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 FOR RESPONDENTS

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QUESTION PRESENTED

The Investment Company Act of 1940 ("ICA") and the Investment Advisers Act of 1940 ("IAA") were enacted together in a single Act of Congress to protect investors against conflicts of interest and unscrupulous business practices. Those statutes impose numerous substantive requirements on investment companies and their advisers. They also contain parallel provisions, in §47(b) of the ICA and §215(b) of the IAA, that allow for the rescission of any contracts that violate those statutory requirements.

In *Transamerica Mortgage Advisors, Inc. v. Lewis* ("*TAMA*"), 444 U.S. 11 (1979), this Court held that §215(b) of the IAA provides a limited private right of action for rescission of a contract that violates the IAA. Congress subsequently amended §47(b) of the ICA to make even more explicit that it entitles parties to seek rescission of unlawful contracts, providing that "[t]o the extent that a contract [that violates the ICA] 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).

The question presented in the petition is:

Whether section 47(b) of the ICA, 15 U.S.C. §80a-46(b), creates an implied private right of action.

CORPORATE DISCLOSURE STATEMENT

Respondents Saba Capital Master Fund Ltd. and Saba Capital Management L.P. (together, "Saba") certify that they have no parent corporation, and that no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Congress enacted the Investment Company Act of 1940 ("ICA") and the Investment Advisers Act of 1940 ("IAA") together on the same day in the same Act of Congress. Through both statutes, Congress sought to protect investors against some of the unscrupulous business practices that had precipitated the financial crash of 1929 and the Great Depression, including investment companies whose advisers managed investor assets in their own interests rather than their shareholders' interests. Toward that end, the statutes impose multiple substantive requirements on investment companies and their advisers to eliminate unethical practices and conflicts of interest. And toward that same end, the ICA and the IAA contain parallel provisions—§47(b) of the ICA and §215(b) of the IAA—that authorize the rescission of contracts that violate their requirements. Those provisions ensure that unwary investors cannot be trapped by unscrupulous advisers into contracts with terms that the ICA and the IAA prohibit.

In *Transamerica Mortgage Advisors, Inc. v. Lewis* (*TAMA*), 444 U.S. 11 (1979), this Court was asked to decide whether the IAA creates a full-blown private right of action for damages, a limited action allowing a party to a contract that violates the IAA to seek rescission, or just a rule of decision and no right of action whatsoever. In an opinion by Justice Stewart, joined by, *inter alia*, Justices Powell and Rehnquist—no friends of implied private rights of action generally—the Court chose the middle course and concluded that "the statutory language itself" in §215(b) "fairly implies a right to specific and limited

relief" in the form of an equitable action for rescission of a contract that violates the IAA. *Id.* at 18. Justice Powell wrote separately to emphasize that recognizing that the IAA provided a limited right to recission was fully consistent with his disavowal of implied rights of action in his famous dissent in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The four dissenting Justices agreed that the IAA provides a right to rescission, but would have gone further to infer a private damages action.

After *TAMA*, Congress amended §47(b) of the ICA—and made the private right to seek rescission under that provision even more explicit, by providing that a court "may not deny rescission at the instance of any party" absent certain findings. 15 U.S.C. §80a-46(b)(2). By its plain terms, §47(b) provides a limited private right to seek rescission of a contract that violates the ICA. That understanding comports with both the specialized and ordinary meaning of the phrase "rescission at the instance of any party." The statutory language provides clear textual evidence of both the right that Congress conferred (to seek rescission) and the class of persons on whom Congress conferred it (any party to a contract that violates the ICA). That construction also comports with the structure of §47 and makes sense of the statute as a whole. And this Court's decision in *TAMA*, and the statutory history of §47(b) before and after that decision, settle the point.

None of petitioners' counterarguments is persuasive. Petitioners (and the United States) spend much of their brief not discussing the text, but railing against the bad old days when this Court routinely

inferred private damages actions. They even go so far as to dismiss the on-point *TAMA* decision as a product of that benighted era. But that story does not wash. By the time of *TAMA*, the textualists were in the majority and rejected the pleas of Justice Brennan *et al.* to infer a damages remedy. At the same time, the implied-rights skeptics in the *TAMA* majority understood that a private right to rescission was "quite different[]," 444 U.S. at 19, and reflected the best reading of the statutory text. That distinction makes sense, as recognizing a limited rescissionary right raises none of the second-order concerns involved in inventing a damages remedy, which requires inventing rules for everything from contribution to aiding-and-abetting liability.

Petitioners' statutory arguments are equally misguided. They assert that §47(b) contains no rights-creating or individual-focused language, but can do so only by ignoring the key phrase "rescission at the instance of any party"—a phrase that their interpretation renders superfluous, if not entirely mystifying. They assert that §47(b) provides only a rule of decision and not a right of action, but *TAMA* squarely rejected that argument under §215(b), and it is even less persuasive here because it requires believing that Congress intended to downgrade the rescissionary action just recognized in *TAMA* to a mere rule of decision available only to parties already in court on some other basis, and did so by adding language expressly providing for "rescission at the instance of any party." Petitioners assert that §47(b) cannot provide a private right of action because the ICA provides for SEC enforcement and two express private damages actions, but that argument was also

rejected in *TAMA* and conflates the limited private right of rescission recognized there and available here with private damages actions. Again, the whole point of *TAMA* was to draw a clear distinction between the two.

Petitioners will get no argument from respondents in asserting that this Court should not reset the clock to the freewheeling days of yore. But petitioners are dead wrong in their attempt to paint *TAMA*, a decision joined by Justices Powell and Rehnquist, as a relic of the *ancien regime*. Denying even a limited private right to rescission in a case like this or *TAMA* is to deny the statutory text. This Court should affirm.

STATEMENT OF THE CASE

A. Statutory Background

1. The ICA and IAA, enacted together in the same Act of Congress in August 1940, are part of a series of federal securities laws that Congress adopted after the stock market crash and the onset of the Great Depression to "eliminate certain abuses in the securities industry … which were found to have contributed" to that crisis. *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 186 (1963); *see* Pub. L. No. 76-768, 54 Stat. 789 (1940) (enacting the ICA and IAA). Those statutes were collectively enacted "to achieve a high standard of business ethics in the securities industry" and prevent the sharp practices and conflicts of interest that had plunged the country into economic disaster. *Cap. Gains*, 375 U.S. at 186.

The ICA "regulates investment companies, including mutual funds." *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 338 (2010); *see* 15 U.S.C. §80a-3 (defining "investment company"). A mutual fund is a

pool of assets, typically consisting primarily of securities, that belong to the individual investors who hold shares in the fund. *Jones*, 559 U.S. at 338. The fund is usually created by a separate entity called an investment adviser, who "selects the fund's directors, manages the fund's investments, and provides other services." *Id.*

As Congress recognized, "the relationship between a fund and its investment adviser" is "fraught with potential conflicts of interest." *Id.* at 339. Congress accordingly adopted the ICA to address "the potential for abuse inherent in the structure of investment companies," by imposing a comprehensive "scheme that regulates most transactions between investment companies and their advisers" and other requirements to protect investors against unscrupulous or self-interested fund advisers. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984); *see Jones*, 559 U.S. at 339 (recognizing the ICA's "protections for mutual fund shareholders").

Congress embodied that purpose in the statutory text and an unusual but explicit statutorily-mandated rule of construction, declaring that the ICA "shall be interpreted" to "mitigate and, so far as is feasible, to eliminate the conditions enumerated in [the statute] which adversely affect the national public interest and the interest of investors." 15 U.S.C. §80a-1(b). Those enumerated conditions include:

- "when investment companies are organized, operated, [or] managed … in the interest of directors, officers, [or] investment advisers … rather than in the interest of all classes of such companies' security holders";

- "when investment companies issue securities containing inequitable or discriminatory provisions, or fail to protect the preferences and privileges of the holders of their outstanding securities"; and
- "when the control of investment companies is … inequitably distributed."

Id. §80a-1(b)(2)-(4). The ICA also includes substantive protections to ensure that control would remain distributed among investors in a fund in accordance with their economic interests, including by requiring that "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*).

Congress further ensured that unscrupulous investment advisers could not use private contracts to evade the ICA and deprive shareholders of its protection. First, in §47(a), Congress declared 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." Pub. L. No. 76-768, §47(a), 54 Stat. at 845 (codified at 15 U.S.C. §80a-46(a)). Second, in §47(b), Congress declared (as relevant here) that "[e]very contract made in violation of any provision of [the ICA] or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of any provision of … [the ICA], or any rule, regulation, or order thereunder, shall be void." *Id.* §47(b), 54 Stat. at 846 (codified as amended at 15 U.S.C. §80a-46(b)).

