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

BRIEF FOR PETITIONERS AND BLACKROCK RESPONDENTS SUPPORTING PETITIONERS

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

Scott Musoff
Jeremy Patashnik
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

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
Varu Chilakamarri
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
James R. Horner
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019

Counsel for Petitioner Royce Global Trust, Inc.

Tariq Mundiya
Vanessa C. Richardson
Aaron E. Nathan
WILKIE FARR & GALLAGHER LLP
787 Seventh Ave.
New York, NY 10019

Counsel for Respondents BlackRock ESG Capital Allocation Term Trust & BlackRock Municipal Credit Alpha Fund, Inc. (BlackRock Respondents Supporting Petitioners)

QUESTION PRESENTED

Whether Section 47(b) of the Investment Company Act of 1940, 15 U.S.C. § 80a-46(b), creates an implied private right of action.

PARTIES TO THE PROCEEDING

Petitioners are FS Credit Opportunities Corp.; Adams Diversified Equity Fund, Inc.; Adams Natural Resources Fund, Inc.; and Royce Global Trust, Inc. (formerly known as Royce Global Value Trust, Inc.). Petitioners were Defendants-Appellants below.

Respondents Saba Capital Master Fund, Ltd., and Saba Capital Management, L.P., were Plaintiffs-Appellees below.

Respondents BlackRock ESG Capital Allocation Trust; BlackRock Municipal Credit Alpha Fund, Inc. (formerly known as BlackRock Municipal Income Fund, Inc.); Tortoise Midstream Energy Fund, Inc.; Tortoise Energy Independence Fund, Inc.; Tortoise Pipeline & Energy Fund, Inc.; Tortoise Energy Infrastructure Corp.; and Ecofin Sustainable and Social Impact Term Fund were Defendants-Appellants below. Respondents BlackRock ESG Capital Allocation Trust and BlackRock Municipal Credit Alpha Fund, Inc., join this brief.

CORPORATE DISCLOSURE STATEMENTS

FS Credit Opportunities Corp., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

Adams Diversified Equity Fund, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

Adams Natural Resources Fund, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

BlackRock ESG Capital Allocation Trust does not have a parent corporation and no publicly held company holds more than 10% of its stock.

BlackRock Municipal Credit Alpha Fund, Inc., formerly known as BlackRock Municipal Income Fund, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

Royce Global Trust, Inc., formerly known as Royce Global Value Trust, Inc., does not have a parent corporation and no publicly held company holds more than 10% of its stock.

RELATED PROCEEDINGS

United States Court of Appeals (2d Cir.):

Saba Capital Master Fund, Ltd., et al. v. BlackRock ESG Capital Allocation Trust, et al., Nos. 23-8104, 24-79, 24-80, 24-82, 24-83, 24-116, 24-189 (June 26, 2024)

United States District Court (S.D.N.Y.):

Saba Capital Master Fund, Ltd., et al. v. BlackRock Municipal Income Fund, Inc., et al., No. 23-cv-5568 (Jan. 4, 2024)

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

The question here is whether courts can find a private right of action in a federal statute without any textual or structural clue that Congress intended to create one. The straightforward answer is no.

Congress enacted the Investment Company Act of 1940 (ICA or Act), 15 U.S.C. §§ 80a-1 to 80b-21, to regulate investment companies (including mutual funds). It explicitly tasked the Securities and Exchange Commission with enforcing the ICA's provisions. And it expressly authorized private enforcement of the ICA in two narrow provisions, but otherwise made the SEC the ICA's sole enforcer, granting the Commission power to investigate violations, bring actions for injunctive relief and monetary damages, and exempt activity from the ICA.

That was the state of play until 2019, when the Second Circuit found an implied private right of action in Section 47(b) of the ICA. *Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019). In the Second Circuit's view, Section 47(b) creates a federal private right of action for rescission of contracts that violate any provision of the ICA.

The Second Circuit's approach harkens back to an "*ancien regime*"—a time when this Court regularly found private rights of action based on nothing more than a vague idea about congressional purpose. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). But given the serious separation-of-powers problems inherent in finding implied private rights of action, this Court has "sworn off the habit of venturing beyond Congress's intent," and now looks only to statutory text and structure to determine whether Congress created a private cause of action. *Id.*

And here, the text and structure of Section 47 show that Congress didn't create a private right of action. Section 47(b) says merely that a contract that violates the ICA "is unenforceable by either party," 15 U.S.C. § 80a-46(b)(1), and that if a contract "has been performed, a court may not deny rescission at the instance of any party unless" doing so would be more equitable than rescinding the contract, *id.* § 80a-46(b)(2). Those provisions contain none of the rights-creating language required to find an implied private right of action. Instead, those provisions prescribe when courts can order equitable relief for a party already properly before the court—like a defendant in a breach-of-contract action—who argues that a contract is unenforceable because it violates the ICA. And the structure of the ICA—including its comprehensive regime for SEC enforcement and its express provision of a private right of action in *other* statutory subsections—confirms that Congress didn't intend private enforcement.

This case illustrates why an implied private right of action requires clear indications of congressional intent. Congress empowered the SEC to enforce the ICA, and it authorized the SEC to grant exemptions to the ICA to respond to the rapidly changing financial landscape. Recognizing an implied private right of action in Section 47 would upend that system, allowing private parties to seek rescission of all manner of contracts that they allege violate the ICA—potentially even if the SEC is considering granting or has granted an exemption. Finding a private right of action in the ICA would create intolerable uncertainty for regulated funds, threatening the financial stability and retirement security that funds provide for millions of Americans.

The Second Circuit's contrary conclusion is wrong. The court first relied on the language in Section 47(b)(2) that "a court may not deny rescission at the instance of any party" unless certain conditions are met. 15 U.S.C. § 80a-46(b)(2). According to the court, that language "necessarily presupposes" a private right of action. *Oxford University Bank*, 933 F.3d at 105. That's incorrect. Section 47(b)(2) plays an important role by establishing the rules for rescission for parties already before the court—a defendant to a breach-of-contract claim could raise rescission as an affirmative defense. Congress needed to enact that provision to create uniform federal rules for violations of a federal statute, especially since state common-law rules might otherwise restrict rescission. Section 47(b)(2) doesn't need to create a private right of action to have work to do.

The Second Circuit also relied on *Transamerica Mortgage Advisors, Inc. v. Lewis* (*TAMA*), 444 U.S. 11 (1979). But *TAMA* cuts *against* a private right of action in Section 47(b). *TAMA* found an implied private right of action in Section 215(b), but not Section 206(a), of the Investment Advisers Act of 1940 (IAA). *Id.* at 19-21. But Section 215(b) has very different language from Section 47(b). And unlike the IAA, which doesn't provide an express private cause of action, the ICA contains two express private rights of action showing that Congress didn't intend to create a right of action in Section 47(b).

The answer to the question presented here is straightforward: Congress didn't create an implied private right of action in Section 47(b) of the ICA, and that resolves this case. The Court should reverse.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-14a) is unpublished but available at 2024 WL 3174971. The district court's opinion (Pet. App. 15a-32a) is reported at 710 F. Supp. 3d 213.

JURISDICTION

The court of appeals entered judgment on June 26, 2024. Pet. App. 1a. Petitioners timely petitioned for a writ of certiorari on September 24, 2024, and the Court granted review on June 30, 2025. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. §§ 80a-6, 80a-18(i), 80a-29, 80a-35, 80a-41, 80a-46, are reproduced in an appendix to this brief, *see* App. 1a-28a, and in the petition appendix, *see* Pet. App. 51a-78a.

STATEMENT

A. The Investment Company Act

1. Congress enacted the ICA in 1940 as part of a comprehensive effort "to eliminate certain abuses in the securities industry." *Securities & Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963). That effort included the Securities Act of 1933, the Securities Exchange Act of 1934 (1934 Act), the Public Utility Holding Company Act of 1935, the Trust Indenture Act of 1939, and the Investment Advisers Act of 1940. *Id.*

The ICA regulates "investment compan[ies]," the "most common" of which are mutual funds. *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 698 (1975). Before the ICA's enactment, arbitrage investors focused on short-term gains would commandeer funds by acquiring 10% or more of a fund's shares. *See* H.R. Doc. No. 76-279, at 1019-21 (1940). They would then leverage their concentrated voting power to change the funds' investment policies, cashing out at premium prices while leaving long-term shareholders holding the bag. *See id.*

2. Congress enacted the ICA to remedy those problems. "[I]nvestors are adversely affected," Congress found, by certain tactics and practices, including "when the control of investment companies is unduly concentrated" or "when investment companies operate without adequate assets or reserves." 15 U.S.C. § 80a-1(b)(4), (8). To protect investors, the ICA "regulates most transactions between investment companies and their advisers; limits the number of persons affiliated with the adviser who may serve on the fund's board of directors; and requires that fees for investment advice and other services be governed by a written contract approved both by the directors and the shareholders of the fund." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536-37 (1984). The ICA also imposes other safeguards, including requiring funds to register with the SEC and to maintain a minimum proportion of disinterested directors. *See* 15 U.S.C. § 80a-10(a).

The ICA relies almost entirely on the SEC to enforce its provisions. The Act vests "in the SEC broad regulatory authority over the business practices of the investment companies." *E. I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 52 (1977). For example, Section 42 empowers the Commission to enforce "any provision" of the ICA by investigating violations and suing in federal court for temporary and permanent injunctive relief and civil monetary penalties. 15 U.S.C. § 80a-41(d), (e). And Section 6 authorizes the SEC to determine whether, and to what extent, a regulated party is exempt from complying with provisions of the ICA. *Id.* § 80a-6(c).

The ICA contains only two provisions, both narrow, expressly authorizing a private right of action. *First*, Section 30(h) (originally Section 30(f), and now codified at 15 U.S.C. § 80a-29(h)) "expressly authorize[s] private suits for damages" against certain defendants by incorporating the private right of action in Section 16(b) of the 1934 Act, *id.* § 78p(b). *TAMA*, 444 U.S. at 20 & n.10. That targeted provision allows particular plaintiffs (holders of securities) to sue officers, directors, and certain beneficial owners of a corporation who realize profits from short-swing trading by insiders. *See Gollust v. Mendell*, 501 U.S. 115, 122 (1991).

Second, in 1970, Congress added Section 36(b), providing another express private right of action. Section 36 provides that "[a]n action may be brought under this subsection by the Commission, *or by a security holder* of [the] registered investment company … for breach of fiduciary duty." 15 U.S.C. § 80a-35(b) (emphasis added). In that provision, Congress specifically set forth the cause of action's parameters, assigning the burden of proving a breach to the plaintiff and limiting damages to those incurred within one year of the institution of the action. *See id.*

3. Section 47, which Congress enacted in 1940 and then amended in 1980, contains none of the private-right-of-action language of Section 36(b). 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. § 80a-46(a). Section 47(b) provides, in relevant part:

> (1) A contract that is made, or whose performance involves, a violation of this subchapter … 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.

