

No. 24-345

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IN THE  
**Supreme Court of the United States**

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FS CREDIT OPPORTUNITIES CORP., *et al.*,

*Petitioners,*

*v.*

SABA CAPITAL MASTER FUND, LTD., *et al.*,

*Respondents.*

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

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**BRIEF FOR MARLTON PARTNERS, L.P.  
AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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AARON T. MORRIS  
MORRIS KANDINOV LLP  
4915 Mountain Road  
Stowe, VT 05672

ANDREW W. ROBERTSON  
*Counsel of Record*  
MORRIS KANDINOV LLP  
305 Broadway, 7th Floor  
New York, NY 10007  
(212) 431-7473  
andrew@moka.law

*Counsel for Marlton Partners, L.P.*

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## INTEREST OF AMICI<sup>1</sup>

Marlton Partners, L.P. (“Marlton”) is a private fund that invests in, among other types of securities, closed-end investment funds. Marlton believes accountability to shareholders is a necessary and essential hallmark of healthy capital markets. The Investment Company Act of 1940 (“ICA”) enshrined those principles and, as a protective measure, expressly provided a right of action under § 47(b) for rescission of contracts that violate the ICA’s terms. Marlton has a vested interest in the outcome of this litigation because it will impact the ability of stockholders to redress attempts by investment advisers to evade the ICA’s requirements through private contracts, including fund bylaws. The ICA was carefully crafted by Congress to address potential misconduct and conflicts of interests in the investment management industry; no market participants will be served by allowing advisers to simply ignore settled federal law.

## SUMMARY OF ARGUMENT

This dispute pertains, as a practical matter, to the lowest rung of investment advisers whose chronic underperformance has drawn the ire of stockholders. Rather than face the possibility of being fired, these advisers would prefer, as a business matter, to simply eliminate the ability of stockholders to collectively

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1. No counsel for any party authored this brief in whole or in part, and no party or counsel made a monetary contribution to the preparation or submission of this brief. No person other than Marlton Partners, L.P. or its counsel prepared this brief or made a monetary contribution intended to fund the preparation or submission of this brief.



decide who will manage the fund. Such efforts to obtain perpetual, unchallengeable control of investment funds are older than the ICA—indeed, they spawned the ICA and its protections that empower stockholders to hold management accountable at the ballot box.

Although the ICA’s provisions are equitable and designed in the spirit of our free market economy, its structure has never been optimal for the bean counters within investment advisory organizations, who prefer predictable, perpetual revenue over principles of shareholder democracy. Thus, industry trade groups, like the Investment Company Institute (“ICI”) and the Mutual Fund Directors Forum (“MFDF”), have tried and failed for years through legislative,<sup>2</sup> judicial<sup>3</sup> and administrative<sup>4</sup> efforts to once and for all eliminate the ability of stockholders to meaningfully challenge an incumbent manager. This is their Holy Grail.

The latest volume of the saga, of which this appeal is the latest chapter, progressed as follows: for decades, investment advisers assumed that traditional corporate takeover defenses, like vote-stripping (or “control share”) defenses—which bar particular stockholders from voting more than 10% of the fund’s outstanding shares regardless of the percentage of shares they own—were unavailable to investment companies under § 18(i) of the ICA, which

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2. *E.g.*, <https://www.ici.org/news-release/25-bill-protect-cef-investors>.

3. *See, infra*, n. 10.

4. *E.g.*, <https://www.ici.org/system/files/2025-09/25-cl-amendments-nyse-company-manual.pdf>.

requires that “every share of stock” in an investment company “shall be a voting stock and have equal voting rights with every other outstanding voting stock.” In 2010, the SEC issued guidance stating just that: vote-stripping defenses are “inconsistent with the fundamental requirements of Section 18(i).”<sup>5</sup> However, a decade later—and two months after ICI submitted a legally erroneous white paper suggesting that vote-stripping is completely fine under § 18(i)—the SEC withdrew that guidance in a non-binding staff statement with no legal analysis. Investment managers, aided by compliant fund directors, raced to implement vote-stripping defenses across entire complexes of funds as a prophylactic even where the risk of being fired by stockholders was purely theoretical. These efforts were met with litigation, and every single judicial decision found that § 18(i) prohibits vote-stripping defenses.<sup>6</sup>

Having failed to convince any court that vote-stripping is permissible under §18(i), the industry pivoted its focus to the courthouse door. Petitioner filed certiorari in this action not with respect to its § 18(i) violation, which is now settled law, but the statutory right under § 47(b) for shareholders to redress that violation. To this day, boards and advisers continue to knowingly violate § 18(i) by maintaining vote-stripping defenses in what appears to be a corporate version of civil disobedience. A ruling in Petitioner’s favor here would insulate that misconduct from judicial oversight.

