UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. PINNACLE ADVISORS, LLC, *et al*. Defendants.	Case No.: 5:23-cv-00547-FJS-MJK

MEMORANDUM OF LAW TO PROVIDE ADDITIONAL BRIEFING IN SUPPORT OF DEFENDANTS', LAWTON A. WILLIAMSON'S AND MARK E. WADACH'S, RENEWED MOTION TO DISMISS AND REQUEST TO VACATE LIQUIDITY RULE

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Defendants Lawton A. Williamson and Mark E. Wadach ("Independent Trustees") respectfully submit this Memorandum of Law pursuant to the Court's March 27, 2025 order requiring Defendants to re-file their motion to dismiss the Complaint on the ground that Rule 22e-4 ("Liquidity Rule" or "Rule") is not authorized by the Investment Company Act of 1940 ("ICA") to provide additional briefing to address the Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).[1]

I. PRELIMINARY STATEMENT

The Securities and Exchange Commission's ("SEC" or Commission") Complaint against the Independent Trustees of the NYSA Fund ("Fund"), claiming that they aided and abetted the Fund's alleged violation of the Liquidity Rule must be dismissed as the Rule exceeds the SEC's rulemaking authority pursuant to the ICA and is unenforceable. The Supreme Court's decision in *Loper Bright* requires courts to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Loper Bright*, 603 U.S. at 413–14. "Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences" established by agencies. *Id.* at 404.

The Liquidity Rule—its obligations on funds and their boards—exceeds the limited rulemaking authority provided by the ICA. This conclusion is supported by the Rule's text as interpreted using several canons of statutory interpretation and is consistent with the position the SEC held for more than 75 years. The SEC's current litigation position, based purely on policy expressed in the Rule's adopting release, is precisely the type of self-serving agency justification

[1] Pursuant to the Court's March 27, 2025 order, should the Court find that the Liquidity Rule is enforceable, Defendants rely upon their prior briefing (attached as Exhibit C to this brief) to support their argument that the SEC has failed to state a claim upon which relief may be granted against the Independent Trustees for aiding and abetting the Fund's alleged violation of the Liquidity Rule.

that *Loper Bright* eliminated. When the text of the ICA is read according to its plain meaning and applying the "traditional tools of statutory construction," the Court should vacate the Rule.

II. STATEMENT OF FACTS

A. The NYSA Trust and the Fund

Pinnacle Advisors, LLC ("Pinnacle") is an SEC-registered investment adviser the sole client of which was the NYSA Series Trust ("Trust"). The Trust, a formerly registered investment company, has one investment portfolio, the Fund. The Independent Trustees serve on the Fund's board. Complaint, Dkt. No. 1 ("Compl."), ¶¶ 13, 16–18.

B. Registered Investment Companies

The ICA provides the statutory authority for the SEC to regulate investment companies, "such as mutual funds and other publicly pooled investment vehicles." *See Nat'l Assoc. of Private Fund Mgrs. v. SEC*, 103 F.4th 1097, 1102 (5th Cir. 2024). "A mutual fund is an SEC-registered open-end investment company that pools money from many investors and invests the money in stocks, bonds, short-term money-market instruments, other securities or assets…." Securities and Exchange Commission, *Mutual Funds and ETFs: A Guide for Investors*, SEC Pub. 182 (Dec. 2016), www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf. "Investors in mutual funds buy their shares from and sell/redeem their shares to the mutual funds themselves." "Mutual fund shares are typically purchased from the fund directly or through … [brokers]." *Id.*

C. The Liquidity Rule

The SEC promulgated the Liquidity Rule in 2016, pursuant to alleged authority that, according to the SEC's adopting release, Congress granted in Section 22(c), (e), 34(b) and 38(a) of the ICA [15 U.S.C. § 80a-22(c), (e), 80a-33(b), and 80a-37(a)]. SEC Release No. 33-10233

(Oct. 13, 2016), at 436, Exhibit ("Ex.") A, at 436.[2] The Liquidity Rule requires a fund to classify each of its portfolio assets into categories and limits the amount of illiquid assets that a fund can acquire to 15 percent. 17 C.F.R. § 270.22e-4(b)(1)(ii), (iv) and (a)(6), (8), (10), (12). Funds must adopt a written liquidity risk management program ("LRMP") and assess, manage, and periodically review liquidity risk. The Rule requires fund boards to: 1) approve the LRMP; 2) approve a designee to administer the LRMP; and 3) review, no less frequently than annually, a written report prepared by the administrator addressing the LRMP. 17 C.F.R. § 270.22e-4(b)(1) and (2)(i)–(iii).