Congress used the same language to the same effect in the corresponding provision of the IAA, enacted on the same day in the same Act. *Compare id.* §47, 54 Stat. at 845-46 (ICA), *with id.* §215, 54 Stat. at 856-57 (IAA). Like §47(a) of the ICA, §215(a) of the IAA provided that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the IAA] or with any rule, regulation, or order thereunder shall be void." *Id.* §215(a), 54 Stat. at 856 (codified at §80b-15(a)). And like §47(b) of the ICA, §215(b) of the IAA provided that "[e]very contract made in violation of any provision of [the IAA] and every contract heretofore or hereafter made, the performance of which involves the violation of any provision of … [the IAA], or any rule, regulation, or order thereunder, shall be void." *Id.* §215(b), 54 Stat. at 856-57 (codified at §80b-15(b)).

2. In *TAMA*, this Court held that §215 of the IAA creates a limited private right of action for rescission of a contract that violates the IAA. In doing so, the Court rejected (unanimously) arguments that the IAA provided only a rule of decision and thus did not authorize any private action, and (5-4) the reading favored by the dissenters, which would have inferred a private damages action. The Court forged that middle path by focusing firmly on the statutory text. Indeed, the Court's opinion explained that "whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction," and so "begin[s] with the language of the statute itself." 444 U.S. at 15-16. Examining that text, the Court concluded that it "fairly implies a right to specific and limited relief in a federal court"—

namely, a private action to seek rescission of the unlawful contract. *Id.* at 18.

"By declaring certain contracts void," the Court explained, §215 "by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." *Id.* And the logical "somewhere" was federal court. The "legal consequences of voidness" typically include the right to "resort to a court to have the contract rescinded and to obtain restitution of consideration paid," and "the federal courts" are the logical forum and have traditionally treated comparable language as providing "an equitable cause of action for rescission." *Id.* at 18-19. Indeed, the Court itself had previously held that a comparable provision confers a limited private "'right to rescind' a contract void under the criteria of the statute." *Id.* (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 388 (1970)). As such, the Court concluded, "when Congress declared in §215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission." *Id.* at 19; *see* SEC.Br. at *24, *TAMA*, 1979 WL 213662 (U.S. Feb. 9, 1979) ("SEC.*TAMA*.Br.") (§215 provides a private right of action for rescission, which is arguably "more express than implied" given that the statute provides for "avoidance of illegal contracts").

Tellingly, no member of the Court was persuaded by the *TAMA* petitioners' efforts to construe §215 as merely a substantive rule of decision or a defense that could only be invoked by a party with some other reason to be in court. Although recognizing that voidness "could be raised defensively in private

litigation," the Court explained that the consequences of voidness "are typically not so limited." *TAMA*, 444 U.S. at 18-19. The Court also rejected the "anomalous" suggestion that Congress might have intended for §215 to provide only a rule of decision for litigation in state courts, finding no reason to believe that Congress "wished to remit the litigation of a federal right to the state courts." *Id.* at 19 n.8.

The *TAMA* majority thus had no difficulty in concluding that §215 provides a limited private right of action for rescission. At the same time, it "view[ed] quite differently" the plaintiff shareholder's attempt to infer a private right of action for *damages* from §206 of the IAA, which "broadly proscribes fraudulent practices by investment advisers." *Id.* at 16, 19. The majority found no warrant for reading a claim for "monetary liability" into a statute that "simply proscribes certain conduct." *Id.* at 19. Given that Congress "expressly authorized private suits for damages in prescribed circumstances" in other securities laws and in the ICA, the Court considered it "highly improbable" that Congress implicitly intended for a violation of the IAA to give rise to a damages claim. *Id.* at 20.

As if to underscore both the textual grounding for the rescissionary right and the critical difference between that rescissionary action and a private damages action, Justice Powell concurred separately to emphasize that nothing in the Court's opinion was incompatible with his dissent in *Cannon*. *TAMA*, 444 U.S. at 25 (Powell, J., concurring). In that landmark opinion, Justice Powell set his path as the Court's foremost implied-rights-of-action skeptic of his day,

declaring that the mode of analysis applied in *Cort v. Ash*, 422 U.S. 66 (1975), itself a retreat from the even more freewheeling days of *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), "cannot be squared with the doctrine of the separation of powers." *Cannon*, 441 U.S. at 730-31 (Powell, J., dissenting).

Justice White dissented, joined by Justices Brennan, Marshall, and Stevens. The dissenters believed that the majority did not go far enough; they would have held that the IAA implied a private right of action for damages *as well as* a limited private right of action for rescission.

3. Just one year after *TAMA*, Congress passed the Small Business Investment Incentive Act of 1980 to ease some of the constraints of the ICA and thereby help increase the flow of capital to small businesses by stimulating the growth of venture capital financing. *See generally* Richard G. Tashjian, *The Small Business Investment Incentive Act of 1980 and Venture Capital Financing*, 9 Fordham Urban L.J. 865 (1981). Among other changes, Congress amended §47(b) of the ICA, revising it to explicitly address contracts that have already been performed and contracts that violate the ICA only in part, and to ensure that courts would not be obligated to rescind contracts as void when doing so would be inequitable. As amended, §47(b) now reads:

> (b)(1) A contract that is made, or whose performance involves, a violation of [the ICA], or of any rule, regulation, or order thereunder, is unenforceable by either party … unless a court finds that under the circumstances enforcement would produce a

> more equitable result than nonenforcement and would not be inconsistent with the purposes of [the ICA].
>
> (2) To the extent that a contract described in paragraph (1) has been performed, a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of [the ICA].
>
> (3) This subsection shall not apply (A) to the lawful portion of a contract to the extent that it may be severed from the unlawful portion of the contract, or (B) to preclude recovery against any person for unjust enrichment.

Pub. L. No. 96-477, §104, 94 Stat. 2275, 2277 (1980) (codified at 15 U.S.C. §80a-46(b)).

The report on the 1980 amendments explained that the amended provision "to a certain extent, codifies case law under the present section, and its analogs in other securities laws, by requiring a court to examine the equities of the situation and the purposes of the Act in connection with its decision," and that subsection (b)(3) "enunciate[s] equitable principles upon which interpretation and utilization of the present section have been based." H.R. Rep. No. 96-1341, at 37 (1980). Nothing in that report or in any other contemporaneous source suggests that Congress intended the 1980 amendments to prevent §47(b) from continuing to provide a limited private right of action for rescission like the one that *TAMA* recognized §215(b) or to downgrade §47(b) to a mere

rule of decision or defense. On the contrary, the report reflected a far rosier view of private enforcement efforts: "Congress has long taken the view that private rights of action for violations of the federal securities laws are a necessary adjunct to the [SEC's] enforcement efforts," as the SEC's "relatively small staff … cannot be expected to bring actions against even a large portion of those engaged in schemes, devices and activities that are prohibited by federal law." *Id.* at 28. The Committee accordingly emphasized that it "expects the courts to imply private rights of action under this legislation, where the plaintiff falls within the class of persons protected by the statutory provision in question," as doing so "would be consistent with and further Congress' intent in enacting that provision." *Id.* at 29.[1]

4. In 2001, the Second Circuit invited the SEC to file an amicus brief addressing whether §26 and §27 of the ICA, requiring fees and charges for variable insurance contracts to be reasonable, provide implied private rights of action *for damages*. The Commission

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[1] The United States incorrectly asserts that the quoted language "appear[s] under a heading dedicated to the IAA amendments in Title II of the 1980 Act" rather than the ICA amendments. U.S.Br.29. In fact, the quoted language appears under its own subheading—titled "Private actions"—at the end of the "Summary of the Legislation" section (after the summary of Title III, not Title II), and immediately before the "Section-by-Section Analysis." H.R. Rep. No. 96-1341 at 22-29. That placement makes clear that the quoted language refers to the *entire* legislation, not just the IAA amendments. *See id.* at 29 (explaining that the Committee "expects the courts to imply private rights of action under *this legislation*" (emphasis added)). In fact, the end of the "Private actions" section specifically mentions §36 of the ICA, not the IAA. *Id.* at 28-29.

responded with a thoughtful 24-page submission contending that it was "not necessary" to decide that issue, because "the express remedy set forth in Section 47(b) of the ICA" already "permits rescission of the portion of the contract that establishes an unreasonable price, together with restitution of the excess amounts paid." SEC.Br. at 2-3, *Olmstead v. Pruco Life Ins. Co. of N.J.*, 2001 WL 34113763 (2d Cir. 2002) ("SEC.*Olmstead*.Br."). The SEC acknowledged this Court's "reluctance to recognize implied rights of action" for damages, *id.* at 3, but concluded that §47(b) creates an "express" private right to seek rescission "on the face of the statute." *Id.* Even after the 1980 amendments, the SEC explained, §47(b) continues to represent "a version of the common law doctrine of 'void for illegality,'" making it "clear beyond reasonable dispute" under *TAMA* that §47(b) creates a limited private right of action for rescission of contracts that violate the ICA. *Id.* at 9-12. The SEC went on to describe §47(b) as providing an "express" cause of action no less than six separate times in its 24-page brief. *See id.* at 2 (three times), 3, 12, 24.[2]

5. In 2019, the Second Circuit squarely confronted whether §47(b) provides a limited "private right of action for a party to a contract that violates the ICA to seek rescission of that violative contract."

