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 IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant certiorari to address whether, consistent with the plain text of Section 47(b)(2) of the Investment Company Act ("ICA"), 15 U.S.C. § 80a-46(b)(2), parties to illegal contracts may seek rescission; where any disagreement among the Circuits is under-developed and uniquely likely to resolve itself; and the issue is of limited importance given the relatively few instances of parties asserting the narrow right at issue, which does not include any right to compensatory damages?

RULE 29.6 DISCLOSURE

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents Saba Capital Master Fund Ltd. and Saba Capital Management L.P. certify that they have no parent corporation, and that no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

The Petition does not present compelling reasons for review. This is a case in which a shallow and under-developed "split" calls out for further percolation.

In *Oxford University Bank v. Lansuppe Feeder LLC*, 933 F.3d 99, 106 (2d Cir. 2019) (Leval, J.), the Second Circuit held that "[t]he text of [ICA] § 47(b) unambiguously evinces Congressional intent to authorize a private action," faithfully applying this Court's instruction that "[i]n determining whether Congress has created a private right of action, 'the interpretative inquiry begins with the text and structure of the statute.'" *Id.* at 104–05 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288 n.7 (2001)).

No Circuit has considered the issue at hand—whether Section 47(b)(2), 15 U.S.C. § 80a-46(b)(2), gives parties to illegal contracts a private right of action for rescission—since the Second Circuit's careful textual analysis in *Oxford* "created" the split with the Third Circuit's decision in *Santomenno v. John Hancock Life Ins. Co.*, 677 F.3d 178 (3d Cir. 2012). Pet. at 17. The Second Circuit expressed no similar disagreement with the Fourth or Ninth Circuits. With good reason. There is no conflict in the precedential decisions of those courts. Thus, what Petitioners characterize as a 2-1 split, and imply is a 3-1 split, is in fact a fresh 1-1 split between the Second and Third Circuits that no Circuit has had further opportunity to address.

Any budding disagreement easily can and likely will be resolved if the lower courts are given the opportunity. In fact, the Second Circuit's limitations

on Section 47(b)(2) address the concerns that drove the *Santomenno* panel's decision. For example, *Oxford* is clear that Section 47(b)(2) includes no right to sue for damages. 933 F.3d at 108 & n.5. *Oxford* recognizes the Section 47(b)(2) right of rescission is available to "parties to illegal contracts." *Id.* at 108. And, since *Oxford*, the Second Circuit has indicated it will not allow plaintiffs to use Section 47(b) as a "backdoor" to damages actions which are otherwise foreclosed. *NexPoint Diversified Real Est. Tr. v. Acis Cap. Mgmt., LP*, 80 F.4th 413, 419–20 (2d Cir. 2023). These limitations would have foreclosed the *Santomenno* plaintiffs' claims in the Second Circuit just as in the Third. The Third Circuit, which itself relied on pre-*Oxford* Second Circuit precedent in *Santomenno*, is uniquely likely to revisit or refine its approach to Section 47(b) to resolve its narrow conflict with the Second Circuit.

The issue, moreover, is not sufficiently important to warrant this Court's review. Consistent with the statutory text, the Second Circuit has recognized a right of *rescission*, not compensatory damages, available to *parties to illegal contracts*. Those statutory guardrails belie Petitioners' concerns that the right of action will result in excessive liabilities, fee awards, or indiscriminate invalidation of every contract entered into by an investment company. In fact, analogous rights of action have existed under the Investment Advisors Act ("IAA") and the Exchange Act for decades, without the sky-is-falling consequences foretold by Petitioners and their *amici*. *See Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15–19 (1979) (recognizing private right of action under Section 215 of the IAA, 15 U.S.C. § 80b-15, for rescission of illegal contracts); *Mills v.*

Electric Auto-Lite, 396 U.S. 375, 386–88, nn. 9, 10 (1970) (well-recognized private right of action under Section 29(b) of the Exchange Act, 15 U.S.C. § 78cc, to seek rescission of illegal contracts).

The Second Circuit's decision also poses no threat to the SEC's enforcement prerogatives. In fact, the SEC has encouraged courts to recognize a private right of action for rescission in Section 47(b). *See* Br. of the SEC as Amicus Curiae, *Olmsted v. Pruco Life Ins. Co.*, No. 00-9511, 2001 WL 34397948, at *10–12 (2d Cir. Dec. 5, 2001).

Since *Oxford*, it appears Saba is the only party to have obtained relief under Section 47(b)(2). Courts uniformly agreed with Saba that the adoption of "control share provisions" in the bylaws of registered investment companies violates the equal-voting-rights mandate of Section 18(i) of the ICA as a matter of law; accordingly, courts uniformly ordered those provisions rescinded pursuant to Section 47(b)(2). *See* App. 15a–32a, *Saba Cap. Master Fund, Ltd. v. BlackRock Mun. Income Fund, Inc.*, 710 F. Supp. 3d 213 (S.D.N.Y. 2024), *aff'd*, App. 1a–14a, *sub nom. Saba Cap. Master Fund, LTD. v. Blackrock ESG Cap. Allocation Tr.*, No. 23-8104, 2024 WL 3174971 (2d Cir. June 26, 2024); *Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, No. 21-CV-327 (JPO), 2022 WL 493554, at *2 (S.D.N.Y. Feb. 17, 2022), *aff'd*, 88 F.4th 103 (2d Cir. 2023); *Eaton Vance Sr. Income Tr. v. Saba Cap. Maser Fund, Ltd.*, No. 2084cv01533-BLS2, 2023 WL 1872102, at *6–*8 (Mass. Super. Jan. 21, 2023). As these courts recognized, Saba appropriately invoked the right of a party to an ICA-offending contract to have it

rescinded; Saba neither sought nor obtained monetary damages.

