No. 24-345

In the

Supreme Court of the United States

FS CREDIT OPPORTUNITIES CORP., ET AL.,
Petitioners,

v.

SABA CAPITAL MASTER FUND, LTD., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE MUTUAL FUND DIRECTORS FORUM IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Mutual Fund Directors Forum ("MFDF") is an independent, non-profit membership organization for independent directors of mutual funds, exchange-traded funds ("ETFs"), closed-end funds, and other registered investment companies. MFDF helps independent directors navigate an evolving regulatory environment and steward shareholders' investments. To this end, MFDF provides tailored educational resources to its membership and gives independent directors a voice in key issues affecting the mutual fund industry. MFDF's membership includes a wide range of fund boards and represents a diverse community of directors.

Registered investment companies under the Investment Company Act ("ICA") are governed by boards of directors that must include independent directors. *See* 15 U.S.C. §§ 80a-10(a), 80a-2(a)(19). These independent directors make up MFDF's membership, and they are tasked with safeguarding the interests of the shareholders they represent. *See id.* §§ 80a-35, 80a-10; *see also id.* § 80a-1(b). Indeed, this Court has recognized that, by design, independent directors serve as "watchdogs" who "'furnish an independent check upon the management' of investment companies." *Burks v. Lasker*, 441 U.S. 471, 484 (1979) (citation omitted).

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[1] No counsel for any party authored this brief in whole or in part, and no party or counsel made a monetary contribution to the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Independent directors are charged with advancing the best interests of funds and their shareholders. They are thus particularly attentive to any changes in the law that will increase costs to shareholders, reduce the ability of funds to efficiently implement the best investment strategies, or otherwise work against the best interests of fund investors. Consistent with its mission of supporting the crucial role of independent directors in fund oversight, MFDF submits this brief to urge the Court to reverse the Second Circuit's holding that Section 47(b) of the ICA contains an implied private right of action. That decision is incorrect, and it threatens to harm—not protect—fund investors.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ICA protects the interests of investment company shareholders through a comprehensive statutory scheme that does not include a private right of action under Section 47(b) of the Act. The ICA requires investment companies to be supervised by boards comprised of a substantial number of independent directors, a requirement the Court has recognized to be "[t]he cornerstone of the ICA's effort to control conflicts of interest within mutual funds." *Burks*, 441 U.S. at 482. At the same time, Congress charged the Securities and Exchange Commission ("SEC") with ensuring that investment companies comply with the ICA's requirements, including by granting the SEC an express cause of action to enforce the ICA's provisions. 15 U.S.C. § 80a-41.

What Congress did not do in this scheme is provide individual shareholders with a private cause of action

under Section 47(b). Nor should this Court imply one, as the Second Circuit wrongly did here.

First, the Second Circuit's position finds no support in the ICA's text and is inconsistent with this Court's precedents. Private rights of action must be created by Congress, not the courts. And to create them, Congress must include specific rights-creating language that clearly and unmistakably confers federal rights on a particular benefited class. Section 47(b) satisfies none of these requirements. It contains no rights-creating language. Nor does its text focus on a particular benefited class. Further, the fact that Congress tasked the SEC with enforcing the ICA confirms that Section 47(b) does not contain an implied private right of action, as does the inclusion of explicit private rights of action elsewhere in the statute.

Second, the Second Circuit's decision to create a private right of action is unnecessary and inconsistent with the structure and design of the ICA. Beyond SEC oversight and enforcement, Congress protected shareholder interests by ensuring that independent directors serve on investment companies' boards. Those independent directors use their business judgment to weigh competing shareholder concerns and make key decisions for the collective benefit of all shareholders. Given this carefully crafted structure—which "rel[ies] largely upon [independent director] 'watchdogs' to protect shareholders interests," *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 353 (2010) (citation omitted)—a private right of action was neither intended nor needed.

