

**SUPREME COURT
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

FS CREDIT OPPORTUNITIES CORP.,)
ET AL.,)
Petitioners,)
v.) No. 24-345
SABA CAPITAL MASTER FUND, LTD.,)
ET AL.,)
Respondents.)

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5 Petitioners,)
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7 SABA CAPITAL MASTER FUND, LTD.,)
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9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Wednesday, December 10, 2025
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 12:07 p.m.
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4 supporting the Petitioners.

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10 behalf of the Saba Respondents.

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5	BlackRock Respondents supporting	
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1 P R O C E E D I N G S

2 (12:07 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 24-345, FS Credit
5 Opportunities Corporation versus Saba Capital
6 Master Fund.

7 Mr. Dvoretzky.

8 ORAL ARGUMENT OF SHAY DVORETZKY

9 ON BEHALF OF THE PETITIONERS AND BLACKROCK
10 RESPONDENTS SUPPORTING THE PETITIONERS

11 MR. DVORETZKY: Mr. Chief Justice, and
12 may it please the Court:

13 To imply a private right of action in
14 Section 47(b), Congress would have needed to
15 speak clearly and unambiguously. It did not.

16 Start with the text. Section 47(b)
17 doesn't come near the high bar for an implied
18 private right of action. Congress knew how to
19 speak clearly to create a right of action, just
20 as it did in Sections 30(h) and 36(b).

21 Congress could have said an action may be
22 brought by any party to a contract that
23 violates the ICA. Instead, Congress chose
24 language that specifies what remedy is
25 available to parties already before the court.

1 Section 47(b) applies only if a
2 contract is unenforceable, an inherently
3 defensive concept. And Section 47(b)(2)
4 focuses on courts, not who can sue. It uses
5 the term "instance," which ordinarily means a
6 request, not a right to bring an action.
7 Indeed, Congress rewrote Section 47(b) after
8 TAMA, eliminating the phrase "shall be void"
9 that TAMA had held created a private right of
10 action under the IAA.

11 Statutory structure points in the same
12 direction. It makes no sense to think that, on
13 the one hand, Congress expressly specified
14 narrow rights of action for particular
15 plaintiffs in 36(h) and -- in 30(h) and 36(b),
16 but, on the other hand, Congress subtly implied
17 a private right of action for any party to a
18 contract to enforce any provision of the ICA in
19 47(b).

20 What's more, Congress vested the SEC
21 with an array of powers to enforce the ICA,
22 from investigation and rulemaking to exemption
23 and filing suit, which further suggests that it
24 didn't intend private enforcement by
25 implication under Section 47(b)(2).

1 If the Court lets the Second Circuit's
2 decision stand, the clear statement rule in
3 Sandoval and Gonzaga will have little meaning.
4 The Court should leave private rights of action
5 to Congress and reject Saba and the Second
6 Circuit's unworkable return to the ancien
7 régime.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Respondent has quite
10 a different reading of Transamerica than you
11 do, so would you spend just a minute or two
12 just responding to Respondents' argument as to
13 Transamerica?

14 MR. DVORETZKY: Of course. So I think
15 Transamerica, TAMA, is really the linchpin of
16 their argument. Their argument, as I
17 understand it, is that in Transamerica, the
18 Court interpreted "void" a certain way in the
19 IAA, and that necessarily carries over to
20 present-day ICA.

21 That's incorrect on a number of
22 levels. I agree with them that "void" was the
23 key language in TAMA. But Congress moved away
24 from that language in 1980 when it amended the
25 ICA. The -- the very linchpin of the Court's

1 opinion in -- in TAMA was that the concept of
2 voidness necessarily has customary incidents
3 that let you go to court, including not only to
4 determine the voidness but also to get
5 restitution.

6 In the ICA in 1980, Congress
7 eliminated "void" from 47(b). It came up with
8 an entirely new construct in (b)(1) and (b)(2).
9 It replaced voidness with unenforceability.
10 Unenforceability is inherently a defensive
11 concept, not one that lets you go to court
12 affirmatively.

13 And then, in (b)(2), it introduced
14 court-focused language focusing on what courts
15 may or may not do when they have a contract
16 before them in a litigation where the parties
17 are otherwise properly before the court.

18 And so whatever one may think of TAMA
19 as to the IAA, it doesn't apply to the ICA,
20 where Congress moved away from that language.
21 And, in addition to that, a key difference
22 between the ICA and the IAA is that the ICA
23 contains the two express private rights of
24 action in 30(h) and 36(b). And where Congress
25 knows how to write a cause of action explicitly

1 by saying a -- a cause of action -- a claim may
2 be brought or an action may be brought by a
3 particular plaintiff against a particular
4 defendant over a particular violation, that
5 strongly supports the notion that Congress did
6 not impliedly leave the door open in 47(b)(2)
7 for an even broader cause of action that would
8 let any party to the contract go in to sue not
9 just over a particular provision of the ICA but
10 over any provision in the ICA that may be
11 violated.

12 JUSTICE JACKSON: So, Mr. Dvoretzky --

13 JUSTICE SOTOMAYOR: Counsel, your --
14 we have said in Touche Ross, in Cort, in
15 Sandoval, that what we're looking at is whether
16 Congress intended to create a private right of
17 action. You say that neither the text or
18 structure does.

19 But I'm not sure you're leaving out
20 one very important part of the context, which
21 is the statutory history, and that's what the
22 other side relies upon. The IAA and the ICA
23 were passed in the same bill. TAMA then held
24 that identical statutory language in the IAA
25 had a private right of action for rescission.

1 So you're relying on the changes that occurred
2 to differentiate the ICA today, correct?

3 MR. DVORETZKY: We're relying on the
4 changes, but I would also note that TAMA was a
5 holding only as to the IAA, not as to the ICA.
6 And so --

7 JUSTICE SOTOMAYOR: But the language
8 is identical. If this case had come up a year
9 after TAMA, do you think that, on the basis of
10 Sandoval, we would have ruled differently?

11 MR. DVORETZKY: Well, the -- the fact
12 that the IAA, unlike the ICA, contain no
13 express private rights of action was the very
14 first sentence of this Court's analysis in
15 TAMA. And so, even pre-1980, there was that
16 distinction that this Court in -- in this
17 hypothetical case might have focused --

18 JUSTICE SOTOMAYOR: But those -- but
19 that difference went solely to the question of
20 damages, not to the question of an implied
21 cause of action with respect to rescission.

22 There is no other claim being made.
23 The issue is narrow to is there a right to
24 rescission, an implied cause of action with
25 respect to revision -- rescission, correct?

1 MR. DVORETZKY: That -- that's
2 correct. But the Court hasn't distinguished
3 under the Sandoval line of cases between the
4 standard where damages are sought impliedly
5 versus the standard where equitable relief is
6 sought impliedly.

7 JUSTICE SOTOMAYOR: Well, Congress has
8 because what we -- we have said with respect to
9 that statute, the TAMA statute, is that there,
10 there's no implied cause of action for -- that
11 there is an implied cause of action for
12 rescission. We didn't recognize one for
13 damages.

14 MR. DVORETZKY: That -- that's true,
15 but the distinction in TAMA didn't turn on
16 damages versus equitable relief. It turned on
17 the word "void" in Section 215 versus different
18 language in 206.

19 JUSTICE SOTOMAYOR: Well, in TAMA,
20 we said that the word "void" is the power to
21 rescind. And that's exactly the -- the
22 language that Congress used in the ICA in
23 47(b). It says that in the instance of a party
24 that seeks or demands rescission, that it could
25 be given in certain circumstances.

1 So you make much of the fact that
2 Congress did away with the word "void," but it
3 kept exactly the meaning of void. It said:
4 The insistence of a party to seek rescission.

5 MR. DVORETZKY: I don't think it did,
6 Justice Sotomayor, first, because the Court
7 said in TAMA that voidness was about more than
8 just rescission. It was also -- this is at
9 page 18 of the TAMA decision: "A person with
10 the power to void a contract ordinarily may
11 resort to a court to have the contract
12 rescinded and to obtain restitution of
13 consideration paid." So, at the void --

14 JUSTICE SOTOMAYOR: But it didn't.
15 All it talked about was the -- there, the TAMA
16 court was only an implied cause of action for
17 rescission. Where the subsequent disputes
18 among courts lay was whether that statute also
19 permitted damages, and Congress answered that
20 question in the ICA. It only permits damages
21 in a limited number of cases and not in others,
22 and it doesn't permit it in rescission.

23 MR. DVORETZKY: But, Justice
24 Sotomayor, Congress also moved away from the
25 word "void" to the word "unenforceable" in

1 (b)(1), and I think that's a critical
2 distinction.

3 JUSTICE SOTOMAYOR: Well, but --

4 JUSTICE BARRETT: Counsel, can I --
5 oh.

6 JUSTICE SOTOMAYOR: I'm sorry, just
7 one last point.

8 I know that many of my colleagues
9 don't believe in statutory history, but, here,
10 we have both a House and a Senate reports
11 accompanying the 1980 amendments to the ICA,
12 and in both the House and the Senate reports,
13 it says that "Private rights of action for
14 violations of the federal securities laws are a
15 necessary adjunct to the SEC's enforcement
16 efforts due to the SEC's small staff and
17 overwhelming enforcement."

18 The Senate also wrote: "The committee
19 wishes to make clear that private rights of
20 action should be implied to and in its
21 enforcement to the same extent that such causes
22 of action are implied under the ICA."

23 The House wrote: "It wishes to make
24 plain that it expects the courts to imply
25 private rights of action under this legislation

1 where the plaintiff falls within the class of
2 persons protected by the statutory provision in
3 question."

4 I don't know how more -- much more
5 decisive on congressional intent than those
6 statements are. The ICA implies a private
7 cause of action for rescission, and Congress
8 says what you did there, do here.

9 MR. DVORETZKY: Justice Sotomayor,
10 I do think that under Sandoval, the analysis
11 begins and ends with the text and structure.

12 But, if I may respond on the
13 legislative history, first, the legislative
14 history also shows that Congress considered
15 legislation in 1980 that would have explicitly
16 added a private right of action, and it didn't
17 do that. So, in that sense, the same inference
18 from --

19 JUSTICE SOTOMAYOR: But it did it with
20 respect to damages. It didn't say anything
21 about -- it did say about rescission that at
22 the insistence of any party, a court could
23 grant rescission.

24 It seems to me that what you want us
25 to do is to ignore the statutory context and

1 say that's language that's limited only to
2 parties in the litigation. But they didn't use
3 those words. They didn't say it's limited to
4 parties in litigation.

5 MR. DVORETZKY: So I think the term
6 "party" is best read to mean party to the
7 litigation. When Congress wanted to refer to a
8 party to the contract, it did that expressly in
9 (b)(1). But, at the end of the day, it really
10 is not of much moment what "party" refers to
11 because, again, the language that Congress used
12 in (b)(1) is nec- -- is a defensive concept of
13 unenforceability, not one that lets you go into
14 court.

15 And in (b)(2), that is court-focused
16 language. It's not the sort of unmistakable
17 focus on an individual and creating new rights
18 prescribing conduct as unlawful as to that
19 individual that this Court, under Sandoval and
20 Gonzaga and that whole line of cases, has
21 looked to in order to recognize whether
22 Congress meant to create a private right of
23 action, that the text is the ultimate
24 touchstone.

25 JUSTICE BARRETT: Counsel, I'd like to

1 ask you a question about your clear statement
2 rule.

3 I don't read Sandoval to necessarily
4 require or to require a clear statement. I
5 understand the question when we're looking at
6 implied causes of action to simply be ordinary
7 statutory interpretation and what do the text
8 and structure require as distinguished from
9 Gonzaga and our Spending Clause line.

10 Why do you think there should be a
11 clear statement rule here? And I know the
12 government takes the same position.

13 MR. DVORETZKY: So, for starters, I
14 think Gonzaga, and this is at page 290, equates
15 the two standards at least as to the first
16 prong of -- of the Spending Clause cases.
17 Gonzaga said: If Congress wishes to create new
18 rights, it must do so in clear and unambiguous
19 terms, no less and no more than what is
20 required for Congress to create new rights
21 enforceable under an implied private right of
22 action.