The decisions in Saba's favor, including the decision below, have vindicated that the Second Circuit's decision in *Oxford* serves the ICA's investor-protective policies and purposes, without creating undue liability or risk for investment companies, all while remaining faithful to the plain text of Section 47(b)(2). This Court should allow the lower courts to continue to consider the wisdom of the Second Circuit's approach—an opportunity that no other Circuit has had to date.

Respectfully, the Petition should be denied.

STATEMENT OF THE CASE

A. The Investment Company Act serves to protect investors against abuse by fund management.

The ICA was "designed to eliminate certain abuses in the securities industry which were found to have contributed to the stock market crash of 1929 and the depression of the 1930s." *Sec. & Exch. Comm'n v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186 (1963); *see also Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010).

Congress focused on protecting shareholders from abusive practices by management. The ICA was "enacted for the benefit of investors, not fund insiders, and passed primarily to correct the abuses of self-dealing, which led to the wholesale victimizing of shareholders from fantastic abuses of trust by investment company management." *Nuveen*, 88 F.4th

at 120 (cleaned up); *see also id.* (Congress sought "'to provide a comprehensive regulatory scheme to correct and prevent certain abusive practices in the management of investment companies for the protection of persons who put up money to be invested by such companies on their behalf, *i.e.*, the shareholders" (cleaned up)).

The statute expressly directs courts to interpret the ICA "in accordance with" its shareholder-protective "polic[ies] and purposes." 15 U.S.C. § 80a-1(b); *United States v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 720 (1975) (courts "must interpret the Investment Company Act in a manner most conducive to the effectuation of its goals"). Specifically, Congress instructed courts to protect investors against fund managers [1] issuing "securities containing inequitable or discriminatory provisions," 15 U.S.C. § 80a-1(b)(3), [2] depriving "the holders" of their "preferences and privileges," *id.*, and [3] running funds "in the interest of" entrenched management like the "directors, officers, investment advisers, depositors, or other affiliated persons thereof" rather than "all classes" of "security holders," *id.* at § 80a-1(b)(2).

B. In *Oxford*, the Second Circuit recognizes the plain text of ICA Section 47(b) to provide a right of action to rescind illegal contracts.

Consistent with the ICA's commands and the plain text of the statute, the Second Circuit has held that parties to ICA-offending contracts have a right of action for rescission under Section 47(b)(2) of the Act. *Oxford*, 933 F.3d at 99. Section 47(b) provides:

> (1) A contract that is made, or whose performance involves, a violation of this subchapter, or of any rule, regulation, or order thereunder, 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).

In *Oxford*, the Second Circuit found that "[t]he text of § 47(b) unambiguously evinces Congressional intent to authorize a private action," faithfully applying this Court's instruction that "[i]n determining whether Congress has created a private right of action, 'the interpretative inquiry begins with the text and structure of the statute.'" *Oxford*, 933 F.3d at 104–05 (quoting *Sandoval*, 532 U.S. at 288 n.7).

"Both subsections of § 47(b)," the Second Circuit reasoned, "indicate that a party to an illegal contract may seek relief in court on the basis of the illegality of the contract." *Id.* at 105.

The first subsection is defensive. Section 47(b)(1) "renders contracts that violate the ICA 'unenforceable by either party,' meaning at least that a party sued for

failure to perform under such contract may invoke the illegality of the contract as a defense." *Id.*

The second subsection is offensive. As to any contract that "has been performed," Section 47(b)(2) provides that "a court may not deny rescission at the instance of any party." That language "necessarily presupposes that a party may seek rescission in court by filing suit." *Oxford*, 933 F.3d at 105. Particularly in light of the defensive right to non-enforcement specified in Section 47(b)(1), the Second Circuit found no plausible explanation for "what effect § 47(b)(2) has if it does not provide a private right of action." *Id.* at 109; see also *id.* at 106 (Section 47(b)(1) "provides that contracts that violate the ICA are unenforceable by parties to the contract. The next subsection, § 47(b)(2), provides the parallel remedy—rescission rather than non-enforcement—for violative contracts that have already been performed.").

In providing a right of rescission to "any party," Section 47(b)(2) also "identifies a class of persons who are intended to benefit from the right to seek rescission: parties to illegal contracts." *Id.* at 108; *see also id.* at 105. The most natural reading of the provision—and the only reading that makes the use of "party" consistent across Section 47(b)(1) and 47(b)(2)—is that "any party" refers to "any party *to a contract that violates the ICA*." *Id.* at 106 (emphasis in original). Rejecting the argument that the rescission right may only be asserted by the SEC, the court distinguished the right of rescission Section 47(b)(2) provides to "any party" from the rights other provisions of the ICA give to "the Commission." *Id.*

The Second Circuit underscored that its reading of the ICA is supported by this Court's "interpretation of

a similar provision in simultaneously-enacted 'companion legislation' to the ICA, the Investment Advisors Act (IAA)." *Id*. (citing *TAMA*, 444 U.S. 11). In Section 215 of the IAA, Congress intended "'the customary legal incidents of voidness,' including the availability of a suit for rescission, to follow from its identification of certain contracts as void." *Id*. at 107 (quoting *TAMA*, 444 U.S. at 19). "At the time *TAMA* was decided, IAA § 215 was identical to ICA § 47(b)," and Congress shortly thereafter "amended § 47(b) in a manner that strongly implied that it endorsed the result in *TAMA*" and "intended to confirm the availability of a private action for rescission." *Id*. The amended text merely "makes clear in § 47(b)(1) that illegality could be raised as a defense to enforcement" and then "reinforces in § 47(b)(2) that illegality gives rise to a right to seek rescission." *Id.*[1]

C. Saba uses its Section 47(b)(2) right to rescind contractual provisions which courts have uniformly found to violate the ICA as a matter of law.

1. Saba Capital Management is a New York-based manager for certain investment funds, including Saba Capital Master Fund, Ltd. (together, "Saba"). Saba's investments in the Petitioner Funds here are consistent with its strategy of unlocking shareholder value trapped in closed-end mutual funds.

