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 THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as *amicus curiae* in cases, like this one, that raise issues of concern to the Nation's business community.

The Chamber has a strong interest in this case because private litigation under Section 47(b) of the Investment Company Act (ICA) imposes a substantial burden on business. Section 47(b) permits the rescission of contracts made in violation of the ICA, a statute that governs "investment companies" with extensive and far-reaching requirements. Many businesses are registered under the ICA and subject to its demands, while others risk inadvertently becoming "investment companies" subject to SEC registration and oversight. The scope of the ICA's reach is therefore critically important.

The question in this case is whether Section 47(b) of the ICA confers a private right of action. The answer is no. The text of the statute that Congress

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission.

enacted does not express such a private right, and judicial implication of such a right would contravene the structure of the ICA. This Court has admonished that courts should not venture beyond Congress's intent when it comes to private rights of action. And doing so here would be particularly problematic. Recognizing such a right would unleash crippling and unchecked private lawsuits aimed at enforcing the ICA's extensive requirements and seeking to rescind vital business contracts. And arming private individuals to bring such actions would create significant regulatory uncertainty and undermine the SEC's role as the congressionally selected enforcer of the ICA.

The Chamber and its members have a strong interest in restraining such regulatory overreach and ensuring that the statute Congress enacted is enforced consistently with its terms.

INTRODUCTION AND SUMMARY OF ARGUMENT

The central question in this case—whether the Second Circuit properly inferred a private right of action under the Investment Company Act (ICA)—was, for all intents and purposes, decided long ago. Over four decades ago, this Court "swor[e] off the habit of venturing beyond Congress's intent" to recognize implied private rights of action to enforce federal law, and it has repeatedly rebuffed "invitation[s] to have one last drink" ever since. *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). The Court today correctly recognizes that it is the role of Congress, not the courts, to create causes of action. Under this approach, the judiciary's sole task is to interpret the statutes Congress has enacted to

determine whether they display an intent to create a private right of action, and no more. Application of this now settled rule makes this an easy case.

The statute at issue here—Section 47(b) of the ICA, 15 U.S.C. § 80a-46(b)—displays no such intent. The statutory text does not even hint at a private right of action. That is the end of the inquiry. But the statute's structure confirms that this omission was deliberate. The Second Circuit nevertheless recognized an implied private right of action based solely on strained inferences and conjecture about the significance of post-enactment amendments. *See Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106-09 (2d Cir. 2019). The Second Circuit's position defies Section 47(b)'s text and structure, which clearly foreclose any recognition of such a right.

The Second Circuit's decision to recognize a private right also contravenes fundamental separation-of-powers principles central to the Constitution's design. These principles are well-rehearsed in this Court's decisions. Crafting a legal remedy is a function reserved exclusively for Congress, which can deliberate through hearings, debates, and legislative votes before setting forth the law through the text it enacts. Judges lack Congress's political accountability and are tasked with applying the law as enacted. The enforcement of federal laws, moreover, is the Executive's prerogative—not that of private citizens, who might pursue enforcement actions that clash with the Executive's goals. By creating an implied private cause of action to enforce Section 47(b), the Second Circuit usurped Congress's authority, undermined the delicate balance of powers essential to our constitutional framework, and

overstepped its role. There is no justification for this Court to condone such overreach here.

Sanctioning this breach of the separation of powers would impose severe real-world costs on the business community—as evidenced by the history of litigation in the Second Circuit. Armed with the Second Circuit's rule, private litigants currently wield sweeping power: They can seek rescission of a vast array of contracts—including advisory agreements, securities issuances, and even corporate bylaws. The ICA's broad scope of coverage—which can capture companies not structured or operated as funds, such as development-stage companies raising capital—only amplifies the issue, as private plaintiffs can potentially ensnare a wide range of businesses in costly legal battles. This private-enforcement regime has injected substantial regulatory uncertainty into the business landscape, allowing for unpredictable enforcement actions driven by individual plaintiffs' whims rather than any consistent enforcement policy. And given the risks posed by these suits and the substantial resources necessary to litigate them, even companies facing patently meritless claims can be forced to consider settlement.

