No. 24-345

In the Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL., PETITIONERS

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.

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

REPLY BRIEF FOR PETITIONER

Scott Musoff
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Eben Colby
Marley Ann Brumme
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
500 Boylston Street
Boston, MA 02116

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Steven Marcus
Kyser Blakely
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Stephen Sypherd
FS CREDIT OPPORTUNITIES CORP.
201 Rouse Blvd.
Philadelphia, PA 19112

Counsel for Petitioner FS Credit Opportunities Corp.
(additional counsel information on inside cover)

(counsel information continued from front cover)

Stephen G. Topetzes
Jennifer R. Gonzalez
K&L GATES LLP
1601 K St. NW
Washington, DC 20006

Counsel for Petitioners Adams Diversified Equity Fund, Inc. and Adams Natural Resources Fund, Inc.

Eamon P. Joyce
Alex J. Kaplan
Charlotte K. Newell
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019

Counsel for Petitioner Royce Global Value Trust, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 3
I. The circuits have split 2–1 over whether Section 47(b) of the ICA creates an implied private right of action. 3
A. The circuits have divided on the question presented. 3
B. Saba's attempts to downplay the split just confirm that the disagreement is entrenched and requires this Court's intervention. 4
II. The Second Circuit's outlier rule is wrong. 8
A. This Court rarely recognizes an implied right of action, and Section 47(b)'s text and the ICA's structure don't call for one. 8
B. The Second Circuit's decision is wrong, and Saba does little to defend it. 9
III. The question presented is important, and this case is an ideal vehicle for resolving it. 10
CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Acheson Hotels, LLC v. Laufer,
601 U.S. 1 (2023).....11

Alexander v. Sandoval,
532 U.S. 275 (2001).....6, 9

Bittner v. United States,
598 U.S. 85 (2023).....4

Cummings v. Premier Rehab Keller, P.L.L.C.,
596 U.S. 212 (2022).....4

Lessler v. Little,
857 F.2d 866 (1st Cir. 1988).....7

Mathers Fund, Inc. v. Colwell Co.,
564 F.2d 780 (7th Cir. 1977).....7

NexPoint Diversified Real Estate Trust v. Acis Capital Management, L.P.,
80 F.4th 413 (2d Cir. 2023).....7

Olmsted v. Pruco Life Insurance Co. of New Jersey,
283 F.3d 429 (2d Cir. 2002).....6, 10

Oxford University Bank v. Lansuppe Feeder, LLC,
933 F.3d 99 (2d Cir. 2019).....2, 3, 6, 7

PPL Corp. v. Commissioner,
569 U.S. 329 (2013).....4

Rotkiske v. Klemm,
589 U.S. 8 (2019).....4

TABLE OF AUTHORITIES
(continued)

Page(s)

Saba Capital Master Fund, Ltd v. ClearBridge Energy Midstream Opportunity Fund Inc., 694 F. Supp. 3d 394 (S.D.N.Y. 2023).....8

Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.), 677 F.3d 178 (3d Cir. 2012) .....1, 2, 3, ...5, 6, 7, 9

Staniforth v. Total Wealth Management, Inc., No. 14-cv-1899, 2023 WL 3805250 (S.D. Cal. June 2, 2023) 5

Steinberg v. Janus Capital Management, LLC, 457 F. App'x 261 (4th Cir. 2011) (per curiam).....7

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).....8, 9

Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979).....10

UFCW Local 1500 Pension Fund v. Mayer, 895 F.3d 695 (9th Cir. 2018).....1, 2, 3, 4, ...5, 7, 9, 11

Ziglar v. Abbasi, 582 U.S. 120 (2017).....10

STATUTES

Investment Company Act of 1940
15 U.S.C. § 80a-1 *et seq.* .....1, 2, 3, ...4, 5, 6, 7, ...8, 9, 10, 11

15 U.S.C. § 80a-3(b)(2).....4, 5

TABLE OF AUTHORITIES
(continued)

Page(s)

15 U.S.C. § 80a-7 .....4, 5
15 U.S.C. § 80a-26(f) 6
15 U.S.C. § 80a-35 2
15 U.S.C. § 80a-35(b) 9, 10, 11
15 U.S.C. § 80a-41 9
15 U.S.C. § 80a-46(b) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10
15 U.S.C. § 80a-46(b)(1) 8, 9
15 U.S.C. § 80a-46(b)(2) 2, 7, 8, 9, 10, 11