Section 22(e) of the ICA, under which the Rule was promulgated, requires registered investment companies to redeem investor fund shares in seven days or less. 15 U.S.C. § 80a-22(e). The ICA provides three exceptions to this seven-day redemption requirement: (1) when the New York Stock Exchange is closed for other than customary closures or when trading is restricted; (2) in an emergency; or (3) for such time determined by the SEC to protect security holders. *Id.* at § 80a-22(e)(1)–(3). With respect to these three exceptions, Section 22(e) authorizes the SEC to make rules that: (1) identify the conditions under which trading shall be deemed restricted; and (2) determine when an emergency shall be deemed to exist. *Id.*

Section 22(c) of the ICA allows the Commission to "make rules … to the same extent, covering the same subject matter, and [to accomplish] the same ends as are prescribed in subsection (a)." 15 U.S.C. § 80a-22(c). Section 22(a) in turn permits a registered securities

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[2] The Independent Trustees have attached, as Exhibits A and B to this brief, truncated versions of the SEC's adopting releases accompanying the original 2016 Liquidity Rule (Ex. A) and the 2022 proposed amendments to the Liquidity Rule (Ex. B). The full versions of those adopting releases are attached as exhibits to our initial moving brief, which is attached here as Exhibit C, as they are also used to support the argument that the Complaint fails to state a claim upon which relief may be granted on the aiding and abetting charge against the Independent Trustees.

association to promulgate rules that address (a) the method of computing the minimum and maximum prices at which its members may trade redeemable securities with investment companies, and (b) the minimum amount of time that must elapse before a member may redeem investment company shares, "*in each case* for the purpose of eliminating or reducing so far as reasonably practicable any dilution of the value of other outstanding securities of such company or any other result of such purchase, redemption, or sale which is unfair to holders of such other outstanding securities." *Id*. at § 80a-22(a) (emphasis added).

The SEC proposed to amend the Liquidity Rule on November 2, 2022. Ex. B. Commissioners Mark Uyeda and Hester Peirce voted against the proposal. [3] Final Commission Votes for Agency Proceedings (2022), https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2022.xml. On August 28, 2024, the Commission passed the amendment to the Rule by a 3-2 vote with Commissioners Uyeda and Peirce voting against the amendment. [4] Final Commission Votes for Agency Proceedings (2024), https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2024.xml. The Investment Company Institute ("ICI"), a trade organization for the fund industry, issued a comment letter to the SEC in November 2023, that addressed concerns about the Liquidity Rule amendment and argued that

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[3] Commissioner Hester M. Peirce, Statement on Proposed Open-End Fund Liquidity Risk Management Programs (Nov. 2, 2022), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-open-end-funds-110222; Commissioner Mark T. Uyeda, Statement on Proposed Rule (Nov. 2, 2022), https://www.sec.gov/newsroom/speeches-statements/uyedar-statement-open-end-funds-110222.

[4] Commissioner Hester M. Pierce, Statement on Adoption of Guidance on Open-End Fund Liquidity Risk Management Programs (Aug. 28, 2024), https://www.sec.gov/newsroom/speeches-statements/peirce-statement-form-n-port-amendments-082824; Commissioner Mark T. Uyeda, Statement on Adoption of Guidance on Open-End Fund Liquidity Risk Management Programs (Aug. 28, 2024), https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-form-n-port-amendments-082824.

the SEC appeared to lack Congressional authority pursuant to the text of the ICA (Sections 22 and 38(a)) to promulgate the Rule. Letter from the Investment Company Institute to Vanessa Countryman, Secretary, Securities and Exchange Commission, *Open-End Fund Liquidity Risk Management Programs and Swing Pricing* (Nov. 21, 2023), at 3–6, https://www.sec.gov/comments/s7-26-22/s72622-301379-768202.pdf.

III. ARGUMENT

A. Review of Agency Action Following *Loper Bright*

i. Agency Rulemaking Requires Congressional Authorization

An agency cannot make rules that Congress has not authorized. "Agencies have only those powers given to them by Congress and 'enabling legislation' is not generally an 'open book to which an agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). "An agency construction of a statute cannot survive judicial review if a contested regulation reflects an action that exceeds the agency's authority." *Goldstein v. SEC*, 451 F.3d 873, 881 (D.C. Cir. 2006) (citing *Aid Ass'n for Lutherans v. United States Postal Serv.,* 321 F.3d 1166, 1174 (D.C. Cir. 2003)) (SEC Hedge Fund Rule vacated as it contravened text of Investment Advisers Act ("IAA")); *see also Financial Planning Ass'n v. SEC*, 482 F.3d 481, 488–89 (D.C. Cir. 2007) (SEC Broker-Dealer Rule improper as it conflicted with text of IAA).[5]

ii. Courts Interpret Agency Authority

Pursuant to the Supreme Court's decision in *Loper Bright*, courts determine the scope of an agency's rulemaking authority. *See Loper Bright,* 603 U.S. at 392 ("it thus remains the

[5] "Regulated parties 'may always assail a regulation as exceeding the agency's statutory authority in enforcement proceedings against them.'" *Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve System*, 603 U.S. 799, 823 (2024). A federal regulation that is not immediately contested "does not enter a promised land free from legal challenge." *Id*.

responsibility of the court to decide whether the law means what the agency says"). Recognizing that there may be situations where a statute is arguably ambiguous, such ambiguities are not "delegation[s] of law-interpreting power" to executive branch agencies. *Id.* at 399. Reviewing courts are not required, as they had been pursuant to *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–44 (1984), to "afford binding deference to agency interpretations, including those that have been inconsistent over time." *Loper Bright*, 603 U.S. at 399. Statutory interpretation is a matter of law and courts are required to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." *Id*. at 413–14; *see also Art and Antique Dealers League of America, Inc. v. Seggos*, 121 F.4th 423, 435 (2d. Cir. 2024) (applying *Loper Bright*; statutory interpretation "is a question of law, and accordingly, … the court, … not the administrative agency, … determines its meaning"); *Avon Nursing and Rehab. v. Becerra*, 119 F.4th 286, 292 (2d. Cir. 2024) ("[a]gency's terminology" cannot control statutory interpretation pursuant to *Loper Bright*).

