No. 24-345

In the Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL., PETITIONERS

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.

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

BRIEF FOR THE INVESTMENT COMPANY INSTITUTE AND THE ASSET MANAGEMENT GROUP OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI*

The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts in the United States. ICI seeks to strengthen the foundation of the asset management industry for the ultimate

* All parties have been informed of the filing of this amici curiae brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

benefit of the long-term individual investor. ICI's members manage $40.5 trillion invested in funds registered under the Investment Company Act of 1940 (ICA), 15 U.S.C. 80a-1 *et seq.*, serving over 120 million United States investors, and they manage an additional $9.5 trillion in regulated fund assets outside the United States.

ICI works to protect and advance the interests of fund shareholders through advocacy directed at ensuring a sound legal and regulatory framework. ICI's extensive research enhances its advocacy, and its regular research reports include, for example, an annual empirical review of trends and activities in the fund industry. See ICI, 2025 Investment Company Fact Book (2025), https://www.icifactbook.org/pdf/2025-factbook.pdf.

The Asset Management Group of the Securities Industry and Financial Markets Association (SIFMA AMG) represents a wide range of asset management firms, providing views on U.S. and global policy and creating industry best practices. SIFMA AMG's members represent U.S. and global asset management firms—both independent and broker-dealer affiliated—that manage more than 50% of global assets under management. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, and private funds.

ICI and SIFMA AMG submit this brief as amici curiae to urge the Court to reverse.

SUMMARY OF THE ARGUMENT

Petitioners' opening brief sets forth compelling reasons why the text and structure of the ICA cannot be read to provide an implied private right of action for

rescission of contracts under Section 47(b), 15 U.S.C. 80a-46(b). In erroneously holding otherwise, the Second Circuit disregarded the principles of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and thus looked past the clear evidence of Congress's intent in the statute's language—including in particular the provision of two express private rights of action in Sections 30(h) and 36(b) of the ICA, the absence of any rights-creating language in Section 47(b), and the broad mandate for the SEC alone to enforce the ICA. To supplement these cogent textual arguments, undersigned amici respectfully submit this brief to provide additional context regarding the harm to fund shareholder interests threatened by the recognition of private rights of action under Section 47(b). Such negative consequences further illustrate why there is no basis to infer Congressional intent to deputize shareholders to enforce the provisions of the ICA in contravention of the SEC's express and nearly exclusive authority.

Registered funds governed by the ICA—including mutual funds, ETFs, and closed-end funds—are a critical means for tens of millions of U.S. households to meet their retirement savings and other financial goals. The regulatory and governance structure created by the ICA is the bedrock of this key sector of the U.S. economy, fostering dramatic growth and innovation of investment products that provide retail investors with low-cost access to financial security through diversified professional portfolio management. The availability of an unintended private right of action under Section 47(b) risks upending this critical framework, causing significant regulatory uncertainty and wasteful litigation to the ultimate detriment of fund shareholders.

Registered funds are among the most highly regulated financial products in the market. The ICA and rules promulgated thereunder by the SEC set forth detailed requirements for a fund's governance, capital structure, and daily operations. These substantive requirements are in addition to a number of ICA-specific disclosure and reporting requirements, 15 U.S.C. 80a-8(b), as well as the disclosure obligations imposed on public companies generally under other securities laws, which likewise apply to registered funds, 15 U.S.C. 80a-8(c).[1] The cornerstone of registered fund governance is oversight by independent directors who are unaffiliated with the fund's investment adviser. Directors are assigned both plenary supervisory authority and many specific oversight responsibilities—including approving and monitoring the service agreements between funds and their investment advisers (and other services providers). Because fund management and operations are nearly always fully externalized (*i.e.*, funds almost never have dedicated employees of their own), these service agreements cover essentially every action required to create and operate a fund. The ICA further imposes specific substantive requirements on the operations and management of funds, including limits on the use of leverage; strict custody of fund assets separate from the

[1] In addition to the ICA, registered funds are subject to many other provisions of the securities laws, including extensive securities registration and disclosure requirements under the Securities Act of 1933 (Securities Act), 15 U.S.C. 77a *et. seq.* The Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, governs proxy solicitations in funds, funds' trading activities in portfolio securities, and broker-dealers' distribution of fund shares, among other areas, while investment advisers to funds are governed by the Investment Advisers Act of 1940 (IAA), 15 U.S.C. 80b-1 *et seq.*

adviser's assets; and prohibitions on transactions with affiliates—all designed to protect fund shareholders. By contrast, public operating companies and their boards and managers, though subject to the *disclosure* obligations under the securities laws, do not face analogous *substantive* mandates regarding corporate governance, capital structure, and daily operations. In this regard, the ICA is fundamentally different from other securities laws, and registered funds are governed and regulated in a fundamentally different way than other public companies.

