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

SUPPLEMENTAL BRIEF

MARK MUSICO
Counsel of Record
JACOB W. BUCHDAHL
ZACH FIELDS
SUSMAN GODFREY L.L.P.
One Manhattan West,
50th Floor
New York, NY 10001
(212) 336-8330
mmusico@susmangodfrey.com

Counsel for Respondents
Saba Capital Master Fund, Ltd.
and Saba Capital Management L.P.

381989

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Like Petitioners, the Government does not identify compelling reasons for this Court to grant review. In fact, the Solicitor General's brief highlights additional reasons why the petition should be denied. Most notably, the Government effectively concedes that Congress *did* provide a right of action for rescission under Section 47(a) of the Investment Company Act ("ICA"), confirming that Congress provided one under Section 47(b)(2) as well. The Government's concession renders meaningless any relief this Court could provide on the question presented, as Saba also asserted below that the Control Share Provisions are void under Section 47(a). *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (writ improvidently granted where "not clear" resolution of "question will make any difference [] to these litigants").

The Government's implicit concession that Section 47(a) provides a private right of action for rescission derives from its explicit concession that the pre-1980 version of Section 47(b) provided that right. As the Government acknowledges, when this Court recognized a private right of action for rescission under the Investment Advisers Act ("IAA"), the "then-current version" of the ICA "likewise authorized private suits" because Section 47(b) contained language identical to the IAA's directive that unlawful contracts "shall be void." Br.14. That shall-be-void language *remains in Section 47(a)* as to "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision" of the ICA. 15 U.S.C. § 80a-46(a). By the Government's own argument, then, Section 47(a) provides Saba a private

right of action, regardless of whether that right also exists under Section 47(b).

Affording any meaningful relief to Petitioners would thus require this Court to conclude not only that no private right of action exists under Section 47(b), but also that no such right exists under Section 47(a). That latter question has not been presented to this Court, was not adjudicated in the decision below (which rested on Section 47(b) instead), and is not the subject of any split of authority. This Court routinely declines to answer such novel questions in the first instance. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976). And the unaddressed questions about the private rights available under Section 47 more generally only underscore that the shallow, underdeveloped split as to Section 47(b)(2) calls out for further percolation. *See* BIO.14–27.

The Solicitor General also articulates no convincing interest of the United States in precluding private actions to rescind unlawful contracts between private parties. The Government asserts a vague, unsubstantiated concern about interference with "the SEC's discretionary enforcement and exemption decisions." Br.19–20. That is hard to credit when the SEC has been on record *supporting* the availability of a private right of action under Section 47(b) for the past 25 years, BIO.3, 29, and when the Government apparently continues to recognize a private right of action for rescission under Section 47(a), Br.14. Nor can there be a threat to the SEC's enforcement prerogatives when Saba has not asserted, and no court has recognized, a private right under Section 47(b) to challenge SEC exemptive orders. BIO.16–17, 23–24, 30. And there is no "more recent

guidance" from this Court to justify the Government's flip-flop, *contra* Br.12 n.2, as *Alexander v. Sandoval*, 532 U.S. 275 (2001), was decided *before* the SEC urged the Second Circuit to recognize a right of action under Section 47(b).

The Government asserts that a private right of action for rescission under Section 47(b)(2) risks "unpredictable" impacts on the investment industry. Br.20. But no such impact has materialized in the decades since this Court recognized analogous rights of action under both the IAA and the Exchange Act, or in the six years since the Second Circuit decided *Oxford*. *See* BIO.2–3, 28–29. That is hardly surprising: Like the analogous rights of action across the federal securities laws (including Section 47(a)), Section 47(b)(2) provides a narrowly defined right of rescission, *not compensatory damages*, to parties to illegal contracts—consistent with the plain text of the statute and with deeply rooted traditions in equity. *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 18–19 (1979); BIO.5–8, 30–32. The inherently limited nature of that right to seek recission obviates many if not all of the concerns which arise in the very different context of implied rights of action for damages.

In short, the decision below comports with the statutory text, settled interpretive principles, and the market's long-settled expectation that parties to contracts that violate the federal securities laws can sue to invalidate those illegal contracts. This Court should deny certiorari.

ARGUMENT

I. The Government's Statutory Construction Adds to the Reasons the Petition Should be Denied.

Saba sought to invalidate the Control Share Provisions under both Section 47(a) and Section 47(b). The Government asserts that there is no private right of action under Section 47(b)—but effectively concedes that there is a private right of action under Section 47(a), making the question presented practically moot.

