No. 24-345

In the Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL., PETITIONERS

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.

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

REPLY BRIEF FOR PETITIONERS AND BLACKROCK RESPONDENTS SUPPORTING PETITIONERS

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INTRODUCTION

When Congress creates a private right of action, it almost always says so explicitly. Congress doesn't leave such important policy choices to judicial guesswork from vague text.

Saba claims Congress created an implied right of action for rescission in Section 47(b) of the Investment Company Act of 1940 (ICA), 15 U.S.C. § 80a-46(b), which states that a court "may not deny rescission at the instance of any party" when a contract violates the ICA unless certain conditions are met. *Id.* § 80a-46(b)(2). That argument fails. Under *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001), statutory text and structure must clearly show that Congress intended to create a private right of action. Here they do not. Section 47(b) creates no affirmative right to seek rescission. The phrase "at the instance of any party" is directed to courts, and it ensures that parties already before the court can seek the remedy of rescission while barring the court from ordering rescission *sua sponte*. Beyond that, two powerful structural clues foreclose an implied right of action: Congress (1) expressly created private rights of action in two other ICA provisions and (2) delegated ICA enforcement to the SEC. Recognizing an implied private right of action for rescission would cause significant disruption in the fund industry, and is not what Congress intended.

Saba's argument rests on three pillars, but all crumble on inspection.

First, Saba insists that *Sandoval*'s clear-statement rule doesn't apply to implied private rights of action for equitable relief, like rescission, and a relaxed standard should apply. But *Sandoval* itself—

which involved a request for only equitable relief—crushes that argument. The Court doesn't distinguish between damages and equitable relief when considering a claim that a statute implies a private right of action, and *Sandoval* drew equally on decisions addressing damages and injunctive relief. That makes sense: No matter the relief sought, deciding whether to find an implied right of action involves the same serious separation-of-powers concerns.

Second, Saba insists that the phrase "at the instance of any party" in Section 47(b)(2) is rights-creating language and that Congress intended to ratify the Court's decision in *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979), when it amended Section 47(b) in 1980. But "at the instance of any party" just means at the request of a party already before the court. Contrary to Saba's argument, plain English plus historical and current authorities all show that the words are not a magic formula for conferring a cause of action but instead must be read, like most phrases, in context. Here, context makes clear that the phrase doesn't confer a private right of action. And Saba's reliance on *TAMA* is puzzling. For one thing, *TAMA* expressly distinguished the Investment Advisers Act (IAA), the statute before it, from the ICA, noting that the IAA lacked express private rights of action, unlike the ICA. 444 U.S. at 14, 20-21 n.10. For another, in 1980, Congress excised from Section 47(b) the "shall be void" language critical to *TAMA*'s holding about Section 215 of the IAA. 15 U.S.C. § 80b-15; Pub. L. No. 96-477, 94 Stat. 2277. Put simply, the statutory history cuts directly *against* Saba's argument.

Finally, Saba claims an implied private right of action wouldn't cause industry disruption because

there wasn't disruption before Congress amended the ICA in 1980, and there hasn't been disruption since the Second Circuit recognized a private right of action in 2019. Saba also claims disruption is inevitable because state law may provide rights of action for rescission based on ICA violations. Those arguments fail. Until recent suits like Saba's, other courts of appeals rejected would-be Section 47(b) suits that would have been disruptive. And Saba provides no support for the notion that state law allows rescission—and the ICA's reticulated rescission and enforcement scheme would preempt such causes of action anyway.

The Court should reverse.

ARGUMENT

A. The Constitution assigns legislative powers to Congress and limits the judiciary's ability to find implied private rights of action.

The Court's test for implied private rights of action preserves the separation of powers. Congress, not courts, decides whether to confer a private right of action—and courts must presume that if Congress intends to create one—a significant policy choice—it will not do so with ambiguous text. Accordingly, the Court rarely finds an implied private right of action.

Saba professes to accept those points. But, it says, the Court's stringent test for finding implied private rights of action applies only to damages, not equitable relief. That's incorrect. The Court doesn't make that distinction, and for good reason. Whether the relief sought is legal or equitable, the separation-of-powers problems are the same—and so is the test. Indeed, *Sandoval* itself involved equitable relief.

