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 THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 47(b) of the Investment Company Act of 1940, 15 U.S.C. 80a-46(b), gives private plaintiffs a federal cause of action to seek rescission of contracts that are alleged to violate the Act.

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INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC or Commission), administers and enforces the federal securities laws, including the Investment Company Act of 1940 (ICA or Act), ch. 686, Tit. I, 54 Stat. 789 (15 U.S.C. 80a-1 *et seq.*). The question presented in this case—whether Section 47(b) of the ICA, 15 U.S.C. 80a-46(b), creates a private right of action under federal law to sue for rescission of a contract that allegedly violates the ICA—implicates the government's administration and enforcement of the Act. The United States therefore has a substantial interest in the Court's disposition of this case. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

INTRODUCTION

Creating federal rights of action to sue in court is a job for Congress. Where the legislature does not provide a cause of action for private parties to enforce a federal law, "courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). Under the Constitution's separation of powers, the task of weighing the "delicate questions of public policy" attending private law enforcement "belongs to the people's elected representatives, not unelected judges charged with applying the law as they find it." *Medina* v. *Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229-2230 (2025).

The "logical" way for Congress to create a private right of action is to do so "explicit[ly]." *Ziglar* v. *Abbasi*, 582 U.S. 120, 133 (2017). Thus, in two provisions of the ICA, as amended, Congress expressly authorized certain private parties to sue to enforce limited aspects of that law. Section 36(b) of the ICA provides that in specified circumstances "[a]n action may be brought under this subsection * * * by a security holder * * * for breach of fiduciary duty." 15 U.S.C. 80a-35(b). And Section 30(h) incorporates Section 16 of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 896-897, which provides that "[s]uit to recover [short-swing] profit may be instituted" by the issuer or holder of a security. 15 U.S.C. 78p(b); see 15 U.S.C. 80a-29(h). Neither of those express statutory causes of action encompasses respondents' suit.

If Congress has not created a private right of action expressly, then it likely has not created one at all. Only a "rare statute" can satisfy the "'stringent' and 'demanding' test" to *imply* a private right to sue. *Medina*,

145 S. Ct. at 2229 (citation omitted). Such a statute must "clearly and unambiguously" use "rights-creating terms"; it must "display an unmistakable focus on individuals like the plaintiff," *ibid.* (brackets, citations, and internal quotation marks omitted); and it must "manifest[] an intent 'to create not just a private *right* but also a private *remedy*'" under federal law, *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002) (citation omitted).

The question presented here is whether Section 47(b) of the ICA authorizes private parties to commence suits in court to seek rescission of contracts that are alleged to violate the ICA. Unlike the two ICA provisions discussed above, Section 47(b) does not explicitly create a private federal cause of action. Nor does it satisfy this Court's demanding test to imply one. Section 47(b) does not use unambiguous rights-creating language, but primarily functions to limit preexisting rights by rendering contracts that violate the ICA presumptively "unenforceable" and subject to "rescission" unless a court determines that enforcement or denial of rescission would produce a more equitable result. 15 U.S.C. 80a-46(b)(1) and (2).

In incorporating these contract-law terms from the "background of existing state law" against which the ICA was enacted, *Burks* v. *Lasker*, 441 U.S. 471, 478 (1979), Section 47(b) presupposes litigation under longstanding state-law causes of action and supplies federal "rule[s] of decision for courts to use in adjudicating [contract] disputes," whatever the forum, *Thompson* v. *Thompson*, 484 U.S. 174, 183 (1988). And rather than focusing on individual plaintiffs, Section 47(b) is "phrased as a directive to" courts. *Sandoval*, 532 U.S. at 289 (citation omitted). Nothing in the provision's text implies

the creation of a new, freestanding federal cause of action.

The ICA's structure confirms that Section 47(b) does not provide an implied cause of action. "[W]hen Congress wished to provide" private rights to sue to enforce particular aspects of the ICA, "it knew how to do so and did so expressly" by enacting limited private causes of action in Sections 30(h) and 36(b). *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571-572 (1979). But for the remaining requirements and prohibitions imposed by the ICA, Congress authorized the SEC, not private parties, to file enforcement suits.

The contrary reasoning of *Oxford University Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019), on which the decision below rests, is erroneous. In suggesting that Section 47(b)(2) would have no practical effect "if it does not provide a private right of action," *id.* at 109, the *Oxford University Bank* court overlooked the fact that Section 47(b)(2)'s rule of decision can be raised defensively, or in other postures such as equitable suits for rescission, in the course of litigating state-law causes of action that are otherwise properly before a court. The *Oxford University Bank* court's reliance on *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (*TAMA*), was also misplaced. In *TAMA*, this Court inferred a private right to sue under one provision of a different statute, based on language that Congress later *removed* from the ICA, while declining to find a cause of action in other provisions that lacked that language.

The Second Circuit also erred in resorting to legislative history to discern rights not evident in statutory text and structure. In doing so, it harked back to an "expansive rights-creating approach" that this Court

has "abandoned." *Medina*, 145 S. Ct. at 2230 n.1 (citation omitted). The Court's more recent decisions have emphasized that "caution" is the "watchword" when it comes to implying private rights of action. *Hernandez* v. *Mesa*, 589 U.S. 93, 101 (2020).

Because the Second Circuit erred in concluding that Section 47(b) authorized the commencement of suits like respondents', this Court should reverse the court of appeals' judgment.

STATEMENT

A. Legal Background

1. The ICA regulates mutual funds and other "investment compan[ies]." 15 U.S.C. 80a-3(a)(1). Congress enacted the Act "against the background of existing state law" governing investment companies, which, "like other corporations, are incorporated pursuant to state, not federal, law." *Burks*, 441 U.S. at 478.