23 As to why that makes sense, I think it
24 goes to Justice Scalia's concurrence in the
25 Thompson case, which I think is -- is then --

1 becomes much of the basis for the Sandoval
2 opinion, where he said that creating a private
3 right of action is such a significant
4 legislative act that there is only "a remote
5 possibility" -- that's a quote -- that Congress
6 would do that implicitly.

7 And so, before this Court, as a matter
8 of separation of powers, reads an implied
9 private right of action into a statute, it
10 ought to look for that kind of clear,
11 unambiguous language.

12 JUSTICE BARRETT: But that would be
13 an -- that would be an innovation. We haven't
14 expressly said that in our implied cause of
15 action cases.

16 MR. DVORETZKY: I think you've said it
17 in Gonzaga, and I -- and I --

18 JUSTICE BARRETT: Right.

19 MR. DVORETZKY: -- think it's also --

20 JUSTICE JACKSON: But -- but Gonzaga
21 was a Spending Clause --

22 JUSTICE GORSUCH: Haven't we said it
23 in the context of 1983?

24 MR. DVORETZKY: I'm sorry?

25 JUSTICE GORSUCH: Haven't we said it

1 in the context of 1983 and whether it secures a
2 right enforceable under federal law, quite
3 apart from the Spending Clause context?

4 MR. DVORETZKY: Right. You said it
5 under the first prong of the Spending Clause
6 analysis.

7 JUSTICE GORSUCH: Forget -- so
8 whether -- whether 1983 secures a right for
9 purposes of federal law.

10 MR. DVORETZKY: Right. That is the
11 context in which you have equated the two
12 standards. But I think the key point is that
13 you have equated the two standards and that the
14 separation-of-powers concerns are similar
15 across the two contexts and --

16 JUSTICE JACKSON: That -- sorry. Go
17 ahead.

18 JUSTICE GORSUCH: If you might finish
19 your answer first.

20 MR. DVORETZKY: No, I think the
21 separation-of-powers concerns are similar
22 across the two concept -- contexts. In both
23 situations, it is the role of Congress to
24 determine whether it is conferring a right and
25 whether that right is privately enforceable.

1 JUSTICE GORSUCH: Thank you.

2 JUSTICE JACKSON: I had understood
3 that the Spending Clause context had particular
4 concerns that were relevant to this inquiry.
5 So, while we may have said it in the context of
6 1983, I thought we said it, as you pointed out,
7 in Gonzaga and the line of cases there in a
8 Spending Clause context in which we analogized
9 to contracts, and so it was very important to
10 have clarity from Congress in the federal
11 grants context, and that's sort of the impetus
12 of the standards there.

13 I -- have we said that same sort of
14 thing in this context outside of Spending
15 Clause?

16 MR. DVORETZKY: I think, again,
17 Sandoval itself really establishes the clear --
18 the clear statement rule. That's how this
19 Court under -- characterized Sandoval in cases
20 like Gonzaga. When this Court was relying on
21 Sandoval and Gonzaga and applying the same
22 standard for both contexts, the Court described
23 it as a clear statement rule, as a rule
24 requiring Congress to speak clearly on --

25 JUSTICE JACKSON: All right. So,

1 under that rule -- under that rule for this
2 purpose, I'm looking at (b)(2) and you say it
3 doesn't have the kind of party-centric
4 language.

5 I mean, yes, a court may not deny the
6 rescission, but it does say at the instance of
7 any party. And so we do have references in the
8 text of (b)(2) related to parties. Why is that
9 not sufficient in your view?

10 MR. DVORETZKY: Because the way in
11 which this is written, its primary focus is on
12 what courts may or may not do. In that sense,
13 it's like the Thompson case, where the Court
14 said that -- I think it was the -- the Parental
15 Kidnapping Prevention Act there -- is a mandate
16 directed to state courts. It doesn't create
17 individual rights even though what those courts
18 may do may have consequences for individuals.

19 This too is court-focused language.
20 And it also --

21 JUSTICE JACKSON: Right. But, when
22 we're talking -- when the right here is the
23 right to bring the action, then a court can't
24 do what it does unless it has an action.

25 I don't understand why it isn't

1 implicit in a direction to a court related to a
2 kind of legal action that the party, as it says
3 here, any party can bring the action.

4 MR. DVORETZKY: It doesn't say that
5 any party can bring the action the way it does
6 in Section 36. It just says at the instance of
7 any party.

8 "At the instance" ordinarily means at
9 the request of a party, but there are all sorts
10 of things that parties might be able to request
11 from the court once they are already before the
12 court. That doesn't mean --

13 JUSTICE JACKSON: I understood that
14 your argument here was -- was that the party
15 can raise it defensively, is that right? At
16 the instance -- so your -- your point is at the
17 instance of any party in defense? That's how
18 this would work for you?

19 MR. DVORETZKY: I -- I think that that
20 is right, and that follows from
21 unenforceability being inherent.

22 JUSTICE JACKSON: But unenforceability
23 is in (b)(1), and (b)(2), we are looking at the
24 text here, and it says that the contract has
25 been performed. So we're sort of in a

1 different world in (b)(2). In (b) -- (b)(1),
2 the contract hasn't yet been performed, and I
3 suppose you could have an unenforceability
4 argument there, but have -- aren't we already
5 in the world in (b)(2) of a contract being
6 performed?

7 MR. DVORETZKY: Respectfully, I read
8 the interplay between (b)(1) and (b)(2)
9 differently. I think the only way that you get
10 to (b)(2) is through (b)(1) if you have a
11 contract that -- to the extent that a
12 contract --

13 JUSTICE JACKSON: That has been
14 performed.

15 MR. DVORETZKY: -- has been performed,
16 that can be either full or partial performance.
17 And, either way, you need to go through (b)(1)
18 and first show it can -- it can be fully
19 performed but perhaps a contract with a limited
20 term and there's some litigation afterwards
21 about what happened during the term that has
22 now been completed. It may be partially
23 performed. But, either way, the only way to
24 get to (b)(2) is by showing that (b)(1) is
25 satisfied, and that's when --

1 JUSTICE JACKSON: Thank you.

2 MR. DVORETZKY: -- the defensiveness
3 concept comes in.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 Justice Thomas, anything?

6 Justice Alito?

7 Justice Sotomayor?

8 Justice Kagan?

9 Justice Gorsuch, anything?

10 JUSTICE KAVANAUGH: Unfortunately, I
11 have several questions.

12 (Laughter.)

13 JUSTICE KAVANAUGH: I think this case
14 is extremely close, so I'll just put the cards
15 out there on that.

16 So, when you're talking about the
17 statute alone, I get it, but when you look at
18 Transamerica and then you look at the statute,
19 it would be very odd to think Congress has
20 recognized for both statutes, or I get it's for
21 the IAA, a private cause of action and then to
22 think Congress got rid of that by explicitly
23 referring to the rescission right that it had
24 just recognized in Trans -- that the Court had
25 just recognized in Transamerica.

1 And what the statutory language did
2 was add the "unless" clause to show that you
3 don't always have a right of rescission. So
4 what Congress seemed to do was say recognize
5 what the Court had just said about rescission
6 but actually slightly -- put slight exceptions
7 in there with the "unless" clause.

8 And what your position would do is say
9 everything goes to state court and -- as I
10 understand it. You can respond to that. But,
11 in Transamerica, in Footnote 8, they -- they
12 address that possibility.

13 One possibility, of course, is that
14 Congress intended that claims under 215 would
15 be raised under state court, but we decline to
16 adopt such an anomalous construction without
17 some indication that Congress, in fact,
18 wishes -- wished to remit the litigation of a
19 federal right to the state courts.

20 So your theory is Congress comes back
21 in knowing that and refers specifically to
22 rescission but, without giving any indication,
23 does the anomalous thing silently of remitting
24 everything to state court.

25 Now, so that's something you need to

1 answer. And then I'll just get the last thing
2 out which bothers me, which is the SEC in 2001
3 in the Bush administration comes in and says,
4 actually, this is an express right of action, I
5 think six times in the SEC brief in 2001 says
6 this is an express right of action because it
7 refers to rescission specifically.

8 And so you need to deal with that, and
9 you need to deal with how does this work in
10 state court? You want it to go to state court?
11 Can they bring the suit, the rescission -- suit
12 for rescission in state court, and the state
13 court then does what? And why be in state
14 court? So that's a lot. You can deal with
15 whatever you want to deal with there, but those
16 are things that are on my mind.

17 MR. DVORETZKY: Let me deal with as
18 much as I can. I think I can distill that to
19 three questions. You're tell me if I -- you'll
20 tell me if I'm missing something.

21 One is didn't Congress just carry over
22 the concept of rescission from the old statute
23 to the new? Two is what happens in state
24 court? Three is what about the SG's brief in
25 Olmsted in 2001? Does that capture it?

1 JUSTICE KAVANAUGH: Footnote 8 would
2 be useful too, but --

3 MR. DVORETZKY: Okay. I'll -- I'll
4 bake that -- bake that into state court.

5 All right. So, starting with the
6 first question, didn't Congress just carry over
7 the concept of rescission, if that is what
8 Congress would have wanted -- wanted to do, it
9 would have been easy enough for Congress to
10 keep the word "void." "Void" was really the
11 linchpin of this Court's opinion in -- in TAMA.
12 And whether or not the opinion in TAMA is the
13 correct result under the Sandoval framework,
14 what the Court thought in TAMA was that "void"
15 had a particular connotation. There were
16 particular customary incidents, I think was the
17 phrase in TAMA, about what "void" means. And
18 it was that essential term that Congress took
19 out of 47(b), and not only took out that one
20 term, it really rewrote the whole structure.

21 JUSTICE KAVANAUGH: It put in the term
22 "rescission." Keep going.

23 MR. DVORETZKY: It -- it -- it did put
24 in the term "rescission," which can be a
25 consequence of unenforceability, but by -- it

1 came up with this whole new construct that
2 tells you, first, all of this is only triggered
3 when you have unenforceability, which,
4 according to the treatises, according to
5 Corbin, according to Williston, according to
6 the Restatement, that is an inherently
7 defensive concept that's a contrast with what
8 this Court thought "void" meant in TAMA, which
9 was you have an affirmative right to go to
10 court.

11 JUSTICE KAVANAUGH: Why -- why don't
12 you go -- sorry. Why don't you go to the state
13 court and, you know, how does this play out in
14 state court? I've tried to go through this.
15 It strikes me as very bizarre. "Anomalous" was
16 the word that the Court used in Transamerica.
17 I'll -- I'll use "bizarre" to figure out how
18 this would play out in state court and why.

19 MR. DVORETZKY: So I think it's a
20 complicated question, what happens in state
21 court, which I don't think you need to -- to
22 decide here. I don't think that's what's
23 presented here, but --

24 JUSTICE KAVANAUGH: Well, I mean,
25 you're telling us go to state court, not

1 federal court. We should have some idea what's
2 going to happen in state court and why. Why
3 are we going to state court for this?

4 MR. DVORETZKY: So I think that if
5 Saba tried to do in state court what it tried
6 to do here in federal court, first, I'm not
7 aware of any state cause of action anywhere
8 that would actually let them go in as a matter
9 of state law and seek rescission in this way.
10 So I don't know that it could ever even,
11 practically speaking, come up in state court.
12 No party has -- "no party," no pun intended --
13 to this litigation --

14 JUSTICE KAVANAUGH: Yeah. Yeah.

15 MR. DVORETZKY: -- has pointed to any
16 case that is on point for that. If there were
17 such a statute, I think that it would be
18 preempted by the comprehensive scheme that
19 Congress enacted in 47(b). Congress intended
20 for there to be uniform nationwide rules about
21 how to determine -- about what happens when a
22 contract violates the ICA, and that ended up as
23 the subject of litigation.