Unlike the more common open-end mutual funds, closed-end funds issue a fixed number of shares and are "not required to buy back (*i.e.* 'redeem') shares from their shareholders." *Nuveen*, 88 F.4th at 108.

[1] No petition for certiorari was filed in *Oxford*.

While this affords closed-end funds "more leeway in deciding where to invest their funds' assets," since they need not "maintain deep cash reserves or sell their securities to honor shareholders' redemptions," it also means that "closed-end funds can trade at prices significantly below" their net asset value ("NAV")—the total value of the fund's assets minus its liabilities. *Id*.

Saba's strategy "involves buying voting shares in discounted funds and monetizing discounts by, for example, electing new boards of directors, advocating for measures authorizing the buyback of shares at or near NAV, and/or converting funds to open-end structures." *Id*. Saba developed its positions in the Petitioner Funds here with the intent and desire to maximize value for all shareholders, including by exercising its ICA-protected voting rights proportional to its investment stake. *See* App. 8a, 22a–23a.

2. Among the ICA's shareholder protections is its guarantee of "shareholders' ability to exercise voting rights that serve as a check on investment company insiders." *Boulder Total Return Fund, Inc.*, 2010 WL 4630835, at *6 (S.E.C. No-Action Letter Nov. 15, 2010). This "suffrage-based system" is "the very essence of the Act." *Id*. at *6 n.27.

Section 18(i), specifically, addresses the "various devices of control" that investment company insiders used to deny shareholders "any real participation in the management of their companies." S. Rep. No. 76-1775, 76th Cong., 3d Sess. 7 (1940); *see also Investment Trusts and Investment Companies, Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d

Sess. 1034 (1940) ("Complicated capital structures have been devised. Tricky management stocks with disproportionate voting power are issued to insiders.").

The shareholder franchise is "particularly important" in the context of closed-end funds. *See Boulder*, 2010 WL 4630835. at *6 n.28. In closed-end funds, unlike in open-end funds, a "shareholder does not have the right to compel redemption of his shares at asset value." *Id.* Closed-end fund shareholders thus lack the ability to "vote with their feet" by redeeming shares, which would provide a natural check on fund management. *Id.* Accordingly, without an effective mechanism for removing trustees, shareholders in closed-end funds are often left stuck in an underperforming vehicle. *See* John C. Coates IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. Corp. L. 151 (2007).

3. Saba has in recent years been met with resistance by fund insiders unlawfully seeking to limit Saba's exercise of equal voting rights, often in direct response to Saba's development of positions in underperforming closed-end funds to help unlock value for all shareholders.

For example, ICA-regulated closed-end funds managed by Nuveen enacted "control share provisions"—bylaws which strip voting rights from shareholders owning 10% or more of a fund's stock. Saba sought rescission of those provisions. *See Nuveen*, 2022 WL 493554, at *1. The district court entered judgment rescinding the unlawful provisions, finding they violated ICA Section 18(i)'s "requirement that every share of stock be voting stock" and that

"every share of stock have equal voting rights." *Id.* at *4.

The Second Circuit affirmed, in an opinion by Judge Wesley, and joined by Judge Park. *Nuveen*, 88 F.4th 103. The court noted that Saba properly invoked the private right of action recognized in *Oxford* to rescind ICA-offending bylaw provisions, which constituted a contract between the funds and their shareholders. *Id.* at 115 nn. 9 & 10. And, the court held, the District Court properly interpreted and applied ICA Section 47(b)(2) to rescind Nuveen's discriminatory voting provisions because those provisions violated the equal-voting rights mandate of ICA Section 18(i). *Id.* at 117–21. In doing so, the court observed that the policies and purposes of the ICA "lean[ed] in Saba's favor," and that Saba had acted to vindicate the ICA's purposes by seeking to prevent closed-end funds from being operated in the interest of entrenched fund directors and managers. *Id.* at 120–21.

Similarly, Saba sought rescission of control share provisions adopted by certain Eaton Vance closed-end funds in Massachusetts superior court. *See Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund*, No. 2084-cv-01533-BLS2, 2021 WL 2785120 (Mass. Super. Apr. 7, 2021). The court followed *Oxford* in recognizing a private right of action for rescission under ICA Section 47(b)(2), *id.* at *6, and ultimately agreed with Saba that the provisions had to be rescinded as a matter of law based on their inconsistency with ICA Section 18(i), *Eaton Vance Sr. Income Tr. v. Saba Cap. Master Fund*, No. 2084-cv-01533-BLS2, 2023 WL 1872102, at *8 (Mass. Super. Jan. 21, 2023).

D. The Petitioner Funds attempt to circumvent the ICA by voluntarily opting into Maryland's statutory control share provisions.

1. The Petitioner closed-end mutual funds here adopted resolutions ("Control Share Provisions") in their bylaws opting into a provision of the Maryland Control Share Acquisition Act ("MCSAA"), which in substance functioned no differently from the control share provisions invalidated in *Nuveen* and *Eaton Vance*. The resolutions thus had the effect of stripping the voting rights of any "control shares . . . acquired in a control share acquisition," defined as those shares which would place the holder at 10% or more of a given fund's total voting power. *See* Md. Code Ann., Corps. & Ass'ns §§ 3-701, 3-702.

2. Saba filed suit against sixteen closed-end funds, seeking rescission of their Control Share Provisions. *See* App. 15a–18a. Saba argued that (i) the Provisions violated ICA Section 18(i)'s guarantee of equal voting rights; (ii) that, as opt-in regulations under the MSCAA, the Provisions were not "required by law" and thereby exempt from the statute's equal-voting-rights mandate; and (iii) pursuant to ICA Section 47(b), Saba was thus entitled to rescission of the illegal contracts to which it had been made a party. *See* App. 29a–31a.