The ICA "functions primarily to 'impos[e] controls and restrictions on the internal management of investment companies.'" *Burks*, 441 U.S. at 478-479 (emphasis omitted; brackets in original) (quoting *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 705 n.13 (1975)). It provides a variety of "protections for mutual fund shareholders," *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010), including provisions that regulate investment-company transactions, board structure, and fees, see *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536-538 (1984).

The ICA requires investment companies to register with the SEC, 15 U.S.C. 80a-7, 80a-8, and vests the Commission with "broad regulatory authority over [their] business practices," *National Ass'n of Sec. Dealers*, 422 U.S. at 704-705; see *id.* at 705 n.13. It authorizes the SEC to investigate and bring enforcement

actions in response to violations of "any provision of [the ICA] or of any rule, regulation, or order" issued under the Act. 15 U.S.C. 80a-41(a). To remedy such violations, the Commission "may in its discretion bring an action in the proper [federal] court" seeking temporary and permanent injunctive relief and civil money penalties. 15 U.S.C. 80a-41(d) and (e). The Commission may also promulgate regulations to implement the Act, 15 U.S.C. 80a-37(a), and may exempt any person, security, or transaction from "any provision" of the ICA or SEC implementing regulations, 15 U.S.C. 80a-6(c). A person aggrieved by an SEC order under the ICA may obtain review in an appropriate court of appeals. 15 U.S.C. 80a-42.

The ICA also includes two provisions that authorize private enforcement suits in limited circumstances. As originally enacted in 1940, Section 30(f) of the ICA, 54 Stat. 837 (currently codified as Section 30(h) of the ICA), "expressly authorized private suits for damages" against certain investment-company insiders, *TAMA*, 444 U.S. at 20, by incorporating the private right of action in Section 16(b) of the Securities Exchange Act, which provides that "[s]uit to recover [short-swing] profit may be instituted" by the issuer or holder of a security, 15 U.S.C. 78p(b). See 444 U.S. at 20 n.10; 15 U.S.C. 80a-29(h); *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 223 (2012) (discussing Securities Exchange Act Section 16(b)). And in 1970, Congress amended the ICA to add Section 36(b), which provides that "[a]n action may be brought * * * by a security holder * * * for breach of fiduciary duty" in specified circumstances involving an investment adviser's "receipt of compensation for services." 15 U.S.C. 80a-35(b); see Investment Company

Amendments Act of 1970, Pub. L. No. 91-547, § 20, 84 Stat. 1428-1430.

2. This case principally concerns Section 47(b) of the ICA, as amended, 15 U.S.C. 80a-46(b). In its current form, Section 47(b)(1) states that any contract that violates the ICA, or that violates any rule, regulation, or order issued under the ICA, is generally "unenforceable by either party." 15 U.S.C. 80a-46(b)(1). That general rule is subject to an exception that permits judicial enforcement of such a contract if "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" the ICA. *Ibid.*

Section 47(b)(2) states that, "[t]o the extent that a contract described in [Section 47(b)(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" the ICA. 15 U.S.C. 80a-46(b)(2). Section 47(b)(3) provides that Section 47(b) "shall not apply" to the "lawful portion of a contract to the extent that it may be severed from the unlawful portion of the contract," and that Section 47(b) does not "preclude recovery against any person for unjust enrichment." 15 U.S.C. 80a-46(b)(3).

B. The Present Controversy

1. Petitioners are four investment funds organized under Maryland law and registered with the Commission under the ICA. Pet. App. 17a, 41a; see Pet. ii, 10. Respondent Saba Capital Master Fund, Ltd., holds shares in each of the four petitioner funds and is managed by respondent Saba Capital Management, L.P. Pet. App. 21a, 36a-37a. When Saba began to acquire

substantial stakes in the four petitioner funds, the funds' directors caused each fund to adopt a resolution to opt in to a provision of Maryland law, the Maryland Control Share Acquisition Act (MCSAA), Md. Code Ann., Corps. & Ass'ns §§ 3-701 to 3-710, that is designed to make it more difficult for outside investors to gain control of a corporation and exercise their strategies through shareholder voting rights. Pet. App. 4a-5a. Under MCSAA, when a shareholder in a Maryland corporation acquires sufficient shares to control at least ten percent of shareholder voting power, that person lacks voting rights "with respect to the control shares" unless approved by a two-thirds vote of other shareholders. Md. Code Ann., Corps. & Ass'ns § 3-702(a)(1) (LexisNexis Supp. 2024); see *id.* § 3-701(e)(1) (defining "[c]ontrol shares").

In response to petitioners' resolutions opting in to MCSAA, Saba brought this action in the United States District Court for the Southern District of New York. Pet. App. 15a. The complaint named as defendants the four petitioner funds, along with several other investment funds that had also opted in to MCSAA after Saba began to acquire a position in the funds. See *id.* at 4a, 16a, 37a-39a.

Saba's suit relied on Sections 47(b) (discussed above) and 18(i) of the ICA. See Pet. App. 18a. Section 18(i) provides that, "[e]xcept * * * as otherwise required by law, every share of stock hereafter issued by a registered management company * * * shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. 80a-18(i).[1] The

[1] For purposes of the ICA, each of the petitioner funds is a "registered management company." 15 U.S.C. 80a-18(i); see 15 U.S.C. 80a-4(3) (defining "[m]anagement company").

gravamen of Saba's suit was that stripping Saba's shares of the voting rights that come with those shares would violate Section 18(i), and that Section 47(b) "provides a private right of action" for Saba to seek rescission of the resolutions adopted by the defendant funds. Pet. App. 45a.

2. The district court granted Saba's motion for summary judgment. Pet. App. 15a-32a. The court held that, under circuit precedent, Section 47(b)(2) "creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract." *Id.* at 18a (quoting *Oxford Univ. Bank*, 933 F.3d at 109). The court accepted the parties' shared view that, under Maryland law, the bylaws of a corporation "constitute a contract between the corporation * * * and its shareholders." *Ibid.* The court therefore understood Section 47(b) to provide a mechanism through which Saba, as a party to the defendant funds' bylaws, could sue in federal court to seek rescission of the portions of those contracts under which the funds had opted in to MCSAA.