Id. § 80a-46(b)(1)–(2). Every court of appeals that has interpreted Section 47(b) agrees that "Congress did not expressly state that a party to an illegal contract may sue to rescind it." *Oxford University Bank*, 933 F.3d at 105. The question presented is whether Section 47(b) nonetheless impliedly creates a private right of action. Only the Second Circuit has held it does. *See* Pet. 17-23.

B. Factual and procedural background

Petitioners and the BlackRock Respondents (which support Petitioners) are closed-end investment companies (Funds). This case arises from the Funds' adoption of a commonplace measure, authorized by state law, designed to protect ordinary, long-term investors from opportunistic investors who seek to exert inequitable control over funds to capture short-term profits at long-term investors' expense. That measure, called a "control-share provision," restricts the voting rights of certain shareholders who acquire (typically)

10% or more of a fund's shares (with the shares above 10% called "control shares"). Respondents Saba Capital Master Fund, Ltd., and Saba Capital Management, L.P. (together, Saba), sued the Funds, expressly relying on *Oxford University Bank* to affirmatively seek rescission of the control-share provision under Section 47(b). The district court granted summary judgment for Saba, and the Second Circuit affirmed.

1. The Funds serve investors who rely on long-term investments.

a. The Funds are a special kind of investment—called "closed-end" funds—registered under the ICA and organized under Maryland law. Pet. App. 17a. Closed-end funds are often desirable investments for investors, like many retirees or people approaching retirement, who seek the long-term stability of dividend-producing assets. Generally speaking, the distribution rates of closed-end funds (in the form of dividends) exceed those of comparable investments like the open-end funds discussed below.

The best way to understand the defining features of a closed-end fund is to compare it with an "open-end" fund. "Open-end" funds, which include typical mutual funds, continually issue new shares to investors who wish to invest in the fund. *Board of Governors of Federal Reserve System v. Investment Company Institute*, 450 U.S. 46, 51 (1981). The fund also "stands ready at any time to redeem" those shares at a price based on the fund's current net asset value. *Id.*; *see also* 17 C.F.R. § 270.22c-1(a). By contrast, a "closed-end" fund generally "does not issue shares after its initial organization except at infrequent intervals and does not stand ready to redeem its shares." *Investment Company Institute*, 450 U.S. at 51. Instead, shares of closed-end funds are typically traded, like "any other corporate stock," "on the exchanges or over-the-counter at a price established by the market." 6 Law Sec. Reg. § 20:17, Westlaw (database updated May 2025). Thus, a closed-end fund's share price fluctuates based on how much an investor is willing to pay for the share, which can often be at a premium or a discount to the fund's net asset value. *See generally Saba Capital CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 108 (2d Cir. 2023).

Given their special characteristics, closed-end funds often have more leeway than open-end funds in making investment decisions. That's largely because, unlike open-end funds, closed-end funds aren't required to redeem shares from shareholders, while open-end funds are. *See id.* In fact, the ICA prohibits shares of a closed-end fund from being redeemable at the option of their holders. Thus, closed-end funds need not maintain significant cash reserves, and they can invest in less liquid securities. *See id.* And closed-end funds can leverage their financial position (that is, borrow money to invest) more than open-end funds. *See* Investment Company Institute, *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses*, at 12 (Mar. 2020) (ICI Report), tinyurl.com/4ekds39x.

Those differences result in different investment benefits, so the different funds attract investors with different priorities. Long-term investors often invest in closed-end funds precisely because they generally produce higher and more consistent dividends. *See* ICI Report 12; *I. Meyer Pincus & Associates, P.C. v.*

Oppenheimer & Co., 936 F.2d 759, 762 (2d Cir. 1991). For example, individuals closer to retirement may wish to buy and hold shares in closed-end funds given the steady dividends closed-end funds often produce. *See* ICI Report 12 n.37.

The features of closed-end funds also make them vulnerable to investors who seek to control the fund to maximize their short-term profits at the expense of longer-term investors. Long-term investors can't reap the long-term benefits that attracted them to the closed-end fund in the first place if the closed-end fund is commandeered and forced to implement short-term investment strategies. Addressing the problem, many states, including Maryland, have enacted control-share statutes that expressly restrict the rights of a corporation's concentrated shareholders to vote their shares above a certain threshold. *See* Pet. App. 49a-50a (listing state statutes). Those statutes allow funds to structure their governance to ensure that investors realize the benefits of the closed-end fund.

b. Like other closed-end funds, the Funds are designed mainly for long-term investors. And because the Funds seek to protect their long-term investors against concentrated short-term investors that exert inequitable control to obtain short-term profits, they adopted resolutions opting in to the Maryland Control Share Acquisition Act (MCSAA), one of the many state statutes that protects closed-end funds from investors focused on short-term profits. Pet. App. 4a-5a.

The MCSAA provides, in relevant part:

> Holders of control shares of the corporation acquired in a control share acquisition have no voting rights with respect to the control shares except to the extent approved by the

> stockholders at a meeting held under § 3-704 of this subtitle by the affirmative vote of two-thirds of all the votes entitled to be cast on the matter, excluding all interested shares.

Md. Code Ann., Corps. & Ass'ns § 3-702(a)(1). That provision applies when a person owns or has the power to direct the voting of certain shares, with the lowest threshold being 10% or more of all voting power. *Id.* § 3-701(d)-(e). Thus, shareholders owning a disproportionate number of shares are presumptively prohibited from voting their shares above certain thresholds (the first, relevant here, is 10%) without the approval of non-interested shareholders holding two-thirds of the non-interested shares. Pet. App. 5a.

2. Saba is an arbitrage investor focused on short-term profits.

Saba describes itself as an activist investor. *Saba*, 88 F.4th at 108. It invests in closed-end funds whose shares are trading at a discount compared to the funds' net asset value. Then it sells its shares at or close to the net asset value to earn a short-term profit, *id.*, often at the expense of long-term investors.

Saba captures short-term profits by implementing a specific "business strategy." *Id.* It acquires large numbers of shares to gain disproportionate control over a fund, and then leverages that control to initiate investment or structural actions that typically create opportunities to sell its shares at a price closer to the net asset value. *See* Dist. Ct. Doc. 100 at 14-17. For example, Saba pushes for "measures authorizing the buyback of shares at or near [net asset value]." *Saba*, 88 F.4th at 108. This maneuver lets the short-term concentrated investor squeeze a quick profit from the fund at long-term investors' expense. *See* 3 Law Sec.

Reg. § 11:52. Other actions likewise can lead to similar short-term profits, like "converting" a closed-end fund into an open-end fund. *Saba*, 88 F.4th at 108; *see* Dist. Ct. Doc. 100 at 14-17.

These tactics conflict with the interests of other shareholders. Take forced share-buybacks. A fund needs cash to satisfy a share buyback. But closed-end funds, by design, generally hold comparatively little cash. Instead, they increase their potential for long-term returns by *fully* investing their assets—something they can do only because, unlike open-end funds, they are not required to redeem shares daily "at the option of the shareholder." *Green v. Nuveen Advisory Corp.*, 295 F.3d 738, 740 n.1 (7th Cir. 2002). Thus, if a closed-end fund is forced to satisfy a large share buyback, it must find the money to do so by selling portfolio holdings—even, if necessary, at a loss, particularly when the holdings are not liquid. ICI Report 12-13; *see, e.g.*, *Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.*, No. 2084CV01533, 2024 WL 4579652, at *2 (Mass. Super. Ct. Oct. 21, 2024). The consequences are a decreased asset base, reduction in leverage, and potentially unfavorable tax consequences—"all to the detriment of the fund's returns and distributable income." ICI Report 13. When short-term concentrated investors cash out, the ordinary shareholders suffer.

3. Invoking Section 47(b), Saba sues the Funds under Second Circuit precedent that created a circuit split.

a. In June 2023, Saba sued the Funds, invoking Section 47(b) of the ICA. Pet. App. 5a. Saba alleges that the Funds' resolutions adopting the MCSAA violate Section 18(i) of the ICA, which requires that "every share of stock … shall be a voting stock and have equal voting rights with every other outstanding stock." 15 U.S.C. § 80a-18(i); *see* Pet. App. 5a. In Saba's view, the resolutions thus must be rescinded under Section 47(b). Pet. App. 5a.

Saba sued even though it had only a nominal interest in many of the Funds—as low as 2% for one (Royce), nowhere near the MCSAA's 10% threshold. Pet. App. 8a-9a. Saba purchased that 2% stake about two years after Royce had adopted its control-share provision, and never increased its stake. Dist. Ct. Docs. 23-2 at 3-5, 92-1 at 13, 92-2 at 5, & 92-14 at 29. Although Saba claimed it would have purchased more shares but for the control-share provision, *see* Pet. App. 8a, Saba didn't own any shares of other Funds before those Funds adopted control-share provisions, suggesting that Saba wanted to purchase shares only because a Fund had a control-share provision.

Saba moved for summary judgment, relying on *Oxford University Bank*, 933 F.3d at 109, which holds that Section 47(b) creates an implied private right of action for a party seeking rescission of a contract that allegedly violates the ICA. *See* Pet. App. 5a, 36a, 45a. That holding conflicts with the published decisions of the Third and Ninth Circuits—each of which holds that neither the language nor the structure of the ICA permits a court to read Section 47(b) as implying a private right of action. Pet. 17-23. Because the district court was bound by *Oxford University Bank*, the Funds preserved their argument that Section 47(b) does *not* create an implied private right of action. *See, e.g.*, Dist. Ct. Docs. 90 at 12-13, & 106 at 14 n.11.

b. Following *Oxford University Bank*, the district court ruled that Saba could sue because Section 47(b) "creates an implied private right of action." Pet. App. 18a. It granted summary judgment for Saba, holding that under Second Circuit precedent, the Funds' resolutions opting in to the MCSAA violate Section 18(i) of the ICA. *See* Pet. App. 29a-31a. The court thus ordered that the resolutions be rescinded. Pet. App. 31a-32a.

c. On appeal, because the Second Circuit was also bound by *Oxford University Bank*, the Funds again preserved their argument that Section 47(b) does not create an implied private right of action. *See, e.g.*, CA2 Doc. 66 at 5, 21-22, 39-41. The Second Circuit affirmed the district court's judgment, *see* Pet. App. 9a-14a, without addressing the implied-private-right-of-action issue.

SUMMARY OF ARGUMENT

Section 47(b) of the ICA doesn't create a private right of action. After decades of finding implied private rights of action based on nothing more than perceived congressional purpose, the Court changed course and now applies a strict test, exemplified by *Sandoval*, that looks to statutory text and structure to determine whether Congress intended to create a private right of action. That test makes clear that Congress did not intend Section 47(b) to confer a private right of action.

A. The Constitution delegates legislative power to Congress, and Congress decides what statutory rights to confer, on whom, and how they will be enforced. The judiciary usurps that legislative policymaking power when it finds private rights of action absent clear indication of Congress's intent.

1. The Court looks only to statutory text and structure to determine whether Congress implied a private right of action. In statutory text, the Court looks for "rights-creating language"—language that creates substantive rights for a particular class of persons, rather than provisions simply directed to courts or regulators. As to structure, the Court asks whether Congress created other mechanisms (like administrative remedies) for statutory enforcement, or private rights of action elsewhere in the statute. The presence of either feature suggests that Congress didn't imply a private right of action.