Third, creating a private right of action out of whole cloth risks massively disrupting investment companies and the trillions of dollars they manage. If private litigants can seek rescission of virtually any investment company contract—even when the company's independent directors and the SEC have not questioned that decision—then investment companies and their investors will be subject to costly litigation, and courts will be put in the difficult position of second-guessing the good-faith business judgments of directors. Chaos will reign, and investors will be worse off. Nothing about the ICA's text or structure requires that outcome, and the separation of powers militates against it. The judgment below should be reversed.

ARGUMENT

I. Congress Did Not Create a Private Right of Action Under Section 47(b).

The Second Circuit wrongly held that Section 47(b) creates an implied private right of action. Section 47(b)'s plain text and this Court's precedents make that clear.

"Private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). That is because it is Congress, not the courts, who "controls the availability of remedies for violations of statutes." *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990). "[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (Rehnquist, J.). After all, "the decision whether to let

private plaintiffs enforce a new statutory right poses delicate questions of public policy" that fall firmly within the province of "the people's elected representatives, not unelected judges charged with applying the law as they find it." *Medina v. Planned Parenthood S. Atl.*, 145 S. Ct. 2219, 2229 (2025).

In reviewing whether a statute creates a cause of action, courts must discern Congress's judgment only through the "text and structure" of the laws it has duly enacted. *Alexander*, 532 U.S. at 288. The court's job in this inquiry "is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* at 286 (citing *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15 (1979)). This means the statute must grant "private rights" to an "identifiable class." *Touche Ross & Co.*, 442 U.S. at 576. The Court has "described this as a stringent and demanding test." *Medina*, 145 S. Ct. at 2229 (quotation marks omitted); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (recognizing that the test for "discerning whether personal rights exist in the implied right of action context" is the same as for rights enforceable in § 1983 cases like *Medina*).

The bar becomes nigh impossible to surmount when the statute's context shows that Congress did not intend to create a private right of action. For example, when Congress "explicitly confer[s]" enforcement authority for a statute on someone other than private litigants, it "suggests that other means of enforcement are precluded." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 331–32 (2015). So too does Congress's inclusion of an explicit private right of

action in one provision of an act while omitting it elsewhere. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration adopted; citation omitted)).

Here, a straightforward reading of Section 47(b) makes clear that Congress did not intend to create an implied private right of action. The bar cannot be cleared: Section 47(b) contains no rights-creating language, Congress conferred enforcement of the ICA on the SEC, and Congress added a private right of action in two other provisions of the statute, but not in Section 47(b).

To begin, Section 47(b) contains no rights-creating language conferring "private rights" on an "identifiable class," "phrased in terms of the persons benefited," with an "unmistakable focus on the benefited class." *Touche Ross & Co.*, 442 U.S. at 576; *see Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 183 (2023). Instead, it simply guides courts on what remedies they may provide when faced with contracts that violate the ICA.

Section 47(b)'s first subpart provides that "[a] contract that is made, or whose performance involves, a violation of this subchapter . . . is unenforceable by either party . . . unless a court finds that under the circumstances enforcement would produce a more equitable result than nonenforcement and would not be inconsistent with the purposes of this subchapter." 15 U.S.C. § 80a-46(b)(1). The plain language of this

provision confers no private right on any identifiable class of people. Instead, it describes a remedy: Any contract violative of the ICA is generally unenforceable.

Section 47(b)'s second subpart then declares that courts may not deny rescission of violative contracts that have already been performed, as identified in the first subpart, at the request of the parties unless the balance of equities favors it. *Id.* § 80a-46(b)(2). Here too, as above, there is no private right conferred on an identified class. Instead, the subpart instructs courts on available remedies. By its plain language, "Section 47(b) creates a remedy rather than a distinct cause of action or basis of liability." *Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 677 F.3d 178, 187 (3d Cir. 2012) (quotation marks omitted).

The inquiry could end there. But the rest of the ICA further confirms that Congress did not hide an implied right of action within Section 47(b).