24 JUSTICE KAVANAUGH: I thought you
25 wanted it to be a federal rule of decision

1 in --

2 MR. DVORETZKY: I'm sorry?

3 JUSTICE KAVANAUGH: I thought you
4 wanted it to be a federal rule of decision in a
5 state court proceeding even if brought
6 defensively. No?

7 MR. DVORETZKY: So -- so I think this
8 issue can come up in state court in that
9 limited circumstance.

10 JUSTICE KAVANAUGH: And it would be a
11 federal rule of decision?

12 MR. DVORETZKY: Where it is a federal
13 rule of decision.

14 JUSTICE KAVANAUGH: Okay.

15 MR. DVORETZKY: But -- but --

16 JUSTICE KAVANAUGH: Why don't you go
17 to the SEC brief. Sorry.

18 MR. DVORETZKY: So, on the SEC
19 brief --

20 JUSTICE KAVANAUGH: I'm using too
21 much --

22 MR. DVORETZKY: -- I'll let
23 Mr. Schulman address it in more detail, but
24 I -- but I think the --

25 JUSTICE KAVANAUGH: Well, they refer

1 to it as an express right of action.

2 MR. DVORETZKY: So, first --

3 JUSTICE KAVANAUGH: Or express remedy.

4 MR. DVORETZKY: -- that was
5 essentially dicta in an amicus brief because
6 the case, Olmsted, did not itself even present
7 the question of whether there was a right of
8 action in 47(b).

9 JUSTICE KAVANAUGH: Okay. Thank you.

10 MR. DVORETZKY: It's not the most
11 carefully considered statement by the
12 government.

13 JUSTICE KAVANAUGH: Really? Okay.
14 Well --

15 MR. DVORETZKY: Well, and -- and --
16 and if -- if I might -- if I might just add --

17 JUSTICE KAVANAUGH: Do you know that,
18 or are you just --

19 MR. DVORETZKY: Well, if I might just
20 add, I think they have said that in the wake of
21 Sandoval, which had come out just shortly
22 before that Olmsted brief, they've
23 reconsidered --

24 JUSTICE KAVANAUGH: Seven -- seven
25 months before, I think, but yeah.

1 MR. DVORETZKY: But -- but not just
2 Sandoval. This Court's cases applying
3 Sandoval, in Stoneridge and the later cases,
4 showing that this Court really meant something
5 like a clear statement rule and that --

6 JUSTICE KAVANAUGH: Thank you. Thank
7 you.

8 MR. DVORETZKY: -- this action would
9 have been satisfied.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Just one follow-up
13 question to Justice Kavanaugh. How might this
14 play out in federal court in a diversity case?
15 Could there be a declaratory judgment for
16 breach of contract relying on that state law
17 cause of action?

18 MR. DVORETZKY: I -- I don't think
19 there could be. I think for much the same
20 reason that Congress intended this to be a
21 uniform scheme that would preempt state law, it
22 would also displace the ability to bring a
23 declaratory judgment action. It could be used
24 and, in fact, is intended to be used as a rule
25 of decision in federal court if it comes up

1 defensively.

2 In a situation, let's say
3 hypothetically, where a fund has a dispute with
4 the advisor over the payment of fees, and a
5 defense to that could be, well, wait a minute,
6 actually, the contract was never valid in the
7 first place or is unenforceable because it
8 somehow violated the ICA. That might come up
9 as a defense in that kind of a suit between a
10 fund and an advisor, whether it's in federal or
11 state court.

12 JUSTICE BARRETT: Is that necessary to
13 your argument? If we -- if we think that
14 rescission isn't just a defense, then do you
15 lose on the cause of action point?

16 MR. DVORETZKY: No, because even if
17 rescission conceptually can be something other
18 than a defense, this statute doesn't create the
19 right to go to court for all of the reasons
20 that we've been discussing. It doesn't say an
21 action may be brought. It is court-focused,
22 not -- not focused -- doesn't have the
23 unmistakable focus on creating individual
24 rights that this Court's cases require.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: So can I just get
3 back to Justice Sotomayor's questions about the
4 legislative history? I understand -- I
5 understand your point about Sandoval and moving
6 away from legislative history in general, but
7 do -- do you agree that Sandoval said that
8 statutory intent is determinative of this
9 issue?

10 MR. DVORETZKY: I -- I don't think the
11 intent is determinative. I think the text that
12 Congress enacted is determinative and
13 obvious --

14 JUSTICE JACKSON: Isn't that what
15 Sandoval said? Statutory intent "is
16 determinative" when it comes to figuring out
17 whether Congress implied a cause of action?

18 MR. DVORETZKY: Sure, but there's
19 a -- statutory intent.

20 JUSTICE JACKSON: Right.

21 MR. DVORETZKY: So the question is
22 what -- what -- how is the intent reflected --

23 JUSTICE JACKSON: Correct.

24 MR. DVORETZKY: -- in the words that
25 Congress enacted.

1 JUSTICE JACKSON: Correct. So --
2 but -- but the goal is that we're trying to
3 figure out what Congress intended. And so I
4 appreciate that some people look only at the
5 text and structure in context to figure that
6 out, but you did in your argument here refer to
7 TAMA and the enactment history and the extent
8 to which you think that Congress wasn't
9 incorporating the same kinds of ideas that we
10 indicated in TAMA. So there is some -- there's
11 something to your argument that is about the
12 statutory development here and not just the
13 text, right?

14 MR. DVORETZKY: Well, I think, if we
15 never had TAMA --

16 JUSTICE JACKSON: Mm-hmm.

17 MR. DVORETZKY: -- I'd be making the
18 same argument about what 47(b)(1) and (b)(2)
19 means. The argument about TAMA is because I
20 understand and understood from Justices Tom --
21 Justice Thomas's first question --

22 JUSTICE JACKSON: Yeah.

23 MR. DVORETZKY: -- that that is really
24 the linchpin of the other side's argument.

25 JUSTICE JACKSON: Of the other side.

1 MR. DVORETZKY: They start with that
2 and they say it's carried through. And so I'm
3 responding to that by saying --

4 JUSTICE JACKSON: I see.

5 MR. DVORETZKY: -- no, it's not
6 carried through because Congress changed the
7 key language. But, even without that change,
8 I'd be making the same argument about what the
9 language that is in 47(b) means on its face.

10 JUSTICE JACKSON: Yes. And if we --
11 if we are trying to understand whether it was
12 carried through, you say Congress changed the
13 language and you say don't look at the
14 legislative history to assess that.

15 Is that your position? Because the
16 legislative history refers to TAMA and makes
17 pretty clear, as Justice Sotomayor pointed out,
18 that Congress wanted a implied private right of
19 action in this situation just as we had held in
20 TAMA the year before.

21 So part of your argument does require
22 us in response to the other side to close our
23 eyes to that -- that part of the context of
24 this.

25 MR. DVORETZKY: So -- so I don't think

1 it does in light of Sandoval, not only because
2 Sandoval says focused on text and structure but
3 also because Sandoval at 287 to 288 rejected
4 reliance on what it called I think contemporary
5 context.

6 So it really is a matter of the text.
7 But, Justice Jackson, understanding that you
8 may wish to look at the legislative history,
9 the other thing I'll say about the legislative
10 history is that the House report and the Senate
11 report that talks about implied right --
12 private rights of action is talking about six
13 different statutes that were all amended at the
14 same time. That's not specific to 47(b). The
15 only place in which the reports do specifically
16 discuss 47(b), that doesn't mention a private
17 right of action at all.

18 And so this -- they're --

19 JUSTICE JACKSON: So you say it
20 doesn't even get us there when we look there?

21 MR. DVORETZKY: This -- this -- this
22 very general legislative history, even if you
23 were to look at it contrary to Sandoval --

24 JUSTICE JACKSON: Yeah.

25 MR. DVORETZKY: -- doesn't bear the

1 weight that it would need to bear here.

2 JUSTICE JACKSON: Thank you.

3 MR. DVORETZKY: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Schulman.

7 ORAL ARGUMENT OF MAX E. SCHULMAN

8 FOR THE UNITED STATES, AS AMICUS CURIAE,

9 SUPPORTING THE PETITIONERS

10 MR. SCHULMAN: Mr. Chief Justice, and
11 may it please the Court:

12 Most statutes fail the stringent and
13 demanding test to imply a private right of
14 action under this Court's precedents. Section
15 47(b) of the Investment Company Act is no
16 exception to that rule. Its text does not
17 unambiguously create new rights or focus
18 unmistakably on individual plaintiffs.

19 Instead, it references preexisting
20 state law rights and tells courts how to limit
21 them after finding a violation. The ICA's
22 structure confirms that Congress knew how to
23 authorize private suits, as it did expressly in
24 two narrow provisions that do not apply here,
25 while otherwise entrusting broad enforcement

1 authority to the Securities and Exchange
2 Commission.

3 In contrast to those express rights of
4 action, Section 47(b) simply imposes rules of
5 decision that apply in cases otherwise properly
6 before a court, but it does not implicitly
7 authorize commencement of new federal lawsuits
8 by anyone who alleges that a contract violates
9 any part of the ICA.

10 The judgment of the Second Circuit
11 should be reversed.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Would you zero in on
14 Respondents' argument and use of the
15 Transamerica case?

16 MR. SCHULMAN: Yes. Thank you. So
17 I -- I agree with my friend that the
18 Transamerica case was focused on the word
19 "void" in the Investment Advisers Act. That's
20 the key language that it relied on, the
21 customary incidents of voidness to imply a
22 right of action for rescission. And that's the
23 language that Congress removed from the
24 Investment Company Act in 1980.

25 So that's not the text that's before

1 this Court, and I don't think this Court needs
2 to question Transamerica at all. This Court
3 has a different statute in front of it, and the
4 post-1980 ICA does not meet the standard to
5 imply --

6 JUSTICE KAGAN: If -- if it were,
7 Mr. Schulman, suppose that Congress had done
8 nothing on the ICA front. Would Transamerica
9 control?

10 MR. SCHULMAN: We think that would be
11 a closer question, but, no, ultimately, I don't
12 think it would. I think, as my friend
13 mentioned, there are differences between the
14 ICA even before 1980 and the Investment
15 Advisers Act, such as the fact that there were
16 other express rights of action in the
17 Investment Company Act. That's something that
18 the Transamerica court noted about the advisers
19 act. So we think that alone could provide a
20 distinction and if it --

21 JUSTICE KAGAN: Although there were
22 express rights of action for damages, and,
23 presumably, Congress is considering both of
24 these pieces of legislation at the same time,
25 they're companion bills. The fact that they

1 decided to have damages suits in the one, I
2 don't know.

3 Like, they -- they knew how to do it.
4 They decided to have damages suits in one, not
5 in the other, but what does that have to say
6 about the -- about the issue that Transamerica
7 decided?

8 MR. SCHULMAN: Well, I agree with
9 my -- what my friend also said that this
10 Court's implied right of action cases have not
11 drawn a distinction between damages and
12 equitable relief, that it's sort of drawn,
13 painted with a broad brush in that respect.

14 JUSTICE KAGAN: But you would really
15 have us take -- look at these two companion
16 pieces of legislation passed at the same time
17 and say that the exact same language has one
18 result in one statute and the other result in
19 another statute just because there happens to
20 be in one of the statutes private rights of
21 action for damages that are essentially
22 unrelated?

23 MR. SCHULMAN: So --

24 JUSTICE KAGAN: That seems like a -- a
25 pretty extreme position, honestly.

1 MR. SCHULMAN: So I will say that's a
2 hypothetical question that this Court doesn't
3 need to decide. It obviously doesn't have the
4 pre- --

5 JUSTICE KAGAN: But it helps me think
6 about it. You know, it helps me figure out,
7 like, what's the baseline here.

8 MR. SCHULMAN: Sure. So I'll offer
9 two things in -- in response to that. I think
10 there's another potential distinction between
11 the two statutes, which is that the Investment
12 Company Act is distinctive among the securities
13 laws, even as distinct from the advisers act in
14 how intrusively it treads on core matters of
15 state law about the internal workings of
16 corporations, who can be on a board.