2. The Court's approach reflects a course correction after a period of finding implied private rights of action to advance Congress's perceived policy goals in enacting a statute. A prime example from this bygone *ancien regime* is *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), a securities decision finding an implied private right of action in Section 14(a) of the 1934 Act because recognizing one would supposedly advance the chief purposes of the statute. The Court purported to find a cause of action even while acknowledging that the text of the statute didn't refer to or even hint at a private right of action.

The Court explicitly repudiated the *ancien regime Borak* exemplified in *Sandoval*, 532 U.S. at 287. The Court no longer recognizes private rights of action simply because doing so might advance perceived statutory purpose. Unless statutory text or structure shows Congress's intent to create a private right of action, the Court cannot recognize one.

B. Section 47(b) doesn't create an implied private right of action. Neither the text of Section 47(b) nor the structure of the ICA suggests any intent to create a private right of action. Instead, both confirm that

Congress intended the SEC, not private parties, to enforce Section 47(b).

1. Section 47(b)'s text doesn't contain any "rights-creating language" implying a private right of action. Unlike other ICA provisions, Section 47(b) does not "proscribe[] any conduct as unlawful." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). Rather, Section 47(b) instructs courts when they can order certain equitable relief. Its first paragraph describes when a court can enforce a contract that violates the ICA. And its second paragraph establishes a uniform federal rule that supersedes state-law rules about the rescission of such contracts. Neither provision confers a substantive right on any particular party. Instead, Section 47(b) speaks to courts, not those who may wish to sue, and is triggered only when a contract violates a different, substantive provision of the ICA.

2. Two structural features of the ICA confirm that Congress didn't intend to create a private right of action in Section 47(b).

First, the ICA already provides an express remedy for substantive violations: Congress crafted a detailed administrative scheme empowering the SEC to promulgate rules under the ICA, investigate violations, bring enforcement actions and issue subpoenas, and seek injunctive and monetary relief. In short, Congress gave the SEC comprehensive enforcement authority, leaving no room or need for private enforcement through Section 47(b).

Second, Congress expressly provided for narrow private rights of action in two different provisions of the ICA, showing that it knew how to do so, but declined to create one in Section 47(b). In Section 30(h), Congress provided that certain parties would be subject to the private enforcement mechanisms "imposed by section 16 of the [1934 Act]." 15 U.S.C. § 80a-29(h). And in Section 36(b), Congress specified that "[a]n action may be brought" for breach of fiduciary duty "by a security holder of [a] registered investment company." *Id.* § 80a-35(b). But Congress included no such language in Section 47(b).

The SEC's comprehensive enforcement scheme, coupled with Congress's demonstrated ability to expressly authorize narrow private rights of action elsewhere in the statute, makes clear that the omission in Section 47(b) was deliberate. Those structural features confirm that the ICA's text means what it says when it reserves enforcement of Section 47(b) to the SEC and not to private litigants.

C. Recognizing a private right of action would result in inconsistent enforcement, destabilizing the fund industry. The legislative history further confirms that Congress did not intend private enforcement of Section 47(b) or the disruption it would cause.

1. The fund industry championed the ICA expecting that centralizing enforcement in the SEC would bring much-needed certainty and predictability to the industry. Finding an implied private right of action in Section 47(b) would undermine those goals by subjecting regulated parties to inconsistent enforcement. The ICA empowers the SEC to grant exemptions to specific transactions and categories of transactions that might violate the ICA. *See* 15 U.S.C. § 80a-6(c). Recognizing a private right of action would disrupt that authority, potentially creating situations where the SEC is considering exempting or has exempted activity from the ICA but a private party nonetheless can sue to enforce the ICA under Section 47(b). Even that possibility would create uncertainty in the fund industry.

2. Legislative history reinforces the textual and structural analysis. The ICA was a cooperative effort between the SEC and private parties—a rare statute uniformly endorsed by all the major regulated parties. Indeed, market participants welcomed centralized enforcement by the SEC. There is no indication in the legislative history that Congress believed that private parties would enforce the ICA; to the contrary, the ICA never would have garnered the fund industry's support if it contained the broad private right of action that Saba now claims.

D. The Second Circuit's novel recognition of a private right of action in Section 47(b) lacks merit.

1. The Second Circuit's textual analysis is unsound. The court lasered in on Section 47(b)(2)'s language that "a court may not deny rescission at the instance of any party." 15 U.S.C. § 80a-46(b)(2). In the court's view, that phrase necessarily presupposes a private right of action. That is incorrect. Section 47(b)(2) establishes the standard for rescission for parties already before the court by creating uniform federal rules that displace state law. While "the use of [recission]" as "an equitable remedy" is generally left to the courts' discretion," *Beck Chevrolet Co. v. General Motors LLC*, 787 F.3d 663, 680 (2d Cir. 2015), Congress here displaced that discretion through "clear and valid legislative command," *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 496 (2001). Section 47(b) thus allows parties defending against a breach-of-contract claim to defend on the ground that the contract violates the ICA, is unenforceable, and must be rescinded. Section 47(b)(2) provides a uniform federal rule that applies in state and federal courts alike when the parties have some basis—not the nonexistent Section 47(b) right of action—for being before the court. The Second Circuit failed to grapple with Section 47(b)(2)'s role in providing for an affirmative defense and instead wrongly concluded that Section 47(b)(2) must create a private right of action or else it would have no work to do.

2. The Second Circuit's reliance on *TAMA* was misguided, too. *TAMA* held that Section 215 of the IAA contains a private right of action. But IAA Section 215 has different language and appears in a different statute and context than ICA Section 47(b). Section 215 provides that a contract is "void," 15 U.S.C. § 80b-15(b), while Section 47(b) of the ICA declares that a contract is "unenforceable," *id.* § 80a-46(b)(1). According to *TAMA*, a provision declaring a contract "void" is directed at the contracting parties and necessarily allows a party to sue for recission. 444 U.S. at 18. But a provision declaring a contract "unenforceable" is primarily directed at courts and does not, by itself, allow a party to do anything. What's more, *TAMA* was an *ancien regime* decision relying on legislative history and purposivist reasoning. By its terms, *TAMA* doesn't apply here. But even if it could, the Court shouldn't extend *TAMA*'s troubled methodology.

ARGUMENT

A. The Constitution assigns legislative powers to Congress and limits the judiciary's ability to find implied private rights of action.

1. Whether a statute creates an implied private right of action turns solely on statutory text and structure.

a. The Constitution assigns the "legislative Powers" to Congress. U.S. Const. art. I, § 1. It is bedrock constitutional law that the legislative branch writes the laws and the judiciary interprets and enforces them. *See Sandoval*, 532 U.S. at 286; *see also Jesner v. Arab Bank, PLC*, 584 U.S. 241, 282 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). Thus, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Sandoval*, 532 U.S. at 286. And "no matter how desirable [it] might be as a policy matter," when a statute does not provide a cause of action, courts cannot create one. *Id.* at 287.

Because "Congress says what it means and means what it says," *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016), when Congress intends to create a private right of action, it usually does so expressly, *see Ziglar v. Abbasi*, 582 U.S. 120, 132-33 (2017). Indeed, it is only a "remote possibility" that Congress "may intend to create a private right of action" "by implication" rather than expressly. *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment). The judicial task in determining whether a statute implies a private right of action is to discern whether the statute reveals Congress's intent to create one. And in that inquiry, the guiding principle remains that Congress shows its intent through statutory text, *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014), and, as is always the case with statutory interpretation, "legal context matters only to the extent it clarifies text," *Sandoval*, 532 U.S. at 288.

The party claiming that the statute implies a private right of action must show "affirmative evidence" that Congress intended that result. *Id.* at 293 n.8. Without that evidence, "the essential predicate for implication of a private remedy simply does not exist," and the Court cannot presume that Congress intended to create a private right. *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 94 (1981).

b. Only two kinds of evidence can support a private right of action: statutory text and statutory structure. *Sandoval*, 532 U.S. at 288. Policy arguments about the desirability of a private right of action, or arguments from the "contemporary legal context," are not relevant. *Id.* at 287-88.

i. Start with text. To ensure respect for Congress's legislative role, *Sandoval* requires the party claiming a private right of action to identify "rights-creating" language in the statute. *Id.* at 288. Rights-creating language differs from language describing how to "effectuat[e] rights already created" in another part of the statute. *Id.* at 289. Rights-creating language is found in "substantive provisions" of statutes, *Touche Ross*, 442 U.S. at 577, and it focuses on the "individuals protected," not on the entities who "will do the regulating," *Sandoval*, 532 U.S. at 289. That means that statutory language that is "directed to … courts" is not rights-creating language. *Thompson*, 484 U.S. at 183.

Gonzaga University v. Doe, 536 U.S. 273 (2002), illustrates those principles. There, the Court held that Congress didn't imply a private right of action in a provision of the Family Educational Rights and Privacy Act of 1974 (FERPA), which states that "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records." 20 U.S.C. § 1232g(b)(1). The Court explained that the provision doesn't contain "rights-creating" language. 536 U.S. at 287. The Court contrasted the FERPA provision's language, which "speak[s] only to the Secretary of Education," with the "individually focused terminology of Titles VI and IX," which imply private rights of action by providing that "[n]o person … shall … be subjected to discrimination." *Id.* The FERPA provision is directed at the regulator—not the individual. *Id.* In contrast, statutes with rights-creating language are "phrased 'with an *unmistakable focus* on the benefited class.'" *Id.* at 284.

Similarly, other decisions make clear that where the statute's language speaks to what courts, rather than private parties, can do, it doesn't imply a private right of action. Take the Parental Kidnapping Prevention Act of 1980 (PKPA), at issue in *Thompson v. Thompson*, 484 U.S. 174. That statute authorizes state courts to enforce a child custody determination issued by the court of another state if certain conditions are met. *See* 28 U.S.C. § 1738A. In *Thompson*, a father invoked the PKPA to attempt to sue in federal court, arguing that a California decree (which granted the father custody) was valid, while a Louisiana decree (which granted the mother custody) was not. 484 U.S. at 178. This Court held that the PKPA didn't create a private right of action because, "[u]nlike statutes that explicitly confer a right on a specified class of persons, the PKPA is a mandate directed to state courts." *Id.* at 183. Even though the plaintiff asserting a cause of action benefits from the PKPA's authorization of courts to enforce custody determinations, Congress's choice to direct the statute at courts, and not private parties, revealed that Congress did not intend to create a private right of action.

Touche Ross reflects the same kind of analysis. There, the Court found that a jurisdictional provision of a statute did not imply a private right of action because the provision, which "grants jurisdiction to the federal courts and provides for venue and service of process" did not create a "cause of action of its own force and effect." 442 U.S. at 577. There, too, the provision was directed at courts and not at any class of plaintiffs.

ii. The question driving the structural analysis is the same as the question driving the textual analysis: Did Congress intend to imply a private right of action in the provision in question? This Court's precedents emphasize two structural features that help determine whether Congress intended to imply a private right of action.

