22-407

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SABA CAPITAL CEF OPPORTUNITIES 1, LTD.,
SABA CAPITAL MANAGEMENT, L.P.,

Plaintiffs-Appellees,

—against—

NUVEEN FLOATING RATE INCOME FUND, NUVEEN FLOATING RATE INCOME OPPORTUNITY FUND, NUVEEN SHORT DURATION CREDIT OPPORTUNITIES FUND, NUVEEN GLOBAL HIGH-INCOME FUND, NUVEEN SENIOR INCOME FUND, TERENCE J. TOTH, in their capacity as Trustees of the Nuveen Trusts, JACK B. EVANS, in their capacity as Trustees of the Nuveen Trusts, WILLIAM C. HUNTER, in their capacity as Trustees of the Nuveen Trusts, ALBIN F. MOSCHNER, in their capacity as Trustees of the Nuveen Trusts, JOHN K. NELSON, in their capacity as Trustees of the Nuveen Trusts, JUDITH M. STOCKDALE, in their capacity as Trustees of the Nuveen Trusts, CAROLE E. STONE, in their capacity as Trustees of the Nuveen Trusts, MARGARET L. WOLFF, in their capacity as Trustees of the Nuveen Trusts, ROBERT L. YOUNG, in their capacity as Trustees of the Nuveen Trusts, MATTHEW THORNTON, III, in their capacity as Trustees of the Nuveen Trusts,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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RULE 26.1 DISCLOSURE STATEMENT

Plaintiffs-Appellees Saba Capital CEF Opportunities 1, Ltd. and Saba Capital Management, L.P., have no corporate parents and no publicly held corporation owns 10% or more of their stock.

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INTRODUCTION

Each of the Nuveen Funds is a closed-end fund regulated by the Investment Company Act of 1940 ("ICA"). Section 18(i) of the ICA requires that every share of common stock issued by a regulated fund must be (a) "voting stock" and (b) "have equal voting rights" with all other shares:

> Except as provided in subsection (a) of this section, or as otherwise required by law, ***every share of stock hereafter issued by a registered management company*** (except a common-law trust of the character described in section 80a-16(c) of this title) ***shall be a voting stock and have equal voting rights with every other outstanding voting stock*** . . . .

15 U.S.C. § 80a-18(i) (emphases added).

Nuveen nevertheless adopted a Control Share Amendment that impermissibly strips voting rights from certain common stock. *See, e.g.*, JA320 (Nuveen Amended Bylaws) § 9.4(c)(i) (designating a subset of "Common Shares" that "shall not be 'entitled to vote'"). The District Court—in a concise and thorough opinion by Judge Oetken debunking each of Nuveen's arguments—correctly concluded the Amendment creates non-voting stock without equal voting rights as other common stock, in violation of Section 18(i). SA2-13. In doing so, the District Court rightly rejected Nuveen's primary argument on appeal—*i.e.*, that the Control Share Amendment does not affect the voting rights of ***shares***, but instead only affects the voting rights of share***holders***.

The District Court readily disposed of Nuveen's proffered share-shareholder distinction as "meaningless." SA8-9. Directly contrary to Nuveen's argument, "voting stock" is expressly defined in the ICA by reference to the share***holder's*** ability to vote the stock. 15 U.S.C. § 80a-2(a)(42) ("security" is "voting" only if it is "***presently entitling*** the ***owner or holder thereof to vote*** for the election of directors…" (emphases added)); *id.* § 80a-2(a)(36) ("security" includes "stock"). The ICA's statutory definitions put to rest any doubt that Nuveen's Control Share Amendment violates Section 18(i). Invalidating the Control Share Amendment, and rejecting the share-shareholder distinction, likewise furthers the ICA's statutory purposes of protecting against investment companies' issuing "securities containing inequitable or discriminatory provisions" and failing to protect the rights of "***the holders***" of those securities, 15 U.S.C. § 80a-1(b)(3) (emphasis added), and preventing investment companies from being run "in the interest of" entrenched fund management and "affiliated persons thereof," rather than "all classes" of "security ***holders***," *id.* § 80a-1(b)(2) (emphasis added).

Nuveen's efforts to conjure a "longstanding" share-shareholder distinction recognized by Section 18(i) could not be farther from the truth. In reality, the cottage industry of closed-end fund managers exploiting the supposed share-shareholder distinction began just a few years ago, in 2020, when the SEC staff announced—in a statement that the District Court noted was explicitly without "legal force or effect"

and lacks any legal analysis of Section 18(i), *see* SA8—that it would no longer recommend enforcement action against closed-end funds making use of control share provisions. Prior to that, fund managers followed the longstanding position of the SEC—articulated in its only reasoned interpretation of Section 18(i)—that control share provisions are "inconsistent with the fundamental requirements of Section 18(i) of the Investment Company Act that every share of stock issued by the Fund be voting stock and have equal voting rights with every other outstanding voting stock." *Boulder Total Return Fund, Inc.*, 2010 WL 4630835, at *2 (S.E.C. No-Action Letter Nov. 15, 2010). Nuveen does not discuss or even cite the 2010 *Boulder* letter; and Nuveen only cursorily mentions the SEC staff's terse and unreasoned 2020 statement on which it placed great weight below.

Tellingly, Nuveen's supposedly "longstanding" share-shareholder distinction derives from a Delaware ***state court*** case and its progeny, construing a Delaware ***state law*** that ***expressly permits*** companies, in their charter, to vary the rights of stock based on the identity of the stockholder. However, Nuveen's distinction is contrary to the plain text of Section 18(i) and the defined terms therein, and runs against the basic purposes of the federal ICA. While Nuveen points to ***other*** provisions of federal law that it says reflect the share-shareholder distinction, those provisions only reinforce the fact that no such distinction is recognized in Section 18(i). Nuveen's proffered share-shareholder distinction with respect to voting rights

has no basis in the text, purpose, or legislative history of Section 18(i), and runs contrary to every interpretation of Section 18(i) to date, including the SEC's only reasoned interpretation of the provision. The District Court correctly rejected Nuveen's attempt to evade the clear mandates of the ICA.

The District Court also easily and properly disposed of Nuveen's non-merits-based arguments. The District Court properly concluded Saba has Article III standing; because Saba's "acquisition of any additional stock would turn its stock into a control share subject to the control share amendment," the District Court correctly reasoned that Saba has "already suffered the injury of being unable to acquire additional shares that are voting stock with equal voting rights with every other outstanding stock." SA10-11. The District Court also correctly followed the statutory directive that the Court "may not deny rescission" of the offending Control Share Amendment, 15 U.S.C. § 80a-46(b)(2), after finding the Amendment not only contrary to Section 18(i) but also "flatly inconsistent with the purposes" of Section 18(i). SA9 (citing with approval 2010 *Boulder* letter). Finally, the District Court properly declared that the Control Share Amendment violates Section 18(i); other than its unfounded standing- and merit-based arguments, Nuveen has not separately challenged the District Court's grant of declaratory judgment.

Saba respectfully requests that this Court enforce the ICA's plain requirement that "every share of stock" must "be a voting stock and have equal voting rights with

every other outstanding voting stock." Applying this foundational "one-share, one-vote" principle to invalidate Nuveen's bespoke bylaw serves Congress's purpose in enacting the ICA: protecting shareholders from disenfranchisement and manipulation by powerful fund managers like Nuveen. The judgment of the District Court should be affirmed.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellees invoked the District Court's jurisdiction pursuant to 15 U.S.C. § 80a-43 and 28 U.S.C. § 1331. This Court has jurisdiction to review the District Court's Order under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Framed properly, the issues presented by Defendant-Appellants' appeal are:

1. Whether the District Court properly concluded it had subject-matter jurisdiction over Saba's claims.
2. Whether the District Court properly concluded Nuveen's Control Share Amendment violates 15 U.S.C. § 80a-18(i).
3. Whether the District Court properly ordered rescission of Nuveen's unlawful Control Share Amendment pursuant to 15 U.S.C. § 80a-46(b)(2).

STATEMENT OF THE CASE

I. Congress, Through the ICA, Protected Investors Against Management Abuse and Discrimination in Voting

The "Investment Compan[y] Act of 1940 and the companion Investment Advisers Act . . . were among statutes designed to eliminate certain abuses in the securities industry which were found to have contributed to the stock market crash of 1929 and the depression of the 1930s." *Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977). "The 1940 legislation was based on exhaustive studies by the SEC which culminated in a number of extensive reports on investment trusts, investment companies and investment advisers." *Id.* That "four-year study of the investment company industry . . . . depicted fantastic abuse of trust by investment company management and wholesale victimizing of security holders." *United States v. Deutsch*, 451 F.2d 98, 108 (2d Cir. 1971).

Congress's intent in enacting the ICA was to curb the abusive practices of fund management, and to protect fund investors. "Congress adopted the Investment Company Act of 1940 because of its concern with the potential for abuse inherent in the structure of investment companies." *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 339 (2010) (cleaned up). "Recognizing that the relationship between a fund and its investment adviser was 'fraught with potential conflicts of interest,'" the ICA created a variety of "protections" for shareholders. *Id.* Congress set out "to provide a comprehensive regulatory scheme to correct and prevent certain abusive practices

in the management of investment companies ***for the protection of persons who put up money to be invested*** by such companies in their behalf." *Indep. Inv. Protective League v. Sec. & Exch. Comm'n*, 495 F.2d 311, 312 (2d Cir. 1974) (emphasis added); *Reeves v. Continental Equities Corp.*, 912 F.2d 37, 41 (2d Cir. 1990) (any "review of the legislative history and case law indicates that the ICA was enacted for the benefit of *investors*, and not employees of investment companies"); *Boulder*, 2010 WL 4630835, at *7 & n.32 (ICA "proscribes actions by investment companies—not shareholders").