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[2] The SEC claims it has "since reconsidered its view of Section 47(b) in light of this Court's more recent guidance on implied private rights of action." U.S.Br.24 n.2. But the text has not changed, and it is unclear what "more recent guidance" the SEC has in mind, given that *Alexander v. Sandoval*, 532 U.S. 275 (2001)—a decision repeatedly emphasized by petitioners and the government here—was issued eight months *before* the SEC's *Olmstead* brief.

Oxford Univ. Bank v. Lansuppe Feeder, LLC, 933 F.3d 99, 109 (2d Cir. 2019). Relying on the plain text and structure of §47(b), and following this Court's decision in *TAMA*, the Second Circuit unanimously concluded that §47(b) provides a limited private right of action for rescission. *Id.*

As the Second Circuit explained, "[t]he text of §47(b) unambiguously evinces Congressional intent to authorize a private action." *Id.* at 105. By providing that "a court may not deny rescission at the instance of any party" absent narrow judicial determinations, the text "necessarily presupposes that a party may seek rescission in court by filing suit." *Oxford*, 933 F.3d at 105. "The language Congress used is thus effectively equivalent to providing an express cause of action." *Id.*; *see* SEC.*Olmstead*.Br.2-3, 12, 24 (recognizing §47(b)'s "express remedy" for rescission); SEC.*TAMA*.Br.24 (suggesting that §47(b)'s rescissionary right is arguably "more express than implied").

The Second Circuit further explained that the statutory text places clear limits on §47(b)'s private action for rescission. The text specifically identifies the "class of persons" who are entitled to assert that private right of action for rescission: namely, "parties to a contract whose provisions violate the ICA." *Oxford*, 933 F.3d at 105 (emphasis omitted). And the nature of the private right of action itself is likewise limited, as it affords only "the right to seek rescission of the violative contract," not damages or other relief. *Id.* at 106.

The Second Circuit found "support in the Supreme Court's interpretation of a similar provision

in simultaneously enacted 'companion legislation'" at issue in *TAMA*. *Id.* As the Second Circuit observed, "[a]t the time *TAMA* was decided," the language of §215 of the IAA (which the *TAMA* Court held provided a private right of action for rescission) "was identical to ICA §47(b)." *Id.* at 107. And "[t]he following year, Congress amended §47(b) in a manner that strongly implied that it endorsed the result in *TAMA*," by deeming ICA-violative contracts "unenforceable by either party" and providing for their "rescission at the instance of any party." *Id.* The legislative history "further supports the view that, in the 1980 amendment, Congress intended to confirm the availability of a private action for rescission" under §47(b) that this Court had just recognized under its companion provision in §215(b). *Id.*

Finally, the Second Circuit rejected various arguments against recognizing a right to rescission in §47(b). The Second Circuit was not persuaded by the *Oxford* defendants' argument that "the right to seek rescission might instead be that of a governmental actor, such as the SEC, and not of a private party," finding it "highly unlikely that Congress meant to allow a suit only by the SEC" when it provided for "rescission at the instance of any party." *Id.* at 105. Nor was it persuaded that ICA provisions expressly providing for a private *damages* remedy in narrow circumstances created any inference that Congress did not create a private rescissionary right in §47(b). *See id.* at 105-06, 108.

B. Factual and Procedural Background

1. The typical mutual fund is an "open-end" fund, meaning that the fund stands ready at any time to

issue new shares to any investor who wants to buy into the fund, and likewise stands ready at any time to redeem its shares at a price based on the fund's net asset value. *See Bd. of Governors of Fed. Rsrv. Sys. v. Inv. Co. Inst.*, 450 U.S. 46, 51 (1981). That structure provides investors who are unhappy with the fund's management with an easy exit: They can simply sell their shares back to the fund at net asset value, and invest their money elsewhere instead. That exit right, in turn, keeps fund managers disciplined. *See generally* Albert O. Hirschman, *Exit, Voice, and Loyalty* (1970).

This case, by contrast, involves closed-end funds. A closed-end fund does not offer investors the same easy entrance and exit opportunities; instead, it issues shares only at "its initial organization" and "at infrequent intervals" thereafter, and "does not stand ready to redeem its shares" based on net asset value. *Bd. of Governors*, 450 U.S. at 51. Those limited exit rights create a real potential for mismanagement and investor harm: If a closed-end fund is underperforming, its investors are trapped. Unlike investors in an open-end fund, they cannot simply vote with their feet by redeeming their shares at net asset value and then re-investing elsewhere. Instead, the only way that investors can exit a closed-end fund is by selling their shares to another investor at whatever price the market sets—which, given that potential buyers will face the same restrictions on exit and may have a similarly jaundiced view of management, is often "significantly below" the shares' net asset value. *Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 108 (2d Cir. 2023). Because of investors' limited exit

opportunities, managers view closed-end funds as permanent capital, which earns substantial management fees in perpetuity.

Petitioners provide a case in point. During the relevant time frame, each of these four closed-end funds traded well below net asset value—at some points, as far as 26% below. D.Ct.Dkt.23 at 4 n.4 (citing C.A.App.80); *see* Pet.App.44a. That is, from the market's point of view, the funds would have been worth substantially more if their managers had stopped trying to (mis)manage them and had instead just sold the funds' assets and distributed the proceeds to their shareholders. And the market had good reasons for reaching that conclusion, as the funds' expense ratios, director compensation, and managerial-adviser fees were all unduly elevated. *See* Pet.App.44a. But despite the funds' obvious underperformance, their managers had little incentive to mend their ways or do anything other than continue to earn management fees on trapped capital. *See* D.Ct.Dkt.23 at 4. And while the individual investors in the funds had every incentive to demand better management, they faced significant collective-action problems that made it difficult for them to force through the necessary changes, as any individual investor who launched a reform campaign would bear all the costs but reap only a small fraction of the benefits.

Petitioners' mismanagement eventually attracted the attention of Saba, a hedge fund whose investment strategy in part entails identifying underperforming closed-end funds, purchasing a significant stake to overcome the collective-action problems that impede

reform, and then winning shareholder approval for reforms needed to push the funds' market value closer to the value of the underlying assets. C.A.App.570-71. The resulting share-price increase not only benefits Saba, but also unlocks value for other shareholders. *Id.* Saba's intervention is rarely welcomed by an underperforming fund's management, who can count on Saba "mak[ing] its voice heard" and "holding [management] accountable in votes for the election of directors, approval of advisory agreements, and other governance matters." Pet.App.44a.

2. To prevent investors from challenging their poor management, petitioners adopted bylaws provisions opting into the Maryland Control Share Acquisition Act (MCSAA). *See* Md. Code Ann., Corps. & Ass'ns §§3-701 to -710.[3] As one petitioner explained, opting into that pro-management law entrenches Maryland closed-end fund advisers in much the same way that "poison pill" provisions entrench Delaware boards of directors, C.A.App.341: Once a shareholder acquires at least 10% of the shares in the fund, the MCSAA deprives that shareholder of the ability to vote any of its shares above that 10% threshold unless two-thirds of the other shareholders affirmatively allow it. *See* Md. Code Ann., Corps & Ass'ns §§3-701(e)(1), 3-702(a)(1). That not only strips the targeted shareholder of its right to vote its full economic interest in the fund, but reinforces the

[3] Like many other closed-end funds, petitioners were incorporated in Maryland, which is known for its pro-management legal regime. *See, e.g.*, Inv. Co. Inst., *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses* 71-72 (Mar. 2020), http://bit.ly/46OqLyI.

collective-action problem that makes reform of an underperforming fund all but impossible. Not coincidentally, opting into the MCSAA squarely violates §18(i) of the ICA, which requires that "every share of stock" in a fund "shall be a voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. §80a-18(*i*); *see Nuveen*, 88 F.4th at 117-21; Pet.App.11a-12a, 29a-30a.

