No.

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Emoluments Clause provides that no person holding an "Office of Profit or Trust" under the United States "shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. Art. I, § 9, Cl. 8. The Domestic Emoluments Clause provides that, apart from the President's compensation for the period for which he is elected, he "shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. Art. II, § 1, Cl. 7. In this case, various members of the hospitality industry sued President Donald J. Trump, in his official capacity, asserting an implied cause of action to enforce the Emoluments Clauses. The district court granted the President's motion to dismiss, holding that alleged business competitors cannot seek redress in an Article III court to enforce the Emoluments Clauses against the President. A panel of the court of appeals vacated and remanded. The question presented is:

Whether plaintiffs who claim to compete with businesses in which the President of the United States has a financial interest can seek redress in an Article III court to enforce the Foreign and Domestic Emoluments Clauses of the U.S. Constitution against the President.

PARTIES TO THE PROCEEDING

Petitioner Donald J. Trump, in his official capacity as President of the United States, was defendant in the district court and appellee in the court of appeals.

Respondents Citizens for Responsibility and Ethics in Washington; Restaurant Opportunities Centers United, Inc.; Jill Phaneuf; and Eric Goode were plaintiffs in the district court and appellants in the court of appeals.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Citizens for Responsibility & Ethics in Wash., Rest. Opportunities Ctrs. United, Inc. v. *Donald J. Trump, President of the United States*, No. 17-cv-458 (Dec. 21, 2017)

United States Court of Appeals (2d Cir.):

Citizens for Responsibility & Ethics in Wash., Rest. Opportunities Ctrs. United, Inc. v. *Donald J. Trump, President of the United States*, No. 18-474 (as amended Mar. 20, 2020)

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of President Donald J. Trump, in his official capacity, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-76a, 77a-79a) is reported at 953 F.3d 178. The order of the court of appeals denying rehearing en banc and the opinions concurring in and dissenting from that denial (App., *infra*, 115a-204a) are not published in the Federal Reporter but are available at 2020 WL 4745067. The opinion of the district court (App., *infra*, 80a-114a) is reported at 276 F. Supp. 3d 174.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2019. A petition for rehearing was denied on August 17, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Foreign Emoluments Clause (U.S. Const. Art. I, § 9, Cl. 8) provides:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

The Domestic Emoluments Clause (U.S. Const. Art. II, § 1, Cl. 7) provides:

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

STATEMENT

The Constitution's Foreign and Domestic Emoluments Clauses are structural provisions that prophylactically protect the Nation as a whole against the corruption of official action. Yet in seeking to invoke the power of the federal courts to determine whether the President is violating the Emoluments Clauses because of his financial interests in various hotels and restaurants, respondents rely on attenuated and speculative economic

harms that their businesses allegedly suffer in competing for the patronage of foreign and domestic governmental customers. App., *infra*, 2a-7a.

The district court granted the President's motion to dismiss. App., *infra*, 80a-114a. It held that respondents lacked Article III standing because they failed to adequately allege that they have been injured at all, much less that the President's challenged conduct caused any injury. *Id.* at 91a-96a. The court further held that, even if respondents could satisfy Article III, their alleged competitive injuries would fall outside any zone of interests protected by the Emoluments Clauses. *Id.* at 97a-100a. A divided panel of the court of appeals vacated and remanded. *Id.* at 1a-76a. It held that respondents had Article III standing to sue and that the district court's zone-of-interests analysis was mislabeled as jurisdictional. *Id.* at 12a-35a, 77a-79a. The court of appeals denied en banc review by an 8-4 vote, with several judges authoring opinions. *Id.* at 115a-204a.

1. In 2017, respondents brought this suit directly under the Constitution against the President of the United States, in his official capacity, for alleged violations of the Foreign and Domestic Emoluments Clauses. D. Ct. Doc. 1 (Jan. 23, 2017). As relevant here, respondents allege that they own, operate, or work for hospitality companies, hotels, or restaurants in the New York City or Washington, D.C. areas. App., *infra*, 82a-84a. They further allege that, since taking office, the President has maintained an ownership interest, through the Trump Organization, in a variety of properties and restaurants in New York City and Washington, D.C., and that, when foreign and state governmental officials

patronize those businesses, the President receives benefits in violation of the Domestic and Foreign Emoluments Clauses. *Id.* at 84a-85a. Respondents assert that, as a result of those alleged violations, "they will suffer increased competition" and lose business. *Id.* at 88a; see *id.* at 88a-89a. Respondents seek a declaration that the President has violated and will continue to violate the Emoluments Clauses, an injunction preventing the President from receiving prohibited Emoluments in the future, and an injunction requiring the President to release financial records to confirm that he is not engaging in further transactions that would violate the Emoluments Clauses. *Id.* at 81a; see D. Ct. Doc. 28, at 64-65 (May 10, 2017).[1]

2. The President moved to dismiss respondents' complaint for lack of jurisdiction and for failure to state a claim on which relief could be granted. D. Ct. Docs. 34, 35 (June 9, 2017).

