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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

As formulated by petitioners, the question presented is whether an assignee "that has no personal stake in the case" has standing to litigate on behalf of assignors. Pet. Br. i; Pet. i. As was pointed out in the brief in opposition (at 4 n.3), this case does not present that question. The court below expressly held that respondents do have the "personal stake required under Rule 17(a)" and that the "interest required for standing" is identical in this context. Pet. App. 16.

This Court presumably will decide whether the court below was right or wrong in that conclusion—not whether one who "has no personal stake in the case" has standing, a question that has never been in dispute at any stage of this litigation. Accordingly, the question actually presented is as follows:

Whether an assignee that has been given "all rights, title and interest" in an assignor's relevant "claims, demands or causes of action" (Pet. App. 114) has standing, when a separate agreement (Pet. App. 116-121) obligates the assignee to return to the assignor the amounts collected on its behalf, provided the assignor has stayed current in its obligation to fund the litigation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, defendants and appellants below, are Sprint Communications Company L.P. and AT&T Corp.

Respondents, plaintiffs and appellees below, are APCC Services, Inc.; Data Net Systems, L.L.C.; Davel Communications Group, Inc.; Jaroth, Inc. d/b/a Pacific Telemanagement Service; NSC Telemanagement Corp., n/k/a Intera Communications Corporation; and Peoples Telephone Co., Inc.

APCC Services, Inc., a Virginia corporation, is a for-profit subsidiary of the American Public Communications Council, Inc., a District of Columbia not-for-profit corporation that is not publicly traded.

Data Net Systems, L.L.C., is an Illinois Limited Liability Company that is not affiliated with any publicly traded company.

Davel Communications Group, Inc. is an Illinois corporation whose parent corporation, Davel Communications, Inc., is a wholly owned subsidiary of MobilPro Corp., which is a publicly traded corporation. No publicly traded corporation holds a 10 percent or greater ownership in MobilPro Corp.

Jaroth, Inc. d/b/a Pacific Telemanagement Services is a California corporation that is not affiliated with any publicly traded company.

NSC Telemanagement Corporation n/k/a Intera Communications Corporation is a Delaware corporation that is not affiliated with any publicly traded company.

Peoples Telephone Company, Inc., is a New York corporation whose parent corporation, Davel Communications, Inc., is a wholly owned subsidiary of MobilPro Corp., which is a publicly traded corporation. No publicly traded corporation holds a 10 percent or greater ownership in MobilPro Corp.

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BRIEF FOR RESPONDENTS

STATEMENT

Respondents, some of whom are "aggregators," sued petitioner AT&T in 1999 for failure to pay approximately 1400 payphone service providers (PSPs) amounts due under FCC rules governing dial-around calls. In so doing, the aggregators fulfilled their established role—long endorsed by the FCC—of tracking dial-around compensation owed by inter-exchange carriers (IXCs) and collecting it on behalf of PSPs.

Respondents did not merely act as agents for the PSPs. Instead, the PSPs assigned to respondents "all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114. As the D.C. Circuit observed, there is "no reason to believe the assignment is anything less than a complete transfer to [respondents] of the PSP's dial-around compensation claim." Pet. App. 12.

The assignments under which respondents sued said *nothing* about remitting proceeds to the PSPs. The aggregators and PSPs did, however, execute a second agreement to reflect that the aggregators would distribute litigation proceeds among the PSPs that funded the litigation. That collateral agreement did not purport to modify the assignment.

No court has ever held that an assignee with unfettered legal title to a claim lacks standing to pursue it merely because it has reached a collateral agreement to dispose of litigation proceeds in a particular way. To the contrary, nearly 90 years ago, this Court held that an assignee could invoke the jurisdiction of a federal

court, even though the benefits of the litigation would inure to someone else. *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134 (1920). The result here should be no different.

A. Regulatory Background

1. PSPs have long been required to permit callers to choose the inter-exchange carrier (IXC) that will carry the calls they make from a payphone. See 47 U.S.C. § 226(c)(1)(B); *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1517-1518 (2007). But, when a caller makes a coinless call and chooses an IXC with which the PSP has no contractual relationship, the task of ensuring compensation for the PSP is complex. Although carriers can contract with PSPs to pay compensation, there is no incentive to do so since PSPs are required to allow payphone users to dial all carriers' access codes; PSPs cannot deny service even to a carrier that says it won't pay. Litigation to collect is the only direct remedy for the PSP.

At Congress's direction, in 1996, the FCC developed a compensation plan to ensure that PSPs are compensated for dial-around calls. See *Global Crossing*, 127 S. Ct. at 1518. The plan required IXCs such as AT&T to compensate PSPs for calls that the IXC "completes." *E.g.*, *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 20,541, 20,567-20,568, 20,586 (¶¶ 50-51, 86) (1996) (*First Payphone Order*). The Commission preferred this mechanism to a plan in which callers would directly compensate the PSP "because it would result in less transaction costs because the toll-carrier could aggregate its payment to [PSPs]." *Id*. at 20,580 (¶ 77). Those transaction cost savings

exist, in large measure, because of the functions performed by "aggregators" like respondent APCC Services, Inc. (APCCS), which collect billing information from a large number of PSPs, provide that information to IXCs or their agents, collect the IXCs' payments, and distribute those payments to PSPs.

2. Apart from their salutary role in streamlining the compensation process, aggregators are also necessary in practice because PSPs are typically small businesses lacking the technical ability or financial resources to pursue claims independently. See JA252 ("Several hundred APCC Services customers have between 1-5 payphones."). For PSPs with so few payphones, the cost of pursuing a contested claim against an IXC would outrun any recovery. See Br. in Opp. 17, *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications*, No. 05-705 (discussing fact that entire litigation involved only $30,000).

Even for larger PSPs, substantial practical barriers effectively prevent them from pursuing dial-around claims unilaterally. Without aggregators, PSPs may be unaware that a claim even exists. An IXC's failure to compensate PSPs is often revealed only by comparing the IXC's *total* dial-around call volume in a period to the *total* dial-around compensation it paid in that period. JA253-254. Such aggregate analysis is impossible for an individual PSP, which lacks information on call volume or compensation paid to any other PSP. Without aggregate data, a PSP cannot tell whether its lack of compensation results from an unknown IXC's nonpayment, payment irregularities from an IXC on the PSP's lines versus other PSPs' lines, or questionable systematic abnormalities in an IXC's reported call traffic. Because aggregators like respondent APCCS have access to analytical software and compensation

records for the majority of PSPs in the industry, they can identify responsible IXCs and compare an IXC's expected payments (given its dial-around call volume) to its actual payments. *Ibid.*

For these and other reasons, the FCC has recognized the indispensable role aggregators play in collecting compensation for dial-around calls. *E.g., Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, 7 F.C.C.R. 3251, 3259 (¶ 49) (1992) (authorizing use of clearinghouses for billing and collection). Indeed, as the *amicus* brief of NetworkIP notes (at 7), aggregators have brought myriad cases before the FCC, which has never doubted the desirability of aggregators' litigating to collect compensation that IXCs failed to pay to PSPs. See, *e.g.*, *APCC Servs., Inc.* v. *NetworkIP, LLC*, 22 F.C.C.R. 4286 (2007); see also *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration and Order on Remand, 17 F.C.C.R. 21,274, 21,302-21,303 n.151 (¶ 82 n.151) (2002) (FCC identified the present cases as means for PSPs to recover underpayments). Aggregators have "settl[ed] scores" of these cases. NetworkIP Br. 7. Not once in all of those cases has a PSP opted out of the lawsuit or agency proceeding, or claimed it is not bound by the aggregator's settlement decision.

Petitioner AT&T stands before this Court arguing that PSPs are the *only* proper plaintiffs in an action for dial-around compensation, yet AT&T has long *insisted* that all demands for payment, and all questions concerning disputed bills, must come *only* from the aggregators. AT&T refuses to deal with individual PSPs. JA252-253, 259-260, 264, 268, 272. AT&T even forbids the aggregators to disclose to PSPs the telephone

number of the AT&T representative who handles dial-around compensation issues. JA253.

B. The Assignments, The Separate Agreement Governing Proceeds Of Litigation, And Initial Proceedings Below

1. In anticipation of filing suit, respondent aggregators presented PSPs with two independent agreements and a cover letter. Approximately 1400 PSPs signed identical agreements.

Petitioners represent to this Court that there is but one relevant agreement between each aggregator and each PSP, which petitioners term "the assignment." That is simply false.

a. The first agreement between the aggregators and PSPs, titled "Assignment and Power of Attorney" (APOA), assigned to respondents "all rights, title and interest of the [PSP] in the [PSP's] claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114. Consistent with that complete transfer, the APOA gives respondents plenary authority to sign

> settlement agreements, releases, or other documents relating to the settlement of [dial-around compensation] claims. [PSP] hereby agrees to be bound by any settlement, compromise or release reached by [aggregator] on its behalf and that any document executed in connection with any such settlement, compromise or release by [aggregator] on behalf of the [PSP] shall be binding on the [PSP].

Pet. App. 115.

The APOA also emphasized that the transfers to APCC were unconditional and could not be revoked

unilaterally, stating that "[t]his Assignment and Power of Attorney * * * may not be revoked without the written consent of the attorney-in-fact," *i.e.*, the aggregator. *Ibid.*

Nothing in the APOA obligates respondents to remit litigation proceeds to the PSPs. But see Pet. Br. 6 (asserting that "[t]he assignments bind the aggregators * * * to 'pass back to the [payphone operators] any amounts they recovered thereby'"). Rather, proceeds of litigation are covered in a *separate* agreement between PSPs and aggregators.

b. The second agreement between the aggregators and the PSPs is titled "Amendment to APCC Services Agency Compensation Agreement." Pet. App. 116-121.[1] This Compensation Agreement did not modify the APOA; instead, it amended the standing compensation arrangement between the aggregator and PSP (JA 182-206) in order to fund the dial-around litigation. See Pet. App. 119 (setting forth additional amounts respondents were allowed to deduct from compensation collected on PSPs' behalf). PSPs were made aware that, "[i]n the event that PSP chooses not to meet the funding requirements or PSP terminates the Agreement, [aggregator] will be relieved of any further obligation to represent PSP in the collection of PSP's DAC Claims and [aggregator] will have no obligation to remit to PSP any amounts previously deducted from PSP's DAC payments." Pet. App. 119-120.

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[1] The appendix to the certiorari petition makes it appear that the Compensation Agreement is simply a continuation of the APOA, on the same page. Pet. App. 116. As the original documents reproduced in the joint appendix filed in the D.C. Circuit show, the Compensation Agreement is actually a stand-alone document. See C.A. App. 135-138, reproduced as an Addendum to this brief.