In particular, Congress was concerned that fund management's creation of an "unbalanced allocation of voting privileges" was "largely responsible for many of the abuses and defects which developed in the course of the histories of [investment] companies." *Investment Trusts and Investment Companies; Hearings on S. 3580 Before a Subcomm. Of the Senate Comm. On Banking and Currency*, 76th Cong., 3d Sess. at 1034 (1940) ("ICA Hearings"). Section 18(i) was born of those concerns. Congress adopted Section 18(i) to address the "various devices of control" that investment company insiders used to deny shareholders "any real participation in the management of their companies." S. Rep. No. 76-1775, at 7 (1940). Section 18 in particular—titled "[c]apital structure of investment companies"—was motivated by a concern that, through the disproportionate allocation of voting power among shareholders, management would be able to unfairly exercise control in spite of the

wishes of the fund's shareholders. *See ICA Hearings*, at 38 ("Complicated capital structures have been devised. Tricky management stocks with disproportionate voting power are issued to insiders.").

II. Nuveen Adopted its Management-Entrenching Control Share Amendment Following Chronic Underperformance and Saba's Acquisition of a Substantial Stake in the Trusts

The Nuveen Funds are chronic underperformers. And worse, the Funds' incumbent management did little, if anything, to address that chronically poor performance.

Nuveen admits in its annual reports that the shares of NSL, JFR, JRO, and JSD trade at a substantial discount to their NAV (in other words, the market value of the fund is less than the combined value of the assets held by the fund). For example, as reported July 2020, NSL traded at -13.56%; JFR at -14.57%; JRO at -14.39%; and JSD at -16.74%. JA876 (Nuveen 2020 Annual Report). Likewise, Nuveen admits in its annual report that, as compared to the performance of a "corresponding market index," the Funds' "total returns at NAV" in the reporting period were "NSL -9.89%," "JFR -8.82%," "JRO-8.91%," and "JSD -11.19%." JA869. For Nuveen, 2020 continued in the long tradition of underperformance against comparable indices. *See, e.g.*, JA878, JA880, JA882, JA884 (over 10 years, reporting average annual returns of: NSL (3.43% at common share price, compared

to 4.38% index); JFR (3.86%, compared to 4.38% index); JRO (3.69%, compared to 4.38% index); JSD (1.87%, compared to 3.86% index)).

In the meantime, Nuveen, as investment advisor, continued to leech unjustifiable fees from the Funds. Notably, Nuveen's fees are ***not*** based on performance but instead, based on a percentage of the "Fund's Managed Assets." *See, e.g.*, JA197. That scheme, in which Nuveen wins even when shareholders lose, is made possible by the Trustees who serve on boards across the Fund complex and receive their own significant compensation doing so. *See, e.g.*, JA785, JA798, JA808, JA818, JA828.

Seeing an opportunity to generate value for all investors in the face of entrenched mismanagement, Saba began accumulating positions in the Funds in December 2018, and increased the size of those positions over the next two years.[1] By the end of 2020, Saba was the beneficial owner of at least 9.9% of each of the Funds' outstanding shares. SA10; JA833, JA841, JA848, JA773, JA859; JA1049 ¶¶ 8-12.

[1] Saba disclosed its increases in beneficial ownership of (i) 400,138 JGH shares in December 2018 to 2,288,325 shares in December 2020; (ii) 13,519 JSD shares in December 2018 to 1,211,203 shares in December 2020; (iii) 87,415 NSL shares in December 2018 to 3,815,160 shares in December 2020; (iv) 266,251 JRO shares in December 2018 to 4,493,406 shares in December 2020; and (v) 143,887 JFR shares in December 2018 to 6,685,445 shares in December 2020. JA271, JA276; Dist. Ct. Dkt. 39 at 13.

Nuveen took notice and sought to entrench itself. On October 5, 2020, the Nuveen-beholden Trustees of each of the Nuveen Funds adopted Amended and Restated By-Laws (the "Amended Bylaws"). JA284, JA728 (Amended Bylaws); *see* JA1048, ¶¶ 6-7. Among the amendments to the bylaws were provisions eliminating any voting rights for shares held by the same beneficial owner in excess of a certain threshold. *Id.* ¶ 7; *see* JA315 (Amended Bylaws), art. IX. Under the Amended Bylaws, shares of the fund obtained through a "Control Share Acquisition"—defined as more than 10% of the fund's shares acquired by a single beneficial owner—no longer have voting rights. As Nuveen characterized it in the press release accompanying the Amended Bylaws, "voting rights with respect to such shares" may be exercised "only to the extent the authorization of such voting rights is approved by other shareholders of the fund." JA1049 ¶ 6; JA723 (Oct. 5, 2020 Release), at 3.

Nuveen's Control Share Amendment is just the most recent in the rules of elections it has adopted in an effort to entrench incumbent management. Nuveen's bylaws, for example, also include a heightened voting standard for electing trustees in the context of contested elections—*i.e.*, elections in which a challenger runs against the incumbents. In a non-contested election, only a "plurality" of shares ***present*** at the meeting is required to elect trustees. *See* JA297, § 2.7(b)(ii). In a contested election, the bylaws protect incumbents by increasing the threshold for electing new trustees to a majority of ***all outstanding shares*** in the fund. *Id.*

§ 2.7(b)(i). Given that turnout in closed-end fund elections tends to be low (and fund management knows it), these heightened voting thresholds are designed to make it impossible in practice to unseat incumbent trustees. *See Saba Capital CEF Opportunities 1, Ltd. v. Voya Prime Rate Tr.*, 2020 WL 5087054 (Ariz. Super. Ct. June 26, 2020) (enjoining bylaw amendment raising voting threshold for electing closed-end fund trustees to impermissibly high level, at 60% of shares outstanding); *Eaton Vance Senior Income Tr. v. Saba Cap. Master Fund, Ltd.*, 2021 WL 2222812, at *7 (Mass. Super. Ct., Mar. 31, 2021) (denying motion to dismiss challenge to heightened voting threshold in contested elections, at 50% of shares outstanding). Nuveen's heightened voting threshold would be even more likely out of reach if its Control Share Amendment were allowed to remain in effect and challengers were unable to accumulate more than 10% of the shares in a fund to be voted against the incumbents.

III. The Nuveen Funds are a Case Study in the Need for Effective Elections and the Benefits of Activism

The Nuveen Funds at issue provide a case study in the need for an effective and fair process for electing and removing trustees, and the value an "activist" can generate for all shareholders. Make no mistake: the relative merits of shareholder activism are ultimately irrelevant to the resolution of this case; the shareholders of closed-end funds, with the equal voting rights assured them by the ICA, can decide for themselves whether they trust incumbent management or the board nominees of

an "activist" shareholder to make the most of their investments. But, contrary to the large portions of the briefs filed by Nuveen and its lobbyists at the Investment Company Institute, shareholder activism is an important tool for holding fund management accountable and maximizing value for all shareholders.

Without an effective mechanism for removing trustees who are, in turn, beholden to fund managers like Nuveen, shareholders in closed-end funds are left stuck in an underperforming vehicle—unlike, for example, in open-end funds. In an open-end fund, shareholders have the ability to "vote with their feet" by redeeming their shares, which provides a natural check on fund management. *See* John C. Coates, IV and R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 JOURNAL OF CORPORATION LAW 151 (2007).

In closed-end funds, where shareholders are unable to redeem, management's interests are less closely aligned with shareholders' interests, creating a well-documented agency problem. *See, e.g.*, Michael J. Barclay, Clifford G. Holderness, and Jeffrey Pontiff, *Private Benefits from Block Ownership and Discounts on Closed-End Funds*, 33 JOURNAL OF FINANCIAL ECONOMICS 263 (1993); Jonathan B. Berk and Richard Stanton, *Managerial Ability, Compensation, and the Closed-End Fund Discount*, 62 JOURNAL OF FINANCE 529 (2007); Martin Cherkes, Jacob Sagi, and Richard Stanton, *A Liquidity-Based Theory of Closed-End*

Funds, 22 REVIEW OF FINANCIAL STUDIES 257 (2009). An effective mechanism for electing and removing trustees of closed-end funds is thus an essential tool to protect against opportunistic behavior and underperformance by closed-end fund management. *See generally* Michael Bradley, Alon Brav, Itay Goldstein, and Wei Jiang, *Activist Arbitrage: A Study of Open-Ending Attempts of Closed-End Fund*, 95 JOURNAL OF FINANCIAL ECONOMICS 1 (2010) (providing empirical analysis of the performance incentives for closed-end funds given the prospect of activist intervention).

A recent review of empirical evidence on activism in closed-end funds concluded that activist hedge funds are "in a unique position to mitigate the agency cost" endemic to closed-end funds, and found such activism to be overall value-enhancing. *See* Alon Brav, Wei Jiang, and Rongchen Li, *Governance by Persuasion: Hedge Fund Activism and the Market for Corporate Influence*, Finance Working Paper No. 797/2021, European Corporate Governance Institute, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3955116. This is consistent with research on activism in the context of public operating companies and the manner in which challengers to incumbents were able to spur a variety of beneficial changes. *See* Lucian Bebchuk, Alon Brav, Wei Jiang, and Thomas Keusch, *Dancing with Activists*, 137 JOURNAL OF FINANCIAL ECONOMICS 1 (2020); Thomas Keusch, *Shareholder Activists and Frictions in the CEO Labor Market*, LawFin

Working Paper No. 19, https://ssrn.com/abstract=3533683. Indeed, Schedule 13D filings by hedge fund activists disclosing their accumulation of a significant stake are frequently accompanied by positive stock price reactions; this is widely interpreted to reflect the market's expectation that activist engagement will have positive effects for shareholders. *See, e.g.*, Brav, Jiang, and Li, *Governance by Persuasion*, *supra*, at 37-41.