1. The Constitution requires a strict focus on text and structure to prevent courts from arrogating Congress's legislative power.

The Constitution assigns legislative powers to Congress. Creating a cause of action is a "legislative act so significant" that there is only a "remote possibility" that Congress would do so only implicitly. *Thompson v. Thompson*, 484 U.S. 174, 191 (1988) (Scalia, J., concurring in the judgment). The Court thus will find an implied cause of action only if text and structure clearly show Congress meant to create one. *Sandoval*, 532 U.S. at 287. That approach reflects a retreat from a liberal recognition of implied rights of action. *Medina v. Planned Parenthood South Atlantic*, 606 U.S. 357, 369 n.1 (2025).

2. Saba advocates a relaxed standard for finding implied rights of action seeking equitable relief, but the Court has already correctly rejected that argument.

Saba claims the Court's clear-statement rule applies only to "private rights of action for damages," not actions for equitable relief. Br. 36. But the Court has already rejected that distinction. *Sandoval* analyzed an asserted claim for equitable relief, not damages, and the Court applied the clear-statement approach and rejected the "*ancien regime*" that once applied to requests for both damages and injunctive relief. The Court singled out *J.I. Case Co. v. Borak*, 377 U.S. 426, 428 (1964)—where plaintiffs sought both equitable relief *and* damages—as the lead example of the Court's wayward approach. *Sandoval*, 532 U.S. at 287. Subsequent decisions have applied *Sandoval*'s clear-

statement rule to actions for both injunctive relief, *e.g.*, *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 332 (2015), and damages, *e.g.*, *Astra USA, Inc. v. Santa Clara County*, 563 U.S. 110 (2011). That makes sense: The separation-of-powers concerns are equally problematic no matter the relief.

Saba contends (Br. 37-38) that *TAMA*'s recognition of a private right of action for rescission in the IAA, but not a claim for damages, supports its distinction. But that differential treatment reflected key textual differences between two IAA provisions, not different tests for equitable relief versus damages. The phrase "shall be void"—language not in the damages provision—taken together with structural clues, supported an implied right of action for equitable relief. *See* 444 U.S. at 19. *TAMA* didn't adopt or rely on Saba's proposed distinction.

Precedent aside, Saba claims (Br. 37) that the standard must be more forgiving for equitable relief because damages actions raise more second-order questions. That's wrong, too, and also irrelevant to the separation-of-powers concerns behind the clear-statement rule. Actions seeking equitable relief raise just as many questions, including about the scope of injunctive relief and against whom it runs. Take Section 5 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. § 10304. After recognizing an implied private right to sue for injunctive relief in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court repeatedly grappled with questions about procedure and the scope of relief related to that private right. *See, e.g.*, *Perkins v. Matthews*, 400 U.S. 379 (1971); *Morris v. Gresette*, 432 U.S. 491 (1977); *Presley v. Etowah County Commission*, 502 U.S. 491 (1992). Second-

order questions provide no reason to deviate from *Sandoval*'s clear-statement rule.

Saba tries downplaying *Sandoval*'s clear-statement rule by focusing on its facts—that the plaintiff claimed a private right of action based on statutory "text that simply conferred regulatory authority on a federal agency." Br. 38. But this Court's repeated reliance on *Sandoval* to reject implied rights of action in many different statutes confirms that *Sandoval*'s clear-statement rule applies *whenever* a plaintiff claims an implied right of action. *See, e.g.*, *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-63 (2008).

B. Section 47(b)'s text and the ICA's structure show that Congress didn't intend to create a private right of action in that provision.

Saba cannot satisfy *Sandoval*'s clear-statement rule and rebut with statutory text and structure the strong presumption that Congress doesn't imply private rights of action. *Sandoval*, 532 U.S. at 293 n.8. Section 47(b)'s text doesn't contain the necessary rights-creating language. It speaks to courts, and it doesn't confer an affirmative right to seek rescission. What's more, structural clues confirm that Congress didn't intend private enforcement of the ICA through Section 47(b). Congress authorized the SEC to enforce the ICA, and provided express private rights of action in two other provisions—and not Section 47(b).

