No. 07-552

In The

Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY L.P. & AT&T CORP.,

Petitioners,

v.

APCC SERVICES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The D.C. Circuit's ruling in this case defies foundational principles of Article III standing, in direct conflict with this Court's precedents and the decisions of other circuits. A plaintiff has standing only if it has both a stake in the outcome of its own case and the ability to litigate in its own interests. Respondents concededly have neither – they stand to win or lose nothing in this suit, and they are obligated to litigate the case entirely in the interests of the third-party PSPs. Equally troubling, the PSPs claim not to be bound by the outcome in this case if respondents – who are the PSPs' "agent[s]" (Pet. App. 117) – fail to litigate "in the [PSPs'] interest" (*id.* at 115). Contrary to the submission of the brief in opposition, the fact that respondents may be "real parties in interest" does not confer constitutional standing. This Court's intervention is warranted to review the D.C. Circuit's extraordinary departure from these basic principles of Article III standing.

I. Respondents Lack Article III Standing Because They Lack Any Interest In The Outcome Of Their Own Case.

a. Respondents miss the mark in complaining that the question presented "requires this Court to *assume* that the D.C. Circuit was wrong in concluding that respondents *do* have a personal interest in the controversy." BIO 4 (emphases in original). The D.C. Circuit held that a single consideration – the validity of the PSPs' assignment of their claims – creates a sufficient personal interest to satisfy Article III. Pet. App. 16; *see also id.* at 27 ("We hold that, as a result of the PSPs' valid assignment of their claims to the plaintiff aggregators, the aggregators have

standing to sue [petitioners] for failing to pay the PSPs dial-around compensation as required by the regulation[.]"). The petition raises the foundational question of whether that "interest" is sufficient for Article III when it carries with it no concrete interest in the outcome of this litigation, from which *all* the proceeds will go to the PSPs. *See* Pet. 4; Pet. App. 7, 9-10, 120, 124-25.

The requirement that the plaintiff have a concrete stake in the outcome of its own case from which it would personally benefit is a cornerstone of Article III standing jurisprudence. What respondents disparage as a "razor-thin distinction" and "radical theory" (BIO 5, 8) is, in fact, the very essence of constitutional standing. *E.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n.5 (1998) ("[T]he point [of the Court's Article III standing inquiries] has always been the same: whether [the] plaintiff 'personally would benefit in a tangible way from the court's intervention.'") (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1974)) (second alteration in original); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992) (Article III requires a "concrete private interest in the outcome of [the] suit").

The D.C. Circuit rendered the fundamental separation-of-powers principle embodied in Article III a mere inconvenience to be contracted around. Any party may pay his attorney, a bill collector, or any other person with no personal interest or exposure to litigate a claim in the payee's name, even though the payee has no stake in the case and the real party can seek to disavow any adverse judgment that might result in that shadow litigation. *See* Pet. 22-23.

b. Unsurprisingly, this Court's precedents forbid such facile evasion of Article III. *Vermont Agency of Natural Resources v. United States ex rel. Stevens* held that the standing of a *qui tam* relator – an "assignee" of the claim of the United States – depends critically on the "bounty" the relator receives for successful litigation under the False Claims Act. 529 U.S. 765, 772 (2000). Respondents claim to have searched that decision "in vain for *any* indication by this Court – let alone a holding –" that a personal bounty is required. They overlook, however, this Court's central conclusion that the relator's "portion of the recovery – the bounty he will receive if the suit is successful – provides the 'concrete private interest in the outcome of [the] suit'" that Article III requires. *Id.* at 772 (quoting *Lujan*, 504 U.S. at 573) (alteration in original). The Court underscored that point by resting its ruling on the historical tradition of statutes providing for a bounty (*id.* at 776-77) and cases in which the assignee uniformly received a share of the proceeds of the suit (*see* Pet. App. 30-31 (Sentelle, J., dissenting)).