Consonantly, the more draconian a closed-end fund's "defensive mechanisms," thereby impeding shareholder activism, the more fund insiders have been found to extract value from shareholders. *See, e.g.*, Matthew E. Souther, *The Effects of Takeover Defenses: Evidence from Closed-End Funds*, 119 JOURNAL OF FINANCIAL ECONOMICS 420 (2016). One study, for example, found that "expense ratios, director compensation levels, and managerial advisor fees are all higher when [there are] greater numbers of takeover defenses," that "adoptions of additional defenses are associated with simultaneous increases in director compensation and advisory fees," and that "takeover defenses have a negative effect on firm value." *Id.* at 439. The study concludes that its results highlight "the financial benefits that directors receive from the use of takeover defenses" and that defenses "allow [fund insiders] to extract benefits from shareholders." *Id.*

Nuveen's scare-mongering that activists like Saba can "force" actions detrimental to fund shareholders is likewise unfounded. At issue is the election of

trustees, whose conduct will be conscribed by shareholder approval and duties to act in the best interests of the funds and their shareholders. And even as to the types of actions Nuveen says activists tend to prompt by nominating candidates to challenge incumbent management—tender offers being a common example—the benefits of those actions redound to ***all*** shareholders. Even the report prepared by Nuveen's lobbyists undermines the claim that only challengers or activist shareholders benefit from actions like tender offers. *See* ICI Report (cited Br. at 14) at 66 (presenting data suggesting that "activist shareholders [on average] are 31 percent of total shares tendered," meaning 69% of the shares tendered come on average from non-activist shareholders) (cleaned up).

Shareholder activism is an important tool for holding fund management accountable for poor performance and maximizing value for ***all*** shareholders. But the efficacy of activism, and the ability of all shareholders to hold management to account, would be severely jeopardized if—contrary to the plain mandates and purposes of the ICA—management were permitted to impose inequitable entrenchment mechanisms to defeat the will of shareholders voting on a one-share, one-vote basis.

IV. Nuveen's Control Share Amendment Creates Non-Voting Common Stock and Stock with Unequal Voting Rights as Other Common Stock

The Control Share Amendment, Article IX of the Amended Bylaws, operates as follows:

Section 9.1 of the Amended Bylaws defines a new event called a "Control Share Acquisition." JA316 (Nuveen Bylaws, § 9.1(c)). A "Control Share Acquisition" is defined as the "acquisition by any Person of beneficial ownership of Common Shares which, but for the provisions of this Article IX, would have voting rights." *Id.* § 9.1(c)(i). The provision is triggered when a shareholder has sufficient common shares that, "when added to all other Shares beneficially owned by such Person," the person would be entitled "upon acquisition of such Common Shares, to vote or direct the voting of shares having voting power in the election of Trustees . . . [of] one-tenth or more." *Id.* § 9.1(c)(i)(1). In other words, the provision begins restricting newly acquired shares once a beneficial owner acquires 10% of all voting stock in the Trust.

The remaining provisions of Article IX remove the "voting rights" from certain shareholders' common shares. Under Section 9.4 of the Amended Bylaws, "[t]he beneficial owner of Common Shares of the Trust acquired in any Control Share Acquisition shall have only such voting rights with respect to such Shares as are authorized pursuant to this Section [of the bylaws]." *Id.* § 9.4(a). That Section explains that (a) "such beneficial owner shall not be 'entitled to vote' such Common Shares" and (b) "such Common Shares held by such beneficial owner shall not be 'entitled to vote.'" *Id.* § 9.4(c)(i). "[T]he beneficial owner of such Common Shares shall not otherwise have voting rights with respect to such Common Shares with

respect to any matter pursuant to the Declaration of Trust or these By-Laws." *Id.* § 9.4(c)(iii).

Should a beneficial owner wish to attempt to restore the voting rights of shares acquired above the 10% threshold, the beneficial owner must deliver a "Control Share Acquisition Statement" to the Trustees. *Id.* § 9.3(a)(i). The beneficial owner must then ask for a special shareholder meeting. *Id.* § 9.4(a); *see id.* § 9.4(b) (voting rights can be restored "only to the extent authorized by vote of Shareholders at a meeting of [the] Shareholders."). The beneficial owner's request for such a meeting is "not effective" unless accompanied by an undertaking stating that, in the course of seeking restoration of voting rights, the beneficial owner agrees to "pay the Trust's reasonable expenses in connection with the special meeting," including expenses incurred "in opposing a vote to authorize voting rights." *Id.* § 9.3(a)(i).

At the special shareholder meeting, restoration of voting rights requires a vote in favor of the proposal by a majority of all shares in the fund, irrespective of how many shares are absent from participating in voting. *See id.* § 9.4(b) (restoration of voting rights requires the "affirmative vote of the holders of a majority of all Shares entitled to vote generally in the election of Trustees, excluding Interested Shares"). Notably, this threshold is significantly higher than the threshold that is required for ordinary shareholder proposals, in which the vote of a simple majority of the shareholders present at the meeting suffices for the proposal to pass. *See id.* § 2.7(b)

("Shareholders shall take action by the affirmative vote of the holders of a majority of the Shares present and entitled to vote at a meeting of Shareholders at which a quorum is present."). In the course of the vote-restoration meeting, all shares held by the shareholder that triggered the "control share" provision are prohibited from voting. *See id.* § 9.1(e) ("Interested Shares" means "Shares that are beneficially owned by: (i) any Person who has acquired Beneficial Ownership of Shares in a Control Share Acquisition"). Especially after removing the 10%+ stake of a "control" shareholder from the count, the 50%-outstanding threshold likely makes any attempted vote-restoration impossible in practice to achieve. *Cf. Saba Capital CEF Opportunities 1, Ltd.*, 2020 WL 5087054.

V. Saba Brought this Action to Rescind Nuveen's Unlawful Control Share Amendment and Obtain a Declaration that it Violates the ICA

The Control Share Amendment is a blatant entrenchment mechanism designed to squelch dissenting shareholders like Saba and to protect the substantial management fees Nuveen derives from the Funds. Saba filed this action to obtain rescission of the Control Share Amendment, and a declaration regarding its unlawfulness.

Saba held shares in each of the Trusts at or above the threshold for triggering the Control Share Amendment—specifically, at least 11.7% of the shares of JFR; 10.2% of the shares of JRO; 12.0% of the shares of JSD; 9.9% of the shares of JGH; and 9.9% of the shares of NSL. JA833, JA841, JA848, JA773, JA859; JA1049 ¶¶ 8-

12. But for the adoption of the Control Share Amendment, Saba would have acquired additional shares of the Trusts. *See* JA34-35 (Verified Compl. ¶ 29). However, because of the Control Share Amendment, Saba has not done so, because any additional shares that Saba were to acquire would immediately be stripped of their voting rights. *Id.* The Control Share Amendment plainly violates the equal voting rights that are guaranteed to shareholders by Section 18(i) of the ICA, which requires that every common share of stock must be a "voting stock and have equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i).

The ICA provides a private cause of action authorizing a party to a contract that violates the ICA to seek rescission. *See Oxford University Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 106 (2d Cir. 2019); 15 U.S.C. § 80a-46(b) ("(1) A contract that is made, or whose performance involves, a violation of this subchapter . . . is ***unenforceable by either party*** . . . . [and] (2) To the extent that a contract described in paragraph (1) has been performed, ***a court may not deny rescission at the instance of any party*** unless such court finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes of this subchapter." (emphases added)). The ICA thereby authorizes shareholders to seek rescission of unlawful bylaws—recognized as a contract with fund shareholders, *see, e.g.*, *ER Holdings, Inc. v. Norton Co.*, 735 F. Supp. 1094, 1102-03 (D. Mass. 1990) (fund's bylaws are a

"contract made for the shareholders' benefit")—like the Control Share Amendment at issue.

The District Court, in a thorough and well-reasoned opinion, granted Saba's requested relief, entering judgment for Saba on its claim for rescission of the Control Share Amendment and declaring that the Amendment violates Section 18(i). SA2-13. The District Court properly held that the "control share amendment [] violates Section 18(i)'s requirement that every stock issued be voting stock," SA5-6, and that every share of stock "have equal voting rights with every other outstanding voting stock," SA9-10.

In doing so, the District Court readily disposed of Nuveen's proffered share-shareholder distinction as "meaningless," particularly in light of the ICA's definition of a "voting security" as one "*presently* entitling the owner or holder thereof to vote for the election of directors of a company." SA5-6. The District Court also rejected Nuveen's argument that other portions of the ICA reflected the share-shareholder distinction that Nuveen said should be read into Section 18(i), at minimum because Section 18(i) expressly provides that where "otherwise required by law" its "equal voting" requirements do not apply. SA6-7. And the District Court rejected Nuveen's reliance on a 2020 SEC staff statement that it would no longer recommend enforcement action against closed-end funds making use of control share provisions, which lacked any legal analysis of Section 18(i) and was explicitly without "legal

force or effect." SA8. The District Court instead cited with approval the SEC staff's 2010 *Boulder* letter which, after extensive analysis, concluded that control share provisions are inconsistent with both the text and purposes of Section 18(i). SA9.

The District Court also easily and properly disposed of Nuveen's non-merits-based arguments. The District Court properly concluded Saba has Article III standing; because Saba's "acquisition of any additional stock would turn its stock into a control share subject to the control share amendment," the District Court correctly reasoned that Saba has "already suffered the injury of being unable to acquire additional shares that are voting stock with equal voting rights with every other outstanding stock." SA10-11. The District Court also correctly followed the statutory directive that the Court "may not deny rescission" of the offending Control Share Amendment, 15 U.S.C. § 80a-46(b)(2), after finding the Amendment not only contrary to Section 18(i) but also "flatly inconsistent with the purposes" of Section 18(i). SA9 (citing with approval the SEC's 2010 *Boulder* letter). Finally, having disposed of Nuveen's standing- and merits-based arguments, the District Court appropriately declared that the Control Share Amendment violates Section 18(i). SA10-11, SA12.

SUMMARY OF ARGUMENT

I. The District Court properly concluded Saba has standing to maintain this action. There is no dispute that Saba's holdings in the Nuveen funds were at or above

the threshold for triggering the Control Share Amendment. SA10; JA833, JA841, JA848, JA773, JA859; JA1049 ¶¶ 8-12. Saba suffered the real, concrete "injury of being unable to acquire additional shares that are voting stock with equal voting rights with every other outstanding stock." SA11. At minimum, given that the Control Share Amendment prevented Saba from buying even a single additional share in the funds that had equal voting rights with all other shares, the harm to Saba's voting rights was sufficiently imminent to maintain standing.