Saba can't account for statutory structure. Instead, it fixates on "at the instance of any party," but that clause means only that a "party" already before a court can seek relief. Saba also invokes *TAMA*. But that decision turned on language in the IAA that

Congress later removed from the ICA, plus different structural clues—indeed, *TAMA* expressly differentiated the IAA from the ICA. Congress's amendment of Section 47(b) after *TAMA* confirms that Saba's reliance on *TAMA* fails and that Congress disclaimed, not embraced, a private right of action.

1. Statutory text and structure confirm that Section 47(b) creates no implied private right of action.

a. Unlike statutes that create an implied private right of action, Section 47(b) doesn't contain rights-creating language.

To imply a private right of action, a statute must contain "rights-creating" language focusing on "the individuals protected"—not the regulating entity—and "creat[ing] new rights," *Sandoval*, 532 U.S. at 288-89, usually by proscribing certain conduct as unlawful, *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979). For example, Title IX provides that "[n]o person … shall, on the basis of sex, … be subjected to discrimination," 20 U.S.C. § 1681(a), and VRA Section 5 provides that "no person shall be denied the right to vote for failure to comply with" a new covered but unapproved state law, 52 U.S.C. § 10304(a). *See Cannon v. University of Chicago*, 441 U.S. 677, 688-89 (1979); *Allen*, 393 U.S. at 555.

Section 47(b) contains no such rights-creating language. The provision focuses on what *courts* can do at the request of parties already before it. It confers no affirmative substantive rights to sue for rescission. Instead, Section 47(b) establishes a uniform rule for courts confronted with a contract that violates the ICA—for instance, when adjudicating a breach-of-

contract case. *See* FS Br. 31-32. Congress's inclusion of that uniform rule makes sense, because state law differs about both who can defensively seek the remedy of rescission based on contract illegality and what that party must show. For instance, when there is another adequate remedy at law, some states deny equitable rescission, *e.g.*, *Rudman v. Cowles Communications, Inc.*, 280 N.E.2d 867, 874 (N.Y. 1972); *Clark v. McDaniel*, 546 N.W.2d 590, 595 (Iowa 1996), while others allow it, *e.g.*, *Granite Buick GMC, Inc. v. Ray*, 856 N.W.2d 799, 805 (S.D. 2014); *Van Dyke Spinal Rehabilitation Center, PLLC v. USA Underwriters*, No. 365848, 2024 WL 2787560, at *4 (Mich. Ct. App. May 30, 2024).

b. "At the instance of any party" means on the motion of a party to existing litigation—it doesn't confer a private right of action on any party to the contract.

Read in context, "at the instance of any party" allows a party to ongoing litigation to seek relief, but it doesn't confer a private right of action. The text plays several important roles. By replacing the statute's prior "shall be void" language—language that *TAMA*, in a different context, found supported a right of action—Congress made clear that *TAMA* doesn't apply to the ICA. Congress also made clear that a uniform defensive federal rescission rule, not state law, applied, and that courts shouldn't order rescission *sua sponte*, but only at a party's request. *Supra* pp. 15-16.

i. Start with the text. "Instance" means "request"—as in, I "am writing you at the instance of my client." Merriam-Webster, *Instance*, https://www.merriam-webster.com/dictionary/instance. For example:

- A "Rule" is an "order made by a court, at the instance of one of the parties to a suit, commanding [a] party to do some act." *Rule*, *Black's Law Dictionary* (5th ed. 1979).
- With a "subpoena duces tecum," "the court, at the instances of a party, commands a witness" to produce documents at trial. *Subpoena duces tecum*, *Black's Law Dictionary*, *supra*.
- A court can "open a judgment" "at the instance of a party showing good cause." *Open a judgment*, *Black's Law Dictionary*, *supra*.