On the merits, the district court agreed with Saba that the resolutions at issue violate Section 18(i), and it ordered that those resolutions be "rescinded forthwith." Pet. App. 32a.

3. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-14a. Like the district court, the court of appeals concluded that the challenged resolutions violate Section 18(i) of the ICA. *Id.* at 11a-12a. The court also found that "the district court did not abuse its discretion by granting rescission" under "Section 47(b)(2)." *Id.* at 13a. The court of appeals did not otherwise address whether Section 47(b) confers a private right of action.

SUMMARY OF ARGUMENT

I. Section 47(b) of the ICA does not create an implied private right of action either to rescind a contract that allegedly violates the Act or to obtain a declaration that such a contract is unenforceable. Rather, it establishes substantive rules of decision that presuppose an existing state-law backdrop of contract rights and remedies. Section 47(b) requires both state and federal courts to apply those federal rules of decision in cases that are otherwise properly before them, but it does not provide an independent basis for commencing suit in court. Because the Second Circuit erred in construing Section 47(b) to create a freestanding federal cause of action, this Court should reverse the court of appeals' judgment.

A. A long line of this Court's decisions disfavors implied rights of action to sue in court. Under the Constitution, the creation of a cause of action is a legislative act, and judicial attempts to divine implied rights of action from a statute's putative purpose threaten to transgress the separation of powers. The Court's precedents accordingly establish "a 'stringent' and 'demanding' test" for implying a private right to commence suit. *Medina*, 145 S. Ct. at 2229 (quoting *Health & Hosp. Corp.* v. *Talevski*, 599 U.S. 166, 180, 186 (2023)).

B. Under this Court's demanding test for implying a private right of action, Section 47(b)'s text and structure do not support respondents' claim of a right to sue in court under that provision.

1. Section 47(b)'s primary office is to *limit* preexisting rights, subject to equitable and other exceptions, in contracts formed under and governed by state law. Section 47(b) does so by referencing traditional doctrines of unenforceability and rescission, which naturally

"incorporate *state* law" as part of the backdrop to the ICA. *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991). Thus, Section 47(b) establishes "rule[s] of decision" that may potentially be invoked either by defendants or by plaintiffs during litigation of state-law causes of action, either in state court or in federal court under diversity jurisdiction. *Thompson*, 484 U.S. at 183. The fact that Section 47(b) is framed as "a mandate directed to * * * courts," *ibid.*, rather than "focus[ing] on individuals like the plaintiff[s]," *Medina*, 145 S. Ct. at 2229 (citation and internal quotation marks omitted), indicates that it addresses the proper disposition of suits for which some *other* cause of action exists.

2. The ICA's structure confirms the absence of an implied right of action in Section 47(b). Other ICA provisions create express private rights of action in limited circumstances. Those provisions demonstrate that "when Congress wished to provide a * * * remedy" to enforce the ICA, "it knew how to do so and did so expressly." *Touche Ross & Co.*, 442 U.S. at 571-572. For the majority of ICA provisions, Congress has authorized the SEC, but not private parties, to commence enforcement suits. Reading Section 47(b) to imply a private federal cause of action would subvert the congressional design.

II. The Second Circuit's contrary view of Section 47(b) is incorrect. That court's decision in *Oxford University Bank*, *supra*, proceeded from the erroneous premise that Section 47(b)(2) would have no effect if did not imply a federal right of action. In fact, Section 47(b)(2), like Section 47(b)(1), prescribes a rule of decision that may have outcome-determinative effect in a variety of procedural postures under state-law causes of action. The Second Circuit also misread *TAMA*,

supra, in which this Court interpreted language that appeared in a different statute and that Congress later removed from the ICA. The court further erred in invoking a selective reading of legislative history as support for its interpretation.

ARGUMENT

I. SECTION 47(B) OF THE ICA DOES NOT CREATE AN IMPLIED PRIVATE RIGHT OF ACTION

A. Implied Private Rights Of Action Are Disfavored

"The Constitution charges the Executive Branch with enforcing federal law. Art. II, § 3. But sometimes Congress also allows private parties to enforce the law through civil litigation." *Medina* v. *Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025). Under the Constitution's separation of powers, any "private rights of action to enforce federal law must be created by Congress." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Ibid.* That legislative judgment is "determinative"; "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-287.

In a prior era, this Court was willing to "imply causes of action not explicit in the statutory text" when suits by injured private persons were perceived to be necessary or helpful to effectuate a statute's purposes. *Ziglar* v. *Abbasi*, 582 U.S. 120, 132 (2017) (collecting examples). "But, as this Court has since come to appreciate, no statute pursues any single 'purpos[e] at all costs.'" *Medina*, 145 S. Ct. at 2229 (quoting *American Express*

Co. v. *Italian Colors Rest.*, 570 U.S. 228, 234 (2013)) (brackets in original). The Court has also come "to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power," as a court "risks arrogating legislative power" when it "recognizes an implied claim * * * on the ground that doing so furthers the 'purpose' of the law." *Hernandez* v. *Mesa*, 589 U.S. 93, 100 (2020). Because "creating a cause of action is a legislative endeavor," *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022), deciding whether to authorize private suits to enforce a federal statute is a task that "belongs to the people's elected representatives, not unelected judges charged with applying the law as they find it," *Medina*, 145 S. Ct. at 2229-2230.

For these reasons, the Court has more recently "adopted a far more cautious" approach, declining to find implied private rights of action on multiple occasions and stressing that it is "logical" to "assume that Congress will be explicit if it intends to create a private cause of action." *Abbasi*, 582 U.S. at 132-133. This cautious approach is now well "settled," and "for good reason." *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008). In light of the difficulties of divining private rights of action from putative statutory purpose, and the constitutional concerns attending such judicial endeavors, the Court has "cautioned that, where Congress 'intends private litigants to have a cause of action,' the 'far better course' is for Congress to confer that remedy in explicit terms." *Abbasi*, 582 U.S. at 132-133 (citation omitted).