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5. *See, infra*, n. 7.

6. *See, infra*, n. 10.

None of the policy points made by Petitioner and its amici suggest that this Court should enable knowingly illegal conduct by overriding Congress’s decision to include an express enforcement right under § 47(b). The ICA’s protections responded to decades of abusive practices by investment advisers—not shareholders—which had been studied extensively by the SEC and Congress. While these provisions hold advisers accountable to shareholders, not every shareholder has the time, interest and resources to actively oversee their fund’s activities. Larger institutional investors (coined “activists” by some) often carry the torch for all stockholders by expending time and money advocating for managerial improvements. These efforts inure to the benefit of all shareholders—long-term, short-term or otherwise—and foster competition for individual management contracts in a market that is otherwise completely uncompetitive.

Amici’s plea for a “stable regulatory framework” is a euphemism for the freedom to decide, unilaterally without the risk of judicial oversight, whether and how to comply with the ICA. Similarly, amici’s feigned concern over “back door claims” is only as great as the risk that federal courts will find their conduct to violate the ICA. Finally, the Court should reject amici’s invitation to delegate the role of the judicial branch to unelected officials at the SEC or, even worse, private citizens serving as independent directors. As to the latter, independent directors enabled the wave of vote-stripping defenses, which were struck down by the courts, and to this day still maintain such defenses on the books of many funds they oversee. Directors do not provide an independently sufficient check on an adviser’s compliance with federal law, and actually stand to benefit from entrenching themselves in office. As

to the SEC, the agency published guidance for a decade stating that vote-stripping defenses violate § 18(i). Its withdrawal of that guidance in a non-binding statement, and willingness to allow vote-stripping defenses to proliferate even in the face of judicial decisions striking them down, is entitled to precisely zero deference. In any event, foundational constitutional principles provide that the judicial branch interprets and applies Congress's laws, not the administrative. If anything, this case is a prime example of why an independent judiciary is necessary to the fair application of our laws.

As an investor in closed-end funds, Marlton respectfully submits that the Court should affirm the lower court's ruling that § 47(b) of the ICA creates an express cause of action for the rescission of private contracts that violate the ICA.

## **ARGUMENT**

### **I. This Dispute Arises From An Industry-Wide Refusal To Stop Using Illegal Contracts To Maintain Control Of Investment Funds**

Petitioners and their amici would have this Court ignore the true origin of this dispute: the use of illegal defensive mechanisms by investment advisers that violate § 18(i) of the ICA, which requires that "every share of stock" in an investment company "shall be a voting stock and have equal voting rights with every other outstanding voting stock." What Petitioner refers to as a "commonplace measure" (Brief at 7) is, in reality, an unambiguously illegal entrenchment device that has been heavily litigated and struck down by every court to consider the matter.

For decades, fund managers assumed that § 18(i) prohibited the use of vote-stripping defensive mechanisms, called “control share” provisions, which are designed to alter or remove voting rights when a stockholder crosses a certain threshold of share ownership (usually 10%). In 2010, the SEC issued guidance affirming that the use of a control share provision by an investment company to “restrict the ability of certain shareholders to vote ‘control shares’ . . . would be inconsistent with the fundamental requirements of Section 18(i).”<sup>7</sup>

However, in a remarkable example of regulatory capture, the SEC changed its tune in 2020 after ICI—an organization that represents the interests of investment managers, not stockholders, and is funded by the industry’s largest insurance carrier—issued a 91-page whitepaper arguing, erroneously, that the use of [control share provisions] authorized by state law are fully consistent with both the language of the Investment Company Act and its underlying purposes.”<sup>8</sup> Two months later, the SEC issued a non-binding statement with “no legal force or effect” that withdrew its guidance in the *Boulder* Letter and stated that SEC staff would consider compliance with § 18(i) on a case-by-case basis.<sup>9</sup> The Staff

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7. *Boulder Total Return Fund, Inc.*, File No. 811-07390, 2010 WL 4630835, at \*2 (SEC No-Action Letter, Nov. 15, 2010) (the “*Boulder* Letter”).