The Compensation Agreement also explained the PSPs' and aggregators' division of responsibilities during the litigation. The aggregators would "take any reasonable step on PSP's behalf to collect payment for the DAC Claims, including, without limitation, * * * filing and prosecuting legal complaints * * *, and entering settlements * * * without obtaining further oral or written authorization from PSP." Pet. App. 118; see also Pet. App. 118-119 (reiterating settlement authority). The PSPs, in addition to funding, promised that they would "promptly provide [aggregator] with all documentation that [aggregator] or its counsel reasonably believes to be necessary in order to pursue collection of PSP's DAC Claims." Pet. App. 118.

c. The APOA and Compensation Agreement were sent to PSPs with a cover letter from an official of APCC Services. The letter explained in laymen's terms the reasons for assigning the claims to the aggregators, the need for additional funding, and the consequences of a PSP's failure to continue funding the litigation—namely, "You've got to pay to play and once you're in, you've got to stay in to reap the benefits." Pet. App.126. It explained that, "[i]f at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." *Id.* at 127. However, the PSP would "*get nothing—no back dial around collected by this litigation or any return of your funding contributions*" as to claims assigned before the withdrawal. *Id.* at 126. No claim against petitioners (or *amici*) has ever, in fact, been transferred back to a PSP that had assigned its claim to one of the respondents in this case.

As the D.C. Circuit observed, "[t]he possibility that APCCS would no longer represent a PSP in litigation does nothing * * * to suggest the PSP could revoke the

assignment as long as APCCS continues to represent the PSP in the litigation." Pet. App. 12. True, "APCCS itself could repudiate the assignment and presumably would do so if it no longer wanted to represent the PSP in the litigation." *Ibid.* Even then the parties understood that at most APCCS would consider relinquishing the right to pursue the *prospective* value of the claims. Ruth Jaeger, Vice President of APCC, stated under penalty of perjury in a declaration submitted to Judge Huvelle in 2003:

> While the PSPs can terminate their funding obligation unilaterally, they cannot terminate unilaterally their assignment of claims. Paragraph 4 of the assignment requires the written consent of the plaintiff aggregators. * * * APCCS and the PSPs contemplated that any such termination, if allowed, would operate prospectively only, *i.e.*, as to claims for unpaid compensation that had not yet accrued and, therefore, were not encompassed by an ongoing suit. It is these **prospective** claims as to which APCCS would not be representing the PSP that the PSP will be able to pursue on its own, should it so choose.

Declaration of Ruth Jaeger ¶ 9, filed July 15, 2003, in *APCC Services, Inc.* v. *Cable & Wireless, Inc.*, Civ. Action No. 1:02 CV 0158 (ESH).[2]

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[2] Although the July 15, 2003, Jaeger Declaration was filed in *APCCS* v. *C&W*, Judge Huvelle had it before her when deciding the standing issue in the *Sprint* and *AT&T* cases now before this Court as well. The three cases proceeded before her in parallel fashion, and she held joint hearings and considered an order in one case to be dispositive of the issue in the other two. AT&T, too, recognized that the cases were joined at the hip—in its *Reply in Support of its Motion for Reconsideration* filed October 20, 2003, AT&T attempted to refute the argument that one plaintiff had standing by citing

Because withdrawing PSPs have only the right to pursue claims prospectively, the aggregators have from the beginning held at least a contingent interest in the proceeds of assigned claims. See *id.* ¶ 8 ("A PSP's refusal to continue to fund this litigation * * * vitiates APCCS' obligation to remit the proceeds of suit to it. Since APCCS, as an assignee, is the owner of the claim, in such a circumstance **it** becomes entitled to retain those proceeds."). The lower courts have addressed the standing issue in this case on the *assumption* that the aggregators must pass back to PSPs all proceeds of the litigation, and this Court may properly address the question presented on the same assumption. To the extent, however, that petitioners wish this Court to treat it as *established fact* that respondent aggregators must pass back to PSPs all proceeds of litigation—*e.g.*, Pet. Br. 6 ("the aggregators stand to gain or lose nothing from the lawsuit, no matter how it is resolved")—their position is factually inaccurate.

2. Respondents sued AT&T in 1999. AT&T asserted, among other things, counterclaims against respondents for alleged overpayments to the PSPs. Although petitioners now lament that they could "only

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briefing submitted in *C&W*. In her opinion in which she explained her decision to certify *AT&T* for interlocutory appeal (Pet. App. 64-82), Judge Huvelle cited *C&W* six times. In the accompanying certification order, she certified *all three* cases, not just *AT&T* and *Sprint*. Pet. App. 81-82. C&W was not a party to the D.C. Circuit appeal only because it entered bankruptcy. Despite all those facts, petitioners moved to strike references to the Jaeger Declaration at pages 18-19 of respondents' D.C. Circuit brief, taking the position that the court of appeals could consider only materials before Judge Huvelle in the *Sprint* and *AT&T* cases, not the parallel *C&W* case simultaneously certified for interlocutory appeal. The D.C. Circuit decided the appeal and then in an order dated June 29, 2005, dismissed the motion to strike as moot.

name the aggregators (rather than the payphone operators) as counterclaim defendants" (Pet. Br. 8), at no time did petitioners attempt to interplead the PSPs, join them as necessary parties to the litigation, or bring separate lawsuits against them.

Judge Huvelle appointed a Special Master to oversee discovery, which proceeded with nothing more than the squabbles typical of civil litigation. Petitioners sought disclosure of documents in the PSPs' possession. Although they artfully word their brief to suggest that the assignments prevented them from getting it—"*Respondents took the position that* the operators themselves were immune from party discovery because they were not participating in the suit" (Pet. Br. 8) (emphasis added)—in truth the Special Master ordered the aggregators to collect discovery from the PSPs, which they did. See Special Master Mem. Op. & Order No. 5 (Aug. 31, 2002) (holding that PSPs are under aggregators' control for discovery purposes).

C. Decisions Below

1. After four years of litigation, AT&T moved to dismiss on the ground that some plaintiffs lacked standing. JA160-178. The district court first granted the motion (JA313) but, on reconsideration, concluded that all respondents have standing. Pet. App. 83-106. The court relied on "a long line of cases and legal treatises that recognize a well-established principle that assignees for collection purposes are entitled to bring suit where the assignments transfer absolute title to the claims." *Id*. at 90. As we explained above, respondent aggregators hold such assignments.[3]

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[3] At least three of the six respondents have additional interests in the compensation and therefore have standing without regard to

The district court also rejected petitioners' position that the assignments were invalid under state law. The district court held that federal—not state—law controlled the validity of the assignments, and that petitioners had not shown them to be invalid under federal law. Pet. App. 104-105.

The district court certified for interlocutory appeal the question whether the aggregator respondents have standing and the separate question—raised by petitioner Sprint in a lawsuit initiated in 2001 and later consolidated for purposes of appeal—whether there is a private cause of action to enforce the FCC regulations. Pet. App. 45-63.

2. A motions panel of the D.C. Circuit accepted the case for interlocutory appeal. Pet. App. 42-44 (Rogers, Tatel & Roberts, JJ.). The motions panel reminded the parties that, under *Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 204-205 (1996), they could raise on appeal *any* issue presented in the district court's September 3 and December 17 orders (Pet. App. 83-106, 45-63). Despite that invitation, petitioners refrained from challenging the district court's conclusion that the assignments are valid. But see Pet. Br. 22 (criticizing court of appeals for assuming the validity of the assignments without any discussion and asserting—despite having lost this issue in the district court and failed to raise it in the court of appeals—that "[t]hat is a state law question, and the court of appeals offered no explana-

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whether assignees have standing. Pet. App. 10 n.**. Petitioners nevertheless assert that they challenge the standing of two of those three respondents. Pet. Br. 4-5 n.1. This point—like numerous others (see note 16, *infra*)—should be taken up on remand in the event this Court agrees with petitioners' basic contention that assignees-for-collection lack standing.

tion for its apparent assumption that the assignments effectively transferred legal title to the operators' claims").

A merits panel (Ginsburg, C.J., & Sentelle & Randolph, JJ.) then split three ways, with two differently constituted majorities holding that respondents have standing but that there is no private cause of action. Pet. App. 4-41. Judge Sentelle dissented with respect to standing. Chief Judge Ginsburg dissented with respect to a private cause of action based on 47 U.S.C. § 201(b).

In upholding the standing of respondent assignees, the majority observed that "[t]he assignments at issue here * * * transfer to the assignees the entire interest of the PSPs in their dial-around compensation claims." Pet. App. 14. And "[c]ourts and commentators agree that, if an assignment properly transfers ownership of a claim, then the assignee's interest 'is not affected by the parties' additional agreement that the transferee will be obligated to account for the proceeds of a suit brought on the claim.'" Pet. App. 14-15 (quoting *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d 11, 17 (2d Cir. 1997)).

The majority acknowledged that some of the authorities on which it relied addressed the question of who is the "real party in interest" for purposes of FED. R. CIV. P. 17(a). It also acknowledged that the proposition that standing and real-party-in-interest inquiries sometimes diverge is "true enough, as far as it goes." Pet. App. 15. "But standing also depends in part, as does a plaintiff's status as the real party in interest, upon having 'a personal interest in the controversy.'" *Ibid.* (quoting *Whelan* v. *Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992)). The Rule 17 cases indisputably establish that respon-

dents have a personal interest in the controversy as a result of the assignments. And the D.C. Circuit saw "no basis for distinguishing the personal stake required under Rule 17(a) from the interest required for standing." Pet. App. 16.

At no point did the D.C. Circuit suggest that Rule 17 *confers* standing on respondents. Rather, courts *interpreting* Rule 17 have had to grapple with the same question—albeit under a different source of law—that is presented by this case, namely whether an assignee-for-collection has a "personal stake" in the controversy. What was relevant was not the Rule itself, but rather the *unanimous* conclusion of every court ever to consider the question that assignees-for-collection *do* have the requisite stake.

3. After this Court decided *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, *supra*, it was clear that Chief Judge Ginsburg's dissent had been correct and that the D.C. Circuit majority had been wrong to conclude that no private right of action existed. Following a remand from this Court, 127 S. Ct. 2094 (2007), the D.C. Circuit therefore affirmed the district court in its entirety. Pet. App. 1-3.

4. Following remand to the district court, the aggregators moved for leave to amend the complaint to reflect that certain PSPs' failure to make the required payments had, in fact, triggered the aggregators' contingent rights to retain litigation proceeds. See *Motion for Leave to Amend Consolidated Amended Complaint*, filed in Civil Action No. 1:99 CV 696 (ESH) (Jan. 10, 2008). Because this Court had granted certiorari, however, Judge Huvelle denied the motion to amend with-

out prejudice. Minute Order, Civil Action No. 1:99 CV 696 (ESH) (Jan. 29, 2008).

SUMMARY OF ARGUMENT

I. Both courts below held that the assignments irrevocably transfer the PSPs' claims to respondents. Petitioners assert in their brief many propositions contrary to those holdings. This Court should not even consider those fact-bound arguments, but in any event every one of them is wrong. Because—contrary to petitioners' misrepresentation—the assignment and the agreement to return proceeds are *separate* agreements, any hypothetical dispute about the adequacy of respondents' performance of their contractual duties cannot affect petitioners; it would give rise only to a contractual dispute between a PSP and respondents and could not upset the finality of a resolution of a PSP's claim against petitioners.

II. Assignees-for-collection who—like respondents—hold *title* to assigned claims have always had standing. The reasoning of *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), disposes of petitioners' arguments to the contrary. "[T]he assignee of a claim has standing to assert the injury in fact suffered by the assignor." *Id*. at 773. The bounty that the *qui tam* relator in *Vermont Agency* sought was not helpful to his standing; rather, "the *United States'* injury in fact suffice[d] to confer standing" on the relator. *Id*. at 774 (emphasis added).

