RICHARD J. SULLIVAN, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the majority that the State Petitioners lack standing to bring their petition. I also happen to agree with the majority's analysis of Regulation Best Interest and its rejection of the investment advisers' challenge on the merits. Nevertheless, because I am convinced that XY Planning Network, LLC and Ford Financial Solutions, LLC (together, the "XYPN Petitioners") also lack standing to challenge Regulation Best Interest, I would dismiss the petitions in their entirety, without reaching the merits of petitioners' regulatory arguments.

In order to establish Article III standing, petitioners "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The XYPN Petitioners offer a grab bag of standing theories, most of which are easily brushed aside for failing to establish one or more of the three requirements articulated in *Spokeo*.

For example, Ford asserts that it has standing to challenge Regulation Best Interest because the rule will subject Ford's broker-dealer competitors to "comparatively fewer regulatory obligations, lower compliance costs, and less legal exposure, giving them a competitive advantage." XYPN Br. Add. at 5. But

Ford cannot establish that Regulation Best Interest is the *cause* of these alleged injuries, since the XYPN Petitioners concede that the competitive imbalance between investment advisers and broker-dealers predated the rule. *See* XYPN Br. at 11 (explaining the "reality of the retail market for investment advice, in which broker-dealers . . . regularly provide personalized financial advice alongside investment advisers without registering themselves under the Investment Advisers Act"); *id.* at 17 (acknowledging that Regulation Best Interest "preserved the regulatory gap between broker-dealers and investment advisers in the market for personalized investment advice"). If anything, Regulation Best Interest will actually lessen the competitive disadvantage faced by investment advisers since it in fact *increases* the regulatory obligations, compliance costs, and legal exposure borne by broker-dealers. So even if Ford is correct in asserting that it remains at a disadvantage because the SEC did not equalize the duties and obligations of investment advisers and broker-dealers, that injury "cannot tenably trace" to Regulation Best Interest. *Cal. Ass'n of Physically Handicapped, Inc. v. FCC*, 778 F.2d 823, 827 (D.C. Cir. 1985). Moreover, a favorable judicial decision in this action would not redress the investment advisers' alleged injuries, since vacatur of the regulation would restore the status quo, leaving broker-dealers with even fewer obligations and a more pronounced competitive advantage over investment advisers.

For its part, XY Planning contends that it has standing because the rule's failure to impose a uniform fiduciary standard on both broker-dealers and investment advisers "reduces the likelihood that broker-dealers will register as investment advisers," thereby "resulting in a loss of business" from broker-dealers who might otherwise be induced to join XY Planning as dues-paying members. XYPN Br. at 31. But in addition to being wholly speculative, this theory again fails to establish a causal relationship between the regulation and the alleged injury. At bottom, XY Planning does not claim that Regulation Best Interest will cause it to lose business; it merely complains that the rule does not do more to mitigate a preexisting competitive injury. But that is not enough to establish injury-in-fact or causation. And since the SEC is under no statutory mandate to impose an equalizing fiduciary standard on broker-dealers, a favorable result in this litigation – vacatur of Regulation Best Interest – will do nothing to redress that preexisting harm. To the contrary, vacatur will ensure that broker-dealers continue to enjoy a more pronounced competitive advantage – and have even less incentive to join XY

Planning as dues-paying members – than would be the case under Regulation Best Interest.

Notwithstanding the inadequacies of the XYPN Petitioners' principal standing arguments, the majority purports to find a winning theory of standing at the very bottom of the bag. That theory – which might be characterized as "the client marketing theory" – posits that Ford and similarly situated investment advisers meet the requirements of *Spokeo* because "Regulation Best Interest will impair [Ford's] ability to differentiate its services from broker-dealers' based on its higher duty of care." Maj. Op. at 14. Accepting at face value the affidavit of Ford's principal, the majority concludes that (1) Ford attracts customers by touting its fiduciary duty to clients, in contrast to the lower suitability standard that broker-dealers owe to their clients, and (2) Regulation Best Interest poses "a significant risk that clients will not be able to effectively differentiate the fiduciary duty that [Ford] owe[s] them from the lower duty that broker-dealers owe their clients." *Id.* at 15 (internal quotation marks omitted). According to the majority, Regulation Best Interest threatens to impair Ford's ability to market its higher fiduciary duty as a way of differentiating itself from broker-dealer competitors. Put another way, the majority concludes that Ford uses this tactic to attract customers, but will no longer be able to do so if broker-dealers can advertise that they too must act in their customers' "best interests" by virtue of the new regulation.

But surely more is required to establish an injury-in-fact for standing purposes. Under this theory, anyone would be able to challenge a regulation that imposes duties on third parties simply because the challenger chose to adopt a marketing strategy that made reference to the existence or non-existence of such regulations. Consider, for example, a not-far-fetched scenario involving the Food and Drug Administration's ("FDA") food labeling requirements. Under current regulations, food manufacturers are required to list the ingredients and pertinent nutritional information on the labels of their products. However, the FDA exempts small manufacturers from complying with those requirements so long as fewer than 100,000 units of a product are sold annually in the United States and the manufacturer employs fewer than 100 people. 21 C.F.R. § 101.9(j)(18). Imagine that a major food brand launched an ad campaign designed to increase its market share at the expense of small food manufacturers by highlighting its obligation to post ingredients on its labels ("read all about it") in contrast to the exemptions that allow gourmet food shops to stay silent ("who knows?"). If the FDA proposed a regulation change that would lift the labeling exemptions on small manufacturers, would the major food brand have standing to challenge the new regulation merely because its catchy ad campaign would no longer be relevant?

To my mind, the impairment of a marketing tactic based on a competitor's characterization of government regulations simply cannot rise to the level of a legally cognizable injury-in-fact for standing purposes. As the Supreme Court has recognized, where a party is not "the object of the [challenged] government action," its standing is "substantially more difficult" to establish. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (internal quotation marks omitted). In those circumstances, "much more is needed," *id.*, namely, a "concrete, particularized, and actual or imminent" injury, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted).

Here, Ford's diminished ability to market its fiduciary duty as a differentiating factor from its broker-dealer competitors does not satisfy this requirement. Neither the hypothetical food brand nor the actual petitioners here have a property interest in characterizing competitors as un- or under-regulated. And while they may have a limited First Amendment right to make such statements in the marketplace, they certainly don't have Article III standing to challenge a regulation simply because it threatens to alter the regulatory status quo and render their marketing strategy less compelling.

For all these reasons, I am convinced that the XPYN Petitioners lack standing to challenge Regulation Best Interest, and that we are compelled to dismiss their petitions outright without reaching the merits of the challenge.