8. See Investment Company Institute, *Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses*, available at [https://www.ici.org/system/files/attachments/20\\_ltr\\_cef.pdf](https://www.ici.org/system/files/attachments/20_ltr_cef.pdf).

9. See Staff Statement, Division of Investment Management, May 27, 2020, available at <https://www.sec.gov/investment/control-share-acquisition-statutes> (the “Staff Statement”).

Statement was accompanied with the following disclosure: “The Commission has neither approved nor disapproved its content. This statement, like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.”

The investment fund industry eagerly construed the non-binding and legally irrelevant Staff Statement as an open invitation for the wholesale implementation of illegal control-share provisions across hundreds of closed-end funds. This was predictably met with litigation brought by stockholders, which resulted in a series of decisions holding that the use of control share provisions by investment companies violates § 18(i).<sup>10</sup> To be clear, every court to consider the matter has unanimously held that § 18(i) prohibits the use of vote-stripping defenses.

Despite these unambiguous judicial holdings, many closed-end funds continued to maintain their vote-stripping defenses, and ICI has never modified its position on the legality of such defenses under § 18(i). Rather, after the most recent loss, Petitioner—undoubtedly in consultation with ICI and other industry groups—opted to appeal not on the legality of their defensive mechanisms under § 18(i) but on a *procedural mechanism* through which investors are permitted—under § 47(b) of the ICA—

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10. See *Eaton Vance Senior Income Trust v. Saba Capital Master Fund, Ltd.*, 2021 WL 2785120 (Mass. Super. Ct. Apr. 7, 2021); *Saba Cap. CEF Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 2022 WL 493554 (S.D.N.Y. Feb. 17, 2022), *aff’d* 88 F.4th 103 (2d Cir. Nov. 30, 2023); *Saba Capital Master Fund, Ltd. v. BlackRock Municipal Income Fund, Inc.*, 2024 WL 43344 (S.D.N.Y. Jan. 4, 2024), *aff’d* 2024 WL 3174971 (2d Cir. June 26, 2024).

to void illegal contracts with their investment advisers. Rather than simply discontinue their illegal conduct, Petitioner and its amici seek to eliminate a means for stockholders to complain about it.

## **II. The ICA Was Passed To Protect Investors From Abusive Investment Advisers, Not Shareholders**

Petitioner’s suggestion that the ICA was designed to thwart the ability of stockholders to determine who will govern the fund is wholly fabricated and does not support limitation on the express right under § 47(b) to seek rescission of illegal contracts. The legislative record is replete with materials demonstrating that it was precisely this kind of abusive conduct by investment advisers that led to the passage of § 18(i) and the enforcement mechanism in § 47(b).

In the early decades of the 20th century, investment companies operated in an “atmosphere of self-dealing [by insiders] and conflicting interests,” and the “pecuniary interest of the promoters, distributors and managers dominated almost every phase of the organization and operation of investment companies to the detriment of investors.”<sup>11</sup> The ICA was born out of these systemic abuses by fund managers and other insiders, like Petitioners, not unaffiliated shareholders.<sup>12</sup>

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11. See Robert F. Wagner, *Senator Wagner Introduces Investment Trust Legislation* (March 14, 1940) at 2, available at [https://www.sechistorical.org/collection/papers/1940/1940\\_0314\\_InvestmentWagner.pdf](https://www.sechistorical.org/collection/papers/1940/1940_0314_InvestmentWagner.pdf).