None of this is justified by the text of the statute Congress enacted. The Court should adhere to its precedents, respect Congress's intent, and hold that no private right of action under Section 47(b) exists. Anything less would invite a return to the "bad old days" that this Court rightly ended. Transcript of Oral Argument at 45:10-12, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (No. 06-1431) (Scalia, J.) (observing that the Court "inferred th[e] cause of action [at issue] in the bad old days, when we were inferring causes of action all over the place").

ARGUMENT

I. No Basis Exists For Inferring A Private Right Of Action Under Section 47(b)

This Court should not infer a private right of action under Section 47(b). As Petitioners explain, Section 47(b)'s text contains no hint of a private right of action. *See* Pet. Br. 30-35. That should be the end of the matter. Moreover, the ICA contains two other strong indicators that Congress did not intend private enforcement of Section 47(b): Congress delegated enforcement of the ICA *to the SEC*, and Congress expressly created a private right of action in two different provisions of the ICA. *Id.* at 35-37.

This brief highlights an additional, critical flaw in the Second Circuit's decision: Creating an implied private right of action under Section 47(b) contravenes separation-of-powers principles that this Court has consistently stressed for more than four decades. Sanctioning this breach of the separation of powers here would not only disrupt the constitutional balance, but also would impose severe costs on business that Congress did not intend.

A. Respect For The Separation Of Powers Requires A Clear Indication Of Congressional Intent Before Recognizing A Private Right Of Action

The principles governing the creation, and implication, of private rights of action boil down to the proper role of the legislative and judicial branches under the separation of powers.

"In the mid-20th century, . . . the Court assumed it to be a proper judicial function to 'provide such remedies as are necessary to make effective' a statute's purpose," and so, "as a routine matter with

respect to statutes, the Court would imply causes of action not explicit in the statutory text itself." *Ziglar v. Abbasi*, 582 U.S. 120, 131-32 (2017). As Justice Scalia once remarked, those were the "bad old days." Transcript of Oral Argument at 45:11, *CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008) (No. 06-1431).

Starting in 1975, the Court altered its approach. It "adopted a far more cautious course before finding implied causes of action," focusing closely on the statutory text to ascertain whether Congress intended to create a private right of action. *Ziglar*, 582 U.S. at 132-33; *see Cort v. Ash*, 422 U.S. 66, 68-69 (1975). And by 2001, the Court had emphatically acknowledged that the practice of liberally recognizing implied private rights of action was not only wrong but a relic of an "*ancien regime*" that the Court had "abandoned." *Alexander v. Sandoval,* 532 U.S. 275, 287 (2001). In the decades since, the Court "has been very hostile to implied causes of action." *Johnson v. Interstate Mgmt. Co.*, 849 F.3d 1093, 1097 (D.C. Cir. 2017) (Kavanaugh, J.); *see, e.g.*, *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 264 (2018) (observing that the "Court's recent precedents cast doubt on the authority of courts to extend or create private causes of action" not expressly created by Congress); *Ziglar*, 582 U.S. at 133 (similar).

The reason for this shift is clear: The "judicial creation of a cause of action . . . places great stress on the separation of powers." *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 636 (2021) (plurality opinion); *see also Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 230 (2022) (Kavanaugh, J., concurring). Deciding that "persons . . . who engage in certain conduct will be liable to [others] is, in every meaningful sense, just like enacting a new law"—a

role that belongs exclusively to Congress. *Jesner*, 584 U.S. at 282 (Gorsuch, J., concurring in part and concurring in the judgment); *see Egbert v. Boule*, 596 U.S. 482, 491 (2022) ("At bottom, creating a cause of action is a legislative endeavor.").

When courts sanction a new cause of action, they are "invariably" "'weigh[ing] and apprais[ing]'" a host of policy-laden factors, including the potential for abuse, the predicted impact on the judicial system, and the existence of alternative enforcement mechanisms. *Elhady v. Unidentified CBP Agents*, 18 F.4th 880, 883 (6th Cir. 2021) (Thapar, J.) (citation omitted), *cert. denied*, 143 S. Ct. 301 (2022); *see Ziglar*, 582 U.S. at 133-36 (discussing these concerns). These are precisely the types of complex "policy considerations" that Congress, not the Judiciary, is equipped to address. *Egbert*, 596 U.S. at 491; *see Nestlé*, 593 U.S. at 637 (plurality opinion) ("[A]ny judicially created cause of action risks 'upset[ting] the careful balance of interests struck by the lawmakers.'" (alteration in original) (citation omitted)). For that reason, "when a party seeks to assert an implied cause of action under a federal statute, separation-of-powers principles are or should be central to the analysis." *Ziglar*, 582 U.S. at 135.