First, when "a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 533 (1989). Put differently, Congress's "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290. That understanding reflects a specific application of the general principle that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). When Congress specifies remedies, courts are "compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). Thus, when Congress provides for administrative enforcement, courts will generally not find an implied private right of action. *See, e.g.*, *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980).

Karahalios provides a good illustration. There, the Court held that Title VII of the Civil Service Reform Act of 1978 didn't create a private right of action for federal employees to sue their union alleging a breach of the duty of fair representation. 489 U.S. at 529. While the statute "expressly recognize[s]" a duty of fair representation, the Court reasoned, it also provides that violations are subject to an administrative remedy before the Federal Labor Relations Authority. *Id.* at 533. Given that backdrop, the Court looked for (and didn't find) an "express suggestion in [the statute] that Congress intended to furnish a parallel remedy in a federal district court to enforce the duty of fair representation." *Id.* at 532.

Karahalios offers just one of many examples. For instance, in *Gonzaga*, as noted (at 22), the Court held that FERPA did not create an implied private right of action. 536 U.S. at 289-90. The Court reasoned that Congress authorized the Secretary of Education to enforce FERPA's nondisclosure provision, and those "administrative procedures" "counsel against … finding a congressional intent to create individually enforceable private rights." *Id.* In *Astra USA, Inc. v.*

Santa Clara County, 563 U.S. 110, 117 (2011), the Court found that private healthcare facilities could not bring an action because Congress had vested the relevant enforcement authority exclusively in the Department of Health and Human Services. And in *Daily Income Fund*, 464 U.S. 523, the Court declined to find an implied private right of action for registered funds to sue, holding that because Section 36(b) allowed for private enforcement by security holders (*i.e.*, fund shareholders) and the SEC, it didn't imply a private right of action for other parties.

Second, when a statute contains an "express provision for private enforcement in certain carefully defined circumstances," but doesn't do so elsewhere, that "strongly evidences an intent not to authorize additional remedies." *Northwest Airlines*, 451 U.S. at 93-94; *see also Universities Research Ass'n v. Coutu*, 450 U.S. 754, 773 (1981). That understanding is itself a more specific application of the principle just discussed that Congress's provision of one remedial scheme implies the absence of others.

In *Northwest Airlines*, the question was whether an employer had a private right of action under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964 against a union for contribution if the union was at least partially responsible for the employer's violation of either statute. 451 U.S. at 79-80. The Court held that Congress did not imply a private right of action for employers to seek contribution. *Id.* at 92-94. The Court observed that Congress clearly established private rights of action in several provisions of the Equal Pay Act and Title VII, but had not done so for a claim brought by employers for contribution. *Id.* at 93. Congress knew how to authorize a private right of action, but it chose not to do so for the claim the plaintiff-employers sought to bring. That was powerful evidence that Congress did not mean something it did not say. *Id.* at 93-94.

2. Those clear principles reflect the Court's retreat from a bygone era when courts would regularly find implied private rights of action.

The Court has not always heeded the Constitution's limitations on courts' authority to infer that Congress intended to create a private right of action. Rather, for much of the twentieth century, the Court adopted a "hospitable attitude towards implied rights of action." *Thompson*, 484 U.S. at 190 (Scalia, J., concurring in the judgment). The Court has since corrected course, as discussed above. But understanding the Court's earlier caselaw helps put the correct principles into clear relief.

a. The "high-water mark for implied causes of action came in the period before [this] Court's 1975 decision in *Cort v. Ash*." *Johnson v. Interstate Management Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.); *see Cort v. Ash*, 422 U.S. 66, 77-85 (1975). During that "*ancien regime*," *Sandoval*, 532 U.S. at 287, the Court "would imply causes of action not explicit in the statutory text itself," *Abbasi*, 582 U.S. at 132.

Exhibit A of that bygone era was *Borak*, which involved a claim seeking relief under Section 14(a) of the 1934 Act. 377 U.S. at 428. There, the Court acknowledged that the language of Section 14(a) "makes no specific reference to a private right of action," but it inferred one anyway by focusing on its perception of the "chief purposes" of the statute. *Id.* at 432. The

Court declared that it had a "duty" to infer "remedies … necessary to make effective the congressional purpose." *Id.* at 433.

In subsequent decades, however, the Court rejected *Borak*'s far-reaching understanding of the judicial role. In 1975, in *Cort v. Ash*, the Court announced a four-pronged test for determining whether a statute implied a private right of action: (1) whether the plaintiff was a member "of the class for whose especial benefit the statute was enacted"; (2) whether Congress indicated either implicitly or explicitly its intent to extend or deny a private right of action; (3) whether the private right of action was consistent with the underlying purposes of the statutory scheme; and (4) whether the subject matter of the statute was typically left to the states to regulate. 422 U.S. at 78.

The Court began narrowing the inquiry to text and structure in *Touche Ross*. There, the Court explained that the judicial task is "limited solely to determining whether Congress intended to create the private right of action asserted." 442 U.S. at 568. The *Cort* factors were essentially a means to discern congressional intent, and were not entitled to equal weight. *Id.* at 575-76.

Over the two decades following *Touche Ross*, the Court's inquiry into congressional intent became more textual. *See, e.g.*, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994). The Court increasingly recognized that the "decision to create a private right of action is one better left to legislative judgment in the great majority of cases," *Jesner*, 584 U.S. at 264, and that separation-of-powers concerns are "central to the analysis," *Abbasi*, 582 U.S. at 135. "No law 'pursues its purposes at all costs,'" and the decision about who should enforce statutory rights, and to what extent, is for the legislature, which must weigh the tradeoffs inherent in allowing private enforcement. *Hernandez v. Mesa*, 589 U.S. 93, 100, 114 (2020).

The first course correction came from *Cort*'s four-factor test, and its rejection of *Borak*'s insistence that courts had a duty to imply remedies to make effective statutory purpose, *see Sandoval*, 532 U.S. at 287.

The second course correction came in *Sandoval*, which has set the course going forward. There, the Court explicitly rejected *Borak*'s "*ancien regime*," explaining that it had "abandoned that understanding in *Cort*" and "sworn off the habit of venturing beyond Congress's intent." *Sandoval*, 532 U.S. at 287. *Sandoval* narrowed the inquiry into Congress's intent to the "text and structure" of the statute. *Id.* at 288. The Court rejected the argument that it should consider "the expectations that the enacting Congress had formed in light of the contemporary legal context." *Id.* at 276. Although *Sandoval* didn't explicitly overrule *Cort*, it didn't apply the *Cort* factors, either. Since *Sandoval*, this Court has relied on *Sandoval*'s formulation to analyze whether Congress intended to create a private right of action.

b. The Court's decisions over the last several decades in the securities context also reflect this course correction on implied private rights of action. Consider the well-known implied right of action under Section 10(b) of the 1934 Act, 15 U.S.C. § 78j, and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. In 1946, a federal district court held that Section 10(b) and Rule 10b-5 implied a private right of action. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). Over the next 25 years, a consensus formed in the district and circuit courts. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975). In 1971, the Court accepted that implied private right of action without any discussion. *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971). But since that high-water mark, the Court has recognized no implied private rights in securities laws outside of Section 10(b). In 1994, the Court confirmed that there is no private right of action for aiding and abetting a Section 10(b) violation. *Central Bank of Denver*, 511 U.S. at 191. The Court reaffirmed *Central Bank* in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164-65 (2008), explaining that the "§ 10(b) private cause of action is a judicial construct that Congress did not enact in the text of the relevant statutes," and so while "it remains the law, the § 10(b) private right should not be extended beyond its present boundaries." *Stoneridge* also made clear that the Section 10(b) anomaly survives because Congress "ratified the implied right of action after the Court moved away from a broad willingness to imply private rights of action." *Id.* at 165. The Section 10(b) saga thus doesn't support finding any other implied private rights of action.

B. Section 47(b)'s text and the ICA's structure show that Congress did not intend to create a private right of action in that provision.

The text and structure of Section 47(b) and the ICA both show that Section 47(b) does not create an implied private right of action.

1. Section 47(b) contains no language creating rights or otherwise suggesting a private right of action.

Section 47(b) doesn't contain any of the "rights-creating language" needed to suggest a private right of action. Section 47(b) isn't aimed at a class of plaintiffs who can seek to enforce it. Nor is it directed at the regulated party. Rather, Section 47(b) speaks to when *courts* can order certain equitable relief. Unlike statutes that contain an implied private right of action, Section 47(b) "focuses neither on the individuals protected nor even on the … recipients being regulated, but on the [government] that will do the regulating." *Sandoval*, 532 U.S. at 289.

a. To see that Section 47(b) doesn't imply any private right of action, it helps to see what Section 47 *is* doing. The provision, which comes at the end of Title I, explains procedurally when courts can order an equitable remedy, but it creates no rights in the process. The statute contains four subprovisions.

- Section 47(a) declares that any contract that purports to waive compliance with any provision of the ICA "shall be void." 15 U.S.C. § 80a-46(a).
- Section 47(b) describes courts' authority to address contracts that violate the ICA. *Id.* § 80a-46(b).
- Section 47(b)(1) restricts a court from enforcing a contractual provision that violates the ICA unless the "court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this subchapter." *Id.* § 80a-46(b)(1).

- Section 47(b)(2) establishes a uniform federal rule that governs the enforceability of contracts made in violation of the ICA, superseding any otherwise-applicable state-law rules. *Id.* § 80a-46(b)(2). Section 47(b)(2) supersedes state contract-law doctrines that might prevent rescission even when a contract violates a federal statute.
- Finally, Section 47(b)(3) exempts paragraphs (b)(1) and (b)(2) from application to the lawful portion of a contract that has been severed and clarifies that Section 47(b) does not preclude recovery for unjust enrichment, again superseding any otherwise-applicable state-law rules. *Id.* § 80a-46(b)(3).

As its constituent parts make clear, Section 47(b) operates as a remedial provision that generally renders contracts violating the ICA unenforceable and subject to rescission, and it gives courts discretion to consider equitable factors and the purposes of the Act. But Section 47(b) creates no right or mechanism for a party to bring an action challenging a contract that allegedly violates another provision of the ICA. Rather, Section 47(b) provides the rules that courts must follow when a contract that allegedly violates the ICA comes before them. Those rules could kick in, for example, when one party sues another for breach of contract—the counterparty might then argue that the contract is unenforceable and must be rescinded under Section 47(b) because it violates the ICA.