INTRODUCTION

Saba's brief in opposition only confirms that the Court should intervene now to resolve the acknowledged and consequential circuit split over whether Congress created an implied private right of action in Section 47(b) of the Investment Company Act (ICA), 15 U.S.C. § 80a-46(b). Indeed, Saba *concedes* the split on the first page of its brief. Saba then focuses on contending that the split is 1–1 rather than 2–1; the Third Circuit might reverse course given the Second Circuit's insights; and the question presented isn't important. Those arguments fail. The split is clear, acknowledged, and entrenched—dividing the circuits most likely to hear claims involving the financial industry—and the Third and Ninth Circuits relied on textual and structural analysis at odds with the Second Circuit's. And Saba's own litigation tactics and narrative belie its claim that the issue isn't important. The Court should grant review to realign the Second Circuit with this Court's precedents and restore the balance that Congress struck in the ICA.

1. The Third and Ninth Circuits hold that Section 47(b) creates no private right of action, because "neither the language nor the structure of the ICA" supports an implied right. *Santomenno ex rel. John Hancock Trust v. John Hancock Life Insurance Co. (U.S.A.)*, 677 F.3d 178, 187 (3d Cir. 2012); *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 700 (9th Cir. 2018). Saba and the Second Circuit both acknowledge the conflict between the Second and Third Circuits. Saba's fanciful response is that the Third Circuit might revisit its precedent because, deep down, the two circuits hold similar policy views.

But the Third Circuit rested its decision on the ICA's text and structure.

As to *Mayer*, simply reading the opinion refutes Saba's notion that the Ninth Circuit reached the question presented only in dicta. The Ninth Circuit reiterated that "section 47(b) does not establish a private right of action"; that it "[could] not" accept the plaintiff's argument "read[ing] section 47(b) as implying a private right of action … to sue for rescission of [a] contract"; and that it "agree[d] with the Third Circuit" in *Santomenno* that precedent "about a different statute … does not control." *Mayer*, 895 F.3d at 700 & n.3. Unless the Court intervenes, the split will persist.

2. The Second Circuit's rule is wrong, and Saba makes only a halfhearted effort to defend it. Section 47(b) contains no rights-creating language, and the ICA's structure doesn't support a right of action, either. Congress created a right of action in Section 36, but not in Section 47(b), and it authorized the SEC, not private parties, to enforce the ICA. The Second Circuit and Saba fixate on the language that "a court may not deny rescission at the instance of any party," 15 U.S.C. § 80a-46(b)(2); *see Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 105-06 (2d Cir. 2019), but that language merely authorizes defensive rescission, not a private right of action. Saba doesn't engage with this key point.

3. The question presented is critical. Unless the Court intervenes, the Second Circuit's rule gives parties a license to sue that Congress withheld. Saba's primary responses are that rescission is less significant than damages and that only Saba has won cases under Section 47(b). But rescission is a powerful

tool, especially in the investment industry, as Saba's own litigation record shows.

The circuit split is important and outcome-determinative. Further percolation is unlikely, because courts in New York will often have jurisdiction over financial industry defendants. It's also of little value given both (a) the Third and Ninth Circuits' careful textual and structural reasoning and adherence to this Court's precedent and (b) the financial industry's concentration within the divided circuits in New York, Delaware, and California. The Court should intervene now.

ARGUMENT

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

A. The circuits have divided on the question presented.

The circuits have split 2–1 over whether Section 47(b) creates an implied right of action, and the Second Circuit has expressly acknowledged the conflict. Pet. 18-21. The Third and Ninth Circuits hold that Congress did not create an implied private right of action. To reach that conclusion, both courts examined the text and structure of Section 47(b) and the ICA, and both held that Section 47(b) lacks "rights-creating language." *Santomenno*, 677 F.3d at 187; *Mayer*, 895 F.3d at 700. But the Second Circuit has "reached the opposite result," *Oxford*, 933 F.3d at 108, forcing Saba to concede a circuit "split," Opp. 1, and making clear that this Court must intervene.

B. Saba's attempts to downplay the split just confirm that the disagreement is entrenched and requires this Court's intervention.