Even where "Congress's instructions have supposedly run out, leaving a statutory gap, … [c]ourts … understand that such statutes, no matter how impenetrable, do—in fact, must—have a single best meaning … [that] is fixed at the time of enactment." *Loper Bright*, 603 U.S. at 400. "Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences" established by agencies. *Id*. at 404. "It … makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best. In the business of statutory interpretation, if it is not the best, it is not permissible." *Id*. at 400.

B. The ICA Fails to Provide Rulemaking Authority for the Liquidity Rule

The Court must determine whether the ICA grants the SEC authority to promulgate the Liquidity Rule by applying the traditional canons of statutory interpretation. The text of the ICA does not provide authority for the Rule. When the text is given its plain meaning and the canons of statutory interpretation are appropriately applied, the Liquidity Rule must be vacated.

i. Supremacy of the Text

Statutory construction "begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations omitted). The Supremacy-of-the-Text Canon is the starting point for every statutory analysis. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 2 at 56 (2012) ("SCALIA & GARNER") ("[T]he words of a governing text are of paramount concern, and what they convey in their context is what the text means"); *see, e.g., Thompson v. U.S.*, 145 S. Ct. 821, 826 (2025) ("We start with the text."); *Campos-Chaves v. Garland*, 602 U.S. 447, 457 (2024) (same); *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 484 (2023) (same).

The SEC claims in the Liquidity Rule's adopting release that Congress allegedly authorized the Rule primarily pursuant to Sections 22(c) and (e) of the ICA. Ex. A, at 436. These sections are unambiguous with respect to the SEC's rulemaking authority, and they do not permit the SEC to promulgate a rule that (1) limits the amount of illiquid assets a fund may acquire; (2) requires boards to approve and review LRMPs; and (3) obligates funds to assess, manage, and review liquidity risk and classify all fund assets into SEC-determined liquidity categories. 15 U.S.C. § 80a-22 (c) and (e); 17 C.F.R. § 270.22e-4. There is no text in Section 22 (c) or (e) that provides rulemaking authority for the mandates contained in the Liquidity Rule.

Section 22(e)

Section 22(e) of the ICA, under which Rule 22e-4 was promulgated, requires registered investment companies to redeem investor fund shares in seven days or less. 15 U.S.C. § 80a-22(e). The text provides three exceptions to this seven-day redemption requirement: (1) when the New York Stock Exchange is closed for other than customary closures or when trading is restricted; (2) in an emergency; or (3) for such other periods that the SEC may order for the protection of security holders. 15 U.S.C. § 80a-22(e)(1)–(3). With respect to these exceptions, Section 22(e) specifically limits the SEC's rulemaking to: (1) identifying the *conditions* under which *trading* shall be deemed restricted; and (2) determining when an *emergency* shall be deemed to exist. *Id*. (emphasis added).

These two rulemaking grants relate only to trading restrictions and emergencies. They have nothing to do with liquidity and do not provide additional discretionary rulemaking. The Liquidity Rule does not address conditions under which trading should be restricted, nor does it address when an emergency exists such that the right of redemption may be suspended. The rulemaking authority provided in Section 22(e) is limited, focused, and entirely inapposite to the Liquidity Rule. The statute is clear; there is no text in Section 22(e) that provides authority for the Liquidity Rule. *See Hughes*, 525 U.S. at 438; SCALIA & GARNER, at 56.

Section 22(c)

The SEC's attempt to find authority in Section 22(c) also fails on the same canon of statutory construction. Section 22(c) of the Act allows the SEC to "make rules … to the *same* extent, covering the *same* subject matter, and for the accomplishment of the *same* ends as are *prescribed* in subsection (a)." 15 U.S.C. §§ 80a-22(c) (emphasis added). The ends that are prescribed in Section 22(a) permit a registered securities association[6] to promulgate rules that address (1) the method of *computing the minimum price* at which a member may purchase a

[6] A registered securities association is an association of brokers and dealers. 15 U.S.C. §78o-3. FINRA is currently the only registered securities organization. FINRA Regulatory Notice 23-19, *FINRA Adopts a Short-Form Membership Application for Certain Firms* (Nov. 9, 2023), https://www.finra.org/rules-guidance/notices/23-19.

redeemable security from an investment company and *the maximum price* at which a member may sell a redeemable security to an investment company[7]; and (2) the *minimum amount of time that must elapse* after sales of such securities before a member may redeem such security. 15 U.S.C. § 80a-22(a) (emphasis added). The securities association's rules may prohibit members from purchasing, selling, or surrendering redeemable securities contrary to such rules. *Id*.

These two specific rulemaking grants address only methods of computing prices for redeemable securities (mutual fund shares) and setting time restrictions on redemptions of such shares. They have nothing to do with liquidity and do not provide additional discretionary rulemaking to address items beyond price and time. The Liquidity Rule does not address methods for computing prices or set time restrictions. The plain text of Section 22(a) and (c) does not authorize the Rule. *See Hughes*, 525 U.S. at 438; SCALIA & GARNER, at 56.