Section 47(b)(2) plays a vital role in this scheme. States have long maintained a patchwork of common-law rules that restrict the availability of equitable rescission. For example, Connecticut courts allow rescission only when the party seeking rescission proves that it had offered to restore the breaching party to its former condition. *Keyes v. Brown*, 155 Conn. 469, 476 (1967). And Illinois courts allow rescission only upon a finding that there is no adequate remedy at law. *CC Disposal, Inc. v. Veolia ES Valley View Landfill, Inc.*, 406 Ill. App. 3d 783, 788-89 (2010). Section 47(b)(2) overrides states' varying common-law approaches and establishes a uniform standard for defensive rescission based on a violation of the ICA.

b. As the survey above of Section 47's subsections makes clear, the statute does not create rights for private parties and is not directed at regulated parties. Nor does Section 47 "proscribe[] any conduct as unlawful." *Touche Ross*, 442 U.S. at 569. The language stands in marked contrast to other provisions showing that Congress knew how to prohibit conduct and did so when it intended to. For example, Section 17 of the ICA declares that it "shall be unlawful" for certain entities affiliated with a registered investment company to sell certain securities to the company. 15 U.S.C. § 80a-17(a). And unlike other provisions, Section 47 doesn't require regulated parties to take any affirmative steps. For instance, Section 8 requires registered investment companies to file statements with the SEC. 15 U.S.C. § 80a-8(b). Section 47 doesn't proscribe or require any conduct. Instead, it cross-references other provisions of the ICA, applying only when a contract violates *another* provision of the ICA.

In this respect, Section 47 is different from the handful of statutes that the Court has held contain an implied private right of action. In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), for example, the Court held that Title IX implied a private right of action by providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Likewise, the Court recognized an implied private right of action in Title VI, focusing on language mirroring Title IX but instead prohibiting discrimination "on the ground of race, color, or national origin." *Guardians Ass'n v. Civil Service Commission of City of New York*, 463 U.S. 582, 584 n.1 (1983) (quoting 42 U.S.C. § 2000d). Unlike Section 47(b), Titles VI and IX are distinctly rights-creating and rights-conferring: They grant classes of persons the right to be free from certain conduct.

What Section 47 does resemble is the part of the 1934 Act that the Court in *Touche Ross* held did not imply a private right of action. The Court reasoned that Section 17, 15 U.S.C. § 78q, which requires broker-dealers to maintain certain records, does not "purport to create a private cause of action in favor of anyone," because it "neither confers rights on private parties nor proscribes any conduct as unlawful." *Touche Ross*, 442 U.S. at 569. The Court further concluded that Section 27, 15 U.S.C. § 78aa, which the plaintiffs contended provided a damages remedy for breach of Section 17(a), simply grants authority to federal courts to exercise jurisdiction over securities litigation and to issue subpoenas under certain circumstances. *Touche Ross*, 442 U.S. at 577. Section 27 thus contains no "cause of action of its own force and effect; it imposes no liabilities." *Id.*

So too here. Section 47 creates no liabilities or affirmative duties. Rather, like Section 27 of the 1934

Act, Section 47(b) confers authority on courts to address a violation properly before them of a different provision of the statute—but no right to sue based on those other provisions.

c. Given that Section 47(b) is directed at courts, it also isn't directed at individual investors like Saba. That's still more evidence that Congress did not mean to give individual investors a right to sue.

Recall that Section 47(b)(1) provides that any contract that violates other provisions of the ICA is generally unenforceable, but it allows a court to enforce such a contract if it finds that enforcement would be more equitable than nonenforcement and would align with the purposes of the ICA. Section 47(b)(2) then provides that if such a contract has already been performed, a court may not deny rescission at the request of any party, unless the court finds that denying rescission would produce a more equitable result than granting it and would not be inconsistent with the purposes of the ICA. That federal rule directs courts to grant rescission of illegal contracts unless there are strong equitable reasons not to.

From top to bottom, then, the provision concerns relief that a court can grant when a registered investment company enters into a contract that violates a provision of the ICA and that contract properly comes before the court. But statutes that confer authority on courts aren't directed at a class of potential plaintiffs, even if the relief a court orders as a result of that authority might benefit the plaintiff. Section 47(b) thus provides no way to get an allegedly unlawful contract before a court in the first place. As discussed below (at 42-44), there is nothing odd about conferring remedial authority on a court without creating a cause of action. Contracts come before courts all the time, without any help from supposed private rights of action under the federal securities laws. Breach-of-contract actions are the obvious example. Put simply, nothing in Section 47(b)'s text suggests that Congress intended private parties to enforce its provisions.

2. The ICA's structure also shows that Congress did not intend to create a private right of action in Section 47(b).

The ICA's structure and other provisions beyond Section 47(b) confirm that Congress did not create an implied private right of action. Congress likely did not create an implied cause of action when the same statute provides a different enforcement mechanism or other provisions of the same statute *do* contain express private causes of action. *See supra* pp. 23-26. The ICA presents both of those structural clues, and they point in the same direction: Congress didn't intend a private right of action in Section 47(b).

a. Congress didn't leave the courts to guess about how it wanted the ICA enforced. Rather than create a private right of action in Section 47(b), Congress explicitly gave the SEC broad authority to promulgate rules and regulations to carry out the statute. *See, e.g.*, 15 U.S.C. §§ 80a-8(a), 80a-10(e)(3). And the SEC has used its authority to promulgate a bevy of rules, *see* 17 C.F.R. Part 270, and to regularly publish formal and informal interpretive guidance. Congress also gave the SEC detailed enforcement powers to police violations of the ICA's substantive provisions and of the SEC's rules and regulations. *See* 15 U.S.C. § 80a-41. The SEC is authorized to conduct any investigations "it deems necessary to determine whether any person has violated or is about to violate any provision" of the ICA. *Id.* § 80a-41(a). The SEC can subpoena witnesses, compel their attendance at hearings, and require the production of documentary materials. *Id.* § 80a-41(b). The SEC can bring an action in the federal courts for an injunction or for monetary penalties, *id.* § 80a-41(d), (e), and the Act specifies three tiers of penalties that apply for violations of the Act, *id.* § 80a-41(e)(2)(A)-(C).

Congress's decision to create a comprehensive administrative enforcement regime makes clear that Congress didn't intend for private enforcement of the ICA. *See Northwest Airlines*, 451 U.S. at 93. Congress intended for the SEC to exercise its rulemaking authority and its enforcement discretion to curb abuses in the fund industry—that's why Congress granted such sweeping powers to the SEC. Nothing in the statute suggests that Congress was thoughtful enough to write a comprehensive SEC enforcement scheme and expressly create narrow private enforcement rights in Sections 30(h) and 36(b), but forgetful enough not to expressly state the private right of action it supposedly meant to create in Section 47(b). To the contrary, the natural understanding of the ICA's structure is that Congress specified in the ICA not only what regulated funds must do, but also how those rules should be elaborated and enforced—by an agency able to study industry issues and promulgate rules and provide guidance, not by private attorneys general with their own agendas. Any contention by Saba that the Funds violated the ICA must be channeled through SEC enforcement, not through a private suit.

b. But that's not all. Congress did another thing that makes implausible the idea that Congress implied in Section 47(b) that investors like Saba can sue: Congress expressly provided private rights of action in two *other* provisions of the ICA. Those other provisions show that Congress knew how to provide a private enforcement right but chose not to do so in Section 47(b).

First, in Section 30(h), Congress provided that certain officers and owners of registered companies would be subject to the same liabilities as imposed under section 16 of the 1934 Act. 15 U.S.C. § 80a-29(h). Section 16(b) creates a private right of action for parties to recover short-swing profits realized by a regulated individual. 15 U.S.C. § 78p(b). By incorporating Section 16 of the 1934 Act by reference in the ICA, Congress created a private right of action for violations of one of the ICA's provisions. *TAMA*, 444 U.S. at 20 & n.10.

Second, in Section 36(b), Congress provided that investment advisers of a registered investment company have a fiduciary duty to that company with respect to fees. 15 U.S.C. § 80a-35(b). Congress specified that a breach-of-fiduciary-duty action can be brought by the SEC "*or* by a security holder of [the] registered investment company." *Id.* (emphasis added).

Congress's enactment of these two express private rights of action elsewhere in the ICA shows that Congress used words, not silence, when it wanted to create a private right of action. When Congress wished to provide a cause of action, "it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. But Congress said nothing about a private cause of action in Section 47(b).

C. Finding an implied right of action in Section 47(b) would disrupt the fund industry by undermining the SEC's sole enforcement authority.

Finding an implied private right of action in Section 47(b) would not just be a result Congress did not intend. It also would produce harm that Congress carefully designed the ICA to avoid. Finding a private right of action would subject regulated parties to inconsistent enforcement, throwing Congress's carefully crafted scheme into disarray.

1. The Court has refused to recognize a private right of action where Congress has established an administrative enforcement scheme on the ground that a private right of action would "undercut" that scheme. *Coutu*, 450 U.S. at 783. Finding a private right of action in Section 47(b) would do just that. The ICA grants the SEC discretion to enforce the ICA, including by exempting certain activity from the statute. A private right of action could throw that carefully crafted scheme into chaos.

In addition to empowering the SEC to enforce the substantive provisions of the ICA, Congress has granted the agency broad authority to exempt companies and even categories of transactions from the ICA. *See* 15 U.S.C. § 80a-6(c). The SEC may "conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this subchapter" if the SEC finds that an exemption is in the public interest and aligns with the purpose of the ICA. *Id.* Advocating for the exemption authority, the SEC told Congress that it was concerned that "there might be companies … that ought to be exempted" and should "not in fairness be made subject to the statute." *Investment Trusts and Investment Companies: Hearings on S. 3580 Before the Subcommittee on Banking and Currency*, 76th Cong. 872 (1940). In giving the SEC its requested exemption authority, Congress drew on the SEC's experience "in the early days of the Exchange Act," when the SEC's "liberal powers of exemption" allowed it to register thousands of securities "without serious interruption of business." *Id.* at 873.

To this day, the SEC makes important use of its exemptive power. For instance, at the start of the COVID-19 pandemic, the SEC exempted all regulated parties from Section 15(c)'s requirement that certain agreements be approved by in-person votes. *See Order Under Section 6(c) and Section 38(a) of the Investment Company Act of 1940*, Release No. 33817 (March 13, 2020). And the SEC regularly uses its Section 6(c) authority to exempt specific transactions from ICA requirements. Earlier this year, for example, the agency granted an investment company an exemption from Section 18, which prohibits regulated parties from issuing certain classes of securities. *See, e.g.*, *Order Under Section 6(c) of the Investment Company Act of 1940*, Release No. 35618 (June 2, 2025).

Creating a private right of action in Section 47 would gut the SEC's discretion and potentially bring chaos to the fund industry, as the United States agreed at the cert stage. Congress authorized the SEC "to grant case-by-case exemptions" from the ICA, and creating a private right of action would "upset the balance that Congress struck." U.S. Cert-Stage Br. 19. Just take the SEC's order exempting votes from Section 15(c)'s in-person requirement. A private right of action could allow a plaintiff to sue for rescission of agreements made during the pandemic without an in-person vote, casting a pall of uncertainty over countless actions taken during the pandemic. As the government put it, "private enforcement suits under Section 47(b) threaten to have an unpredictable impact on the operations and contractual arrangements of investment funds, including the mutual funds on which millions of Americans rely." *Id.* at 20.

2. Although the analysis stops at text and structure, legislative history confirms that Congress wanted exactly the opposite of the disruption a private right of action in Section 47(b) would create. The lack of any "suggestion whatsoever in the legislative history" that Congress intended private enforcement can "reinforce[]" no finding of a private right. *Touche Ross*, 442 U.S. at 571. And here, the ICA's legislative history shows that Congress intended the SEC to enforce the provisions of the ICA, as the fund industry's overwhelming support for the law and the predictable regulatory enforcement it sought shows.

