

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*

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The Court should grant review for the reasons explained in the Solicitor General’s invitation brief, the petition, and the reply. This case presents an acknowledged circuit split on an important question: whether Section 47(b) of the Investment Company Act (ICA), 15 U.S.C. § 80a-46(b), creates a private right of action.

Saba’s supplemental brief offers no reason to deny review. Petitioners write solely to respond to the argument Saba raises for the first time that this case is a poor vehicle because Saba also has a right of action under Section 47(a), so resolving the question presented would be “meaningless.” Saba Suppl. Br. 1. That new argument raises no vehicle issue, because neither the Second Circuit nor the district court addressed it. It is also wrong on the merits—and, indeed, Saba makes no attempt to explain it.

1. Saba’s Section 47(a) argument presents no obstacle to review. Neither the Second Circuit nor the district court addressed whether Section 47(a) gives Saba a private right of action. Rather, both courts decided that Saba could sue solely on Section 47(b)(2) grounds. Thus, there is no alternative ground making resolution of the question presented “meaningless.” And Second Circuit precedent makes clear that Saba’s newfound Section 47(a) argument would have failed had Saba made it.

a. The district court addressed only Section 47(b)(2). The court held that, under binding Second Circuit precedent, that “rescission provision ‘creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract.’” App. 18a (quoting *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 109

(2d Cir. 2019)). And Saba never raised Section 47(a) as a basis for rescission. Instead, Saba’s complaint stated that Saba “seeks rescission of the Control Share Provisions pursuant to Section 47(b)(2) of the [ICA].” App. 36a. Similarly, Saba’s summary judgment motion sought rescission only “under Section 47(b) of the ICA.” Dist. Ct. Doc. 23, at 15-16.

When defending rescission before the Second Circuit, Saba likewise argued that the district court was correct that a court “may not deny rescission” under Section 47(b)(2), and did not rely on Section 47(a). CA2 Doc. 75.1, at 3. The most Saba said (in a footnote) was that “[t]o the extent other provisions of § 80a-46 are relevant,” they support Saba’s position about Section 47(b)(2). *Id.* at 28 n.11. The Second Circuit, in turn, held only that Section 47(b)(2) created a private right of action for Saba’s claim. App. 13a.

b. Saba’s Section 47(a) argument cannot create a vehicle problem because no court below addressed it. But the problem goes deeper: Had Saba made the argument, the Second Circuit would have rejected it.

Section 47(a) provides that “[a]ny 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. § 80b-46(a). Saba rests its argument on the observation (Suppl. Br. 4, 7) that Section 47(a) tracks Section 215(a) of the Investment Advisers Act (IAA), which states that “[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the IAA] or with any rule, regulation, or order thereunder shall be void.” 15 U.S.C. § 80b-15(a). But in the Second Circuit, that language does not create a cause of action to rescind provisions that

violate the statute. To the contrary, the Second Circuit has explained that “Section 215(a) is plainly drafted as an anti-waiver provision that prohibits parties from contracting around compliance with the IAA. It does not ‘address[] the circumstance in which a provision facially violates the IAA.’” *NexPoint Diversified Real Estate Trust v. Acis Capital Management, L.P.*, 80 F.4th 413, 419 n.6 (2d Cir. 2023).

NexPoint rules out Saba’s Section 47(a) argument. The control share provisions that Saba seeks to rescind do not purport to waive compliance with the ICA, either implicitly or explicitly. Instead, Saba claims that the provisions facially violate the ICA because they limit voting rights, contrary to the ICA. Under *NexPoint*, Saba has no Section 47(a) argument.

2. In any event, Saba’s Section 47(a) argument fails on the merits for the reasons *NexPoint* explained. Section 47(b) addresses contract provisions that “involve[]” “a violation” of the ICA, 15 U.S.C. § 80b-46(b), whereas Section 47(a) addresses provisions that “waive compliance with” the ICA, *id.* § 80b-46(a). Saba’s unexplained argument equates a violation of the ICA with a waiver of the ICA, contravening plain text and also defying “the rule that [courts] must normally seek to construe Congress’s work ‘so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant.’” *Ysleta del Sur Pueblo v. Texas*, 596 U.S. 685, 698-99 (2022) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). No matter whether Section 47(a) might grant a right of action in some circumstances—a question neither this Court nor any court of appeals has addressed—Saba cannot invoke Section 47(a) because the control share provisions it seeks to rescind do not purport to waive compliance with the ICA.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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