Just last Term, this Court reinforced these principles in the analogous context of evaluating whether a federal statute created rights enforceable against state and local officials under 42 U.S.C. § 1983. In *Medina v. Planned Parenthood South Atlantic*, the Court emphasized that its stringent rules against casually inferring private rights of action are designed to "'vindicat[e] the separation of powers.'" 145 S. Ct. 2219, 2229-30 (2025) (alteration in original) (citation omitted). It made clear that "the

decision whether to let private plaintiffs enforce a new statutory right poses delicate questions of public policy." *Id.* at 2229. And it underscored that "[t]he job of resolving how best to weigh [the] competing costs and benefits" in allowing private enforcement of a statute "belongs to the people's elected representatives, not unelected judges charged with applying the law as they find it." *Id.* at 2229-30. These principles apply equally to the decision whether to infer a private right under Section 47(b).

Recognizing an implied private cause of action not only infringes on Congress's exclusive role in making laws but also encroaches on the Executive's role in administering them. Private enforcers—who are unaccountable to the electorate and typically indifferent to the "social impact of their enforcement decisions"—sometimes pursue enforcement objectives that misalign with, or even oppose, broader regulatory goals. Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 Va. L. Rev. 93, 114, 119 (2005); *see, e.g.*, *New England Tel. & Tel. Co. v. Public Utils. Comm'n*, 742 F.2d 1, 5-6 (1st Cir. 1984) (Breyer, J.) (noting that recognizing an implied private right to enforce FCC regulations would place the FCC's "interpretive function squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission," which would "deprive the FCC" of its congressionally conferred "authority in creating, interpreting, and modifying" a "coherent nationwide communications policy"), *cert. denied*, 476 U.S. 1174 (1986). This lack of accountability can lead to overzealous, inefficient, and misguided enforcement efforts.

A private enforcement regime also allows plaintiffs' lawyers "to set policy nationwide" rather than permitting regulators to shape and balance regulatory objectives with necessary protections. U.S. Chamber Institute for Legal Reform, *Ill-Suited: Private Rights of Action and Privacy Claims* 14 (July 2019) (*Ill-Suited*).[2] And private enforcement can lead to "inconsistent and dramatically varied district-by-district court rulings," driven by individual plaintiffs' aims (and perhaps attempts to secure a lucrative settlement) rather than an agency regulator's comprehensive enforcement agenda. *Id.*; *see* Stephenson, *supra*, at 119 (discussing concerns).

Experience shows that agencies are not incapable of overreach, either. But, when regulators act consistently with the law, agency enforcement is more likely to yield "constructive, consistent decisions" that protect investors while offering a structured, stable framework "for companies aiming to align their practices with existing and developing law." *Ill-Suited*, *supra*, at 14. Such predictability is vital for business planning and investment, enabling companies to focus on growth and innovation rather than diverting resources to fend off unpredictable potential private litigation. Layering the threat of private enforcement actions on top of agency enforcement trades predictability for the uncertainty of a constant threat of litigation. That is precisely the kind of trade-off that Congress would need to consider before creating a private right of action.

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[2] https://instituteforlegalreform.com/wp-content/uploads/2020/10/Ill-Suited_-_Private_RIghts_of_Action_and_Privacy_Claims_Report.pdf.

B. Congress Gave No Indication That It Intended Section 47(b) To Be Privately Enforced

The Second Circuit's decision to recognize an implied right of action under Section 47(b) flouts these separation-of-powers principles and grants private parties a license to sue that Congress did not.

1. Nothing in the text of Section 47(b) expressly establishes any private right of action. *See* Pet. Br. 30-35. That should be the end of the matter. As this Court emphasized in *Ziglar*, "[if] the statute does not itself so provide, a private cause of action will not be created through judicial mandate." 582 U.S. at 133.