II. The District Court properly held that the "control share amendment [] violates Section 18(i)'s requirement that every stock issued be voting stock." SA5. Under the Control Share Amendment, when "a shareholder acquires new stock in one of the Trusts, and the total amount of her stock in that trust constitutes a control share, her newly acquired stock does not presently entitle her to vote. Instead, whether a control shareholder's newly acquired stock entitles her to vote is contingent on an uncertain future event . . . . The plain language of the ICA makes this contingency impermissible." SA5-6.

The District Court also correctly concluded the Control Share Amendment violates Section 18(i)'s requirement that every share of stock "have equal voting rights with every other outstanding voting stock." SA9. Under the Control Share Amendment, "the voting rights of stock owned by control shareholders are inferior to the voting rights of stock owned by non-control shareholders. A control

shareholder's stock can completely lose its voting rights if the conditions within the control share amendment are not met; the same cannot be said of a non-control shareholder's stock. This asymmetry in voting rights runs afoul of Section 18(i)'s requirement of equal voting rights." SA9-10.

Nuveen's only attempt to reconcile the Control Share Amendment with Section 18(i) is based on a supposed distinction between depriving share***holders*** of voting rights, as opposed to ***shares***. That distinction, however, is rooted in Delaware state statutory provisions expressly permitting companies to deviate from a one-share one-vote standard when provided for in their certification of incorporation. The ICA, by contrast, expressly rejects the distinction, defining "voting stock" by reference to the share***holder's*** ability to vote the stock. 15 U.S.C. § 80a-2(a)(42) ("security" is "voting" only if it is "***presently entitling*** the ***owner or holder thereof to vote*** for the election of directors" (emphases added)). Nuveen's proffered share-shareholder distinction is contrary to the plain text of Section 18(i) and defined terms therein, contrary to the statutory purposes of the ICA, finds no support in the legislative history or any authority interpreting Section 18(i), and should be rejected.

III. The District Court properly ordered rescission of the offending Control Share Amendment pursuant to 15 U.S.C. § 80a-46(b)(2). Nuveen waived any argument that the District Court was required to weigh the equities before granting rescission. Nuveen never argued that equitable balancing was a precondition to

granting rescission under the statute, never offered § 80a-46(b)(2) as reason to deny summary judgment, and in fact, ***never cited § 80a-46(b)(2) at all***. The statute, moreover, ***prohibited*** the District Court from denying rescission after it found the Control Share Amendment "inconsistent with the purposes" of the ICA. SA8. In any event, the statute does not require such equitable balancing as a precondition to granting rescission or require the District Court to take evidence or make any explicit findings about such balancing.

ARGUMENT

I. The District Court Correctly Ruled that Saba Has Article III Standing

The District Court properly concluded Saba suffered actual, imminent, and concrete injury in the form of interference with its trading activity, business practices, and its ability to acquire shares in the Nuveen funds with the equal voting rights guaranteed by the ICA.

A. The District Court Properly Concluded Saba Suffered Actual Injury

There is no dispute that Saba's holdings in the Nuveen funds were at or above the threshold for triggering the Control Share Amendment. SA10; JA833, JA841, JA848, JA773, JA859; JA1049 ¶¶ 8-12. As a result, Nuveen is incorrect that Saba's injury was a "future injury" that supposedly "depends on a speculative chain of possibilities, including the possible future decisions of independent decisionmakers." Br. at 36. The Control Share Amendment prevented Saba from

buying even a ***single additional share*** in the funds that had equal voting rights with all other shares. As the District Court properly concluded, that meant Saba "***already*** suffered the injury of being unable to acquire additional shares that are voting stock with equal voting rights with every other outstanding stock." SA11 (emphasis added).

The interference with Saba's trading activity caused by the Control Share Amendment is a plainly cognizable injury-in-fact. The "loss of the opportunity to purchase a desired product is a legally cognizable injury." *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 138 (D.C. Cir. 2005) (Chamber of Commerce injured by lost opportunity to purchase shares in mutual funds on desired terms). That is true even when a would-be purchaser could theoretically obtain the desired product from another source. *See, e.g.*, *Orangeburg, South Carolina v. Fed. Energy Reg. Comm'n*, 862 F.3d 1071, 1074 (D.C. Cir. 2017).

The Control Share Amendment has also resulted in "impairment to a specific business practice" of Saba's. *XY Plan. Network, LLC v. United States Sec. & Exch. Comm'n*, 963 F.3d 244, 252 (2d Cir. 2020). Nuveen characterizes Saba's investment strategy as buying up ever-larger stakes in closed-end funds trading at a discount to NAV in order to seize control. *E.g.*, Br. at 16; Dist. Ct. Dkt. 39 at 7 (characterizing Saba as a "well-known 'activist' investor that specializes in buying up shares in closed-end funds . . . in order to seize control of the funds"). The *raison d'être* of the

Control Share Amendment is to interfere with the business practice as characterized by Nuveen itself. *See generally* JA928 (Nuveen Demand Letter Response) (justifying Control Share Amendment as response to "activist investors, often hedge funds like Saba, seek[ing] to gain control of a substantial stake in closed-end funds"). Saba of course disagrees with Nuveen's pejorative characterization; Saba is simply trying to accumulate enough shares to overcome Nuveen's draconian entrenchment mechanisms and hold underperforming management to account. But, in any event, Nuveen's interference with Saba's business practice is itself another form of harm Saba already suffered as a result of the Control Share Amendment.

The record belies Nuveen's assertion that Saba attempts to ground its standing on an "unsubstantiated intention" to acquire more shares. Br. at 37. Saba's ***verified*** complaint states unequivocally that "Funds managed by Saba, including Saba CEF 1, would have acquired additional shares in the Trusts but for the Vote-Stripping Amendment, and the Vote-Stripping Amendment has prevented Saba from acquiring voting shares in the trusts with equal voting rights as required by the 40 Act." JA20-21 ¶ 29; SA10-11. That assertion—sworn under penalty of perjury by Saba Portfolio Manager Paul Kazarian, and made with personal knowledge, *see* JA25—has the evidentiary weight of an affidavit for purposes of summary judgment. *Jamison v. Metz*, 541 F. App'x 15, 18 (2d Cir. 2013) (summary order) (a "'verified complaint is to be treated as an affidavit for summary judgment purposes'" (quoting

Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995))). Nuveen itself, moreover, has highlighted the uniform ***increases*** in Saba's holdings in the Funds, up to or above the control-share threshold, from December 2018 through the end of 2020. JA271, JA276; Dist. Ct. Dkt. 39 at 13. Particularly in light of Saba's sworn assertion of its desire to acquire more shares, the District Court was well within its discretion to credit the only reasonable inference from Saba's steadily increasing holdings until the funds adopted the Control Share Amendment in October 2020: that Saba wanted to acquire and would have acquired additional shares were it not for the Control Share Amendment.

B. The District Court Properly Concluded Saba Suffered Imminent Injury

At minimum, the District Court was correct that Saba's injury was imminent, having come within a hair's breadth—literally a ***single share***—of triggering the Control Share Amendment. As the District Court properly concluded, the law "does not require that Saba first experience the further injury of actually purchasing stock with unequal voting rights" to have standing. SA11. Federal courts have "long accepted jurisdiction" where a plaintiff's "self-avoidance of imminent injury is coerced by the threatened enforcement action of a private party." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 130 (2007) (citing *Am. Machine & Metals, Inc. v. De Bothezat Impeller Co.*, 166 F.2d 535 (2d Cir. 1948)); SA10.

Saba's documented record of acquiring shares up to or above the control-share threshold, Saba's under-oath assertion that it would have purchased additional shares but-for the Control Share Amendment, and Nuveen's own characterization of Saba's business strategies to buy up shares to gain control, add up to far more than a "some day intention" to acquire additional shares. Br. at 35. Rather, the record amply supports that Saba had the type of "concrete plan" to acquire additional shares that satisfies the imminence requirement. *Id.; see Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (plaintiffs had standing to bring pre-enforcement challenge to statute prohibiting false campaign statements where it had previously made statements that might qualify as false under the statute and expressed an intent to make similar statements in the future); *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015) (plaintiffs had standing to bring pre-enforcement challenge to statute banning certain knives where it had previously sold knives that might fall under the statute and intended to sell such knives in the future).

Nuveen misconstrues the operation of the Control Share Amendment when it argues Saba cannot be harmed until other Nuveen shareholders vote on the potential restoration of control-share voting rights. *See* Br. at 37-39 (attempting to establish a "speculative" chain of decisions by "independent actors" before the Control Share Amendment could cause Saba harm, citing *Lacewell* and *Clapper*). To the contrary, the Control Share Amendment causes immediate and automatic harm by stripping

voting rights from any control shares unless and until there is a shareholder vote to restore those rights. Saba alleged, and the District Court agreed, that even such a temporary removal of voting rights violates Section 18(i)'s mandate that all common stock be ***voting*** stock, SA5-6, and that subjecting any common stock to additional vote-restoration procedures violates Section 18(i)'s mandate of ***equal*** voting stock, SA9-10.

Nuveen's attempt to argue Saba cannot be harmed until ***after*** going through the Control Share Amendment's labyrinthine vote-restoration procedures also confuses standing with the merits. *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 212 (2d Cir. 2020) ("We have cautioned against arguments that would essentially collapse the standing inquiry into the merits." (cleaned up)); *accord Dubuisson v. Stonebridge Life Ins. Co.*, 887 F.3d 567, 574 (2d Cir. 2018). Even the temporary removal of voting rights, or the imposition of additional procedures as a precondition to regaining voting rights, is a concrete harm to Saba's right and ability to acquire shares that are voting stock with equal voting rights with every other outstanding stock. SA11.