Here, as in *Vermont Agency*, history and long tradition also confirm respondents' standing. Blackstone's treatise published in 1766, the Judiciary Act of 1789, and other sources make it clear that assignees had standing at the time of the Framing. Assignees-for-collection have been recognized as proper plaintiffs in

cases and commentaries dating from, for example, 1904, 1920, and 1925—including an article by noted proceduralist and future Judge Charles E. Clark. These cases and commentaries can no more be disregarded—on the ground that they fail to address "modern" standing doctrine—than the cases on which this Court relied in *Vermont Agency*, which suffered the same "defect." Equally important, petitioners cite no case in which a court has *ever* held that an assignee-for-collection with legal title is an improper plaintiff merely because of what it intends to do with the proceeds of litigation.

No recognized rationale for the standing doctrine justifies denying standing to assignees-for-collection. Assignees-for-collection do not assert a generalized grievance. There is no reason for concern about the absence of concrete adverseness. Separation-of-powers concerns *support* standing when the defendant is not a governmental actor and the cause of action is based on a statute and agency regulations.

Petitioners get it backward when they argue that respondents are trying to evade limitations on associational standing and class actions. The traditional device of an assignment for collection is a vastly superior—and far better established—alternative to associational standing and class actions, both of which were first recognized long after the Framing and have proved controversial.

III. Petitioners mislead this Court when they suggest that they have been unable to obtain discovery from individual PSPs. The Special Master ordered such discovery. If petitioners are dissatisfied with the result, they should take their dissatisfaction up with the Special Master, who has ample tools to manage the

ordinary discovery disputes at issue. In addition, the information necessary to prove liability and damages is already in petitioners' possession; their claims that they need discovery available only from PSPs, and that the participation of individual PSPs is necessary to prove damages, are false.

Petitioners also use scare tactics when they lament their inability to pursue counterclaims against PSPs. Petitioners have never even tried to implead PSPs or join them as necessary parties.

ARGUMENT

Because petitioners—contradicting *every* judge who considered this case below—thoroughly misrepresent the documents by which respondents were assigned the claims at issue and separately promised to account for litigation proceeds to the PSP, it is necessary to address those factual misrepresentations (Point I below). We then explain (Point II) that this Court has rejected petitioners' position in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), *Titus* v. *Wallick*, 306 U.S. 282 (1939), and *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117 (1920), and that historical practice overwhelmingly supports the ability of assignees—including assignees-for-collection—to sue in federal court. Indeed, petitioners have *not one case* to the contrary. Finally, we address petitioners' and *amici*'s unpersuasive case-specific arguments (Point III).

I. RESPONDENTS WERE GIVEN ALL RIGHTS, TITLE, AND INTEREST IN THE CLAIMS IN THIS CASE

The district court concluded that "the assignments currently before the Court, which purport to transfer

ownership of the right to collect, give plaintiffs legal title to the dial-around-compensation claims." Pet. App. 94. Petitioners briefed at length on appeal their disagreements with that conclusion. The D.C. Circuit thus considered petitioners' arguments that "the assignments did not transfer the PSPs' compensation claims to the aggregators." Pet. App. 11. The court rejected those arguments. Pet. App. 11-13. Under the two-courts rule, this Court ordinarily would not revisit the fact-bound question of the completeness of the assignment. See *Graver Tank & Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949).

Nevertheless, petitioners in this Court attempt to show that the assignments are something other than the complete and irrevocable transfer of ownership that both courts below held them to be. Petitioners' arguments are wrong.

A. The Terms Of The Assignments Are Clear And Unequivocal

Petitioners distort the record by ascribing to "the assignment" provisions that are not contained in the APOA, the agreement that transfers the claims and control of litigation from the PSPs to the aggregators. See*, e.g.*, Br. 27 ("There is only one assignment, and it contains interlocking promises, not distinct ones.").

In fact, the APOA is set forth in its entirety from Pet. App. 114 through the signature block on Pet. App. 116. Although it is not clear from petitioners' appendix, the subsequent Compensation Agreement is, in fact, an entirely separate document from the APOA and does not purport to qualify or modify it.[4]

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[4] See note 1, *supra*. In many instances, PSPs signed the APOA and Compensation Agreement days or weeks apart.

The terms of the APOA are unequivocal. It provides that the PSP assigns to the aggregator "for purposes of collection *all rights, title and interest* of the Company in the Company's claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114 (emphasis added). Beyond that, it emphasizes two key points:

First, the PSPs "agree[] to be bound by final determinations in court or regulatory proceedings prosecuted by APCCS in the [PSP's] interest." Pet. App. 115 ¶ 2. The PSPs likewise "agree[] to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the [PSP] shall be binding on the [PSP]." *Id.* ¶ 3.

Second, the assignments are irrevocable by the PSPs because they cannot be revoked "without the written consent of the attorney-in-fact," *i.e.*, the aggregator. *Id.* ¶ 4.

The APOA says nothing more; as business contracts go, it is a model of simplicity and clarity. But petitioners argue that the phrase "for purposes of collection" somehow negates any language that follows (Br. 35); that, contractual terms notwithstanding, PSPs might "disavow or attempt to avoid the binding effect of any judgment entered on the claims" (Br. 46); and that the PSPs can "take their supposedly assigned claims back at any time they choose just by discontinuing payment of the litigation fees" (Br. 36), even though the APOA says *nothing* about payment of fees. Each of those suggestions is meritless.

B. Under The Assignments, The Aggregators Possess Unfettered Legal Title To Claims And Proceeds And Possess Plenary Authority Over The Litigation

The APOA transfers "for purposes of collection all rights, title and interest of the Company in the Company's claims, demands or causes of action for 'Dial-Around Compensation.'" Pet. App. 114. Petitioners, however, submit that the assignment "transferred only the right 'of collection'" and thus constitutes in effect "nothing more than a contract for legal services." Br. 35. They are wrong in multiple ways.

1. Respondents Possess Plenary Authority Over The Litigation

Petitioners suggest that, by inserting the phrase "for purposes of collection" before the transfer of unfettered title and interest in the claims, respondents qualified or perhaps even nullified that transfer. But, as the D.C. Circuit observed, the phrase "certainly does not affect the validity of the assignment of the PSP's dial-around compensation claim." Pet. App. 12; accord *Titus* v. *Wallick*, 306 U.S. 282, 288 (1939).

According to petitioners, the APOA transfers only the "right 'of collection.'" Br. 35. But the phrase "right of collection" appears nowhere in the APOA—the transfer is of "all rights, title and interest"—and this distinction is hardly cosmetic.

Petitioners contend that the APOA takes back with one hand what it gives with the other. For example, the APOA states that PSPs "agree[] to be bound" by "final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's

interest" as well as "any settlement, compromise or release reached by APCCS on its behalf." Pet. App. 115. Yet petitioners submit that the phrase "in the Company's interest" "raise[es] the specter" of PSPs disavowing final dispositions on the ground that the aggregators did not act "in [their] interest." Br. 47. Petitioners speak of specters because they are unable to point to a single attempt by a PSP to disavow a settlement. *Amici* note that aggregators have filed "hundreds of complaints" and "settl[ed] scores" of lawsuits involving claims assigned by PSPs. NetworkIP Br. 7. But no PSP has even advanced petitioners' argument, because the phrase "in the company's interest" does not mean what petitioners contend. Far from being a loophole, the phrase "determinations * * * prosecuted in the [PSP's] interest" merely clarifies to each individual PSP that no determination of claims that *other* PSPs assigned will affect the disposition of claims that *it* assigned; rather, only a determination of a claim prosecuted "in *the [PSP's]* interest"—as opposed to "*a [PSP's]* interest"—will bind that PSP.

Equally tenuous is petitioners' resort to phrases in the *Compensation Agreement* to argue that PSPs can disavow dispositions of claims assigned in the APOA. See Br. 47-48 (arguing that "[t]he accompanying documents" require aggregators to exercise "reasonable discretion" and take only "reasonably necessary and appropriate" measures to collect on assigned claims). Even if petitioners were correct about the language in the Compensation Agreement, an aggregator's breach of that agreement would merely give rise to a lawsuit by the PSP *against the aggregator* for breach of contract. A breach of the Compensation Agreement could not possibly render the disposition of a claim transferred in the independent, unconditional APOA any less

final or binding. Respondents, *not* petitioners, would be on the hook if there were any valid reason to question the adequacy of respondents' performance.

2. Respondents Have Legal Title To Litigation Proceeds And—Vis-à-Vis Petitioners—Legal Authority To Direct Proceeds As They See Fit

Just as respondents' collateral commitments to PSPs to act "reasonably" in prosecuting claims do not undermine respondents' legal title to the claims, their collateral agreements to remit litigation proceeds do not negate their legal title to the proceeds. In each case, there are two independently enforceable agreements: the APOA, which gives respondents "all rights, title and interest" in the claims and proceeds, and the Compensation Agreement, in which respondents make certain promises to the PSPs. Thus, if respondents collect on the assigned claims to which they have "all rights, title and interest," they own the proceeds as well and—at least vis-à-vis petitioners—have legal authority to dispose of those proceeds as they see fit. If respondents were to give the proceeds to charity, *the PSPs* would have a promising breach-of-contract claim against them. But the contract breached would not be the APOA, and petitioners are not third-party beneficiaries of the *separate* Compensation Agreement. How respondents direct the proceeds is a contractual matter between them and the PSPs.

Because respondents have legal title to litigation proceeds, they are situated no differently from an *original* owner of a claim who signs a collateral agreement with a charity obligating herself to donate every penny she recovers in litigation. As petitioners acknowledge,

the charitable pledge alone cannot deprive the claim's owner of standing. Br. 31. In each situation, the party bringing suit has legal title over the claim, injury, and proceeds, but another party ultimately stands to benefit by the amount collected and has contractual recourse against the legal owner of the claim and proceeds.

C. The Assignments Are Irrevocable

No judge below agreed with petitioners' tired allegation that the PSPs can revoke the assignments. Yet petitioners persist. Br. 36. They recount that, "[i]f at any point [the aggregator] is no longer representing [the operator] in the litigation, [the operator] will be able to pursue [its] claims on [its] own, should it so choose." Br. 7 (quoting Pet. App. 127). They splice that quotation together with one from the previous page of the relevant document, which states that, if a PSP fails to pay litigation proceeds, "[the aggregator] will drop that [service provider] from the plaintiff's list and will have no obligation to represent the [service provider] in the collection of these claims." *Ibid.* (quoting Pet. App. 126).

The document petitioners are quoting is not the APOA or even the Compensation Agreement. Instead, it is the *cover letter* that accompanied the litigation packets sent to the PSPs. That fact is critical because the APOA does not mention litigation funding *at all*, much less provide that a PSP may revoke its assignment by ceasing to contribute. Quite the opposite, the APOA says the assignment "*may not be revoked* without the written consent of the attorney-in-fact." Pet. App. 115 (emphasis added).