In any event, the structure of the ICA confirms no private right of action to enforce Section 47(b) exists. For instance, Congress explicitly empowered the SEC to enforce "any provision" of the ICA, including Section 47(b). 15 U.S.C. § 80a-41(d). The SEC can seek injunctive relief, *id.*, and it can seek monetary penalties under detailed procedures set out by Congress, *id.* § 80a-41(e). These express provisions underscore that Congress knew perfectly well how to create rights of action *when it wanted to do so*—and it deliberately chose not to do so for Section 47(b).

As this Court emphasized in *Sandoval*, such comprehensive provisions for agency enforcement "*contradict* a congressional intent to create privately enforceable rights through [a statutory provision]." 532 U.S. at 290 (emphasis added). After all, "[i]t is hard to believe that Congress intended" to provide for an implicit right of action, the contours of which would be entirely subject to judicial creation, when it explicitly provided for a comprehensive remedial scheme based on enforcement by the federal government. *Middlesex Cnty. Sewerage Auth. v.*

National Sea Clammers Ass'n, 453 U.S. 1, 20 (1981); *see Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94 (1981) (noting that statute's comprehensive provisions for enforcement by the federal government "strongly evidence[] an intent not to authorize additional remedies"). Recognizing an implied private right of action in Section 47(b) would disrupt the careful balance Congress struck, providing competing enforcement power to private parties eager to litigate any perceived ICA violation.

On top of that, in Section 36(b), Congress explicitly created a private right of action to enforce certain breaches of fiduciary duties. 15 U.S.C. § 80a-35(b). And in Section 30(h), Congress expressly authorized private suits for damages against certain defendants who realize profits from short-swing trading by insiders with nonpublic information. 15 U.S.C. § 80a-29(h). These targeted provisions show that "when Congress wished to provide" a *private* right of action to enforce the ICA, "it knew how to do so and did so expressly." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979). Congress did not do so in Section 47(b)—which means that it did not mean to create such a right. After all, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action" when it explicitly and intentionally provided for enforcement of *other* ICA provisions by private persons—and instead provided for SEC enforcement of these provisions. *Cannon v. University of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting).

Moreover, it is unreasonable to think that Congress intended to leave all the details of an implicit private action under Section 47(b) to judicial creation when Congress meticulously defined the

scope of the private rights of action in Sections 30(h) and 36(b). Section 36(b), for instance, allows "a security holder of [a] registered investment company" to bring suit against an "investment adviser" for breach of fiduciary duty, but only under narrowly defined circumstances spelled out in six separate subsections. *See* 15 U.S.C. § 80a-35(b)(1)-(6). Section 36(b) includes detailed rules for these actions, like a statute of limitations, *id.* § 80a-35(b)(3), and burden of proof, *id.* § 80a-35(b)(1). Given this level of specificity, it is inconceivable that Congress would leave the details of a Section 47(b) private action to judicial discretion.

2. Rather than heed these principles, the Second Circuit traveled back in time, invoking this Court's half-century-old decision in *Transamerica Mortgage Advisors, Inc.* (*TAMA*) *v. Lewis*, 444 U.S. 11 (1979). *See Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106-07 (2d Cir. 2019). But *TAMA* offers no support for the Second Circuit's creation of a private right under Section 47(b).

In *TAMA*, this Court *rejected* a private right of action under Section 206 of the Investment Advisers Act (IAA), which sets fiduciary standards for investment advisers, holding that "the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action" on their behalf. 444 U.S. at 24. This Court emphasized that Congress had already "expressly provided both judicial and administrative means for enforcing compliance with [Section] 206": (1) the federal government could prosecute willful violations of the Act as criminal offenses; (2) the SEC could bring civil actions in federal court to enforce compliance with the Act, including Section 206; and (3) the SEC

could impose various administrative sanctions on violators of the Act, including Section 206. *Id.* at 20. "In view of these express provisions for enforcing the duties imposed by [Section] 206," *TAMA* explained, "it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.'" *Id.* (citation omitted).

Those same three considerations apply equally to Section 47(b): (1) the federal government can prosecute willful violations of the ICA as criminal offenses, *see* 15 U.S.C. § 80a-48; (2) the SEC can bring civil actions in federal court to enforce "any [ICA] provision," including Section 47(b), *id.* § 80a-41(d); and (3) the SEC can impose administrative sanctions on violators of the ICA, including on violators of Section 47(b), *id.* § 80a-9(b). Far from validating the Second Circuit's position, then, *TAMA* actually undermines it—confirming that the ICA's robust enforcement mechanisms negate any implication that Congress intended to create a private right of action under Section 47(b) without saying so.