Nuveen's argument that Saba has failed to demonstrate a "genuine threat of enforcement" of the Control Share Amendment, Br. at 35, makes no sense in this context. *MedImmune, Inc.,* 549 U.S. at 129. The Control Share Amendment does not require "enforcement." It works automatically, stripping all shares acquired above

the 10% threshold of their voting rights, or at least their equal voting rights. In any event, there can be no dispute Nuveen intended to enforce the Control Share Amendment against Saba, having rejected Saba's demand that the Amendment be rescinded. JA926.

C. Saba's Injury Is Concrete

Saba's injury is concrete. To start, Nuveen does not even address the interference with Saba's trading activity and business practices, which constitutes an indisputably "real" and "traditional tangible" harm. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

Nuveen also ignores the wide body of caselaw allowing shareholders to maintain suit in federal court to remedy harms to their voting rights; in fact, those decisions regularly recognize such harms as real, concrete, and irreparable. *E.g.*, *ER Holdings*, 735 F. Supp. at 1101 ("[S]hareholder disenfranchisement creates serious risk of irreparable harm."); *Fox v. Riverview Realty Partners*, 2013 WL 1966382, at *4 (N.D. Ill. May 10, 2013) (shareholder was injured by merger where, had the merger not taken place, she would have received new common stock carrying additional voting power*); Daly v. Neworld Bank for Sav.*, 1990 WL 8095, at *2 (D. Mass. Jan 25, 1990) (shareholder's "significant loss in voting power" was injury sufficient to support standing in misleading proxy suit); *see also Starr Int'l Co., Inc. v. United States*, 856 F.3d 953, 986 (Fed. Cir. 2017) (Wallach, C.J., concurring-in-

part and concurring-in-the-result) (plaintiff "alleged a cognizable property interest by claiming dilution and loss of voting power").

Suits in state court to remedy harms to shareholder voting rights are likewise well-established, confirming that such harms are well-recognized in "American history and tradition," *TransUnion*, 141 S. Ct. at 2204. *E.g.*, *Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund*, 466 Mass. 368, 379 (2013) ("Courts have consistently recognized the irreparable harm" that results both from "endanger[ing] shareholder voting rights" or even delaying their exercise"); *see also Pell v. Kill*, 135 A.3d 764, 793 (Del. Ch. 2016) ("Courts have consistently found that corporate management subjects shareholders to irreparable harm by denying them the right to vote their shares." (cleaned up)).[2]

Moreover, Congress' view as to which harms are sufficiently concrete to support Article III standing remains "instructive." *Spokeo, Inc v. Robins*, 578 U.S. 330, 340 (2016). Indeed, while Congress may not "simply enact an injury into existence, using its lawmaking power to transform something that is not remotely

[2] In any event, Nuveen attempts to stretch *TransUnion* and *Spokeo* beyond any reasonable application. "History and tradition" are meant to serve only as a "meaningful guide to the types of cases that Article III empowers federal courts to consider." *TransUnion*, 141 S. Ct. at 2204. And an injury need "not [have] an exact duplicate in American history and tradition" to qualify as concrete. *TransUnion,* 141 S. Ct. at 2204. While Nuveen points out that different jurisdictions at different times have had different rules with respect to shareholder voting rights, Br. at 41-43, there is no indication that interference with those voting rights—whatever they may have been—were treated as anything other than real, tangible, cognizable harms to shareholders.

harmful into something that is," *TransUnion*, 141 S. Ct. at 2204, Congress has "the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," *Spokeo*, 578 U.S. at 341. Congress, in enacting the ICA, recognized that the "unbalanced allocation of voting privileges" was "largely responsible for many of the abuses and defects which developed in the course of the histories of [investment] companies." *Investment Trusts and Investment Companies; Hearings on S. 3580 Before a Subcomm. Of the Senate Comm. On Banking and Currency*, 76th Cong., 3d Sess. 1034 (1940) (memorandum regarding "section 18 . . . relating to capital structure"). Such unbalanced allocation of voting privileges thus results in concrete "harm [to] persons with ownership interests in the company." *Indep. Inv. Protective League*, 495 F.2d at 312.

II. The District Court Correctly Ruled that the Control Share Amendment Violates Section 18(i) of the Investment Company Act

Nuveen's Control Share Amendment removes voting rights from certain common stock, and creates a labyrinthine (and likely impossible) path to getting any such rights back. The District Court correctly concluded the Amendment impermissibly creates non-voting stock without equal voting rights as other common stock, in violation of Section 18(i) of the ICA and the defined terms therein.

A. The District Court Properly Applied the Plain Text of the ICA

The District Court properly held that the "control share amendment [] violates Section 18(i)'s requirement that every stock issued be voting stock." SA5. Under the

Control Share Amendment, when "a shareholder acquires new stock in one of the Trusts, and the total amount of her stock in that trust constitutes a control share, her newly acquired stock does not presently entitle her to vote. Instead, whether a control shareholder's newly acquired stock entitles her to vote is contingent on an uncertain future event—whether the holders of the majority of stock, excluding stock owned by control shareholders, authorize it. . . . The plain language of the ICA makes this contingency impermissible." SA5-6.

The District Court also correctly concluded the Control Share Amendment violates Section 18(i)'s requirement that every share of stock "have equal voting rights with every other outstanding voting stock." SA9. Under the Control Share Amendment, "the voting rights of stock owned by control shareholders are inferior to the voting rights of stock owned by non-control shareholders. A control shareholder's stock can completely lose its voting rights if the conditions within the control share amendment are not met; the same cannot be said of a non-control shareholder's stock. This asymmetry in voting rights runs afoul of Section 18(i)'s requirement of equal voting rights." SA9-10; *accord Eaton Vance Senior Income Trust*, 2021 WL 1422031, at *6 ("If a share cannot be voted by its present owner, then the voting right attached to that share is no longer equal to that attached to shares owned by investors that control a small share of the Trust's total beneficial interest.").

B. The District Court Properly Rejected Nuveen's Share-Shareholder Distinction on the Plain Text of Section 18(i) and the Defined Terms Therein

"As in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002). "The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). "When the words of a statute are unambiguous, then . . . 'judicial inquiry is complete.'" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

Nuveen's interpretation of Section 18(i), and the defined terms therein, is conspicuously divorced from the text of the statute. Section 18(i) is not complicated, and it is unambiguous. All common stock of a federally registered investment company "shall be a voting stock" and have "equal voting rights with every other outstanding voting stock." 15 U.S.C. § 80a-18(i). There is no exception for shares held by certain shareholders. There is no language suggesting it is permissible for an investment company to take voting rights away from stock, or vary the circumstances in which stock may be voted, or impose additional procedures or other prerequisites to voting stock, depending on who owns it.

Contrary to Nuveen's contention that the ICA endorses some sort of share-shareholder distinction with respect to voting rights, "voting stock" is expressly

defined by reference to the ***shareholder's*** ability to vote the stock. Specifically, the ICA defines a "security" as a "voting security" only if it is "presently ***entitling the owner or holder thereof to vote*** for the election of directors." 15 U.S.C. § 80a-2(a)(42) (emphasis added); *id.* § 80a-2(a)(36) ("security" includes "stock"). The stock, moreover, must ***presently*** entitle the shareholder to vote, making clear that the statute is not satisfied by a potential future ability to vote the stock—for example, following the Control Share Amendment's tortuous vote-restoration procedures. The District Court appropriately concluded that "[d]epriving a shareholder of her ability to vote her stock, even temporarily, necessarily means that her stock cannot be considered a 'voting security' as the ICA defines the term." SA8-9.

Nuveen ties itself in knots in an effort to evade the plain import of the statutory language. Nuveen tries to say that "all Nuveen Fund shares 'presently' confer a right to vote no matter who beneficially owns the share"; but in the same breath Nuveen admits, as it must, that "a shareholder may not be entitled to vote some of its shares" under the Control Share Amendment—precisely what the statutory text prohibits. *See* Br. at 58-59. Nuveen's attempt to justify this plainly impermissible result is to say that "it is not the *share* that 'presently' prevents a vote from being cast." *Id.* at 59. But that is a non-sequitur. The statutory requirement is that a share must presently "entitle" a shareholder to vote—which, by operation of the Control Share Amendment, certain shares do not. Nuveen then highlights that if "shares are

transferred," then "the transferee could vote the shares." *Id.* at 59. But in attempting to justify the Control Share Amendment based on a future contingency about when a share might entitle the holder to vote, Nuveen reads the term "presently" out of the statutory definition of "voting stock" entirely.

Nuveen then mischaracterizes the District Court's decision as having interpreted the ICA to mean that "shareholders must have the freedom to 'presently' vote their stock *at all times*," even outside of "shareholder meetings" or where there is no "quorum." Br. at 59. Nonsense. The District Court did not hold that shareholders must be able to "vote" for the election of directors at ***any*** time; rather, consistent with the statutory text, the District Court held shareholders must ***always*** be "***entitled***" to vote for the election of directors, on equal footing with all other shareholders, *i.e.*, when the issue is duly presented for a vote. In fact, the statutory definition of "voting stock" again expressly recognizes that the vote on the election of directors will occur "at the annual or a special meeting of the security holders of such company duly called." 15 U.S.C. § 80a-2(a)(42). Nuveen's "hyperliteral interpretation" of the statute is a red herring, bears no relationship to the District Court's actual holding, and does not undermine the District Court's sound application of the statute's plain text.

C. The Statutory Context Bolsters the District Court's Interpretation of Section 18(i)

The statutory context further supports the District Court's well-reasoned decision. For example, the ICA provides that "[n]o person shall serve as a director of a registered investment company unless elected to that office by the ***holders*** of the outstanding voting securities of such company." 15 U.S.C. § 80a-16(a). The statutory context makes clear that it is the share***holders*** who have a "right to participate in Trust decision making" with respect to the election of directors, not "disembodied share[s]." *Eaton Vance Senior Income Tr.,* 2021 WL 2222812, at *3 (reasoning from provision of a closed-end fund charter, parallel to § 80a-16(a), providing that "the **Shareholders** shall have power to vote . . . with respect to the election of Trustees").