Although Saba concedes the split on the first page of its brief, it claims that (1) the split is 1–1, not 2–1, because the Ninth Circuit addressed the question presented only in dicta, and (2) the Third Circuit might decide to revisit its precedent. The first argument misrepresents the Ninth Circuit's decision; the second is baseless and also ignores this Court's repeated grants of certiorari to resolve 1–1 splits on questions of statutory interpretation. *See, e.g.*, *Bittner v. United States*, 598 U.S. 85, 89 (2023); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212 (2022); *Rotkiske v. Klemm*, 589 U.S. 8, 12 (2019); *PPL Corp. v. Commissioner*, 569 U.S. 329, 334 (2013).

1. Saba claims (Opp. 15-16) that the Ninth Circuit's decision in *Mayer* isn't part of the split because it addressed only whether Section 47(b) permits a private right of action for challenging an ICA exemption while relegating the question presented here to dicta. That contention is incorrect. *Mayer* squarely held that "section 47(b) does not establish a private right of action." 895 F.3d at 700.

The plaintiff in *Mayer* sued Yahoo!, which the SEC had conditionally exempted from the ICA. *Id.* at 698. The plaintiff invoked Section 47(b) and sought rescission of Yahoo! contracts on the ground that Yahoo! had violated its conditional exemption and its contracts violated the ICA. *Id.* at 698, 700. The Ninth Circuit concluded that the ICA did not establish a private cause of action to challenge the validity of an ICA exemption. *Id.* at 698-99. To reach that result, the

court held that none of several ICA provisions (Sections 3(b)(2), 7, and 47(b)) created a cause of action. Specifically, the court held categorically that "section 47(b) does not establish a private right of action." *Id.* at 700. That's because "nothing in the text of the section [47(b)]" or in "the structure of the ICA" permits a court to read Section 47(b) to confer a private right of action. *Id*. The court also expressly rejected the plaintiff's argument that Section 47(b) creates "a private right of action … to sue for rescission of [a] contract" that allegedly violates the ICA, *id.*, and made clear that it was rendering a "decision"—not issuing dicta, *id.* at 700 n.3.

Unsurprisingly, district courts in the Ninth Circuit understand *Mayer* to hold that Section 47(b) doesn't create a private right of action. *See, e.g.*, *Staniforth v. Total Wealth Management, Inc.*, No. 14-cv-1899, 2023 WL 3805250, at *5 (S.D. Cal. June 2, 2023). Saba recognizes as much. *See* Opp. 26.

2. When it comes to the Third Circuit, Saba concedes the disagreement (Opp. 1) but suggests that the Third Circuit might later revisit or narrow its precedent or that the Second Circuit might otherwise limit the availability of relief under Section 47(b). Those arguments fail.

a. Saba speculates (Opp. 19-20) that the Third Circuit might overrule *Santomenno* because the Second Circuit addressed the policy concerns "driving" *Santomenno*—that the Third Circuit just wanted to shut down the plaintiffs' "excessive fees claim." 677 F.3d at 187.

That cynical argument ignores what the Third Circuit said in *Santomenno*. *Santomenno* rested on textual analysis, not policy concerns. As the court

explained, "neither the language nor the structure of the ICA" supports a private right of action. *Id.* That holding followed this Court's instruction to construe statutory text and context when resolving implied-private-right-of-action issues. *See id.* at 186 (citing *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001)). True, *Santomenno* noted that a private right of action could allow plaintiffs to bring excessive fees claims. *Id.* But that wasn't the basis for the Third Circuit's holding. And the Second Circuit in *Oxford* never mentioned the policy concern supposedly "driving" *Santomenno*, Opp. 19—it simply "disagree[d]" with *Santomenno*'s textual interpretation. 933 F.3d at 108.

b. Saba also suggests that the Third Circuit might overrule *Santomenno* because *Santomenno* cited a Second Circuit decision, *Olmsted v. Pruco Life Insurance Co. of New Jersey*, 283 F.3d 429 (2d Cir. 2002), that *Oxford* supposedly "clarified." Opp. 20. That argument is hard to follow, and Saba appears to contradict it later by recognizing (Opp. 29) that *Olmsted* didn't address the question presented here. Instead, *Olmsted* held (correctly) that Section 26(f) of the ICA doesn't create a private right of action because it lacks "rights-creating language." 677 F.3d at 187. That's why *Olmsted*, in Saba's words, "did not foreclose" a private right of action under Section 47(b). Opp. 21. But *Olmsted* doesn't compel an implied private right of action under Section 47(b), either. And the Second Circuit in *Oxford* didn't overrule or even clarify *Olmsted*, but cited *Olmsted* just once, in a "quoting" parenthetical from the district court opinion. 933 F.3d at 104. It's unclear why Saba thinks anything about *Olmsted* suggests the Third Circuit will revisit *Santomenno*.