The statute limits the securities association's authority to these two specific rulemaking grants "*for the purpose* of eliminating or reducing so far as reasonably practicable any dilution of the value of other outstanding securities of such [investment] company or any other result of such *purchase, redemption or sale* which is unfair to holders of such outstanding securities," and does not grant the association unfettered discretion to make additional rules to meet such purpose. 15 U.S.C. § 80a-22(a) (emphasis added). The stated purpose for the two rulemaking grants is to reduce dilution of the value of the fund shares resulting from the "purchase, redemption, or sale" of such shares, not for any other reason. That Congress identified this

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[7] The ICA defines redeemable security as "any security … the holder, upon its presentation to the issuer … is entitled … to receive approximately his proportionate share of the issuer's current net assets or the cash equivalent." 15 U.S.C. 80a-2(a)(32). Mutual fund shares are "redeemable securities." Securities and Exchange Commission, *Mutual Funds and ETFs: A Guide for Investors*, SEC Pub. 182 (Dec. 2016), www.sec.gov/investor/pubs/sec-guide-to-mutual-funds.pdf.

purpose for its two rulemaking grants does not permit the SEC to misuse the stated purpose to expand Congress' express and limited rulemaking. "Limitations expressed in statutory terms" must control as it is incorrect to assume "any result consistent with … the statute's overarching goal is the law." *See Hensen v. Santander Consumer USA, Inc.*, 582 U.S. 79, 89 (2017) (citations omitted) ("[The] legislature says … what it means and means … what it says.")).

Pursuant to Section 22(c), should a securities association fail to promulgate such rules, the SEC may do so within the same limitations that Congress prescribed. 15 U.S.C. § 80a-22(c). Congress' use of the word "same" three times leaves no doubt that it intended the Commission's rulemaking to be the "same" as that permitted in Section 22(a) for securities associations but not to exceed it. "[W]hile legislative history can never defeat unambiguous statutory text, historical sources can be useful" to confirm the meaning of the text at the time the statute was passed. *Bostock v. Clayton County, Georgia*, 590 U.S. 644, 674 (2020). Consistent with the clear text of Section 22(a), the legislative history confirms that a securities association, "*subject to the provisions of [Section 22]*, is empowered to make rules to protect investors … against any dilution of their equity *due to* the methods of pricing, distribution, and redemption of redeemable securities[,]" not as the SEC would have it, due to the liquidity of mutual fund assets. S. Rep. No. 76-1775 at 16 (1940) (emphasis added). The legislative history confirms that securities associations may not promulgate rules beyond the limitations set forth in Section 22(a). Liquidity simply is not a method of pricing, distribution or redemption and, as such, the Liquidity Rule is plainly outside the limited rulemaking provisions of Section 22(a).[8]

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[8] The SEC, in its adopting release, cites the ICA's legislative history, including statements from then SEC Commissioner Robert Healy who in 1940 noted the importance of fund portfolio liquidity given the ICA's redemption requirements. Ex. A, at 5, fn. 5. Importantly, while portfolio liquidity was addressed in the lead up to the ICA, Congress chose not to

The role of the Court is to ensure that agencies act within the authority delegated to them by Congress. *See Loper Bright*, 603 U.S. at 413. In the last year, three SEC rules have been vacated, two by federal district courts as the agency acted outside of the text of the enabling statutes pursuant to which those rules were promulgated. *See Inst. S'holder Serv., Inc. v. SEC*, 718 F.Supp.3d 7, 27–28 (D.D.C. 2024) (SEC's proxy rule vacated as regulation of "proxy advisory firms" was contrary to plain meaning of term 'proxy solicitation' in the Securities Act and, therefore the rule was not authorized by Congress); *Nat'l Assoc. of Private Fund Mngrs. v. SEC*, 2024 WL 4858589, at **1, 8 (N.D. Tex. Nov. 21, 2024) (court vacated SEC's dealer rule, narrowly adopted by 3-2 vote of the SEC, where its dramatic expansion of 'dealer' definition contravened ordinary meaning of term 'dealer' found in text of Securities Exchange Act written 90 years earlier); *Nat'l Assoc. of Private Fund Mngrs.,*103 F.4th at 1111–14 (court vacated private fund rule as text of ICA, IAA, and Dodd-Frank Wall Street Reform Act of 2010 did not authorize SEC to regulate private funds).

The ICA's unambiguous text does not authorize the Liquidity Rule and, thus, it too should be vacated. *See Loper Bright,* 603 U.S. at 404 (courts interpret statutes based on traditional tools of statutory interpretation; not agency policy considerations); *Hensen,* 582 U.S. at 89 (Congress "says what it means and means what it says"); *Hughes*, 525 U.S. at 438 (statutory interpretation starts and ends with the clear text); *Antique Dealers*, 121 F.4th at 435 (agency regulations cannot be inconsistent with meaning of statute); *Goldstein*, 451 F.3d at 881–82 (SEC's rules cannot defy statutory text).