12. See Statement of Commissioner Robert E. Healy (April 2, 1940) at 4 (stating to Congress that the SEC’s investigation into the

In introducing the ICA, Senator Robert Wagner catalogued some of the “abuses and deficiencies” within the industry, including, as relevant here, that “in many cases” fund managers had made their funds “impregnable” through the use of “management voting stock [and establishing a] form of organization in which security holders have no vote,” “long-term management contracts which also assured substantial compensation irrespective of the company’s performance,” and “domination of the proxy machinery for the solicitation of authority to vote the shares held by public stockholders.”<sup>13</sup> He likewise noted frequent instances in which fund managers had “used their control of the applicable corporate and statutory machinery to subject stockholders to inequitable readjustments of the rights, privileges, preferences and values of their securities.”<sup>14</sup>

The ICA brought order to the industry and standardized the capital structure of investment companies in a manner that protected the rights of investors to control their fund commensurate with their economic interests (*i.e.*, in an equitable way). That protection was effectuated, in part, by § 18(i), which prohibits manipulative capital structures that consolidate voting power with fund managers.

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industry found that “too often investment trusts and investment companies were organized and operated as adjuncts to the business of the sponsors and insiders to advance their personal interest at the expense of and to the detriment of their stockholders”), *available at* <https://www.sec.gov/news/speech/1940/040240healy.pdf>.

13. *See, supra*, n. 11 at 2.

14. *Id.* at 3.



Of the thousands of single-spaced pages of the SEC’s “intensive” reports to Congress that preceded the ICA, and of all the publicly available legislative statements and materials, Petitioners cite a single document to suggest (erroneously) that the “Congress enacted the ICA” to address “arbitrage investors focused on short-term gains [who] would commandeer funds by acquiring 10% or more of a fund’s shares.” (Brief for Petitioners at 5.)

There was no such concern at the time. The pages cited address abuses by *fund managers* who sold control of closed-end funds through undisclosed transactions with unscrupulous third parties, not stockholders.<sup>15</sup> The SEC noted that, before the ICA was passed, investment advisers were known to covertly sell control of investment companies to acquirers who would, through a combination of collusive transactions and coerced “exchange offers,” extract any remaining value from the fund without sharing it with investors.<sup>16</sup> Indeed, the SEC recognized that “in many cases, a dissolution of the investment companies rather than a shift in control would have prevented the losses which frequently resulted” and “would have resulted in the stockholders receiving [the] companies’ assets.”<sup>17</sup> However, selling an adviser’s managerial position was more “pecuniarily attractive for sponsors and managers” who “would have received nothing in the event of a dissolution.”<sup>18</sup> Thus, the critical distinction between

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15. See H.R. Doc. No. 76–279, at 1019–31 (1940), *available at* <https://ia904601.us.archive.org/25/items/investmenttrusts3335unit/investmenttrusts3335unit.pdf>.

16. *Id.* at 1024.

17. *Id.* at 1022.

18. *Id.* at 1022–23.

the pre-1940 abuses by insiders and the fund activists of today is that the former involved secret, collusive transactions driven by a *fund's manager* for profit—*i.e.*, “sell[ing] their stockholders down the river”—whereas today’s shareholders obtain fund-wide results for all stockholders, including liquidation and a distribution of the value of the fund’s assets.<sup>19</sup>

Indeed, the congressional record cited by Petitioners suggests an *acute need for more and better activist shareholders*, which would have pushed investment advisers to take value-maximizing actions, like liquidation. The SEC noted an incumbent manager’s “control over the proxy machinery . . . provides a formidable defense against threats to their continued tenure of office,” including “ready access to stockholders’ lists and to corporate funds for the solicitation of proxies.”<sup>20</sup> “An opposing group, even if it made out a strong case for a change of management, would be confronted with the task of overcoming the inertia,” and thus the SEC observed that “in almost every case where the original sponsors placed their representatives in positions of control over investment companies, this control, except where voluntarily surrendered, has continued and is still exercised.”<sup>21</sup>

The passage of the ICA followed decades of manager-led schemes to insulate themselves from the will of

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19. *Id.* at 1022.

20. *Id.* at 1876.