Respondents also maintain that they have standing under *Vermont Agency* because the Court in that case, "speaking through Justice Scalia and without dissent on the relevant proposition, reaffirmed 'the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor.'" BIO 5 (quoting 529 U.S. at 773). But respondents wrench that language from its context. After concluding that the bounty did not *alone* confer standing – because "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing" (529 U.S. at 772) – the Court actually stated: "We believe, how-

ever, that adequate basis for the relator's suit *for his bounty* is to be found in the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id.* at 773 (emphasis added).

The point is illustrated by *United States ex rel. Gebert v. Transportation Administration Servs.*, 260 F.3d 909 (8th Cir. 2001). In that case, the *qui tam* relators went bankrupt before filing suit. Although their claim "passed to the bankruptcy estate," they argued that they nonetheless had "standing to bring the *qui tam* claim because it is the United States' injury-in-fact that imparts standing to the Geberts, not the Geberts' own injury in fact." *Id.* at 913. The relators thus advanced precisely the interpretation of *Vermont Agency* that respondents press here: that the injury of the assignor is sufficient standing alone to confer standing. But the Eighth Circuit squarely rejected that argument, explaining that *Vermont Agency* "framed the issue of a *qui tam* relator's Article III standing around the potential recovery that the relator may realize from the claim." *Id.* at 914. In words that speak directly to respondents' argument, the Eighth Circuit held that the relators lacked standing because they "no longer ha[ve] an interest in any damages because the claim is no longer [theirs] * * *, *i.e.*, there was no 'bounty' that they would be entitled to in the event their claim was successful." *Id.* Other leading judges recognize *Vermont Agency*'s clear holding.[1]

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[1] *Glanton v. AdvancePCS*, 465 F.3d 1123, 1126 n.3 (9th Cir. 2006) (Kozinski, J.) (premise of *Vermont Agency* is that the "*qui tam* relator has an interest in the outcome of the lawsuit be-

c. The petition also demonstrated that the decision below conflicts with decisions of other circuits, which have faithfully applied this Court's precedents, including the holding of *Vermont Agency* that an "assignee" has Article III standing only if it has a personal interest in the outcome, such as a *qui tam* "bounty." *See* Pet. 19-22.

Respondents invoke the Second Circuit's recognition that "[t]here are also situations" in which a "valid and binding assignment of a *claim*" may confer Article III standing. BIO 10 (citing *Connecticut v. Physicians Health Servs.*, 287 F.3d 110, 117, *cert. denied*, 537 U.S. 878 (2002)) (emphasis in original). But respondents overlook the Second Circuit's specific recognition that in all those "*situations*" the assignees (in contrast to respondents here) "stood, personally and individually, to recover a monetary award." 287 F.3d at 118 (citing, *inter alia*, *Vermont Agency*, *supra*). *Accord Connecticut v. Health Net, Inc.*, 383 F.3d 1258, 1261 & n.2 (11th Cir. 2004). Nor was the Second Circuit "reiterating" a distinction drawn in its prior decision in *Advanced Magnetics, Inc. v. Bayfront*, 106 F.3d 11 (1997), which it did not cite. *Contra* BIO 10. *Advanced Magnetics* does not broadly "recog-

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cause he stands to gain a part of the recovery. * * * The balance of the opinion deals with the difficult question of whether Congress *may* give a third party a stake in a lawsuit seeking to redress the invasion of somebody else's rights"); *Judicial Watch v. United States Senate*, 432 F.3d 359, 363 (D.C. Cir. 2005) (Williams, J., concurring) ("absent the partial assignment the bounty would no more qualify than would a 'wager on the outcome'") (quoting *Vermont Agency*, 529 U.S. at 772); Pet. App. 29 (Sentelle, J., dissenting) (precedents such as *Vermont Agency* accept *qui tam* standing because the relator has "an actual interest in the recovery").

nize[] the ability of assignees for-collection to bring suit" (*contra id.* at 12) – the decision did not involve Article III standing but instead merely acknowledged that the *validity* of an assignment "is not affected by the parties' agreement that the transferee will be obligated to account for the proceeds." 106 F.3d at 17.[2]