In December 2017, the district court dismissed the complaint for lack of jurisdiction. App., *infra*, 80a-114a. As relevant here, the court first held that respondents lacked Article III standing. *Id.* at 91a-96a. It emphasized that respondents could not adequately show that

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[1] Respondent Citizens for Responsibility and Ethics in Washington—the sole original plaintiff in this action—asserted a different set of injuries, but it has abandoned its challenge to the district court's holding that it lacks Article III standing. App., *infra*, 2a n.1. Respondent Jill Phaneuf, who left the job in which she allegedly competed against the President's businesses, has likewise acknowledged that she no longer has Article III standing to pursue her claims. *Ibid.* References to respondents therefore cover the remaining respondents, all of whom have asserted hospitality-related competitive injuries.

any loss of foreign or domestic governmental business was caused by the President's financial interest in competing hotels and restaurants, as opposed to any of the other reasons why customers might prefer those establishments to respondents'. See *id.* at 93a-96a. The court further held that "[t]he zone of interests doctrine demonstrates that [respondents] are not the right parties to bring a claim under the Emoluments Clauses." *Id.* at 97a. Because "[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition," *id.* at 98a, the court found "no basis" to conclude that respondents' alleged competitive injuries entitled them to bring suit under the Emoluments Clauses, *id.* at 100a. The court construed both holdings as implicating its subject-matter jurisdiction, and thus did not otherwise reach the question whether respondents had stated a cognizable claim under the Emoluments Clauses. *Id.* at 81a n.1.

3. A divided panel of the court of appeals vacated and remanded. App., *infra*, 1a-79a.

a. As to standing, the panel majority concluded that the "Article III threshold for economic competitors" requires only a showing that, "because of unlawful conduct, [a plaintiff's] rivals enjoy a competitive advantage in the marketplace." App., *infra*, 13a. And the majority found that respondents have cleared that bar by alleging that they compete over the same customer base with various President Trump-affiliated establishments. *Id.* at 14a-15a. The majority also concluded that respondents had adequately pleaded causation and redressability by alleging "that the President's receipt (and invitation) of allegedly illegal emoluments actually influences

at least some government customers' purchasing decisions." *Id.* at 22a.

As to the zone-of-interests requirement, the panel majority initially concluded both that the district court had improperly labeled the requirement as jurisdictional and also that the court had erred in its substantive analysis because any "[p]laintiffs who are injured by the defendant's alleged violation of a limiting law may sue to enforce the limitation." App., *infra*, 44a; see *id.* at 35a-44a. The majority later amended its opinion, however, to remove any discussion of the substantive analysis. *Id.* at 77a-79a. The amended opinion instead rests solely on the rationale that the zone-of-interests requirement relates to the availability of a cause of action rather than to a court's subject-matter jurisdiction. *Ibid.*

b. Judge Walker dissented. App., *infra*, 50a-76a. In his view, respondents have failed to plead "any direct injury actually caused by violations of the Emoluments Clauses, much less how such injury might actually be redressed by the courts." *Id.* at 55a. He explained that "it cannot be the case that, every time a competitor achieves some benefit through allegedly unlawful conduct that has no direct relationship to competition, competing businesses have standing to challenge that unlawful action simply by virtue of their status as a direct competitor." *Id.* at 60a. He also disagreed with the majority that respondents have adequately pleaded "a causal chain that rises above speculation" between the President's alleged acceptance of emoluments and any harm to respondents' businesses. *Id.* at 68a.