The District Court dismissed Saba's claims against five funds, finding that forum selection clauses in those funds' bylaws required suit in Maryland. *See Saba Cap. Master Fund, Ltd. v. ClearBridge Energy Midstream Opportunity Fund Inc.*, 694 F. Supp. 3d 394, 403–05 (S.D.N.Y. 2023). The District Court granted summary judgment in Saba's favor against

the remaining eleven funds. App. 29a–33a. The District Court, consistent with the Second Circuit's decision in *Nuveen*, held that each of the Funds' "offending resolutions" must be rescinded pursuant to ICA Section 47(b). App. 30a–31a.

The Second Circuit affirmed, in a summary order issued by Judges Nardini, Menashi, and Lee. App. 4a–14a. On the merits, the court reasoned that the Control Share Provisions, like those in *Nuveen*, violated the ICA by both (i) denying the owners of some shares in the Funds from being able to vote their shares like any other owner, *see* 15 U.S.C. § 80a-2(a)(42), and (ii) depriving some shares of equal voting rights, *id*. § 80a-18(i). App. 9a–14a. The Circuit held that the Funds' "voluntary" election to opt into the MCSAA's requirements did not excuse the discriminatory nature of the Control Share Provisions, as they were not "required by law." App. 12a. As in *Nuveen*, the court had no occasion to revisit—nor apparent interest in revisiting—*Oxford*'s recognition of the right of a party to ICA-offending contracts to seek rescission.

Only four of the Defendant Funds below are Petitioners in this court. Pet. at ii. The group of Funds seeking review notably excludes the Defendant Funds managed by BlackRock, the world's largest asset manager, and by Tortoise Capital.

REASONS FOR DENYING THE PETITION

The Petition, which fails to identify any "compelling reasons" for review, should be denied. Sup. Ct. R. 10.

I. There is No Disagreement Among the Circuits Sufficiently Compelling to Grant Certiorari.

Any disagreement among the Circuits is shallow and under-developed. The extent of any disagreement is limited. The Second Circuit, for example, likely agrees with the Third and Ninth Circuits that the plaintiffs in *Santomenno* and *Mayer* asserted non-viable claims. But the Second Circuit reaches that result without adopting an atextual reading of Section 47(b)(2) that eliminates all private rights of action. It is uniquely likely that the Circuits will harmonize their approaches to Section 47(b) if given an opportunity to do so. The issue calls out for further percolation.

A. Any Split is Shallower and More Nuanced than Petitioners Suggest.

The Second Circuit's recently stated disagreement with the Third Circuit reflects the full extent of any "split." The Second Circuit explained, in detail, how and why the Third Circuit erred in *Santomenno* when it held that Section 47(b) does not provide any private rights of action. *See Oxford*, 933 F.3d at 108–09.

The Second Circuit did not express disagreement with the Ninth Circuit's decision in *UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695 (9th Cir. 2018),

or the Fourth Circuit's decision in *Steinberg v. Janus Cap. Mgmt., LLC*, 457 F. App'x 261 (4th Cir. 2011). With good reason. The Ninth Circuit's decision in *Mayer* does not conflict with *Oxford*. And the Fourth Circuit had no occasion in *Steinberg* to decide whether Section 47(b)(2) provides a private right of action for rescission.

1. The Ninth Circuit, in *Mayer*, addressed an issue that no other Circuit has considered.

Specifically, the question was whether Section 47(b) of the ICA establishes "a private right of action for challenging the continued validity of an ICA exemption" granted by the SEC. *Mayer*, 895 F.3d at 700. UCFW alleged that Yahoo! had "been operating as an unregistered investment company" because it "had violated the conditions of its ICA exemption by investing in Alibaba." *Id.* at 698. All of UCFW's claims "hinge[d] on the power to challenge the continued validity of Yahoo!'s ICA exemption." *Id.* at 701.

On that narrow issue presented, the Ninth Circuit held UCFW had no private right to enforce or challenge the continued validity of Yahoo!'s ICA exemption. *See id.* at 700–01. The Court reasoned that the provisions of ICA Section 3 specifically address exemptions; those provisions give the SEC sole authority for policing such exemptions; and the more specific provisions of Section 3 trump the general provisions of Section 47. *Id.* at 700 ("Congress contemplated that companies would contravene the conditions of ICA exemptions and concluded that the SEC, not the courts, should decide in the first instance what to do when that happens."); *see also* 15 U.S.C. § 80a-3(b)(2) ("Whenever *the Commission*, upon its own motion or upon application, finds that the

circumstances which gave rise to the issuance of an order granting an [exemption] under this paragraph no longer exist, *the Commission* shall by order revoke such order." (emphases added)).

That holding, foreclosing private parties from meddling with the SEC's exemptive orders under the guise of a claim for rescission, was independently sufficient to dismiss UCFW's claims. The remainder of the panel's commentary on private rights of action under the ICA is non-binding *dictum*.

Accordingly, *Mayer* does not conflict with any decision of the Second Circuit. In fact, for at least three reasons, UCFW's claims likely would have been as non-viable in the Second Circuit as in the Ninth.

First, the Second Circuit would likely agree with the Ninth Circuit that Section 47(b) provides no private right to challenge SEC exemptive orders. The Ninth Circuit emphasized the need to respect Congress's allocation of responsibility to enforce the ICA between the SEC and private parties. *See Mayer*, 895 F.3d at 701. The Second Circuit similarly took pains to distinguish the powers Congress gave the "Commission" in various provisions of the ICA, and the right of rescission Congress gave any "party" to an ICA-offending contract in Section 47(b)(2). *Oxford*, 933 F.3d at 106. Faithfully applying the plain text of the statute, the Second Circuit construed the right afforded by Section 47(b)(2) as the right of a "party" to "seek rescission of the violative contract," *id*.—not a right of the "Commission," and not a right to challenge the validity of an exemptive order. Consonantly, the Second Circuit would likely agree with the Ninth Circuit that, in Section 3(b)(2), Congress gave only the "Commission" the power to determine whether the

circumstances justifying an exemptive order "no longer exist" and the power to "revoke" an exemptive order. *See Mayer*, 895 F.3d at 697–98.