Congress granted sole regulatory authority to enforce the ICA to the SEC, which devotes significant resources to the regular examination of registered funds and their advisers to assess compliance, as well as the investigation of potential violations by the SEC's Division of Enforcement. At the same time, the ICA also grants the SEC authority to define exemptions to the statute's requirements, which has resulted in a series of crucial exemptive rules and orders allowing innovative fund products and practices that would otherwise be prohibited by the statute's broad proscriptions, including such widely utilized products as ETFs and money market funds. In addition to its formal exemptive authority, the SEC and its staff frequently issue interpretative guidance to the industry (including via staff "no-action" letters) regarding compliance with the ICA's provisions. Unsurprisingly, given the central role of the SEC in this framework, the ICA contains only two express private rights of action. First, under Section 30(h) (originally Section 30(f) as adopted in 1940, now codified at 15 U.S.C. 80a-29(h)), Congress authorized private suits for damages against certain insider defendants profiting from short-swing trading by incorporating the

private right of action in Section 16(b) of the Securities Exchange Act, 15 U.S.C. 78b(b). Second, under Section 36(b), Congress explicitly allowed shareholders to bring private claims for excessive fees paid by a fund to its investment adviser. Following *Alexander*, courts have consistently declined to read implied private rights of action into the ICA, including under Section 47(b)—until the Second Circuit's ill-considered decision in *Oxford University Bank* v. *Lansuppe Feeder, LLC*, 933 F.3d 99 (2019), at issue here.

The availability of a private right of action under Section 47(b) of the ICA, as inferred by the court in *Oxford University Bank*, threatens to disrupt the stable and well-developed regulatory framework relied upon by funds and their boards and advisers in serving U.S. retail investors. Authorizing fund shareholders—whose interests may diverge from one another—to sue for "rescission" of a contract "whose performance involves * * * a violation of" the ICA would open a back door for private suits alleging violations of the statute's many *other* substantive provisions, whose enforcement is the sole province of the SEC. See, *e.g.*, *Oxford Univ. Bank*, 933 F.3d at 107. Virtually *any* alleged misstep under the ICA might be construed by plaintiffs as being part of the "performance" of a contract, thus giving rise to an ostensible action for rescission of the entire contract. Handing such a skeleton key to shareholders and the plaintiffs' bar would in effect invite them to assume the role of private attorneys general to enforce the substantive provisions of the ICA alongside the SEC and to second-guess the judgments of the independent directors Congress identified as the first-line protectors of shareholder interests. There is no statutory basis to believe Congress intended this result under the ICA's unique structure.

One example of this back door scenario is presented by the current litigation. Because the by-laws and other governing documents of a fund are treated by many states' laws as contracts between a fund and its shareholders, so-called "activist" investors like respondents Saba Capital Master Fund, Ltd. and Saba Capital Management, L.P. (together, Saba) have in numerous cases since the Second Circuit's decision in *Oxford University Bank* seized upon Section 47(b) as an entry point to challenge closed-end fund by-laws as violating other provisions of the ICA regarding fund capital structure and board elections. Saba's transparent agenda in asserting these claims is to further its closed-end fund "arbitrage strategy," seeking to dismantle funds to obtain short-term profits at the expense of other shareholders—often retirees with long-term investment goals who desire a steady income stream and are less concerned about short-term price swings. Tellingly, the SEC has not taken any enforcement action to embrace Saba's theories and challenge the by-laws in question as violating the ICA.

But the back door threat posed by a Section 47(b) private right of action extends well beyond the closed-end fund "activist" context. Given the fully externalized management of nearly all registered funds, virtually every task involved in sponsoring and managing a fund and distributing its shares is undertaken by the investment adviser or other service providers pursuant to a written agreement with the fund in exchange for a fee. If fund shareholders can assert derivative or direct claims for "rescission" of such service agreements—and disgorgement of the fees—based on alleged violations of other ICA provisions in the "performance" of the contracts (regardless of whether the SEC considers the

statute or a rule to have been violated), the potential claims contrived by the private plaintiffs' bar are almost limitless in scope. And given the large dollar amounts at stake in many fund agreements, the incentive to assert such claims would be substantial. The extensive history of private litigation involving the registered fund industry bears this out. Funds and their advisers and boards have been targeted for decades by class action plaintiffs' lawyers, motivated by the desire to score a large attorney fee from perceived "deep pocket" defendants.[2] Recognizing a Section 47(b) private right of action could be tantamount to declaring open season on the SEC's interpretation of the ICA's substantive provisions (and funds' reliance on it), leading the plaintiffs' bar to press its own interpretations in pursuit of a payday. A flood of new litigation could risk contradictory interpretations and regulatory uncertainty, and would certainly impose massive litigation costs and distraction, all to the ultimate detriment of registered fund shareholders.

The Second Circuit's decision should be reversed.

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[2] The litigation faced by registered funds and their advisers and boards has included many claims alleging excessive advisory fees under Section 36(b) of the ICA and claims of misleading disclosures under the Securities Act and Exchange Act. Such actions are brought under recognized express private rights of action, and their availability will be unaffected by the Court's decision regarding the availability of an implied right of action under Section 47(b).