21. *Id.* at 1876–77.

unaffiliated shareholders.<sup>22</sup> For example, the SEC found that advisers retained control over investment companies through utilization of dual classes of common stock: Class A “intended primarily for distribution to the public” and Class B “designed for the sponsor.”<sup>23</sup> Not surprisingly, Class A stock “brought the major contribution to the capital of the company,” but was “awarded little voting power” and sometimes none at all.<sup>24</sup> Other self-dealing devices included corporate forms with limited voting rights, including a “type of trust where the shareholders are not given the right to vote,” options or warrants that “fortified against any threat to [an adviser’s] control since it could always exercise sufficient of these warrants to insure adequate voting power,” and convertible securities with the same effect.<sup>25</sup> As a result, by 1935, fund managers and their “affiliated interests” controlled the “majority voting power” in a significant percentage of all investment companies with more than \$500,000 in assets.<sup>26</sup> This

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22. *See, e.g., id.* at 1566 (“[C]omplex capital structure has been an important element in fostering and facilitating many of the abuses which have characterized that industry”).

23. *Id.* at 1620.

24. *Id.* Interesting examples of the two-tiered structure abound in the SEC’s reports. In one case, public shareholders had no voting rights at all despite contributing virtually all of the capital, *id.* at 1623; in another case public shareholders were entitled to one vote per share in a director election but insiders were entitled to “the number of shares multiplied by the number of directors to be elected,” *id.* at 1627; in another case public shareholders were entitled to “one-half of the voting power of the total outstanding common stock,” *id.* at 1632; and in another case insiders had “three votes per share” whereas public shareholders had only one. *Id.* at 1631.

25. *Id.* at 1891–99.

26. *Id.* at 1875.

control was rarely if ever commensurate with capital contribution; rather, advisers routinely obtained majority voting power with “no contribution or a very small contribution to the capital investment.”<sup>27</sup>

The ICA addressed the inequitable control schemes at the time as well as potential future schemes with simple efficiency: § 18(i) guarantees that in every investment company that “every share of stock . . . shall be a voting stock and have equal voting rights.” The rationale articulated by the SEC at the time rings just as true today:

[The] primary importance [of capital structure] to the investor is his opportunity to supplant the management of his investment company when the conduct of those representatives no longer meets with his approval. The divorcement of control over management from the ownership of the investment company almost invariably presents vital problems. The problems are most acute where the insulation of management from ownership is complete—where the beneficial owners of the fund are deprived of any voice in the conduct of management.<sup>28</sup>

### **III. Shareholder Engagement Fosters Competition In An Otherwise Uncompetitive Market**

In the marketplace for investment funds, some funds may compete with other funds for the same customers, but no competition exists for the role of adviser as to any

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27. *Id.* at 1620.

28. *Id.* at 1874.

particular fund.<sup>29</sup> This is because fund directors never, save in extremely rare and catastrophic situations, hire an investment adviser other than the fund’s incumbent adviser. Every year, fund directors across the country engage in an industry-wide Kabuki theatre during which investment advisers and lawyers manufacture thousands of pages “§15(c) materials”<sup>30</sup> to support the board’s rubberstamp of the terms proposed by the incumbent adviser.<sup>31</sup> Boards accept this procedure in lieu of actually

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29. See *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 351 (2010) (acknowledging that competition between “funds for shareholder business does not support an inference that competition must therefore also exist between investment advisers for fund business. The former may be vigorous even though the latter is virtually non-existent”); *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 929 (2d Cir. 1982) (“[I]nvestment advisers seldom, if ever, compete with each other for advisory contracts with mutual funds.”). This phenomenon has been examined by academics. See, e.g., Stewart L. Brown, *Mutual Fund Advisory Fees: An Objective Fiduciary Standard*, 20 U. Pa. J. Bus. L. 477, 478 (2018) (“[T]here is an unseverable relationship between investment management firms, also known as fund sponsors, and their captive funds. Essentially, each mutual fund faces a monopoly seller of investment advisory services.”).

30. This refers to § 15(c) of the ICA, which requires that management contracts be “approved at least annually by the board of directors.” Like a dependable old grandfather clock, boards renew incumbent management contracts every year, typically dozens or even hundreds in a single meeting, without any process whatsoever to solicit or consider competing bids.

