the ability to sell its shares at above-market prices, yielding short-term arbitrage profits. These actions usually include disruptive changes, such as large tender offers (prompting significant asset liquidation), merger of a fund, or outright liquidation, that harm ordinary long-term shareholders. ICI, Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses 5-6 (2020), https://www.ici.org/doc-server/pdf%3A20_ltr_cef.pdf (ICI March 2020 Report). Because these changes benefiting Saba come at the expense of ordinary shareholders in the funds, who typically seek long-term income streams from their investments, closed-end fund boards have adopted various measures seeking to ensure that such transformative and potentially harmful fund changes only occur if they have the support of a large portion of all fund shareholders—not just concentrated minority holders. *Id.* at 11-16. At least one court has recognized the legitimate interest of fund boards in considering such measures to protect long-term shareholders from the potential harm caused by the "activist" arbitrage strategy.[2] Among the

[2] In granting partial summary judgment against Saba in connection with its claim for breach of fiduciary duty against certain Eaton Vance closed-end funds and their independent trustees, a

identified abuses Congress sought to address expressly in the ICA were harms caused by concentrated minority holders acting in ways that hurt ordinary shareholders with different interests. H.R. 279, 76th Cong. (1939); 15 U.S.C. 80a-1(b).

Saba has seized on the fact that the by-laws and other governing documents of a fund are treated by many states' laws as contracts between the fund and its shareholders, and it has been invoking Section 47(b) to seek "rescission" of board actions adopting defensive measures that might hamper its arbitrage strategy. The underlying basis for these rescission claims is alleged violations of other provisions of the ICA that are otherwise within the enforcement authority of the SEC. In the present case, the provision at issue is Section 18(i), part of the "Capital Structure" section of the statute,

---

Massachusetts Superior Court found that the "Trustees had a legitimate business reason for their action * * * that the purpose of the Bylaw Amendments was to protect Funds' retail shareholders from the harm they perceived that activist hedge funds like Saba could cause if they gained a concentrated minority of shares, forced short-term liquidity events, and thereby threatened retail investors' interest in the Funds and the Funds' viability" as long-term investment vehicles. *Eaton Vance Senior Income Tr.* v. *Saba Cap. Master Fund, Ltd.*, No. 2084CV01533-BLS2, 2023 WL 1872102, at *11 (Mass. Super. Ct. Jan. 21, 2023). In its trial ruling rejecting Saba's challenge to a majority-of-outstanding-shares voting standard, the court found that "Saba's activist objectives are generally inconsistent with the Funds' investment objectives. The goal of monetizing the discount to [net asset value] differs from the goal of managing a stable pool of assets for a steady income stream over a long period of time." Findings of Fact, Conclusions of Law, and Order for Judgment, *Eaton Vance Senior Income Tr.* v. *Saba Cap. Master Fund, Ltd.*, No. 2084CV01533-BLS2, slip op. at 13 (Mass. Super. Ct. Oct. 21, 2024).

requiring that all fund shares issued be voting securities that have "equal voting rights" with all other shares. In its most recent guidance on this question, the SEC staff issued a statement in May 2020 that it would *not* recommend enforcement action for violation of Section 18(i) in the event a fund opted into the Maryland Control Share Acquisition Act. See SEC, Staff Statement and Boulder No-Action Letter at *2, https://www.sec.gov/investment/control-share-acquisition-statutes (recognizing, both expressly and implicitly, the legitimacy of actions taken by boards of closed-end funds to respond to activist investors). Nevertheless, Saba brought the present lawsuit[3] to challenge the actions of multiple fund boards as violating Section 18(i), alleging that the SEC staff's views on the provision were of no relevance for the court in adjudicating Saba's claims.

In separate litigations, Saba challenges other types of closed-end fund board actions, including the adoption of a voting standard requiring the support of a majority of outstanding shares to elect trustees and the implementation of a shareholder rights plan (often referred to as a "poison pill"). Here again, the SEC has not taken any enforcement action or suggested in guidance that such measures violate the ICA provisions that Saba

[3] Despite the fact that all of the funds at issue were organized under Maryland law, Saba asserted the actions within the Second Circuit, transparently to take advantage of the circuit split created by *Oxford University Bank*. The Third Circuit has ruled to the contrary. *Santomenno ex rel. John Hancock Tr.* v. *John Hancock Life Ins. (U.S.A.)*, 677 F.3d 178 (2013). Several of the funds were dismissed by the district court based on by-laws requiring them to be sued in Maryland.

invokes via the Section 47(b) back door opened by the Second Circuit.