17 And so, there, I think there's special
18 reason to think that Congress might not have
19 been treading into areas traditionally governed
20 by state law to the same extent.

21 I also think that even if the logic of
22 TAMA might suggest the -- the same result for
23 the pre-1980 ICA, this Court didn't confront
24 it, and this Court, its methodology has evolved
25 and if this --

1 JUSTICE KAGAN: It's kind of -- you
2 know, it hasn't really. This is several years
3 after Cort v. Ash. I think Mr. Clement makes
4 this point in his brief. We hadn't gotten to
5 the rhetorical pitch that we discovered in
6 later cases maybe, but -- but the Court had
7 made a shift already. This was by the exact
8 same people who decided Cort v. Ash. This is
9 not an ancien régime case.

10 MR. SCHULMAN: So I think TAMA is a
11 transitional case. There are certain respects
12 in which it more closely resembles the modern
13 cases.

14 But it also is relying on some of the
15 bad old days cases, such as the Kardon case
16 from the district court, the Mills case, which
17 was really a follow-on to Borak, the epitome of
18 the bad old days. So I think it's certainly --

19 JUSTICE KAGAN: Sandoval specifically
20 cites Transamerica in a kind of approving way.

21 MR. SCHULMAN: That's true, and I
22 think --

23 JUSTICE KAGAN: Not kind of approving.
24 Very approving. Several times.

25 MR. SCHULMAN: It -- it cites the

1 specific aspects of TAMA that more closely
2 resemble the modern cases, the rule statement
3 at the beginning about how an implied right of
4 action is a question of statutory intent, and
5 then it cites the analysis of the damages
6 question in 206.

7 It conspicuously does not cite the
8 portion of the TAMA opinion that is discussing
9 whether there's a right to rescission.

10 JUSTICE KAGAN: I'll ask you one more
11 and then I'll stop. So you said void. And
12 you're absolutely right, you know, all the
13 language is void, void, void. But I'm
14 wondering whether the fact that they changed
15 "void" to "unenforceable" has to do with just
16 what Justice Kavanaugh was talking about, that
17 they have this "unless" clause in there, so
18 they basically say, well, not always, it's
19 really unless enforcement would be more
20 equitable.

21 And -- and once you have an unless
22 clause, you kind of have to change the word
23 "void." You know, like void unless, blah,
24 blah, blah. It's just not the way we think of
25 voidness, that, like, you can be void and then

1 discover you're not void.

2 So -- so they did change it. They
3 did -- they did say not always rescission, but
4 they changed it in a way that actually explains
5 why they had to change the word "void," and I'm
6 not sure that you can pin too much on that.

7 MR. SCHULMAN: So I think that that
8 point dovetails with and supports our argument
9 that whatever you think Congress was doing in
10 1980, it was clearly pulling back from and
11 reacting and saying that it did not want the
12 full consequences of voidness that Thomas
13 suggested.

14 And so we think that's a reason to
15 suggest that it clearly was contemplating that
16 more of these contracts would be enforced, and,
17 you know, certainly, that, I think, dovetails
18 with our argument that it also doesn't pass the
19 clear statement to imply a private right of
20 action.

21 I think there's an important
22 distinction too that the 1980 amendments also
23 amended other provisions of the Investment
24 Advisers Act but did not amend 215 in the
25 advisers act, the key provision in TAMA, which

1 still says "void."

2 So I think that's just a very strange
3 way to think that Congress was ratifying the
4 intent, the decision in TAMA as applied to the
5 ICA. If anything, I think that it suggests
6 that Congress was perhaps acquiescing in that
7 result as to the advisers act but saying no, we
8 don't want that result in 47(b) of the
9 Investment Company Act. We're moving away from
10 that.

11 JUSTICE KAVANAUGH: What can happen in
12 state court now under your view?

13 MR. SCHULMAN: So -- so I think all
14 parties agree, and we do too, that it can at
15 least be raised defensively. The party --

16 JUSTICE KAVANAUGH: Can it be -- the
17 "at least" is important. Can it be raised more
18 than defensively in your view?

19 MR. SCHULMAN: So we are agnostic on
20 that for purposes of this case. We agree
21 with --

22 JUSTICE KAVANAUGH: Well, that's a
23 pretty important thing to be agnostic on.

24 MR. SCHULMAN: Well, so I -- I --

25 JUSTICE KAVANAUGH: You don't have a

1 view on that, how it's going to play out in
2 state court?

3 MR. SCHULMAN: So I -- I agree with
4 what Petitioners say, that the cases that have
5 been cited in the briefs, you know, we haven't
6 seen a case brought under a state law cause of
7 action, even in the circuits that have not
8 allowed --

9 JUSTICE KAVANAUGH: Well, you will
10 soon if you prevail here.

11 MR. SCHULMAN: I think that's a --
12 a -- a fair question, but, you know, the Third
13 Circuit has barred express -- has barred a
14 private right of action under 47(b)(2) since
15 2012, and we haven't seen cases in that
16 circuit.

17 JUSTICE SOTOMAYOR: Except there is a
18 question, which is federal law trumps state
19 law, correct?

20 MR. SCHULMAN: Certainly.

21 JUSTICE SOTOMAYOR: And what you're
22 suggesting is that Congress thought that it was
23 the right of the state to permit bylaws that
24 violate the ICA, unless you go to court to
25 challenge that practice.

1 MR. SCHULMAN: So --

2 JUSTICE SOTOMAYOR: Meaning you, the
3 government.

4 MR. SCHULMAN: -- we do think that the
5 SEC is the primary enforcer, and that's an
6 important --

7 JUSTICE SOTOMAYOR: I agree, but what
8 you're suggesting to Justice Kavanaugh is that
9 Petitioner -- Respondents are barred from going
10 to state law for a declaratory judgment rule.
11 They could go to state law and say this
12 permissible bylaw under this state's rules
13 violates federal law, and federal law trumps.

14 MR. SCHULMAN: So we actually haven't
15 taken a position on whether a declaratory
16 judgment --

17 JUSTICE SOTOMAYOR: Well, that --
18 I'm -- I'm pushing you the way Justice
19 Kavanaugh did.

20 MR. SCHULMAN: Well --

21 JUSTICE SOTOMAYOR: Do you really
22 think that Congress intended in this language
23 change to permit states to let companies do
24 what they wanted with respect to voting rights
25 and do it until the SE -- until the SEC acted?

1 MR. SCHULMAN: So I do think that
2 Congress intended for the state law remedies or
3 causes of action available to be in the first
4 instance where parties should turn. And I
5 think that, you know, whatever else the 1980
6 amendments did --

7 JUSTICE SOTOMAYOR: State law should
8 be where they should first turn. So they go to
9 state law and say declare this bylaw invalid
10 under federal law. Can they do that or can't
11 they?

12 MR. SCHULMAN: So I'll just say
13 Respondents here are asking for a rescission.
14 I don't think that that could be provided in a
15 declaratory judgment action. So that's all you
16 need to decide this case.

17 To the extent there would be a
18 hypothetical question about a declaratory
19 judgment action, the complaint in this case at
20 Pet. App. 36 suggested --

21 JUSTICE SOTOMAYOR: I don't know what
22 else --

23 JUSTICE BARRETT: Mr. --

24 JUSTICE SOTOMAYOR: -- "void" means
25 but that.

1 MR. SCHULMAN: I -- I'm sorry.

2 JUSTICE BARRETT: Please finish.

3 MR. SCHULMAN: That there is not
4 complete diversity among the parties in this
5 case, so I -- I don't think that would be
6 available here. In another hypothetical case,
7 it's possible, but, certainly, the Declaratory
8 Judgment Act just gives courts discretion, and
9 we think it might not be appropriate for courts
10 to exercise their discretion. But we think
11 that's a case -- a issue that this Court can
12 leave for another day.

13 JUSTICE BARRETT: I have a question,
14 Mr. Schulman, about how you understand the
15 scope of -- I'll ask in my round robin time.

16 CHIEF JUSTICE ROBERTS: No, no,
17 please.

18 JUSTICE BARRETT: How you understand
19 the scope of the cause of action that would be
20 implied here. You know, as I read TAMA, it was
21 a pretty narrow cause of action because the
22 Court said it was apparent that the two
23 sections were intended to benefit the clients
24 of investment advisors and parties to advisory
25 contracts.

1 Do you understand the cause of action
2 that Respondents are seeking here to sweep far
3 more broadly than that?

4 MR. SCHULMAN: I do think there's
5 potential that it could. You know, the parties
6 in this case have a disagreement over what
7 "party" means. We don't think that's
8 dispositive. And I understand Petitioners to
9 agree with that.

10 But I do think there's potential that
11 Congress could have thought this would be
12 disruptive to allow, and that's potentially why
13 it made that change in 1980 to the extent this
14 Court --

15 JUSTICE BARRETT: Because it could be
16 any contract. Putting aside the parties point,
17 it's not just focused on a particular kind of
18 contract or a narrow beneficiary or a
19 particular statutory provision.

20 MR. SCHULMAN: That's exactly right.
21 Yes, Your Honor.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: I want to
24 figure out exactly what we're talking about
25 when we're referring to the ancien régime. It

1 seems to me that could be understood in two
2 different ways. One is if you have a court
3 interpreting the statute and relying in its
4 interpretation on materials that would not
5 necessarily be relied on today, the legislative
6 history. I understand that you don't say,
7 well, we're going to start all over again and
8 reinterpret that statute.

9 But, if you have this statute come
10 before us today, the fact that there's
11 legislative history in it and that the statute
12 was passed back in that day, I understood the
13 approach of cases like Gonzaga and others to be
14 that we think that the best way of
15 understanding that statute is to look at the
16 text of the statute rather than what some
17 legislators from some houses of Congress may
18 have thought about it.

19 So that's not -- the fact that the
20 statute comes from before Sandoval and all is
21 not a license to look at -- at what legislative
22 history. All that means as I understand it is
23 that you don't go back and reinterpret a
24 statute you've already interpreted. Is that
25 your understanding?

1 MR. SCHULMAN: Yes, absolutely. And I
2 think Sandoval says that the Court will not
3 revert to the understanding of implied rights
4 of action that was prevailing at the time the
5 statute was passed. This Court applies its
6 current methodology to the cases that come
7 before it.

8 CHIEF JUSTICE ROBERTS: Thank you.
9 Justice Thomas?

10 JUSTICE THOMAS: No.

11 CHIEF JUSTICE ROBERTS: Justice Alito?
12 Justice Sotomayor?

13 Justice Kagan?

14 Justice Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: Sorry.

17 CHIEF JUSTICE ROBERTS: Yeah.

18 JUSTICE KAVANAUGH: The SEC brief in
19 2001 referred to it multiple times as an
20 express remedy. Do you disagree with that?

21 MR. SCHULMAN: We do. As we say in
22 our brief, we've reconsidered that position in
23 light of this Court's developing jurisprudence.
24 And I don't think that's the theory on which
25 the Second Circuit ruled either. The Second

1 Circuit said that there is not an express right
2 to sue in 47(b). And so we just think that the
3 way this Court analyzes these statutes now, it
4 does not provide a right of action.

5 JUSTICE KAVANAUGH: You mentioned that
6 the SEC can grant exemptions and that would
7 create confusion in your brief, right?

8 MR. SCHULMAN: We do think there's the
9 possibility of that. I -- I do want to say we
10 are taking this Court at its word that text and
11 structure is what matters, so we're not making
12 a policy argument, that you should decide on
13 that basis, but we do think there's a
14 possibility of that.

15 JUSTICE KAVANAUGH: Okay. But, if
16 there's state court actions, those SEC
17 exemptions and the certainty that would grant
18 would be out the window anyway, whether it's
19 state court or federal court. And you being
20 agnostic on the state court thing means that
21 argument really just drops out entirely then
22 unless you want to take a position on that.