This Court's decisions instruct that, if Congress has not authorized private suits expressly, then it likely has not done so at all. As this Court recently explained in

the related context of evaluating whether federal statutes create private rights enforceable under 42 U.S.C. 1983, the Court applies "a 'stringent' and 'demanding' test" to determine whether Congress has authorized private suits to enforce federal statutes. *Medina*, 145 S. Ct. at 2229 (citation omitted); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283 (2002) (explaining that the implied-right-of-action and Section 1983 "inquiries overlap" for these purposes). A reviewing court "must * * * determine whether Congress *intended to create a federal right*," *Gonzaga*, 536 U.S. at 283, rather than simply enacting the more "[r]outine[]" category of legislation that merely "seeks to *benefit* one group or another," *Medina*, 145 S. Ct. at 2229. "[T]his Court has emphasized" that "statutes create individual rights only in 'atypical'" cases. *Ibid.* (quoting *Health & Hosp. Corp.* v. *Talevski*, 599 U.S. 166, 183 (2023)).

To establish that a federal statute authorizes private enforcement suits, a plaintiff first "must show that the law in question 'clearly and unambiguously' uses 'rights-creating terms.'" *Medina*, 145 S. Ct. at 2229 (brackets and citation omitted). "In addition, the statute must display an unmistakable focus on individuals like the plaintiff." *Ibid.* (citation and internal quotation marks omitted). Only a "rare statute" will satisfy these requirements. *Ibid.* Moreover, "even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy'" under federal law. *Gonzaga*, 536 U.S. at 284 (emphases omitted) (quoting *Sandoval*, 532 U.S. at 286).

B. Section 47(b) Does Not Imply A Private Right Of Action

Under established precedent, courts should not infer a private right of action simply because "the plaintiff falls within the general zone of interest that the statute is intended to protect." *Gonzaga*, 536 U.S. at 283; see *Talevski*, 599 U.S. at 183 (quoting *Gonzaga*). Consistent with that principle, respondents do not argue that Section 18(i)—the substantive provision of the Act that petitioners were found to have violated—confers a right to sue in court. Respondents contend, however, that such a right to sue is implicit in Section 47(b), which addresses a court's choice of remedies in any case where a contract is found to violate the ICA. That argument lacks merit.

1. Section 47(b)'s text does not unambiguously create individual private rights

a. Section 47(b) does not "employ[] the sort of clear and unambiguous 'rights-creating language' *Gonzaga* demands." *Medina*, 145 S. Ct. at 2233 (citation omitted). "Instead, section 47(b) on its face merely establishes what it says: that contracts formed in violation of the ICA are usually unenforceable," "unless 'a court' makes certain findings." *UFCW Local 1500 Pension Fund* v. *Mayer*, 895 F.3d 695, 700 (9th Cir. 2018) (quoting 15 U.S.C. 80a-46(b)(1) and citing *Santomenno ex rel. John Hancock Trust* v. *John Hancock Life Ins. Co.*, 677 F.3d 178, 186-187 (3d Cir.), cert. denied, 568 U.S. 978, and 568 U.S. 979 (2012)); see *Steinberg* v. *Janus Capital Mgmt., LLC*, 457 Fed. Appx. 261, 267 (4th Cir. 2011) (per curiam) (similar). That general ban on judicial enforcement does not imply authorization for any private plaintiffs to sue in federal court to challenge a contract that is alleged to violate the ICA.

Section 47(b)'s primary office is to *limit* existing state-law "right[s] under [a] contract" that violates the ICA. 15 U.S.C. 80a-46(b)(1). Those are the only "right[s]" that the provision mentions, by way of restricting the circumstances in which courts can enforce them (subject to Section 47(b)(3)'s express exceptions). 15 U.S.C. 80a-46(b)(1) and (3). Section 47(b)(1)'s "framing" is thus the opposite of other statutes that "expressly" delineate "'*rights*,'" which this Court has found "indicative of an individual 'rights-creating' focus." *Talevski*, 599 U.S. at 184 (citations omitted); cf. *Medina*, 145 S. Ct. at 2236 (identifying no "unambiguous rights-creating language" in provisions that do not "mention[] 'rights'").

Section 47(b)(2) likewise does not use unambiguous rights-creating language or confer on any class of private parties a cause of action to sue in court. As an adjunct to Section 47(b)(1)'s rule of decision regarding the enforcement of illegal contracts, Section 47(b)(2) specifies the circumstances under which contracts that are "described in [Section 47(b)(1)]" and have already been performed are subject to "rescission." 15 U.S.C. 80a-46(b)(2). In Section 47(b)(1) and (2), Congress referenced preexisting contract rights and borrowed common-law concepts of unenforceability and rescission, terms of art that "bring with them the 'old soil' that has long governed how courts enforce" contracts. *Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019). Those provisions address the remedial steps a court may take *after* it determines that a particular contract (or portion thereof) violates the ICA. But the provisions say nothing about how or by whom a suit implicating such a contract may be commenced.

This reading is especially apt because the ICA was "enacted against the background of existing state law"

governing corporations, an "entire corpus" that Congress has not "replaced." *Burks* v. *Lasker*, 441 U.S. 471, 478 (1979). "Mutual funds, like other corporations, are incorporated pursuant to state, not federal, law." *Ibid.* And "[t]he ICA does not purport to be the source of authority for managerial power"; rather, it presupposes and in some respects limits existing authority conferred by state law. *Ibid.* Because "private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," this Court has recognized a "particularly strong" "presumption that state law should be incorporated" in "fill[ing] the interstices of [the] federal remedial scheme[]." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). The Court has accordingly read the ICA to "incorporate *state* law" in several respects, *id.* at 108; see *Burks*, 441 U.S. at 486 (holding that "federal courts should apply state law governing the authority of independent directors to discontinue derivative suits to the extent such law is consistent with the policies of the ICA"); *Jones* v. *Harris Assocs. L.P.*, 559 U.S. 335, 346 (2010) (reading the ICA to "incorporate[] a standard taken from the law of trusts").