c. Finally, Saba tries to downplay the circuit split by suggesting that "[t]he Second Circuit has addressed *Santomenno*'s concerns in at least three ways." Opp. 20. Those arguments, too, lack merit. *First*, the question here is about rescission, not damages, so whatever *Oxford* says about damages is beside the point. *Second*, the Second Circuit has *not* held that non-parties cannot bring Section 47(b) actions. Although *NexPoint Diversified Real Estate Trust v. Acis Capital Management, L.P.*, 80 F.4th 413, 415, 419-20 (2d Cir. 2023), mentioned the ICA in passing, it interpreted *a different statute* and didn't limit Section 47(b)'s private right of action to contractual parties. At any rate, the circuits are split on whether even *parties* can sue under Section 47(b)—and the consequences of that disagreement, as discussed below (at 10-12), are significant.

3. Saba also cites *Lessler v. Little*, 857 F.2d 866 (1st Cir. 1988), and *Mathers Fund, Inc. v. Colwell Co.*, 564 F.2d 780 (7th Cir. 1977), as "indications" that courts will "coalesce around the Second Circuit's approach." Opp. 26. But as the Ninth Circuit explained, those cases were decided before this Court emphasized that implied private rights of action are disfavored and require a statute to meet a heightened standard. *Mayer*, 895 F.3d at 700 n.3. Indeed, the clarity of this Court's recent decisions is probably why a Fourth Circuit panel could efficiently resolve the question presented in an unpublished opinion in *Steinberg v. Janus Capital Management, LLC*, 457 F. App'x 261, 267 (4th Cir. 2011) (per curiam). Ultimately, Saba's argument only underscores the entrenched disagreement and need for this Court's intervention.

4. Finally, Saba contends that the Court should let the question presented percolate given the "varied

factual circumstances in which claims under Section 47(b)(2) may arise." Opp. 23. But Saba gets it backwards. The facts underlying claims brought under Section 47(b) will often vary, precisely because Section 47(b) establishes that a contract is unenforceable whenever it violates "this subchapter," *i.e.*, *any* provision of the ICA. 15 U.S.C. § 80a-46(b)(1). Section 47(b)'s broad scope thus shows the importance of *granting* cert.

What's more, the Second Circuit's plaintiff-friendly rule means the question presented is unlikely to percolate. Pet. 3. Saba responds (Opp. 24-25) that forum-selection clauses will allow percolation. But even assuming any significant number of contracts have forum-selection clauses, Saba's own argument earlier in this case is that state law "does not permit corporations to adopt a forum selection [clause] for claims arising under the federal securities laws, such as the [ICA]." *Saba Capital Master Fund, Ltd v. ClearBridge Energy Midstream Opportunity Fund Inc.*, 694 F. Supp. 3d 394, 399 (S.D.N.Y. 2023). The Second Circuit is likely to be Saba's (and other plaintiffs') forum of choice, undermining percolation and making this Court's review all the more urgent.

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

The Third and Ninth Circuits are correct: Section 47(b) does not create a private right of action. Saba's cursory counterarguments simply track the Second Circuit's flawed reasoning.

A. This Court rarely recognizes an implied right of action, and Section 47(b)'s text and the ICA's structure don't call for one.

To create a cause of action, Congress must speak clearly—usually expressly, and rarely by implication.

Pet. 23-25; *see Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979). Put simply, a statute must contain "'rights-creating' language." *Alexander*, 532 U.S. at 288. Even then, if a statute provides another means of enforcement, or if it authorizes a private right of action for a different provision, courts will presume that Congress did *not* intend to implicitly create a private right of action. *See id.* at 290.

Section 47(b) doesn't create a private right of action. Pet. 25-27. The first subpart provides that a "contract that is made, or whose performance involves, a violation of [the ICA] … is unenforceable by either party." 15 U.S.C. § 80a-46(b)(1). If so, the second subpart prohibits a court from "deny[ing] rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant." *Id.* § 80a-46(b)(2). Neither provision contains rights-creating language; instead, they identify the relief a court can order if it finds that a contract violates the ICA. The ICA's structure likewise shows that Congress didn't create a right of action. Congress expressly created a private right of action *elsewhere* in the ICA, *see Mayer*, 895 F.3d at 701 (discussing Section 36(b)), while expressly empowering only the SEC to enforce Section 47(b), *see Santomenno*, 677 F.3d at 186 (discussing 15 U.S.C. § 80a-41).