3. Given the clear conflict between §18(*i*) and petitioners' bylaw provisions opting into the MCSAA, Saba brought suit seeking a declaratory judgment and rescission of the opt-in provisions under §47. *See* Pet.App.33a-47a. Consistent with the limited private right of action afforded by §47, Saba did not seek any monetary damages. *See* Pet.App.47a. The district court (Rakoff, J.) granted summary judgment for Saba, explaining that the challenged bylaw provisions violate the "plain and unambiguous" provisions of §18(i) in "two distinct ways": By depriving some of the targeted shareholder's shares of their voting rights, the challenged provisions (1) make those shares "not 'voting' stock," and (2) deny them "equal voting rights." Pet.App.29a-30a. The district court accordingly declared that the challenged provisions violate §18(*i*), and ordered that they "be rescinded forthwith." Pet.App.31a-32a. The Second Circuit unanimously affirmed in an unpublished summary order joined by Judges Nardini, Menashi, and Lee. Pet.App.1a-14a.

SUMMARY OF ARGUMENT

Section 47(b) provides a limited right of action for rescission of a contract that violates the ICA, *i.e.*, the same kind of limited rescissionary action that this Court recognized in *TAMA*. The statutory text is

clear. The initial version used the exact same formulation as the provision in *TAMA*, and the current version even more clearly provides for a private rescissionary action: A court "may not deny rescission at the instance of any party" unless rescission would be inequitable or contrary to the purposes of the ICA. 15 U.S.C. §80a-46(b)(2). By providing for a right to "rescission at the instance of any party," absent specific judicial determinations, §47(b) uses precisely the kind of rights-creating, individual-focused language that this Court has recognized as creating a private action. That conclusion follows from the nature of "rescission," the specialized and historical meaning of "at the instance of any party," which was (and is) regularly used to mean bringing a cause of action, and from the ordinary meaning of those words today. It follows also from the structure of §47, which works together as a unified whole to ensure that investors will not be trapped in contracts that violate the ICA, and from related ICA provisions that instruct that the statute should be construed to vindicate its policies, which were plainly violated here, as both courts below found. And it follows from common sense: §47(b) plainly envisions a right to seek rescission somewhere, and in the context of a rescissionary right to ensure that federal rights will not be undermined by state-law contracts, that somewhere is federal court.

This Court's *TAMA* decision and §47(b)'s statutory history reinforce that conclusion. In *TAMA*, this Court held that §215(b) of the IAA—enacted on the same day, in the same Act of Congress, and with the same language as §47(b) of the ICA—provides a limited private right of action for rescission (while rejecting

an implied private right of action for damages). Given *TAMA*, there can be no reasonable dispute that when §47(b) was enacted, it likewise created a limited private right of action for rescission. And the 1980 amendments to §47(b) only confirmed that limited private right of action by reaffirming that ICA-violative contracts were "unenforceable by either party," i.e., void; explicitly authorizing "rescission at the instance of any party"; and expressly providing for the application of severance and unjust enrichment principles in actions for rescission.

Petitioners' contrary arguments are unavailing. Petitioners begin not with §47(b)'s text, but with an extended discussion of how separation-of-powers principles counsel against judicially inventing private damages actions. Those arguments echo the arguments made by Justice Powell in his influential *Cannon* dissent. Justice Powell's arguments did not carry the day in *Cannon*, but they eventually persuaded the Court to get out of the business of inferring private damages actions in cases like *TAMA*. But the same majority (including Justice Powell) that refused to infer a damages action in the IAA felt very differently about recognizing that §215(b)'s statutory text provided a limited private rescissionary right. Justice Powell underscored the critical difference between an implied damages remedy and a targeted and text-based right to rescission by concurring to emphasize that the majority's recognition of the latter was fully consistent with his *Cannon* dissent.

When petitioners get around to addressing the text, their arguments are unavailing. Their assertion that §47(b) contains no rights-creating, individual-

focused language simply ignores the key phrase "rescission at the instance of any party." Rather than grapple with that text, petitioners declare that §47(b) provides only a rule of decision and not a right of action. But *TAMA* rejected a parallel argument; indeed, that position did not garner a single vote, for the simple reason that it was—and is—inconsistent with the statutory text. Petitioners also contend that §47(b) must not provide a private right of action because Congress showed in two other ICA provisions that it knew how to create express private actions for damages. But once again, petitioners' arguments ignore the critical difference between the damages actions authorized in those two sections and the rescissionary right expressly authorized in §47(b). *TAMA* rejected the same negative-inference argument by emphasizing the fundamental difference between a damages action and a limited right to rescission.

Petitioners end by criticizing the Second Circuit's decision in *Oxford* and (more boldly) this Court's decision in *TAMA*. Their critiques only underscore the flaws in their own case, and their inability to respond to either the explicit text of §47(b) or the majority's persuasive reasoning in *TAMA*. The decision below should be affirmed.

ARGUMENT

I. Section 47(b) Creates A Limited Private Right Of Action For Rescission Of Contracts That Violate The ICA.

A. The Plain Text of §47(b) Creates a Private Right of Action for Rescission.

As this Court has often explained, "[t]he question whether a statute creates a cause of action, either

expressly or by implication, is basically a matter of statutory construction." *TAMA*, 444 U.S. at 15; *see, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017); *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). The answer to that question accordingly "begin[s] with the language of the statute itself." *TAMA*, 444 U.S. at 16; *see, e.g.*, *Sandoval*, 532 U.S. at 288; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). And here, the analysis "can end" there as well, *Sandoval*, 532 U.S. at 288, because the statutory text "unambiguously evinces Congressional intent to authorize a private action" for rescission of contracts that violate the ICA. *Oxford*, 933 F.3d at 105.

1. The relevant text is straightforward: Under §47(b)(2), "a court may not deny rescission at the instance of any party unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter." 15 U.S.C. §80a-46(b)(2). That language, added in 1980, elaborates on the sparser "shall be void" language that both the original §47(b) and §215(b) of the IAA shared, and that this Court found sufficient to create a private rescissionary action in *TAMA*. That elaboration only makes the existence and express nature of the rescissionary action more clear. By expressly referring to "rescission," Congress reinforced that, as this Court indicated just one year earlier in *TAMA*, the previous "shall be void" language was no mere defense to a breach-of-contract action, but a right to have the non-conforming contract rescinded (subject to the conditions and limitations set forth in the balance of the section). And by providing for "rescission at the instance of any party," *id.*,

Congress chose language historically used to refer to rights of action and made clear that this right was not limited to the SEC, but extended to all parties harmed by ICA-violative contracts. That is exactly the kind of "'rights-creating' language" focused on "the individuals protected" that this Court has found sufficient to demonstrate that Congress intended "to confer rights on a particular class of persons." *Sandoval*, 532 U.S. at 288-89. It is the very antithesis of a direction to an agency alone to take action, as in *Sandoval*. Indeed, as the SEC observed in the immediate wake of *Sandoval*, SEC.*Olmstead*.Br.2-3, 12, 24, and the Second Circuit subsequently explained in *Oxford*, that language is "effectively equivalent to providing an express cause of action." *Oxford*, 933 F.3d at 105. If Congress had meant to provide a damages remedy, it no doubt would have used different language. But short of explicitly saying "any party shall have the right to seek rescission," it is hard to see how Congress could have more clearly afforded a targeted and text-based right to seek rescission than by saying "a court may not deny rescission at the instance of any party."

The historical roots of the phrase "at the instance of any party" confirm the point. That phrase—from the Latin *ad instantiam partis*—is one of those "terms of art in which are accumulated the legal tradition and meaning of centuries of practice," such that Congress is presumed to have "adopt[ed] the cluster of ideas that were attached to [that] borrowed word in the body of learning from which it was taken." *Morissette v. United States*, 342 U.S. 246, 263 (1952); *see Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source,

whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))). Here, the history of that term shows that it did more than describe a defense or rule of decision in a suit that was already pending by some other means. Instead, it regularly described the right to bring suit in the first instance—i.e., a private right of action.