Properly understood against this state-law backdrop, Section 47(b)'s regulation of the enforcement of illegal contracts "is most naturally construed to furnish a rule of decision for courts to use in adjudicating [contract] disputes and not to create an entirely new cause of action." *Thompson* v. *Thompson*, 484 U.S. 174, 183 (1988); cf. *DeVillier* v. *Texas*, 601 U.S. 285, 292 (2024) (distinguishing a "substantive rule of decision" from a "cause of action"). The provision "only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending

suit." *Thompson*, 484 U.S. at 182-183 (quoting *Minnesota* v. *Northern Sec. Co.*, 194 U.S. 48, 72 (1904)). Section 47(b) thus addresses the proper disposition of suits for which some *other* valid cause of action exists; it does not speak to the circumstances under which suit may be filed.

Specifically, Section 47(b)(1) tracks background contract-law principles in generally declaring a contract judicially "unenforceable" on public-policy grounds when performance of the contract would violate a statute—here, the ICA. 15 U.S.C. 80a-46(b)(1); see, *e.g.*, Restatement (Second) of Contracts § 179(a) (1981) (stating that a "public policy against the enforcement of promises" in a contract "may be derived" from, among other things, relevant "legislation"); *Armstrong* v. *Toler*, 24 U.S. (11 Wheat.) 258, 278 (1826) ("[W]here the contract grows immediately out of, and is connected with, an illegal or immoral act, a Court of justice will not lend its aid to enforce it."). And Section 47(b)(2) authorizes the traditional remedy of rescission as a means to address certain illegal contracts that have already been performed (in whole or in part). See 15 Samuel Williston, *A Treatise on the Law of Contracts*, § 1787, at 348 (3d ed. 1972); Dan B. Dobbs, *Handbook on the Law of Remedies* 254 (1973); *Black's Law Dictionary* 1565 (12th ed. 2024) ("Rescission is generally available as a remedy or defense for a nondefaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual positions.").

Section 47(b)'s rules of decision may apply in a variety of procedural postures, none of which requires or implies a private federal cause of action under Section 47(b) itself. For example, a defendant sued under a state-law cause of action could "interpose[]" Section

47(b)(1) "[a]s a defense to an action based on contract," either in state court or in federal court under diversity jurisdiction. *Kelly* v. *Kosuga*, 358 U.S. 516, 516, 518 (1959) (addressing analogous defense of illegality under the Sherman Act, 15 U.S.C. 1 *et seq.*). Indeed, the most obvious procedural setting in which a litigant might argue that a contract provision is "unenforceable," 15 U.S.C. 80a-46(b)(1), is as a defense to a contract-enforcement action. Similarly, to the extent a contract has already been performed in whole or in part, rescission under Section 47(b)(2) could be raised "as a defense" to a state-law contract suit. 12 Williston § 1525, at 615; see 15 Williston § 1787, at 352 n.9 ("defensively") (citation omitted). Alternatively, state law may furnish a cause of action for a plaintiff to seek rescission of a contract that has been performed. 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 881, at 1826 (4th ed. 1918) ("an equitable suit for the purpose of resci[ssion]"); see *George* v. *Tate*, 102 U.S. 564, 571 (1881) ("The remedy is by a direct proceeding to avoid the instrument.") (citing *Irving* v. *Humphrey*, 1 Hopk. Ch. 284 (N.Y. 1824)). And these examples may not exhaust the available procedural avenues. Cf. Pet. 28 (suggesting other possibilities).

In any of these postures, Section 47(b)'s "unless" clauses, 15 U.S.C. 80a-46(b)(1) and (2), would still permit enforcement (or prevent rescission) of such a contract when, "under the circumstances," enforcement would be more equitable than nonenforcement. Because federal law supersedes contrary state law under the Supremacy Clause, a court could order enforcement of the ICA-violative contract under the conditions specified in Section 47(b), even if state law contained no analogous exception. See *Kelly*, 358 U.S. at 519 ("[T]he

effect of illegality under a federal statute is a matter of federal law, even in diversity actions.") (citation omitted). And "once a case or controversy properly comes before a court, judges are bound by federal law." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326 (2015). Thus, when a plaintiff has properly commenced suit in court under some *other* cause of action, any party to the litigation may invoke Section 47(b) in support of arguments concerning the proper disposition of the suit. Section 47(b) therefore may have an outcome-determinative effect in ordinary contract litigation implicating the ICA, even though that provision does not create any freestanding federal cause of action. Cf. *Thompson*, 484 U.S. at 182-183.

b. Section 47(b) also does not meet the "addition[al]" requirement that a "statute must display 'an unmistakable focus' on individuals like the plaintiff" in order to imply a private right of action. *Medina*, 145 S. Ct. at 2229 (citation omitted). For example, this Court has identified the requisite focus in certain civil-rights provisions that begin: "*No person* in the United States *shall*" be subjected to discrimination. *Gonzaga*, 536 U.S. at 284 & n.3 (citation omitted). Where a statute "does not include this sort of" language, the Court "rarely impute[s] to Congress an intent to create a private right of action." *Id.* at 284 n.3 (citation omitted).