23 MR. SCHULMAN: Well, so I'm not sure
24 that that's right about exemptions. The
25 parties don't really get into this. But I

1 think it's at least possible that an exemption
2 granted by the SEC is not a simple forbearance
3 from prosecution. It's granting an exemption
4 from the requirements of the statute that I
5 think could apply in state -- private action as
6 well. So we don't think it would necessarily
7 undermine exemptions in that way.

8 The -- the Yahoo litigation is an
9 example of litigation over the scope of an
10 exemption, but I don't think the parties were
11 arguing there that the exemption was not a
12 shield in private litigation.

13 JUSTICE KAVANAUGH: And from your
14 perspective, the Second Circuit's had this rule
15 for about seven-ish years, I think, six or
16 seven. There have been problems in the Second
17 Circuit with the rule?

18 MR. SCHULMAN: So there have been an
19 increasing number of suits invoking this
20 private right of action that we've seen. As I
21 say, we're not primarily relying on disruption,
22 but the amici do point to things that, from
23 their perspective, are disruptive, and we
24 think, to the extent this Court is concerned --

25 JUSTICE KAVANAUGH: Well, how would

1 you characterize -- what's -- is it disruption
2 just meaning illegality in the contracts as
3 being the subject of the suits, or what's the
4 disruption?

5 MR. SCHULMAN: Well, so I would say
6 the disruption is that the SEC is the primary
7 regulator in this area. It's in communication
8 with regulated parties. It brings enforcement
9 actions. It has informal communications with
10 parties.

11 And then, for private parties to come
12 in and seek to upset these contracts that the
13 SEC is aware of from these registered
14 investment companies, that's -- you know, we
15 don't think Congress anticipated that
16 necessarily.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 Justice Jackson?

21 JUSTICE JACKSON: Is there any
22 daylight between you and Mr. Dvoretzky?

23 MR. SCHULMAN: I don't think we
24 disagree on anything necessary to decide the
25 case. As I was attempting to say earlier, we

1 haven't taken a position on the argument in
2 Petitioners' reply brief about whether there
3 would be preemption of an affirmative state
4 cause of action, but I don't think this Court
5 needs to reach that to decide this case.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Mr. Clement.

10 ORAL ARGUMENT OF PAUL D. CLEMENT
11 ON BEHALF OF THE SABA RESPONDENTS

12 MR. CLEMENT: Mr. Chief Justice, and
13 may it please the Court:

14 Having heard the argument to this
15 point, let me emphasize three points. First, I
16 don't really think this is an implied cause of
17 action case at all. There's express text here,
18 there's about 150 words in 47(b), and the
19 question is what's the best reading of that
20 statutory text.

21 I think, if you look at the actual
22 statutory text, it becomes clear that Congress
23 couldn't have possibly wanted to get rid of the
24 rescission action it would have understood
25 there to be in the "shall be void" language.

1 In (b)(1), it adds not just the word
2 "unenforceability," which, if that were it,
3 might be different. But it says "unenforceable
4 by either party," which is very close to a
5 synonym to "void." And probably the reason
6 that Congress used the synonym and not "void"
7 is precisely the one Justice Kagan suggested,
8 which the "unless" clause looks a little uneasy
9 with the word "void" but works better with
10 "unenforceability by either party."

11 But, in all events, (b)(2) uses
12 "rescission by any party." So it makes it
13 express. That's why the SEC had this exactly
14 right in the Bush administration, that this is
15 an express cause of action case.

16 And then (b)(3) should not be ignored
17 either because it addresses two secondary
18 questions that can arise with a right to
19 rescission, namely, severability and whether
20 you get unjust enrichment.

21 Now I know better than anybody that
22 not everybody at this Court likes to look at
23 legislative history, but if you're going to
24 look at anything, look at what Congress said
25 specifically about adding this particular

1 provision, and that's on page 27 of the House
2 report. The identical language appears at page
3 10 of the Senate report. So you have
4 bicameralism without presentment.

5 What it says these words are meant to
6 do is that "they are designed to provide
7 clearer statutory guidance in interpreting that
8 equitable rescission remedy." They are
9 talking -- that equitable rescission remedy is
10 their reference to Section 47. So it is
11 crystal-clear if you're going to look at that
12 report that they were not trying to make the
13 rescission remedy go poof. They were trying to
14 refine it.

15 And the last thing I was going to say
16 is this is a weird case because all three
17 parties agree that this language does more than
18 just create a statutory right enforceable only
19 by the SEC.

20 The only question is whether it
21 weirdly or anomalously, to use the Footnote 8
22 term, is only enforceable by -- in state court
23 or whether you can bring it directly in federal
24 court.

25 I welcome the Court's questions.

1 JUSTICE THOMAS: What would a -- a
2 state law action look like where you could
3 raise it as a defense?

4 MR. CLEMENT: Boy, I have no idea, but
5 let me speculate, and that's all I'm doing is
6 speculating.

7 I think, for starters, we could
8 probably just go in and say we have a common
9 law right to bring an equitable rescission
10 action. I can -- I can cite sort of Story on
11 equity, that just in the old equity courts you
12 could go in and demand they bring a deed in or
13 a contract in and you could seek rescission of
14 it.

15 So, if federal law provides sort of
16 the -- the substantive law for the vessel of
17 that equitable rescission action, which is what
18 I thought the S -- I thought the government was
19 kind of at least not foreclosing, I mean, I
20 think that's one way to do it.

21 Obviously, the "at least" language is
22 right. We all agree that you could at least
23 raise it as a defense in a breach-of-contract
24 action. But keep in mind, that would be a very
25 weird thing for Congress to go to all the

1 trouble of saying that in this context we care
2 enough about compliance with the Investment
3 Company Act that we're going to expressly use
4 the words "rescission by any party," but the
5 only time you can bring it is as a defense to
6 a breach-of-contract action, which in this
7 context would mean an action where the fund
8 managers actually go to the trouble of suing
9 their own shareholders for breach of contract.

10 Now, as far as we can tell, that
11 essentially never happens. And the whole point
12 of the Investment Company Act is to protect the
13 shareholders against fund managers who have all
14 kinds of bad incentives, like in this case,
15 where they say, you know, if you get more than
16 10 percent of the shares and you're going to
17 tell us that we should do things differently
18 and get this fund to be closer to net asset
19 value, well, guess what, anybody over
20 10 percent, you don't get to vote anymore. I
21 mean, that's a clear violation of 18(i) of the
22 Investment Company Act.

23 So there's no way the fund here is
24 going to sue my clients for breach of contract.
25 So, under their theory, this language that

1 Congress went to all this trouble to add is
2 basically nugatory.

3 CHIEF JUSTICE ROBERTS: Counsel, you
4 cited the House report and then you said this
5 is what Congress said. Did Congress pass the
6 House report?

7 MR. CLEMENT: Of -- of course, they
8 didn't, Your Honor. And I -- and -- and,
9 obviously, a little bit loose in that language.
10 But not everybody looks at House reports and
11 Senate reports. If you don't look at them,
12 just ignore it. But, if you ever look at
13 these, when you have the same language in the
14 House report and the Senate report and they're
15 explaining what they're trying to accomplish by
16 the changes to this precise provision, my
17 friend on the other side said there's the
18 language that we talked about that's about a
19 page later in the House report and the Senate
20 report that says that the Congress of 1980
21 liked implied causes of action more than the
22 court in 1979 liked implied causes of action.

23 I don't think that's the language to
24 focus on. It's helpful to us. But the
25 critical language is a page before, where they

1 say what we are trying to do -- and the "we"
2 here is the House and the Senate, not -- not
3 Congress -- but what we are trying to do here
4 is to provide clearer statutory guidance in
5 interpreting an equitable rescission remedy.

6 JUSTICE KAVANAUGH: And why did they
7 need --

8 JUSTICE SOTOMAYOR: Counsel --

9 JUSTICE KAVANAUGH: Go ahead.

10 JUSTICE SOTOMAYOR: We've put you in a
11 difficult spot, because you usually advocate
12 against statutory history, but this is not an
13 individual legislator at a hearing or on the
14 Senate floor making a statement, correct? This
15 is the Senate and House reports that accompany
16 the bill.

17 MR. CLEMENT: That -- that's exactly
18 right.

19 JUSTICE SOTOMAYOR: All right. Now,
20 to the extent -- isn't there a difference
21 between citing to something like that as
22 opposed to citing to ad hominem statements by
23 senators --

24 MR. CLEMENT: I totally --

25 JUSTICE SOTOMAYOR: -- at a committee

1 hearing somewhere else?

2 MR. CLEMENT: Totally agree. I mean,
3 there is --

4 JUSTICE SOTOMAYOR: All right.

5 MR. CLEMENT: For those that look at
6 it, there's a hierarchy of legislative history,
7 and House reports and Senate reports are
8 towards the top.

9 But I do want to be clear that I read
10 every member of this Court as being willing to
11 look at not legislative history but statutory
12 history --

13 JUSTICE SOTOMAYOR: Statutory history.

14 MR. CLEMENT: -- and the evolution of
15 a statute. And, indeed, Justice Scalia, who
16 didn't like legislative reports, even House
17 reports very much, one of the things he looked
18 at is kind of the evolution of a statute. And
19 he found -- this is the Gwinnett County case,
20 another case where he favorably cited TAMA, if
21 you're trying to keep track of that -- and in
22 Gwinnett County, he dealt with a situation
23 where the text of the statute didn't have an
24 express cause of action. But Congress, in a
25 later statute, expressly waived the state's

1 Eleventh Amendment immunity.

2 And what Justice Scalia said in that
3 case is: Uncle. You got me.

4 I mean, at the point that you're
5 addressing secondary questions that presuppose
6 the existence of a cause of action, even if
7 there's not an express cause of action, I'm
8 going to agree that there's a cause of action.

9 JUSTICE SOTOMAYOR: But you can --

10 MR. CLEMENT: And that's --

11 JUSTICE KAGAN: Can I take --

12 MR. Clement: -- what we have here.

13 JUSTICE SOTOMAYOR: -- look at the
14 statutory context to --

15 MR. CLEMENT: Yeah.

16 JUSTICE SOTOMAYOR: -- figure that
17 out.

18 JUSTICE KAGAN: Can I take you back to
19 the language?

20 MR. CLEMENT: Sure.

21 JUSTICE KAGAN: So I -- I start from
22 the baseline that if Congress had done nothing
23 and we had decided TAMA, you know, we couldn't
24 reach two different results on the same
25 statutory language. But, in fact, Congress

1 didn't just leave well enough alone. It
2 changed a lot.

3 And whether you're going to say, you
4 know, the void is the question or -- I mean, I
5 hate to be simple-minded about this, but there
6 is a lot of red on this page when you do a
7 redline of the TAMA provision and then the
8 as-amended provision. And I wonder whether
9 that just doesn't take TAMA out of the picture
10 and say now we just look at it in the standard
11 way. We say, is -- is -- is this language
12 enough to be rights-creating?

13 MR. CLEMENT: So I think, if you look
14 at it without TAMA, there's still enough there
15 to say that there is an action. So I -- I
16 want -- you know, but in terms of the redline,
17 it's -- there's a lot of red, but it's all,
18 like, red addition. It's not struck out. The
19 three words are struck out, "shall be void."

20 And they're replaced with 120 words
21 that tell you all the details about how this
22 rescissionary action is going to proceed. And
23 the unless clause is a qualification that
24 wasn't there, but it's a qualification that
25 presupposes that you can get into court for a

1 rescission.

2 In fact, (b)(2) is kind of written in
3 this backwards way which sort of assumes that
4 the rescission is being asked for by the
5 plaintiff, and you -- the court shall not deny
6 rescission unless it makes a finding.

7 And if you want to really get deep
8 into the weeds of this, if you trace back the
9 proposed language here, it goes back to a
10 proposal that was a sort of model approach
11 to securities law by Louis Loss and it
12 originally said in (b) -- something like
13 (b)(1), it said defendant, and in (b)(2), it
14 said something like plaintiff.