ARGUMENT

I. THE ICA HAS PROVIDED A STABLE REGULATORY FRAMEWORK ENABLING THE GROWTH OF REGISTERED FUNDS, GIVING SHAREHOLDERS READY ACCESS TO FINANCIAL SECURITY THROUGH LOW-COST DIVERSIFIED PROFESSIONAL PORTFOLIO MANAGEMENT

"Congress adopted the [ICA] because of its concern with 'the potential for abuse inherent in the structure of investment companies.' Unlike most corporations, an investment company is typically created and managed by a preexisting external organization known as an investment adviser." *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 536 (1984) (quoting *Burks* v. *Lasker*, 441 U.S. 471, 480 (1979)). "Recognizing that the relationship between a fund and its investment adviser was 'fraught with potential conflicts of interest,' the [ICA] created protections for mutual fund shareholders." *Jones* v. *Harris Assocs. LP*, 559 U.S. 335, 339 (2010) (quoting *Daily Income Fund*, 464 U.S. at 536-538, *Burks*, 441 U.S. at 481-82).

> In order to minimize such conflicts of interests, Congress established a scheme that regulates most transactions between investment companies and their advisers, 15 U.S.C. § 80a-17; limits the number of persons affiliated with the adviser who may serve on the fund's board of directors, § 80a-10; and requires that fees for investment advice * * * be governed by a written contract approved by both the directors and the shareholders of the fund, § 80a-15.

Daily Income Fund, 464 U.S. at 536-537.

The ICA provides additional shareholder protections through specific substantive requirements touching virtually every aspect of the structure, governance, and operations of registered funds, including for example: imposing limits on the use of leverage in portfolio management, 15 U.S.C. 80a-18(f); mandating strict custody of fund assets separate from the adviser's assets, 15 U.S.C. 80a-17(f); barring capital structures that concentrate voting power in the hands of selected shareholders, 15 U.S.C. 80a-18(i); requiring shareholder approval of changes to a fund's fundamental investment policies, 15 U.S.C. 80a-13(a); barring funds from purchasing securities on margin or effecting short sales, 15 U.S.C. 80a-12(a); limiting the use of fund assets for purposes of marketing the fund's shares to new investors and thereby increasing the adviser's revenues, 15 U.S.C. 80a-12(b), 17 C.F.R. 270.12b-1; delimiting the terms on which funds may offer to exchange their shares for those of other funds, 15 U.S.C. 80a-11(a); restricting the ability of funds to purchase the shares of other registered funds, insurance companies, and brokerage firms, 15 U.S.C. 80a-12(d); limiting the basis and frequency of funds' distributions of dividends and net capital gains to shareholders, 15 U.S.C. 80a-19(a); and prohibiting certain transactions between registered funds and their affiliates, 15 U.S.C. 80a-17.

At the same time, Congress also recognized that the ICA's broad requirements and prohibitions might be unnecessarily rigid in certain situations, potentially stifling shareholder-friendly innovation consistent with the statute's policy goals. Congress thus gave the SEC broad authority to grant exemptions to the statutory provisions "if and to the extent that such exemption is necessary or appropriate in the public interest and

consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the ICA]." 15 U.S.C. 80a-6(c). The SEC has exercised this authority to adopt various exemptive rules authorizing transactions and structures that would otherwise be prohibited by the ICA upon the satisfaction of specified conditions—which often include a determination by a fund's board that the action is in the fund's best interests. For example, Section 17(a) of the ICA generally prohibits transactions between a registered fund and its affiliated persons (*e.g.*, the adviser) to protect funds and their shareholders from potential self-dealing and overreaching by affiliated persons or entities. 15 U.S.C. 80a-17. However, recognizing that certain transactions with an affiliate may in fact benefit fund shareholders, the SEC has granted express authority to engage in such transactions when certain protective conditions are met (*e.g.*, securities are bought and sold at "current market price"). See 17 C.F.R. 270.17a-7. Similarly, whereas a merger of a fund into an affiliated fund would otherwise be barred by Section 17(a), the SEC has authorized such mergers conditioned on a board finding that the merger is in the best interests of the fund and will not dilute the interests of the merging fund's holders. 17 C.F.R. 270.17a-8.

The SEC also exercises its authority to grant exemptive orders upon the application of a given fund and/or adviser, based upon the applicant's representations in its request and frequently upon conditions set forth in the application or order. Orders are compiled and published on the SEC's website and provide market participants with clarity about the SEC's policy views.

In addition to formal exemptive relief, the SEC staff also provides "no action" guidance where an individual or entity "is not certain whether a particular product, service or action would constitute a violation of the securities laws." SEC, No Action Letters, https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters. If the staff grants the request for relief, it provides a letter concluding "that the SEC staff would not recommend that the Commission take enforcement action against the requester based on the facts and representations described in the individual's or entity's request." *Ibid.* The SEC publishes a compilation of the no-action letters on its website and explains: "In some cases, the SEC staff may permit parties other than the requestor to rely on the no-action relief to the extent that the third party's facts and circumstances are substantially similar to those described in the underlying request." *Ibid.* Industry participants frequently rely on no-action letters issued to others as indicative of what conduct will not result in enforcement proceedings.