First, Congress elsewhere charged the SEC with enforcing the ICA. *See* 15 U.S.C. § 80a-41. That is a powerful indicator "that other means of enforcement are precluded," including private rights of action. *Armstrong*, 575 U.S. at 331–32; *see also Alexander*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others[.]").

Second, Congress included explicit and delimited private rights of action in two other sections of the ICA. *See* 15 U.S.C. §§ 80a-29(h), 80a-35(b). But it did not do the same in Section 47(b). This too counsels against finding an implied right of action, as it shows

that "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *TAMA*, 444 U.S. at 21 (citation omitted).

In short, the text of Section 47(b), read in context with the rest of the ICA, does not clear this Court's high bar for finding a private right of action. The Second Circuit erred in holding otherwise.

II. The ICA Protects Shareholders' Interests Through Independent Fund Directors and SEC Oversight, Making a Private Right of Action Unnecessary.

Congress's decision not to create a private right of action in Section 47(b) is unsurprising given that the ICA protects investors in other ways.

Congress adopted the ICA out of "concern [for] the potential for abuse inherent in the structure of investment companies." *Jones*, 559 U.S. at 339 (quoting *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984)). Typically, an investment company is created by an investment adviser, which then "manages the fund's investments[] and provides other services" to the fund. *Id.* at 338. The investment company—along with investors in the company—"cannot, as a practical matter[,] sever its relationship with the adviser," which means that "the forces of arm's-length bargaining do not work in the mutual fund industry." *Id.*

Because this structure is "fraught with potential conflicts of interest," *id.* at 339, Congress protected investors through the ICA in two ways. *First*, Congress required that at least 40% of an investment company's board be made up of independent directors.

See 15 U.S.C. § 80a-10(a). In practice, 86% of mutual fund boards are made up of at least 75% independent directors. *See* Independent Directors Council, *Board Composition*, http://bit.ly/4gfZNV9 (last visited Sept. 3, 2025). *Second*, as a backstop, Congress gave the SEC rulemaking authority, as well as the power to "bring an action" in federal court to remedy "any act or practice constituting a violation of any provision" of the ICA via an injunction or monetary penalties. 15 U.S.C. § 80a-41(d).

A. Congress Included the Independent Fund Director Requirement to Protect All Investors' Interests.

This Court has called the ICA's independent-director requirement "the 'cornerstone' of the Act's efforts to check conflicts of interest." *Jones*, 559 U.S. at 339 (citation omitted). And for good reason. When Congress adopted the ICA in 1940, it "entrusted to the independent directors of investment companies . . . the primary responsibility for looking after the interests of the funds' shareholders." *Burks*, 441 U.S. at 485. In this role, independent directors serve as "'independent watchdogs' of the relationship between a mutual fund and its adviser." *Jones*, 559 U.S. at 348 (citation omitted). They place "an independent check upon the management of investment companies." *Burks*, 441 U.S. at 484.

Independent directors also "provide a means for the representation of shareholder interests in investment company affairs." S. Rep. No. 91-184, at 32 (1969), *as reprinted in* 1970 U.S.C.C.A.N. 4897, 4927. And the ICA's structure ensures that independent directors not only protect investors' interests but will actually stand

in the shoes of shareholders to protect them. They provide oversight and operate as an independent check on those charged with day-to-day management of the fund's activities. *See, e.g.*, 15 U.S.C. § 80a-15(c) (requiring independent director approval of investment advisory contracts). Indeed, that is why independent directors are responsible for major decisions that will affect the funds they serve—and why the ICA "assigns a host of special responsibilities involving supervision of management and financial auditing" to them. *Burks*, 441 U.S. at 483.