4. The President petitioned for rehearing en banc. By an 8-4 vote, the court of appeals denied the petition. App., *infra*, 115a-116a.

a. Judge Cabranes dissented from the denial of rehearing en banc. App., *infra*, 117a-118a. He explained that "[t]he exceptional importance of the case is beyond dispute." *Id.* at 117a.

b. Judge Menashi, joined by Judges Livingston and Sullivan, also dissented. App., *infra*, 119a-157a. Judge Menashi first contended that respondents lack Article III standing. He observed that respondents have failed "to identify some evidence that at least one official has actually chosen a Trump-located restaurant over one of [respondents'] restaurants for an emoluments-based reason," which rendered any injury "speculative" rather than "concrete." *Id.* at 121a-122a. Judge Menashi also urged that rehearing was warranted "to address whether and when injunctive relief may be granted directly against the President," a "disputed antecedent question" that he asserted the panel had overlooked. *Id.* at 131a. Finally, he contended that "the district court's zone-of-interests analysis was correct on the merits." *Id.* at 137a.

c. Judge Walker, whose senior status made him ineligible to vote, filed a statement opposing the denial of rehearing en banc. App., *infra*, 158a-171a. He reiterated that the panel's competitor-standing analysis was "inconsistent with the law in our sister circuits" and "contradicted binding Supreme Court precedent." *Id.* at 158a-159a. He also urged that "this case warranted en banc review because of its exceptional national importance," "involving the President and the separation of powers." *Id.* at 159a-160a (emphasis omitted).

d. Judge Leval filed a statement in support of the denial of rehearing en banc, largely responding to Judge Menashi's dissent. App., *infra*, 172a-204a. He first contended that injunctive relief was available because, in his view, respondents had challenged private conduct rather than official presidential actions, despite having sued the President solely in his official capacity. *Id.* at 173a-178a. He also contended that the alleged harms to respondents and other hospitality competitors were "substantially likely," rather than speculative, and thus could support Article III standing. *Id.* at 187a.

5. In addition to this case, two other suits have been brought against the President alleging violations of the Emoluments Clauses. Each of those is now separately before this Court.

First, in *Blumenthal* v. *Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam), petition for cert. pending, No. 20-5 (filed July 6, 2020), individual Members of Congress sued to enforce the Foreign Emoluments Clause. *Id.* at 16. On interlocutory review under 28 U.S.C. 1292(b), the court of appeals held that the legislators lack Article III standing. 949 F.3d at 18-20. The legislators have filed a petition for a writ of certiorari, and the President's brief in opposition is being filed contemporaneously with this petition.

Second, in *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc), the State of Maryland and the District of Columbia sued to enforce both Emoluments Clauses, relying principally on a theory of competitive harm similar to the one asserted here. After the district court denied a motion to dismiss and refused to certify its orders under Section 1292(b), a panel of the court of appeals

granted the President's petition for mandamus; directed that the orders be certified for interlocutory appeal; and, exercising jurisdiction under Section 1292(b), held that the suit should be dismissed because the plaintiffs lack Article III standing. *In re Trump*, 928 F.3d 360 (4th Cir. 2019). In a 9-6 decision, the en banc court of appeals vacated the panel decision on the ground that the standard for mandamus relief had not been satisfied, without squarely addressing the Article III question. *In re Trump*, 958 F.3d at 282-287. The President is contemporaneously filing a petition for a writ of certiorari in that case.

REASONS FOR GRANTING THE PETITION

The court of appeals erred in permitting this suit to proceed against the President of the United States, in his official capacity, based on an expansive theory of competitor standing that has no place in a suit concerning the Emoluments Clauses. The court concluded that respondents have alleged an injury-in-fact cognizable under Article III because their businesses "compet[e] over the exact same customer base" as businesses which allegedly "secure an unlawful advantage" under the Emoluments Clauses because of the President's financial interest. App., *infra*, 15a (emphasis omitted). The court also concluded that respondents' alleged injury was fairly traceable to the alleged violations, "notwithstanding other possible, or even likely, causes for the benefit going to [respondents'] competition." *Id.* at 19a. Among other defects with these conclusions, they both are fatally speculative: respondents cannot plausibly establish that, within the narrow slice of restaurant and hotel customers in New York City and Washington,

D.C. who are foreign or domestic governmental officials, there are some who would not patronize businesses affiliated with the President but for his personal financial interest, and who would otherwise patronize respondents' particular businesses instead, let alone that the loss of any such customers is not outweighed by the gain of those with the opposite preferences. And even if they could establish the minimum requirements for Article III standing, business competitors like respondents do not fall within a zone of interests protected by the Emoluments Clauses, which are structural measures designed to protect the Nation as a whole by prophylactically preventing the corruption of official action through undue influence from foreign and domestic governments.

This case warrants the Court's review. Even assuming that a competitor-standing theory were appropriate in this case, the court of appeals' decision conflicts with decisions of this Court making clear that competitor standing is not "boundless," *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 99 (2013), and that theories of injury and causation cannot rest on a "speculative chain of possibilities," *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). The decision also conflicts with decisions of other courts of appeals, which have required a business to demonstrate a high likelihood of economic injury flowing from the government's conduct with respect to its competitors. Moreover, because this suit is brought directly against the President in his official capacity, it raises serious separation-of-powers concerns that require a more stringent standing analysis. See *Raines* v. *Byrd*, 521 U.S. 811, 819-820 (1997); see also *Cheney* v.