31. Warren Buffett observed this phenomenon in one of his annual letters to shareholders: “Year after year, at literally thousands of funds, directors had routinely rehired the incumbent management company, however pathetic its performance had been. Just as routinely, the directors had mindlessly approved fees that in many cases far exceeded those that could have been negotiated.”

negotiating the contract like traditional business people. Investment advisers, for their part, may advertise on behalf of their own funds but, also unlike traditional business people, never compete for contracts with funds managed by competing advisers.

Activist investors introduce competition into this otherwise anticompetitive structure. While all shareholders have the right to participate in deciding a fund's policies, including firing the adviser,<sup>32</sup> small investors typically lack the time and resources to actively oversee a fund's management.<sup>33</sup> Thus, institutional investors—who are shareholders like any other despite the sometimes derogatorily applied “activist” label—play

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Feb. 27, 2004 Letter *available at*: <https://www.berkshirehathaway.com/letters/2003ltr.pdf>. See also Alan R. Palmiter, *The Mutual Fund Board: A Failed Experiment in Regulatory Outsourcing*, 1 BROOK. J. CORP. FIN. & COM. L. 165, 191 (2006) (Contractual renegotiations are “rare event[s]” that happen in only 10% of funds.”); Joseph A. Warburton, *Should Mutual Funds Be Corporations? A Legal & Econometric Analysis*, 33 J. CORP. L. 745, 756 (2008) (citing only three historical instances in which “independent directors refused to approve management contracts and the issue subsequently fell to shareholders”).

32. Section 15(a)(3) of the ICA provides that a management contract may be “terminated at any time, without the payment of any penalty . . . by vote of a majority of the outstanding voting securities of such company.”

33. See Robert F. Wagner, *Senator Wagner Introduces Investment Trust Legislation* (March 14, 1940) (<https://tinyurl.com/5n6v4ywv>) (noting in connection with introducing the ICA that the “financial resources of the average stockholder are usually insufficient to meet the burden of complicated and long-drawn-out judicial and other proceedings which may be necessary to oppose successfully unfair management-prepared plans.”).

a critical role by providing the expertise and resources necessary to challenge an incumbent manager. These investors typically focus on the worst funds with significant room for improvement through new management or a value-maximizing transaction and purchase a meaningful percentage of outstanding shares to make their engagement economically viable. Activists pay the expenses of engagement out of their own pocket, for the benefit of all shareholders, such as the costs of soliciting proxies to elect new directors or fighting off meritless litigation management may bring as a stall or defense tactic.<sup>34</sup> Activists share the same financial interests as other shareholders and advocate for transactions that will affect shareholders *pro rata*.

The work of shareholder activists brings into sharp contrast the ever-present tension between investors and managers: an incumbent manager is not motivated to enact change that may threaten to reduce the fee revenue from its management contract with the fund, even if such changes would materially benefit shareholders. Activist shareholders check this self-interest in ways that both fund directors and the SEC have demonstrated an unwillingness to do.

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34. For example, in *Johnson v. Saba Cap. Mgmt., L.P.*, 2023 WL 1345717, at \*1–2 (S.D.N.Y. Jan. 31, 2023), the former CEO of investment adviser Franklin Templeton filed suit against an institutional stockholder after shareholders at large voted to replace certain members of the board of directors. The court found the complaint’s allegations to be “speculative, not imminent, and not concrete,” but not before the litigation generated significant costs for all parties involved. *Id.* at \*4.

#### **IV. Petitioner And Amici Are Peddling Fictions Not Reflected In The Marketplace**

##### **A. The So-Called “Long-Term Individual Investor” Is A Litigation-Driven Invention**

The caricature of “long-term investors” in briefing—*i.e.*, stockholders who do not care about investment performance or profitability and only want the continuation of the incumbent adviser in perpetuity—bears no connection whatsoever to the realities of the marketplace.

First, Petitioners and their amici cannot objectively define a “long-term” shareholder other than to say that it is an unidentified investor that very much likes the incumbent adviser and never plans to sell shares. It is implausible that any investor would be agnostic to investment performance, a fund’s trading discount<sup>35</sup> or a potential value-creating transaction, much less long-term investors who have the most to lose from protracted underperformance.