In Section 47(b)(2), "party" means party to the litigation, not a party to a contract. Section 47(b)(2) addresses what relief the court can order—context confirming that "party" means a party before the court. When Congress wants to refer to parties to a contract, in contrast, it says so expressly—as in Section 47(b)(1), which sets out a rule that applies to a "nonparty to the contract." 15 U.S.C. § 80a-46(b)(1). (Even if "party" in Section 47(b)(1) or (2) referred to a contractual party, Section 47(b) still wouldn't create a right of action, because, as text and structure make clear, it confers no right for a party to get into court to seek rescission.)

ii. Longstanding legislative and judicial usage—including this Court's—confirms that "at the instance of any party" means at the request of a party already before a court. That usage shows that the phrase doesn't create a cause of action.

Congress uses the phrase to mean "at the request of," not to confer a right of action:

- Federal marshals must "serve any subpoenas that may be issued at the instance of such private party or parties." 2 U.S.C. § 190m.
- The "testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation pending before the" Federal Communications Commission. 47 U.S.C. § 409(h).
- Congress provided that any findings by a court relating to certain Pueblo land could be "reviewed on appeal or writ of error at the instance of any party aggrieved." Pueblo Lands Act of 1924, c. 331, § 14, 43 Stat. 636, 641.

States use the phrase the same way:

- Florida allows depositions "at the instance of any party" to workers' compensation "proceedings." Fla. Stat. § 440.30.
- Indiana law addresses witnesses before the Indiana Plumbing Commission "subpoenaed at the instance of any party to the proceeding." Ind. Code § 25-28.5-1-37.
- Georgia requires court clerks to distribute fines and forfeitures as required by law to parties before the court, but if the clerk does not, a court can require the clerk to do so "at the instance of any party aggrieved." Ga. Code Ann. § 15-21-4.

Courts also use the term "at the instance of" to mean at the request of:

- An appellant cannot complain of erroneous jury instructions "given at the instance of" that party. *Little Rock & Monroe Railway Co. v. Russell*, 113 S.W. 1021, 1023 (Ark. 1908).

- A worker's compensation award can be "modified at the instance of either party"—employer or employee—under certain circumstances. *Corby v. Matthews*, 541 S.W.2d 789, 793 (Tenn. 1976).
- In a Fourth Amendment case, this Court explained that the "interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *United States v. Payner*, 447 U.S. 727, 735 (1980).
- In 1980, this Court's Rule 51 provided that a petition for rehearing "will not be granted except at the instance of a Justice who concurred in the judgment or decision and with the concurrence of a majority of the Court." Sup. Ct. R. 51.1 (1980).

c. The ICA's structure confirms that Congress didn't create an implied private right of action in Section 47(b).

The ICA's structure also shows that Congress didn't confer a private right of action in Section 47(b). Rather, Congress indicated just the opposite by giving an administrative agency robust enforcement tools, *see Northwest Airlines, Inc. v. Transport Workers Union of America,* 451 U.S. 77, 93 (1981), and expressly providing private rights of action in two other places in the ICA, *see Touche Ross*, 442 U.S. at 571-72. FS Br. 35-37.

2. Saba misinterprets "at the instance of any party" and has no answer to the ICA's structural clues.

a. Contrary to Saba's lead argument, the phrase "at the instance of any party" doesn't create a private right of action.

Saba claims (Br. 24-25) that, under the common law and this Court's precedent, "at the instance of any party" *always* confers a right of action, no matter the context. That's incorrect: "At the instance of any party" isn't a magic phrase for conferring a private right of action, and the sources Saba cites don't suggest otherwise. To the contrary, those sources show that the phrase means "at the request of"—a phrase whose meaning turns on context. Here, context makes clear that the phrase means that a court can issue an order at the request of a party already before it. *Supra* pp. 7-9.