The explosive growth of the registered fund industry since 1940 is testament to the effectiveness of the ICA's balanced regulatory framework in cultivating investor confidence through shareholder protections, while also allowing sufficient flexibility for innovation to respond to investors' evolving goals. Prime examples of consequential investment innovations that emerged under the SEC's broad powers without the need for legislative amendments to the ICA are the development of money market funds beginning in the 1970s and ETFs in the 1990s. Neither of these products would be legal under a facial reading of the ICA's provisions, and both owe their existence to the SEC's discretionary exercise of its exemptive authority. In each instance, the SEC initially

issued a series of exemptive orders allowing individual firms to engage in otherwise-violative conduct necessary to launch and operate the products, which orders were ultimately replaced by a comprehensive rule setting forth the protective conditions to qualify for the exemption. 17 C.F.R. 270.2a-7 (money market funds), 17 C.F.R. 270.6c-11 (exchange-traded funds).

The success of the ICA's flexible regulatory structure in fostering the registered funds marketplace is manifest. At year-end 2024, there was over $39 trillion invested in US registered funds, held by 74 million households (or 56.0% of all US households) and 126.8 million individuals. ICI, 2025 Investment Company Fact Book, *supra*. In 2024, nearly two-thirds of mutual fund-owning households had more than half of their household financial assets invested in mutual funds. ICI, Characteristics of Mutual Fund Investors, 2024, ICI Rsch. Perspective (Oct. 2024), https://www.ici.org/system/files/2024-10/per30-09.pdf. What's more, the cost of investing in registered funds has significantly declined over the course of decades. See ICI, Trends in the Expenses and Fees of Funds, 2024, ICI Rsch. Perspective 1 (Mar. 2025), https://www.ici.org/system/files/2025-03/per31-01.pdf ("From 1996 to 2024, the average expense ratio for equity mutual funds dropped by 62 percent and the average expense ratio for bond mutual funds dropped by 55 percent."). Through registered funds, U.S. retail investors with relatively modest amounts to invest can gain unparalleled access to financial security through low-cost diversified professional portfolio management that might otherwise be unavailable to them.

A. The ICA's requirements for the governance and operations of registered funds are vigorously examined and enforced by the SEC

In addition to the SEC's exemptive authority, both registered funds and their advisers are subject to regular examination by the staff of the SEC's Division of Examinations. This Division—the SEC's "eyes and ears"—publishes an annual list of its examination priorities, including those provisions of the ICA of particular focus. The most recent edition explained, "[t]he Division continues to prioritize examinations of registered investment companies (RICs or funds), including mutual funds and [ETFs], due to their importance to retail investors, particularly those saving for retirement." SEC, *Fiscal Year 2025 Examination Priorities* 7, https://www.sec.gov/files/2025-exam-priorities.pdf. Examiners regularly issue "deficiency" letters to funds and/or their advisers, reflecting the staff's finding that provisions of the ICA have not been fully complied with. The staff typically identifies what steps it expects to be taken to address any deficiencies—steps that do not typically include rescission of service agreements.

Moreover, the Examinations staff can and regularly does refer matters to the Division of Enforcement for further investigation and potential formal claims. Section 42 of the ICA empowers the agency to enforce all the provisions of the statute by granting it broad authority to investigate suspected violations and initiate actions in federal court for injunctive relief and other financial remedies. See 15 U.S.C. 80a-41; *UFCW Loc. 1500 Pension Fund* v. *Mayer*, 895 F.3d 695, 701 (9th Cir. 2018). The SEC's Enforcement staff deploys significant resources in fulfilling this responsibility, with an

extremely active emphasis on the investigation of potential violations of the ICA by funds and advisers. See Press Release, SEC, SEC Announces Enforcement Results for Fiscal year 2024 (Nov. 22, 2024), https://www.sec.gov/newsroom/press-releases/2024-186 (reflecting 135 enforcement actions against investment advisers and/or investment companies during FY24).

Given that Congress delegated comprehensive examination and enforcement authority over the ICA to the SEC—paired with the power to exercise its judgment to grant exemptions and guidance regarding the statute's many technical provisions—it is hardly a surprise that Congress did not also see fit to deputize shareholders to pursue their own potentially disparate enforcement agendas of the statute's provisions. Congress has adopted only two express private rights of action. Under Section 30(h), Congress authorized private suits for damages against certain defendants by incorporating the private right of action in Section 16(b) of the Securities Exchange Act, 15 U.S.C. 78b(b). In adding Section 36(b) by amendment in 1970, Congress provided a direct shareholder claim for allegedly excessive fees. 15 U.S.C. 80a-35(b). Since *Alexander*, courts have consistently declined to read implied private rights of action into the ICA, including under Section 47(b)—until the Second Circuit's decision in *Oxford University Bank* in 2019.

B. Oversight of registered funds is further strengthened by independent fund directors, the "watch dogs" under the ICA's governance structure

As a further check, the ICA "interposes disinterested directors as 'independent watchdogs' of the relationship between a mutual fund and its adviser." *Jones*,

559 U.S. at 348 (quoting *Burks*, 441 U.S. at 484). "The cornerstone of the ICA's effort to control conflicts of interest within mutual funds is the requirement that at least 40% of a fund's board be composed of independent outside directors. 15 U.S.C. § 80a-10(a)." *Burks*, 441 U.S. at 482 (footnote omitted). The minimum number of independent directors is for practical purposes 50%, because a majority is required for funds to qualify for the SEC exemptive rules discussed above. 17 C.F.R. 270.0-1. And in practice, independent directors typically comprise more than 75% of today's fund boards. IDC & ICI, Overview of Fund Governance Practices, 1994-2022, at 6 (Oct. 2023), https://www.ici.org/system/files/2023-10/23-fund-governance-practices.pdf (finding 89% of fund boards are comprised of 75% or more independent directors).