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include the term liquidity in the ICA, much less provide rulemaking authority to address it. This makes sense, as managing portfolio assets is for the financial professionals managing fund portfolios, not securities associations or the SEC.

ii. Omitted-Case Canon and the Negative Implication Canon

Notwithstanding that nothing in the text of Sections 22(a), (c) and (e) supports the grant of rulemaking authority related to the governance of fund liquidity, the SEC in its adopting release appears to focus on policy and purpose to imply unwritten grants of rulemaking authority to address its concerns regarding "liquidity" and "dilution." Ex. A, at 5–6. Such a position, however, is contrary to the Supreme Court's decision in *Loper Bright,* 603 U.S. at 404 (courts interpret statutes pursuant to the canons of statutory construction, not policy considerations), and cannot survive the application of two additional standard canons of statutory interpretation: (1) the Omitted-Case Canon (SCALIA & GARNER, at 93); and (2) the Negative-Implication Canon (*Id*. at 107).

Pursuant to the Omitted-Case Canon, "[n]othing is to be added to what the text states or reasonably implies. [A] matter not covered is to be treated as not covered." SCALIA & GARNER, at 93. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 439–40 (2020) (unanimous Court applied Omitted-Case Canon to treaty interpretation). To this end, "'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia*, 597 U.S. at 723. Agencies "[do] not have authority to pass regulations that are inconsistent with the meaning of a statute." *Antique Dealers*, 121 F.4th at 435. Similarly, courts cannot replace statutory "text with speculation as to Congress' intent." *Henson*, 582 U.S. at 89. "It is … mistaken to assume … that [what] might appear to 'further [ ] the statute's primary objective must be the law.'" *Id.*

The ICA is a comprehensive statute that "governs virtually every aspect of the investment companies' operations, including boards of directors" and was passed in 1940 after an "exhaustive study" of "the functions and activities of … investment companies." *See Nat'l Assoc. of Private Fund Mngrs*., 103 F.4th 1097, 1102, 1111 (citing *SEC v. Capital Gains Rsch.*

Bureau, Inc., 375 U.S. 180, 187 (1963)). The ICA provides limited rulemaking authority with respect to certain matters and is silent as to others. Neither the word "liquidity" nor the explicit authority to make rules to regulate fund liquidity and impose liquidity obligations on mutual fund boards appear in the ICA. Silence in the context of an extensive and comprehensive regulatory statute such as the ICA that covers every operational aspect of investment companies must be interpreted as intentional. *See Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001) (regarding "fundamental details" of a federal regulatory regime, Congress does not "hide elephants in mouseholes"); SCALIA & GARNER, at 93.

That the ICA neither mentions liquidity nor provides rulemaking grants to address liquidity is significant to this Court's analysis. The SEC stated that, at the end of 2021, there were approximately 11,488 open-end registered funds holding approximately $26 trillion in net assets subject to the Liquidity Rule. SEC Release No. 33-11130 (Nov. 2, 2022), at 254 (draft amendments to Liquidity Rule), Ex. B, at 254. At the end of 2020 more than 100 million Americans owned registered funds. Investment Company Institute, *2021 Investment Company Factbook*, www.ici.org/system/files/2021-05/2021_factbook.pdf. Placing substantive liquidity requirements on more than 11,000 funds and their boards that play a major role in the financial planning of over 100 million Americans is best left to Congress. *See West Virginia*, 597 U.S. at 723.

The Negative-Implication Canon further demonstrates the SEC's lack of authority to promulgate the Liquidity Rule. "The ancient maxim *expressio unius est exlusio alterius* (mention of one impliedly excludes the others) cautions us against engrafting an additional exception to what is an already complex [federal tax code]." *Greene v. U.S.*, 79 F.3d 1348, 1355 (2d Cir. 1996) (citing *Water Transp. Ass'n v. ICC*, 722 F.2d 1025, 1028–29 (2d Cir. 1983) and

U.S. v. Smith, 499 U.S. 160, 167 (1991)); *see also U.S. v. Merz*, 653 F. App'x. 72, 75 (2d Cir. 2016) (quoting *In re Lehman Bros., Inc.*, 791 F.3d 277, 288 (2d Cir. 2015); *see also* SCALIA & GARNER, at 107 ("The principle that specification of the one implies exclusion of the other validly describes how people express themselves and understand verbal expression"). "The more specific the enumeration the greater the force of the canon." SCALIA & GARNER, at 108.

The two exclusive grants in Section 22 (a) and (c) that permit rulemaking to determine methods of pricing and time periods for redemptions regarding open-end funds are specific and exclude all other rulemaking, including the Liquidity Rule. 15 U.S.C. § 80a-22(a) and (c). Similarly, the two exclusive rulemaking grants included in Section 22(e) related to trading restrictions and emergencies are specific and exclude all other rulemaking, including the regulation of fund liquidity. *See Merz*, 653 F. App'x. at 75–76 (court declined to add withdrawal slip to definition of 'security' where Congress did not include it in list of items deemed securities); *Greene*, 79 F.3d at 1355 (Court declined to add exception to federal tax code where text did not include it); SCALIA & GARNER, at 107.