15 And in all events, then you get to
16 (b)(3) and (b)(3) answers the kind of
17 second-order questions that Congress answered
18 in the Title IX context when it said we're
19 going to waive the state's sovereign immunity.
20 It says --

21 JUSTICE GORSUCH: I -- I guess,
22 though, what Justice Kagan's getting at is, all
23 right, when -- when -- when Congress says we
24 waived sovereign immunity or whatever, it's
25 pretty: Uncle, uncle, uncle. Hard to get

1 around that, right? It presupposes that there
2 is a cause of action.

3 But, here, the redline is -- takes
4 away the words "shall be void" and does a whole
5 lot of other things. And that implication is
6 not inevitable at that stage. And then it
7 really is asking us to take one last drink.

8 Thoughts?

9 MR. CLEMENT: Thoughts. I think it
10 is -- once you get to the language that they
11 added, 120 words they added by my rough count,
12 they all presuppose that there is an -- a
13 rescission remedy available at the instance of
14 any party.

15 And I do think (b)(3) are the
16 functional equivalent of waiving sovereign
17 immunity. You're basically answering the
18 question of what are we going to do about the
19 severability of the valid provisions of the
20 contract from the invalid provisions.

21 And, oh, by the way, you know, (b)(2)
22 talks about partial performance. So there are
23 going to be some situations where you rescind a
24 contract that's been partly performed. And
25 then the question is, if you got some benefit

1 from the partial performance by the side that
2 you're now rescinding the contract, do they owe
3 you, like, a hundred bucks for mowing your lawn
4 under quantum meruit? And the answer is, yes,
5 you get that unjust enrichment --

6 JUSTICE GORSUCH: I appreciate, you
7 know, there are interesting complications, some
8 of which are befuddling, and -- but it is not
9 the unmistakable, there has to be a cause of
10 action because, otherwise, you don't waive
11 sovereign immunity from it. And, in fact, the
12 language that we relied on isn't here anymore.

13 MR. CLEMENT: But -- but its
14 functional equivalent is.

15 JUSTICE GORSUCH: Okay. Its
16 functional equivalent.

17 MR. CLEMENT: From what I -- from what
18 I -- no, but when I learned contracts, it --

19 JUSTICE GORSUCH: I mean, is that our
20 test?

21 MR. CLEMENT: When -- when I learned
22 contracts, I was told that "unenforceable by
23 either party" meant void, okay, that they were
24 the same. And that was different from a
25 voidable contract that was only voidable by the

1 party, like, the infant or the minor or, you
2 know, the orphan, right, you know, that --
3 so -- so I don't think Congress changed this
4 language in any material respect except they
5 added the "unless" clause to both (b)(1) and
6 (b)(2) and they're providing a little equitable
7 play in the joints.

8 But that makes no sense unless there
9 is a rescissionary cause of action. And then
10 you get to the rescission by any party, by --
11 at the instance of any party, and --

12 JUSTICE KAVANAUGH: That's added too,
13 right? I mean -- I mean --

14 MR. CLEMENT: That's added too. And,
15 you know, the Latin root for that tells you
16 that's, like, not just at the request, that's
17 the initiation by any party.

18 So, you know, I don't know if you want
19 to go all the way back to Hale and the
20 ecclesiastical courts, but I think any fair
21 reading of this, with -- whether or not you
22 look at the House report or the Senate report
23 that tells you exactly what they were doing,
24 but any fair reading of this text --

25 JUSTICE KAVANAUGH: Why do you

1 think --

2 JUSTICE GORSUCH: I'll remember that
3 next time.

4 JUSTICE KAVANAUGH: -- why -- why do
5 you think they phrased it this way, though, the
6 "at the instance of any party"? I mean,
7 that's -- that's your hurdle, I think. I mean,
8 it also helps you, but the hurdle as it's
9 phrased, you know, in the language of the
10 court, a court may not deny rescission at the
11 instance of any party. And so it's kind of an
12 odd phrasing, I think you would acknowledge.
13 Why do you think it came out that way?

14 MR. CLEMENT: I think it came out that
15 way -- I mean, again, the honest --

16 JUSTICE KAVANAUGH: What's a theory?
17 What's a theory?

18 MR. CLEMENT: The honest answer is it
19 was based on this Louis Loss's model security
20 language that had something like this. And it
21 made a little more sense the way it was
22 originally written because (b)(1) was a pure
23 defense by the defendant, and (b)(2) was
24 rescission by the plaintiff. And, as sometimes
25 happened, they modified the words a little bit,

1 and maybe something gets a little clouded, but
2 I don't think it really gets clouded.

3 Let's say this for -- for -- for
4 starters. If you are trying to say that this
5 is only a defense that can only be raised by
6 the defendant, the worst phrase in the world
7 would be "rescission by any party," I mean,
8 because -- because that makes it clear, like,
9 it's the plaintiff or the defendant.

10 JUSTICE KAVANAUGH: Yeah, how does
11 that -- I -- I -- I think I agree with what you
12 just said. How does that even play out, do you
13 think? I mean, we're getting back to the state
14 court action, but --

15 MR. CLEMENT: And -- and I'm glad you
16 asked about that because, you know, by the time
17 my friend is done explaining how this is going
18 to play out if you don't have a federal cause
19 of action, by my count, he's got implied
20 preemption kicking in, so much for textualism,
21 but it -- but then I heard today for the first
22 time that there's somehow going to be, like,
23 implied displacement of the federal Declaratory
24 Judgment Act in a case where there's diversity
25 jurisdiction? I mean, the circus music is

1 playing over here.

2 (Laughter.)

3 MR. CLEMENT: And you avoid all of
4 that, all of that, all of the anomalous result
5 from Footnote 8, if you just say, hey, this
6 isn't that big a deal, you go in -- and --
7 and -- and keep in mind, whatever you decide in
8 this case, you are going to be able to go into
9 federal court under an equivalent action under
10 the Investment Advisers Act and the Exchange
11 Act. It's not just TAMA. It's 29(b) of the
12 Exchange Act which has the same "shall be void"
13 language, happens to actually -- Congress, in
14 1938, two years before it passed these
15 statutes, it added a statute of limitations to
16 the "shall be void" language making clear
17 beyond all cavil that that was a cause of
18 action.

19 And I think you have a similar thing
20 here. By the time they add (b)(2), by the time
21 they add (b)(3), that you can only understand
22 it --

23 JUSTICE KAVANAUGH: Do you understand
24 their implied preemption thing? I -- they --
25 what were they talking about there?

1 MR. CLEMENT: I think they were
2 talking about the fact that once you were in
3 state court and you raised this as a defense,
4 it is a uniform nationwide federal defense that
5 would displace any state law that sort of got
6 in the way of raising the state defense.

7 But, again, to me, when -- when --
8 when they're trying to get up here and bang the
9 table about, you know, text, text, text, text,
10 at the point they're relying on implied
11 preemption to make things sort of work in state
12 court, I think they've lost the theme. The
13 theme is look at the text.

14 I'm -- you know, I think this is an
15 easy case after TAMA for the reasons we
16 discussed, but I take this text straight on,
17 and this text -- I mean, rescission at the
18 instance of any party, of course --

19 JUSTICE BARRETT: But, Mr. Clement,
20 any party, if it refers "party" to the
21 contract, then it's not crazy language to use.
22 I -- I heard you say to Justice Kavanaugh that
23 that would be the worst language to use if it
24 was a defense, and I assume that you meant
25 because you're thinking of parties to the

1 litigation? Or did I misunderstand that?

2 MR. CLEMENT: No. I think either
3 way --

4 JUSTICE BARRETT: Either way.

5 MR. CLEMENT: -- it's the worst
6 language if what you're saying is it's only a
7 defense because then you would say rescission
8 by the defendant or rescission as a defense.
9 You wouldn't say rescission by any party.

10 JUSTICE BARRETT: No, but what if it's
11 party to the contract, rescission by either
12 party who wants to get out of the contract, as
13 opposed to party to the litigation?

14 MR. CLEMENT: But -- but, again, I
15 mean, you would say -- you would say rescission
16 by the defendant or rescission by -- you know,
17 as a defense. You wouldn't say rescission by
18 any party. Rescission by any party sort of
19 suggests that either, you know, the -- the
20 prince -- you know, both principals to the
21 contract could raise -- raise the issue.

22 And so it -- like, I just don't
23 understand. If you were saying it's only a
24 defense, why would you say rescission by any
25 party? Especially because keep in mind -- and

1 I'm going to give you an old chestnut here --
2 Ward against Sherman, a 1912 case from this
3 Court which described rescission as an
4 affirmative remedy. So, like, the idea --
5 like -- and -- and this Court said as much in
6 TAMA without citing my chestnut, that --
7 that -- that in -- in TAMA, like we could say
8 you can raise voidness or rescission as a
9 defense, but we've never thought of it as being
10 only a defense. The customary incident of
11 voidness includes an affirmative right to
12 rescission.

13 And one way to think about this and
14 the way I think about this, and I think it's
15 the way the SEC was thinking about this in
16 2001, is TAMA probably is fairly described as
17 finding an implied right to rescission because
18 it had to get from the word "voidness" to the
19 incidents of voidness, which include
20 rescission, which requires a little bit of
21 implication.

22 I think, after 1980, we're out of
23 implied cause of action land. We are into
24 express textual references to rescission by any
25 party.

1 JUSTICE BARRETT: There's an express
2 cause of action in the ICA, though. What
3 about -- and that's a difference between this
4 and the IAA and TAMA, that there is an express
5 cause of -- cause of action in this statute.

6 MR. CLEMENT: Remember, the party that
7 was resisting even an implied right to
8 rescission in TAMA raised Sections 30 and 36 of
9 the ICA. And they also raised some other
10 express causes of action in other provisions of
11 the securities law. And they said these --
12 this shows you that when they want to do an
13 express cause of action, they know how to do
14 it.

15 And that didn't deter the majority in
16 TAMA, which, of course, included Justices
17 Rehnquist and Justice Powell, from finding the
18 rescission remedy. And, of course, that
19 decision -- you know, there's -- there's the
20 transition from, yes, we're finding a
21 rescission remedy to, no, we're not finding a
22 damages remedy. And the Court says it's quite
23 different. So, in TAMA, they expressly
24 considered the same causes of action for
25 damages, and it didn't -- in -- in the ICA, and

1 it didn't stop them from inferring a rescission
2 remedy in the IAA.

3 And now, like, my friend will tell
4 you, well, yeah, but this time they're the
5 exact same statute. But that makes very little
6 difference in the context of these two
7 particular statutes, which were passed the same
8 day in the same act of Congress.

9 And so -- and, indeed, if anything,
10 the argument that was kind of made in TAMA is,
11 look, the Investment Company Act, they wanted
12 some remedial stuff because they had these two
13 damages actions, so they probably would have
14 been more forgiving of wanting a rescission
15 action.

16 So I just don't think you can get
17 there from that. I think TAMA got it right on
18 the rescission, but it was by implication. I
19 think, after 1980, it's no longer even by
20 implication. And that's, I think, what the SEC
21 was saying in 2001 when they said -- and, you
22 know, dictum, I don't know -- I didn't know
23 amicus briefs could have dictum, but they said
24 it six times. So it was a pretty considered
25 position.

1 And, by the way, it was all in service
2 of getting the Second Circuit not to come up
3 with an implied damages remedy. The SEC told
4 the Second Circuit: You don't have to do that
5 because there is an express remedy in the
6 statute.

7 JUSTICE KAVANAUGH: That's the same as
8 TAMA then, right?

9 MR. CLEMENT: What's that?

10 JUSTICE KAVANAUGH: That's the same as
11 Transamerica: Don't have the damages remedy;
12 just have the rescission.

13 MR. CLEMENT: Yes, exactly.

14 JUSTICE KAVANAUGH: And that was --

15 MR. CLEMENT: And I will say this. I
16 mean, you know --

17 JUSTICE KAVANAUGH: They were 9-0 on
18 the rescission and 5-4 on the damages, right?

19 MR. CLEMENT: They were -- exactly.
20 Exactly. And --

21 JUSTICE KAVANAUGH: But -- but can
22 I -- well, keep going. Sorry.

23 MR. CLEMENT: Yeah, I'd just like to
24 make this point about this, which is, like,
25 there's a huge difference between a damages

1 action, which is going to attract all sorts of
2 litigation, and a rescission action, which is
3 about the most targeted kind of relief you can
4 get. And there just isn't a lot of money in
5 most cases in rescission.