The ICA was a "cooperative effort upon the part of the [SEC] and the representatives of the investment-company industry." H.R. Rep. No. 76-2639, at 5 (1940). After Congress considered a bill opposed by the industry, the SEC and industry representatives worked together "to reach a common ground and to submit a joint recommendation" on a replacement bill. S. Rep. No. 76-1775, at 1 (1940). The resulting bill, which became the ICA, enjoyed "virtually unanimous support of the persons for whose regulation it provides" and was "strongly endorsed … by almost every company which appeared in opposition to" an earlier draft. *Id.* at 2. The investment company industry supported the ICA because it meant that the industry would "no longer live in uncertainty." *Id.*

The ICA likely wouldn't have enjoyed that support had it contained a private right of action that could undermine the industry's stability. *See supra* pp. 38-40. Rather, the legislative history confirms that the industry, the SEC, and Congress all understood that the SEC almost exclusively would enforce the ICA. Both the Senate and House reports describe the Commission as "the regulatory agency" to "administer[]" the ICA. S. Rep. No. 76-1775, at 2; H.R. Rep. No. 76-2639, at 5. And the Senate Report emphasizes that the ICA provides "for the carrying out of the powers and duties vested in the Commission, and for court review of the Commission's action." S. Rep. No. 76-1775, at 20. Indeed, the SEC sought "broad exemptive power" to allow it to "meet situations which were not known." *Investment Trusts and Investment Companies: Hearings on H.R. 10065 Before a Subcommittee of the Committee on Interstate and Foreign Commerce*, 76th Cong. 120 (1940). The resulting Section 6(c) of the ICA, as noted (at 38-40), allows the Commission to "exempt any person, security, or transaction" from provisions of the ICA if it finds that doing so is in the public interest. 15 U.S.C. § 80a-6(c).

Nothing in Section 47's legislative history suggests Congress intended to create a private right of action. Instead, the reports describe Section 47 as one of the ICA's "usual provisions relating to … validity of contracts, liability of controlling persons, and preventing compliance." S. Rep. No. 76-1775, at 20; *see* H.R. Rep. No. 76-2639, at 25. That's a small mousehole for a mammoth private right of action.

D. The Second Circuit's view is wrong.

The Second Circuit's conclusion that Section 47 contains a private right of action is wrong. *Oxford University Bank* rested on two incorrect grounds. *First*, the Court fixated on one clause in Section 47(b)(2)—that a court "may not deny rescission at the instance of any party"—to erroneously conclude that the clause necessarily presupposes a private right of action. It doesn't, because parties can seek rescission under Section 47(b)(2) without any private right of action—consider rescission as an affirmative defense in a breach-of-contract suit. Section 47(b)(2) simply establishes the uniform federal scheme for rescission where the parties are already properly before the court. *Second*, the Court thought that *TAMA*'s 1979 holding that a different provision in a different statute created a private right of action meant that Section 47(b)(2) did too. But the two statutes are different, and nothing in *TAMA* (and its pre-*Sandoval* approach) suggests that Section 47(b)(2) creates a private cause of action.

1. The Second Circuit's textual analysis is unsound.

The crux of the Second Circuit's textual analysis is that Section 47(b) presupposes a private right of action because Section 47(b)(2) says that a court "may not deny rescission at the instance of any party." *See Oxford University Bank*, 933 F.3d at 105. In the court's view, only a private right of action could give meaning to those words. *See id.*

That reasoning is wrong, because that statutory language simply tells the court what to do when a party seeks rescission when a case is already properly before the court. For example, a breach-of-contract defendant might assert that it did not need to perform, and seek rescission, because the contract violated the ICA and so is "unenforceable by either party" under Section 47(b)(1). 15 U.S.C. § 80a-46(b)(1). In that circumstance, Section 47(b)(2) provides that if the contract has been performed, courts should generally grant rescission unless denying rescission is more equitable. *Id.* § 80a-46(b)(2). *Supra* pp. 31-32.

Far from implying a private cause of action, Section 47(b) has an important role to play in setting out the conditions for defensive rescission. The statute thus creates a uniform, stabilizing federal rule, superseding any inconsistent state law, *supra* pp. 31-32, based on the well-established principle that rescission is an affirmative defense to a breach-of-contract claim, *see, e.g.*, *Batka v. Liberty Mutual Fire Insurance Co.*, 704 F.2d 684, 687 (3d Cir. 1983); *Long v. Insurance Company of North America*, 670 F.2d 930, 933 (10th Cir. 1982); *Simonson v. Fendell*, 675 P.2d 1218, 1220 (Wash. 1984); *In re Liquidation of Union Indemnity Insurance Co. of New York*, 674 N.E.2d 313, 315, 321 (N.Y. 1996); *Duarte v. Pacific Specialty Insurance Co.*, 13 Cal. App. 5th 45, 56 (2017), *as modified* (June 29, 2017); *Chase Manhattan Bank, N.A. New York v. Clusiau Sales & Rental, Inc.*, 308 N.W.2d 490, 491-92 (Minn. 1981). Section 47(b)(2) makes clear what happens if a contract violates the ICA, depending on whether the parties have performed.

That approach makes sense: Congress wanted uniform SEC enforcement, not backdoor state-law disuniformity. Because the ICA is federal law, Congress needed to provide a uniform rule superseding state law limiting courts' ability to alter or deny the defense of rescission. That's exactly what Section 47(b)(2) does. The paragraph provides that defendants can seek rescission as an affirmative defense to a breach-of-contract claim if they show that the contract violates the ICA, and the court must grant rescission unless the court finds that "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).

The Second Circuit didn't grapple with the defensive role that Section 47(b)(2) plays. Its conclusion that the provision necessarily presupposes a private right of action—despite the statute's text and structure—is wrong.

2. *TAMA* doesn't support finding a private right of action in Section 47(b), either.

The second pillar of the Second Circuit's decision was its reliance on *TAMA*, 444 U.S. 11. In the court's view, *TAMA* compels finding a private right of action in Section 47(b). That reasoning, too, is incorrect. In *TAMA*, the Court held that Section 215(b) of the IAA, 15 U.S.C § 80b-15(b)—a different provision, with different language, in a different statute—created a private right of action. *TAMA*'s reasoning doesn't support finding a private right of action in Section 47(b). Even if it did, the Court shouldn't extend *TAMA*'s reasoning. *TAMA* was a product of the old "habit" that the Court renounced decades ago of textually unmoored purposivism, and the Court should "not accept respondents' invitation to have one last drink." *Sandoval*, 532 U.S. at 287.

a. *TAMA*'s holding doesn't apply to Section 47(b) because it turned on the different language and context of IAA Section 215(b). For example, *TAMA* relied on the absence of an express private right of action in the IAA, but the ICA, since its enactment the same year as the IAA, has expressly provided for a private right of action—but not in Section 47(b).

i. *TAMA* narrowly found a limited private right of action to void investment adviser contracts under Section 215(b) of the IAA, but otherwise expressly rejected any broader private causes of action for damages or other relief under the IAA. In *TAMA*, the shareholder of an investment trust sued the trust's investment adviser and related parties alleging violations of the IAA, including fraud and breaches of fiduciary duty. 444 U.S. at 13-14. The shareholder sought injunctive relief, rescission of the investment adviser contract, restitution, an accounting, and damages. *Id.* The Court held that Section 215(b) of the IAA permits a private client to bring an action to void a contract that violates the IAA, including to seek rescission, an injunction against continued operation of the contract, and restitution. *Id.* at 19. But the Court held that the IAA does not create any other causes of action, legal or equitable, such as for damages or broader injunctive relief. *Id.*

To reach that result, the Court applied *ancien regime* methods and examined the IAA's legislative history. *Id.* at 17-18. Finding the legislative history "entirely silent" about whether Congress intended enforcement through private litigation, the Court reasoned that an intent to confer a private right of action could "appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Id.*

Starting with Section 215(b), the Court explained that "the statutory language itself fairly implies a right to specific and limited relief in a federal court." *Id.* Section 215(b) states that contracts that violate the IAA "shall be void … as regards the rights of" the violator. 15 U.S.C. § 80b-15(b). The Court reasoned that the statute's language implicitly allows a private suit for rescission and related equitable relief, because those forms of relief are a "customary legal incident[]" of voidness. *TAMA*, 444 U.S. at 18-19. "By declaring certain contracts void," the Court explained, "§ 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." *Id.* at 18.

But the Court reached a different conclusion as to Section 206 of the IAA, 15 U.S.C. § 80b-6. *See TAMA*, 444 U.S. at 19-21. Section 206 prohibits fraudulent practices by investment advisers, but it does not create or alter civil liabilities, and thus did not create an implied private right of action for damages. *Id.* The Court reasoned that because the IAA provided for administrative and criminal enforcement by the SEC, the presence of those express remedies counseled against implying additional private rights. *Id.* Comparing the IAA to other securities laws, the Court noted that "when Congress wished to provide a private damages remedy" in other securities statutes—including the ICA, "which was enacted as companion legislation" to the IAA—"it knew how to do so and did so expressly." *Id.* at 20-21.

ii. *TAMA*'s holding rested on the text of Section 215, the common-law incidents of voidness, and the absence of any other private right of action in the IAA. But none of those features applies to Section 47(b).

First, Section 47(b)'s language isn't like Section 215(b)'s and isn't rights-creating. Section 215(b) of the IAA expressly provides that contracts made in violation of the IAA "shall be void," a formulation the Court found "necessarily contemplate[d] that the issue of voidness under its criteria may be litigated somewhere." *Id.* at 18. When the Court decided *TAMA*, Section 47(b) of the ICA similarly declared that contracts violating the ICA were "void." Pub. L. No. 76-768, 54 Stat. 789, 846 (1940). But a year after *TAMA* was decided, Congress amended Section 47(b) to its present form, replacing the "shall be void" language with today's language that addresses when contracts are "unenforceable." Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, Title I, § 104, 94 Stat. 2275, 2277. Congress, presumed to be "aware of relevant judicial precedent," *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 233 (2020), thus took a different path, creating only a defensive remedy by focusing on unenforceability and equitable rescission and omitting any rights-creating language.

The amendment wasn't merely semantic. Declaring a contract "void" is materially different from declaring a contract "unenforceable." Under hornbook law, a "void" contract is "a legal nullity," 1 Williston on Contracts § 1:20 (4th ed. Oct. 2022 Update), that "has no legal effect" whatsoever, *Void*, *Black's Law Dictionary* (12th ed. 2024). By contrast, an "unenforceable contract" is "[a]n otherwise valid contract that, because of some technical defect, cannot be fully enforced." *Contract*, *Black's Law Dictionary* (12th ed. 2024). The legal consequences of a "void" contract are different from those of a contract that is "unenforceable." "Void" contracts are treated as nullities *ab initio*, giving rise to affirmative remedies. As the Court noted in *TAMA*, "the legal consequences of voidness are typically not … limited [to defensive use]. A person with the power to void a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid." 444 U.S. at 18. "Unenforceable" contracts, in contrast, may simply be unavailable as a basis for relief in court, without necessarily creating a right to sue for rescission. Again, Section 47(b) is a directive to courts, not a provision conferring a benefit on any particular class of plaintiffs, *see supra* pp. 32-34, unlike the way the Court read the "void" language in *TAMA*.