The Court's role "is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Merz*, 653 F. App'x. at 76 (citing *Burrage v. U.S.*, 134 S. Ct. 881, 892 (2014)). "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known 'pursues its [stated] purpose [ ] at all costs.'" *Hensen*, 582 U.S. at 89 (citations omitted). Neither the SEC nor the Court can ignore the clear rulemaking limitations in the text of Section 22(a), (c), and (e). The specific limitations are exhaustive and do not authorize the Liquidity Rule. "To read out of a statutory provision a clause setting forth a specific condition or trigger to the provision's applicability is ... an entirely unacceptable method of construing statutes." *Financial Planning*

Ass'n, 482 F.3d at 488 (court declined to read out of IAA specific exemption applicable to broker dealers to add an exemption crafted by the SEC).

iii. Congress Did Not Require Fund Boards to Oversee Fund Liquidity

Regardless of whether the SEC was authorized to promulgate the Liquidity Rule in its entirety—and it was not—Congress did not authorize the SEC to impose liquidity obligations on fund boards. For this reason alone, the Rule should be vacated. Where Congress intended investment company boards to oversee fund operations, it has specified such requirements in the text of the ICA. No such obligations exist for fund boards related to liquidity.

The ICA creates obligations for fund boards with respect to the valuation of certain fund assets not subject to observable market quotations, an assessment that is wholly separate from liquidity.[9] Section 2(a)(41) of the ICA defines "value," with regard to securities and fund assets that are not subject to market quotations, "as determined in good faith by the board of directors." 15 U.S.C. § 80a-2(a)(41)(A)–(B). Congress, in the same section of the statute, also provides specific rulemaking authority with respect to valuation. *Id*. Pursuant to this language, the SEC promulgated the Valuation Rule. 17 C.F.R. § 270.2a-5(b). The ICA does not define or contain the term "liquidity," contains no language conferring liquidity obligations on fund boards, and provides no authority to promulgate rules to regulate fund liquidity.

"When Congress includes particular language in one section of a statute and omits it from a neighbor, the Court normally understands that difference in language to convey a difference in meaning …." *See Bittner v. U.S.*, 598 U.S. 85, 94 (2023); *Merz*, 653 F. App'x. at 75–76;

[9] Valuation is what a security is worth, *see* 15 U.S.C. § 80a-2(a)(41); liquidity is the time in which a security can be expected to be sold. *See* 17 C.F.R. § 270.22e-4(a)(6), (8), (10), (12).

SCALIA & GARNER, at 107. The language applicable to board involvement in determining the fair value of fund assets that are not subject to market quotations and the omission of such a requirement related to board involvement in liquidity must be interpreted to mean that Congress did not impose liquidity obligations on fund boards. The SEC cannot promulgate a Liquidity Rule placing obligations on fund boards in the same way it did for valuation when the ICA does not grant the SEC the same authority. *Id*. This common-sense application of the "canons of statutory interpretation," the "separation of powers," and a "practical understanding of legislative intent," renders the Liquidity Rule unauthorized and unenforceable. *See West Virginia*, 597 U.S. at 721–23; s*ee also Loper Bright,* 603 U.S. at 399–404; *Bittner*, 598 U.S. at 94.

C. The ICA's Rulemaking Provision Cannot Save the Liquidity Rule

The SEC cannot rely upon Section 38(a) of the ICA to justify the Liquidity Rule. Ex. A, at 436. Section 38(a) is not a general discretionary rulemaking provision. Rather, it limits the SEC's rulemaking "to … exercise of the powers conferred … elsewhere in the [ICA], including rules defining accounting, technical and trade terms used in [the ICA] and prescribing … forms in which information required in registration statements, applications, and reports to the [SEC] shall be set forth." 15 U.S.C. § 80a-37(a). The power to regulate fund liquidity and impose such requirements on boards are not found elsewhere in the ICA as discussed above. Moreover, the Rule's mandates on funds and their boards are not definitions of accounting, technical or trade terms used in the ICA, as Congress did not include the term liquidity in the ICA. Further, the Rule does not prescribe a form in which to include information required in registration statements, applications, and reports. Section 38(a) is not a general discretionary rulemaking grant that allows the SEC to promulgate any rule it sees fit but rather limits the SEC's rulemaking to that which Congress specifically provided elsewhere in the ICA. *See Loper*

Bright, 603 U.S. at 413 ("[W]hen a particular statute delegates authority to an agency … courts must respect the delegation, while ensuring that the agency acts within it").

To the extent that there is any doubt about the unambiguous text of Section 38(a), the legislative history of the ICA with respect to Section 38(a) states that "[s]ubsection (a) of the corresponding section of the original bill has been *modified to make it clear* that this section *does not grant* the Commission substantive powers but merely implements powers elsewhere conferred." H.R. Rep. No. 76-2639, at 26 (1940) (emphasis added). The power to promulgate the Liquidity Rule is not "elsewhere conferred" in the statute and, thus, should be vacated.