Second, the Second Circuit has indicated it will not allow the right of action afforded by Section 47(b)(2) to be used as a "backdoor" to private rights of action beyond rescission of illegal contracts. *See NexPoint*, 80 F.4th at 420; *id.* (characterizing right of action under *Oxford* as "applying to illegal contracts, rather than to legal contracts performed in an illegal manner"). *NexPoint* suggests that the Second Circuit, like the Ninth, would conclude that plaintiffs cannot shoehorn a right to challenge an SEC exemptive order into the statutorily prescribed right to seek rescission of ICA-offending contracts.

Third, the Second Circuit likely would share the Ninth Circuit's incredulity toward UCFW's claimed right to rescind "every . . . contract Yahoo! has entered into for the better part of a decade." *Mayer*, 895 F.3d at 701. *Oxford* held that Section 47(b)(2) provides a right of action to a specifically defined "class of persons"—namely, any "*party to a contract* that violates the ICA." 933 F.3d at 106 (emphasis added). UCFW, however, asserted a right to invalidate all of Yahoo!'s contracts—regardless of UCFW's status as a party or even third-party beneficiary to the challenged contracts.

All told, the "split" Petitioners assert between the Second and Ninth Circuits is illusory. Any perceived tension between *Oxford* and *Mayer* is the product of unnecessarily broad *dictum* from the Ninth Circuit, in response to factual circumstances the Second Circuit apparently agrees would not give rise to a viable cause of action.

At minimum, *Oxford* and *Mayer* highlight factual nuances arising in claims brought under Section 47(b) that have not been adequately aired by the lower courts, and that call for allowing the issue to percolate further, *see infra*.

2. The Fourth Circuit has not determined whether Section 47(b)(2) provides a private right of action for rescission.

Putting aside the nonprecedential weight of the Fourth Circuit's unpublished opinion in *Steinberg*, 457 F. App'x at 263, even a published opinion could not have created binding authority on the availability of a right of action under Section 47. The *Steinberg* plaintiffs did not even attempt to argue Section 47(b) provides a private right of action. *See* Plaintiffs'-Appellants' Opening Brief, 2010 WL 3375202, at *55 (Aug. 27, 2010) ("Plaintiffs . . . do not contest that Section 47(b) provides a remedy only, not a private cause of action."); Plaintiffs'-Appellants' Reply Brief, 2010 WL 4859355, at *11–12 (Nov. 29, 2010) ("Plaintiffs do not argue here that there is a stand-alone right of action for 'violation' of Section 47(b).").

The panel in *Steinberg* thus had no occasion to consider or decide whether Section 47 provides a private right of action, and no ability to bind future courts on the issue. *See, e.g., Ochoa-Salgado v. Garland*, 5 F.4th 615, 619–20 (5th Cir. 2021) ("where a party concedes an issue, that party does not *raise* it," and "where a panel relies on that concession, without further analysis, it does not give the issue *reasoned consideration*" binding future courts (emphasis in original)).

B. Any Disagreement Among the Circuits is Narrow and Uniquely Likely to Resolve Itself.

The Third Circuit has not had an opportunity to revisit or refine its interpretation of Section 47(b) in light of *Oxford*. Neither has the Ninth Circuit, to the extent any disagreement with the Second Circuit exists in the first place. The Circuits easily can—and likely will—harmonize their approaches if given the chance.

1. The narrow scope of disagreement between the Second and Third Circuits makes the split uniquely likely to resolve itself.

The Second Circuit likely would agree with the Third Circuit that the *Santomenno* plaintiffs lacked a viable cause of action. But the Second Circuit has addressed the concerns driving the Third Circuit's decision in *Santomenno*, without abandoning the statutorily prescribed right of action enshrined in the plain text of Section 47(b)(2).

The *Santomenno* panel expressed concern that plaintiffs were improperly attempting to "insinuate their excessive fees claim" for damages into Section 47(b). *Santomenno*, 677 F.3d at 187. While "[s]uch a claim is cognizable under Section 36(b)" the plaintiffs lacked "standing to sue under that provision" because they were not "security holders entitled to bring an action." *Id*. at 185; *Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, No. 2:10-CV-01655, 2011 WL 2038769, at *5 (D.N.J. May 23, 2011) ("It is not contested that the contracts between the Plans' trustees and the Defendants have been terminated.

I.e., Plaintiffs do not currently own any interests in the Defendants' funds.").

The Second Circuit has addressed *Santomenno*'s concerns in at least three ways, while remaining faithful to the text of Section 47(b)(2). First, *Oxford* is clear that Section 47(b)(2) includes no right to sue for damages, thereby foreclosing the *Santomenno* plaintiffs' attempts to recover excessive fees. 933 F.3d at 107–08 & n.5. Second, *Oxford* properly construed the text of Section 47(b)(2) to provide a right of rescission to "parties to illegal contracts," *id*. at 108, which the *Santomenno* plaintiffs were not. Third, *NexPoint* confirms the Second Circuit would not allow plaintiffs to use Section 47(b) as a "backdoor" to a Section 36(b) damages action for which they lack standing as non-parties to the contracts at issue. *NexPoint*, 80 F.4th at 420.

With the benefit of *Oxford* and *NexPoint*, it is uniquely likely the Third Circuit will revisit or refine *Santomenno* to address that panel's concerns without the blunt instrument of depriving all private rights of action under Section 47(b)(2).

2. Any disagreement is especially likely to resolve itself, given the Third Circuit's reliance on Second Circuit precedent that *Oxford* clarified did not, in fact, foreclose recognizing Section 47(b)'s private right of action for rescission.