Saba's argument turns on the notion (Br. 23-26) that "at the instance of any party" is a term of art carrying a settled meaning that Congress intended to import into Section 47(b)(2). But it wasn't "well-settled" (*Kemp v. United States*, 596 U.S. 528, 539 (2022)) in 1980, when Congress used that phrase that those words conferred a private right of action—because they didn't and don't. *Supra* pp. 6-11.

i. Saba cites (Br. 25) Hale's use of the Latin "*ad instantiam partis*" to differentiate civil jurisdiction from criminal jurisdiction in ecclesiastical courts. But Hale never suggested—because it wasn't true—that the phrase let any party bring a civil action. The phrase didn't create rights; rather, it was used to describe cases brought by private parties versus those

brought by the church. The right of action existed elsewhere. Rights of action brought by individuals, for example, included "matters of tithes;" "cases of matrimony and divorces; testamentary causes"; and other discrete causes—rights of action that all proceeded *ad instantiam partis*. Matthew Hale, *History of the Common Law of England* 28 (6th ed. 1820). For instance, one "Suit was for *Striking* in the Church"—battery—brought by individual "*V.* against *E.*," or "*Ad instantiam partis*." John Godolphin, Reportium canonicum, at 633 (London, S. Roycroft, 1678), https://name.umdl.umich.edu/A42925.0001.001. The phrase described *who* brought the civil suit, but didn't confer the right to bring it.

Saba cites (Br. 25-26) language from this Court's decisions that it claims shows that "at the instance of any party" *always* creates a private right of action. Not so. In those cases, the phrase "at the instance of any party" didn't create a right of action—some other source of law created that right, like a state statute, *Campbell v. City of Kenosha*, 72 U.S. (5 Wall.) 194, 202 (1867); *New Orleans v. Louisiana Construction Co.*, 129 U.S. 45, 46 (1889), federal statutes, *Sackett v. Environmental Protection Agency*, 566 U.S. 120, 130 (2021), and a writ of mandamus, *Meriwether v. Garrett*, 102 U.S. 472, 518 (1880). The phrase "at the instance of any party" wasn't a talismanic phrase for conferring a cause of action; rather, it appeared in the Court's opinions to refer in passing to litigation and *who* might sue. The words just mean "at the request of any party"—words that can refer, or not refer, to a private right of action, depending on other text, context, and structure. And the text, context, and structure of Section 47(b) and the ICA make clear that "at the instance of any party" in Section 47(b)(2) refers

to a request for the remedy of rescission by a party already before the court. *Supra* pp. 6-11.

ii. Saba next insists that "at the instance of any party" confers a right of action because it uses "individual-centric language." Br. 27 (quoting *Health & Hospital Corp. of Marion County v. Talevski*, 599 U.S. 166, 183 (2023)). But those aren't magic words, and Saba ignores context. Section 47(b)(2) tells courts what to do about the remedy of rescission when a party to litigation already before it seeks that remedy. *Supra* pp. 7-9. When the Court found implied rights of action in *Cannon* (441 U.S. at 689-94), *Allen* (393 U.S. at 554-58), and *Talevski* (599 U.S. at 185-87), it relied on context—including individual rights–focused language—supporting a right of action. Here, context and structure foreclose an implied private right of action. *Supra* pp. 7-11.

b. Saba attacks Petitioners' reading as creating superfluity, but "at the instance of any party" does work—it creates a uniform rule allowing third-party intervenors to seek rescission while barring *sua sponte* rescission.

i. Saba argues (Br. 41-42) that reading "at the instance of any party" to permit only defensive rescission makes the clause superfluous. That's wrong. A clause isn't superfluous if it removes doubt about an issue. *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008). Congress frequently uses "technically unnecessary" language out of "an abundance of caution," *Fort Stewart Schools v. Federal Labor Relations Authority*, 495 U.S. 641, 646 (1990), or "to remove doubt," *Marx v. General Revenue Corp.*, 568 U.S. 371, 385

(2013). Here, "at the instance of any party" is a sensible way of clarifying—especially after *TAMA*—that only parties to existing litigation can seek rescission, and courts cannot order rescission *sua sponte*.

First, "at the instance of any party" replaces "shall be void"—language that *TAMA* held, in the context of the IAA and its different structure, creates a private right of action. *Infra* pp. 18-19. By changing the language, Congress intended that courts wouldn't find a private right of action in Section 47(b)(2).