Nuveen's arguments about the statutory context are self-cannibalizing. To the extent Nuveen is correct that the "share-shareholder distinction" is "reflected elsewhere in the ICA"—including, for example, § 80a-12(d)(1), Br. at 49—that only highlights the ***absence*** of any such distinction in Section 18(i). Even if Nuveen were correct that Section 12(d)(1) endorses the share-shareholder distinction, it would only confirm that when Congress wanted to permit differential treatment among the voting rights of shares based on the size of a shareholder's holdings, it knew how to do so. *See Alvarez v. Garland*, 33 F.4th 626, 641 (2d Cir. 2022) ("plain meaning can best be understood by looking to the statutory scheme as a whole" and where

"Congress uses language in one part of a statute that it omits from another—particularly a closely adjacent other—well-established principles of statutory construction instruct courts to assume that the choice was deliberate and indicative of a different intent" (cleaned up)); *cf. also Hillman v. Maretta*, 569 U.S. 483, 496, (2013) ("where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent" (cleaned up)).

In fact, as the District Court noted, Congress contemplated that ***other*** provisions of the ICA might permit such differential treatment, and expressly carved them out of Section 18(i)'s clear "equal voting" mandate. SA7. Nuveen has never suggested, because it cannot, that its Control Share Amendment is authorized by some other provision of the ICA, such as Section 12(d)(1).[3] Having admitted the Control Share Amendment is not authorized by Section 12(d), Nuveen can seek no refuge in any "exception" it might provide to the general mandate that every shareholder must be entitled to one vote for each one of its shares. At minimum, Section 12 fails to meet the "high standard" that is required to invoke the "context

[3] Nuveen similarly undermines its own argument when it invokes provisions of the Securities Exchange Act of 1934, and control share statutes adopted by various states, in an attempt to demonstrate the supposed *bona fides* of its proffered share-shareholder distinction. Br. at 50. Again, to the extent those authorities reflect or endorse a share-shareholder distinction, they only highlight the ***absence*** of any such distinction in Section 18(i) and its defined terms.

clause" exception to the definitions in the ICA. *SEC v. Nat'l Presto Indus., Inc.*, 486 F.3d 305, 310 (7th Cir. 2007); *see id.* ("[C]ourts had better not depart from [the statute's] words without strong support for the conviction that, under the authority vested in them by the 'context' clause, they are doing what Congress wanted. . . ." (cleaned up)).[4]

D. The Statutory Statement of Purpose Bolsters the District Court's Interpretation of Section 18(i)

The ICA's statement of purpose cannot justify deviating from the plain text of the statute as set forth above. *See, e.g.*, *Reeves v. Cont'l Equities Corp. of Am.*, 912 F.2d 37, 42 (2d Cir. 1990) (refusing to imply terms providing for private right of action in 15 U.S.C. § 80a–47(b) based on statutory statement of purpose in § 80a–1(b)); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (where statutory language is "unambiguous," the "inquiry begins with the statutory text, and ends there as well" (cleaned up)); *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 192 (2016) ("policy arguments cannot supersede the clear statutory text").

[4] In any event, the District Court properly concluded that Section 12(d)(1) is irrelevant to this case. Section 12(d) "prevents funds from acquiring more than three percent of a registered investment company's 'voting stock'" but "contains an exception providing that a fund may exceed the three-percent limit if the fund votes its stock in accordance with instructions from its clients or in the same proportion as the vote of all other holders." *Id.* (citing 15 U.S.C. § 80a-12(d)(1)(E)(iii)(aa)). The District Court appropriately rejected the notion that this exception was akin to a restriction of "voting stock" because "Section 12(d) provides a *condition* under which a fund can avoid the *ownership restriction*; it is not itself a restriction on voting stock," and "Section 12(d)'s exception addresses *how* a fund-shareholder can exercise its stock's voting rights, but it does not strip a fund-shareholder of its ability to vote." SA6-7; *accord Boulder*, 2010 WL 4630835, at *7 & n.32.

That said, to the extent this Court, unlike the District Court, finds any ambiguity, it "must interpret the Investment Company Act in a manner most conducive to the effectuation of its goals." *United States v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 720 (1975). Congress directed courts to rely on the statements of purpose that it wrote into the ICA as a guide to its meaning. *See Chabot v. Empire Trust Co.*, 301 F.2d 458, 461-62 (2d Cir. 1962) ("Section 1 of the Investment Company Act of 1940 . . . . instructs the courts to interpret the provisions of the act in a manner than will 'mitigate, and so far as is feasible, eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors.'" (quoting 15 U.S.C. § 80a-1)).

The statements of policy for the ICA, 15 U.S.C. § 80a-1, make clear that a central concern motivating provisions like Section 18(i) was that investment companies might include in their charter or bylaws certain unfair or unequitable provisions that would adversely affect share***holders***' voting rights—*i.e.*, exactly what Nuveen did here:

> **(b) Policy**. . . . [I]t is declared that the national public interest and the interest of investors are adversely affected—
> . . .
>
> (3) when ***investment companies issue securities containing inequitable or discriminatory provisions*****,** or fail to protect the preferences and privileges of ***the holders*** of their outstanding securities;

15 U.S.C. § 80a-1(b)(3) (emphases added).

The ICA is designed to protect investors against management abuse. In particular, courts have recognized that the protection of shareholder voting rights against management overreach is a foundational concern of the statute. The "purpose of the Act is to eliminate [such] abuses, [including] through the accomplishment of . . . greater participation in management by holders of investment company securities." *Herpich v. Wallace*, 430 F.2d 792, 815-16 (5th Cir. 1970) (citation omitted).

Nuveen, through selective quotation, repeatedly misconstrues the statement of purpose set forth in 15 U.S.C. § 80a-1(b)(2). *E.g.*, Br. at 1, 7, 12, 29, 48. Nuveen tries to make it sound as if the statutory purpose articulated in that subsection reflects a generalized policy against "investors who own at least five per-cent of the voting power." *E.g.*, Br. at 48. But Nuveen takes the reference to "affiliated persons" entirely out of context and, in doing so, flips the stated statutory purpose on its head.

Section 80a-1(b)(2) cautions against organizing registered investment companies "in the interest of directors, officers, investment advisers, depositors, or other affiliated persons ***thereof***"—*i.e.*, "affiliates" of ***management***, not "affiliates" of shareholders. The stated purpose thus reflects Congress's intent "to provide a comprehensive regulatory scheme to correct and prevent certain ***abusive practices in the management*** of investment companies for the ***protection of persons who put up money*** to be invested by such companies in their behalf." *Indep. Inv. Protective*

League, 495 F.2d at 312 (emphases added); *Mathers Fund, Inc. v. Colwell Co.*, 564 F.2d 780, 783 (2d Cir. 1977) (intention was "to protect against self-dealing" by the fund subject to the ICA); *Option Advisory Serv.*, 668 F.2d at 121 (2d Cir. 1981) ("The purpose of the Act is to remedy certain abusive practices in the management of investment companies, for protection of persons whose money is invested by such companies.").

The premise of the ICA was not ***limiting*** shareholder control but rather ***protecting*** it, in order to prevent the "wholesale victimizing of security holders" from the "fantastic abuse of trust by investment company management." *United States v. Deutsch*, 451 F.2d 98, 108 (2d Cir. 1971). To ensure this intent was effectuated, Congress included policy statements requiring courts to protect the "interest of investors" against companies being "organized, operated, [or] managed . . . in the interest of directors, officers, [and] investment advisors." 15 U.S.C. § 80a-1(b)(2). These statements of purpose clearly indicate that courts must construe the Act not to restrict shareholder voting, but to "protect the preferences and privileges of the holders of . . . outstanding securities" against "inequitable or discriminatory provisions" imposed by managers like Nuveen. *Id.* § 80a-1(b)(3).

Nuveen is thus left to hang its hat on § 80a-1(b)(4), which cautions against situations in which "the control of investment companies is unduly concentrated through pyramiding or inequitable methods of control, or is inequitably distributed."

The concerns articulated in § 80a-1(b)(4), even if they had any application to the situation at hand, cannot justify deviating from the plain text of Section 18(i) and the other clearly stated purposes of the ICA that Section 18(i) is meant to implement, *e.g.*, §§ 80a-1(b)(2), (3). But, in any event, the concerns discussed in § 80a-1(b)(4) are far afield from anything at issue in this case.

As Nuveen itself has highlighted, provisions of the ICA ***other*** than Section 18(i)—for example, Section 12(d)—address § 80a-1(b)(4)'s stated concern about concentrated holdings, and the potential implications for voting shares that are part of concentrated holdings. Section 80a-1(b)(4) thus informs a "different section[] of the statute, with different wording and purpose," and "sheds little light" on the proper interpretation of Section 18(i). *Nat'l Marine Eng'rs Beneficial Ass'n, AFL-CIO v. N.L.R.B.*, 274 F.2d 167, 173 (2d Cir. 1960). Section 12(d), moreover, reflects the considered judgment of Congress about the relationship between concentrated holdings and voting rights, and the situations in which one may have implications for the other. This Court should not "risk disturbing the balance that Congress settled on" in Section 12(d) by conjuring atextual exceptions to Section 18(i)'s clear and unequivocal equal-voting-rights mandate. *John Wiley & Sons, Inc. v. DRK Photo*, 882 F.3d 394, 405 (2d Cir. 2018).

Tellingly, Nuveen is happy to take the capital of investors who beneficially own more than 10% of the funds. Nuveen just does not want certain shareholders

(*i.e.*, those it suspects are not friendly to incumbent management) to have the concomitant voting rights of ownership. The Control Share Amendment at issue is thus far removed from, or at best only pretextually related to, the "inequitable concentration" or "pyramiding" concerns expressed in § 80a-1(b)(4), and Nuveen cannot look to that provision to justify its adoption of its blatantly discriminatory provisions with respect to voting rights.