Hale, for instance, used that phrase to distinguish ecclesiastical courts' criminal proceedings, where the Church alone had prosecutorial discretion, from "[t]he civil causes committed to their cognizance, wherein the proceedings are *ad instantiam partis*," including "rights of institution and induction to ecclesiastical benefices"—i.e., suits that could be brought by private parties. Matthew Hale, *History of the Common Law of England* 27-28 (6th ed. 1820); *see ad instantiam*, Black's Law Dictionary 32 (1st ed. 1891) (citing Hale's use of *ad instantiam partis*).

American sources from the same period, including this Court, likewise used "at the instance of a party" to refer to a right to initiate suit in the first place, not just to seek relief in a suit already pending. *See, e.g.*, *City of New Orleans v. La. Constr. Co.*, 129 U.S. 45, 47 (1889) (describing the "statutory remedy given in many of the states to try the right of property at the instance of the party whose property is alleged to be wrongfully seized"); *Meriwether v. Garrett*, 102 U.S. 472, 517 (1880) (court can grant mandamus to compel executive officers to perform ministerial acts "at the instance of a party directly interested"); *Campbell v. City of Kenosha*, 72 U.S. (5 Wall.) 194, 202 (1866)

(describing a decision holding that "city authorities could be restrained from collecting [unauthorized taxes] at the instance of a party interest"); *see also discussion*, Black's Law Dictionary 374 (1st ed. 1891) ("proceeding, at the instance of a surety" to require a creditor to exhaust the debtor's property before seeking recourse from surety). That same usage of "at the instance of a party" to refer to the right to bring suit in the first instance persists to the present day. *See, e.g.*, *Sackett v. EPA*, 566 U.S. 120, 130 (2012) (Scalia, J.) (explaining that "[w]here a statute provides that particular agency action is reviewable at the instance of one party," there is a strong "inference that it is not reviewable at the instance of other parties").

2. Even setting aside the long history of using "at the instance of any party" to refer to private rights to go to court to seek specified remedies like rescission, that language does just what this Court has said is required to demonstrate Congress' intent to create a private right. As this Court has explained, Congress intends a statutory provision to create a private right "where the provision in question is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166, 183 (2023) (quoting *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 287 (2002)).

Section 47(b) plainly fits that bill. By requiring courts to grant "rescission at the instance of any party" of a contract that violates the ICA, the statute is clearly "phrased in terms of the persons benefited" with an "unmistakable focus on the benefited class"—

namely, persons who are being harmed by contracts that the ICA makes unlawful (who, not coincidentally, are the same persons that the ICA as a whole seeks to protect). *Talevski*, 599 U.S. at 183; *see Oxford*, 933 F.3d at 105 (recognizing that §47(b)(2) "identifies a 'class of persons' who benefit from the availability of the right of action," namely, "parties to a contract whose provisions violate the ICA" (citation and emphasis omitted)); *cf. Daily Income Fund*, 464 U.S. at 536 (Congress adopted the ICA "because of its concern with the potential for abuse inherent in the structure of investment companies").

By the same token, §47(b)(2)'s reference to "rescission at the instance of any party," is indisputably "'rights-creating,' individual-centric language" rather than language with an "aggregate, not individual, focus." *Talevski*, 599 U.S. at 183. That language does not just generically address how contracts can violate the ICA (other ICA provisions do that); instead, it explicitly envisions the ability of the individual party to an ICA-violative contract to seek relief from that contract. The statute's "individually focused terminology" accordingly demonstrates "the requisite congressional intent to create new rights," and shows that Congress created a private right of action for parties to ICA-violative contracts to seek rescission under §47(b). *Gonzaga*, 536 U.S. at 287. In that regard, §47(b)'s language is far removed from the language at issue in *Sandoval* (a decision that explicitly cited *TAMA*'s textual approach with approval, *see* 532 U.S. at 286). Section 47(b) is not a direction to the SEC to come up with rules to protect investors or regulate investor companies. It is a

direction authorizing interested parties to go to court and get invalid contracts rescinded.

3. The structure of §47 further confirms the point, as each of its subsections (and sub-subsections) works together to ensure that investors will not be trapped in contracts that violate the ICA. To begin, §47(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of [the ICA] or with any rule, regulation, or order thereunder shall be void," preventing parties from contracting around ICA rules (and more to the point, preventing unscrupulous fund managers from tricking investors into waiving the ICA's protections). 15 U.S.C. §80a-46(a). By using the same language that this Court held in *TAMA* authorized a private right of action for rescission, in a statute enacted on the same day (in language that has remained unchanged since the date of passage), §47(a) plainly authorizes investors like Saba to seek rescission of ICA-violative bylaws provisions. *See TAMA*, 444 U.S. at 18-19 (by providing that IAA violative contracts "shall be void," Congress intended to create all the "legal consequences of voidness," including the right to "resort to a court to have the contract rescinded"). Indeed, Saba also relied on §47(a) below, and should be allowed to proceed based on that subsection no matter how this Court resolves the question presented here. *See* Saba.Supp.Br.4-5.

Congress then made the availability of a federal action for rescission even more clear in §47(b). In §47(b)(1), Congress declared that a contract that violates the ICA is presumptively "unenforceable by either party," a phrase materially identical to the

earlier language deeming such contracts void. *See, e.g.*, 17 C.J.S. *Contracts* §11 (2025) (explaining that a void contract is enforceable by neither party); *accord* 17A Am.Jur.2d *Contracts* §9 (2d ed. 2025); 5 Williston on Contracts §1:20 (4th ed. 2025). Section 47(b)(1) adds a new caveat: "unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the [ICA's] purposes," which expressly calls for a judicial determination and presupposes a private action for rescission.

Section §47(b)(1) sets the stage for §47(b)(2), which explains that in cases of whole or partial performance of an ICA-violative contract, "a court may not deny rescission at the instance of any party" unless rescission would be inequitable or inconsistent with the ICA's purposes. That caveat parallels the caveat in §47(b)(1) and makes clear that it applies to "rescission at the instance of any party." Finally, §47(b)(3) provides two further caveats that ameliorate the consequences of rescinding contracts, ensuring that §47(b) will not apply "to the lawful portion of a contract to the extent that it may be severed from the unlawful portion," or "to preclude recovery against any person for unjust enrichment."

In short, the plain text of those subsections makes clear beyond cavil that in the 1980 amendments Congress was refining the kind of private right to rescission recognized in *TAMA*, not forswearing it or abandoning the notion that ICA-violative contracts were generally void. The additional caveats explaining the judicial findings necessary for rescission and the consequences of rescission for

severable provisions and claims for unjust enrichment all make clear that §47(b) provides a targeted and text-based private right to rescission.

4. That plain-text reading of the ICA is buttressed by one additional aspect of the statute's plain text. In §1 of the ICA, Congress codified an explicit ICA-specific rule of statutory construction, directing that the ICA "shall be interpreted" to "mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors." 15 U.S.C. §80a-1(b). Congress went on to identify the specific adverse conditions that the ICA targets, including "when investment companies are organized, operated, [or] managed … in the interest of directors, officers, [or] investment advisers … rather than in the interest of all classes of such companies' security holders"; "when investment companies issue securities containing inequitable or discriminatory provisions"; and "when the control of investment companies is … inequitably distributed." *Id.* §80a-1(b)(2)-(4).

Those textual guides to the ICA's construction reinforce that §47(b) cannot be given a miserly construction that limits it to a rule of decision or defense invocable only in the happy coincidence that the party seeking rescission has an independent basis to be in court—i.e., petitioners' construction. This Court is rightly skeptical of judicially invented rules favoring broad construction of remedial statutes and the like. Every statute deserves a fair construction, not a broad or a narrow one. *See Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 88-89 (2018). But a fair

construction must consider all the statutory text, including provisions like §80a-1(b) that make clear Congress' intent to stop the kind of discriminatory and management-entrenching provisions in the contracts at issue here. It seems clear enough that in shifting from language that this Court had already interpreted to provide a private right to rescission to language that even more explicitly gives such rights to "any party," Congress intended to retain and refine a limited private right of action for rescission, not inadvertently eliminate it. But if any doubt remained, Congress directed how it wanted that doubt resolved, in language that fully complied with bicameralism and presentment. That language is the law, and courts acting as "the faithful agents of Congress" are obligated to follow that explicit statutory rule of construction. Amy Coney Barrett, *Substantive Canons & Faithful Agency*, 90 B.U. L. Rev. 109, 110 (2010).