"Unlike statutes that explicitly confer a right on a specified class of persons," Section 47(b) "is a mandate directed to * * * courts." *Thompson*, 484 U.S. at 183; cf. *Riley* v. *Bondi*, 145 S. Ct. 2190, 2203 (2025) (distinguishing other statutes as "litigant-focused" in that they "impose[] requirements on litigants, not the courts"). The provision contains three references to "court[s]" and lays out "find[ings]" that courts must make before they

may enforce contracts that violate the ICA. 15 U.S.C. 80a-46(b)(1) and (2). It thus resembles other "statute[s] found not to create a right of action" in that it is "'phrased as a directive to'" government entities. *Sandoval*, 532 U.S. at 289 (quoting *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 772 (1981)); see *Medina*, 145 S. Ct. at 2236 (citing *Armstrong*, 575 U.S. at 331-332 (plurality opinion)); *Gonzaga*, 536 U.S. at 287. Given Section 47(b)'s textual focus on courts, it does not exhibit the "*unmistakable focus* on the benefited class," *Gonzaga*, 536 U.S. at 284 (citation omitted), that a statute "must display" to imply a private right of action, *Medina*, 145 S. Ct. at 2229.

2. The ICA's structure confirms that Section 47(b) does not create an implied private right of action

"The structure of the [ICA] similarly counsels against recognition of the implied right [respondents] advocate[]." *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 93 (1981). Other sections of the ICA "make express provision for private enforcement in certain carefully defined circumstances, and provide for enforcement at the instance of the Federal Government in other circumstances." *Ibid.*; see pp. 5-6, *supra*. Those provisions demonstrate that, "when Congress wished to provide a" cause 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, 571-572 (1979).

a. By enacting limited express private rights of action in Sections 30(h) and 36(b), Congress "demonstrated in this very statute that it 'knew how to create a private right of action to enforce a particular section of the [ICA].'" *Mayer*, 895 F.3d at 701 (brackets in original) (quoting *Northstar Fin. Advisors, Inc.* v. *Schwab Invs.*, 615 F.3d 1106, 1117 (9th Cir. 2010)). Congress's

express creation of "private causes of action in other sections" of the ICA highlights the absence of any similar right of action to challenge ICA-violative contracts generally, or violations of Section 18(i) in particular. *Santomenno*, 677 F.3d at 186.

This Court has already drawn similar structural inferences from these very provisions. In *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979), the Court cited ICA Section 30(f) (currently codified as ICA Section 30(h)) as an example of an express authorization of private suits that "strongly suggests that Congress was simply unwilling" to imply a private right of action for damages elsewhere in the securities laws. *Id.* at 21; see *id.* at 20 & n.10. The Court then identified the enactment of Section 36(b) as "another clear indication that Congress knew how to confer a private right of action when it wished to do so." *Id.* at 23 n.13.

In this case as well, the absence of an implied right of action in Section 47(b) is confirmed by comparison to Congress's enactment of Sections 30(h) and 36(b). Those express causes of action are "by [their] terms limited," *Touche Ross & Co.*, 442 U.S. at 574, and they authorize relief only in "prescribed circumstances," *TAMA*, 444 U.S. at 20 (citing Section 30(f), currently codified as Section 30(h)). Sections 30(h) and 36(b) authorize suit only with respect to particular substantive requirements and prohibitions imposed by the ICA—not including Section 18(i), the substantive provision at issue in this case, see pp. 8-9, *supra*—and only by specified categories of persons. See 15 U.S.C. 80a-29(h), 80a-35(b). By contrast, Section 47(b) sweepingly addresses contracts that "violate any provision of [the ICA] or of any rule, regulation, or order thereunder"; and it addresses not just contracting "part[ies]" but also

"nonparty" beneficiaries. 15 U.S.C. 80a-46(b)(1). Courts should be "extremely reluctant to imply a cause of action in § [47(b)] that is significantly broader than the remedy that Congress chose to provide." *Touche Ross & Co.*, 442 U.S. at 574; see *Mayer*, 895 F.3d at 701 (Congress "tends not to 'hide elephants in mouseholes'") (quoting *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

The inference against an implied cause of action is especially strong when Section 47(b) is viewed against the backdrop of established state-law mechanisms for bringing contract disputes before a court. See pp. 16-20, *supra*. The remedial issues that Section 47(b) addresses—whether to enforce or to rescind contracts that have been found unlawful—would typically come before courts in suits based on state-law causes of action. And those state-law mechanisms alleviate any concern that Section 47(b) must be construed to confer a private right of action in order for that provision to have meaningful practical effect. These additional "method[s] of enforcing [Section 47(b)'s] substantive rule[s]" further dispel any implication of a new federal right to sue. *Sandoval*, 532 U.S. at 290.

b. The ICA "'vests in the SEC broad regulatory authority over the business practices of the investment companies,'" and the Act commits to that expert agency "the task of applying" the statute's "broad terms" to "particular business situations." *E.I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 52, 54 (1977) (quoting *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 704-705 (1975)); see pp. 5-6, *supra*. The Act "empowers 'the SEC to enforce all of the provisions of the statute by granting the SEC broad authority to investigate suspected violations; initiate

actions in federal court for injunctive relief or civil penalties; and create exemptions from compliance with any ICA provision.'" *Mayer*, 895 F.3d at 701 (brackets and citation omitted); see *Santomenno*, 677 F.3d at 186. Congress's express authorization of SEC enforcement suits makes it "highly improbable that 'Congress absentmindedly forgot to mention an intended private action'" in Section 47(b). *TAMA*, 444 U.S. at 20 (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting)).[2]

II. THE COURT OF APPEALS ERRED IN CONSTRUING SECTION 47(B) TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION

A. The decision below rested on the Second Circuit's holding in *Oxford University Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99 (2019), that Section 47(b) "creates an implied private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract." *Id.* at 109. The *Oxford University Bank* court stated that "[t]he text of § 47(b) unambiguously evinces Congressional intent to authorize a private action" through its references to party enforce-