Like directors of operating companies, independent fund directors have a general fiduciary duty to represent the interests of the funds. But they also have specific statutory and regulatory responsibilities under the ICA beyond the duties required of other types of directors. "To these statutorily disinterested directors, the [ICA] assigns a host of special responsibilities involving supervision of management and financial auditing." *Burks*, 441 U.S. at 482-483. For example, they have the statutory duty to review and approve the contracts of the investment adviser and the principal underwriter, 15 U.S.C. 80a-15(c), to appoint other disinterested directors to fill board vacancies, 15 U.S.C. 80a-16(b), and to select the independent public accountants who certify the fund's financial statements, 15 U.S.C. 80a-31(a). SEC rules promulgated pursuant to the ICA likewise require fund board action with respect to various matters, including annual review and approval of the fund's compliance policies and procedures as reasonably designed to prevent

violations of the securities laws, 17 C.F.R. 270.38a-1(a)(2); approval of the appointment, compensation and removal of the fund's chief compliance officer, 17 C.F.R. 270.38a-1(a)(4); and valuation oversight, 17 C.F.R. 270.2a-5, among others.

II. A Private Right Of Action Under Section 47(b) Opens A Back Door For Private Suits Over Other Provisions Of The ICA

The availability of a private right of action under Section 47(b) would disrupt the established regulatory framework that guides the daily actions of funds and their boards, advisers, and other service providers. This framework depends on a series of contracts consistent with the requirements of the ICA, and frequently also exemptive rules and orders thereunder, which are subject to approval by independent directors and review by SEC staff.

Allowing shareholders a claim for "rescission" of contracts whose "performance" the shareholder believes involve a "violation" of the ICA opens a back door to private suits over essentially every other provision of the ICA. Such suits would inevitably involve plaintiffs second-guessing the interlocking judgments of both the SEC and independent directors often required in approval of many common investment actions—for example, the SEC's crafting of an exemptive rule or order, the SEC's requirements and guidance for compliance with that rule or order, and the independent directors' approval of the action as complying with the SEC requirements. This litigation back door would promote significant regulatory uncertainty, as well as wasteful litigation expense. This uncertainty could discourage fund sponsors from creating new funds or seeking innovative

forms of exemptive relief, thereby potentially reducing the types of investments available to prospective investors.

A. "Activist" challenges to closed-end fund governance measures

One example of such back door litigation is presented by the current litigation involving "activist" hedge fund investor Saba. Saba engages in what it calls a closed-end fund "arbitrage strategy," acquiring large numbers of shares of closed-end funds and frequently using its concentrated voting power to force transformational changes in the fund—which in turn provide Saba the ability to sell its shares at above-market prices, yielding short-term arbitrage profits. These actions usually include disruptive changes, such as large tender offers (prompting significant asset liquidation), merger of a fund, or outright liquidation, that harm ordinary long-term shareholders. ICI, Recommendations Regarding the Availability of Closed-End Fund Takeover Defenses 5-6 (2020), https://www.ici.org/doc-server/pdf%3A20_ltr_cef.pdf. Because these changes benefiting Saba come at the expense of ordinary shareholders in the funds, who typically seek long-term income streams from these investments, closed-end fund boards have adopted various measures seeking to ensure that such transformative and potentially harmful fund changes only occur if they have the support of a large portion of all fund shareholders—not just concentrated minority holders. *Id.* at 11-16. At least one court has already recognized the legitimate interest of fund boards in considering such measures to protect long-term shareholders from the potential harm caused by the "activist" arbitrage

strategy.[3] Among the identified abuses Congress sought to address expressly in the ICA were harms caused by concentrated minority holders acting in ways that hurt ordinary shareholders with different interests. H.R. 279, 76th Cong. (1939); 15 U.S.C. 80a-1(b).

Saba has seized on the fact that the by-laws and other governing documents of a fund are treated by many states' laws as contracts between the fund and its shareholders, and it has been invoking Section 47(b) to seek "rescission" of board actions adopting defensive measures that might hamper its arbitrage strategy. The underlying basis for these rescission claims is alleged violations of other provisions of the ICA that are otherwise within the enforcement authority of the SEC. In

