No. 24-345

IN THE
Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL.,
Petitioners,
v.
SABA CAPITAL MASTER FUND, LTD., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Separation of Powers Clinic at The Catholic University of America's Columbus School of Law (previously at the Antonin Scalia Law School at George Mason University) provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation. The Clinic has submitted over fifty briefs in federal cases implicating separation of powers.

The Clinic has submitted briefs at this Court in several cases about implied private causes of action, including *Egbert v. Boule*, No. 21-147, and *Cisco Systems, Inc. v. Doe I*, No. 24-856.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

"We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment); *see* Part I, *infra*.

Judicial creation of a cause of action therefore "is an extraordinary act that places great stress on the separation of powers." *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 636 (2021) (op. of Thomas, J., joined by Gorsuch & Kavanaugh, JJ.). That "stress" extends both to the Article I legislature, which has the prerogative to create causes of action; and, in many cases, also to the Article II executive, which typically has the sole prerogative to enforce statutes absent a private cause of action, *see* Part III, *infra*.

For Section 47(b) of the Investment Company Act, there are significant textual indications that Congress did *not* intend to create an implied private cause of action, and thus judicially inventing one would yield "great stress" to the separation of powers. Notably, Congress provided a separate private mechanism to ensure limited judicial recognition of the protections in Section 47(b), while stopping short of providing an affirmative cause of action. *See* Part II, *infra*.

To be sure, the courts have implied private causes of action for enforcement of a handful of SEC Rules like 14a-8 and 14a-9, but that practice dates back many decades and involves narrow rights not analogous to those in Section 47(b). *See* Part IV, *infra*.

ARGUMENT

I. The Legislative Power—Including Creating Causes of Action—Is Vested Exclusively with Congress.

Article I vests "legislative Powers" in Congress alone. U.S. Const. art. I, § 1. That power can be exercised only subject to certain stringent and precise procedural requirements such as bicameralism and presentment, subject to veto override procedures. U.S. Const. art. I, § 7. Congress through those procedural requirements is assigned the responsibility for enacting statutes creating federal jurisdiction. *See* U.S. Const. art. I, § 8, cl. 9. The parameters of legislative power extend not just to the announcement of new substantive federal law but also to the methods of enforcement of that federal law—e.g., whether to create a private cause of action.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 334 (2020); *see Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). Accordingly, "[a]t bottom, creating a cause of action is a legislative endeavor." *Egbert v. Boule*, 596 U.S. 482, 491 (2022).

A second core structural feature of the federal government is the constitutionally limited assignment of federal courts to the resolution of certain enumerated matters. Article III permits federal courts to hear only certain limited categories of matters—"Cases" and "Controversies"—and this ensures that "federal courts exercise 'their proper function in a limited and separated government.'"

TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021). "Under Article III, ... [f]ederal courts do not possess a roving commission to publicly opine on every legal question," nor do they have power to "exercise general legal oversight of the Legislative and Executive Branches, or of private entities." *Id.* at 423–24. Rather, "federal courts instead decide only matters 'of a Judiciary Nature.'" *Id.* at 424 (quoting 2 *Records of the Federal Convention of 1787*, at 430 (M. Farrand ed. 1966)).

This structural reality, combined with the constitutionally ordained role of Congress and the President in the establishment (or not) of courts, causes of action, and permissible relief through statutory enactments, suggests that the entire enterprise of squinting to discern a privately enforceable cause of action is at odds with the Constitution's limited role for the judiciary. *See Nestle*, 593 U.S. at 636 (op. of Thomas, J., joined by Gorsuch & Kavanaugh, JJ.) ("[J]udicial creation of a cause of action is an extraordinary act that places great stress on the separation of powers.").

II. There Are Especially Strong Textual Indications Against Implying a Private Cause of Action Here.

Those relative roles of Congress and the Judiciary mean that "[t]he question is not what case or congressional action *prevents* federal courts from" creating causes of action, but rather "what *authorizes*" the courts to recognize such actions at all. *Sosa*, 542 U.S. at 744 (Scalia, J., concurring in part and concurring in the judgment).

On that score, there are no textual indications that Congress intended an affirmative, private cause of action to enforce Section 47(b). In fact, quite the opposite. Congress provided various private mechanisms for enforcing certain ICA rights, *including those in Section 47(b) itself*—but did not provide a private right to enforce Section 47(b) directly.

Start with other ICA provisions. As originally enacted in 1940, a different part of the ICA "expressly authorized private suits for damages" against certain investment-company insiders. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979); *see* 54 Stat. 837. Congress later added Section 36(b), which states that "[a]n action may be brought … by a securityholder of [a] registered investment company on behalf of such company" for breach of fiduciary duty against the company's investment adviser or certain affiliates. 15 U.S.C. § 80a-35(b); 84 Stat. 1428–30.

Turning to Section 47(b) itself: Congress provided a limited private mechanism for enforcing the protections in that provision. Section 46(b) provides that a contract that violates Section 47(b) generally "is unenforceable by either party." 15 U.S.C. § 80a-46(b)(1). That allows a defendant in a breach-of-contract case to avoid liability by arguing the contract violates Section 47(b). But it is odd, to say the least, to infer an affirmative cause of action—i.e., to let a plaintiff sue to *enforce* a right—based on a clause that says only that something is "*un*enforceable." Congress clearly intended Section 47(b) to be used by private parties as a private, not a sword.