In concluding the *Santomenno* plaintiffs lacked a right of action to rescind annuity insurance contracts based on violations of Section 26(f)'s "reasonable" fee requirement, the Third Circuit relied on *Olmsted v. Pruco Life Ins. Co. of New Jersey*, 283 F.3d 429 (2d Cir. 2002). The *Santomenno* panel leveraged *Olmsted*'s

holding that Section 26(f) does not include "rights-creating language" or otherwise "create investor rights," to conclude that Section 47(b) provided no right to relief for violations of Section 26(f) either. *Santomenno*, 677 F.3d at 186–87.

Oxford clarified that *Olmsted* did not foreclose the right of action for rescission apparent in the text of Section 47(b)(2). The unavailability of "private right of action for damages" under other provisions of the ICA does "not support the conclusion that [parties to ICA-offending contracts] have no private right of action for rescission" under Section 47(b). *Oxford*, 933 F.3d at 105. Unlike those other provisions, "Section 47(b)(2) does contain rights-creating language"—namely, "the clear language of § 47(b)(2) that 'a court may not deny rescission *at the instance of any party* . . . ." *Id.* at 108 (emphasis in original). The Third Circuit in *Santomenno* "[s]trangely . . . failed to mention" Section 47(b)(2) at all, even though it provides the "strongest textual indication of Congressional intent to provide a right of action." *Id.*; *see Santomenno*, 677 F.3d at 185–87 (concluding Section 47(b)(1)'s use of the term "unenforceable" did not implicate a private right of action).

The Third Circuit should be given an opportunity to revisit *Santomenno* based on the Second Circuit's subsequent clarification of Second Circuit precedent on which the *Santomenno* panel relied.

3. If there were any real disagreement between the Ninth and Second Circuits, that too is likely to resolve itself.

The Ninth Circuit, like the Third Circuit, invoked *Olmsted* in its commentary on private rights of action

under the ICA, as well as another pre-*Oxford* decision, *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110 (2d Cir. 2007). *Mayer*, 895 F.3d at 700. In *Bellikoff*, the Second Circuit concluded ICA Sections 34(b), 36(a), and 48(a) provide no private rights of action for damages. *See* 481 F.3d at 117. *Oxford* clarifies that *Bellikoff*, like *Olmsted*, does not foreclose finding a private right of action for rescission on the plain text of Section 47(b)(2). *Oxford*, 933 F.3d at 104–05.

The Ninth Circuit, like the Third Circuit, oddly examined only Section 47(b)(1), not the clear textual indications of a private right of action in Section 47(b)(2). *See Mayer*, 985 F.3d at 700–01. Thanks to *Oxford*, more careful attention to the statutory text is likely in future cases.

The Ninth Circuit, like the Third Circuit, also was driven by concerns that the Second Circuit has addressed without depriving parties to illegal contracts of any right to relief under Section 47(b)(2). *See supra.*

* * *

With the benefit of (1) *Oxford*'s attention to the plain-text indications of a private right of action *Santomenno* and *Mayer* apparently overlooked; (2) *Oxford*'s clarification of Second Circuit precedent on which the *Santomenno* and *Mayer* panels relied; and (3) *Oxford*'s ability to address the Third and Ninth Circuits concerns without gutting the statutorily prescribed right of action for rescission, the Circuits are uniquely likely to harmonize their approach to Section 47(b)(2) if given the opportunity.

C. Further Percolation is Warranted.

Further percolation is warranted to inform the availability and scope of the rescission right set forth in Section 47(b)(2). Any disagreement among the lower courts is not "entrenched." *Contra* Pet. at 3. To the contrary, indications are that the lower courts will coalesce around the Second Circuit's approach.

1. This Court should allow the lower courts to continue to assess the varied factual circumstances in which claims under Section 47(b)(2) may arise, and the implications of those factual nuances on the availability and scope of the right of action for rescission available under Section 47(b)(2).

Oxford, *Santomenno*, and *Mayer* are indicative of the questions that have not yet been adequately aired by the lower courts. Does any Circuit actually disagree with the Ninth that Section 47(b)(2) cannot be used to challenge SEC exemptive orders? (Answer: "No.") Does any Circuit actually disagree with the Third that Section 47(b)(2) cannot be used as a back door for otherwise-unavailable damages claims? (Another: "No.") Further percolation will likely vindicate that the Second Circuit has appropriately identified the discrete set of parties possessing a right of action for rescission as reflected in the text of Section 47(b)(2)—while still foreclosing the sorts of claims that the Third and Ninth Circuits have indicated should be foreclosed.

Various open issues identified by Petitioners and their *amici* only underscore why further percolation is warranted. For example, echoing concerns aired by the Third and Ninth Circuits, Petitioners and their *amici* claim that allowing a right of action under

Section 47(b) will permit rescission of nearly every contract entered into by an investment company, *e.g.*, Chamber Br. at 8–9; will allow litigants to treat "[v]irtually *any* alleged misstep" as basis for rescission, *e.g.*, ICI Br. at 5; and will encroach on the SEC's enforcement prerogatives and exemptive orders, *e.g.*, Chamber Br. at 9.

The Second Circuit's decisions in *Oxford* and *NexPoint* should already place sufficient guardrails on the Section 47(b)(2) right of rescission to address the stated concerns, as discussed *supra*. But, for present purposes, the point is that there is no reason to guess. This Court should let these issues to continue to play out in the lower courts, rather than intervene based on Petitioners' unfounded prophecies of doom-and-gloom.

2. There is no basis for Petitioners' assertion that any split is "entrenched." Even with relatively few claims arising under Section 47(b)(2)—a fact that itself confirms the insufficient importance of the issue for this Court's review, *see infra*—litigants have pursued and will continue to pursue those claims in a variety of jurisdictions beyond the Second Circuit.

Even in this case, the District Court dismissed claims against five funds that it found could not be sued in New York due to forum selection clauses pointing to Maryland. *See ClearBridge*, 694 F. Supp. 3d at 403–05. The contracts of other sophisticated investment companies—necessarily the targets of claims brought under Section 47(b)(2)—are likely to contain similar forum selection clauses pointing to jurisdictions around the country.