Even if Section 38(a) were a general rulemaking provision—and it is not—"[t]he ordinary meaning of the statutory text controls, and it cannot be overcome by a broad grant of rulemaking authority." *Inst. S'holder Serv., Inc.,* 718 F.Supp.3d at 28 (citing *Aid Ass'n for Lutherans*, 321 F.3d at 1174); *see Financial Planning Ass'n*, 482 F.3d at 493 (SEC cannot rely on general rulemaking provision where such provision suggests no intention by Congress to ignore text elsewhere in statute). The SEC's reliance on Section 38(a) ignores the rulemaking limitations found in Section 22 of the ICA. If agencies can engage in unlimited rulemaking under general provisions that allow them to make rules, they could effectively usurp the role of Congress and rewrite statutes to their desired specifications. The Constitution does not permit this type of uncontrolled authority. The SEC cannot rely on Section 38(a) to promulgate the Liquidity Rule while ignoring the specific rulemaking limitations in the text of the ICA.

Finally, the SEC's proposed interpretation of the ICA renders meaningless the rulemaking limitations in Section 22(a), (c), and (e). "When a statutory construction … 'render[s] … entire subparagraph[s] meaningless,' … the canon against surplusage applies with special force." *Pulsifer v. U.S.*, 601 U.S. 124, 143 (2024) (citations omitted). If the SEC is authorized to promulgate any rule it desires pursuant to the ICA, then the specific rulemaking grants in the text provide no limits at all and, therefore, have no meaning. Such an interpretation is not permitted. *Id*. Congress' specific and limited rulemaking grants in the ICA must be given effect and cannot be eliminated by the SEC's reliance on other provisions that do not provide for discretionary rulemaking.

D. Reliance on Anti-Fraud Provisions is Misplaced

The SEC improperly relies upon the anti-fraud provisions of the ICA, IAA, the Securities Exchange Act of 1934, and the Securities Act of 1933 to support the Liquidity Rule. Ex. A, at 436. This justification is misguided. First, Section 34(b) of the ICA does not include a rulemaking provision and, therefore, cannot support the Rule. 15 U.S.C. § 80a-33(b). Second, the text of Section 34(b) prohibits fraudulent statements of any kind in SEC filings, which would include those about fund assets and liquidity. Congress provided the prohibition it deemed necessary to protect fund investors from fraud; the SEC cannot add to it through a rule that regulates fund asset liquidity.

Third, the liquidity of a fund's assets is unrelated to fraud. As such, the Liquidity Rule does not include any provisions that reference fraud, deceit or similar malfeasance. The SEC's reliance on Section 34(b), the anti-fraud provision of the ICA, and the anti-fraud provisions of all the other federal securities laws is mere "pretext" to support its litigation position and should not be countenanced. *See Nat'l Assoc. of Private Fund Mngrs*., 103 F.4th at 1113 (SEC could not rely on anti-fraud provisions of IAA to support private fund rule when no "rational connection" existed between fraud and any part of private fund rule).

Specifically, Section 206(4), the anti-fraud provision of the IAA, cannot be used to justify the Liquidity Rule which was promulgated pursuant to the ICA. The IAA does not apply to investment companies or their boards. The IAA, as its name states, applies to investment advisers, defined as "any person who, for compensation, engages in the business of advising others … as to the value of securities or as to the advisability of investing in, purchasing, or selling securities...." 15 U.S.C. § 80b-2(a)(11). The ICA applies to registered investment companies. 15 U.S.C. §§ 80a-1 and 80a-3; *see also Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977) (explaining applicability of both statutes). The SEC cannot rely upon a statute that applies to investment advisers to justify a rule that applies to investment companies and was promulgated pursuant to a statute that applies to investment companies. Nor can it rely on the generic principle of investor protection and the anti-fraud provisions of all the other federal securities laws to circumvent the rulemaking limits of the ICA. *See Nat'l Assoc. of Private Fund Mngrs*., 103 F.4th at 1113 ("[SEC] cannot promulgate rules under the guise of [IAA anti-fraud provision]" to circumvent exemptions from regulation found elsewhere in ICA). Congress did not intend this result.

E. <u>The SEC's Position for 75 Years Contradicts its Current Claim</u>

The ICA's requirement that open-end investment companies redeem their shares within seven days has been the law since 1940 as have concerns about asset liquidity. The SEC did not assert authority to promulgate a Liquidity Rule for 75 years. Yet, in 2016, the SEC claimed the statutory authority to promulgate a rule that in 1992, the agency's Division of Investment Management ("Division") publicly recommended should result from a legislative amendment to the ICA. *See* Securities and Exchange Commission, *Staff Guidance and Studies, Protecting Investors: A Half Century of Investment Company Regulation*, 1992 WL 12623680, at *248

(1992) (recommending "legislation to amend Section 12 of the [ICA] to impose an express liquidity requirement on open-end companies…").[10]

While the Division's conclusions are not the law, "courts may consider the consistency of an agency's views when weigh[ing] the persuasiveness of any interpretation it proffers in court," and when an agency's historic position is at odds with its current position, "that counts as one more reason yet to question whether its current position represents the best view of the law." *Bittner*, 598 U.S. at 97 (citing *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944)). "A statutory interpretation … that results from an unexplained departure from prior policy and practice is not a reasonable one." *See Goldstein*, 451 F.3d at 883 (quoting *Northpoint Technology, Ltd. v. FCC*, 412 F.3d 145, 156 (D.C. Cir. 2005)).[11]

The SEC's sudden recognition, after 75 years, of some hidden authority to authorize the Liquidity Rule, is further evidence that the SEC's current litigation position should be rejected. "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a

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10 The SEC cited the Division's 1992 report in its adopting release that accompanied the Valuation Rule (SEC Release No. IC-34128 (Dec. 3, 2020)). More recently, Commissioner Uyeda cited the report when noting the substantial regulatory protections that the ICA already provides to investors in his comments on the 2022 amendments to the Liquidity Rule. *See* Commissioner Mark T. Uyeda, Statement on Proposed Rule: Open-End Fund Liquidity Programs and Swing Pricing (Nov. 2, 2022), www.sec.gov/newsroom/speeches-statements/uyedar-statement-open-end-funds-110222.