The cover letter (which was never signed by any PSP) cannot change the plain terms of the APOA. But in addition it says nothing close to what petitioners

claim. In explaining the funding requirements contained in the Compensation Agreement, the letter states that, if a PSP ceases to meet its funding commitment, APCCS will have "no *obligation* to represent" it going forward. Pet. App. 126 (emphasis added). On the next page, in discussing the meaning of the APOA, it explains, "[i]f at any point APCCS is no longer representing you in the litigation, you will be able to pursue your claims on your own, should you so choose." Pet. App. 127. Neither of these statements—which were made with respect to different documents—obligates an aggregator to return a claim to a PSP. The D.C. Circuit made short work of petitioners' forced logic:

> The possibility that APCCS would no longer represent a PSP in litigation does nothing * * * to suggest the PSP could revoke the assignment as long as APCCS continues to represent the PSP in the litigation. Of course, APCCS itself could repudiate the assignment * * * [but] the assignment itself is plain: the PSP may not revoke it without the consent of the aggregator.

Pet. App. 12.

The Jaeger Declaration (see note 2, *supra*) further undermines petitioners' reading of the cover letter. She explains that "APCCS and the PSPs contemplated that any such termination, if allowed, would operate prospectively only, *i.e.*, as to claims for unpaid compensation that had not yet accrued and, therefore, were not encompassed by an ongoing suit. It is these **prospective** claims as to which APCCS would not be representing the PSP that the PSP will be able to pursue on its own, should it so choose." Jaeger Decl. ¶ 9 (July 15, 2003). And the amended complaint respondents sought to file in January 2008 made clear that

they in fact *have not* returned the claims of the PSPs that have ceased to fund litigation, but instead will retain the proceeds of those forfeited claims to use as they see fit.

II. ASSIGNEES-FOR-COLLECTION HAVE STANDING WHEN THEY HAVE BEEN ASSIGNED TITLE TO THE CLAIMS

"Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) (quoting *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 102 (1998)). This case is preceded by a long tradition of suits by assignees-for-collection to recover monetary damages arising from commercial transactions. Federal courts have entertained innumerable cases of this kind. Petitioners are unable to cite *any* case holding that an assignee that owns legal title to a claim lacks standing to assert that claim because of what it plans to do with the proceeds. There is no good reason to depart from this long tradition.

A. The Reasoning Of *Vermont Agency* Shows That Assignees' Standing Does Not Depend On Their Intended Use Of Proceeds

In *Vermont Agency*, this Court held that Article III's standing requirements were satisfied when a private party sued under the False Claims Act to seek a remedy for an injury suffered by the United States. The Court found an "adequate basis" for the relator's standing in "the doctrine that the assignee of a claim has standing to assert the injury in fact suffered by the

assignor." 529 U.S. at 773. That principle also controls this case.

Petitioners try to distinguish this case from *Vermont Agency* by arguing that the relator in that case intended to keep whatever bounty he recovered, whereas respondent aggregators intend to return damages won in this case to the assignors. Petitioners assert that *Vermont Agency* "held that the bounty the *qui tam* relator receives if the suit is successful gives the relator the 'concrete private interest in the outcome of the suit' required for Article III standing." Br. 24 (citation omitted). Petitioners argue that the relator's interest in the bounty was essential to the relator's injury in fact and redressability. *Id*. at 24-25, 36-37. But *Vermont Agency* said exactly the *opposite*.

The standing issue in *Vermont Agency* arose because this Court, after granting certiorari on a different question, ordered supplemental briefing on the question "Does a private person have standing under Article III to litigate claims of fraud upon the government?" 528 U.S. 1015 (1999).

Petitioner Vermont Agency of Natural Resources (VANR) in its supplemental brief argued against standing and made many of the same arguments petitioners in the present case now make.

- Quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), VANR argued that "[t]he Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally." 1999 WL 1101312, at *4. VANR regarded that proposition as dispositive against standing—just as peti-

tioners in the present case do. See Pet. Br. 24-25.

- Citing among other cases *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d at 17, and *Titus* v. *Wallick*, 306 U.S. 282, 289 (1939), VANR argued that "the relator cannot claim standing based on an assignment of the Federal Government's right of action." 1999 WL 1101312, at *7.

In one key respect, however, VANR advanced the exact opposite of the proposition petitioners now endorse.

- VANR disdained the notion that the *qui tam* relator's bounty could support standing: "a by-product of litigation such as an interest in a bounty is not injury in fact." *Id*. at *3. Now, however, petitioners say that "redressability through the bounty" was "critical to the Court's opinion" in favor of standing. Pet. Br. 25.

The Court *accepted* VANR's argument—which petitioners contradict in the present case—that the bounty could play no role in supporting standing. But the Court *rejected* VANR's first two arguments—the ones petitioners repeat in the present case.

The first relevant paragraph of the Court's opinion rejected the United States' argument as *amicus* that "the damages and penalties awarded in a successful *qui tam* action (of which the relator is entitled by law to recover a share) are not a 'byproduct' of the suit." 1999 WL 1086464, at *9 n.6. With respect to the bounty, the Court agreed entirely with VANR's contrary position:

> There is no doubt, of course, that as to this portion of the recovery—the bounty he will receive

> if the suit is successful—a *qui tam* relator has a "concrete private interest in the outcome of [the] suit." But the same might be said of someone who has placed a wager upon the outcome. An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the "right" he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a "byproduct" of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.

529 U.S. at 772-773 (citations and footnote omitted).

The Court thus discussed the bounty *only* to *reject* it as a basis for standing. But cf. Pet. Br. 26 (asserting that the Court had "no reason to discuss" the bounty unless the Court was relying on it to support standing). The first sentence of the paragraph advances only the proposition that the bounty meets the literal wording of some of the Court's prior opinions. The remainder of the paragraph, however, begins with the word "But" and explains in detail why that fact is unhelpful to a *qui tam* relator's standing.

That is why the next paragraph—which upholds standing on a *different* basis—begins with a sentence containing the word "however." The United States argued in its supplemental brief that *qui tam* provi-

sions could be regarded as assignments of claims. 1999 WL 1086464, at *9-*10 (citing *Advanced Magnetics, Inc.* v. *Bayfront Partners, Inc.*, 106 F.3d at 17; *Spiller* v. *Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 134-135 (1920); and *Titus* v. *Wallick*, 306 U.S. at 288-289). As noted above, VANR argued the contrary. On this point, unlike the bounty, the Court sided with the United States:

> We believe, however, 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. The FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim. Although we have never expressly recognized "representational standing" on the part of assignees, we have routinely entertained their suits—and also suits by subrogees, who have been described as "equitable assign[ees]." We conclude, therefore, that the United States' injury in fact suffices to confer standing on respondent Stevens.

529 U.S. at 773-774 (citations and footnote omitted). The Court went on to say that its conclusion was "confirmed" by long tradition (*id.* at 774).

As to injury in fact, then, the Court's conclusion was *not*, as petitioners imply, that the relator suffered a violation of his right to receive a bounty. It was, instead, that "the *United States' injury in fact* suffices to confer standing" on the relator. 529 U.S. at 774 (emphasis added).

That was true despite the general principle that "'Art. III judicial power exists only to redress or otherwise to protect against injury *to the complaining party*."

529 U.S. at 771 (quoting and adding emphasis to *Warth* v. *Seldin*, 422 U.S. at 499). The relator's standing to assert someone else's injury in fact "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. This "representational standing" provided "adequate basis" for the relator's suit because the United States had standing to sue. *Ibid.* Here, respondents have standing to sue because the assignors had standing to sue, whether or not respondents retain a "bounty."

Vermont Agency also made clear that the bounty had no bearing on the redressability of the alleged injury. The Court defined redressability as "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact." 529 U.S. at 771. As that definition indicates, redressability has nothing to do with what a plaintiff intends to do with his recovery; it concerns the relationship between the injury in fact that the plaintiff alleges and the judicial action that the plaintiff seeks. For example, in *Steel Co.*, this Court held that reimbursement of the costs incurred by the plaintiff to investigate and prosecute a suit dealt with "a byproduct of the litigation itself" but would not redress the deprivation of information that constituted the injury in fact. 523 U.S. at 107. Reimbursement "would assuredly benefit" the plaintiff. *Ibid.* But "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Ibid.*

Vermont Agency applied the same analysis to the relator's bounty. Contrary to petitioners' claim (Br. 24-25) the Court did *not* indicate that the redressability requirement was satisfied by the bounty. Citing *Steel Co.*—a case that was *only* about redressability (*Steel*

Co., 523 U.S. at 105 (declining to address injury in fact because complaint failed redressability test))—the Court described the bounty as a byproduct of the suit. *Vermont Agency*, 529 U.S. at 773.

Vermont Agency reiterated that standing exists in cases "'of the sort traditionally amenable to, and resolved by, the judicial process.'" *Vermont Agency*, 529 U.S. at 774 (quoting *Steel Co.,* 523 U.S. at 102). The Court explained that it had "routinely entertained" suits by assignees asserting claims that originally belonged to assignors. The Court also recounted the tradition of *qui tam* actions in which courts heard cases brought by informers "even if they had not suffered an injury themselves." *Id*. at 775. Every assignee or *qui tam* case the Court cited was decided without discussion of "standing" in the Article III sense, or of what petitioners describe (Br. 38) as "modern" Article III jurisprudence. The Court nevertheless described the tradition of such suits, combined with the theoretical justifications for assignee standing, as "well nigh conclusive" (529 U.S. at 777).

Vermont Agency's "assignment" analysis, thus, is dispositive in respondents' favor. But here, as in *Vermont Agency*, the Court's holding that assignees have standing can also be "confirmed" by history and long tradition.

B. Assignees-for-Collection Have A Long History Of Being Allowed To Pursue Claims In Federal Court

Suits by assignees, including those who intend to pass back recoveries to the assignors, are cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process. Such suits have long been litigated in federal courts, including this Court.

Federal courts have consistently rejected arguments that such assignees could not sue because they lacked the requisite interest in the claims or in the damages they sought. Petitioners offer only unpersuasive arguments that the history of these cases should be ignored. And they cite *no* decision holding that assignees-for-collection lack Article III standing. The cases on which they rely address entirely different questions.

1. Federal Courts Have Routinely Entertained Suits By Assignees-For-Collection

Petitioners argue that "there is no * * * tradition and practice of standing by assignees for collection." Br. 37. They are wrong.

The right of assignees to sue was well established when the Constitution was ratified. In 1766, Blackstone wrote of a time when "no chose in action could be assigned or granted over * * *. But this nicety is now disregarded * * *." II BLACKSTONE COMMENTARIES, ch. 30 at 442. The Judiciary Act of 1789, enacted by First Congress, acknowledged the practice of suits by assignees. See 1 Stat. 73, 79 (1789). Edmund Randolph, the first Attorney General, rendered two opinions in 1791 recognizing the rights of assignees. See Hon. Edmund Randolph, *Interest on Certificates for 1791*, 1 U.S. Op. Atty. Gen. 17, 17 (1791) (holder of certificates "or his assigns" entitled to rights flowing from the paper); Hon. Edmund Randolph, *Commissioners of the Bank of the United States*, 1 U.S. Op. Atty. Gen. 19, 23 (1791).