According to the Government, *TAMA*'s recognition of a private right of action in the IAA turned on the statutory language providing that contracts in violation of the IAA "shall be void." Br.14 (quoting 15 U.S.C. § 80b-15(b)). That language "necessarily contemplates that the issue of voidness under its criteria may be litigated." *Id.* (quoting *TAMA*, 444 U.S. at 18). And "Congress, in declaring certain contracts 'void,' presumably 'intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission.'" *Id.* (quoting *TAMA*, 444 U.S. at 19).

Given *TAMA*, the Government concedes that the pre-1980 version of Section 47(b)—which used the same "shall be void" language—provided a private right of action for rescission. Br.14. And Section 47(a) still contains the "shall be void" language that, as the Government concedes, reflects Congressional intent to allow private "suit[s] for rescission" as one of the "customary legal incidents of voidness":

> Any condition, stipulation, or provision binding any person to waive compliance with

> any provision of [the ICA] or with any rule, regulation, or order thereunder *shall be void*.

15 U.S.C. § 80a-46(a) (emphasis added). Here, Saba brought its action asserting that the Control Share Provisions were void pursuant to Section 47(a) as well as Section 47(b). *See* Resp.C.A.Br.28 n.11; Resp.D.Ct.MSJ.Br.15; Resp.D.Ct.MSJ.Reply.15; Compl.App.C.46a-47a. Under the Government's own view, then, an answer on the question presented—whether Saba has an implied right of action for rescission under Section 47(b)—is effectively moot because Saba's claim is independently supported by Section 47(a) in any event. That confirms that certiorari should be denied. *See Ticor Title Ins.*, 511 U.S. at 122; *DeBacker v. Brainard*, 396 U.S 28, 31–33 (1969) (writ improvidently granted after concession that petitioner would have lost "[n]o matter what the standard was").

II. The Solicitor General Identifies No Compelling Reasons to Grant Review.

The Solicitor General also does not articulate any convincing interest of the United States in precluding private suits to rescind unlawful contracts between private parties.

1. The Government does not explain how a limited private right to seek rescission of illegal contracts under Section 47(b)(2)—with no right to seek damages, or to challenge compliance with SEC exemption orders—threatens "the SEC's discretionary enforcement and exemption decisions." Br.19–20. It does not even attempt to address the Second Circuit's explanation that the SEC maintains its enforcement and exemption authority under the

ICA notwithstanding the availability of private suits for rescission. *See Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 104–05 (2d Cir. 2019); *see also* BIO.16–17, 23–24, 30.

The SEC's longstanding endorsement of a private right to seek rescission under Section 47(b) also heavily undermines its newfound skepticism. BIO.3, 29. In December 2001, the SEC filed an *amicus* brief urging the Second Circuit to recognize a right of action for rescission under Section 47(b). *See* Br.SEC, *Olmsted v. Pruco Life Ins. Co. of NJ,* No. 00-9511 (2d. Cir), 2001 WL 34397948, at *10–12 (Dec. 5, 2001). The SEC asserted that because "Congress was aware of [*TAMA*] at the time it amended [Section 47(b)]," and "given [its] explicit language," Section 47(b) "should be viewed as [providing] an *express* rather than an implied" private right of action to seek rescission. *Id.*12 (emphasis added).

The Government now asserts that the SEC has "reconsidered" its view given "this Court's more recent guidance on implied private rights to enforce federal law." Br.12 n.2. But no "more recent guidance on implied private rights" from this Court actually exists, and the SEC went out of its way to contend that the right to seek recission under Section 47(b) is *express*. This Court decided *Sandoval* in April 2001—articulating the still-operative standard for evaluating private rights of action, *see Maine Comm. Health Options v. United States*, 590 U.S. 296, 323 n.12 (2020)—before the SEC, in December 2001, examined the ICA's text and determined that a private right of action was unambiguously conferred. *See Sandoval*, 532 U.S. 275 (decided April 24, 2001); Br.SEC, *Olmsted*, 2001 WL 34397948 (filed Dec. 5,

2001). Nothing this Court has said since then casts doubt on the limited right of action for rescission of illegal contracts under Section 47(b)(2) that the SEC recognized more than two decades ago, and apparently continues to recognize under Section 47(a).