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[3] In granting partial summary judgment against Saba in connection with its claim for breach of fiduciary duty against certain Eaton Vance closed-end funds and their independent trustees, a Massachusetts Superior Court found that the "Trustees had a legitimate business reason for their action * * * that the purpose of the Bylaw Amendments was to protect Funds' retail shareholders from the harm they perceived that activist hedge funds like Saba could cause if they gained a concentrated minority of shares, forced short-term liquidity events, and thereby threatened retail investors' interest in the Funds and the Funds' viability" as long-term investment vehicles. *Eaton Vance Senior Income Tr.* v. *Saba Cap. Master Fund, Ltd.*, No. 2084CV01533-BLS2, 2023 WL 1872102, at *11 (Mass. Super. Ct. Jan. 21, 2023). In its trial ruling rejecting Saba's challenge to a majority-of-outstanding-shares voting standard, the court found that "Saba's activist objectives are generally inconsistent with the Funds' investment objectives. The goal of monetizing the discount to [net asset value] differs from the goal of managing a stable pool of assets for a steady income stream over a long period of time." Findings of Fact, Conclusions of Law, and Order for Judgment, *Eaton Vance Senior Income Tr.* v. *Saba Cap. Master Fund, Ltd.*, No. 2084CV01533-BLS2, slip op. at 13 (Mass. Super. Ct. Oct. 21, 2024).

the present case, the provision at issue is Section 18(i), part of the "Capital Structure" section of the statute, requiring that all fund shares issued be voting securities that have "equal voting rights" with all other shares. In its most recent guidance on this question, the SEC staff issued a statement in May 2020 that it would *not* recommend enforcement action for violation of Section 18(i) in the event a fund opted into the Maryland Control Share Acquisition Act. See SEC, Control Share Acquisition Statutes Staff Statement (May 27, 2020), https://www.sec.gov/investment/control-share-acquisition-statutes (recognizing, both expressly and implicitly, the legitimacy of actions taken by boards of closed-end funds to respond to activist investors). Nevertheless, Saba brought the present lawsuit to challenge the actions of multiple fund boards as violating Section 18(i), alleging that the SEC staff's views on the provision were of no relevance for the court in adjudicating Saba's claims.

Despite the fact that all of the funds at issue were organized under Maryland law, Saba asserted the actions within the Second Circuit, transparently to take advantage of *Oxford University Bank*. The Third Circuit has ruled to the contrary. *Santomenno ex rel. John Hancock Tr.* v. *John Hancock Life Ins. (U.S.A.)*, 677 F.3d 178 (2013). Several of the funds were dismissed by the district court based on by-laws requiring them to be sued in Maryland.

In separate litigations, Saba challenges other types of closed-end fund board actions, including the adoption of a voting standard requiring the support of a majority of outstanding shares to elect trustees and the implementation of a shareholder rights plan (often referred to as a "poison pill"). Here again, the SEC has not taken

any enforcement action or suggested in guidance that such measures violate the ICA provisions that Saba invokes via the Section 47(b) back door opened by the Second Circuit.

The uncertainty created by the repeated attacks of Saba and other "activists" against multiple closed-end funds is having a demonstrated negative effect on the availability of listed closed-end funds to investors in the market. ICI data show that, as the number of funds targeted by "activists" has continued to grow, the number of listed closed-end funds available to investors in the market has contracted significantly. ICI, Closed-End Fund Activism (2025), https://www.ici.org/system/files/2024-05/cef-activism.pdf ("The activist presence discourages new listed [closed-end fund] entry into the market and is an important reason for the 43 percent drop in the number of listed [closed-end funds] since 2007."). As of the end of 2024, Saba alone held positions in fully one-quarter of all closed-end funds in the market. *Ibid.*[4]

B. Claims seeking "rescission" of fund service agreements

The back door litigation threat posed by a Section 47(b) private right of action reaches well beyond the closed-end fund activist context. Under the prevalent

[4] In pursuing its "arbitrage strategy" to force transformational changes at closed-end funds, Saba regularly accumulates positions of 15-20% or more of a fund's outstanding shares. In doing so, Saba evades the ICA's 3% limit on the number of shares of a registered fund that may be held by another investment company—including by unregistered hedge funds like Saba's. 15 U.S.C. 80a-12(d)(1). Saba claims to be able to exceed the 3% cap via the fig leaf of spreading its large holdings across multiple indistinguishable funds pursuing the same strategy, none of which exceeds 3% on its own.

externalized management model, virtually every task required to operate a registered fund and offer it to investors is undertaken by a service provider pursuant to a written agreement with the fund in exchange for a fee. In a typical structure, the adviser manages the fund's portfolio in accordance with its investment strategy, engages with third-party brokers who execute portfolio transactions, facilitates the creation of required fund disclosures, and coordinates the efforts of the other service providers. Separately, the underwriter markets and distributes the fund's shares in a broker-dealer capacity; the custodian bank maintains custody of the fund's portfolio holdings; the transfer agent conducts the execution and recordkeeping of transactions in the fund's shares; the administrator prepares the fund's financial statements and other detailed SEC filings and calculates the fund's daily net asset value; and a public auditing firm audits the firm's financial statements for inclusion in the annual shareholder report.