6 JUSTICE KAVANAUGH: Well, but this is
7 what I was going to ask. The amicus briefs say
8 if we agree with -- some of the amicus briefs
9 on the other side, in addition to Petitioners
10 and the SEC, I think, used phrases like
11 "chaos," "disruption," kind of tossed those
12 around. So I want to -- you know --

13 MR. CLEMENT: I'm -- I'm glad you
14 asked. So let's --

15 (Laughter.)

16 MR. CLEMENT: -- let's start with the
17 last six years in the Second Circuit, okay? I
18 eventually want to talk about history going
19 back to the Exchange Act in 1935 and the
20 Investment --

21 JUSTICE KAVANAUGH: Let's just go to
22 the last six years.

23 MR. CLEMENT: Let's just go to the
24 last six years.

25 (Laughter.)

1 MR. CLEMENT: Now I would say, in most
2 circumstances, just six years in one circuit,
3 not that big a deal. But, in a financial case,
4 six years in the Second Amendment -- in the
5 Second Circuit is --

6 (Laughter.)

7 MR. CLEMENT: Freudian. Six years in
8 the Second Circuit is a long time. And I
9 looked at those amicus briefs, and I actually
10 tracked down what's happened in the Second
11 Circuit. As far as I can tell, there's really,
12 like, two sets of litigation. There's the
13 litigation my clients are bringing. And I
14 think we're on the side of the angels trying to
15 liberate shareholders and increase net asset
16 value, okay, so -- so I'll defend those to
17 the -- to the end.

18 The other cases I found, there are
19 three cases they cite that involve challenges
20 to SPACs, okay? Here's what actually happened
21 in those cases. Those three SPACs, like,
22 raised a bunch of money thinking they had some
23 great new idea, and then that idea sort of
24 petered out, and they hung on to their money
25 for, like, 18 months. And at that point,

1 somebody said, geez, this looks like an
2 unregulated investment company because they're
3 holding on to all this money for purposes of
4 investment and they haven't done anything with
5 it. And so they brought that action.

6 The SEC -- I think it was in the last
7 administration, but the SEC looked at it and
8 said, yeah, actually, this is a problem. And
9 then they created a new rule that says you
10 basically have 18 months when you have a SPAC
11 before you need to actually take those funds
12 and invest them. Otherwise, you either got to
13 give the money back or you got to, you know,
14 satisfy all the requirements for an investment
15 company. And then those cases settled
16 favorably to the plaintiffs.

17 And that's it as far as I could tell.
18 That's -- that's -- that's the floodgates have
19 opened. And I think the reason for that -- and
20 then, of course, we've had rescission actions
21 under the Exchange Act since 1935. I don't
22 think there's been a moment under the Exchange
23 Act where courts didn't think there was a cause
24 of action for rescission under the Exchange
25 Act.

1 In 90 years, floodgates have not
2 opened. Now why is that? Because there's just
3 not the same money in rescission that there is
4 in a damages action.

5 And, by the way, like, rescission
6 isn't even as forceful a remedy as an
7 injunction. You know, under injunction, you
8 can run a prison, right? Like rescission, all
9 you can do is take this one contract and a
10 severable provision of the contract if you look
11 at (b)(3), take this one provision of the
12 contract and you knock it out.

13 Now there are circumstances like this
14 case where doing so is incredibly important,
15 but it's just not going to attract the
16 plaintiffs bar or this flood of cases or this
17 parade of horrors.

18 JUSTICE GORSUCH: Does that make it
19 any more acceptable for us to imply a cause of
20 action? Does it matter? Do we have any more
21 power to imply a modest cause of action as
22 opposed to a substantial one? And, if so, what
23 standard do we use to tell the difference?

24 MR. CLEMENT: So I don't think, at the
25 end of the day --

1 JUSTICE GORSUCH: And, again, is this
2 another -- is this another --

3 MR. CLEMENT: I don't -- I don't --
4 but -- but I'm asking you to exply. I'm not
5 asking you to imply. I'm just asking you to
6 read the text of the statute.

7 JUSTICE GORSUCH: Well, your -- your
8 brief says it's one thing to imply damages and
9 it's another thing to imply rescission. It's
10 right out of your brief.

11 MR. CLEMENT: Yeah. And I think that
12 fairly describes what the Court was thinking in
13 TAMA. And --

14 JUSTICE GORSUCH: But I'm just asking
15 you, do you -- is it your position that you
16 think it's okay to imply rescission but not
17 damages?

18 MR. CLEMENT: I don't actually. But,
19 but -- but --

20 JUSTICE GORSUCH: Okay. I wouldn't --
21 I'm glad to hear it.

22 JUSTICE KAVANAUGH: But your --

23 MR. CLEMENT: Yeah. But -- but I do
24 think there are circumstance we're looking at
25 the same text.

1 JUSTICE GORSUCH: No, I understand --

2 MR. CLEMENT: Yeah, okay. Okay --

3 JUSTICE GORSUCH: -- your argument
4 about text.

5 MR. CLEMENT: -- okay.

6 JUSTICE GORSUCH: I just -- I just --

7 MR. CLEMENT: And -- and I do think --
8 but I will say this. I don't think it's okay,
9 but it is less disastrous to do it, I mean,
10 because I do think, particularly with the
11 rescission --

12 JUSTICE GORSUCH: Less disastrous
13 for -- for -- for private litigants perhaps but
14 pretty disastrous for -- for our system of
15 government, where the people are supposed to
16 write the laws that govern them, not judges.

17 MR. CLEMENT: Yeah, I get it. But --
18 but -- but --

19 JUSTICE GORSUCH: You get it, the
20 separation of powers might be disastrous?

21 (Laughter.)

22 MR. CLEMENT: No, I get it, I get it,
23 but, look -- at the end of the day, look at
24 their position. They have the same
25 separation-of-powers problems and now they have

1 huge federalism problems because they admit
2 this isn't -- this isn't the normal --

3 JUSTICE GORSUCH: I'm talking about
4 implied causes of action. And it seems to me
5 you've -- you've acknowledged that it would be
6 bad -- not okay at least for us to imply any
7 cause of action.

8 MR. CLEMENT: And you don't have to do
9 it here.

10 JUSTICE GORSUCH: I've got you.

11 MR. CLEMENT: And -- and --

12 JUSTICE KAVANAUGH: Because it refers
13 to rescission, right? I mean, that's --

14 MR. CLEMENT: It does, rescission by
15 any party.

16 JUSTICE KAVANAUGH: Rescission's in
17 the text.

18 MR. CLEMENT: Right. This is not a
19 one last swig.

20 JUSTICE JACKSON: Mr. --

21 MR. CLEMENT: This is look at this
22 text. This text says rescission --

23 JUSTICE KAVANAUGH: Could you deal --
24 so it's a federal court, state court issue as I
25 see it. Like, this is going to happen. It's

1 just going to happen in federal court or state
2 court.

3 Now they say -- they cite Thompson a
4 lot, so you need to respond to Thompson.
5 Obviously, that's on the kidnapping, you know,
6 child custody situation, state courts -- deal
7 with Thompson.

8 MR. CLEMENT: Please. So, first of
9 all, let me -- let me -- can I -- can I start
10 with the dissent.

11 Justice Scalia, Thompson, another case
12 where he cites TAMA favorably in his -- yeah,
13 it's a concurrence, it's a concurrence --

14 JUSTICE KAVANAUGH: Yeah. Yeah.

15 MR. CLEMENT: -- sorry, but he cites
16 TAMA favorably in the concurrence. Now I
17 wouldn't overread the majority opinion in
18 Thompson. Thompson is a majority opinion --

19 JUSTICE KAVANAUGH: In Thompson, yeah.

20 MR. CLEMENT: In Thompson. Am I --

21 JUSTICE KAVANAUGH: Yeah.

22 MR. CLEMENT: I would not overread the
23 majority opinion in Thompson because Thompson
24 finds no cause of action in the Parental
25 Kidnapping Act and it's an easy case. I mean,

1 the majority opinion is written by Justice
2 Marshall. Talk about sort of the anti-Scalia
3 when it comes to being comfortable with implied
4 causes of action, but even he doesn't find one
5 in the parental kidnapping act.

6 Now here's why. That statute was
7 passed as essentially pursuant to Congress's
8 power to implement the Full Faith and Credit
9 Clause. And in that context, a statute that is
10 addressed to the courts is almost certainly
11 assuming that you've already got a judgment
12 under some other cause of action and the
13 question for the courts is should the courts
14 give full faith and credit to that earlier
15 action.

16 And in that context, to try to go into
17 court and affirmatively use this full faith and
18 credit statute to have a cause of action, an
19 initial cause of action is a complete misfit.
20 That's why it's nine-zip against that.

21 But I think it would be a huge mistake
22 to say that a provision directed to the courts
23 is somehow a strike against something being an
24 express cause of action because, actually, if
25 you're thinking not about the questions under

1 1981, where 1981 provides the vessel and this
2 is just a statute that affects individual
3 rights.

4 When you're actually talking about
5 something that may very well be and in my view
6 is an express cause of action, it's not at all
7 anomalous to refer to the courts in that
8 because the courts are the ones that are going
9 to administer the cause of action.

10 So it doesn't make any difference
11 whether you say the courts shall not deny
12 rescission unless or if you have, say, a party
13 has a right to rescission in court unless the
14 court -- like, they're the same thing. So
15 it -- you know, it is a strike and I -- and I
16 don't -- don't want to be misunderstood about
17 this. Like, it is a strike against the statute
18 in the 1981 case if it were directed to the
19 courts and not to the private party.

20 But, when you have something like
21 this, where the question is, is 47(b) an
22 express cause of action, then the fact that it
23 talks about the courts is not a strike against
24 it. It's pretty normal to say that an express
25 cause of action is going to be directed to the

1 courts. The courts are the ones that are going
2 to apply it.

3 And let's hope it's the federal
4 courts. I mean, I have to say, like, at the
5 end of the day, I think, if my friends on the
6 other side win this case but win it on the
7 grounds that all these things have to go to
8 state court, they're going to rue the day.

9 I mean, from the perspective of what
10 they care about, disrupting the SEC's
11 enforcement actions and all of that kind of
12 stuff, like, the one thing worse than having
13 the occasional rescission remedy in federal
14 court is 50 state courts going on and
15 interpreting the Investment Company Act on a
16 routine basis. And that's the world they
17 envision.

18 Or, you know, in fairness to
19 Petitioners, what they really envision is that
20 they're going to interpret this into nothing.
21 And so all this 120 words about rescission by
22 any party is never going to happen because no
23 investment company is ever going to actually go
24 to the trouble of sharing its -- suing its
25 shareholders for breach of contract in a state

1 court.

2 JUSTICE KAVANAUGH: One -- one comment
3 more for Petitioner on rebuttal, but I'll get
4 it out there, is that Thompson does make clear
5 then in the context of custody determinations
6 and full faith and credit, it's a mandate
7 directed to state courts, which, you know, I'll
8 just throw that out there and let you speak to
9 that.

10 MR. CLEMENT: Yeah. No, no. And,
11 again, in the full faith and credit context,
12 which is a very specific context where, like,
13 yeah, you're telling the courts what their
14 directions are about giving sort of credit to
15 judgments that you assume have already happened
16 in some other court, and in that context, it's
17 custody, so, of course, it's going to be state
18 court.

19 But, you know, again, that was -- that
20 argument that was made there was a 9-0 loser in
21 an opinion written by Justice Marshall. That's
22 not the -- that's not the edge case that tells
23 you how to interpret every other statute.