There is also no basis for the claim that a private right of action for rescission under Section 47(b)(2) could have "unpredictable" impacts on the investment industry. Br.20. This Court has recognized analogous rights of action to rescind unlawful contracts in provisions across the federal securities laws for over half a century, without any apparent negative effects on private investment or the securities markets. *See* BIO.2–3, 28–29 (citing *TAMA*, 444 U.S. at 15–19 (private right of action for rescission under Section 215 of the IAA, 15 U.S.C. § 80b–15); *Mills v. Electric Auto-Lite*, 396 U.S. 375, 386–88, nn. 9, 10 (1970) (private right of action for rescission under Section 29(b) of the Exchange Act, 15 U.S.C. § 78cc)). And even as to Section 47(b) itself, the Government cites nothing suggesting that the sky has fallen since the Second Circuit decided *Oxford* six years ago.

On the contrary, the limited right of private parties to rescind illegal private contracts under Section 47(b) promotes the uniform application of federal law. As the Second Circuit recognized, the text of Section 47(b) specifically recognizes the role of private parties in enforcing the ICA's substantive protections. *Oxford*, 933 F.3d at 106; *compare, e.g.,* 15 U.S.C. § 80a-3(b)(2) ("*the Commission* shall by order revoke such order" (emphasis added)), *with id.* § 80a-46(b)(2) ("a court may not deny rescission at the instance of *any party*" (emphasis added)). That private mechanism is critical, given that the SEC cannot

possibly police every private contract entered into by every registered investment company. And because that private mechanism is limited to rescission of illegal contracts, without any right to seek damages or to challenge SEC exemptive orders, it poses no threat of improper interference with SEC enforcement authority and discretion.

2. The small handful of cases in which Saba has obtained rescission of unlawful contractual provisions, BIO.30; Br.19, demonstrate how the limited private right available under Section 47(b)(2) poses no threat to the SEC's enforcement powers or the investment industry, and instead furthers the ICA's investor-protective purposes. The courts in each of those cases found—as a matter of law, and without need for discovery—that Saba's claims vindicated the ICA's shareholder-protective policies and purposes by seeking to prevent closed-end funds from being operated in the interest of entrenched management. *See* BIO.11; *Saba Capital Cef Opp. 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 120–21 (2d Cir. 2023) (purposes of the ICA "lean in Saba's favor"). And consistent with the narrow right of rescission recognized by the Second Circuit:

- None of the cases brought by Saba sought any award of damages, belying any concern that defendants could be pressured into settling to avoid monetary liability;
- None involved invalidation of contracts to which Saba is not a party, belying any concern that roving "private attorneys general" might upset broad swaths of contracts across the industry; and

- None involved any challenge to SEC exemption orders, belying any concern that a private right to rescind illegal contracts could disturb the SEC's considered enforcement judgment.

See generally BIO.3–4, 8–13, 29–30.

Consider, for example, one of the Defendants below: the BlackRock ESG Capital Allocation Trust. Saba does not know why the SEC has not itself taken action against BlackRock based on the unlawful governance provisions of its so-called "Environmental, Social, and Governance" (ESG) trust—which, as its name suggests, places extraneous interests above the interests of shareholders. *See* Max Schanzenbach & Robert Sitkoff, *Reconciling Fiduciary Duty and Social Conscience*, 72 STAN. L. REV. 381 (2020) (considering frequent disconnect between trustees' duties to shareholders and ESG investing). But as best Saba can tell, its suit against the BlackRock ESG trust *aligns* with the Government's posture toward ESG-based investing generally, and BlackRock's ESG investing in particular.[1] And of course, if the SEC has some reason to exempt the BlackRock ESG trust from the ICA, Section 47(b)(2) would not provide a private right of action to challenge that exemption order.

In short, the Solicitor General cannot explain how recognizing an appropriately circumscribed right

---

[1] *See Texas v. BlackRock, Inc.*, No. 6:24-cv-00437-JDK (E.D. Tex.), Statement of Interest of the United States, Dkt. 99 at 21 (DOJ and FTC arguing BlackRock engages in unlawful collusion "purportedly in service of an 'ESG agenda'"); *Utah v. Chavez-DeRemer*, No. 23-11097 (5th Cir.), Gov't Letter (May 28, 2025) (Department of Labor engaging in rulemaking to replace challenged 2023 rule permitting ESG considerations by ERISA fiduciaries).

of action under Section 47(b)(2) to rescind unlawful contracts, with no right to seek damages or challenge SEC orders, would have any negative impact on the SEC's authority and discretion or on the investment industry generally.