The Second Circuit relied on *TAMA*'s conclusion that Section 215 of the IAA, which provides that "'contracts whose formation or performance would violate the [IAA] "shall be void . . . as regards the rights of" the violator,'" implies a private right of action to seek rescission. *Oxford Univ. Bank*, 933 F.3d at 106 (alterations in original) (quoting *TAMA*, 444 U.S. at 16-17). But that portion of *TAMA* does not apply here. As *TAMA* itself recognized, and as Justice Scalia's opinion for the Court in *Sandoval* reiterated, "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *TAMA*, 444 U.S. at 19; *see Sandoval*, 532 U.S. at 290. In *TAMA*, that logic did

not extend to Section 215 because the IAA offered no other private causes of action. *See TAMA*, 444 U.S. at 14 (emphasizing that the IAA "nowhere expressly provides for a private cause of action"). By contrast, Congress explicitly included two private causes of action in the ICA. *See supra* at 11. And those provisions affirm that "when Congress wished to provide" a private cause of action in the ICA, "it knew how to do so and did so expressly." *TAMA*, 444 U.S. at 21 (citation omitted); *see also Santomenno v. John Hancock Life Ins. Co. (U.S.A.)*, 677 F.3d 178, 186 (3d Cir.) (distinguishing *TAMA* on these grounds), *cert. denied*, 568 U.S. 978 (2012).

In any event, this portion of *TAMA*—which tries to make something out of statutory "silen[ce]," 444 U.S. at 18—reflects the kind of reasoning that this Court has since repudiated. *See, e.g.*, *Ziglar*, 582 U.S. at 133 (emphasizing that courts can "assume that Congress will be explicit if it intends to create a private cause of action"). *TAMA* primarily relied on the fact that common-law courts had "ordinarily" recognized a cause of action to rescind void contracts as a matter of contract law. 444 U.S. at 18. But the Court is "[n]ow long past 'the heady days in which [it] assumed common-law powers to create causes of action.'" *Egbert*, 596 U.S. at 491 (citation omitted); *see Sandoval*, 532 U.S. at 287 ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." (citation omitted)). And while *TAMA* also pointed to cases decided during those heady days, *see* 444 U.S. at 19, those cases should remain relics of that era—not extended here. *See, e.g.*, *Sandoval*, 532 U.S. at 287 (refusing to "revert . . . to the understanding of private causes of action that

held sway" in this Court's earlier cases). Adopting *TAMA*'s reasoning here would turn back the clock on this Court's precedents.

Unsurprisingly given its vintage, *TAMA* also failed to consider Congress's explicit provision for agency enforcement of Section 215. Yet *Sandoval* clarified that such provisions can be so important that they "preclude[] a finding of congressional intent to create a private right of action, even though other aspects of the statute," such as "language making the would-be plaintiff 'a member of the class for whose benefit the statute was enacted'" or language "admittedly creat[ing] substantive private rights," point in the opposite direction. 532 U.S. at 290 (citation omitted). Here, Congress specifically tasked the SEC with enforcing "any provision" of the ICA, 15 U.S.C. § 80a-41(d)—eliminating the need for a private right of action to enforce Section 47(b).

Despite these differences, the Second Circuit insisted that Congress's amendment of Section 47(b) one year after *TAMA*, which "distinguished between unperformed and performed contracts" and confirmed that "illegality could be raised as a defense to enforcement," "strongly implied" an intent for courts to interpret Section 47(b) like Section 215 of the IAA. *Oxford Univ. Bank*, 933 F.3d at 107. This is incorrect. The amended Section 47(b) language does not even align with Section 215 of the IAA—the latter states that "[e]very contract made in violation of any provision of this subchapter . . . *shall be void* . . . as regards the rights of" the violator, 15 U.S.C. § 80b-15(b), while the former stipulates that "[a] contract that is made, or whose performance involves, a violation of this subchapter . . . *is unenforceable*," *id.* § 80a-46(b) (emphasis added). Regardless,