24 JUSTICE JACKSON: Mr. Clement, I
25 thought it interesting in the amicus brief for

1 the securities law scholars that they looked at
2 the historical context. And I don't know to
3 what extent that matters to all of us, but it
4 looks as though these -- this language, even
5 the void and they say even the amendment really
6 mirrors or tries to incorporate the state Blue
7 Sky laws and the sort of pedigree of this is
8 that everybody really understood that a private
9 right of action was necessary in this kind of
10 context to -- for a rescission in order to aid
11 compliance with the state and federal
12 securities laws in this way.

13 So it was sort of like the background
14 under which these types of provisions came into
15 being. Do you agree with that perspective?

16 MR. CLEMENT: I -- I -- I agree with
17 that. I think that is a very helpful brief. I
18 mean, not everybody's going to give it full
19 faith and credit, but -- but I think it's a
20 very helpful brief.

21 And I think the point at which it
22 becomes most helpful is when they sort of
23 explain the transition from the state Blue Sky
24 laws to the Exchange Act of '34 and Section
25 29(b) because that's the first statute that

1 used the "shall be void" language. And, of
2 course, everybody kind of understood and it was
3 quite -- if I can finish?

4 CHIEF JUSTICE ROBERTS: Sure.

5 MR. CLEMENT: It was quite
6 uncontroversial that 29(b) created a right to
7 rescission, and that's the -- the same language
8 that carried over into the Investment Advisers
9 Act and -- and the Investment Company Act.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Alito?

14 Justice Sotomayor? No?

15 Justice Kagan?

16 Justice Gorsuch?

17 Justice Kavanaugh? Justice Kavanaugh?

18 Justice Barrett?

19 Justice Jackson?

20 Okay, thank you, counsel.

21 Rebuttal, Mr. Dvoretzky?

22 REBUTTAL ARGUMENT OF SHAY DVORETZKY

23 ON BEHALF OF THE PETITIONERS AND BLACKROCK

24 RESPONDENTS SUPPORTING THE PETITIONERS

25 MR. DVORETZKY: Thank you, Mr. Chief

1 Justice.

2 I think the colloquy here today shows
3 that this is about the most roundabout way that
4 one could write a cause of action. If Congress
5 wanted to create a right to sue here, it could
6 easily have specified who can go to court, for
7 what, whether it's for damages or for
8 rescission, against whom. It didn't do any of
9 those things in this statute.

10 And so what -- what was Congress
11 possibly concerned with here? One thing, we
12 know Congress was concerned with the level of
13 enforcement and with where it was going to
14 happen. We know that because Congress pulled
15 back on the rescission remedy by adding the
16 balancing requirement and the severance
17 requirement, and that shows that Congress was
18 concerned about over-enforcement.

19 Congress in this statute made the SEC
20 the primary enforcer of the ICA. It also
21 allowed the SEC to grant exemptions, which
22 again shows that Congress was concerned about
23 over-enforcement.

24 What Congress didn't try to do in
25 47(b)(2) was create a back-door cause of action

1 that would allow anybody into court, any -- any
2 party to sue over any violation of the ICA
3 anywhere.

4 With respect to Justice Sotomayor's
5 question about how investors could be trapped
6 under these impermissible bylaws, one, again,
7 the SEC has taken positions on that issue, and
8 depending on the presidential administration,
9 it's gone both ways. So it's the SEC that's
10 the primary enforcer of that.

11 With respect to my friend's comments
12 about closed-end funds, we're actually the ones
13 who are the angels here. These closed-end
14 funds are ones that provide a reliable and
15 important long-term stream of income for
16 retirees and the -- the strategy on the other
17 side is to acquire a significant share, go in,
18 change the investment strategy of the fund, and
19 then cash out. That's precisely one of the
20 things that Section 1 of the ICA says that
21 Congress was concerned about when it passed
22 this statute.

23 With respect to TAMA, I do think that
24 even -- even under the pre-1980 version of
25 Section 47(b), this Court today would look at

1 that and reach a different result.

2 I think TAMA, as my friend from the
3 government said, characterized it as a
4 transitional case. The standards up at the
5 front of the opinion, which are what Justice
6 Scalia latched onto, the 206 analysis, spot on.

7 The 215 analysis, reading a lot into
8 "void," relying on Mills, which was a -- an
9 ancien régime era case relying on legislative
10 history, not so much. So I -- I don't think
11 that the Court would read the statute today in
12 the way that TAMA did.

13 But, critically, again, Congress
14 changed the key language that TAMA relied on.
15 The three critical words are gone from
16 the current version.

17 With respect to damages versus
18 injunctive relief, Sandoval itself involved
19 injunctive relief. The Armstrong case later
20 involved injunctive relief as well, and the
21 separation-of-powers concerns are the same.

22 Justice Kavanaugh, with respect to
23 what happens in state court, just to clarify
24 the point about preemption, again, I don't
25 think you need to decide this here, but I think

1 what would be preempted is an affirmative cause
2 of action under state law to seek rescission.
3 The reason that would be preempted is that
4 Congress created a federal rule of decision,
5 and the -- the -- the mischief that would
6 result, I think, is illustrated in particular
7 by the Yahoo case in the Ninth Circuit if you
8 wanted to look at that.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 The case is submitted.

13 (Whereupon, at 1:26 p.m., the case was
14 submitted.)

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1 1 [1] 93:20 10 [3] 57:3 59:16,20 120 [3] 64:20 66:11 88:21 150 [1] 55:18 18 [3] 11:9 79:25 80:10 18(i) [1] 59:21 1912 [1] 74:2 1935 [2] 78:19 80:21 1938 [1] 71:14 1979 [1] 60:22 1980 [12] 7:6 12:11 13:15 37:24 38:14 43:10,22 47:5 49:13 60:20 74:22 76:19 1981 [3] 87:1,1,18 1983 [4] 16:23 17:1,8 18:6 2 2001 [6] 24:2,5,25 51:19 74:16 76:21 2012 [1] 45:15 206 [3] 10:18 42:6 94:6 215 [4] 10:17 23:14 43:24 94:7 27 [1] 57:1 287 [1] 35:3 288 [1] 35:3 29(b) [3] 71:11 90:25 91:6 290 [1] 15:14 3 30 [1] 75:8 30(h) [1] 7:24 34 [1] 90:24 36 [3] 20:6 47:20 75:8 36(b) [1] 7:24 4 47 [1] 57:10 47(b) [15] 7:7 10:23 25:19 27:19 29:8 34:9 35:14,16 36:15 37:4 44:8 52:2 55:18 87:21 93:25 47(b)(1) [1] 33:18 47(b)(2) [3] 8:6 45:14 92:25 5 50 [1] 88:14 5-4 [1] 77:18 8 8 [4] 23:11 25:1 57:21 71:5 9 90 [1] 81:1	9-0 [2] 77:17 89:20 A ability [1] 30:22 able [2] 20:10 71:8 absolutely [2] 42:12 51:1 acceptable [1] 81:19 accompany [1] 61:15 accompanying [1] 12:11 accomplish [1] 60:15 according [4] 26:4,4,5,5 acknowledge [1] 69:12 acknowledged [1] 84:5 acquiescing [1] 44:6 acquire [1] 93:17 across [2] 17:15,22 act [34] 16:4 19:15 36:15 37:19,24 38:15,17,19 40:12,13 43:24,25 44:7,9 48:8 59:3,12,22 70:24 71:10,11,12 76:8,11 78:19 80:21,23,25 85:25 86:5 88:15 90:24 91:9,9 acted [1] 46:25 actions [5] 52:16 54:9 76:13 80:20 88:11 actual [1] 55:21 actually [17] 23:6 24:4 27:8 31:6 43:4 46:14 59:8 71:13 79:9,20 80:8,11 82:18 86:24 87:4 88:23 93:12 ad [1] 61:22 add [6] 23:2 29:16,20 60:1 71:20,21 added [7] 13:16 66:11,11 68:5,12,14 71:15 adding [2] 56:25 92:15 addition [3] 7:21 64:18 78:9 address [2] 23:12 28:23 addressed [1] 86:10 addresses [1] 56:17 addressing [1] 63:5 adds [1] 56:1 adjunct [1] 12:15 administer [1] 87:9 administration [4] 24:3 56:14 80:7 93:8 admit [1] 84:1 adopt [1] 23:16 advisers [9] 37:19 38:15,18 40:13 43:24,25 44:7 71:10 91:8 advisor [2] 31:4,10 advisors [1] 48:24 advisory [1] 48:24 advocate [1] 61:11 affects [1] 87:2	affirmative [4] 26:9 55:3 74:4,11 affirmatively [2] 7:12 86:17 afterwards [1] 21:20 agnostic [3] 44:19,23 52:20 agree [16] 32:7 37:17 39:8 44:14,20 45:3 46:7 49:9 57:17 58:22 62:2 63:8 70:11 78:8 90:15,16 ahead [2] 17:17 61:9 aid [1] 90:10 alito [3] 22:6 51:11 91:13 alleges [1] 37:8 allow [2] 49:12 93:1 allowed [2] 45:8 92:21 almost [1] 86:10 alone [3] 22:17 38:19 64:1 already [6] 20:11 21:4 41:7 50:24 86:11 89:15 although [1] 38:21 amend [1] 43:24 amended [2] 35:13 43:23 amendment [3] 63:1 79:4 90:5 amendments [3] 12:11 43:22 47:6 amici [1] 53:22 amicus [7] 29:5 36:8 76:23 78:7,8 79:9 89:25 among [3] 11:18 40:12 48:4 analogized [1] 18:8 analysis [6] 9:14 13:10 17:6 42:5 94:6,7 analyzes [1] 52:3 ancien [3] 41:9 49:25 94:9 angels [2] 79:14 93:13 anomalous [5] 23:16,23 26:15 71:4 87:7 anomalously [1] 57:21 another [9] 39:19 40:10 48:6,12 62:20 82:2,2,9 85:11 answer [4] 17:19 24:1 67:4 69:18 answered [2] 11:19 65:17 answering [1] 66:17 answers [1] 65:16 anticipated [1] 54:15 anti-scalia [1] 86:2 anybody [3] 56:21 59:19 93:1 anyway [1] 52:18 apart [1] 17:3 app [1] 47:20 apparent [1] 48:22 appears [1] 57:2 applied [1] 44:4 applies [1] 51:5	apply [5] 7:19 36:24 37:5 53:5 88:2 applying [2] 18:21 30:2 appreciate [2] 33:4 67:6 approach [2] 50:13 65:10 appropriate [1] 48:9 approving [3] 41:20,23,24 area [1] 54:7 areas [1] 40:19 aren't [1] 21:4 arguing [1] 53:11 argument [23] 20:14 21:4 31:13 33:6,11,18,19,24 34:8,21 36:7 37:14 43:8,18 52:12,21 55:1,10,14 76:10 83:3 89:20 91:22 arise [1] 56:18 armstrong [1] 94:19 around [2] 66:1 78:12 as-amended [1] 64:8 ash [2] 41:3,8 aside [1] 49:16 aspects [1] 42:1 assess [1] 34:14 asset [2] 59:18 79:15 assume [2] 72:24 89:15 assumes [1] 65:3 assuming [1] 86:11 attempting [1] 54:25 attract [2] 78:1 81:15 authority [1] 37:1 authorize [2] 36:23 37:7 available [3] 47:3 48:6 66:13 avoid [1] 71:3 aware [2] 27:7 54:13 away [6] 7:20 11:2,24 32:6 44:9 66:4 B b)(1) [14] 7:8 12:1 14:9,12 20:23 21:1,8,10,17,24 56:1 65:13 68:5 69:22 b)(2) [19] 7:8,13 14:15 19:2,8 20:23 21:1,5,8,10,24 33:18 56:11 65:2,13 66:21 68:6 69:23 71:20 b)(3) [6] 56:16 65:16,16 66:15 71:21 81:11 back [13] 23:20 32:3 43:10 50:12,23 63:18 65:8,9 68:19 70:13 78:19 80:13 92:15 back-door [1] 92:25 background [1] 90:13 backwards [1] 65:3 bad [4] 41:15,18 59:14 84:6
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