Second, *TAMA* emphasized that the IAA "nowhere expressly provides for a private cause of action." 444 U.S. at 14. In the Court's view, the absence of an express cause of action was a reason to infer one from the "void" language. *Id.* at 20. By contrast, the ICA contains express private rights of action in Sections 30(h) and 36(b), and it vests broad enforcement authority in the SEC for all other provisions, including Section 47(b). *Supra* pp. 35-36. The ICA's express remedies show that Congress knew how to create private rights of action but chose not to do so in Section 47(b). Those remedies rule out the Court's reasoning in *TAMA* about needing to infer a private right of action—they cut in the opposite direction.

b. Even if IAA Section 215(b) and ICA Section 47(b) were identical, the Court shouldn't extend *TAMA* here. *TAMA* was decided in 1979, when the Court still looked to legislative history and perceived purpose as much as—if not more than—text and structure. *See supra* pp. 26-28. But the proper approach, as *Sandoval* explained, requires focusing on statutory text and structure, not policy or legislative history, to determine whether Congress intended to create a private right of action. *See* 532 U.S. at 287. *TAMA*'s reasoning doesn't apply here even on its own terms. But even if it did, the Court has "sworn off the habit" of implying private rights of action absent clear textual and structural cues, *id.*, and it should continue abstaining here.

CONCLUSION

The Court should reverse and hold that Section 47(b) of the ICA does not create an implied private right of action.

Respectfully submitted.

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

Scott Musoff
Jeremy Patashnik
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

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

Counsel for Petitioner FS Credit Opportunities Corp.

(additional counsel information on following page)

(counsel information continued from previous page)

Stephen G. Topetzes
Jennifer R. Gonzalez
Varu Chilakamarri
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
James R. Horner
SIDLEY AUSTIN LLP
787 Seventh Ave.
New York, NY 10019

Counsel for Petitioner Royce Global Trust, Inc.

Tariq Mundiya
Vanessa C. Richardson
Aaron E. Nathan
WILKIE FARR & GALLAGHER LLP
787 Seventh Ave.
New York, NY 10019

Counsel for Respondents BlackRock ESG Capital Allocation Term Trust & BlackRock Municipal Credit Alpha Fund, Inc. (BlackRock Respondents Supporting Petitioners)

August 27, 2025

APPENDIX

TABLE OF CONTENTS

APPENDIX A

15 U.S.C. § 80a-6. Exemptions

(a) Exemption of specified investment companies

The following investment companies are exempt from the provisions of this subchapter:

(1) Any company which since the effective date of this subchapter or within five years prior to such date has been reorganized under the supervision of a court of competent jurisdiction, if (A) such company was not an investment company at the commencement of such reorganization proceedings, (B) at the conclusion of such proceedings all outstanding securities of such company were owned by creditors of such company or by persons to whom such securities were issued on account of creditors' claims, and (C) more than 50 per centum of the voting securities of such company, and securities representing more than 50 per centum of the net asset value of such company, are currently owned beneficially by not more than twenty-five persons; but such exemption shall terminate if any security of which such company is the issuer is offered for sale or sold to the public after the conclusion of such proceedings by the issuer or by or through any underwriter. For the purposes of this paragraph, any new company organized as part of the reorganization shall be deemed the same company as its predecessor; and beneficial ownership shall be determined in the manner provided in section 80a–3(c)(1) of this title.

(2) Any issuer as to which there is outstanding a writing filed with the Commission by the Federal Savings and Loan Insurance Corporation stating that exemption of such issuer from the provisions of this subchapter is consistent with the public interest and the protection of investors and is necessary or appropriate by reason of the fact that such issuer holds or proposes to acquire any assets or any product of any assets which have been segregated (A) from assets of any company which at the filing of such writing is an insured institution within the meaning of section 1724(a)[1] of title 12, or (B) as a part of or in connection with any plan for or condition to the insurance of accounts of any company by said corporation or the conversion of any company into a Federal savings and loan association. Any such writing shall expire when canceled by a writing similarly filed or at the expiration of two years after the date of its filing, whichever first occurs; but said corporation may, nevertheless, before, at, or after the expiration of any such writing file another writing or writings with respect to such issuer.

(3) Any company which prior to March 15, 1940, was and now is a wholly-owned subsidiary of a registered face-amount certificate company and was prior to said date and now is organized and operating under the insurance laws of any State and subject to supervision and examination by the insurance commissioner thereof, and which prior to March 15, 1940, was and now is engaged,

[1] See References in Text note below.

subject to such laws, in business substantially all of which consists of issuing and selling only to residents of such State and investing the proceeds from, securities providing for or representing participations or interests in intangible assets consisting of mortgages or other liens on real estate or notes or bonds secured thereby or in a fund or deposit of mortgages or other liens on real estate or notes or bonds secured thereby or having outstanding such securities so issued and sold.

(4)(A) Any company that is not engaged in the business of issuing redeemable securities, the operations of which are subject to regulation by the State in which the company is organized under a statute governing entities that provide financial or managerial assistance to enterprises doing business, or proposing to do business, in that State if—

(i) the organizational documents of the company state that the activities of the company are limited to the promotion of economic, business, or industrial development in the State through the provision of financial or managerial assistance to enterprises doing business, or proposing to do business, in that State, and such other activities that are incidental or necessary to carry out that purpose;

(ii) immediately following each sale of the securities of the company by the company or any underwriter for the company, not less than 80 percent of the securities of the company being offered in such sale, on a classbyclass basis, are held by persons who reside or who have a substantial business presence in that State;

(iii) the securities of the company are sold, or proposed to be sold, by the company or by any underwriter for the company, solely to accredited investors, as that term is defined in section 77b(a)(15) of this title, or to such other persons that the Commission, as necessary or appropriate in the public interest and consistent with the protection of investors, may permit by rule, regulation, or order; and

(iv) the company does not purchase any security issued by an investment company or by any company that would be an investment company except for the exclusions from the definition of the term "investment company" under paragraph (1) or (7) of section 80a–3(c) of this title, other than—

(I) any debt security that meets such standards of credit-worthiness as the Commission shall adopt; or

(II) any security issued by a registered open-end investment company that is required by its investment policies to invest not less than 65 percent of its total assets in securities described in subclause (I) or securities that are determined by such registered open-end investment company to be comparable in quality to securities described in subclause (I).

(B) Notwithstanding the exemption provided by this paragraph, section 80a–9 of this title (and, to the extent necessary to enforce section 80a–9 of this title, sections 80a–37 through 80a–50 of this title) shall apply to a company described in this paragraph as if the company were an investment company registered under this subchapter.

(C) Any company proposing to rely on the exemption provided by this paragraph shall file with the Commission a notification stating that the company intends to do so, in such form and manner as the Commission may prescribe by rule.

(D) Any company meeting the requirements of this paragraph may rely on the exemption provided by this paragraph upon filing with the Commission the notification required by subparagraph (C), until such time as the Commission determines by order that such reliance is not in the public interest or is not consistent with the protection of investors.

(E) The exemption provided by this paragraph may be subject to such additional terms and conditions as the Commission may by rule, regulation, or order determine are necessary or appropriate in the public interest or for the protection of investors.

(b) Exemption of employees' security company upon application; matters considered

Upon application by any employees' security company, the Commission shall by order exempt such company from the provisions of this subchapter and of the rules and regulations hereunder, if and to the extent that such exemption is consistent with the protection of investors. In determining the provisions to which such an order of exemption shall apply, the Commission shall give due weight, among other things, to the form of organization and the capital structure of such company, the persons by whom its voting securities, evidences of indebtedness, and other securities are owned and controlled, the prices at which securities issued by such company are sold and the sales load thereon, the disposition of the proceeds of such sales, the character of the securities in which such proceeds are invested, and any relationship between such company and the issuer of any such security.

(c) Exemption of persons, securities or any class or classes of persons as necessary and appropriate in public interest

The Commission, by rules and regulations upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this subchapter or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter.

(d) Exemption of closed-end investment companies

The Commission, by rules and regulations or order, shall exempt a closed-end investment company from any or all provisions of this subchapter, but subject to such terms and conditions as may be necessary or appropriate in the public interest or for the protection of investors, if—

(1) the aggregate sums received by such company from the sale of all its outstanding securities, plus the aggregate offering price of all securities of which such company is the issuer and which it

proposes to offer for sale, do not exceed $10,000,000, or such other amount as the Commission may set by rule, regulation, or order;

(2) no security of which such company is the issuer has been or is proposed to be sold by such company or any underwriter therefor, in connection with a public offering, to any person who is not a resident of the State under the laws of which such company is organized or otherwise created; and

(3) such exemption is not contrary to the public interest or inconsistent with the protection of investors.

(e) Application of certain specified provisions of subchapter to otherwise exempt companies

If, in connection with any rule, regulation, or order under this section exempting any investment company from any provision of section 80a–7 of this title, the Commission deems it necessary or appropriate in the public interest or for the protection of investors that certain specified provisions of this subchapter pertaining to registered investment companies shall be applicable in respect of such company, the provisions so specified shall apply to such company, and to other persons in their transactions and relations with such company, as though such company were a registered investment company.

(f) Exemption of closed-end company treated as business development company

Any closed-end company which—

(1) elects to be treated as a business development company pursuant to section 80a–53 of this title; or

(2) would be excluded from the definition of an investment company by section 80a–3(c)(1) of this title, except that it presently proposes to make a public offering of its securities as a business development company, and has notified the Commission, in a form and manner which the Commission may, by rule, prescribe, that it intends in good faith to file, within 90 days, a notification of election to become subject to the provisions of sections 80a–54 through 80a–64 of this title,

shall be exempt from sections 80a–1 through 80a–52 of this title, except to the extent provided in sections 80a–58 through 80a–64 of this title.

…

APPENDIX B

15 U.S.C. § 80a-18. Capital structure of investment companies

…

(i) Future issuance of stock as voting stock; exceptions

Except as provided in subsection (a) of this section, or as otherwise required by law, every share of stock hereafter issued by a registered management company (except a common-law trust of the character described in section 80a–16(c) of this title) shall be a voting stock and have equal voting rights with every other outstanding voting stock: *Provided*, That this subsection shall not apply to shares issued pursuant to the terms of any warrant or subscription right outstanding on March 15, 1940, or any firm contract entered into before March 15, 1940, to purchase such securities from such company nor to shares issued in accordance with any rules, regulations, or orders which the Commission may make permitting such issue.

…

APPENDIX C

15 U.S.C. § 80a-29. Reports and financial statements of investment companies and affiliated persons

(a) Annual report by company

Every registered investment company shall file annually with the Commission such information, documents, and reports as investment companies having securities registered on a national securities exchange are required to file annually pursuant to section 13(a) of the Securities Exchange Act of 1934 [15 U.S.C. 78m(a)] and the rules and regulations issued thereunder.