This Court has repeatedly recognized the power of assignees to sue. *See, e.g.*, *Turner* v. *Bank of North Am.*, 4 U.S. (4 Dall.) 8, 10 (1799) (interpreting Section 11 of

the Judiciary Act of 1789 in the context of a suit by an assignee); *Welch* v. *Mandeville*, 14 U.S. (1 Wheat.) 233, 236-237 & n. (1816) (Story, J.) (recognizing the adoption by common law courts of chancery rules—which followed the earlier civil law tradition reflected in the Romanic and Napoleonic codes—permitting assignment of choses in action); *Sheldon* v. *Sill*, 49 U.S. 441, 449-450 (1850) (same); *Deshler* v. *Dodge*, 57 U.S. 622, 631 (1853) (interpreting the Judiciary Act of 1789); *Shoecraft* v. *Trustees of Internal Improvement Fund*, 124 U.S. 730, 735-736 (1888) ("standing in court to ask [for] enforcement" of a contract the same in the hands of assignee as it would be for the assignor); *Ambler* v. *Eppinger*, 137 U.S. 480, 482 (1890) (interpreting the Judiciary Act of 1887 by reference to earlier interpretation of the Judiciary Act of 1789).

Assignments accompanied by an agreement to return a judgment to the assignor also have a long history. By the early 20th century, the ability of assignees-for-collection to bring suits was regarded as well established. Pomeroy's treatise described as "settled by a great preponderance of authority" that an assignee was entitled to sue if "the entire legal title vests in the assignee, [notwithstanding] any contemporaneous collateral agreement by virtue of which he is to receive a part only of the proceeds and is to account to the assignor or other person for the residue, or even is to thus account for the whole proceeds." JOHN NORTON POMEROY, CODE REMEDIES § 70, at 96 (4th ed. 1904). To the same effect, future Judge Charles E. Clark wrote: "an assignee who has no beneficial interest, like an assignee for collection only, may prosecute an action in his own name, and many, probably most, American jurisdictions have so held." Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 264 (1925).

This Court entered judgments in favor of assignees-for-collection in *Spiller* and *Titus*. *Spiller* reversed a court of appeals holding that the assignee-for-collection could not recover reparations for injury suffered by the assignors. The assignments "vest[ed] the legal title in Spiller. What they did not pass to him was the beneficial or equitable title. But this was not necessary to support the right of the assignee to claim an award of reparation and enable him to recover it by action at law brought in his own name but for the benefit of the equitable owners of the claims; especially since it appeared that such was the real purpose of the assignments." *Spiller*, 253 U.S. at 134. *Titus*, likewise, held that an assignee-for-collection could recover damages on the basis of an assignment that transferred "dominion over the claim for purposes of suit. In that respect its legal effect was not curtailed by the recital that the assignment was for purposes of suit and that its proceeds were to be turned over or accounted for to another." *Titus*, 306 U.S. at 289.[5]

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[5] What may have been this Court's first encounter with an assignee-for-collection came even earlier, in *Williams* v. *Nottawa*, a case involving bonds "transferred * * * simply for the purpose of collection." 104 U.S. 209, 210 (1881). In that case, a Michigan citizen assigned claims to an Indiana citizen, who then invoked diversity jurisdiction to sue a Michigan defendant. The Court in *Nottawa* rejected that attempt to manufacture diversity jurisdiction; the Court applied the principle, first codified in the Judiciary Act of 1789, that an assignee could not sue in federal court unless the court would have jurisdiction to hear the claim "if no assignment had been made." *Ibid*. But there is no suggestion in *Nottawa*, or in the Judiciary Act of 1789, that an assignee-for-collection could *never* sue in federal court because there could be no case or controversy. See also *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 325 (1902) (federal court would have jurisdiction "if the only objection to the jurisdiction of the circuit court is that the plaintiff was invested with the legal title * * * simply for purposes of collection").

Lower courts, too, have frequently entertained suits by assignees-for-collection. "[I]t is commonplace for individual persons claiming antitrust injury to assign their claims to an association formed for the specific purpose of pursuing litigation." *Gulfstream III Associates, Inc.* v. *Gulfstream Aerospace Corp.*, 995 F.2d 425, 437 (3d Cir. 1993) (Greenberg, J., concurring). See also *Jefferson County Pharmaceutical Ass'n*, *Inc.* v. *Abbott Labs.*, 460 U.S. 150 (1983) (trade association of retail pharmacists pursued Robinson-Patman Act claims as assignee of claims of its individual members); *Chiropractic Coop Ass'n* v. *American Medical Ass'n*, 867 F.2d 270 (6th Cir. 1989) (association brought monopolization claims assigned to it by individual chiropractors); *Hahn* v. *Oregon Physicians' Service*, 786 F.2d 1353 (9th Cir. 1985) (podiatrists formed corporation to which they assigned antitrust claims); *Klamath-Lake Pharmaceutical Ass'n* v. *Klamath Medical Service Bureau*, 701 F.2d 1276, 1282 (9th Cir. 1983) (pharmacies assigned claims to an association but "retained their interest in the outcome of the litigation"); *In re Fine Paper Litig.*, 632 F.2d 1081, 1090 (3d Cir. 1980) (citing cases); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1207-1208 (9th Cir. 1975).

The consistent holdings that lawsuits by assignees-for-collection may proceed have been acknowledged by standard modern treatises. See 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1545 (2d ed. 1990); 6 Am. Jur. 2d *Assignments* § 184; 6A C.J.S. *Assignments* § 109. If petitioners are right, however, then the treatise writers as well as all federal judges ever to address assignee-for-collection cases have missed a glaring Article III deficiency. That position is neither

plausible nor consistent with this Court's recognition that routine entertainment of particular kinds of suits by the federal courts is itself probative of Article III standing, whether or not each decision discusses Article III principles.

2. *Titus*, *Spiller*, And Real-Party-In-Interest Cases Are Relevant To Standing

Petitioners argue that these cases are irrelevant and should be ignored, but they advance only unpersuasive reasons to ignore them.

a. As to *Titus* and *Spiller*, petitioners argue that this Court had no reason to concern itself with the standing of an assignee-for-collection because Titus and Spiller were suing to enforce judgments that had been entered in their own names, not judgments that had been entered for someone else and assigned to them. Br. 40-41. That is nonsense *under petitioners' own theory*. It is true that neither case presented the question whether the plaintiff had Article III standing in the proceeding in which the original judgment was entered—a case filed in state court in *Titus*, and a case filed before a federal agency in *Spiller*. But Article III jurisdiction was required in both cases to invoke the power of federal courts *to review or enforce the judgments*. Both Titus and Spiller were asking a federal court to enter a judgment in their favor, even though the damages they would recover had been pledged to someone else. If petitioners' theory is correct, Titus and Spiller lacked standing to ask a federal court to act, because they would have obtained no redress from a federal court judgment in their favor.

b. Petitioners also ask the Court to ignore the many cases holding that assignees-for-collection have

a personal interest in a case, whenever such holdings are cast in the rubric of "real party in interest." Petitioners try to dismiss these cases by creating, and then tearing down, a straw man. Contrary to petitioners' suggestion (Br. 42-43), respondents have never argued that Federal Rule of Civil Procedure 17 was, itself, a source of federal jurisdiction, or that Congress, by enacting or modifying Rule 17, could somehow override Article III limitations. Respondents' and the D.C. Circuit's position is that, even though Rule 17 and Article III standing requirements sometimes diverge, they often ask the same question, *i.e.*, whether the plaintiff has "'a personal interest in the controversy.'" Pet. App. 15 (quoting *Whelan* v. *Abell*, 953 F.2d 663, 672 (D.C. Cir. 1992)).

Real-party-in-interest rules are rooted in the distinction between law and equity—a distinction that produced the rules (long since discarded) that obligees and assignees of a chose in action could sue, but must do so in the name of the assignor. See Hon. William Wirt, *The Saline Bank of Virginia*, 1 U.S. Op. Atty. Gen. 214, 216 (1818) (describing common law rule that "suits are necessarily brought in the name of the obligee or payee, for the use and benefit of the real owner of the debt: so the nominal plaintiff is one person, and *the real plaintiff in interest* is another") (emphasis in original). Real-party-in-interest rules discarded the "cumbersome procedures" that were a relic of that distinction, and "simply provided that actions should be prosecuted in the name of 'the real party in interest.'" 6A WRIGHT, MILLER & KANE, *supra*, § 1541, at 320. "At common law, the assignee of a chose in action did not hold legal title to it and * * * in large measure the real party in interest concept developed as a means of eliminating this restrictive rule. Under present law an

assignment passes the title to the assignee so that he is the owner of any claim * * * and should be treated as the real party in interest * * *." *Id*. § 1545, at 346. Thus, the real party in interest is the owner of legal title to the claim, *i.e.*, the assignee, "even [if] the assignee must account to the assignor for whatever is recovered in the action." 6A WRIGHT, MILLER & KANE, *supra*, § 1545, at 348.

Rule 17 addresses the question of which party is entitled to sue in a broad range of situations involving intangible rights, interests, and duties. It addresses assignments, subrogation, trustees, guardians, bailees, third-party beneficiaries of contracts, and many others. Pursuant to well-developed legal principles, many parties (*e.g.*, trustees and guardians) are permitted to sue because of injuries suffered by another party, to seek a remedy that will benefit another party, or both. The identity of the "real party in interest" often turns on the nature and breadth of intangible property rights, including such questions as what "rights" to the "ownership" of a "chose in action" are transferred in an "assignment."

Real-party-in-interest decisions are highly relevant to (even if not *always* dispositive of) standing issues for two reasons. First, such decisions are ultimately based on a judgment about the scope and nature of the legal rights (especially intangible property rights) on which a claim is based. For that reason, Rule 17 decisions shed light on whether the plaintiff is asserting "legal rights, the invasion of which creates standing." *Warth* v. *Seldin*, 422 U.S. at 500. Real-party-in-interest decisions reflect judgments concerning the nature of rights that can properly be claimed by the party before the court. See 6A WRIGHT, MILLER & KANE, *supra*, § 1543.

Second, the large body of decisions holding that an assignee-for-collection is the real party in interest is, itself, support for the proposition that suits by such assignees are cases and controversies. That is especially true given the historical roots of the real-party-in-interest doctrine and, in particular, its relation to the rights of assignees to sue. See Clark & Hutchins, *supra*, 34 YALE L.J. at 259-273 (describing history of assignability of choses in action and real-party-in-interest statutes). A large body of law, developed over centuries for the purpose of deciding whether and in what circumstances assignees can sue, certainly bears on whether such suits have been "traditionally amenable to, and resolved by, the judicial process."

c. Petitioners also argue that all of the assignee-for-collection cases are "drive-by jurisdictional rulings" that should be given no effect, especially because they antedate "modern" standing jurisprudence. Br. 38. That argument is wrong for many reasons.

First, federal courts have a responsibility to examine the basis for jurisdiction, even if no party has questioned it. Jurisdictional defects are sometimes overlooked, but petitioners' argument assumes blindness to supposed jurisdictional defects on a massive scale. It assumes that every litigant to contest the ability of an assignee-for-collection to sue, every treatise writer, and every court to address a suit by an assignee-for-collection (including this Court) has missed an Article III defect and asked the wrong legal questions, even while focusing on the very fact that the assignee had agreed to return the proceeds of suit to the assignor.

