

U.S. Supreme Court Holds That Section 47(b) of the Investment Company Act Does Not Create a Private Right of Action

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On June 11, 2026, the U.S. Supreme Court issued its ruling in *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, holding that Section 47(b) of the Investment Company Act (the ICA) does not provide an implied private right of action. In a 6-3 decision authored by Justice Barrett, the Court concluded that language providing that “a court may not deny rescission” of contracts that violate the ICA “at the instance of any party” does not confer a cause of action to private parties. Justices Kagan and Jackson filed separate dissents.¹

The decision reinforces the Court’s strict approach to implied private rights of action: “Congress, not the Judiciary, decides who may enforce the law.”² The ruling is significant for investment companies—including closed-end funds—as it forecloses a theory that had previously been accepted in the Second Circuit as a valid avenue for private litigants to challenge fund governance.³

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¹ Justice Jackson’s dissent was joined by Justice Sotomayor, and in part by Justice Kagan.

² *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, No. 24-345, Slip Op. at 1 (U.S. 2026).

³ For a full summary of the Second Circuit precedent that was overruled by *FS Credit Opportunities Corp.*, see *Second Circuit Decision Finds Implied Private Right of Action Under the Investment Company Act*, Cleary Gottlieb Steen & Hamilton LLP (Sept. 18, 2019), <https://www.clearygottlieb.com/news-and-insights/publication-listing/second-circuit-decision-finds-implied-private-right-of-action-under-the-investment-company-act>.



Background

The petitioners (the Funds) were investment companies that manage closed-end mutual funds, which contain a fixed number of shares that trade on the open market. Saba Capital Master Fund, Ltd. and Saba Capital Management, L.P. (together, Saba), the plaintiffs in the lower court proceedings, manage open-end mutual funds, which continually issue new shares to investors. Importantly, Saba also engages in activist investing by identifying low-performing closed-end funds and purchasing enough shares to change the funds' investment strategies or convert them to open-end funds.⁴ Like many closed-end funds, the Funds are incorporated in Maryland and have adopted resolutions opting into the Maryland Control Share Acquisition Act (the MCSAA), which limits voting rights for shareholders holding a disproportionate number of shares, unless the other shareholders first approve.⁵

In June 2023, Saba sued the Funds in the Southern District of New York, alleging that MCSAA resolutions violate the ICA's requirement that "every share of stock . . . shall be a voting stock and have equal voting rights with every other outstanding stock."⁶ Saba invoked Section 47(b)(2) of the ICA, which provides that "a court may not deny rescission" of contracts that violate the ICA "at the instance of any party" unless the court finds that denying rescission would produce a more equitable result and would not be inconsistent with the ICA's goals.⁷

The district court granted summary judgment to Saba, relying on Second Circuit precedent to hold that Section 47(b) creates an implied private right of action, and that the Funds' conduct violated the ICA.⁸ The district court also cited a previous case brought by Saba: *Saba Cap. CEF Opportunities I, Ltd. v. Nuveen Floating Rate Income Fund*, in which the Second Circuit held that defendant Nuveen violated the ICA by adopting an amendment limiting the voting rights of large shareholders.⁹ The Second Circuit affirmed the judgment against the Funds,¹⁰ and the Supreme Court granted certiorari to resolve the circuit split regarding whether Section 47(b) creates a private right of action.

Among the federal circuits, the Second Circuit was the only one that had recognized a private right of action under Section 47(b). The Third, Fourth, and Ninth Circuits had all held that Section 47(b) creates no private right of action.¹¹

The Supreme Court's Decision

The majority began by emphasizing that Congress determines who can sue to enforce federal law, and that the Court has "rejected the practice of fashioning rights of action" because judicially created causes of action are difficult to reconcile with the separation of powers.¹² To create a private right of action, a statute must use "'rights-creating language' aimed at protecting 'a particular class of persons'"—"Language that 'focus[es] on the person regulated rather than the individuals

⁴ *Id.* at 2.

⁵ *Id.*; Md. Corp. & Assns. Code Ann. §3-702(a)(1) (2026).