Perhaps the most important way in which independent directors protect shareholders' interests is by "review[ing] and approv[ing] the contract[] of the investment adviser" each year. *Smith v. Franklin/Templeton Distribs., Inc.*, 2010 WL 2348644, at *3 (N.D. Cal. June 8, 2010) (citing 15 U.S.C. § 80a-15(c)). This is not a formulaic, "check the box" exercise. Rather, independent directors weigh what services are (and are not) covered, the nature and quality of those services, and whether the fund is performing consistently with the investment objective and strategies described in the fund's registration statement. *See* Mutual Fund Directors Forum, *Board Oversight of Advisory Agreement Approvals: Part 3: Gartenberg Factors Analysis and Board Considerations*, at 2–6 (July 2025), http://bit.ly/4oT238A [hereinafter, "MFDF Report"]. Congress intended independent directors to play an active role, and when it wanted to strengthen shareholder protections in the 1970 ICA amendments, it tightened independence requirements and empowered independent directors to obtain more information relevant to reviewing and approving

advisory contracts. *See* 15 U.S.C. §§ 80a-10(a), 80a-15(c); *see also* S. Rep. No. 91-184, at 32 (1969), *as reprinted in* 1970 U.S.C.C.A.N. 4897, 4927 ("The function of [these Amendments] with respect to unaffiliated directors is to supply an independent check on management and to provide means for the representation of shareholder interests in investment company affairs."). At bottom, the independent directors ensure that the investment company, and its shareholders, are getting a fair deal. *See* 1970 U.S.C.C.A.N. at 4903 (noting that the 1970 Amendments were "designed to strengthen the ability of the unaffiliated directors to deal with [negotiating advisory fees]").

Independent directors are tasked with other important responsibilities as well. They must "fill vacancies resulting from the assignment of the advisory contracts," *Burks*, 441 U.S. at 483 (citing 15 U.S.C. § 80a-16(b)), and they are responsible for "select[ing] the accountants who prepare the company's [SEC] financial filings," *id.* (citing 15 U.S.C. § 80a-31(a)). This last responsibility highlights how independent directors and the SEC play complementary roles in protecting investors' interests.

Individual shareholders may have individual, idiosyncratic views about what is best for the investment company. But to reconcile those differences, and to ensure that their *collective* interests are protected, Congress chose to put independent directors—not individual shareholders—in charge of investment companies' most important decisions. That reflected Congress's considered judgment about who would be best positioned to

protect shareholders' common interests, while avoiding unnecessary disruption to the operations of the fund.

B. Congress Empowered the SEC to Provide an Additional Layer of Protection for Investors.

In addition to imposing the independent-director requirement, Congress provided another layer of oversight and protection through the SEC, which it charged with looking out for shareholders in several ways.

One of the main ways the SEC protects investors is through rulemaking and interpretation of the ICA's substantive provisions. Many of these rules protect shareholders in part by imposing additional responsibilities on independent directors. For example, while the ICA generally bars investment companies from merging with affiliated entities, *see* 15 U.S.C. § 80a-17(a)(1)–(2), the SEC has issued an exemptive rule permitting such transactions as long as shareholder interests are not diluted and "[t]he board of directors, including a majority of the directors who are not interested persons," determines that it is in the best interests of the company, *see* 17 C.F.R. § 270.17a-8. Similarly, the SEC has allowed investment companies to cross trade certain securities with certain affiliated companies, which is generally impermissible under 15 U.S.C. § 80a-17(a)(1), as long as, among other things, the Board, including a majority of independent directors, approves policies and procedures for such trades and satisfies other fund governance and oversight standards and requirements, *see* 17 C.F.R. §§ 270.17a-7, 270.0-1.

Other examples include SEC rules that contemplate independent director approval and oversight of liquidity management programs for most registered open-end investment companies, *see id.* § 270.22e-4, and derivatives risk management programs for registered open-end funds (other than money market funds), closed-end funds, and business development companies, *see id.* § 270.18f-4. Rules like these confirm that the SEC, like Congress, agrees that independent directors are crucial to safeguarding investors' interests.