Second, Petitioner has no idea what percentage of shares, at any given time, are held for the “long-term” (however defined), and even if that information could be known as to a particular day, the percentage would continuously change. Shareholders with long-term holdings sell every trading day for myriad reasons. There are no policy interests unique to “long-term” holders that

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35. The spread between a fund’s intrinsic value per share (its “net asset value” or “NAV”) and the price at which the fund’s shares trade in the market. A large discount between NAV and market price is a hallmark of poor managerial performance and often spurs activism.



are supported by entrenching an incumbent manager and extended poor performance.

Third, even if the foregoing two points were not true, nothing in the ICA suggests that discrimination among types of shareholders is permissible for any reason, including length of holding. To the contrary, § 18(i) guarantees equal voting rights to all investors, not just those aligned with management, and § 47(b) provides an enforcement mechanism for aggrieved shareholders to remedy such discrimination. These provisions are based on the principle, repeatedly proven throughout history, that the most dependable method for governance is a fair vote in which shareholders are permitted to voice their opinions commensurate with their economic stake.

**B. “Stable Regulatory Framework” Means Unilateral Interpretation Of The ICA Without The Risk Of Judicial Interference**

Petitioner’s amici catastrophize about “significant regulatory uncertainty” (ICI Brief at 24–29) that would “necessarily inject chaos into investment funds’ operations.” (MFDF Brief at 18–19.) Nothing of the sort exists or is likely to develop. The only conceivable “regulatory uncertainty” was created by the industry’s own self-interested efforts to persuade the SEC to back away from its reasoned legal analysis in the *Boulder* Letter. The industry utilized that brief moment of perceived “uncertainty” to begin violating the law. Since then, however, every court considering the matter has held—unsurprisingly—that stripping votes from certain shareholders violates § 18(i)’s “equal voting

rights” requirement.<sup>36</sup> Petitioner’s amici are undoubtedly disappointed in that result because it makes it harder for them to insulate management contracts from the preferences of stockholders, but that does not create “regulatory uncertainty.” They are just on the wrong side of the law.

Amici’s purported concern regarding “whether courts would be bound by the SEC’s interpretations” or “unbound by the SEC’s long-stated views” is even more confused. (ICI Brief at 25–26; *see also* MFDF Brief at 18). It should come as no surprise, under foundational constitutional principles, that the judicial branch is not, in fact, constrained by administrative branch officials in interpreting laws passed by Congress. *See* U.S. CONST. art. III, § 2; *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”). This is the case regardless of the SEC’s views, but especially so where the SEC has no legitimate “long-stated views.” The *Boulder* Letter, which prohibited vote-stripping defenses, constituted the SEC’s only meaningful legal analysis of § 18(i) and it stood for a decade. As of now, the SEC’s only recent contribution has been to withdraw the *Boulder* Letter through a division staff statement with “no legal force or effect,” which provides no basis for this Court to delegate the judicial branch’s core function.

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36. *See, supra*, n. 10.

### **C. Shutting Down “Back Door Claims” Means An Unfettered Ability To Violate The ICA**

Petitioner’s amici’s also feign outrage over the potential for “back door claims”<sup>37</sup> to—of all things—“challenge contractual terms that are alleged to violate any ICA provision.” (ICI Brief at 22.) ICI, for example, suggests that such claims would be “almost limitless in scope” “with the bounty being disgorgement of the fees paid thereunder.” (*Id.*) Again, nothing about that result is surprising or inconsistent with the ICA’s express provision granting disgorgement as a remedy to an *illegal* contract. Indeed, the scope of such claims is limited only by the ingenuity of investment advisers, their lawyers, and the staff at ICI, and their willingness to violate the provisions of the ICA in exchange for fee revenue. Amici’s argument boils down to the same principle addressed above: that they would prefer the privilege of determining how and when to comply with the ICA, in collaboration with the SEC, without the risk of judicial oversight. Congress astutely recognized that risk in passing § 47(b) and amici have posited no basis for this Court to abdicate its traditional constitutional role in interpreting a federal statute.