E. The Legislative History Supports the District Court's Judgment and Belies Nuveen's Share-Shareholder Distinction

As discussed, Section 18(i) and the defined terms therein are unambiguous in their directive of equal voting rights and prohibition on discriminating among shareholders in the ability to vote their shares. The legislative history thus should not distract from the Court's application of the plain text of the statute; in fact, Nuveen itself asked the District Court to disregard the statute's legislative history. Dist. Ct. Dkt. 49 at 20 n.8.

To the extent the Court considers the legislative history, however, it further supports the District Court's interpretation and application of Section 18(i). The legislative hearings preceding adoption of the ICA evidence Congress's intent to ensure that all the "***the holders***" of shares in registered investment companies have voting rights, and the ability to exercise them "***pari passu***," *i.e.*, in proportion to their shareholdings in the fund. *ICA Hearings* at 271, 305 (emphases added).

Section 18(i) addressed Congress's concern that management would unfairly discriminate between classes of shareholders by ensuring that the statute contained a mandate that every shareholder must have a vote proportionate to her holdings in the fund, "like a mutual savings bank – one class of stock, no conflicts, [and] everybody has a *pari passu* share in the voice of the management." *ICA Hearings*, at 271 (statement of Mr. David Schenker, Chief Counsel of SEC Investment Trust Study). As then-SEC Commissioner Healy testified in connection with the adoption of the ICA, "[u]nder the terms of this bill, ***all the holders*** of stock in the future will have voting rights, if the bill is passed." *Id.* at 305 (emphasis added). If there were any doubt, the issue of equal shareholder voting rights was no small concern. Rather, the ability of funds ***prior*** to the ICA to discriminate between shares or shareholders was described as "largely responsible" for the industrywide faults that motivated the ICA in the first place. That is because—as with democratic elections outside of the context of corporate governance—the exercise of the right to vote by the governed is a fundamental right, acting as a "final check" on the ability to oust managers whose misconduct has not been prevented by other provisions of law.

The foregoing belies Nuveen's argument that "Congress passed the ICA "without discussion of the meaning of 'equal voting rights.'" Br. at 13 (citing *In the Matter of Solvay Am. Corp.*, 27 S.E.C. 971, 1948 WL 28463 (Apr. 12, 1984)). That is not accurate, and it is not what *Solvay* says. As indicated, the concept of "equal

voting rights" was addressed in the original ICA hearings. *E.g.*, *ICA Hearings*, at 271 (voting rights must be "*pari passu*"). It was a "***revised bill***," later introduced to add an exception to Section 18(i) for "senior securities," that did not involve further discussion of "equal voting rights." *Solvay*, 1948 WL 28463, at *2. *Solvay* spoke to the rights of "senior securities" *vis a vis* other classes; not the clear and well-understood illegality of stripping rights from ***common shares***. *Id.* at *2-3; *Boulder*, 2010 WL 4630835, at *9 (*Solvay* not applicable to a "single class of CEF shares").

Nuveen, moreover, mischaracterizes the thrust of the SEC Reports and any concerns they expressed about concentrated holdings. *E.g.*, Br. at 8-13, 16, 52-53. Far from justifying discrimination with respect to shareholders' voting rights, those reports exhaustively documented the abuse of power by fund insiders, including attempts to entrench themselves by adopting unequal voting arrangements that provided fund insiders with voting power disproportionate to their equity contribution.

The SEC, for example, stressed that prior to the enactment of the ICA, fund insiders often held voting securities while public investors held preferred shares with limited or no voting power. H.R. Doc. No. 279, 76th Cong., 1st Sess. (1940) ("SEC Report III") at 1573, 1594. The SEC expressed concern that fund insiders' having voting power disproportionate to their equity contributions—situations in which "the control of the enterprise has been retained by the sponsors with small proportionate

investments"—"gives rise to another crucial element of conflict within the investment company field; the general public holding the major part of the senior securities has the greatest stake in the enterprise, while the sponsor or insiders, having a much smaller stake, control the enterprise." SEC Report III at 1594-95. Disproportionate concentration of voting power in the hands of a fund insiders, the SEC Report explained, rendered them "the arbiter of the affairs of the company, which power [they] may exercise to [their] personal advantage." SEC Report III at 1641. In other words, the SEC was concerned about arrangements that provide insiders with undue control "[enabling] management, frequently, to cause the company to engage in activities which . . . tend to favor the . . . management." SEC Report III at 1708.

Even the portions of the SEC Reports cited by Nuveen involving acquisitions or changes in control of investment companies, when properly read in context, detail how the harm to shareholders was the product of concentrated control of the fund ***by incumbent management***. *See, e.g.*, SEC Report II at 1024 (discussing problem of incumbent management keeping shareholders in the dark about changes in control); *id.* at 1027 (discussing problem of incumbent management negotiating preferential treatment for themselves in connection with changes of control); *id.* at 1030 (discussing bias of concentrated incumbent managers not to protect smaller investors). The foundational cause for concern in all of these scenarios was that the

"holder of the larger blocks of voting securities" would "usually include the management or interests affiliated with or friendly to the management." *Id.* at 1500.

All told, the legislative history does not support Nuveen's mangled interpretation of Section 18(i). Congress enacted the ICA to ***limit*** the control exercised by management (*e.g.*, Nuveen) and to protect the rights of fund shareholders equally (*e.g.*, Saba and every other fund investor). The Court should not indulge Nuveen's request to flip this fundamental statutory purpose on its head.

F. The Only Reasoned Guidance from the SEC Supports Saba's Position

The SEC—in its only ***reasoned*** interpretation of Section 18(i)—appropriately concluded that state control share statutes, which operate similarly to the Control Share Amendment here, are "inconsistent with the fundamental requirements of Section 18(i) of the Investment Company Act that every share of stock issued by the Fund be voting stock and have equal voting rights with every other outstanding voting stock." *Boulder*, 2010 WL 4630835, at *2 (S.E.C. No - Action Letter Nov. 15, 2010); *id.* at *7 ("'security' must be interpreted with reference to definition of "voting security" in § 80a-2(a)(42)). Based on a detailed analysis of the statutory text, the statute's stated purposes, and the legislative history, the SEC staff found that "Section 18(i) addresses [Congress's] concerns by ensuring that each investment company shareholder has a vote proportionate to his or her stock holdings." *Id.* at *6 (Section 18(i) designed to curb "abuses" such as "the organization, operation and

management of investment companies in the interest of insiders," the "entrenchment" of management, and the "issuance of securities that contain inequitable or discriminatory provisions").

Nuveen does not discuss or even cite the 2010 *Boulder* letter in its brief, and only cursorily mentions the SEC staff's 2020 statement indicating that it would no longer recommend pursuing enforcement actions in response to closed-end funds' opting into control share statutes. While Nuveen previously placed great weight on that terse, unreasoned 2020 SEC staff recommendation on the pursuit of SEC enforcement actions, the District Court properly concluded that the statement "by its own terms, has 'no legal force or effect'" and does not "contain any legal analysis of Section 18(i)." SA8; *see Gryl ex rel. Shire Pharms Group PLC v. Shire Pharms. Grp. PLC*, 298 F.3d 136, 145 (2d Cir. 2002) (SEC no-action letters "are entitled to no deference beyond whatever persuasive value they might have.").[5] That the SEC staff under a new administration changed its enforcement recommendations on Section 18(i)—as announced in a statement including no interpretation of the statute

[5] The only explanation of why the SEC staff changed its enforcement recommendations is that it was based on "market developments since its issuance, and recent feedback from affected market participants." *Control Share Acquisition Statutes*, 2020 WL 2745562, at *3 (S.E.C. No - Action Letter May 27, 2020). What those "developments" or "feedback" were (or whether this simply alludes to the influence of fund lobbyists on the prior administration) is never explained; at the very least, the statement is devoid of any actual legal analysis and admits its own lack of legal force or effect.

and explicitly stating that it had no legal effect—does not make the SEC's prior, well-reasoned analysis any less persuasive.

Only the 2010 *Boulder* letter "examined the Investment Company Act in detail and explained why closed-end funds opting into control share statutes violated the plain language of both Section 18(i)'s 'voting stock' and 'equal voting rights' requirements." SA8. It remains the only reasoned, persuasive position of the SEC on the appropriate interpretation of Section 18(i).

G. The District Court Properly Rejected Nuveen's Reliance on Inapposite Authorities

For all of Nuveen's braggadocio about the "longstanding" share-shareholder distinction, the District Court correctly recognized that Nuveen has identified no authority supporting the application of that distinction in Section 18(i). SA8.

The District Court properly and easily disposed of the "sole case interpreting Section 18(i)" that Nuveen cited below, and that remains so on appeal—namely, *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 342 F. Supp. 2d 371 (D. Md. 2004). SA8. *Neuberger* held that a company adopting a "poison pill" measure—which entitled non-control shareholders to purchase additional shares at a lower price than control shareholders—was consistent with Section 18(i). SA8; *Neuberger*, 342 F. Supp. 2d at 375–76. But the *Neuberger* court expressly distinguished the effects of defensive measures like poison pills, which differentiate among shareholders with respect to their ***economic*** interests in and

ability to acquire additional shares, from provisions that might prevent shareholders from ***voting*** shares they actually owned. *Id.* at 376 (a "poison pill does not change the fact that all shares are granted equal voting rights"; poison pill results only in a "dilution of economic interest," and "has nothing to do with the voting rights of the shares").[6] Far from supporting Nuveen's position, *Neuberger* implicitly recognizes that differential treatment of shareholders with respect to their ability to vote their shares likely ***would*** run afoul of Section 18(i).