Second, "at the instance of any party" is a key component of language establishing a uniform rule that any party to the litigation, including third-party contract beneficiaries properly before the court, can seek rescission as a remedy when the contract in question violates the ICA. A uniform rule makes sense, because states impose varying rules about who can seek rescission and when. *See* FS Br. 31-32; *supra* p. 8. California law, for instance, forbids third-party beneficiaries from seeking rescission, *see Schauer v. Mandarin Gems of California, Inc.*, 125 Cal. App. 4th 949, 959 (2005), but New York allows them to do so, *Kaung v. Board of Managers of Biltmore Towers Condominium Ass'n*, 873 N.Y.S.2d 421, 435-36 (Sup. Ct. 2008), *aff'd*, 895 N.Y.S.2d 505 (App. Div. 2010). Section 47(b)(2) ensures that third parties can seek rescission based on ICA violations.

Third, "at the instance of any party" clarifies that courts shouldn't order rescission *sua sponte*. Rescission is disruptive to funds, *infra* pp. 20-21, so it makes sense to permit it only when a party to the litigation seeks it. Other language confirms that understanding: Courts must also ask whether "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).

ii. Saba argues (Br. 41) that Section 47(b)(2) can't operate defensively because it is triggered only when a contract "has been performed," and (in Saba's view) a party can't bring a breach-of-contract claim after a contract has been performed. Saba's premise is wrong: Plaintiffs *can* bring breach-of-contract claims (and defendants can seek rescission defensively in those suits) when a contract has been partially or fully performed. *See* Restatement (Second) of Contracts § 236. Ultimately, Saba concedes this point, recognizing that breach claims are uncommon "at least after *full* performance," Br. 41 (emphasis added). But Section 47(b)(2) isn't limited to full performance.

c. Saba whistles past the ICA's structural clues demonstrating that Congress didn't intend a private right of action.

Saba has no persuasive response to the ICA's structural clues that Section 47(b) contains no implied private right of action—Congress's express provision of private rights of action in two other sections and commitment of ICA enforcement to the SEC.

i. Saba first points (Br. 30-31) to Congress's general statements of purpose in Section 1 of the ICA. Those statements cut against Saba, too; one of the purposes is to protect investors from "affiliated persons" like Saba acting in their own interest. 15 U.S.C. § 80a-1(b)(2). Regardless, general statements of purpose—and a litigant's or court's view of how they should be implemented—do not override text and structure. Indeed, even before *Sandoval*, the Court

declined to find a private right of action in Title VII of the Civil Service Reform Act of 1978—a statute that includes similar prefatory language calling for expansive statutory interpretation. *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 533 (1989); 5 U.S.C. § 7101.

ii. Saba next tries to disguise a purposivist argument as a structural one, claiming that the provisions of Section 47 work together to "ensure that investors will not be trapped in contracts that violate the ICA." Br. 28. That's just a question-begging policy argument of the sort the Court rejected in *Sandoval*—there, that a private right of action to enforce Title VI would further Congress's goal of remedying discrimination against non-English speakers. 532 U.S. at 301-02 (Stevens, J., dissenting). Section 47's provisions do work together, *see* FS Br. 30-32, but text, context, and structure confirm that Section 47(b) doesn't provide a right of action.

iii. Finally confronting the SEC's enforcement authority, Saba argues (Br. 43) that *TAMA* found a private right of action in Section 215 of the IAA, despite the SEC's authority to enforce the IAA. But *TAMA* relied on other clues, like Section 215's "shall be void" language, while recognizing that Congress's delegation to the SEC cut *against* finding a private right of action. 444 U.S. at 20.

Saba's response (Br. 45-46) to the two express private rights of action in the ICA likewise fails. Saba again invokes *TAMA*, arguing that *TAMA* found a private right of action despite "the express private rights of action for damages in the ICA and elsewhere in the securities laws." Br. 45. That gets *TAMA* exactly backwards. *TAMA* recognized a private right of action in

Section 215 in part because the IAA "nowhere expressly provides for a private cause of action"—a feature of the IAA that *TAMA* contrasted with the express causes of action in the ICA. 444 U.S. at 14 & 20-21 n.10.

3. Saba's reliance on *TAMA* and statutory history fails.

A key pillar of Saba's argument is that *TAMA* controls. And, Saba contends (Br. 31-35), Congress didn't repudiate *TAMA* as to the ICA in 1980 because it would have spoken more clearly had it meant to do so.