It is one thing to ignore a single case in which a jurisdictional defect might have been overlooked. It is another thing entirely to disregard a long tradition of

allowing lawsuits with particular characteristics, and to impute to scores of jurists and litigants and scholars an inability to recognize the absence of a case or controversy. That is not this Court's approach. In *Vermont Agency*, this Court placed weight on cases in which the resolution of a jurisdictional issue had been implicit rather than explicit. 529 U.S. at 773-774 (discussing cases this Court has "routinely entertained").

Second, petitioners offer no explanation why "modern" standing jurisprudence should require dismissal after federal courts, over the course of many decades, have exercised jurisdiction in such cases. *Titus* was decided in 1939, the same year Justice Frankfurter explained that under Article III "[j]udicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted 'Cases' or 'Controversies.'" *Coleman* v. *Miller*, 307 U.S. 433, 460 (1939) (concurring opinion). It is presumptuous for petitioners to assert that the Court of 1939 failed to take authentic standing principles into account when it decided *Titus*. If "modern" standing principles required a different result from that reached in *Titus* and similar cases—which they do not—that would be a reason to question "modern" standing principles, not a reason to question *Titus*.

3. No Authority Supports Petitioners' Contention That Assignees-For-Collection Lack Standing

Petitioners cannot cite one decision holding that assignees-for-collection lack standing to assert claims for which they hold legal title because of what they

intend to do with the proceeds. Instead, petitioners rely on cases that address entirely different issues.

a. The "redressability" cases cited by petitioners are especially wide of the mark. The redressability component of standing doctrine asks whether the remedy a plaintiff seeks will redress the injury in fact that the plaintiff alleges. For example, civil penalties payable to the government might promote an undifferentiated public interest in law enforcement (which is *not* a cognizable injury in fact), but do not provide compensation for a plaintiff's injuries from a prior failure to provide information. *Steel Co.*, 523 U.S. at 106-107. Revoking a hospital's nonprofit tax status would not remedy a plaintiff's lack of access to medical care. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-43 (1976). Criminal prosecution of a father would not remedy a failure to receive child support payments. *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 618 (1973). *Every* redressability case cited by petitioners involved such a mismatch between injury alleged and remedy sought. This case involves no such mismatch; an injury in fact arising from a defendant's failure to pay compensation is directly redressed by an order requiring such payment.

No case cited by petitioner even hints that the redressability of an injury depends on what the plaintiff plans to do with any recovery. And making redressability turn on that fact would deny standing in cases that courts have traditionally entertained.

For example, in one of this Court's early landmarks on the scope of judicial power, *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), the Attorney General was permitted to sue on behalf of William Hayburn, who was seeking a pension. Of more current interest,

petitioners' redressability theory would deny standing to trustees who seek a recovery that will be transferred to, and inure to the sole benefit of, the trust and its beneficiaries. The principle would therefore have broad ramifications for the law of trusts and estates, bankruptcy, and ERISA, in which trustees routinely sue for damages that are pledged to another party. It could also undermine arrangements for the securitization of financial assets. Securitization may be accomplished, for example, when the original owner of a financial asset (*e.g.*, a bank that has lent money for a home mortgage, or a business that has accounts receivable) transfers the asset (the mortgage or the accounts receivable) to a trust or other legal entity, which in turn issues securities backed by the asset. This entity retains legal ownership of the underlying financial asset, but the purchasers of the securities will have a beneficial interest in any payments received from the debtors. See, *e.g.*, 1 JASON H.P. KRAVITT, SECURITIZATION OF FINANCIAL ASSETS § 4.02[B] (2d ed. 2002) (describing legal structure of securitization). If a debtor defaults and is sued (by the entity that owns the claim for payment, but has transferred a beneficial interest in the payment to the purchasers of the securities), petitioners' theory would preclude standing to recover money owed by the debtor.

b. Petitioners also rely on cases that define limitations on federal jurisdiction *other than* the case-or-controversy limitation. To the extent those cases are relevant, they support respondents, not petitioners. *New Hampshire* v. *Louisiana*, 108 U.S. 76 (1883), *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387 (1938), *Woodside* v. *Beckham*, 216 U.S. 117 (1910), and other cases cited by petitioners (Br. 28-31) stand for the unremarkable proposition that limitations on this

Court's original jurisdiction, and limitations arising from the Eleventh Amendment, diversity, and amount-in-controversy requirements, cannot be evaded by transferring claims. If (as in this case) the assignor had a claim that it could have enforced in federal court, the claim can still be enforced in federal court by an assignee that acquires legal title to the claim. If the assignor could not have enforced the claim in the federal court in which suit was initiated (as in the cases cited above), that defect cannot be remedied by transferring title to the claim to an assignee.

More important, however, these cases demonstrate the long tradition of assignments for collection. Surveying all of these cases—and the cases they in turn cite (see, *e.g.*, cases cited in *Woodside*, 216 U.S. at 121)—one cannot find even a *hint* that a suit by an assignee-for-collection might not be a case or controversy, even though each of these cases was *about* federal jurisdiction.

C. None of the Recognized Rationales For The Standing Doctrine Justifies Denying Standing To Assignees-For-Collection, As Either A Prudential Or A Constitutional Matter

None of the recognized rationales for the standing doctrine provides any reason to depart from the established principle that assignees-for-collection may sue in federal court. To the contrary, every rationale strongly *supports* standing in this case.

Respondents are not asserting a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. at 499. In this case, there can be no concern that a federal court is being asked to serve as a "publicly funded

forum[] for the ventilation of public grievances or the refinement of jurisprudential understanding." *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). This case is about hard cash. The judgment sought will be based on concrete events, so "a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court." *Id*. at 472.

There is no reason for concern about the absence of "concrete adverseness which sharpens the presentation of issues." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). It makes no sense to suggest that there is any meaningful distinction, in ways that matter for standing, between the interests of respondents in this litigation and the interests of the PSPs. That congruence is a reflection of the long-standing business relationships between respondent aggregators and the PSPs before the litigation commenced; the continuing business relationships between them; the assignments; the mutual obligations of the parties that are contained in the separate contractual relationships; and their mutual financial interests in collecting compensation that is owed. Respondents have a genuine stake in this litigation, and so do the PSPs. Respondents' interests are more than sufficient to ensure concrete adversity, as petitioners well know. The nine years respondents have now litigated against AT&T, just to obtain recognition of the right to litigate the merits, bespeak concrete adverseness in full measure.

Allowing this case to proceed does not implicate any concern about separation of powers. Respondents sue not to *challenge* legislation or agency action, but to *fulfill* the mandate of Congress that PSPs be compen-

sated and to *effectuate* the FCC's remedial scheme. As we have explained, this is the precisely the kind of dispute that courts have traditionally resolved. There is no risk that resolution of this case would intrude on matters the Constitution reserves for the legislative or executive branches.

As we explain below, the assignments for collection provide a fair and efficient method—indeed, the *most* fair and efficient method, and for many PSPs the *only* method—to implement and enforce the congressional command that payphone operators must be compensated. The practical effect of a holding that respondents lack standing would be that many PSPs would not receive the compensation that Congress commanded. In this case, a proper respect for the constitutional prerogatives of the political branches counsels strongly *in favor of* permitting cases of this kind to be heard and resolved in federal court.

D. Respondents' Use Of A Traditional Form Of Litigation Is Not An End Run Around The Protections Of Relatively Recent Innovations Such As Class Actions And Associational Standing

Petitioners assert that allowing this action to proceed based on assignments for collection evades "the limits that this Court has imposed on associational standing" (Br. 52 (emphasis and capitalization altered)), and evades class-action protections as well (Br. 54-57). Petitioners have it exactly backward. Litigation by an assignee-for-collection is a long-recognized and efficient form of litigation. Actions brought in a representative capacity by associations, and actions brought in a representative capacity as class actions,

are extraordinarily controversial innovations of relatively recent vintage.

1. Standing for an association to represent the rights of its members, when it has suffered no injury in its own right, appears to have first been recognized by this Court in *National Motor Freight Traffic Ass'n* v. *United States*, 372 U.S. 246 (1963). Two decades later, the Solicitor General urged this Court to "reconsider the doctrine of representative standing." Br. for the Respondent, 1986 WL 728213, at *9, *International Union, United Automobile Workers* v. *Brock*, 477 U.S. 274 (1986) (No. 84-1777). According to the United States, "most of the Court's decisions on representative standing are not of longstanding effect." *Id*. at *36 n.35. And "[c]ourts and commentators ha[d] begin to note the inadequacies of and limitations on the doctrine of representative standing." *Id*. at *37 n.36. Among other problems, an association "might lack authorization from its members to proceed on their behalf (indeed, it may not have notified them of the suit at all) or exceed the scope of its authority." *Id*. at *39.

The problems with the doctrine of associational standing are wholly absent when an assignee sues, because assignors have *voluntarily and expressly* assigned to it all right, title, and interest in their claims. That is why Judge Bork indicated that associational standing should be disallowed in an action for money damages *precisely because* "the association's members could" instead "assign it their rights." *Telecommunications Research & Action Center* v. *Allnet Communications Services, Inc.*, 806 F.2d 1093, 1098 (D.C. Cir. 1986) (concurring opinion). Assignee standing is not an evasion of limitations on, but a *vastly* superior alternative to, associational standing.

2. Three years ago, an official of the United States Chamber of Commerce remarked that "the American class action system has turned into a litigation 'business' designed to squeeze money out of companies whether or not those companies have really done anything wrong." Remarks by Stanton D. Anderson, Paris Class Action Conference (Apr. 13, 2005).[6] In a concurrent poll of the business community, 84 percent of businesses described class action reform as an "extremely high" or "very high" priority. See U.S. Chamber of Commerce 2005-2006 National Business Agenda at 4.[7] In light of that consensus, it is difficult to take seriously petitioners' purported dismay that cases like the present one might "frustrate" "[t]he careful calibration of the Rule 23 class action mechanism" (Br. 56). Their explanation is no more convincing.

Rule 23's certification process safeguards the rights of both defendants and absent class members. But there *are* no absent "class members"; the only claims at issue in this case are those pertaining to compensation of PSPs that have *affirmatively and voluntarily* assigned their claims to respondents. And petitioners do not identify any way in which they have fewer rights than they would have in a class action—the PSPs are bound by any final judgment or settlement, and the Special Master has determined that, for discovery purposes, respondents possess any documents the PSPs possess. In fact, petitioners would be entitled to far *less* discovery in a class action, where

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[6] Available at http://www.uschamber.com/press/speeches/2005/050413ParisClassActionConference.htm.

[7] Available at http://www.uschamber.com/NR/rdonlyres/eozchhhftscl7qgxsektgbhlmzwerwz7hiaunujhkf7jkn5gf4gxzllvrlrasivzw2gihrqns7ysuazm3xar7ttzzwe/2005-2006_NBA_Report.pdf.

only the named plaintiffs would be compelled to respond to discovery requests.