### **D. Independent Directors Are Puppets That Have Provided No Meaningful Protection**

Petitioner’s amici argue that the rescission right under § 47(b) “would wreak havoc on the mutual fund industry by permitting litigants to second-guess virtually all contracts

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37. Which is, itself, a mischaracterization of the “front door” claim for rescission expressly provided by § 47(b).

that an investment company’s independent directors have already ratified.” (MFDF Brief at 15.) But, setting aside that the ICA requires exactly what amici lament, the decisions of independent directors in this context are entitled to no deference whatsoever because they have *facilitated the illegal conduct underlying this appeal*. The industry’s push to implement vote-stripping defenses was entirely dependent on the willingness of independent directors to take corporate action (such as amending a fund’s bylaws), which directors uniformly agreed to do across hundreds of closed-end funds regardless of the SEC’s analysis under the *Boulder* Letter and even after sequential judicial opinions holding that the defenses are barred by § 18(i). The decisions by directors to implement these illegal defenses were blatantly self-interested because the defenses made it easier for directors to keep their jobs and substantial director compensation. Indeed, to this day, independent directors across the industry continue to permit funds to utilize vote-stripping measures under the rationale that the law is somehow still “unsettled.”

MFDF argues that a “flood” of lawsuits will force judges to “assume the role of investment company experts.” (MFDF Brief at 17) That is a poorly designed strawman. The lower courts will only do what they are accustomed to doing on a daily basis: applying a statutory framework to challenged conduct. This was proven out in the cases challenging the vote-stripping defenses in which the courts had no problem distinguishing between legal and illegal conduct under § 18(i).

MFDF also argues erroneously that “[i]ndividual shareholders may have individual, idiosyncratic views

about what is best for the investment company [but] Congress chose to put independent directors—not individual shareholders—in charge.” (MFDF Brief at 11.) Amici would certainly prefer if investment funds were structured for unilateral control by directors (who, by the way, are initially selected by the investment adviser and would facilitate control by the adviser if no subsequent elections were held).<sup>38</sup> In reality, the “collective interests” of stockholders are directly represented at the ballot box in the reelection of representatives, and the ICA for good reason protects against infringement of those voting rights.

**E. The SEC’s Inconsistent Protection Of Investors Provides No Reason To Discard Private Rights Under The ICA**

Finally, Petitioner’s amici argue that the Court should ignore the express language of § 47(b) because the SEC might protect investor interests if it so desires. (MFDF Brief at 13 (SEC as the “backstop enforcer of any ICA violations”); ICI Brief at 24 (“Recognizing a Section 47(b) private right of action could be tantamount to declaring open season on the SEC’s multi-layered interpretation and application of the ICA’s substantive provisions”)). But neither amici advise the Court that the SEC’s only credible legal position on § 18(i) was the *Boulder* Letter, which found vote-stripping defenses to be illegal, and the SEC’s view now is, at best, that it “expect[s] any inquiry into the application of section 18(i) to be based on the

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38. See Investment Company Institute, How U.S.-Registered Investment Companies Operate at 7, available at <https://www.ici.org/system/files/2023-06/us-reg-funds-principles.pdf>.

facts and circumstances.”<sup>39</sup> Meanwhile, following the Staff Statement, the SEC has done nothing to curb the industry-wide implementation of vote-stripping, even after the string of judicial decisions holding that the tactics violate the ICA. Instead, the agency appears to have chosen to defy or simply ignore the judicial branch in favor of the industry’s contrary view of § 18(i).

Congress empowered stockholders to rid themselves of illegal contracts through a rescission right in § 47(b) without reliance on the SEC to take action. That decision has proven prescient in the most recent chapter involving vote-stripping defenses. The Court should not disrupt the thoughtful checks and balances established by Congress through the ICA.

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39. *See, supra*, n. 9.

**CONCLUSION**

Marlton respectfully submits that Congress enacted § 47(b) of the ICA to prevent investment advisers from contracting around the important investor protections in the ICA. That enforcement mechanism is valuable to all investors in closed-end funds and should not be eliminated merely to facilitate the self-interests of advisers, which the ICA was enacted to curb. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

AARON T. MORRIS  
MORRIS KANDINOV LLP  
4915 Mountain Road  
Stowe, VT 05672

ANDREW W. ROBERTSON  
*Counsel of Record*  
MORRIS KANDINOV LLP  
305 Broadway, 7th Floor  
New York, NY 10007  
(212) 431-7473  
andrew@moka.law

*Counsel for Marlton Partners, L.P.*

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