11 The ICI, it its November 21, 2023 comment letter to the SEC addressing the amendment to the Liquidity Rule, noted that the SEC's authority to promulgate the Liquidity Rule had been in doubt for years relying specifically upon the Division's 1992 report. *See* Letter from the Investment Company Institute to Vanessa Countryman, Secretary, Securities and Exchange Commission, *Open-End Fund Liquidity Risk Management Programs and Swing Pricing* (Nov. 21, 2023), at 3–6, https://www.sec.gov/comments/s7-26-22/s72622-301379-768202.pdf.

measure of skepticism." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). "The late recognition of a latent authority is good evidence to question the [SEC's] statutory authority." *Nat'l Assoc. of Private Fund Mngrs.*, 2024 WL 4858589, at *6.

In 1992, the SEC Chairman asked the Division Director to examine whether the ICA, which had been the law for 50 years, "should be more flexible, or whether regulatory costs could be reduced without sacrificing … investor protection." *Protecting Investors*, 1992 WL 12623680, at *1. In response, the Division produced a comprehensive review of the ICA, including Chapter 11, Repurchases and Redemptions of Investment Company Shares, that addressed open-end investment companies and proposed an amendment to the ICA to authorize the SEC to regulate liquidity and make related rules. *Id*. at *247–48.

Although mutual fund shares need not be redeemed in cash (15 U.S.C. § 80a-2(a)(41)), the Division found it important for open-end funds to maintain adequate liquidity given the ICA's 7-day redemption requirement and recommended that "express liquidity standards be established for all … investment companies that redeem … their shares." *Id*. at *248. Recognizing the rulemaking limitations of the ICA, the Division recommended that the SEC "seek *legislation* to amend Section 12 of the [ICA][12] to impose an express liquidity requirement on open-end companies…." *Id*. (emphasis added). As the ICA does not include the term liquidity, the Division proposed that "[t]he statute … contain a general, self-effecting requirement that investment company portfolios have sufficient liquidity to meet any redemption or repurchase obligations." *Id*. at *249.[13]

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12 Section 12 includes specific requirements and limitations applicable to all investment companies, including provisions related to margin and short sales. 15 U.S.C. § 80a-12.

13 Recognizing that express liquidity provisions were not authorized for open-end companies, the Division recommended other limited rules only to allow open-end companies to redeem

Twenty-four years later, in contravention of the 1992 report and the interpretation of the ICA that the agency held for more than 75 years, the SEC promulgated the Liquidity Rule. "[R]egardless of how serious the problem an administrative agency seeks to address, … [an agency] may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Inst. S'holder Serv., Inc.*, 718 F.Supp.3d at 28 (*citing Brown & Williamson Tobacco*, 529 U.S. 120, 125 (2000)). The Division heeded that warning in 1992 and drafted a proposed amendment to the ICA that could be adopted by Congress to authorize the SEC to make rules that address the liquidity of investment company assets. The draft amendment did not assign any obligations to fund boards but defined illiquid assets and included a provision to specifically authorize the SEC to make rules "designed to ensure that a registered company's assets are liquid … for the protection of investors." *See Protecting Investors*, 1992 WL 12623680 at *252, APPENDIX 11-A, Proposed Amendment to the ICA.

The report and draft amendment, prepared from a legal and analytical perspective and not in support of rulemaking or to advance a litigation position, is strong support that the text of the ICA does not authorize the Liquidity Rule. The draft statutory amendment provides the SEC with the exact rulemaking authority that it now claims it has had since 1940. The draft amendment along with the SEC's 75-year abstention from such rulemaking should cause the Court to view with extreme skepticism the agency's current position and find that the ICA does not authorize the Rule. *See Nat'l Assoc. of Private Fund Mngrs.*, 2024 WL 4858589, at *7

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on a periodic basis or with an extended period of payment to meet the 7-day redemption requirement. *Protecting Investors*, 1992 WL 12623680, at *252. The Division did not propose a rule to regulate fund liquidity. *Id*. at *252. The Division also proposed amendments to Rule 22c-1 applicable to closed-end not open-end companies or mutual funds, related to limited redemptions and periodic repurchases, not asset liquidity. *Id*. at *248, n. 141.

(SEC's "newfound attempt to change the [dealer] definition, when the statutory language [had] not changed" in 90 years, was "in excess of its statutory authority").

The Division got it right in 1992. The Liquidity Rule exceeds the SEC's authority under the ICA and should be vacated.

IV. **CONCLUSION**

For the foregoing reasons, the Liquidity Rule should be vacated, and the Complaint should be dismissed with prejudice.

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Respectfully submitted,

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