speculating about Congress's intent based on changes to statutory language that do not alter the operative statutory language in any relevant respect is the antithesis of the textual analysis this Court's precedents require. Indeed, this Court has "repeatedly stated" that courts cannot "replace the actual [statutory] text with speculation as to Congress' intent." *Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 815 (2024) (citation omitted); *see also Barr v. American Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 624 (2020) (plurality opinion) (rejecting a similar argument in the context of considering whether a statutory provision was severable). Congress easily could amend Section 47(b) to provide an express private right of action—as it did with Section 36(b) in 1970—but it has not done so. This intentional omission must be given weight, particularly given *Sandoval*'s directive to check for express rights of action before finding an implied one. *See Sandoval*, 532 U.S. at 290; *see also Touche Ross*, 442 U.S. at 572.

The Second Circuit's strained reasoning cannot be reconciled with this Court's longstanding approach to recognizing private rights of action. The sole authority to amend, as well as pass, federal laws rests with Congress. By recognizing an implied private right of action under Section 47(b), the Second Circuit undermined Congress's exclusive authority to make law and overstepped its own role.

II. Judicially Creating An Implied Right Of Action Under Section 47(b) Would Impose Significant Real-World Costs

Judicial creation of private rights of action is bad enough. But sanctioning the Second Circuit's breach

of the separation of powers and creating a private right of action under Section 47(b) would have severe practical consequences that Congress did not intend.

1. The ICA applies broadly to "investment compan[ies]," defined to include any company that (1) "is engaged . . . in the business of investing, reinvesting, owning, holding, or trading in securities," and (2) "owns or proposes to acquire investment securities having a value exceeding 40 per centum of the value of such issuer's total assets." 15 U.S.C. § 80a-3(a)(1)(C). This "broad definition" covers a wide range of entities—mutual funds, trusts, and hedge funds, to name a few. *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 697 n.1 (1975).

The ICA's regulatory regime is stringent. The Act imposes "onerous requirements and restrictions" on investment companies, addressing everything from disclosure and governance to asset safekeeping and advertising. Jonathan Baird & Eric Stuart, *The US Investment Company Act: A legal minefield for non-US issuers*, PLC Magazine 1-2 (Mar. 2013).[3] As one former SEC Chairman observed, "[n]o issuer of securities is subject to more detailed regulation than a mutual fund." Letter from Ray Garrett, Jr., SEC Chairman, to the Honorable John Sparkman, Chairman of the Comm. on Banking, Housing, and Urban Affairs, United States Senate at v (Nov. 4, 1974), https://www.sec.gov/divisions/investment/report-mutual-fund-distribution-22d.pdf.

Section 47(b) provides that any "contract that is made, or whose performance involves, a violation of

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[3] https://www.jonesday.com/-/media/files/publications/2013/03/the-us-investment-company-act-a-legal-minefield-fo/files/ereadattachment/fileattachment/ereadattachment.pdf.

[the Act], or of any rule, regulation or order thereunder" is unenforceable and potentially subject to rescission. 15 U.S.C. § 80a-46(b)(1). Congress tasked the SEC—not private parties—with enforcing "any provision" of the ICA, and determining whether, and to what extent, a regulated party is exempt from its requirements. *Id.* §§ 80a-41(d), 80a-6(c).

2. Granting private parties the right to enforce Section 47(b) would upend this regime and significantly expand the ICA's reach. Indeed, the ICA's "broad and pervasive" regulations make it easy for plaintiffs to identify purported breaches that can fuel private suits. Harvey Bines & Steve Thel, *The Varieties of Investment Management Law*, 21 Fordham J. Corp. & Fin. L. 71, 91 (2016). And these private actions could lead to rescission of a broad spectrum of contracts, causing significant uncertainty and disruption for the wide swath of companies the ICA governs.

For instance, Section 47(b) plaintiffs have previously leveraged purported violations of the ICA to seek rescission of investment companies' agreements with advisors, their issuances of securities, their shareholder rights plans, and even their corporate bylaws. *See, e.g.*, *Laborers' Loc. 265 Pension Fund v. iShares Tr.*, No. 13-CV-00046, 2013 WL 4604183, at *6 (M.D. Tenn. Aug. 28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014), *cert. denied*, 574 U.S. 1202 (2015); *Staniforth v. Total Wealth Mgmt., Inc.*, No. 14-cv-1899, 2023 WL 3805250, at *2 (S.D. Cal. June 2, 2023); *Saba Cap. Master Fund, Ltd. v. ASA Gold & Precious Metals, LTD.*, No. 24-CV-690, 2025 WL 951049, at *1 (S.D.N.Y. Mar. 28, 2025); Pet. App. 13a. The rescission of such contracts would destroy

continuity and stability and severely disrupt business.