If fund shareholders can assert claims for "rescission" of such service agreements premised on alleged violations of other ICA provisions in the "performance" of the contracts—with the bounty being disgorgement of the fees paid thereunder—the potential claims that could be contrived by the private plaintiffs' bar are almost limitless in scope. In the brief of the United States supporting certiorari, the Solicitor General and the SEC cautioned that "[i]f Section 47(b) creates a private right of action, a plaintiff could sue to challenge contractual terms that are alleged to violate *any* ICA provision, not just the Act's provisions regarding voting rights" at issue in this action. U.S. Amicus Br. 19. "Allowing such expansive private enforcement would upset the balance that Congress struck in the ICA." *Ibid.* Procedurally,

these claims would most plausibly be asserted as derivative claims on behalf of the fund as party to the agreement in question. See, *e.g.*, *In re Regions Morgan Keegan Secs., Derivative, & ERISA Litig.*, 743 F. Supp. 2d 744, 761 (W.D. Tenn. 2010); *Hamilton* v. *Allen*, 396 F. Supp. 2d 545, 558 (E.D. Pa. 2005). There is also some precedent for fund shareholders bringing direct claims as third-party beneficiaries of agreements between funds and service providers. See *Northstar Fin. Advisors Inc.* v. *Schwab Invs.*, 779 F.3d 1036, 1065 (9th Cir. 2015) (holding that fund shareholders could assert a direct claim under state law for breach of the investment advisory agreement between a mutual fund and its adviser as third-party beneficiaries of that contract).

Prior attempts to invoke Section 47(b) in connection with alleged violations of other ICA provisions (albeit unsuccessfully) serve to illustrate the range of such other provisions that might be targeted by back door claims if the door were opened—even though courts have repeatedly held there is no private right of action as to the targeted provisions themselves. See, *e.g.*, *UFCW Local 1500 Pension Fund* v. *Mayer*, 895 F.3d 695, 697-698 (9th Cir. 2018) (Section 3(b)); *Smith* v. *Oppenheimer Funds Distrib., Inc.*, 824 F. Supp. 2d 511, 522-523 (S.D.N.Y. 2011) (Sections 36(a), 38(a)); *In re Regions Morgan Keegan Secs., Derivative, & ERISA Litig.*, 743 F. Supp. 2d at 761-762 (Sections 13, 22, 30, 34(b)); *Hamilton*, 396 F. Supp. 2d at 553-555 (Section 36(a)); *Mutchka* v. *Harris*, 373 F. Supp. 2d 1021, 1025-1026 (C.D. Cal. 2005) (Section 36(a)); *Blatt* v. *Merrill Lynch, Pierce, Fenner & Smith Inc.*, 916 F. Supp. 1343, 1357-1358 (D.N.J. 1996) (Section 13(a)(3)); *Mathers Fund, Inc.* v. *Colwell Co.*, 564 F.2d 780, 782 (7th Cir. 1977) (Section 17(a)(2)). In *Mayer*, where the Ninth Circuit rejected the

existence of a private right of action, the plaintiffs sought to invoke Section 47(b) to establish that the internet search company Yahoo! had violated the conditions of an order granted to it by the SEC under Section 3(b)(2) exempting Yahoo! from registering as an investment company—violations that the SEC itself nowhere alleged. 895 F.3d at 697-98. Under the reasoning of *Oxford University Bank*, there is no meaningful limiting principle on the range of ICA "violations" that plaintiffs could seek remedy through a litigation back door opened under Section 47(b).

C. The resulting uncertainty over applicable regulatory standards, coupled with litigation expense, would harm fund shareholders and their savings goals

Whether back door claims are asserted by self-interested concentrated holders like Saba or by the traditional class action plaintiffs' bar, an implied Section 47(b) private right of action could result in significant regulatory uncertainty and litigation expense for the fund industry to the detriment of shareholders. Recognizing a Section 47(b) private right of action could be tantamount to declaring open season on the SEC's multi-layered interpretation and application of the ICA's substantive provisions, as reflected in the agency's exemptive rules, orders, published guidance, and enforcement actions. See U.S. Amicus Br. 19-20 ("If private parties could invoke Section 47(b) as a freestanding cause of action, they could interfere with the SEC's discretionary enforcement and exemption decisions."). Although Congress gave no indication whatsoever of an intent to deputize shareholders to enforce the ICA's provisions in parallel with (or in tension with) the SEC, that could be the practical effect of a Section 47(b) back door. Recognizing a

private right of action under Section 47(b) effectively converts a provision meant as a shield for defendants in breach of contract actions into a sword for the plaintiffs' bar.[5] See *id.* at 20 ("In the view of the United States, private enforcement suits under Section 47(b) threaten to have an unpredictable impact on the operations and contractual arrangements of investment funds, including the mutual funds on which millions of Americans rely.").

The risk of regulatory uncertainty is made more acute by questions surrounding whether courts would be bound by the SEC's interpretations in private litigation pressing for alternative readings of the ICA. The industry has long relied on the interpretations of the ICA's provisions provided by the SEC and its staff in understanding what structures and practices are deemed appropriate under the statute by its primary enforcer. These interpretations are reflected in rules, orders, no-action letters, and enforcement actions, as well as via informal consultation and comments made by the staff on new fund registration statements before shares are offered to the public. A clear understanding of what activities will and will not trigger an SEC enforcement action has long been a polestar for industry actors in managing funds and investing in new business lines and products. Opening up this body of guidance to second-guessing by private plaintiffs in litigation would dramatically undermine the ability of industry actors to rely on

[5] Rejection of a Section 47(b) private rescission claim does not leave shareholders without redress where fund service providers allegedly fall short. Shareholders can assert derivative claims for damages to a fund under common law theories such as breach of contract or fiduciary duty, as well as direct claims under the federal securities laws in connection with alleged materially misleading statements in a fund's registration statement.