B. This Court's Decision in *TAMA* and the Statutory History of §47(b) Confirm That the Statute Provides a Private Right of Action for Rescission.

For all these reasons, the unambiguous statutory text demonstrates that §47(b) provides a limited private right of action for rescission, and the analysis can end there. That would be the right result even if *TAMA* had never been decided. But *TAMA* was decided, and that decision and §47(b)'s statutory history settle the point. *See BNSF Ry. Co. v. Loos*, 586 U.S. 310, 329 (2019) (Gorsuch, J., dissenting) (distinguishing "statutory history," meaning "the record of *enacted* changes Congress made to the

relevant statutory text over time, the sort of textual evidence everyone agrees can sometimes shed light on meaning," from "unenacted legislative history"); *accord O'Gilvie v. United States*, 519 U.S. 79, 97 (1996) (Scalia, J., dissenting).

Section 47 of the ICA and §215 of the IAA were enacted on the same day, as part of the same Act of Congress, using materially identical language. *See* Pub. L. No. 76-768, §47, 54 Stat. at 845-46 (ICA §47); *id.* §215, 54 Stat. at 856-57 (IAA §215). In *TAMA*, this Court—in an opinion joined by Justices Powell and Rehnquist, no friends of implied private rights of action generally—concluded that "the statutory language itself" of §215 of the IAA "fairly implies a right to specific and limited relief in a federal court," in the form of a limited private right of action for rescission. 444 U.S. at 18. Unsurprisingly, given the Justices in the majority, that opinion conducted exactly the kind of text-based inquiry that this Court continues to apply in determining whether a statutory provision creates a private right of action. *Compare id.* at 15-19 (recognizing that "whether a statute creates a cause of action … is basically a matter of statutory construction" that "begin[s] with the language of the statute itself"), *with, e.g.*, *Ziglar*, 582 U.S. at 133; *Gonzaga*, 536 U.S. at 285-86; *Sandoval*, 532 U.S. at 286-88. And the four dissenting Justices in *TAMA* agreed with the majority that the ICA provides a private right to rescission, making the Court unanimous on that point; the dissenters broke from the majority only because they would have *also* held that the ICA provides a private damages action. *See TAMA*, 444 U.S. at 25-26 (White, J., dissenting). All nine Justices rejected the argument—made in

TAMA and reprised by petitioners here—that the statute did no more than supply a rule of decision or defense.

Given *TAMA*, there can be no reasonable dispute that when §47 was enacted (on the same day and in the same language as §215), it likewise created a private right of action for rescission. *See* U.S.Br.27 (conceding that "*TAMA* … suggests that the then-current version of Section 47(b) likewise authorized private suits"). After all, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). What is true of statutes enacted in quick succession is true, *a fortiori*, of provisions enacted on the very same day in the same Act of Congress.

The only remaining question is whether Congress intended for its 1980 amendments to §47(b) to change that result and strip away the limited private right of action for rescission that this Court had recognized under §215(b) less than a year before. The answer to that is plainly no. As the changes to the statutory text make clear, the 1980 amendments were intended to clarify the statute's application by making even more explicit the right to seek "rescission at the instance of any party," while also ensuring that rescission would not produce inequities or the voiding of perfectly lawful and severable provisions of a contract that included ICA-violative provisions. *Compare* Pub. L. No. 76-768, §47, 54 Stat. at 845-46, *with* Pub. L.

No. 96-477, §104, 94 Stat. at 2277. The idea that Congress, by fine-tuning the private right to rescission that §47(b) had provided for the previous 40 years, actually intended to eliminate that action entirely and reduce the pre-existing private right of rescission to a rule of decision or defense available if, but only if, the investor found some other path to court, "sounds absurd, because it is." *Sekhar*, 570 U.S. at 738. On the contrary, the 1980 amendments "strongly implied that [Congress] endorsed the result in *TAMA*," by explicitly providing that when a contract violates the ICA, a court "may not deny rescission at the instance of any party" absent narrow circumstances. *Oxford*, 933 F.3d at 107. Indeed, by defining those narrow circumstances and expressly providing for limited severability, Congress essentially presupposed the basic right to rescission recognized in *TAMA*.

In short, as the SEC recognized more than two decades ago in its *Olmstead* brief, §47(b) as amended in 1980 continues to "enact[] a version of the common law doctrine of 'void for illegality,'" and so continues to incorporate a private right of action for rescission of a contract that violates the ICA. SEC.*Olmstead*.Br.9. "Indeed, given the explicit language in Section 47(b)(2) that creates a presumption in favor of rescission, the remedy under the current version of Section 47(b) should be viewed as an express rather than an implied one." *Id.* at 12. Put simply, Congress' explicit instruction that a court "may not deny rescission at the instance of any party" cannot plausibly be read to

deprive parties of a pre-existing statutory right to seek rescission.[4]

II. Petitioners' Contrary Arguments Are Unpersuasive.

A. The Limited Private Right of Action for Rescission in §47(b) Fundamentally Differs From the Private Rights of Action for Damages Inferred in the Bad Old Days.

Petitioners begin not with §47(b)'s text, but with an extended ode to separation-of-powers principles and an equally extended philippic against the evils of judicially inferred damages actions. Pet.Br.20-29; *cf.* U.S.Br.12-14. Both are misdirected. No one is asking this Court to return to the bad old days of the "*ancien regime*," when courts felt free to create an implied right of action for damages whenever they deemed it "necessary to make effective the congressional

[4] There is certainly no need to resort to legislative history to reaffirm what the statutory text makes plain. But even a legislative-history skeptic would expect some hint in those materials if Congress did indeed intend to scrap the pre-existing federal-court right to rescission and replace it with a rule of decision that could be invoked by an investor saddled with an ICA-violative contract only on the happy coincidence that she had some alternative basis to find herself in court. *Cf. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988) (Scalia, J.) (deeming it "most improbable" that Congress would have made "a major change in the existing rules … without even any mention in the legislative history"). Here, the House Report on the 1980 amendments was far from silent; it explicitly stated that the Committee "expects the courts to imply private rights of action under this legislation," as doing so "would be consistent with and further Congress' intent." H.R. Rep. No. 96-1341, at 29; *see supra* pp.11-12.

purpose," heedless of statutory text. *Sandoval*, 532 U.S. at 287; *see* Pet.Br.26-27. Indeed, no one is asking the Court to recognize an implied private damages action at all. Instead, the only question is whether, applying the traditional tools of statutory construction, the §47(b)'s text provides "a right to specific and limited relief in a federal court"—namely "an equitable cause of action for rescission" of a contract that violates the ICA. *TAMA*, 444 U.S. at 18-19. For all the reasons already explained, and the reasons that were persuasive to the implied-rights skeptics in the *TAMA* majority, the answer to that question is unmistakably yes.

Petitioners rely heavily on this Court's cases demonstrating its reluctance to infer new private rights of action for damages when those rights are absent from the statutory text. *See, e.g.*, *Astra USA, Inc. v. Santa Clara Cnty.*, 563 U.S. 110, 117 (2011); *Gonzaga*, 536 U.S. at 276; *Karahalios v. Nat'l Fed'n of Fed. Emps.*, 489 U.S. 527, 532-33 (1989); *Daily Income Fund*, 464 U.S. at 527; *Touche Ross*, 442 U.S. at 562; *see also Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 79-80, 92-94 (1981) (contribution). But inferring a private damages remedy is a fundamentally different enterprise from recognizing a limited right to rescission, as the competing opinions in *TAMA* make clear. Indeed, by conflating the limited private right of action for rescission of an illegal contract here with broader questions of implied private rights of actions for damages, petitioners make the same mistake as the *TAMA* dissenters. *See* 444 U.S. at 25-26 (White, J., dissenting) (calling it "anomalous" to distinguish between a limited private right of action for rescission and a broader implied

private right of action for damages). The *TAMA* majority, by contrast—in a decision joined by the foremost implied-rights skeptics of the day—saw the two issues "quite differently," and had no difficulty in finding a private right of action for rescission that flowed directly from the statutory text while rejecting a private right of action for damages that would have had to be superimposed by the courts. *Id.* at 18-24 (majority op.).