Separately, the SEC's Division of Examinations provides an additional check by actively monitoring investment companies to ensure ICA compliance. In addition to conducting physical, on-site examinations of investment advisers and investment companies, the SEC "continually collect[s] and analyz[es] a wide variety of data about all registrants using modern quantitative techniques" to "protect investors, ensure market integrity and support responsible capital formation through risk-focused strategies." *See* SEC, *About the Division of Examinations* (June 29, 2024), http://bit.ly/3JxIYc4. The Division of Examinations also routinely refers violations of the ICA to the Division of Enforcement, ensuring that any violations it discovers will be remedied. *See* SEC, *Enforcement Summary Chart for FY 2024*, http://bit.ly/41mo1a7 (last visited Sept. 3, 2025). This two-part system—charging independent directors with making major decisions to benefit investors, with the SEC serving as the backstop enforcer of any ICA violations—has protected investors well since the ICA was enacted in 1940, making the United States the world's most prominent financial hub.

C. A Private Right of Action Is Unnecessary and Inconsistent with the ICA.

Against this backdrop, Congress sensibly decided not to create a private right of action via Section 47(b). Whatever additional protections investors would have received from an implied private right of action are clearly outweighed by the chaos it would create. This is why "[a]ttention must be paid . . . to what Congress did not do." *Burks*, 441 U.S. at 483. It chose the independent director "watchdog control" model instead of giving private parties a sweeping oversight role. *Id.* (quotation marks omitted). Congress knew how to create a private right of action in the ICA when it wanted to, which is why it created Section 36(b). *See* 15 U.S.C. § 80a-35(b). But it chose to keep the bulk of responsibility of protecting shareholders' interests in the hands of the independent directors.

Further, even when Congress provided a private right of action under Section 36(b), this Court has emphasized that independent directors—not private actors—must take the lead in safeguarding shareholders' interests. *See Jones*, 559 U.S. at 336; *Burks*, 441 U.S. at 485. Section 36(b) allows private litigants to challenge advisory fees as excessive, but when independent directors have faithfully executed their duties under Section 15(c), "their decision to approve a particular fee agreement is entitled to considerable weight, even if the court might weigh the factors differently." *Jones*, 559 U.S. at 351. To supplant the independent directors' judgment, a private litigant typically must demonstrate that a fee is "so disproportionately large that it bears no reasonable relationship to the services rendered and

could not have been the product of arm's-length bargaining"—a tall order intended to prevent "judicial second-guessing of informed board decisions." *Id.* at 351–52. As a result, even private suits under Section 36(b) do not give individual shareholders the power to override informed independent directors' decisions. Congress instead "cho[se] to 'rely largely upon [independent director] watchdogs to protect shareholders interests.'" *Id.* at 353 (quoting *Burks*, 441 U.S. at 485).

III. Reading a Private Right of Action into Section 47(b) Would Disrupt the Functioning of Investment Companies.

Rather than protect shareholders, implying a private right of action into Section 47(b) would disrupt Congress's delicately crafted balance of oversight responsibilities in the ICA. It would encourage spurious claims by individual shareholders with idiosyncratic views based on alleged violations of virtually any provision of the ICA. And it would ultimately create regulatory uncertainty in the investment company industry, thus raising costs and harming investors.

A. A Private Right of Action Would Encourage Spurious Second-Guessing of Independent Directors' Decisions.

Creating an atextual private right of action would wreak havoc on the mutual fund industry by permitting litigants to second-guess virtually all contracts that an investment company's independent directors have already ratified, chief among them being the investment fund's advisory contract.

That cannot be. As discussed above, reviewing and approving the advisory contract is one of the most important duties of independent directors. *See supra* Section II.A. And it was one that Congress specifically entrusted to them—indeed, an investment company cannot even enter into an advisory contract without majority approval from its independent directors. 15 U.S.C. § 80a-15(c). Finding a private right of action within Section 47(b) to challenge that contract would subordinate the judgment of independent directors to the uncertainties and whims of litigation.