Making matters worse is the uncertainty surrounding the ICA's definition of "investment company." 15 U.S.C. § 80a-3(a)(1)(C). That definition is not only broad but "extremely . . . complicated," and it can capture companies that are not structured or operated as funds, such as development-stage companies raising capital, holding companies with minority stakes in other entities, and companies with complicated financing operations. Baird & Stuart, *supra*, at 2. Thus, as practitioners have noted, the implications of the Second Circuit's recognition of a private right of action are "most dramatic" for *unregistered* companies that enterprising plaintiffs might argue should be classified as "investment compan[ies]" under the ICA. Rich Lincer et al., *Implied Private Right of Action Under the Investment Company Act*, Harvard Law School Forum on Corporate Governance (Oct. 7, 2019).[4]

If a private plaintiff successfully argues that an unregistered company should have registered with the SEC, the fallout for that company could be catastrophic. Because the ICA "prohibits [unregistered investment] companies from engaging in interstate commerce, almost every contract [an unregistered investment company] enters into (including any issuances of securities) could be subject to rescission" under the Second Circuit's rule—all without the SEC ever having objected to that company's supposed registration failure. *Id.* As the Ninth Circuit has cautioned, this expansive

[4] https://corpgov.law.harvard.edu/2019/10/07/implied-private-right-of-action-under-the-investment-company-act/.

interpretation of Section 47(b) could empower plaintiffs to seek rescission of "every . . . contract [an unregistered company] has entered into" since inadvertently becoming an "'investment company'"—even contracts that the company entered into *decades* ago. *UFCW Loc. 1500 Pension Fund v. Mayer,* 895 F.3d 695, 701 (9th Cir. 2018) (citation omitted).

This threat is not theoretical. Shareholders, investors, and other contracting parties have already leveraged the Second Circuit's implied private right of action to argue that unregistered companies should be subject to ICA requirements, seeking rescission of a wide range of critical contracts. For instance, shareholders of special purpose acquisition companies (SPACs) have filed a wave of derivative actions in the Second Circuit, claiming these entities are illegally unregistered "investment companies" and demanding rescission of share purchase agreements. One shareholder alone has filed at least three such actions, represented by the same law firm in each. *See Assad v. Pershing Square Tontine Holdings, Ltd.*, No. 21-cv-6907 (S.D.N.Y filed Aug. 17, 2021); *Assad v. E.Merge Technology Acquisition Corp.*, No. 21-cv-7072 (S.D.N.Y. filed Aug. 20, 2021); *Assad v. GO Acquisition Corp.*, No. 21-cv-7076 (S.D.N.Y. filed Aug. 20, 2021). More of these actions would undoubtedly follow if this Court sanctions the Second Circuit's erroneous holding that Section 47(b) contains a private right of action. And again, all of this would happen without Congress's approval.

This breakdown in the constitutional allocation of powers also would be problematic for businesses because it would effectively declare open season on the SEC's multi-layered interpretation and application of the ICA's substantive provisions,

empowering the plaintiffs' bar to press its own interpretations while interfering with the SEC's discretionary enforcement decisions. This case exemplifies the problem. Respondents' Section 47(b) recission claims hinge on alleged violations of *other* ICA provisions that fall squarely within the enforcement authority of the SEC—yet the SEC has chosen not to pursue any enforcement action here. *See* Pet. Br. 12-13. As the Solicitor General has explained, opening a Section 47(b) backdoor in cases like this risks "interfer[ing] with the SEC's discretionary enforcement … decisions"—despite Congress giving no indication whatsoever of any intent to deputize private-party plaintiffs to bring such claims. CVSG Br. 19-20. Recognizing a private right under Section 47(b) thus would "upset the balance that Congress struck in the ICA." *Id.* at 19.