Nuveen is thus left to rely almost exclusively on inapposite state law—namely, *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977), and its progeny, *e.g.*, *Williams v. Geier*, 1987 WL 11285, at *4 (Del. Ch. May 20, 1987); *Dynamics Corp. of Am. v. CTS Corp.*, 805 F.2d 705, 718 (7th Cir. 1986) (applying *Baker* to parallel provisions of Indiana law). *Baker* does not support Nuveen's across-the-board share-shareholder distinction, let alone support such a distinction in the context of Section 18(i). To the contrary, *Baker* is premised on specific Delaware statutory provisions expressly providing that "voting rights of stockholders may be varied from the 'one share-one vote' standard by the certificate of incorporation." *Baker* 378 A.2d at 123.[7] In fact, the *Baker* court acknowledged

[6] Nuveen's other cited cases regarding poison pills are similarly irrelevant. *E.g.*, Br. at 47; *Georgia-Pac. Corp. v. Great N. Nekoosa Corp.*, 728 F. Supp. 807 (D. Me. 1990); *Harvard Industries, Inc. v. Tyson*, 1986 WL 36295 (E.D. Mich. 1986).

[7] Specifically, *Baker* construed 8 Del. Code. § 151 to permit restrictions on the ability of concentrated holders to vote their shares in certain circumstances, where that provision

that the result could differ under other laws, and specifically explained that other jurisdictions "common[ly]" have a "mandatory one share-one vote" rule, *id.* at 123, as is the case with Section 18(i).

When it comes to fund insiders' ability to establish differential voting rights, Delaware law takes fundamentally different approach from the ICA. Delaware law expressly "give[s] maximum effect to the principle of freedom of contract and to the enforceability of governing instruments," 12 Del. Code § 3828(b), while the ICA seeks to constrain the contractual freedom of fund boards and management to discriminate among voting shares, *see, e.g.*, 15 U.S.C. § 80a-1(b)(3). Given the diametrically opposed approaches of the ICA and Delaware law on the issue of equal voting rights, *Baker* and its progeny have no application here.

Nuveen again mischaracterizes the District Court's decision when it says the District Court "ignored *Baker* entirely." Br. at 56. The District Court easily distinguished *Baker* as one in a litany of cases cited by Nuveen having no bearing on the proper interpretation of Section 18(i). SA8. The District Court, moreover, cited with approval the SEC's 2010 *Boulder* letter, which likewise considered and

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"standing alone, neither permits nor prohibits the type of voting restrictions here challenged," but where related provision of 8 Del. Code § 212(a) expressly permitted deviation from the one-share, one-vote principle. *Id.*; *see also id.* at 122 n.1 (under 8 Del. Code § 151, stock "may have such voting powers, full or limited, or no voting powers . . . and such designations, preferences, and . . . rights . . . shall be stated and expressed in the certificate of incorporation").

distinguished several of Nuveen's key authorities, including *Baker*, regarding state-law defensive measures permitting discrimination among shareholders. *See Boulder,* 2010 WL 4630835, at *10-11 & nn. 42, 45 (considering and distinguishing *Baker*, *Nekoosa*, and *Tyson* cases cited by Nuveen, Br. at 45-47). As the SEC staff explained, those state-law defensive measures reflected the "freedom traditionally afforded corporate management under state law," but Congress "determined to regulate investment companies differently." *Id.* at *11 & n. 45. Unlike the management-protective policies blessed by *Baker* and its progeny under state law, "[a]ny interpretation of Section 18(i) that envisages personal discrimination against an investment company shareholder would be flatly inconsistent with the purposes of Sections 18(i) and 1(b) and the special protection that Congress mandated for investment company shareholders…" *Id.*

III. The District Court Properly Granted Rescission and Declaratory Relief

Nuveen waived any argument that the District Court was required to weigh the equities before granting rescission. In any event, the statute required the District Court to grant rescission given its finding that the Control Share Amendment is inconsistent with the purposes of the ICA. At minimum, Nuveen's arguments about

the balance of the equities have no bearing on the District Court's declaration that the Control Share Amendment violates Section 18(i).

A. Nuveen Waived Any Argument that Summary Judgment Should Be Denied Based on a Balancing of the Equities

Nuveen waived any argument that the District Court supposedly "ignored the equities" by failing to raise the argument in the District Court.

Nuveen says, conspicuously without citation, that it "argued that the equities favor denial of rescission and the court could not grant summary judgment without first allowing discovery on that disputed factual issue." Br. at 62. Not true. Nuveen argued in the District Court that there was a factual dispute as to whether activist investor strategies could justify adoption of control share provisions under the ***substantive*** provisions of the ICA—i.e., under Section 18(i) and the statutory statements of purpose. *E.g.*, Dist. Ct. Dkt. 49 at 28-29; *see also* SA12 (characterizing Nuveen's argument that activist investor strategies "could justify the Trusts' adoption of the control share amendment in furtherance of the ICA's purpose of protecting investors").

Nuveen ***never*** argued that the District Court could deny rescission even if it found its Control Share Amendment incompatible with the ICA. Nuveen never argued that equitable balancing was a precondition to granting rescission under the statute. Nuveen never cited the second clause of § 80a-46(b)(2) as reason to deny

summary judgment. In fact, ***Nuveen never cited § 80a-46(b)(2) at all*** in its briefs to the District Court. *See* Dist. Ct. Dkt. 39, 49.

Nuveen also tries to fault the District Court for "not permit[ting] discovery into whether Saba's actions may harm Nuveen Funds shareholders." Br. 65. But that is yet another product of Nuveen's waiver. Nuveen waived any right to seek such discovery because "Federal Rule of Civil Procedure 56(d) provides that a party opposing summary judgment based on incomplete discovery must file an affidavit explaining why such discovery is necessary." *FTC v. Moses*, 913 F.3d 297, 306 (2d Cir. 2019). Nuveen "waived this argument" because it "submitted no such affidavit," *id.*, and "failure to file such an affidavit is by itself 'sufficient grounds to reject a claim that the opportunity for discovery was inadequate,'" *Jones v. Bryant Park Mkt. Events, LLC*, 658 F. App'x 621, 626 (2d Cir. 2016) (summary order) (quoting *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994)). Indeed, Nuveen still has not explained, even outside of the required affidavit, what relevant information it could have obtained in discovery that was not already available to Nuveen.

B. The District Court Lacked Discretion to Deny Rescission After Concluding the Control Share Amendment Is Inconsistent with the Purposes of the ICA.

Nuveen also omits that the statute only allows a court to deny rescission where it "would not be inconsistent with the purposes" of the ICA. But having found

Nuveen's control share provisions inconsistent with the purposes of the ICA, the District Court properly followed the statutory directive against denial of rescission.

The District Court was clear that the Control Share Amendment's "discrimination against an investment company shareholder" is "inconsistent with the purposes of Sections 18(i)." SA8 (citing and quoting with approval *Boulder*, 2010 WL 4630835, at *10–11). Because the District Court found Nuveen's Control Share Amendment inconsistent with the purposes of the ICA, denial of rescission of those offending provisions would be inconsistent with the purposes of the ICA, meaning the District Court lacked any discretion to deny rescission. And given that the District Court lacked discretion to deny rescission, it cannot have erred in denying any discovery or declining to balance the equities in connection with Nuveen's arguments about shareholder activism. *Cf., e.g.*, *United States v. Aiyer*, 33 F.4th 97, 118 (2d Cir. 2022) (no error in declining to consider evidence of economic justifications of price-fixing agreements that was irrelevant to claim of *per se* antitrust violation).

C. Nuveen Misconstrues the Requirements of Section 80a-46(b)(2)

Contrary to Nuveen's contention, nothing in § 80a-46(b)(2) makes a balancing of the equities a necessary precondition to granting rescission. Just the opposite: Section 46(b)(2) makes balancing the equities a necessary precondition to ***denying*** of rescission, not granting it. The statute first issues a directive ***against***

denial of rescission of contracts that offend the ICA. 15 U.S.C. § 80a-46(b) (court "***may not deny*** rescission" of a contract "that is made, or whose performance involves, a violation" of the ICA). It then creates an exception—*i.e.*, it identifies the circumstances in which courts ***may*** deviate from the statutory directive not to deny rescission. *Id.* (court may deny rescission of ICA-offending contract only if it "finds that under the circumstances the denial of rescission would produce a more equitable result than its grant and would not be inconsistent with the purposes" of the ICA).

In any event, there is nothing in the statute that required the District Court to make express findings or hear particular evidence about the balance of the equities. Nuveen is trying to treat the District Court like an administrative agency. It is plain that the District Court did not believe the circumstances for denying rescission were met, and that any equitable considerations could not trump the Control Share Amendment's inconsistency with the "clear and unambiguous" mandates of Section 18(i), SA12, or the ICA's purpose of preventing discrimination against shareholders, SA9. Allowing the Control Share Amendment to remain in force despite those findings would be nothing short of bizarre. The District Court, moreover, should be afforded broad discretion in fashioning the appropriate remedy. *See Sec. & Exch. Comm'n v. Sourlis*, 851 F.3d 139, 146 (2d Cir. 2016) ("Once the district court has found federal securities law violations, it has broad equitable power

to fashion appropriate remedies, and its choice of remedies is reviewable for abuse of discretion." (cleaned up)).

D. Nuveen's Arguments About the Equities Have No Bearing on the District Court's Entry of Declaratory Judgment

For the avoidance of doubt, Nuveen does not and cannot argue that any equitable balancing was also a precondition to the District Court's grant of declaratory relief—*i.e.*, declaring Nuveen's Control Share Amendment to be in violation of Section 18(i). There is, of course, nothing in 28 U.S.C. § 2201 that makes any equitable balancing a precondition to that declaration of the parties' relative "rights" and "legal relations." Nuveen's waived and meritless arguments concerning rescission in no way upset the District Court's entry of declaratory judgment.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Judge Oetken's careful and thorough opinion below, the judgment of the District Court should be affirmed.

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Respectfully submitted,

/s/ Mark Musico

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CERTIFICATE OF COMPLIANCE

This Brief for Plaintiffs-Appellees Saba Capital CEF Opportunities 1, Ltd. et al., complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the Brief contains 13,889 words.

This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Mark Musico
Mark Musico

September 9, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2022, I caused true and accurate copies of the foregoing Brief for Plaintiffs-Appellees Saba Capital CEF Opportunities 1, Ltd. et al. to be served on counsel of record via the CM/ECF system.

/s/ Mark Musico
Mark Musico

September 9, 2022