That distinction is hardly surprising. When a court recognizes a limited private right of action for rescission that flows directly from the statutory text, there is little left for the court to do, as the contours of that right are defined by the statutory language and the traditional equitable remedy of rescission. *See id.* at 19.[5] By contrast, the problems with inferring damages actions are legion, as the original act of judicial innovation requires numerous sequels where the Court is forced to address second-order questions about statutes of limitations, *see Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991); contribution, *see Musick, Peeler & Garrett v. Emps. Ins. of Wausau*, 508 U.S. 286 (1993); and aiding-and-abetting liability, *see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), all of which must be answered without any meaningful guidance from Congress.

[5] About the only things left to do are to address whether severable provisions of the rescinded contract survive and whether a party can recover for unjust enrichment for performance under the rescinded contract. That §47(b)(3) expressly answers both those questions underscores that §47(b) fully preserves the right to rescission that prompts those questions.

That difference explains why the two most prominent implied-rights skeptics of their day—Justices Rehnquist and Powell—joined the majority opinion in *TAMA*, and why Justice Powell viewed the Court's opinion—but not the dissent—as compatible with his *Cannon* dissent.

Petitioners also repeatedly invoke this Court's decision in *Sandoval*, which involved not an implied damages action, but an even more ambitious effort to conjure implied rights from text that simply conferred regulatory authority on a federal agency. The majority had little trouble rejecting that conjuring, but its decision sheds no light on the question here. Indeed, among the most notable features of *Sandoval* is that it took the private damages action this Court inferred in *Cannon* as a given, but refused to extend it to the very different context of creating implied rights from regulations based on statutory text that did no more than confer regulatory authority on the agency, a maneuver that would require a return to the *ancien regime* and then some. But that just highlights that it was the principal dissenters in *Cannon* who had no trouble recognizing a limited rescissionary action in *TAMA*, while simultaneously declining to take one last drink from the implied-damages-action bottle in the same opinion.

B. Petitioners' Textual Arguments Go Nowhere.

When petitioners finally turn to §47(b)'s text, their arguments only confirm that their understanding of the statute cannot be reconciled with the text or this Court's precedent.

1. Petitioners blithely declare that the statute "doesn't contain any of the 'rights-creating language' needed to suggest a private right of action" and "isn't aimed at a class of plaintiffs who can seek to enforce it." Pet.Br.30; *see* U.S.Br.15-16, 20-21. But §47(b) *does* contain rights-creating language (i.e., the right to rescind a contract that violates the ICA), and *does* focus on a specific class of plaintiffs (i.e., those burdened by those contracts) by providing for "rescission at the instance of any party," 15 U.S.C. §80a-46(b)(2). Petitioners make no attempt to reconcile their bald claims of statutory omissions with the explicit statutory conferral of a right to "rescission at the instance of any party." *Id.*

Instead of grappling with the statutory text, petitioners offer the *ipse dixit* that §47(b) just "provides the rules that courts must follow when a contract that allegedly violates the ICA comes before them" on some separate basis for getting into court—which petitioners seem to think will only happen "when one party sues another for breach of contract" and the defendant argues that "the contract is unenforceable and must be rescinded under Section 47(b) because it violates the ICA." Pet.Br.31; *see id.* at 32 (claiming §47(b)(2) just "establishes a uniform standard for defensive rescission"); U.S.Br.17-20. That argument makes no sense, was unanimously rejected in *TAMA*, and makes even less sense in light of subsequent developments.

The notion that a provision like §47(b) supplied nothing more than a rule of decision that could be raised defensively never had anything to recommend it. When the concern is that fund managers would

force investors to sign contracts denying them their federal statutory protections, the notion that the investors' only recourse is to wait until they are sued (presumably by the managers) for breach (presumably in state court) and then raise federal law as a defense makes little sense. That is why no member of the Court accepted that miserly view of the IAA in *TAMA*. The majority certainly recognized that §215(b) "could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract," but saw no reason to give the statute that narrow compass. *TAMA*, 444 U.S. at 18. Instead, the Court recognized, "the power to void a contract" suggests something more, namely the right to "resort to a court to have the contract rescinded." *Id.*; *see id.* at 19 (recognizing that "the federal courts in general have viewed such language as implying an equitable cause of action for rescission"). The dissenters, of course, would have gone even further.

Petitioners' argument is only weakened by the specific language Congress added to the statute in the immediate wake of *TAMA*. As noted above, in 1980 Congress started with language that this Court had just interpreted to provide not just a rule of decision or a defense, but a right to seek rescission in federal court. The notion that Congress first decided to downgrade that right of rescission to a defense and then decided that the right way to do so was to use a phrase—"at the instance of any party"—that had long been used to mean an affirmative right to go into court, and that means nearly the opposite of "only as a defense," strains all credulity. Moreover, the fact that the statute expressly talks about rescission subject to equitable exceptions and a rule of

severability makes clear that Congress is providing something more than just a defense against the enforcement of contractual terms inconsistent with federal law. And as a final straw, §47(b)(2) applies "[t]o the extent that a contract … has been performed," at which point (at least after full performance) there *is no* cause of action for breach, making petitioners' defense-only interpretation untenable. 15 U.S.C. §80a-46(b)(2).

For its part, the government suggests that "state law may furnish a cause of action for a plaintiff to seek rescission of a contract that has been performed." U.S.Br.19. But again, *TAMA* rejected the "anomalous construction" that would limit rescission to those circumstances, finding no indication that Congress "wished to remit the litigation of a federal right to the state courts." 444 U.S. at 19 n.8. And while the government is correct that Saba may *also* be entitled to seek rescission under state law of bylaw provisions that violate the ICA, *see infra* p.44, that is no reason to deny the federal cause of action that Congress created in §47(b).

At bottom, petitioners' (and the government's) interpretation of §47(b) makes the phrase "at the instance of any party" entirely superfluous. 15 U.S.C. §80a-46(b)(2). In their view, the statute would have the same meaning with or without that phrase, in violation of cardinal rules of statutory construction. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (recognizing the "cardinal principle of statutory construction" that courts "must give effect, if possible, to every clause and word of a statute"). It would also render the statute's express references to "rescission"

and "denial of rescission" highly anomalous, as rescission has always been understood as more than a defense or rule of decision. And it is hard to see how the combination of the two—"rescission at the instance of any party"—could mean anything other than the right of any party to affirmatively seek rescission. Indeed, despite all the modern concerns about implied damages remedies, this Court would be hard pressed to interpret a statutory reference to "damages at the instance of any party" as anything other than an express damages provision.

Petitioners also suggest that §47(b) cannot "create rights for private parties" because that provision does not itself "proscribe any conduct as unlawful." Pet.Br.32 (brackets omitted). That gets matters precisely backwards. The entire point of this Court's modern jurisprudence on private rights of action is that substantive provisions that require or proscribe certain conduct do *not* necessarily imply private rights of action. *See, e.g.*, *Sandoval*, 532 U.S. at 286-89; *TAMA*, 444 U.S. at 19 (statute that "simply proscribes certain conduct" does not create a private right of action); *Touche Ross*, 442 U.S. at 568 ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action[.]"). The text here, by contrast, does exactly what a statute must do to create a private cause of action: It confers a specific right to seek rescission on a defined class of potential plaintiffs. 15 U.S.C. §80a-46(b)(2). In fact, if §47(b) does not do that, then it does nothing at all. As petitioners emphasize, it does not itself specify what makes a contract violative of the ICA, and the substantive provisions of the ICA that lie elsewhere in the statute could be

invoked as a defense to a breach of contract action even without §47(b). *See, e.g.*, 17A Am.Jur.2d *Contracts* §290 (courts "will not enforce illegal agreements"). Thus, the fact that Congress defined the substantive requirements of the ICA in other provisions only underscores that §47(b) performs a different function—namely, providing a limited private right of rescission for violations of those substantive provisions.

2. Petitioners contend that because Congress gave the SEC regulatory authority to enforce the ICA, it must not have intended to create a targeted right to rescission in §47(b). Pet.Br.35-36; *see* U.S.Br.23-24. That argument once again runs headlong into *TAMA* and the statutory text. In *TAMA*, this Court recognized that the IAA granted the SEC extensive enforcement authorities, but nevertheless concluded that §215(b) also afforded a limited private right of action to seek rescission. 444 U.S. at 18-20. And if Congress in 1980 wanted to limit enforcement of the ICA to enforcement actions initiated by the SEC, it could hardly have picked a worse phrase than "at the instance of any party." 15 U.S.C. §80a-46(b)(2).