[2] In an amicus brief filed in 2001 at the invitation of the Second Circuit, the SEC took the position that Section 47(b) confers an implied private right of action. SEC Amicus Br. at 2, *Olmsted* v. *Pruco Life Ins. Co.*, 283 F.3d 429 (2d Cir. 2002) (No. 00-9511). The primary issue in that case was whether *other* ICA provisions created implied private rights of action; the SEC argued that they did not, but that Section 47(b) could provide an alternative basis for private enforcement suits in some cases. "Because the plaintiffs ma[de] no claim under § 47(b)," the court "decline[d] to consider" it in that case. *Olmsted* v. *Pruco Life Ins. Co.*, 283 F.3d 429, 436 n.5 (2d Cir. 2002). The SEC has since reconsidered its view of Section 47(b) in light of this Court's more recent guidance on implied private rights of action. See pp. 12-14, *supra*.

ment ("'unenforceable by either party'") and to rescission "'at the instance of *any party*.'" *Id.* at 105 (quoting 15 U.S.C. 80a-46(b)(1) and (2)). The court understood those provisions as "effectively equivalent to providing an express cause of action." *Ibid.*

That reasoning is unsound. To be sure, Section 47(b) may affect (and is intended to affect) the disposition of certain ongoing judicial proceedings that involve contracts between private parties. In such a proceeding, the parties to the contract will typically be parties to the litigation as well. And if any party to the case contends that the contract at issue violates the ICA, the litigants can be expected to offer arguments about the proper reading of Section 47(b) and its application to the case before the court.

It does not follow, however, that Section 47(b) itself authorizes *commencement* of such a proceeding. The provision instead establishes federal rules of decision governing the enforceability and potential rescission of contracts made in violation of the ICA, which rules will supersede any contrary state-law rules addressing the same subjects. Section 47(b) thus may affect the proper disposition of cases that are *otherwise* properly before the relevant court, generally because the plaintiff has invoked an applicable state-law cause of action. But Section 47(b)'s language does not suggest that Congress intended to create a new federal cause of action—much less that it did so "unambiguously." *Oxford Univ. Bank*, 933 F.3d at 105.

The Second Circuit acknowledged that unenforceability under Section 47(b)(1) may be invoked "as a defense." *Oxford Univ. Bank*, 933 F.3d at 105. The court failed to recognize, however, that the same is true of rescission under Section 47(b)(2), which may also be

raised "as a defense" to a state-law contract suit. 12 Williston § 1525, at 615; see pp. 18-19, *supra* (describing this and other possible procedural avenues through which arguments about the meaning and proper application of Section 47(b) may come before a court). Correcting that premise "explain[s] what effect § 47(b)(2) has if it does not provide a private right of action," and it disproves the Second Circuit's suggestion that parties will be unable to "seek rescission" unless Section 47(b)(2) provides a federal cause of action. *Oxford Univ. Bank*, 933 F.3d at 109.

B. Contrary to the Second Circuit's view, see *Oxford Univ. Bank*, 933 F.3d at 106-107, this Court's decision in *TAMA*, *supra*, does not suggest that Section 47(b) creates a private right of action. In *TAMA*, the Court addressed provisions of the Investment Advisers Act of 1940 (IAA), ch. 686, Tit. II, 54 Stat. 847 (15 U.S.C. 80b-1 *et seq.*), which was enacted alongside the ICA in 1940. Section 215 of the IAA states that "[e]very contract made in violation" of the IAA "shall be void" in specified circumstances. 15 U.S.C. 80b-15(b). This Court construed Section 215 to "fairly impl[y] a right to specific and limited relief in a federal court," based on the "customary legal incidents of voidness" that Congress would have expected to "follow" a statute providing that "certain contracts are void." *TAMA*, 444 U.S. at 18-19 (citing *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970)). But the Court "view[ed] quite differently" another IAA provision, Section 206, that merely declared conduct "'unlawful'" without referring to voidness. *Id.* at 16, 19 (quoting 15 U.S.C. 80b-6). Based on the IAA's text, structure, and legislative history, the Court concluded that Section 206 does not create a private cause of action, even though the provision "conced-

edly was intended to protect the victims of the fraudulent practices it prohibited." *Id.* at 24; see p. 22, *supra*.

When Congress enacted the ICA in 1940, Section 47(b) paralleled Section 215 of the IAA in declaring that contracts made in violation of the ICA "shall be void." 54 Stat. 846. The ICA still used that language in 1979, when this Court decided *TAMA*. See 15 U.S.C. 80a-46(b) (1976). The decision in *TAMA* thus suggests that the then-current version of Section 47(b) likewise authorized private suits.[3]

In 1980, however, Congress amended Section 47(b) to its present form, eliminating the prior language stating that contracts made in violation of the ICA "shall be void." Small Business Investment Incentive Act of 1980, Pub. L. No. 96-477, Tit. I, § 104, 94 Stat. 2277. Congress replaced that language with Section 47(b)'s current text, which provides that such contracts are generally "unenforceable" and potentially subject to "rescission," while establishing multiple exceptions to that general rule. *Ibid.* Thus, the key statutory language ("shall be void") on which the *TAMA* Court relied to infer a "limited private remedy," 444 U.S. at 24, does not appear in the current version of ICA Section 47(b). "This difference * * * is significant" given the weight that *TAMA* placed on "[t]he use of the term 'void' in

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[3] Even in 1979, however, the ICA and IAA differed in at least one respect that would potentially have been relevant to the implied-private-right-of-action inquiry. "Unlike" the ICA, with its express private rights of action in other provisions, "the IAA construed in [*TAMA*] did not expressly provide for a private cause of action" anywhere. *Santomenno*, 677 F.3d at 186. Indeed, this Court in *TAMA* noted and relied on the fact that, whereas "the Investment Company Act * * * expressly authorized private suits," "[t]he Investment Advisers Act nowhere expressly provides for a private cause of action." 444 U.S. at 14, 20.

[IAA] § 215." *Santomenno*, 677 F.3d at 187. In "contrast" to that term and its "'customary legal incidents,'" the language now used in ICA Section 47(b) "carries no such legal implications" that Congress intended to "create[] * * * 'a distinct cause of action.'" *Ibid.* (citations omitted); see *Mayer*, 895 F.3d at 700 n.3.