Recognizing an implied private right under Section 47(b) also would threaten to nullify specific ICA exemptions granted by the SEC under its broad authority, allowing private parties to challenge companies' compliance with the terms of those exemptions even when the SEC itself declines to pursue enforcement—undermining the very protections these exemptions were meant to provide.

The SEC has issued conditional exemptions from the ICA's stringent requirements to hundreds of different companies, many containing complex or vague conditions. *See, e.g.*, Tamar Frankel, *The Scope and Jurisprudence of the Investment Management Regulation*, 83 Wash. U.L.Q. 939, 941-48, 958 (2005) (discussing exemptions issued by the SEC before 2000, and the common investment restrictions included in such exemptions). For example, the SEC has recognized that certain "technology and internet

companies" face the problem of becoming inadvertent "investment companies" and has accordingly crafted exemptions for such companies, provided they adhere to limitations on their investments, such as prohibitions against "speculative investing." Christopher P. Healey, *Updating the SEC's Exemptive Order Process Under the Investment Company Act of 1940 to Fit the Modern Era*, 79 Geo. Wash. L. Rev. 1535, 1536, 1552 (2011). Creating a private right of action would open the door to private lawsuits targeting compliance with those terms, even when the SEC itself has not seen fit to intervene.

Consider *UFCW Local 1500 Pension Fund*. There, a plaintiff attempted to halt a multi-billion-dollar deal that "the SEC ha[d] not blocked for alleged violations of an ICA exemption the SEC ha[d] not addressed, even though the SEC ha[d] been made fully aware of the facts underlying those alleged violations." 895 F.3d at 701. The plaintiff claimed that Yahoo!'s investment in Alibaba.com breached its SEC-issued ICA exemption, which required that Yahoo! make investments only "for bona fide business purposes" and "refrain from investing or trading in [securities] for short-term speculative purposes." *Id.* at 698 (alteration in original). The Ninth Circuit dismissed the suit for lack of a cause of action, recognizing that a contrary conclusion could lead to rescission of "every . . . contract Yahoo! has entered into for the better part of a decade." *Id.* at 701. Such risks are untenable.

Moreover, as the Ninth Circuit explained, allowing private litigants to enforce vague and complicated exemption conditions risks thrusting courts and the SEC into a "tellingly odd game of chicken." *Id.* "Congress contemplated that companies would

contravene the conditions of ICA exemptions and concluded that the SEC . . . should decide in the first instance what to do when that happens." *Id.* at 700. But recognizing an implied private right of action would hijack that authority, putting private citizens in the place of the SEC. That would subordinate the SEC—"the body the ICA expressly charges with considering" whether exemptions should be granted, revoked, or enforced "in the first instance"—to private plaintiffs and securities lawyers with an entirely different set of priorities, and to judicial decisions on matters Congress entrusted to the agency's discretion. *Id.* at 701. Alternatively, as the SEC can simply re-exempt a company after a judicial decision, it would render the court's "diligent efforts . . . wasted," squandering valuable judicial resources. *Id.* Neither outcome is desirable.

Meanwhile, if this Court finds an implied private right under Section 47(b), businesses—and American productivity—ultimately would pay the price. The financial toll of defending against lawsuits of this "unparalleled magnitude" can be overwhelming for Section 47(b) defendants. *Id.* Indeed, the costs of litigating securities-related private actions pose a particularly heightened threat to companies due to the extensive discovery and the potentially significant disruption to the company's operations that they implicate. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008). This reality empowers even plaintiffs with "weak claims to extort settlements," *id.*, which only fuels more baseless litigation by "disproportionally benefit[ing]" plaintiffs' lawyers, *Ill-Suited, supra*, at 14; *see* U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities*

Class Action System 14-15 (Feb. 2019) (discussing these concerns, and flagging that private securities claims "brought in recent years are less meritorious than in the past").[5]

In short, violating the separation of powers has consequences. Judicially creating a private right of action under Section 47(b) in this case would thrust companies into the crosshairs of unpredictable and costly legal challenges, all the while creating significant regulatory uncertainty and undermining the careful balance Congress struck in the ICA. The Court can, and should, avoid those results by making clear that it means what it has said. Courts should get out of the business of creating implied private rights.

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[5] https://instituteforlegalreform.com/wp-content/uploads/2020/10/Securities-Class-Action-Reform-Proposals.pdf.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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