The uncertainty created by the repeated attacks of Saba and other "activists" against multiple closed-end funds is having a demonstrated negative effect on the availability of closed-end funds to investors in the market. ICI data show that, as the number of funds targeted by "activists" has continued to grow, the number of closed-end funds available to investors in the market has contracted significantly. ICI, The Closed-End Fund Market, 2023, 30(*5*) ICI Rsch. Perspecive (May 2024), https://www.ici.org/system/files/2024-05/per30-05.pdf; ICI March 2020 Report at 14, App. A.

B. Claims seeking "rescission" of fund service agreements

The back door litigation threat posed by a Section 47(b) private right of action reaches well beyond the closed-end fund activist context. Under the prevalent externalized management model, virtually every task required to operate a registered fund and offer it to investors is undertaken by a service provider pursuant to a written agreement with the fund in exchange for a fee. In a typical structure, the adviser manages the fund's portfolio in accordance with its investment strategy, engages with third-party brokers who execute portfolio transactions, facilitates the creation of required fund disclosures, and coordinates the efforts of the other service providers. Separately, the underwriter markets and distributes the fund's shares in a broker-dealer capacity; the custodian bank maintains custody of the fund's portfolio holdings; the transfer agent conducts the execution and recordkeeping of transactions in the fund's shares; the administrator prepares the fund's financial

statements and other detailed SEC filings and calculates the fund's daily net asset value; and a public auditing firm audits the firm's financial statements for inclusion in the annual shareholder report.

If fund shareholders can assert claims for "rescission" of such service agreements premised on alleged violations of other ICA provisions in the "performance" of the contracts—with the bounty being disgorgement of the fees paid thereunder—the potential claims that could be contrived by the private plaintiffs' bar are almost limitless in scope. Procedurally, these claims would most plausibly be asserted as derivative claims on behalf of the fund as party to the agreement in question. See, *e.g.*, *In re Regions Morgan Keegan Secs., Derivative, & ERISA Litig.*, 743 F. Supp. 2d 744, 761 (W.D. Tenn. 2010); *Hamilton* v. *Allen*, 396 F. Supp. 2d 545, 558 (E.D. Pa. 2005). There is also some precedent for fund shareholders bringing direct claims as third-party beneficiaries of agreements between funds and service providers. See *Northstar Fin. Advisors Inc.* v. *Schwab Invs.*, 779 F.3d 1036, 1065 (9th Cir. 2015) (holding that fund shareholders could assert a direct claim under state law for breach of the investment advisory agreement between a mutual fund and its adviser as third-party beneficiaries of that contract).

Prior attempts to invoke Section 47(b) in connection with alleged violations of other ICA provisions (albeit unsuccessfully) serve to illustrate the range of such other provisions that might be targeted by back door claims if the door were opened—even though courts have repeatedly held there is no private right of action as to the targeted provisions themselves. See, *e.g.*, *Smith* v. *Oppenheimer Funds Distrib., Inc.*, 824 F. Supp.

2d 511, 522-523 (S.D.N.Y. 2011) (Sections 36(a), 38(a)); *In re Regions Morgan Keegan Secs., Derivative, & ERISA Litig.*, 743 F. Supp. 2d at 761-762 (Sections 13, 22, 30, 34(b)); *Hamilton*, 396 F. Supp. 2d at 553-555 (Section 36(a)); *Mutchka* v. *Harris*, 373 F. Supp. 2d 1021, 1025-1026 (C.D. Cal. 2005) (Section 36(a)); *Blatt* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 916 F. Supp. 1343, 1357-1358 (D.N.J. 1996) (Section 13(a)(3)).