Since *Oxford*, claims under Section 47(b)(2) have also been pursued in Massachusetts, Texas, and California. *Eaton Vance*, 2023 WL 1872102, at *6–*8 (rescinding ICA-offending contractual provisions as a matter of law); *Berger on behalf of Income Opportunity Realty Invs., Inc. v. Transcon. Realty Invs.*, No. 3:19-cv-286-E, 2022 WL 799653 (N.D. Tex. Mar. 16, 2022); *Staniforth v. Total Wealth Mgmt., Inc.*, No. 14-cv-1899-GPC, 2023 WL 3805250 (S.D. Cal. June 2, 2023). These courts have tended to favor the Second Circuit's approach.

The Superior Court of Massachusetts—the only court to issue a precedential decision on the issue since *Oxford*—agreed with the Second Circuit that Section 47(b)(2) "creates a private right of action for rescission." *Eaton Vance*, 2021 WL 2785120, at *6 (citing *Oxford*); *see also* Reply Br. in Support of Motion to Dismiss, 2020 WL 12787444, at 15 & n.13 (Nov. 12, 2020) (arguing against private right of action and invoking alleged conflict between *Oxford*, *Santomenno*, and *Mayer*).

The Northern District of Texas "presume[d]," without deciding, "that § 47(b) creates a private right of action" where "a violation of some other section of the Act has been established." *Berger*, 2022 WL 799653, at *5. The court did so after consideration of *Oxford*, *Mayer*, *Santomenno*, and *Steinberg*, as well as a prior Fifth Circuit case indicating that "private actions provide a necessary supplement to SEC action in the enforcement of the Investment Company Act."

Id. at *4–*5 (discussing *Herpich v. Wallace*, 430 F.2d 792, 815 (5th Cir. 1970)).[2]

Only the Southern District of California, in *Staniforth*, indicated Section 47(b) does not provide a private right of action—based not on any statutory analysis but, rather, a rote invocation of *Mayer*. *See* 2023 WL 3805250, at *5. But because the court granted rescission under other provisions of the securities laws, it was unnecessary for the court to consider the issue, let alone give careful attention to whether *Mayer*'s *dictum* leaves room for the Ninth Circuit to align itself with the Second.

3. There are other indications that courts will continue to coalesce around the Second Circuit's approach.

For example, the First Circuit's decision in *Lessler v. Little* suggests that it would agree with the Second Circuit that a party to an ICA-offending contract has a private right to rescind it. 857 F.2d 866, 873 (1st Cir. 1988). The *Lessler* court dismissed plaintiff's claim under Section 47(b) because he was "not a party" to the contract at issue, 857 F.2d at 874—just as the Second Circuit would do under *Oxford*. But the First Circuit, like the Second, indicated it is otherwise "consistent with congressional intent and with governing law to imply a private cause of action under the Investment Company Act." *Id.* at 873.

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[2] *Berger* also considered *Laborers' Loc. 265 Pension Fund v. iShares Trust*, 769 F.3d 399, 407 (6th Cir. 2014) (cited in Chamber Br. at 7), but concluded the issue was not properly before the Sixth Circuit because the plaintiffs there "did **not** appeal the district court's dismissal of their claim under § 47(b)." *Berger*, 2022 WL 799653, at *4 n.2 (emphasis added).

The Seventh Circuit also construed Section 47(b), prior to its amendment in 1980, to provide for "civil suits for relief by way of rescission and for damages." *Mathers Fund, Inc. v. Colwell Co.*, 564 F.2d 780, 783 (7th Cir. 1977). The Seventh Circuit will likely remain faithful to *Mathers* to the extent consistent with the amended text of Section 47(b)—which, as *Oxford* held, affords a right of action for rescission but not damages.

* * *

This Court should allow the issue to continue percolating. Given that opportunity, the lower courts will continue to coalesce around the Second Circuit's approach to rescission rights, which addresses the concerns driving *Santomenno* and *Mayer*, but that remains faithful to the plain text of Section 47(b)(2).

II. The Issue is Not Sufficiently Important to Warrant this Court's Review.

The limited right of action for rescission recognized by the Second Circuit is insufficiently important to warrant this Court's review—especially when so few parties have asserted that right since *Oxford*, and so few courts have had the opportunity to adjudicate claims brought pursuant to Section 47(b)(2).

1. The Second Circuit has faithfully applied the meaningful limitations on statutory right of action apparent in the plain text of Section 47(b)(2).

The Second Circuit has recognized a right of *rescission*, not compensatory damages, available to *parties to illegal contracts*. *See Oxford*, 933 F.3d at 107–08 & n.5. And the Circuit has refused to allow the

provision to serve as a backdoor to otherwise unavailable damages actions. *See NexPoint*, 80 F.4th at 420. These guardrails belie the fearmongering from Petitioners and their *amici* that the Second Circuit's interpretation of Section 47(b)(2) will result in excessive liabilities, fee awards, or indiscriminate invalidation of every contract entered into by an investment company.

The concerns Petitioners express about the Section 47(b)(2) rescission right are further alleviated by the statute's equitable "safety-valve." While Section 47(b)(2) provides that courts "may not deny rescission" of an ICA-offending contract "at the instance of any party," it allows a court to deny rescission if it "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)(2). Courts have proven themselves capable of using the safety-valve to mitigate attempted misuse of the right of action for rescission. *E.g.*, *Mathers*, 564 F.2d at 784 (denying rescission where plaintiff Fund was "in effect, seeking judicial approbation of a practice not unlike those the Act was intended to prevent" in "contravention of the broad policies of the Act").

2. Analogous rights of action have existed under the Investment Advisors Act and the Exchange Act for decades, without the sky-is-falling consequences foretold by Petitioners and their *amici*. *TAMA*, 444 U.S. at 15–19 (recognizing private right of action under Section 215 of the IAA, 15 U.S.C. § 80b-15, for rescission of illegal contracts); *Mills v. Electric Auto-Lite*, 396 U.S. 375, 386–88, nn. 9, 10 (1970) (well-

recognized private right of action under Section 29(b) of the Exchange Act, 15 U.S.C. § 78cc, to seek rescission of illegal contracts).