In a variant on the same theme, petitioners contend that giving effect to §47(b)'s limited private right of action would "disrupt the fund industry by undermining the SEC's sole enforcement authority." Pet.Br.38-40. That argument strains credulity. There is no real dispute that for at least four decades, from 1940 to 1980, §47(b) provided a limited private right to rescind ICA-violative contracts, like its companion IAA provision. *See TAMA*, 444 U.S. at 18-19. Petitioners point to no evidence of disruption to the

SEC's enforcement authority during that time. Nor do they point to any meaningful disruption of the SEC's enforcement authority in the Second Circuit in the years before or since *Oxford*. That resounding silence confirms that petitioners' breathless warnings of potential chaos are greatly exaggerated—which presumably explains why the government itself does not join in petitioners' doomsaying.

The government's silence on that point may also flow from its recognition, *see* U.S.Br.19, that state law often provides an equitable cause of action for rescission of illegal contracts. *See, e.g.*, *Lantau Holdings Ltd. v. Gen. Pac. Grp. Ltd.*, 81 N.Y.S.3d 384, 386 (N.Y. App. Div. 2018); *Merritt v. Craig*, 746 A.2d 923, 931 (Md. Ct. Spec. App. 2000). Thus, under any reading of §47(b), the SEC is not going to be the only party at whose instance an ICA-violative contract can be rescinded. The only question is whether Congress provided a right to get that relief in federal court to avoid the "anomalous" result of "remit[ting] the litigation of a federal right to the state courts." *TAMA*, 444 U.S. at 19 n.8. On top of that, §47(a) provides a cause of action for rescission for contracts that require waiver of rights secured by the ICA, including the bylaw provisions challenged here. *See supra* p.28.

Those manifold alternative paths make clear that any plea to clear the field so that only the SEC can redress investment contracts that violate the ICA is a non-starter. That has never been Congress' vision for the ICA, and if it were, Congress could hardly have picked worse text to embody it. In fact, the vision of

Congress, and until recently the SEC,[6] has been very nearly the opposite. Congress has encouraged private enforcement and presupposed continuing private enforcement even while ensuring it would not produce inequitable results or the invalidation of severable provisions.[7]

3. Petitioners next contend that the two express private rights of action for damages in §30(h) and §36(b) of the ICA undermine the private right of action for rescission in §47(b). Pet.Br.37; *see* U.S.Br.21-22. That argument again runs headlong into *TAMA*, which found a private right of action for rescission in §215 despite the express private rights of action for damages in the ICA and elsewhere in the securities laws. 444 U.S. at 18-21. And *TAMA*'s reasoning is sound: As already described, a limited private right of action for rescission of an illegal contract is fundamentally different from a private right of action for damages. *See supra* pp.35-38. Given the difficult additional questions that private rights of action for

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[6] *See* SEC.*TAMA*.Br.32-33 (explaining that the SEC's "examination and enforcement capabilities have not grown proportionately" with the growth of the investment advisory industry, and so "the magnitude of the enforcement problem requires private litigation" to supplement the SEC's efforts).

[7] Petitioners are wrong to suggest (again without the concurrence of the government) that a limited private right of action for rescission under §47(b) would undermine the SEC's exemptive authority. Pet.38-40. Section 47(b) authorizes rescission only for contracts that violate the ICA, and contracts that the SEC has exempted do not violate the ICA. *See* 15 U.S.C. §80a-6(c). That presumably is why the limited private action in *TAMA* (not to mention the availability of rescission under state law) has co-existed with SEC exemptive authority under the IAA without difficulty for decades.

damages raise, it is predictable that Congress used different and more specific language when providing for the latter.[8]

4. Petitioners turn next to the legislative history of §47(b), speculating that the fund industry would not have supported the ICA if it had included a private right of action. This speculation pushes legislative history inquiries into new frontiers and is about as far from beginning and ending with the text as it gets. It also fails on its own terms. Petitioners cite not a single contemporaneous source actually supporting their industry-would-have-opposed theory. That is unsurprising in light of the limited nature of a private right to rescission, and the fact that the industry allowed a law to pass that made clear that contracts that contravened ICA protections were "void." Moreover, petitioners' speculation about what the fund industry might have wanted in 1940 cannot be reconciled with *TAMA*. The Senate and House Reports that petitioners cite are reports on the single bill that enacted *both* the ICA *and* the IAA, which both had the fund industry's support. *See* S. Rep. No. 76-1775 (1940); H.R. Rep. No. 76-2639 (1940). The *TAMA* majority viewed those reports as "silent" on the relevant question, 444 U.S. at 17-18, while the dissenters would have used them to craft a private damages action. No one thought they supported a

[8] Notably, the committee reports accompanying the 1970 amendments that created the express private right of action for damages in §36(b) made clear that the provision of an express private right of action was not intended to affect the availability of implied private rights of action elsewhere. *See* H.R. Rep. No. 91-1382, at 38 (1970); S. Rep. No. 91-184, at 16 (1969).

rule-of-decision-only interpretation. Finally, to the extent legislative history is relevant at all, the legislative history of the 1980 amendments—which enacted the current text of §47(b)—make clear that the statute *was* expected to be read as creating a private right of action, while ameliorating any legitimate industry concerns by avoiding inequitable applications or the invalidation of severable provisions. H.R. Rep. No. 96-1341, at 28-29; *see supra* pp.11-12.

C. Petitioners' Critiques of *Oxford* and *TAMA* Are Unpersuasive.

Petitioners close by criticizing both the Second Circuit's analysis in *Oxford* and this Court's analysis in *TAMA*. Neither set of criticisms is persuasive.

1. Petitioners accuse *Oxford* of "fixat[ing]" on the statutory phrase "at the instance of any party," claiming that the Second Circuit erred by concluding that "only a private right of action could give meaning to those words." Pet.Br.42. That criticism is unfair—but as between fixating on a key statutory phrase and rendering it utterly meaningless (as petitioners would), the latter is clearly the greater vice.

Petitioners criticize *Oxford*'s reliance on *TAMA*, claiming that the Second Circuit erred in relying on that case because *TAMA* involved "a different provision, with different language, in a different statute." Pet.Br.44. Not so. Section 47(b) and §215(b) were enacted on the exact same day, in the exact same Act of Congress, and used the exact same language, both when they were originally enacted and when *TAMA* was decided. That is why the government

concedes that under *TAMA*, §47(b) did create a private right of action until at least 1980. *See* U.S.Br.27.

Petitioners also note that express causes of action for damages appear elsewhere in the ICA but not in the IAA. Pet.Br.45, 48. But *TAMA* explicitly considered the existence of express causes of action for damages elsewhere in the securities laws, and they did not affect its reading of §215. *See* 444 U.S. at 18-21. So too here: Congress' decision to grant a limited private right of rescission for contracts that violate the ICA is not undermined by its decision to also grant private rights of action for damages in other circumstances. *See supra* pp.45-46.

2. Finally, petitioners (unlike the government) turn to criticizing *TAMA* itself, calling it a relic of the "*ancien regime*" when courts felt free to imply private rights of action without any textual basis. Pet.Br.19; *see* Pet.Br.44, 48-49. That is not even remotely correct. On the contrary, *TAMA* applied precisely the textually focused reasoning that continues to govern this Court's analysis of private rights of action today. *See* 444 U.S. at 15-16 (explaining that "whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction" and so "begin[s] with the language of the statute itself"); *see also Sandoval*, 532 U.S. at 286-87 (citing *TAMA* with approval). That reflects the views of the Justices in the majority in *TAMA*, which included those—like Justice Powell and Justice Rehnquist—who *deposed* the *ancien regime*. *See* 444 U.S. at 25 (Powell, J., concurring) (deeming *TAMA* "compatible with my dissent in *Cannon*"); *see also Cannon*, 441 U.S. at 717-18 (Rehnquist, J.,

concurring); *id.* at 730-31 (Powell, J., dissenting); *see also* Anthony J. Bellia Jr., *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 Notre Dame L. Rev. 2077, 2084 (2017) (explaining that "Justice Scalia more or less signed on" to the position of Justice Powell in *Cannon*.). Nothing in *TAMA* stands for the now-abandoned approach of "relying on legislative history and purposivist reasoning" to determine whether a statute provides a private right of action. *Contra* Pet.Br.19.

Simply put, the implied-rights skeptics in *TAMA* correctly construed the express text of §215(b) to find a private right to seek rescission. The text of §47(b), with its express reference to "rescission," available "at the instance of any party," and subject to equitable exceptions and a rule of severability, even more clearly gives a right to parties like Saba to seek the rescission of contracts that plainly violate the ICA.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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