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 *AMICUS CURIAE* OF ATG CAPITAL MANAGEMENT LLC IN SUPPORT OF RESPONDENTS

SEAN L. MCGRANE
Counsel of Record
SQUIRE PATTON BOGGS (US) LLP
1000 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8538
sean.mcgrane@squirepb.com

Counsel for Amicus Curiae ATG Capital Management LLC

October 16, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF THE *AMICUS CURIAE*[1]

ATG Capital Management invests in registered investment companies ("RICs") and is troubled by recent efforts by some RICs to dilute or evade certain investor protections embodied in the Investment Company Act of 1940 (the "ICA"). ATG believes the crux of this case is whether they can do so with impunity.

SUMMARY OF ARGUMENT

Section 18(i) of the ICA requires 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). The United States Court of Appeals for the Second Circuit affirmed the District Court's holding that the bylaws at issue in this case violate § 18(i). The Petitioners do not now dispute that holding nor that § 47(b) of the ICA contemplates that a party to a contract may seek rescission of a contractual provision that violates the ICA. Instead, the Petitioners argue that the party seeking rescission must be a defendant in a breach-of-contract lawsuit and that § 47(b) is not intended to permit a party to sue for declaratory judgment. That argument is baseless. To the contrary, not only is there nothing in the text of § 47 to support that theory but it is at odds with the interpretive mandate declared in Section 1 of the ICA.

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Phillip Goldstein, a fellow investor in RICs, made a monetary contribution to its preparation or submission.

ARGUMENT

I. NOTHING IN § 47(b) INDICATES AN INTENT TO REQUIRE A PARTY SEEKING RESCISSION OF A CONTRACT THAT VIOLATES THE ICA TO BE A DEFENDANT IN A BREACH-OF-CONTRACT LAWSUIT.

As amended, Section 47(b)(2) reads as follows: "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]." 15 U.S.C. § 80a-46(b). According to the Petitioners, "any party" does not literally mean "any party." Rather, "any party" supposedly means "parties already before the court—a defendant to a breach-of-contract claim . . . ." *See* Pet. Br. at 3. That is nothing more than wishful thinking and an audacious invitation for the Court to abrogate Congress' unqualified intent to authorize *any* party, whether a plaintiff or a defendant to an existing action, to seek a court order rescinding a contractual provision that violates the ICA.

It is noteworthy that Congress adopted the ICA just six years after it passed the Federal Declaratory Judgment Act, now codified at 28 U.S.C. §§ 2201–2202 (as amended, the "DJA"). The DJA provides: "In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201(a). If, as the

Petitioners contend, Congress wanted to preclude a party to a contract from suing a counterparty for a declaration that the contract violates the ICA, it surely would have made that clear. Since § 47(b) does not say or imply that, there is no reason to infer an intent to create such an exception.

Lastly, under common law, any contract that violates any statute is void and unenforceable and an "unlawful contract" defense has always been available to any defendant that is sued for breach of contract. *See, e.g., Central Transp. Co. v. Pullman's Palace Car Co.,* 139 U.S. 24, 59-60 (1891) (finding that defendant was not liable under "unlawful contract" and holding that "[a] contract of a corporation, which is *ultra vires*, . . . is not voidable only, but wholly void, and of no legal effect."). The Petitioners' theory that § 47(b) is intended solely to furnish an affirmative defense to a party alleged to have breached an unlawful contract must thus presume that Congress knowingly adopted a superfluous statutory provision. Consequently, their theory is untenable.

II. SECTION ONE OF THE ICA MANDATES THAT § 47(b) SHOULD NOT BE INTERPRETED AS A LIMITATION ON THE ABILITY OF A PARTY TO RESCIND A CONTRACT THAT VIOLATES THE ICA.

Section 1(b) of the ICA states that "the national public interest and the interest of investors" are "adversely affected" by certain practices, 15 U.S.C. § 80a-1(b), including "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." 15 U.S.C. § 80a-1(b)(3). Unlike many federal statutes, § 1(b) then goes on to broadly require

that "the provisions of this subchapter 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).

To buttress their argument that § 47(b) does not authorize lawsuits by parties to contracts that violate § 18(i), the Petitioners assert that investors may rely on the Securities and Exchange Commission to police violators of § 18(i). However, they fail to note that the Commission has, in recent years and in response to industry lobbying, significantly narrowed its approach to enforcing violations of § 18(i) and signaled its intent to defer to management's own self-interested judgment of what is "reasonable."[2] See *Division of Investment Management Staff Statement Regarding Control Share Acquisition Statutes*, May 27, 2020, available at https://www.sec.gov/investment/control-share-acquisition-statutes ("The staff would not recommend enforcement action to the Commission against a closed-end fund under section 18(i) of the Act for opting in to and triggering a control share statute if the decision to do so by the board was taken with reasonable care . . ."). Therefore, the only meaningful deterrent to the issuance of securities containing inequitable or discriminatory provisions is the possibility of a shareholder lawsuit, a deterrent the Petitioners urge this Court to do away with. With the SEC no longer actively policing violations of § 18(i), it is impossible to reconcile the cramped atextual

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[2] The bylaws at issue here were adopted only after the Commission signaled its intent to narrow its enforcement of § 18(i). *See, e.g.*, Case No. 23-cv-05568-JSR, ECF No. 23-28 (amended bylaws of Petitioner FS Credit Opportunities Corp., adopted March 23, 2022).

interpretation of § 47(b) proposed by the Petitioners with § 1(b)'s interpretive mandate, and the need for enforcement by private shareholders is even greater. Therefore, Petitioners' interpretation should be rejected.

CONCLUSION

Under § 47(b) of the ICA, a party to a contract that violates the ICA is permitted to bring a lawsuit to rescind the offending contract.

Respectfully submitted,

SEAN L. MCGRANE
Counsel of Record
SQUIRE PATTON BOGGS (US) LLP
1000 Key Tower
127 Public Square
Cleveland, OH 44114
(216) 479-8538
sean.mcgrane@squirepb.com

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