For starters, Congress didn't have to repudiate *TAMA* as to the ICA: *TAMA* analyzed a materially different statute, with a different structure, as *TAMA* itself explained. *See* 444 U.S. at 14; *accord* U.S. Br. (Merits) 27 n.3.

Regardless, Congress eliminated from Section 47(b)(2) the critical language that *TAMA* relied on to find a right of action for rescission in IAA Section 215. *Supra* p. 15; U.S. Br. (Merits) 26-28. Courts presume that when Congress changes statutory language, it also changes statutory meaning. *See Intel Corp. Investment Policy Committee v. Sulyma*, 589 U.S. 178, 189 (2020). So when Congress rewrote Section 47(b) after *TAMA*, replacing "shall be void" with "may not deny rescission at the instance of any party," Congress was rejecting, not embracing, *TAMA*'s holding as one might have argued it applied to the ICA. *TAMA* reasoned that the word "void" in IAA Section 215 "necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." 444 U.S. at 18. But Congress replaced that language with "may not deny rescission at the instance of any party." While "void," depending on context, might create a

cause of action, "rescission" is generally "treated as a remedy, rather than its own cause of action." *See W.R. Cobb Co. v. V.J. Designs, LLC*, 130 F.4th 224, 232 (1st Cir. 2025).

Saba responds (Br. 28-29) that Congress meant the same thing as "shall be void" when it replaced it with language in Section 47(b)(1) providing that contracts are "unenforceable by either party." But courts presume that when Congress changes language it changes meaning, *e.g.*, *Bufkin v. Collins*, 604 U.S. 369, 386 (2025), so it would be quite strange for Congress to have meant to apply *TAMA*'s IAA holding to the ICA by changing the *key* language *TAMA* had relied on. Saba doesn't even try to offer an explanation. What's more, unenforceability, unlike *TAMA*'s reasoning as to voidness, *see* 444 U.S.at 14, doesn't imply an affirmative right of action. In the context of Section 47(b)(1), "unenforceable by either party" operates defensively: A party to existing litigation, like the defendant in a breach-of-contract case, can assert that the contract is "unenforceable," Restatement (Second) of Contracts § 78.

C. Recognizing an implied private right of action would disrupt the fund industry.

Saba's theory would have serious consequences for the fund industry. Because bylaws are contracts and funds typically also contract for almost all necessary services, Mutual Fund Directors Forum Br. 16, recognizing an implied right of action would put every aspect of a fund's business at risk.

Saba downplays the disruption by insisting that chaos hasn't ensued since the Second Circuit found a private right of action. But the Second Circuit's rule has only recently allowed the kind of suit that Saba

advances here. Saba also contends that disruption is inevitable anyway because plaintiffs can rely on state causes of action to seek rescission for ICA violations. That's wrong, too, both because it's far from clear that state law provides such a right of action, and because the ICA likely would preempt any such state-law right of action.

1. Plaintiffs could wield an implied private right of action to destroy funds.

Because so much of a fund's business is contractual, an implied private right of action for rescission would allow plaintiffs to subject funds to bet-the-company litigation. Plaintiffs have already invoked Section 47(b) to seek rescission of a host of different contracts—internal and external—that form the core of funds' business. *See* Chamber of Commerce Br. (Merits) 18-19.

What's more, the ICA sweeps broadly, beyond the closed-end funds that are only a fraction of the companies regulated by the ICA. *See id.* at 19-20. Because failing to register as an investment company violates the ICA, *every* contract by an allegedly unregistered investment company would be subject to suit for rescission under Saba's theory. The suits in the Second Circuit demanding rescission of share-purchase agreements entered into by special purpose acquisition companies (SPACs) prove the point. *Id.*

So does the Ninth Circuit *Mayer* litigation. There, Yahoo! obtained an SEC exemption from the ICA resting on certain conditions. Shareholders claimed that Yahoo! violated those conditions, and was thus operating as an unregistered investment company. *UFCW Local 1500 Pension Fund v. Mayer*, 895 F.3d 695, 698

(9th Cir. 2018). Shareholders sought rescission of Yahoo!'s multi-billion-dollar deal with Alibaba on the ground that *every* contract Yahoo! entered into violated the ICA. The Ninth Circuit rejected an implied private right of action and the "awesome power" of the shareholders' theory. *Id.* at 701.