C. The resulting uncertainty over applicable regulatory standards, coupled with litigation expense, would be detrimental to fund shareholders and their savings goals

Whether back door claims are asserted by self-interested concentrated holders like Saba or by the traditional class action plaintiffs' bar, an implied Section 47(b) private right of action could result in significant regulatory uncertainty and litigation expense for the fund industry to the detriment of shareholders. Recognizing a Section 47(b) private right of action could be tantamount to declaring open season on the SEC's multi-layered interpretation and application of the ICA's substantive provisions, as reflected in the agency's exemptive rules, orders, published guidance, and enforcement actions. Although Congress gave no indication whatsoever of an intent to deputize shareholders to enforce the ICA's provisions in parallel with (or in tension with) the SEC, that could be the practical effect of a Section 47(b) back door. Recognizing a private right of action under Section 47(b) effectively converts a provision meant as a shield for

defendants in breach of contract actions into a sword for the plaintiffs' bar.[4]

The risk of regulatory uncertainty is made more acute by questions surrounding whether courts would be bound by the SEC's interpretations in private litigation pressing for alternative readings of the ICA. The industry has long relied on the interpretations of the ICA's provisions provided by the SEC and its staff in understanding what structures and practices are deemed appropriate under the statute by its primary enforcer. These interpretations are reflected in rules, orders, no-action letters, and enforcement actions, as well as via informal consultation and comments made by the staff on new fund registration statements before shares are offered to the public. A clear understanding of what activities will and will not trigger an SEC enforcement action has long been a polestar for industry actors in managing funds and investing in new business lines and products. Opening up this body of guidance to second-guessing by private plaintiffs in litigation would dramatically undermine the ability of industry actors to rely on what have heretofore been considered established guiding principles. This is especially so if courts hearing these challenges consider themselves unbound by the SEC's long-stated views. Private litigants can be expected to argue that the agency's interpretation of the

[4] Rejection of a Section 47(b) private rescission claim does not leave shareholders without redress where fund service providers allegedly fall short. Shareholders can assert derivative claims for damages to a fund under common law theories such as breach of contract or fiduciary duty, as well as direct claims under the federal securities laws in connection with alleged materially misleading statements in a fund's registration statement.

statute—and even its own rules thereunder—are not binding on a court, and in many cases will not be entitled to deference. See *Kisor* v. *Wilkie*, 588 U.S. 558 (2019). Product innovations that have been enabled directly by the industry's ability to rely upon the SEC's reasoned judgments about exemptions from the ICA's prohibitions have furthered the savings goals of millions of American households. Regulatory uncertainty from a litigation-driven reopening of those judgments could seriously hamper product innovation that directly serves U.S. savers.

Moreover, as demonstrated by the long history of private litigation involving funds, such claims are typically motivated by self-interested agendas like Saba's and/or by hopes of a large attorney fee—not to enhance shareholder protection. Funds and their advisers and boards have been targeted for decades by class actions plaintiffs' lawyers, motivated by the desire to score a large attorney fee from perceived "deep pocket" defendants. The sole express private right of action under the ICA—for "excessive fee" claims under Section 36(b)—spawned a wave of cases, typically asserted against large funds that charged modest fees, in hopes of a proportionately large attorney fee recovery. Not a single plaintiff has ever prevailed in these cases, despite imposing hundreds of millions of dollars of legal expenses on the industry to defend against these claims. See ICI Mutual, *Claims Trends: A Review of Claims Activity in the Mutual Fund Industry* at 4 (Apr. 2024), https://www.icimutual.com/sites/default/files/Claims%20Trends%202023-2024.pdf.[5]

[5] Empirical analysis confirms the experience lived by the industry participants defending against this wave of cases: plaintiffs' counsel

The circuit split created by the Second Circuit in *Oxford University Bank* (2019) has itself spawned uncertainty and wasteful incentives—including forum shopping by plaintiffs seeking to take advantage of the Section 47(b) claim within the Second Circuit. Even in the present litigation, plaintiffs below asserted claims in the SDNY against multiple funds with express forum selection clauses outside of New York—resulting in the funds' dismissal.

---

did not select funds for litigation based on high fees, but instead based on large asset bases that would generate a higher attorney fee in the event of a successful case. See Quinn Curtis & John Morley, *An Empirical Study of Mutual Fund Excessive Fee Litigation: Do the Merits Matter?* (Sept. 18, 2012), https://law.yale.edu/sites/default/files/area/workshop/leo/document/Morley_MutualFundExcessiveFeeLitigation.pdf.

CONCLUSION

For the foregoing reasons, the Petition should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

DOUGLAS HALLWARD-DRIEMEIER
AMY D. ROY
ROBERT A. SKINNER
ROPES & GRAY LLP

PAUL G. CELLUPICA
KEVIN ERCOLINE
THE INVESTMENT COMPANY INSTITUTE

LINDSEY WEBER KELJO
THE ASSET MANAGEMENT GROUP OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

OCTOBER 2024