B. The Second Circuit's decision is wrong, and Saba does little to defend it.

Neither the Second Circuit nor Saba points to rights-creating language showing that Congress meant to create an implied right of action in Section 47(b). The analysis should end there.

First, Saba claims (Opp. 31) that the "instance of any party" clause is rights-creating. That's wrong. As Petitioners explained (Pet. 27-29), that language allows a state-law breach-of-contract defendant to seek defensive rescission of a contract that violates the ICA. Alternatively, either party might ask a court to deny rescission and enforce the contract—whether in a breach-of-contract suit or an ICA action by the SEC—if denying "rescission would produce a more equitable result." 15 U.S.C. § 80a-46(b)(2). But the "any party" language isn't rights-creating. Saba doesn't engage with these points.

Second, Saba repeats (Opp. 32) the Second Circuit's reasoning relying on *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979). But Petitioners already explained (Pet. 29) why that decision about a *different* provision of the ICA doesn't help Saba. And Saba's observation (Opp. 29) that the SEC conceded as amicus in *Olmsted*—a decision that didn't address the question presented—that Section 47(b) creates a private right of action doesn't help it, either. That two-decades-old position relied on the same flawed legislative history that the Third and Ninth Circuits rejected in favor of textual analysis.

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

A. 1. Whether Section 47(b) creates an implied private right of action is a critical question. Pet. 29-32. Implied rights of action trigger core separation-of-powers concerns. *See Ziglar v. Abbasi*, 582 U.S. 120, 135 (2017). The Second Circuit's outlier rule here legislates from the bench, disturbing the level-of-enforcement and who-enforces balance that Congress struck when it created an express private right of

action in Section 36(b) while designating the SEC as enforcer more generally.

The question presented is also vital to funds and shareholders. The answer determines whether a shareholder may sue a fund under the ICA seeking rescission of an allegedly unlawful contract. The Second Circuit's rule declares open season on the many regulated parties that may be sued in the New York and hands a license to parties of all kinds who may use litigation to their strategic advantage and the detriment of ordinary investors.

2. Saba says (Opp. 27-28) the question presented isn't important because only parties to a contract can invoke the private right of action, and the action can result only in rescission, not damages. For starters, the Second Circuit put no such limits on its holding. *Supra* p. 7. In any event, whether private parties can bring rescission actions is a critical question. The *Mayer* plaintiff, for instance, sought rescission of executives' employment contracts, 895 F.3d at 698—something the Second Circuit's rule could permit. And rescission actions by contractual parties, like Saba, could allow plaintiffs to cause significant financial harm to investors by disrupting the way investment companies invest their funds. Pet. 31-32.

Saba also contends (Opp. 30) that review is unnecessary because it is the only private plaintiff so far to obtain relief under Section 47(b)(2). But one litigant's efforts, if consequential, can tee up a case warranting this Court's involvement. *See, e.g.*, *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 3 (2023). Just so here. The parties agree that Saba's many suits (Opp. 3, 30) exert significant pressure on investment funds and are

designed to change the way funds invest. That's proof that the question is important and warrants review.

B. Saba doesn't dispute that this case is the perfect vehicle for resolving the question presented. If the Court sides with the Third and Ninth Circuits, the summary judgment in Saba's favor will become a dismissal in Petitioners' favor. Pet. 32.

CONCLUSION

The Court should grant review.

Respectfully submitted.

Scott Musoff
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Eben Colby
Marley Ann Brumme
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
500 Boylston Street
Boston, MA 02116

Shay Dvoretzky
Counsel of Record
Parker Rider-Longmaid
Steven Marcus
Kyser Blakely
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
shay.dvoretzky@skadden.com

Stephen Sypherd
FS CREDIT OPPORTUNITIES CORP.
201 Rouse Blvd.
Philadelphia, PA 19112

Counsel for Petitioner FS Credit Opportunities Corp.

Stephen G. Topetzes
Jennifer R. Gonzalez
K&L GATES LLP
1601 K St. NW
Washington, DC 20006

Counsel for Petitioners Adams Diversified Equity Fund, Inc. and Adams Natural Resources Fund, Inc.

Eamon P. Joyce
Alex J. Kaplan
Charlotte K. Newell
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019

Counsel for Petitioner Royce Global Value Trust, Inc.

December 23, 2024