2. Saba's attempts to downplay the disruption fail.

Saba claims (Br. 43-44) there was no disruption between 1940 and 1980, when (in Saba's view) there was a right of action under Section 47(b). *First*, there was no right of action before 1980. *Supra* pp. 17-18. But even assuming there was a right of action then, the argument doesn't prove anything because plaintiffs didn't assert private rights of action during that time. When plaintiffs *have* sued for rescission—as in *Mayer*—they have advanced expansive theories with major ramifications for funds.

Saba next claims (Br. 44) there has been no disruption in the fund industry since the Second Circuit's *Oxford* decision. That's wrong, too. Investors relying on *Oxford* have tried to rescind major SPAC acquisitions. *Supra* p. 20. And other courts' rejection of an implied right of action has halted far-reaching suits, like *Mayer*. *Supra* pp. 19-21. Finding an implied private right of action would weaponize them.

3. Saba claims disruption is inevitable because state laws allow rescission suits, but Saba identifies no state-law cause of action for rescission based on contract illegality, and Section 47(b)'s detailed rescission scheme would preempt any such right of action anyway.

Saba claims (Br. 43-44) disruption is inevitable because state law provides a right of action for rescission, no matter the answer to the question presented. That's wrong for two reasons.

First, Saba doesn't identify any state-law cause of action for rescission based on contract illegality. Both cases Saba cites (Br. 44) involved alleged fraud or material misrepresentations underlying the contract—not illegality. That's not surprising: Contract illegality is a quintessential breach-of-contract *defense*. *See, e.g.*, *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 525 (2018) (Thomas, J., concurring); 5 Williston on Contracts § 12:8 (4th ed. 2025). And rescission is generally a remedy, not a cause of action, *supra* pp. 18-19, meaning state law is unlikely to provide one.

Second, even assuming state law provides a cause of action for rescission based on an ICA violation, the ICA would preempt those actions. State laws that pose an obstacle to federal law and its purposes and objectives are preempted. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). Congress thus intends to preempt state law when it creates a single, uniform federal regulatory system. *See, e.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 882 (2000). Similarly, when Congress creates a civil enforcement mechanism, it generally intends to preempt state

causes of action. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216 (2004). And when Congress *doesn't* create a private right of action, that's a strong signal that Congress intended preemption. *See In re Series 7 Broker Qualification Exam Scoring Litigation*, 548 F.3d 110, 113-15 (D.C. Cir. 2008).

All those principles point to preemption here. Congress created a detailed federal enforcement scheme to bring uniformity to a decidedly national issue of securities regulation: When and how contracts violating the ICA would be subject to rescission. Congress enacted a detailed regime, enforced by the SEC, to carry out the ICA; carefully set up only two causes of action; and provided the details for rescission—when a party to existing litigation can seek it; when a court may deny it; and which severability rules apply. *See* 15 U.S.C. § 80a-46(b)(2), (3). Congress left no room for a patchwork of state interference with that carefully reticulated regime.

D. Saba's eleventh-hour invocation of Section 47(a)—which is not within the question presented, and which Saba did not invoke in its complaint—fails.

For the first time, Saba claims (Br. 28, 44) Section 47(a) provides a private right of action. But Saba didn't mention Section 47(a) in its complaint, and Saba admits that its Section 47(a) argument "has not been presented to this Court, was not adjudicated in the decision below (which rested on Section 47(b) instead), and is not the subject of any split of authority." Saba Suppl. Br. 2. No exceptional circumstances here warrant straying beyond the question presented. *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

Section 47(a) couldn't help Saba anyway. Saba hasn't identified any contractual provision purporting to "waive compliance with" the ICA. 15 U.S.C. § 80a-46(a). Nor does Section 47(a) create a private right of action, for all the same structural reasons discussed. *Supra* p. 11.

CONCLUSION

The Court should reverse and hold that Section 47(b) does not create an implied right of action.

Respectfully submitted.

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