The Second Circuit inferred from the 1980 amendment that "Congress intended to confirm the availability of a private action for rescission" under ICA Section 47(b). *Oxford Univ. Bank*, 933 F.3d at 107. The court thus ignored the fact that the amendment "eliminated the very term—'[void]'—on which [*TAMA*] had founded" its interpretation of IAA Section 215. *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 593 (2012). "That alteration dooms" the inference the Second Circuit drew from the 1980 amendment "because the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change." *Ibid.* (citing *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005)). Although the ICA and IAA were enacted contemporaneously as "companion" statutes in 1940, *TAMA*, 444 U.S. at 20, their paths diverged for these purposes when Congress amended the relevant ICA language.

C. The Second Circuit also erred in invoking legislative history to support its inference of a private right of action. The court cited a 1980 report's statement that a House committee "expect[ed] the courts to imply private rights of action under [the] legislation" that included the amendment to Section 47(b). *Oxford Univ. Bank*, 933 F.3d at 107 (citation omitted). But "appeal[s] to legislative history * * * do[] not move the needle" in interpreting the statute that "Congress actually enacted." *Medina*, 145 S. Ct. at 2236; see *Epic Sys. Corp.*

v. *Lewis*, 584 U.S. 497, 523 (2018) ("[L]egislative history is not the law."). This Court should both "begin" and "end" its "search for Congress's intent with the text and structure of" the ICA. *Sandoval*, 532 U.S. at 288.

Even considered on its own terms, moreover, the legislative history of the 1980 amendments does not support the Second Circuit's inference that Congress "intended to confirm the availability of a private action" under Section 47(b). *Oxford Univ. Bank*, 933 F.3d at 107. The Second Circuit relied exclusively on a passage in a House committee report that referred generally to "this legislation"—*i.e.*, the Small Business Investment Incentive Act of 1980, whose six titles amended numerous provisions across multiple federal securities laws. See 94 Stat. 2275-2296. The quoted passage did not refer specifically to the provision that amended ICA Section 47(b) (Tit. I, § 104, 94 Stat. 2277), and it appeared under a heading dedicated to the IAA amendments in Title II of the 1980 Act, not the ICA amendments in Title I. H.R. Rep. No. 1341, 96th Cong., 2d Sess. 27-29 (1980) (House Report). The passage also included the qualification that private rights to sue should be implied only "where such actions would not improperly occupy an area traditionally the concern of state law," indicating (consistent with *TAMA*) that each statutory provision should be considered separately in determining whether particular categories of private suits are authorized. *Id.* at 29.

The Second Circuit did not address this House report's separate passages specifically discussing ICA Section 47(b), which offered different reasons for amending that provision that conspicuously did not

involve a private right of action.[4] Nor did the court acknowledge Congress's decision not to enact a prior version of the 1980 bill that would have expressly added private rights of action to the ICA.[5] To the extent that legislative history is relevant here at all, this change from "[e]arly drafts of the bill" provides "one more piece of evidence that Congress did not intend to authorize a cause of action" by implication. *TAMA*, 444 U.S. at 21-22.

D. This Court can reverse the judgment below, which was premised on Section 47(b) of the ICA, without addressing the separate question whether Section 47(a) creates a private right of action. The latter issue is not "fairly included" in the question on which the Court granted certiorari, Sup. Ct. R. 14.1(a), was not passed upon below, and is not alleged to be the subject of any circuit split, see Saba Supp. Br. 2.

In a supplemental brief, but not in their brief in opposition, respondents have suggested that this Court

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[4] The report stated:

> The Committee intends this change to assure that contracts made in violation of any provision of the Act are enforceable only to the extent that enforcement would be more equitable than non-enforcement and would not be inconsistent with the Act's purposes. However, when those conditions are met, the court is given the discretion to require compliance with the contract. Similarly, if the contract has already been performed, rescission may not be denied unless such denial would be more equitable and consistent with the Act's purposes.

House Report 27; see *id.* at 37; S. Rep. No. 958, 96th Cong., 2d Sess. 10, 21-22 (1980) (similar).

[5] See Small Business Investment Incentive Act of 1980, H.R. 7554, 96th Cong., 2d Sess. 20 (as introduced on June 12, 1980) ("Any person so injured may bring an action in law or in equity, in any court of competent jurisdiction.").

may be "require[d]" to address Section 47(a) in order to resolve the question presented. Saba Supp. Br. 2. That argument "may be deemed waived" because it was not "called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2; cf. *City of Oklahoma City* v. *Tuttle*, 471 U.S. 808, 816 (1985). In any event, the Court can and should decide only the Section 47(b) issue on which it granted certiorari. That provision is the sole basis on which the courts below found respondents' claims to be justiciable, and neither court mentioned Section 47(a) in its opinion. See Pet. App. 18a (citing *Oxford Univ. Bank*, 933 F.3d at 109); *id.* at 1a-14a.

The United States has taken no position on whether Section 47(a), which 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), gives rise to a private right of action for rescission. Contra Saba Supp. Br. 1, 4-5. Although Section 47(a)'s use of the term "void" might suggest a conferral of private rights under the reasoning of *TAMA*, that language may be subject to different interpretation based on other considerations including the distinct statutory structure of the ICA.

The parties appear to dispute several issues regarding Section 47(a) that were not passed upon below. Those include whether Section 47(a) supplies a private right of action; whether any such right of action applies to this case; and whether respondents have adequately preserved this issue. See FS Credit Supp. Br. 1-3. As "a court of review, not of first view," this Court should not opine on any of these ancillary issues. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Rather, it should decide the question presented and reverse on that basis,

leaving the court of appeals free on remand to consider any Section 47(a) arguments that have been properly preserved.

CONCLUSION

The judgment of the court of appeals should be reversed.

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