Respondents would distinguish *Glanton v. AdvancePCS*, 465 F.3d 1123 (9th Cir. 2006), on the ground that it "did not involve an assignment at all." BIO 11. But that only underscores the magnitude of the D.C. Circuit's Article III error here. Given that the *Glanton* plaintiffs possessed a right to sue directly conferred *by Congress* (*see* 29 U.S.C. 1109, 1132(a)), they had a stronger claim to standing than respondents because their right was not purely derivative. Respondents also quote the Ninth Circuit's observation that, "whereas *qui tam* actions have existed for centuries, there is no similar tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans." BIO 11 (quoting *Glanton*, 465 F.3d at 1125). But that ignores both that respondents similarly have no deep historical tradition underlying their suit for the PSPs and the Ninth Circuit's conclusion in the very next sentence that, "*[m]ore importantly*, the [False Claims Act] assigns relators a concrete stake in *qui tam* cases by giving them a piece of the action. ERISA gives plan beneficiaries nothing[.]" 465 F.3d at 1125-26 (emphasis added).[3]

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[2] Respondents also fail to explain why Connecticut lacked standing on their understanding of Article III, given that the State (as the participants' assignee) unquestionably was a "real party in interest."

[3] Respondents also have no answer to the petition's showing that they in any event lack "prudential standing," given that the

II. Respondents' Status As "Real Parties In Interest" Has No Bearing On Their Article III Standing.

Although respondents assert that the "widespread conclusion that an assignee-for-collection *may* bring a lawsuit in federal court" is "stated consistently in hornbooks and cases" (BIO 7 (emphasis in original) (footnotes omitted)), every authority they cite merely states that the assignee is the "real party in interest." *Id.* at 7 nn.5 & 6. Respondents' claim that petitioners' argument implies that "every treatise writer has simply overlooked an Article III defect and focused on the wrong legal question" (*id.* at 8) ignores that those treatise writers in fact consistently draw the critical distinction that "elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must both be the real party in interest *and* have standing." 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1542, at 330 (2d ed. 1995) (emphasis added).

Respondents further argue (BIO 9) that this Court's Article III precedents "do not purport to disavow, for standing purposes," *Spiller v. Atchinson, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), or *Titus v. Wallick*, 306 U.S. 282 (1939). But it is more telling that this Court's Article III's precedents do not view *Spiller* and *Titus* as *relevant* to the standing inquiry. As *amicus* Qwest explains at length (Br. 12-17), nei-

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right of action to sue for dial-around compensation was created specifically for the benefit of the PSPs. *See* Pet. 24-25. Indeed, respondents reinforce that point when they emphasize that "respondents sued petitioner AT&T for failure to pay payphone service providers (*PSPs*) amounts *they* were owed under FCC rules." BIO 1 (emphasis added).

ther case addressed standing; indeed, both predated the development of Article III standing doctrine altogether. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) ("'drive-by jurisdictional rulings' * * * should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit") (quoting *Steel Co.*, 523 U.S. at 91).[4]

Respondents, like the majority below, assert that there is "'no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing.'" BIO 4 (quoting Pet. App. 16). But, in fact, there is every reason to distinguish the two, and respondents completely miss the irony of their criticism of "the odd notion that a Federal Rule of Civil Procedure (promulgated in 1937) is relevant to the standing requirements of Article III of the Constitution (ratified in 1788)." BIO 14 n.9. Rule 17(a) *has no* "personal stake" requirement: the only decision cited by the D.C. Circuit for that proposition rejects the argument that the requirements of Rule 17(a) and Article III are equivalent. *Whelan v. Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992); *see also* Pet. 23-24 & n.4 (collecting additional cases). As the petition explained and respondents do not contest, the two requirements serve different purposes: Rule 17(a) ensures that the judgment is entered for or against the correct party; Article III ensures that the judicial power is only invoked to resolve actual cases or con-