But the contracts that litigants may seek to rescind do not end there. Registered investment companies typically contract for almost all services necessary to operate. These include agreements with underwriters to handle the sale of shares to investors, custody agreements with qualified custodians to hold assets, and agreements with transfer agents to handle transactional recordkeeping. Permitting shareholders to sue for rescission of these (and other) contracts based on any alleged violation of the ICA would invite opportunistic, lawyer-driven challenges and threaten to disrupt the orderly operation of registered investment companies—and the trillions of dollars entrusted to them by shareholders.

These are not theoretical concerns. Indeed, shareholders have tried to second-guess the business judgment of independent directors and the SEC on all sorts of contracts under Section 47(b). For example, individual shareholders have tried to rescind distribution agreements with broker-dealers, even when those contracts had been reviewed and approved by the investment company's independent directors.

See Franklin/Templeton Distribs., Inc., 2010 WL 2348644, at *6; *Smith v. Oppenheimer Funds Distrib., Inc.*, 824 F. Supp. 2d 511, 517 (S.D.N.Y. 2011); *Wiener v. Eaton Vance Distribs., Inc.*, 2011 WL 1233131, at *2 (D. Mass. Mar. 30, 2011). Other shareholders have challenged independent directors' decisions on whether to participate in certain securities class action settlements. *See Stegall v. Ladner*, 394 F. Supp. 2d 358, 360 (D. Mass. 2005); *Hamilton v. Allen*, 396 F. Supp. 2d 545, 548 (E.D. Pa. 2005); *Dull v. Arch*, 2005 WL 1799270, at *3 (N.D. Ill. July 27, 2005). Still others have sued to rescind an investment company's officer employment contracts. *See UFCW Loc. 1500 Pension Fund v. Mayer*, 895 F.3d 695, 698 (9th Cir. 2018). Courts have long rejected such challenges on the merits, but adopting the Second Circuit's reading of the ICA would threaten to resurrect such wasteful litigation.

If actions like these are allowed to flood into the courts, then judges will be forced to assume the role of investment company experts and evaluate which contracts and independent directors' actions are in the best interests of shareholders. That is not what Congress wanted. Rather, Congress intentionally charged independent directors with this responsibility because "courts are not well suited" to tasks like this. *Jones*, 559 U.S. at 353 ("[T]he Court is institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them" (citing *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308 (1997))).

B. A Private Right of Action Would Create Regulatory Uncertainty.

Finally, discovering a private right of action under Section 47(b) would create significant regulatory uncertainty. As discussed above, the SEC plays an important role in overseeing investment companies, and part of that role involves promulgating rules—including rules that create exceptions to the ICA when independent directors are involved in the decision-making process. *See supra* Section II.B; 17 C.F.R. §§ 270.17e-1, 270.17a-8. Private actors suing for rescission of contracts based on alleged violations of the ICA could call into question the validity of the SEC's promulgated exemptive rules and the decisions of independent directors relying on them. That would necessarily inject chaos into investment funds' operations, subjecting the funds (and their shareholders) to costly litigation even when the two groups Congress tasked with protecting shareholders' interests—the independent directors and the SEC—agreed that their actions were best for shareholders.

These same concerns apply with equal force to SEC no-action letters (which advise that the SEC will not bring enforcement actions under certain situations), and to SEC exemptive orders (which exempt certain companies from specific ICA provisions and regulations). Private litigants could second-guess these judgments too. Indeed, there is at least one case where shareholders unsuccessfully tried to challenge agreements under Section 47(b) even when the SEC granted exemptive orders to the defendant investment companies. *See Laborers' Loc. 265 Pension Fund v. iShares Tr.*, 2013 WL 4604183, at *2 (M.D. Tenn. Aug.

28, 2013), *aff'd*, 769 F.3d 399 (6th Cir. 2014). The district court dismissed the action because Section 47(b) contains no private right of action. But if that changes, then individual investors will be free to litigate the merits of virtually every SEC no-action letter and exemptive order. That is not what Congress intended, and it finds no support in the text or structure of the ICA.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Second Circuit in this case.

Respectfully submitted,

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