⁶ *FS Credit Opportunities Corp.*, No. 24-345, Slip Op. at 2; 15 U. S. C. § 80a-18(i).

⁷ 15 U.S.C § 80a-46(b)(2).

⁸ *Saba Cap. Master Fund, Ltd. v. BlackRock Mun. Income Fund, Inc.*, 710 F. Supp. 3d 213, 220 (S.D.N.Y. 2024). The Funds had also alleged that Saba lacked standing because it did not yet own a large enough interest to subject it to the MCSAA, and that the court lacked personal jurisdiction over the funds. Regarding standing, the court relied on the Second Circuit's decision in *Nuveen*, holding that Saba's injury was "imminent" because it would have acquired the shares if not for the control provision. *Id.* at 222.

⁹ *Saba Cap. Cef Opportunities I, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 117 (2d Cir. 2023).

¹⁰ *Saba Cap. Master Fund, LTD. v. Blackrock ESG Cap. Allocation Tr.*, 2024 WL 3174971 (2d Cir. June 26, 2024).

¹¹ *See Santomenno ex rel. John Hancock Trust v. John Hancock Life Ins. Co. (U. S. A.)*, 677 F. 3d 178, 186-187 (3d Cir. 2012); *Steinberg v. Janus Capital Mgmt., LLC*, 457 Fed. Appx. 261, 267 (4th Cir. 2011) (per curiam); *UFCW Local 1500 Pension Fund v. Mayer*, 895 F. 3d 695, 699-701 (9th Cir. 2018).

¹² *FS Credit Opportunities Corp.*, No. 24-345, Slip Op. at 3-4.

protected’ does not fit the bill.”¹³ Further, “an express ‘remedial schem[e]’ elsewhere in the statute may ‘foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights.’”¹⁴

Applying this framework, the Court held that Section 47(b) does not create an implied private right of action, for two principal reasons:

- **Section 47(b) creates a remedy, not a right.** Section 47(b) is a “mandate directed to . . . courts,” not a provision that “confer[s] a right on a specified class of persons.”¹⁵ That is, Section 47(b)’s remedy of rescission requires an underlying cause of action: it “presupposes that parties are already before the court and directs the court’s use of its remedial authority.” The Court emphasized that “contract law treats rescission as a remedy, not a cause of action” in its own right.¹⁶
- **The statute provides express enforcement mechanisms.** The ICA empowers the Securities and Exchange Commission (the SEC) to conduct investigations and sue for injunctive relief and civil penalties.¹⁷ Further, the ICA expressly authorizes private rights of action elsewhere: suits against investment advisers for breach of fiduciary duty, and issuer suits to recover short-term profits from regulated shareholders.¹⁸ This demonstrates that “‘when Congress wished to provide a private . . . remedy’ to enforce the ICA, ‘it knew how to do so and did so expressly.’”¹⁹

The Court rejected Saba’s argument that the language “at the instance of any party” confers a right to sue. Relying on a dictionary definition of “at the instance of,” the Court held that the phrase means “at the solicitation” or “suggestion of.”²⁰ That is, the phrase relates only to a court’s remedial power when a case is already before it, and “says nothing about conferring a right to sue in the first place.”²¹

The Court also addressed Saba’s reliance on *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979) (*TAMA*), which held that the “shall be void” language in Section 215 of the Investment Advisers Act (the IAA) implied a private right of action. The Court distinguished *TAMA* because, while Section 47(b) of the ICA originally contained similar “shall be void” language, Congress amended the statute in 1980 to *remove* that language and instead focus on courts’ remedial authority.²² Saba had argued that these changes, namely the addition of the word “rescission,” *strengthened* the provision by making any private right of action more “explicit.”²³ The Court disagreed, holding that these changes were a “renovation, not a new coat of paint.”²⁴

Finally, the Court rejected arguments from Justice Jackson’s dissenting opinion, which focused in part on legislative history—specifically, two committee reports “expressing Congress’s ‘wish’ that courts liberally imply private rights of action.”²⁵ The Court reasoned that there was no need to examine legislative history, but that in any event, the legislative history was at best muddled: the House

¹³ *Id.* at 4 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 288–89 (2001)).