3. The Government also underestimates the value of further percolation. It has no answer to the various ways in which the Second Circuit's narrow construction of Section 47(b)(2) largely aligns with the supposedly conflicting decisions in the Third and Ninth Circuits, including that:

- The circuits agree that Section 47(b)(2) provides no claim for damages or fees. *Oxford*, 933 F.3d at 107–08 & n.5; *accord Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co.*, 677 F.3d 178, 187 (3d Cir. 2012) (rejecting a damages claim).
- The circuits agree that any Section 47(b)(2) right of rescission is limited to "parties to illegal contracts." *Oxford*, 933 F.3d at 108; *accord Santomenno*, 677 F.3d at 181 (rejecting a claim by non-parties).
- The circuits agree that Section 47(b) cannot provide a "backdoor" to other causes of action, *NexPoint Diversified Real Estate Trust v. Acis Capital Mgmt., LP*, 80 F.4th 413, 420 (2d Cir. 2023), including to challenge SEC exemptive orders, *see UFCW Local 1500 Pension Fund v. Mayer,* 895 F.3d 695, 700 (9th Cir. 2018).

The Government, like Petitioners, does not meaningfully engage with these nuances, nor does it contend with the fact that no Circuit has addressed whether Section 47(b)(2) provides a private right of rescission since the Second Circuit's decisions in

Oxford and *NexPoint*. Given the broad areas of agreement in the lower courts and the Second Circuit's narrow holding, which largely resolves the concerns driving the Third and Ninth Circuits' decisions, further percolation could well lead the circuits to harmonize their approaches, particularly in light of the Government's apparent concession that a private right of rescission exists under Section 47(a).

III. *Oxford* Was Correctly Decided.

The decision below is also correct. *See* BIO.5–8, 30–32. In the Government's view, Section 47(b) "simply prescribes a rule of decision for contractual disputes that are otherwise properly before a court." Br.10. But the Government cannot reconcile its reading with the statutory text in at least two respects.

First, the statute provides that "to the extent that a contract . . . *has been performed*, a court may not deny rescission at the instance of any party." 15 U.S.C. § 80a-46(b)(2) (emphasis added). If a contract "has been performed," there is no claim for breach of contract. Section 47(b)(2) thus expressly addresses the situation in which there *is no* otherwise-pending contract action, by affording a private right of action to seek rescission.

Second, the statute provides that a court may not deny rescission at the instance of "*any party*." 15 U.S.C. § 80a-46(b)(2) (emphasis added). The Government would revise that language to say that only "a defendant in a breach of contract action" may obtain rescission. If Congress had wanted to limit Section 47(b)(2) in that way, it would have done so.

In reality, as the Government acknowledges, it was clear after *TAMA* that Section 47(b) provided a private right of action for rescission just like the parallel provision of the IAA. And far from abandoning that private right of action, Congress "reinforce[d]" it in the 1980 amendments to the ICA, by "distinguish[ing] between unperformed and performed contracts, consistent with *TAMA's* interpretation of Congress's intent." *Oxford*, 933 F.3d at 107; *see* A. SCALIA & B. GARNER, READING LAW 252 (2012) ("laws dealing with the same subject[,] being *in pari materia*" should be "interpreted harmoniously").

Legislative history, to the extent this Court considers it at all, confirms the point. The House Committee Report on the 1980 amendments recognized *TAMA*'s holding that the IAA conferred a private right of action to rescind illegal contracts, and made clear that it expected the courts to provide for the same enforcement mechanism under the amendments to Section 47. H.R. Rep. No. 96-1341, 96th Cong., 2d Sess., at 28–29 & n.6 (1980); *see id.*37 (amendment to Section 47(b) "to an extent, codifies case law under the present section, and its analogs in other securities laws"). That history only underscores what the statutory text and *TAMA* make clear: Section 47(b), like Section 47(a), provides a limited private right of action for rescission of illegal contracts.

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

MARK MUSICO
Counsel of Record
JACOB W. BUCHDAHL
ZACH FIELDS
SUSMAN GODFREY L.L.P.
One Manhattan West,
50th Floor
New York, NY 10001
(212) 336-8330
mmusico@susmangodfrey.com

Counsel for Respondents Saba Capital Master Fund, Ltd. and Saba Capital Management L.P.