Those longstanding private rights of action also undercut Petitioners' arguments that recognizing a private right of action for rescission in Section 47(b)(2) would undermine the SEC's broad enforcement authority under the ICA. *See* 15 U.S.C. § 80a-41. Private rights of action for rescission have long co-existed with the SEC's similarly broad enforcement authority under the Advisors Act, 15 U.S.C. § 80b-9, and the Exchange Act, 15 U.S.C. § 78u.

The SEC itself does not view such private rights of action for rescission as a threat to its enforcement prerogatives. In fact, the SEC filed an amicus brief with the Second Circuit in *Olmsted* taking the position that Section 47(b) provides a private right of action. *See* Br. of SEC, 2001 WL 34397948, at *10–12 (Dec. 5, 2001). The Second Circuit had no occasion to decide the issue in *Olmsted* because plaintiffs there "ma[de] no claim under § 47(b)." 283 F.3d at 436 n.5. When squarely presented with the issue in *Oxford*, the Second Circuit appropriately interpreted Section 47(b) not only in accordance with its plain terms, but also consistent with the views of the SEC, and consistent with long-standing precedent of this Court interpreting analogous provisions of the securities laws.

3. The facts on the ground similarly undermine Petitioners' assertion that *Oxford* "will open the floodgates" to litigation or otherwise excessive liabilities. Pet. at 31. Only a handful of published decisions involving the Section 47(b)(2) right of

rescission have emerged even since *Oxford*. None have involved *any* monetary damages.

In fact, since *Oxford*, it appears that Saba is the only party to have obtained relief under Section 47(b)(2). Specifically, Saba has challenged "control share provisions" adopted by registered investment funds which stripped shareholders of voting rights when they accumulated a >10% interest in the funds. Every court to have considered the issue has held, as a matter of law, that such provisions must be rescinded pursuant to Section 47(b)(2) because they violate the equal-voting-rights mandate of Section 18(i) of the ICA. *See BlackRock*, App. 15a–32a, *aff'd*, App. 1a–14a; *Nuveen*, 2022 WL 493554, at *2, *aff'd*, 88 F.4th 103; *Eaton Vance*, 2023 WL 1872102, at *6–*8.

None of those cases involved the supposed misuse of Section 47(b)(2) about which Petitioners complain. None involved an award of damages or attorneys' fees. None involved a challenge to SEC exemptions. None involved invalidation of a broad swath of contracts to which Saba is not a party. Rather, Saba appropriately invoked the right of a party to an ICA-offending contract to have it rescinded, as contemplated by the plain text of 47(b)(2).

III. The Second Circuit's Decision in *Oxford* is Correct.

This Court's intervention in this case is also unwarranted because the Second Circuit's interpretation of Section 47(b)(2) is correct.

Faithfully applying this Court's decision in *Sandoval*, as well as long-standing precedents of this Court recognizing private rights of action for rescission under the securities laws, the Second Circuit correctly found that "[t]he text of § 47(b) unambiguously evinces Congressional intent to authorize a private action." *Oxford*, 933 F.3d at 104–05.

The Second Circuit correctly recognized the clear textual indications in Section 47(b)(2) that Congress intended to give parties to ICA-offending contracts a private right to rescind them. Those textual indications include:

> (1) rights-creating language in Section 47(b)(2)'s provision that rescission may not be denied "at the instance of any party";
>
> (2) the statute's identification of "a class of persons who are intended to benefit from the right to seek rescission: parties to illegal contracts," *Oxford*, 933. F.3d at 105, 108; and,
>
> (3) the structure of the statute indicating that private parties may assert their rights both defensively, § 47(b)(1) (ICA-offending contract is "unenforceable"), *and* offensively, § 47(b)(2) (court may not deny rescission of contract that "has been performed" "at the instance of any party");

The Second Circuit's careful textual analysis confirms that construing Section 47(b) not to include a private right of action for rescission would "effectively read § 47(b)(2) out of the ICA." *Oxford*, 933 F.3d at

108–09; *id.* (finding no credible explanation for "what effect § 47(b)(2) has if it does not provide a private right of action").

The Second Circuit also was appropriately unconcerned about interfering with the SEC's enforcement authority, again given the clear textual indications that Congress intended for a "party" to an ICA-offending contract to enforce the ICA under Section 47(b), not the "Commission." *Id.* at 106. In fact, "[b]oth subsections of § 47(b) indicate that a party to an illegal contract may seek relief in court on the basis of the illegality of the contract." *Id.* at 105.

This Court's long-standing recognition of private rights of action for rescission under analogous provisions of the Investment Advisors Act, *TAMA*, 444 U.S. at 15–19, and Exchange Act, *Mills*, 396 U.S. at 386–88 & nn. 9, 10, confirm the soundness of the Second Circuit's interpretation of Section 47(b)(2). In fact, in *Sandoval*, this Court approvingly cited *TAMA* with respect to the need for courts to carefully examine the statutory text to discern Congressional intent with respect to private rights of action. *See Sandoval*, 532 U.S. at 286–87. The Second Circuit gave appropriate weight to the fact that "IAA § 215 was identical to ICA § 47(b)," at the time *TAMA* found a private right of action in IAA Section 215, and that Congress's subsequent amendments to ICA Section 47(b) only reinforced "that illegality gives rise to a right to seek rescission" pursuant to Section 47(b)(2). *Oxford*, 933 F.3d at 107.

Because there is no good reason to revisit *Oxford*'s reasoned analysis in favor of Petitioners' competing atextual reading—and particularly before any other

Circuit has done so—certiorari should be denied on this independent basis as well.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari respectfully should be denied.

Respectfully submitted,

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