Given that Congress expressly provided private causes of action elsewhere in the ICA (but not for Section 47(b)) and given that Congress did provide a limited means for private parties to assert certain protections from Section 47(b) itself, there are extensive textual indications that Congress did not intend a standalone private cause of action to enforce Section 47(b).

III. Private Section 47(b) Causes of Action Interfere with Article II Enforcement Priorities.

Congress's Article I power is not the only casualty of implying a private right of action to enforce Section 47(b) of the ICA. Doing so would also interfere with the Executive's Article II enforcement powers.

Congress expressly gave the SEC the power to bring enforcement actions in federal courts for ICA violations. 15 U.S.C. § 80a-41(a). In those actions, the SEC can seek injunctive relief and monetary penalties. *Id.* § 80a-41(d), (e). The SEC also may exempt any person, security, or transaction from "any provision" of the ICA. *Id.* § 80a-6(c).

A private cause of action for those or similar violations thus risks serious conflicts between private and Article II priorities. To be sure, Congress can create dual-tracked enforcement regimes and thereby tempt such conflicts. But courts should be chary to provoke that conflict unnecessarily.

As the Ninth Circuit aptly explained, the risk of conflict is especially high in this context. A private cause of action for Section 47(b) could let a party try

"to halt a deal the SEC has not blocked for alleged violations of an ICA exemption the SEC has not addressed, even though the SEC has been made fully aware of the facts underlying those alleged violations." *UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695, 701 (9th Cir. 2018). And a private party could ostensibly seek expansive relief, including trying to force the defendant to rescind "every … contract [it] has entered into for the better part of a decade." *Id.*

Further, "when it comes to ICA exemptions," a private cause of action "threatens to force courts and the SEC into a tellingly odd game of chicken." *Id.* "[I]f a court concluded in the first instance that a company had violated its ICA exemption, and if circumstances had not changed since the court's decision, could the SEC re-exempt the company as it saw fit? Or would the SEC, the body the ICA expressly charges with considering changed circumstances in the first instance, be bound by the court's decision until circumstances changed again? Either the court's diligent efforts get wasted, or the SEC's express prerogatives get thwarted. Pick your poison." *Id.*

As with the textual indications, *see* Part II, *supra*, the Article II considerations here strongly indicate no interest by Congress in allowing private causes of action to enforce Section 47(b).

IV. Private Causes of Action to Enforce SEC Rules 14a-8 and 14a-9 Are Distinguishable.

The Court has held that continued recognition of a limited set of implied private causes of action in the securities realm is acceptable because overturning

them would unsettle longstanding expectations. But there are no such concerns when it comes to Section 47(b).

The Court's continued recognition of an implied cause of action to enforce SEC Rule 14a-9 is perhaps the most famous example of a long-extant implied private cause of action in the securities context. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102–04 (1991) (declining to overrule *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)).

Then-Judge Ruth Bader Ginsburg provided the leading analysis of the limited universe of implied securities actions in *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992), which held there was likewise a cause of action to enforce the closely related SEC Rule 14a-8 even after this Court made clear that Courts should rarely recognize implied actions, *id.* at 419–23.

Her opinion carefully analyzed *Virginia Bankshares*, which balanced a hesitancy to recognize *new* implied rights of action with "a disinclination … to disturb a longstanding 'legal structure of private statutory rights [that] has developed without clear indications of congressional intent.'" *Id.* at 420. Applying *Virginia Bankshares*, the D.C. Circuit could "see no instruction in current Supreme Court opinions to 'freeze out' private enforcement of Rule 14a–8." *Id.* at 422.

Then-Judge Ginsburg identified several reasons why that was the case. *First*, as noted above, this Court has long held there is an implied private cause

of action to enforce Rule 14a-9, and Rule 14a-8 provided for similar private interests. *Id.* at 421.

Second, like with Rule 14a-9, there was a lengthy history of private Rule 14a-8 claims tracing back decades, meaning that suddenly cutting off the private right of action would upset longstanding administrative arrangements and shareholder expectations. *Id.* at 419 (collecting cases enforcing Rule 14a-8).

Accordingly, despite this Court's restriction of implied causes of actions, courts have continued to recognize implied claims to enforce Rules 14a-8 and 14a-9. *See, e.g.*, *KBR v. Chevedden*, 478 F. App'x 213, 215 (5th Cir. 2012); *Bebchuk v. CA, Inc.*, 902 A.2d 737, 742 n.28 (Del. Ch. 2006); *see also* Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 10:28 (2025) ("[C]ourts have agreed in recognizing the implied right of action to enforce rights under Rule 14a-8.").

But Section 47(b) is easily distinguishable from the private enforcement of Rules 14a-8 and 14a-9. The rights under those Rules are about preventing fraud and ensuring shareholder participation in the proxy process, but Section 47(b) is far afield from that interest. Even more to the point, there is no longstanding practice of bringing private Section 47(b) claims. In fact, before the Second Circuit's decision in 2019, the relevant cases had all rejected such a cause of action. *Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co.*, 677 F.3d 178 (3d Cir. 2012); *UFCW*, 895 F.3d at 701.

Accordingly, the Court can easily reverse the decision below without revisiting prior cases recognizing a narrow set of implied securities actions in the context of Section 14 of the Exchange Act.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse.

Respectfully submitted,

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