Furthermore, the IXCs have successfully urged the FCC to create rules that *ensure* that individual PSPs lack sufficient information to prosecute their own claims. See pp. 51-52, *infra*. Because that is so, it is far from certain that an individual PSP or small group of them could effectively prosecute the case if named representative plaintiff. Aggregators are the only entities capable of prosecuting suits like this one, but Qwest, at least, has made clear that it would oppose on typicality grounds any effort to certify a class with an aggregator as representative plaintiff. Qwest Br. 18.[8]

There is, in short, no reason to believe that the class-action device is a good way to pursue the PSPs' claims, no reason to believe it would afford petitioners any protection they now lack, and no reason why the availability of this controversial device, first adopted

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[8] It is ironic that Qwest, which argues here that the assignments are insufficient to confer standing on the aggregators, argued in the district court in a related case that the assignments deprived the PSPs themselves of standing to prosecute the claims at issue in their own names. On June 30, 2003, strictly as a protective measure, six PSPs that had assigned their claims to the aggregators filed a putative class action on behalf of the 1400 PSPs whose claims are at issue here. *D&B Telephones, Inc., et al.* v. *Qwest Communications Corp*., C.A. No. 03-1443 (D.D.C.). Qwest moved to dismiss the action for lack of subject-matter jurisdiction on the theory that the assignments deprived the PSPs of standing. The district court dismissed the action without prejudice and with leave to reinstate in the event of an adverse decision here. Qwest is appealing and arguing that the dismissal should have been with prejudice. Qwest earlier in that action opposed a motion for class certification, which the PSPs filed only after Qwest successfully opposed a motion to stay the action until the aggregators' standing was finally resolved.

with the Federal Rules of Civil Procedure approximately 150 years after the Constitution was ratified, should play any role in the standing analysis.

III. THERE ARE NO CASE-SPECIFIC REASONS TO DENY RESPONDENTS STANDING

Petitioners and *amici* claim they face practical challenges in lawsuits for dial-around compensation to which PSPs are not formal parties. They protest that discovery is difficult and that they cannot bring counterclaims against the PSPs. But the discovery problems are staggeringly exaggerated if not wholly invented, and petitioners have full ability to pursue any legitimate counterclaims.

A. Ordinary Discovery Disputes Are Not A Reason to Deny Standing, And The Courts Below Are Capable Of Resolving The Disputes In This Case

Just as petitioners' arguments about Article III standing turn in large part on erroneous descriptions of the APOA and Compensation Agreement, their prudential-standing arguments regarding the discovery difficulties and the need for individualized proof from PSPs are overstated and detached from reality.

1. Petitioners' and *Amici*'s Alleged Difficulties With Discovery Are Overstated And Easily Handled By Trial Courts

a. First, it is simply not true that petitioners are hamstrung by lack of discovery from individual PSPs, because they *have received discovery from individual PSPs*. The Compensation Agreements clearly state that "PSP will promptly provide APCCS with all documentation that APCCS or its counsel reasonably believes to

be necessary in order to pursue collection of PSP's DAC Claims." Pet. App. 118. When respondents resisted petitioners' discovery requests on the ground that individual PSPs were not parties to the suit, petitioners moved to compel and the Special Master sided with petitioners, reasoning that the Compensation Agreement renders PSPs' documents under respondents' control. See *APCC Servs., Inc.*, v. *AT&T Corp.*, No. 1:99cv00696 (D.D.C. July 31, 2002) (Memorandum Opinion and Order No. 5). He ordered respondents to gather various types of discovery from the PSPs, which respondents have made and are making every effort to do.

Qwest labels this effort a "[c]reative, informal solution[]" to discovery, and terms it "a complete failure" because many PSPs "seemed uninterested in or incapable of providing full and complete responses." Qwest Br. 12, 13. In civil litigation, however, there is nothing at all exotic about filing motions to compel discovery responses, and nothing unusual about having either side be unsatisfied with the results of discovery requests. Indeed, there is no reason to believe that the PSPs' responses are atypical—but, even if they were, the proper course would be to take the issue up with the Special Master, who has vast discretion to craft remedies for problems as routine as discovery squabbles. It will not do for petitioners to write off the entire structure of civil litigation as inadequate merely because they claim (opportunistically) to be frustrated. As the Special Master's Order No. 5 aptly illustrates, federal trial judges are more than up to this task.

b. Because the Special Master has decided that respondents are in control of documents the PSPs possess, Qwest's speculative horror about having to

serve 1400 subpoenas on scattered PSPs will never be more than hypothetical.

If there were a "next case," however—or if the Special Master had turned down petitioners' motion to compel—petitioners would hardly be left without options. At no point did they attempt to interplead the individual PSPs or join them as necessary parties, either of which they might have considered had they thought the game worth the candle. And, if petitioners' nightmare scenario did come to pass and they elected to serve 1400 subpoenas, that is still considerably less effort than it would take to litigate separate cases in each of those 1400 locations. What petitioners know, of course—but will never say—is that their strategic calculus does *not* involve choosing between a single suit involving 1400 subpoenas and 1400 scattered cases with a single subpoena each. Instead, they recognize the reality that, if these cases cannot be brought together, the vast majority will never be brought at all. As Qwest candidly acknowledges, "[t]he [PSPs] are typically small companies, doing business in limited localities." Qwest Br. 12. Such small companies generally would not (for financial reasons) and often could not (for technological reasons) file suit alone.[9] Petitioners' suggestion that the PSPs merely "lack motiva-

[9] Contrary to petitioners' argument that there is no barrier to a PSP's bringing its own suit (Br. 49-50), analysis of AT&T's call tracking systems has necessitated review of 500,000 documents, with many of the most relevant documents still missing. See Memorandum of Law in Support of Plaintiffs' Amended Motion to Compel (pending), filed Jan. 27, 2003, in *APCCS* v. *AT&T*. In addition, an AT&T database containing billions of call records must be searched to account for calls from PSPs' phones. See AT&T's Revised Opposition to Plaintiffs' Amended Motion to Compel (filed Oct. 24, 2007). It is disingenuous to suggest that this could be done in 1400 separate lawsuits or by PSPs with as few as 1-5 payphones.

tion" to sue (Br. 50) cannot be taken seriously, particularly given their efforts supporting nine years of this litigation.

2. The Information Necessary To Prove Liability And Damages Is Already In Petitioners' Possession

a. After years of considering how best to effect Congress's goal of "promot[ing] the widespread deployment of payphone services to the benefit of the general public" (47 U.S.C. § 276(b)(1)), the FCC declined to require PSPs to keep track of the calls and decided that "[i]t is *the responsibility of each carrier* to whom a compensable call from a payphone is routed to track, or arrange for the tracking of, each such call so that *it* may accurately compute the compensation required." 47 C.F.R. § 64.1310(a) (1997) (emphasis added); *First Payphone Order*, 11 F.C.C.R. at 20,590 (¶ 97).[10] Thus, the IXCs—not the PSPs—are responsible for tracking dial-around calls from payphones, and that is how the IXCs wanted it: In comments on the 1996 NPRM, Sprint, among others, argued that "only IXCs can track calls to completion."[11]

The FCC agreed with the IXCs that they are best positioned to track dial-around payphone calls. Indeed, it observed that PSPs are *unable* to do so because "it is technically infeasible for the PSP automatically to receive information about the reseller, including the iden-

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[10] See also *Bell Atlantic-Delaware, Inc.* v. *Frontier Communications Services, Inc.*, Mem. Op. & Order, 16 F.C.C.R. 8112, 8118 (¶ 13) (2001) (reaffirming that the 1996 rule "places tracking and compensation obligations squarely on the [IXCs]").

[11] *First Payphone Order*, 11 F.C.C.R. at 20,588 (¶ 91).

tity of the reseller, whether the carrier has passed ANI information [see JA36] to the reseller, and whether a call was in fact completed by a given reseller."[12] Because individual PSPs are dependent on call data that reside with IXCs, FCC rules provide that the IXC that completes the call is responsible for compensating the PSP,[13] and impose on IXCs various reporting requirements that are designed to provide PSPs with some modicum of information about dial-around calls placed from their phones. See 47 C.F.R. § 64.1310.

b. Given that the IXCs are responsible for tracking dial-around calls, reporting them to PSPs, and compensating PSPs for them—and that PSPs are technologically *incapable* of tracking the calls to completion themselves—it is unlikely that critical facts are known to PSPs that are not known to the IXCs. Qwest suggests four categories of material facts that PSPs possess but aggregators do not, and argues that IXCs are thereby prejudiced by lawsuits for dial-around compensation to which individual PSPs are not parties. Upon inspection, however, none of those categories makes much sense.

First, Qwest claims that IXCs need to know whether "[t]he phone line from which a call is made is actually connected to a payphone." Qwest Br. 7. Such information is already provided to the IXC. FCC rules require payphone lines to be specifically identified. Each calendar quarter, the aggregators provide the IXCs with the PSPs' lists of payphone lines, and the

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[12] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Second Order on Reconsideration, 16 F.C.C.R. 8098, 8105 (¶ 15) (2001).

[13] *First Payphone Order*, 11 F.C.C.R. at 19,983 (¶ 19).

local-exchange carriers (LECs) verify each line and also provide their verified lists to IXCs.[14] Thus, before payments are due, the IXCs already know which lines are connected to payphones.

Second, and relatedly, Qwest contends that "[t]he payphone owner [must] request[] that its [LEC] * * * identify the phone line as a payphone line to the IXC." Qwest Br. 8. However, as just explained, that happens already outside the litigation process. In any event, it is the IXC's—not the PSP's—obligation to request the actual transmission of payphone coding digits by the LEC and to ensure that they are transmitted.[15]

Third, Qwest submits that, before it pays compensation, an IXC must know that "no other carrier has a contract to pay compensation for the call." Qwest Br. 8. Again, this information would likely be known to the IXC, and is *not* likely to be known to the PSP. As explained above, FCC rules are quite clear about which carrier is responsible for tracking dial-around calls and compensating PSPs. If the responsible IXC has entered into a contract with another IXC to shift responsibility for compensating certain calls, the contracting IXCs should be aware of their own arrangement. Breakdowns in communication may happen—Qwest offers but one example, in a footnote, where one of its carrier-customers agreed with a PSP to pay what Qwest would have owed but somehow did not tell Qwest (Qwest Br. 9 n.10)—but the problem is hardly of such gravity as

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[14] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 F.C.C.R. 4998, 5018 (¶ 33) (Common Carrier Bureau 1998) ("PSP payphones must be on LEC payphones lines * * * to be eligible for per-call compensation").

[15] *Id.* at 5020 (¶ 37).

would warrant denial of prudential standing. In any event, aggregators play a critical role in keeping track of these contracts on PSPs' behalf, so IXCs are unlikely to be prejudiced by getting discovery from aggregators.

Fourth, Qwest claims it must be sure that "[t]he payphone operator has not agreed by contract to waive the compensation from a particular IXC." Qwest Br. 8. But these contracts would almost always involve the carrier itself, which would be contracting out of its default obligation to pay under FCC rules. In the unusual circumstance that a PSP gives a waiver to one of the IXC's sales agents, the IXC would still likely find out. In exchange for the waiver, the PSP would typically be given favorable rates for routing coin traffic or operator calls through the agent to the IXC. What is more, if the IXC were to make payments to the PSP (in ignorance of the waiver its agent had executed), it would reduce the agent's commission by the amount it was unnecessarily paying the PSP. The agent would thus have every motivation to inform the IXC of the waiver.