what have heretofore been considered established guiding principles. This is especially so if courts hearing these challenges consider themselves unbound by the SEC's long-stated views. Private litigants can be expected to argue that the agency's interpretation of the statute—and even its own rules thereunder—are not binding on a court, and in many cases will not be entitled to deference. See *Kisor* v. *Wilkie*, 588 U.S. 558 (2019). Product innovations that have been enabled directly by the industry's ability to rely upon the SEC's reasoned judgments about exemptions from the ICA's prohibitions have furthered the savings goals of millions of American households. Regulatory uncertainty from a litigation-driven reopening of those judgments could seriously hamper product innovation that directly serves U.S. savers.

Indeed, the risk of regulatory uncertainty is so pronounced in the ICA framework that the recognition of implied private rights of action under arguably analogous provisions in other statutes cannot inform Congress's intent as to private actions under Section 47(b). For example, the Court found an implied private right of action for rescission under Section 215 of the IAA, which provides that a contract "shall be void" if it is "made" in violation or its performance "involves the violation" of the statute. 15 U.S.C. 80b-15(b); *Transamerica Mortg. Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (*TAMA*). Aside from the fact that *TAMA* predates the modern approach of repudiating the inference of implied private rights of action without express textual or structural support as established in *Alexander* v. *Sandoval* and the important textual distinctions between the provisions discussed in Petitioners' opening brief, the Court's analysis of Congress's implied intent as to IAA Section

215 cannot be exported to ICA Section 47(b) given the important differences in the statutory frameworks within which the two provisions are situated. Unlike the many granular ICA prescriptions and prohibitions regarding registered fund structure, governance and daily operations, the IAA (which is about one-third the length of the ICA) imposes a more limited set of disclosure requirements, fiduciary duties, policy adoption mandates, and a proscription on fraudulent conduct. The IAA likewise does not feature the ICA's further check of independent director oversight. The very granular tapestry of SEC rules, exemptive orders and guidance (reinforced by independent board review) that plays a fundamental role in the governance, structure, and operations of registered funds under the ICA—per Congress's design—is not mirrored in the less pervasive regulation of investment adviser activities under the more principles-based IAA.[6] Congress' statutory framework for registered funds thus relies much more heavily on nuanced and interlocking judgments of the SEC and independent directors, making it all the clearer that there is no basis to infer implied Congressional intent to give private plaintiffs a separate say on these questions.

Moreover, as demonstrated by the long history of private litigation involving registered funds, such claims are typically motivated by self-interested agendas like

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[6] It is also unclear that *TAMA*'s reasoning can be read to open a litigation back door in the IAA of the type that Saba's arguments threaten in the ICA. In *TAMA*, the Court held that "there exists a limited private remedy under [Section 215 of the IAA] to void an investment adviser's contract, but that the Act confers no other private causes of action, legal or equitable"—including recovery of damages for violations of the antifraud provisions in Section 206 of the statute. 444 U.S. at 24.

Saba's and/or by hopes of a large attorney fee—not to enhance shareholder protection. Funds and their advisers and boards have been targeted for decades by class actions plaintiffs' lawyers, motivated by the desire to score a large attorney fee from perceived "deep pocket" defendants. One of the two express private right of action under the ICA—for "excessive fee" claims under Section 36(b)—spawned a wave of cases, typically asserted against large funds that charged modest fees, in hopes of a proportionately large attorney fee recovery. Not a single plaintiff has ever prevailed in these cases, despite imposing hundreds of millions of dollars of legal expenses on the industry to defend against these claims. See ICI Mutual, *Claims Trends: A Review of Claims Activity in the Mutual Fund Industry*, at 4 (Apr. 2024), https://www.icimutual.com/wp-content/uploads/Claims-Trends-2023-2024.pdf. [7]

The Second Circuit's decision in *Oxford University Bank* (2019) has itself spawned uncertainty and wasteful incentives—including forum shopping by plaintiffs seeking to take advantage of the Section 47(b) claim within the Second Circuit. Even in the present litigation, plaintiffs below asserted claims in the SDNY against multiple funds with express forum selection clauses outside of

[7] Empirical analysis confirms the experience lived by the industry participants defending against this wave of cases: plaintiffs' counsel did not select funds for litigation based on high fees, but instead based on large asset bases that would generate a higher attorney fee in the event of a successful case. See Quinn Curtis & John Morley, *An Empirical Study of Mutual Fund Excessive Fee Litigation: Do the Merits Matter?* (Sept. 18, 2012), https://law.yale.edu/sites/default/files/area/workshop/leo/document/Morley_MutualFundExcessiveFeeLitigation.pdf.

New York—resulting in the funds' dismissal, but only after full briefing.

American retail investors have been served exceptionally well by the comprehensive regulation of the registered funds industry, carried out through the combined efforts of the SEC and independent fund directors under the ICA framework. The compound risks of regulatory uncertainty and wasteful litigation posed by a litigation back door under Section 47(b) would not serve shareholder interests and cannot have been Congress's intent.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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