(b) Semi-annual or quarterly filing of information; copies of periodic or interim reports sent to security holders

Every registered investment company shall file with the Commission—

(1) such information, documents, and reports (other than financial statements), as the Commission may require to keep reasonably current the information and documents contained in the registration statement of such company filed under this subchapter; and

(2) copies of every periodic or interim report or similar communication containing financial statements and transmitted to any class of such company's security holders, such copies to be filed not later than ten days after such transmission.

Any information or documents contained in a report or other communication to security holders filed pursuant to paragraph (2) of this subsection may be incorporated by reference in any report subsequently or concurrently filed pursuant to paragraph (1) of this subsection.

(c) Minimizing reporting burdens

(1) The Commission shall take such action as it deems necessary or appropriate, consistent with the public interest and the protection of investors, to avoid unnecessary reporting by, and minimize the compliance burdens on, registered investment companies and their affiliated persons in exercising its authority—

(A) under subsection (f); and

(B) under subsection (b)(1), if the Commission requires the filing of information, documents, and reports under that subsection on a basis more frequently than semiannually.

(2) Action taken by the Commission under paragraph (1) shall include considering, and requesting public comment on—

(A) feasible alternatives that minimize the reporting burdens on registered investment companies; and

(B) the utility of such information, documents, and reports to the Commission in relation to the costs to registered investment companies and their affiliated persons of providing such information, documents, and reports.

(d) Reports under this section in lieu of reports under other provisions of law

The Commission shall issue rules and regulations permitting the filing with the Commission, and with any national securities exchange concerned, of copies of periodic reports, or of extracts therefrom, filed by any registered investment company pursuant to subsections (a) and (b), in lieu of any reports and documents required of such company under section 13 or 15(d) of the Securities Exchange Act of 1934 [15 U.S.C. 78m or 78*o*(d)].

(e) Semiannual reports to stockholders

Every registered investment company shall transmit to its stockholders, at least semiannually, reports containing such of the following information and financial statements or their equivalent, as of a reasonably current date, as the Commission may prescribe by rules and regulations for the protection of investors, which reports shall not be misleading in any material respect in the light of the reports required to be filed pursuant to subsections (a) and (b):

(1) a balance sheet accompanied by a statement of the aggregate value of investments on the date of such balance sheet;

(2) a list showing the amounts and values of securities owned on the date of such balance sheet;

(3) a statement of income, for the period covered by the report, which shall be itemized at least with respect to each category of income and expense representing more than 5 per centum of total income or expense;

(4) a statement of surplus, which shall be itemized at least with respect to each charge or credit to the surplus account which represents more than 5 per centum of the total charges or credits during the period covered by the report;

(5) a statement of the aggregate remuneration paid by the company during the period covered by the report (A) to all directors and to all members of any advisory board for regular compensation; (B) to each director and to each member of an advisory board for special compensation; (C) to all officers; and (D) to each person of whom any officer or director of the company is an affiliated person; and

(6) a statement of the aggregate dollar amounts of purchases and sales of investment securities, other than Government securities, made during the period covered by the report:

Provided, That if in the judgment of the Commission any item required under this subsection is inapplicable or inappropriate to any specified type or types of investment company, the Commission may by rules and regulations permit in lieu thereof the inclusion of such item of a comparable character as it may deem applicable or appropriate to such type or types of investment company.

(f) Additional information

The Commission may, by rule, require that semi-annual reports containing the information set forth in subsection (e) include such other information as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(g) Certificate of independent public accountants

Financial statements contained in annual reports required pursuant to subsections (a) and (e), if required by the rules and regulations of the Commission, shall be accompanied by a certificate of independent public accountants. The certificate of such independent public accountants shall be based upon an audit not less in scope or procedures followed than that which independent public accountants would ordinarily make for the purpose of presenting comprehensive and dependable financial statements, and shall contain such information as the Commission may prescribe, by rules and regulations in the public interest or for the protection of investors, as to the nature and scope of the audit and the findings and opinion of the accountants. Each such report shall state that such independent public accountants have verified securities owned, either by actual examination, or by receipt of a certificate from the custodian, as the Commission may prescribe by rules and regulations.

(h) Duties and liabilities of affiliated persons

Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of outstanding securities (other than short-term paper) of which a registered closed-end company is the issuer or who is an officer, director, member of an advisory board, investment adviser, or affiliated person of an investment adviser of such a company shall in respect of his transactions in any securities of such company (other than short-term paper) be subject to the same duties and liabilities as those imposed by section 16 of the Securities Exchange Act of 1934 [15 U.S.C. 78p] upon certain beneficial owners, directors, and officers in respect of their transactions in certain equity securities.

(i) Disclosure to church plan participants

A person that maintains a church plan that is excluded from the definition of an investment company solely by reason of section 80a–3(c)(14) of this title shall provide disclosure to plan participants, in writing, and not less frequently than annually, and for new participants joining such a plan after May 31, 1996, as soon as is practicable after joining such plan, that—

(1) the plan, or any company or account maintained to manage or hold plan assets and interests in such plan, company, or account, are not subject to registration, regulation, or reporting under this subchapter, the Securities Act of 1933 [15 U.S.C. 77a et seq.], the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], or State securities laws; and

(2) plan participants and beneficiaries therefore will not be afforded the protections of those provisions.

(j) Notice to Commission

The Commission may issue rules and regulations to require any person that maintains a church plan that is excluded from the definition of an investment company solely by reason of section 80a–3(c)(14) of this title to file a notice with the Commission containing such information and in such form as the Commission may prescribe as necessary or appropriate in the public interest or consistent with the protection of investors.

(k) Data standards for reports

(1) Requirement

The Commission shall, by rule, adopt data standards for all reports required to be filed with the Commission under this section, except that the Commission may exempt exhibits, signatures, and certifications from those data standards.

(2) Consistency

The data standards required under paragraph (1) shall incorporate, and ensure compatibility with (to the extent feasible), all applicable data standards established in the rules promulgated under section 5334 of title 12, including, to the extent practicable, by having the characteristics described in clauses (i) through (vi) of subsection (c)(1)(B) of such section 5334.

…

APPENDIX D

15 U.S.C. § 80a-35. Breach of fiduciary duty

(a) Civil actions by Commission; jurisdiction; allegations; injunctive or other relief

The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person who is, or at the time of the alleged misconduct was, serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts, or at the time of the alleged misconduct, so served or acted—

(1) as officer, director, member of any advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 80a–1(b) of this title.

(b) Compensation or payments as basis of fiduciary duty; civil actions by Commission or security holder; burden of proof; judicial consideration of director or shareholder approval; persons liable; extent of liability; exempted transactions; jurisdiction; finding restriction

For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:

(1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.

(2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or

other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.

(3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payment received from such investment company, or the security holders thereof, by such recipient.

(4) This subsection shall not apply to compensation or payments made in connection with transactions subject to section 80a–17 of this title, or rules, regulations, or orders thereunder, or to sales loads for the acquisition of any security issued by a registered investment company.

(5) Any action pursuant to this subsection may be brought only in an appropriate district court of the United States.

(6) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a

violation of this subchapter for the purposes of sections 80a–9 and 80a–48 of this title, section 78*o* of this title, or section 80b–3 of this title, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.

(c) Corporate or other trustees performing functions of investment advisers

For the purposes of subsections (a) and (b) of this section, the term "investment adviser" includes a corporate or other trustee performing the functions of an investment adviser.

…

APPENDIX E

15 U.S.C. § 80a-41 Enforcement of subchapter

(a) Investigation

The Commission may make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subchapter or of any rule, regulation, or order hereunder, or to determine whether any action in any court or any proceeding before the Commission shall be instituted under this subchapter against a particular person or persons, or with respect to a particular transaction or transactions. The Commission shall permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated.

(b) Administration of oaths and affirmations, subpena of witnesses, etc.

For the purpose of any investigation or any other proceeding under this subchapter, any member of the Commission, or any officer thereof designated by it, is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, contracts, agreements, or other records which are relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in any State or in any Territory or other place subject to the jurisdiction of the United States at any designated place of hearing.

(c) Jurisdiction of courts of United States

In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, contracts, agreements, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who without just cause shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor, and upon conviction shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) Action for injunction

Whenever it shall appear to the Commission that any person has engaged or is about to engage in any act or practice constituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. In any proceeding under this subsection to enforce compliance with section 80a–7 of this title, the court as a court of equity may, to the extent it deems necessary or appropriate, take exclusive jurisdiction and possession of the investment company or companies involved and the books, records, and assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, who with the approval of the court shall have power to dispose of any or all of such assets, subject to such terms and conditions as the court may prescribe. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter.

(e) Money penalties in civil actions

(1) Authority of Commission

Whenever it shall appear to the Commission that any person has violated any provision of this subchapter, the rules or regulations thereunder, or a cease-and-desist order entered by the Commission pursuant to section 80a–9(f) of this title, the Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.

(2) Amount of penalty

(A) First tier

The amount of the penalty shall be determined by the court in light of the facts and circumstances. For each violation, the amount of the penalty shall not exceed the greater of (i) $5,000 for a natural person or $50,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation.

(B) Second tier

Notwithstanding subparagraph (A), the amount of penalty for each such violation shall not exceed the greater of (i) $50,000 for a natural person or $250,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), the amount of penalty for each such violation shall not exceed the greater of (i) $100,000 for a natural person or $500,000 for any other person, or (ii) the gross amount of pecuniary gain to such defendant as a result of the violation, if—

(I) the violation described in paragraph (1) involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and

(II) such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.

(3) Procedures for collection

(A) Payment of penalty to Treasury

A penalty imposed under this section shall be payable into the Treasury of the United States, except as otherwise provided in section 7246 of this title and section 78u–6 of this title.

(B) Collection of penalties

If a person upon whom such a penalty is imposed shall fail to pay such penalty within the time prescribed in the court's order, the Commission may refer the matter to the Attorney General who shall recover such penalty by action in the appropriate United States district court.

(C) Remedy not exclusive

The actions authorized by this subsection may be brought in addition to any other action that the Commission or the Attorney General is entitled to bring.

(D) Jurisdiction and venue

For purposes of section 80a–43 of this title, actions under this paragraph shall be actions to enforce a liability or a duty created by this subchapter.

(4) Special provisions relating to a violation of a cease-and-desist order

In an action to enforce a cease-and-desist order entered by the Commission pursuant to section 80a–9(f) of this title, each separate violation of such order shall be a separate offense, except that in the case of a violation through a continuing failure to comply with the order, each day of the failure to comply shall be deemed a separate offense.

…

APPENDIX F

15 U.S.C. § 80a-46. Validity of contracts

(a) Waiver of compliance as void

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this subchapter or with any rule, regulation, or order thereunder shall be void.

(b) Equitable results; recission; severance

(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 (or by a nonparty to the contract who acquired a right under the contract with knowledge of the facts by reason of which the making or performance violated or would violate any provision of this subchapter or of any rule, regulation, or order thereunder) unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this subchapter.

(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.

(3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it

may be severed from the unlawful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment.

…