APCC Servs., Inc. v. *NetworkIP, LLC*, 22 F.C.C.R. 4286 (2007), demonstrates that it is entirely possible to litigate a case of this sort based on information in the carriers' possession. The FCC required NetworkIP to use data in its possession to calculate damages, and the task was accomplished with relative ease—and without the participation of individual PSPs. Moreover, there was no information the PSPs could have provided that the defendant carrier wanted that was not available from the aggregators. Real experience—as opposed to petitioners' and *amici*'s speculation—demonstrates that there is no genuine practical problem with litigation in this form.

B. Recognizing Respondents' Standing Does Not Deprive Petitioners Of Appropriate Means To Pursue Any Legitimate Counterclaims They May Have

Petitioners and *amici* note that they have asserted counterclaims to recover alleged overpayments made to PSPs and express concern that, because the PSPs did not expressly assign *liabilities* to respondents in the APOA—and because the PSPs are not formal parties to this lawsuit—the PSPs might disavow judgments on the counterclaims and leave petitioners unable to collect. Pet. Br. 47; Qwest Br. 14-16. Their concerns are groundless.

a. The data relating to the alleged overpayments the IXCs made to PSPs reside in precisely the same IXC servers as the data relating to the underpayments respondents allege. Thus, for the same reason that the IXCs have all the data necessary to *defend* against respondents' claims, they have the data necessary to *prosecute* counterclaims for overpayment. It would be a relatively straightforward matter to set off any overpayments against the payments owed on the assigned claims.

b. It is true that, because the PSPs are not parties to the litigation over assigned claims, IXCs who seek compensation beyond set-offs for overpayments made to PSPs might have to sue them to collect it. But petitioners have known that throughout the nine years this litigation has been pending, and have failed to attempt to invoke any of the procedural devices potentially available to compel the PSPs to participate in the suit. Most obviously, petitioners might have

attempted to interplead the PSPs under FED. R. CIV. P. 22 or join them under FED. R. CIV. P. 19. See 6A WRIGHT, MILLER & KANE, *supra*, § 1545, at 353 ("In practice, when defendant is faced with an action by only one of the parties to whom he ultimately may be liable, he may move to join the absent person * * *."). Any uncertainty about whether these strategies would have succeeded exists only because petitioners never even attempted them.[16]

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[16] If the Court concludes that respondents lack standing as assignees-for-collection, it should remand the case to allow the courts below to consider whether respondents have standing in their own right or can proceed with this lawsuit in modified form. (1) The aggregators have always made it clear that they will return to delinquent PSPs (if anything) the *future* value of their claims, and will keep proceeds that have accrued through the time the claim is returned. See Declaration of Ruth Jaeger ¶¶ 8-9, *quoted at* pp. 8-9 & 23, *supra*. What was once merely likely has since become reality: Some PSPs have dropped out of the litigation effort, and the aggregators have not returned their claims. See pp. 13-14, *supra* (discussing January 2008 motion to amend). Respondents thus have standing even under petitioners' view of the case. If the Court determines that respondents lack standing as assignees-for-collection, it should remand to permit the district court to consider respondents' motion to amend. (2) In the district court, respondents argued in the alternative that they had associational standing to pursue the assigned claims. The district court initially rejected that argument in the course of holding that respondents lack standing. JA307-312. When it reconsidered and vacated that opinion, however, it did not address associational standing. The D.C. Circuit upheld standing without addressing associational standing, which respondents briefed in that court. If the Court holds that the assignments are insufficient to support standing, it should remand to allow the lower courts to consider associational standing. (3) Finally, if necessary, the Court should remand to let the lower courts consider whether to permit respondents to posture their claims in a different fashion, either by adding the PSPs as formal parties or pursuing class certification. Respondents sought leave to pursue both avenues in the district court after that court initially

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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*Counsel of Record

MARCH 2008

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dismissed the aggregators' complaints but before the court reversed itself on reconsideration.

ADDENDUM

ASSIGNMENT AND POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that Coyote Call, Inc., a Kansas (corporation/partnership/proprietorship), hereinafter referred to as the "Company", hereby assigns, transfers and sets over to APCC Services, Inc. ("APCCS") (or APCCS' assignee) for purposes of collection all rights, title and interest of the Company in the Company's claims, demands or causes of action for "Dial-Around Compensation" ("DAC") due the Company for periods since October 1, 1997, pursuant to Federal Communications Commission rules, regulations and orders. Further, the Company hereby appoints APPCS as its true and lawful attorney-in-fact for the purpose of exercising the following powers:

1. To do all acts necessary for the purpose of collecting DAC due the Company for periods since October 1, 1997.

2. To enter into any discussions or other activities on behalf of the Company in connection with attempting to resolve such DAC claims, including, without limitation, selecting and retaining legal counsel, and filing and prosecuting court or regulatory proceedings in the Company's interest. The Company agrees to be bound by final determinations in court or regulatory proceedings prosecuted by APCCS in the Company's interest.

3. To sign, on behalf of the Company, settlement agreements, releases, or other documents relating to the settlement of DAC claims. Company hereby agrees to be bound by any settlement, compromise or release reached by APCCS on its behalf and that any document executed in connection with any such settlement, compromise or release by APCCS on behalf of the Company shall be binding on the Company.

4. Company specifically acknowledges and confirms that no person or entity who shall pay to APCCS (or its assignee) amounts relating in any way to DAC owed to the Company shall be liable to Company to the extent of any amounts so paid, unless the person or entity making such payment has actual knowledge that the authority granted to APCCS by this Assignment and Power of Attorney has been properly revoked. This Assignment and Power of Attorney (which is coupled with an interest) may not be revoked without the written consent of the attorney-in-fact.

IN WITNESS WHEREOF, Company has caused this Assignment and Power of Attorney to be executed and delivered by a duly authorized officer of the Company, to be effective this 11 day of February, 1999.

Coyote Call, Inc
Company

ATTEST:

By: Vicki H. Lindgren
Its: Vice-President

By: David Lindgren
Its: President

JA0135

AP00295

AMENDMENT TO
APCC SERVICES AGENCY COMPENSATION AGREEMENT

PSP: _____ Federal Tax ID: _____

Address: _____ Authorized Contact: _____

_____

Telephone: _____ Fax: _____

WHEREAS, APCC Services, Inc. ("APCCS") and PSP have entered into an APCC Services Agency Compensation Agreement ("Agreement"), under which APCCS is PSP's exclusive agent for billing and collection of "Dial-Around Compensation" ("DAC"); and

WHEREAS, there are DAC payments owed by telecommunications carriers as a result of the miscounting and undercounting of calls or simply a failure or refusal to pay, which APCCS has not been able to resolve by routine dispute resolution processing and PSP wishes APCCS to take further action to collect the unpaid DAC (hereinafter referred to as "DAC Claims"); and

WHEREAS, APCCS wishes to act as PSP's exclusive agent for resolving DAC Claims and the parties recognize the efficiencies of APCCS taking collective action on behalf of PSP and other independent payphone service providers with similar claims; and

WHEREAS, in order to take quick, effective, and efficient collection action, APCCS will be required to exercise broad reasonable discretion in making collective decisions on behalf of PSP and other payphone service providers.

NOW, THEREFORE, be it agreed that the Agreement is amended as follows:

1. All capitalized terms and abbreviations not defined in this Amendment shall have the meanings set forth in the Agreement.

2. PSP appoints APCCS as its exclusive agent for collection of PSP's DAC Claims which relate to periods since October 1, 1997 and which have not been paid.

3. APCCS will take such action as it deems reasonably necessary and appropriate to collect payment of PSP's DAC Claims, which may include collective legal action such as filing complaints at the FCC or in court on behalf of PSP and other payphone service providers.

4. APCCS is authorized to take any reasonable step on PSP's behalf to collect payment for the DAC Claims, including, without limitation, selecting and retaining legal counsel, filing and prosecuting legal complaints in PSP's name against any or all carriers withholding payments and/or other parties, and entering settlements of some or all DAC Claims with one or more parties, without obtaining further oral or written authorization from PSP. PSP will accept APCCS's reasonable determinations as to what actions are necessary and appropriate to cost-effectively collect payment of the DAC Claims.

5. APCCS will provide general information to PSP from time to time as to the progress of APCCS's overall collection effort for DAC Claims. However, APCCS is not required to inform PSP in advance of any particular measure taken on PSP's behalf or to provide information on legal strategy.

6. PSP will promptly provide APCCS with all documentation that APCCS or its counsel reasonably believes to be necessary in order to pursue collection of PSP's DAC Claims.

7. APCCS is authorized, in the reasonable exercise of its discretion, to agree to a settlement of some or all of PSP's DAC Claims, which may include one or more lump sum settlements that will be apportioned among PSP and other payphone service providers on whose behalf APCCS enters into such settlements. PSP understands that such settlements may preclude any further claim by PSP for the amounts in dispute.

8. For the additional services to be provided by APCCS over and above the services provided pursuant to the Agreement, PSP agrees to and specifically authorizes APCCS to make a deduction from PSP's DAC payments in an amount necessary to fund PSP's share of the activities described above to collect DAC Claims on behalf of PSP. The initial amount of the deduction will be:

> $.007 on the first 50,000 dial around calls paid in the quarterly remittance, plus
> $.006 on the next 900,000 dial around calls paid in the quarterly remittance, plus
> $.005 on the next 550,000 dial around calls paid in the quarterly remittance, plus
> $.004 on the next 1,000,000 dial around calls paid in the quarterly remittance, plus $.003 on any remaining calls.

Quarterly deductions will be capped at $20,000, except in the case of subsequent business combinations for which special conditions may apply requiring additional contributions in excess of the stated cap.

PSP understands that funding requirements will be reevaluated quarterly and agrees that the above level of deduction may be increased or decreased as necessary to provide funding adequate to carry out the above-described activities. In the event that PSP chooses not to meet the funding requirements or PSP terminates the Agreement, APCCS will be relieved of any further obligation to represent PSP in the collection of PSP's DAC Claims and APCCS will have no obligation to remit to PSP any amounts previously deducted from PSP's DAC payments.

APCCS agrees that if it recovers attorneys fees and/or costs in connection with any lawsuit APCCS may bring to collect PSP's DAC Claims, it will remit such recoveries to PSP in

amounts reflecting PSP's proportionate share of the funding for such lawsuit provided by all payphone service providers.

9. Except as amended, the Agreement remains in effect. This Amendment is subject to the "Terms and Conditions" attached to the Agreement, each of which is incorporated herein by reference, except to the extent that such "Terms and Conditions" are amended herein. If the Agreement is not renewed, this Amendment remains in effect.

IN WITNESS WHEREOF, and of the "Terms and Conditions" hereof, the undersigned have entered into this Amendment to the APCC Services Compensation Agreement effective this _____ day of _____, 1999.

PSP	APCC Services, Inc.
Company Name: _____	
By: _____	By: _____
Title: _____	Title: _____

The Assignment and Power of Attorney and the Dial Around Compensation Billing Data Sheet attached to this Amendment must be signed and returned with this Amendment. Please return executed documents to:

APCC Services, Inc.
10306 Eaton Place
Suite 520
Fairfax, VA 22030
(703) 385-5301 - fax