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[4] Those decisions are also properly distinguished because in *Titus* the assignor's obligation to pay the assignee's debts from the proceeds of the case gave the assignee an interest in the outcome (306 U.S. at 286), and in *Spiller* the assignors (unlike respondents here) were members of a common association (253 U.S. at 122-23).

troversies. In particular, Article III requires that there be "concrete adverseness" (*Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 486 (1982) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)) between the opposing parties, to prevent federal courts from issuing advisory decisions and thus exceeding their constitutionally delimited role in a system of separated powers. *See* Pet. 17. That is not a concern of Rule 17(a).[5]

III. Respondents' Remaining Arguments Against Review Lack Merit.

The importance of the question presented cannot be gainsaid. Respondents brought this lawsuit on behalf of more than 1400 PSPs from around the nation, more than 99.5% of whom are not participating in this case but instead "assigned" their right to litigate to respondents. As respondents advised this Court in their own previous petition for certiorari, "Lawsuits to recover unpaid compensation have been filed in district courts around the country." Petition for Cert. at 30, *APCC Servs., Inc. v. Sprint Commc'ns Co.* (No. 05-766). As the district court detailed in concluding that "[r]esolution of this question would also assist many other courts in resolving similar disputes" (Pet. App. 79), in addition to this case and the suit against *amicus* Qwest, "the PSPs and aggregators have filed *numerous suits throughout the country* against com-

[5] It is thus not the case that any "interest" – for example "one penny of every dollar recovered" (BIO 13) – is sufficient to confer standing. In every case, the court must evaluate whether the plaintiff has a genuine – rather than *pro forma* – interest in the outcome of the suit so as to satisfy itself that concrete adversity exists between the parties.

mon carriers based on * * * an assertion of standing based on assignments executed by the PSPs." *Id.* at 71 & n.9 (citing five suits in five different circuits) (emphasis added). *See also id.* at 71 (noting "the rash of these cases countrywide").

The troubling consequences of the D.C. Circuit's contrary ruling are serious and uncontested, and extend far beyond the context of payphone litigation. As noted, the PSPs claim the right not to be bound by the judgment *at all*. Respondents also seemingly embrace the conclusion that their position permits the easy evasion of the strictures of Rule 23 class action procedures. BIO 13 n.9. Equally disturbing, as *amicus* Qwest describes (at 4-5), are the great difficulties in securing discovery from the non-party PSPs – which petitioners have experienced as well because respondents have steadfastly disclaimed any obligation to produce discovery from the PSPs (*see generally* AT&T Corp.'s Memorandum in Support of Its Motion to Compel, *APCC Servs., Inc. v. AT&T Corp.* (D.D.C. No. 1:99-cv-696)) – and the substantial doubts regarding whether counterclaim judgments can be secured against them.

Finally, there is no merit to respondents' contention (BIO 14-15) that the case has been unduly delayed. Petitioners did not move to dismiss this suit for lack of standing at the outset because they had no way of knowing that respondents lacked any personal interest in the case – as respondents know well, that fact only emerged much later in discovery, which was stayed and consequently greatly delayed. Respondents moreover argue at cross-purposes with themselves in contending that this litigation is longstanding, when the alternative they propose is that review

of the question of standing should be still further "deferred until final judgment." BIO 14 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)). At bottom, respondents are merely attempting to reargue the district court's conclusion that "it would be far better for all concerned" to resolve the standing question before the parties are put to the great cost and distraction of trial. Pet. App. 61. Indeed, the point of the case or controversy requirement is to *avoid* the type of potentially advisory litigation that respondents insist petitioners should be forced to litigate for years against a party which has no stake in the outcome.[6]

[6] Petitioners also note the pendency of two other petitions for certiorari involving the Article III requirement that the plaintiff have suffered a concrete, personal injury. *WKB Assocs. v. Fair Housing Council* (No. 07-421) (like this case, set for the January 4, 2008 conference); *Summers v. Earth Island Inst.* (No. 07-463) (to be set for the January 11, 2008 conference).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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