¹⁴ *Id.* (quoting *Sandoval*, 532 U.S. at 290).

¹⁵ *Id.* at 5 (quoting *Thompson v. Thompson*, 484 U.S. 174, 183 (1988)).

¹⁶ *Id.*

¹⁷ *Id.* at 6–7.

¹⁸ 15 U.S.C. §§ 80a-35(b), 80a-29(h).

¹⁹ *FS Credit Opportunities Corp.*, No. 24-345, Slip Op. at 7. (quoting *Touche Ross & Co.*, 442 U.S. 560, 572 (1979)).

²⁰ *Id.* at 8.

²¹ *Id.* at 9.

²² *Id.* at 8–10.

²³ *Id.* at 10.

²⁴ *Id.*

²⁵ *Id.* at 11. Justice Jackson also argued that the “text, structure, and statutory history” of the ICA supported an implied private right of action. *FS Credit Opportunities Corp.*, No. 24-345, Slip Op. at 11 (Jackson, J., dissenting). Justice Kagan joined Justice Jackson’s dissent with respect to parts I and II, and asserted in her own brief dissent that there was no need to rely on legislative history. *FS Credit Opportunities Corp.*, No. 24-345, Slip Op. at 1 (Kagan, J., dissenting).

report had described Section 47(b) as creating a “remedy,” and the dissent’s other cited materials related to securities laws “generally.”²⁶

Key Takeaways

The decision eliminates Section 47(b) of the ICA as a basis for private lawsuits challenging investment company conduct, reversing the rule that had prevailed in the Second Circuit under *Oxford University Bank*. The ruling presents several broader implications:

- **Activist investor litigation.** The ruling removes a key vehicle for activist investors to challenge closed-end fund governance, including the adoption of state control share statutes such as the MCSAA.
- **Implied rights of action.** The decision underlines the Court’s reluctance to find implied private rights of action, and confirms that the current majority prefers a strict textualist approach to statutory interpretation. Quoting *Alexander v. Sandoval*, the majority has “sworn off the habit” of implying private rights of action, and “will not accept [the] invitation to have one last drink.”²⁷
- **TAMA’s continued viability.** The Court did not overrule *TAMA*’s holding that Section 215 of the Investment Advisers Act provides a private right of action. It distinguished Section 47(b) of the ICA from Section 215 of the IAA, based largely on the fact that Congress amended the ICA to remove language similar to that of Section 215. Accordingly, *TAMA* remains good law for Section 215 IAA claims, although the decision’s applicability may be limited.

- **Adoption of the MCSAA and similar control share statutes.** The Supreme Court’s holding confirms that the SEC has exclusive enforcement authority over most of the ICA. This includes, notably, the question of whether a closed-end fund violates the ICA by opting into state control share statutes such as the MCSAA, a question that the Second Circuit had answered in the affirmative.²⁸ In 2020, the SEC Division of Investment Management recommended a no-action position for closed-end funds that opt in to a state control share statute, so long as “the decision to do so by the board of the fund was taken with reasonable care on a basis consistent with other applicable duties and laws and the duty to the fund and its shareholders generally.”²⁹ The Supreme Court’s holding means that the SEC’s no-action position stands, at least for now, as the final word on the viability of control share statutes such as the MCSAA for closed-end funds registered under the ICA.

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²⁶ *FS Credit Opportunities Corp.*, No. 24-345, Slip Op. at 12–13.

²⁷ *Id.* at 8.

²⁸ *Saba Cap. Master Fund, Ltd. v. BlackRock Mun. Income Fund, Inc.*, 710 F. Supp. 3d 213, 225–26 (S.D.N.Y. 2024), *aff’d sub nom. Saba Cap. Master Fund, LTD. v. Blackrock*

ESG Cap. Allocation Tr., 2024 WL 3174971 (2d Cir. June 26, 2024).

²⁹ *Control Share Acquisition Statutes*, Div. of Inv. Mgmt., U.S. Sec. & Exch. Comm’n (May 27, 2020), <https://www.sec.gov/investment/control-share-acquisition-statutes>.