United States Dist. Court, 542 U.S. 367, 385 (2004) (explaining that "the high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding") (brackets, citation, and ellipsis omitted). Those separation-of-powers concerns weigh in favor of this Court's prompt review.

Finally, the President is contemporaneously filing a petition for a writ of certiorari in a parallel Emoluments Clauses case, *In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc). As explained therein, this Court's review of the Fourth Circuit case is critical because, without immediate intervention, the President and Executive Branch would be subject to further litigation and intrusive discovery without any determination by an appellate court that the extraordinary suit is even judicially cognizable. See Pet. at 22-25, *In re Trump*, *supra* (Sept. 9, 2020). Although that prospect is not yet imminent in this case, the Court should grant review in both cases to ensure that it has before it the comprehensive slate of objections to these fundamentally flawed Emoluments Clauses suits brought by asserted business competitors of the President.

A. The Panel's Decision Is Wrong

The court of appeals erred in permitting respondents, who claim to compete with businesses in which the President has an ownership interest, to bring an official-capacity suit against the President to enforce the Emoluments Clauses. Respondents' suit suffers from myriad defects.

At the outset, the court of appeals erred in holding that respondents' suit satisfies the minimum requirements of Article III standing. This Court has rejected

"a boundless theory of standing" under which "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful." *Already*, 568 U.S. at 99. And any more specific allegation is inherently speculative: respondents cannot plausibly plead that (1) certain governmental customers patronize the President's businesses because of his financial interests (rather than the businesses' other qualities, including their general association with the President); (2) those customers would otherwise patronize the particular venues in which respondents have a commercial interest (rather than any of countless other venues); and (3) there is no countervailing effect that must be considered from other governmental customers who may be inclined to avoid the President's business because of his financial interests.

Respondents' ability to seek redress from Article III courts fails for additional reasons. Even if there were an implied cause of action to enforce the Emoluments Clauses in some circumstances (though there is not), respondents could not raise a cognizable claim. Their asserted economic injuries fall well outside any zone of interests protected by the Clauses, which are structural, prophylactic provisions designed to protect the Nation as a whole from official corruption. Moreover, official-capacity relief against the President is not available at all, which dooms this suit from the outset.

1. Article III restricts the jurisdiction of federal courts to "Cases" or "Controversies." U.S. Const. Art. III, § 2, Cl. 1. "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006).

And a "'core component'" of the case-or-controversy requirement is that the plaintiff must have "standing to invoke the authority of a federal court," *id.* at 342 (citation omitted), which requires establishing (among other things) an "'actual or imminent'" injury-in-fact that is "'fairly traceable'" to the defendant's challenged conduct, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (brackets, citations, and ellipsis omitted). Those elements are not met when a plaintiff's alleged injury rests on a "speculative chain of possibilities." *Clapper*, 568 U.S. at 414. And that is especially likely to be the case where the alleged injury "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562 (citation omitted).

Respondents cannot establish an injury-in-fact that is "legally and judicially cognizable," *Raines*, 521 U.S. at 819, flowing from the President's alleged violation of the Emoluments Clauses. Those Clauses are prophylactic measures that protect the Nation as a whole against the exercise or appearance of influence by foreign or domestic governments on actions by covered federal officers. See, *e.g.*, 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 465-466 (2d ed. 1891) (statement of Virginia Governor Randolph explaining that the Foreign Emoluments Clause is "provided to prevent corruption"); *id.* at 486 (similar for Domestic Emoluments Clause). Respondents, of course, cannot assert a generalized grievance, shared by all members of the public, in having the President comply

with prophylactic provisions of the Constitution adopted for the benefit of the Nation as a whole. See *United States* v. *Richardson*, 418 U.S. 166, 176-178 (1974); accord *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974).

Nor have respondents articulated any concrete and particularized injury that they have suffered. Even assuming there is an implied cause of action directly under the Constitution to enforce the Emoluments Clauses in some circumstances, respondents do not assert any actual corrupted action—let alone that any such action has injured them. Instead, respondents' purported injury is an attenuated and speculative economic harm: that they are disadvantaged in competing for business from governmental customers who may choose to patronize businesses in which the President has a financial interest in order to curry favor with him. That effort to manufacture a suit to enforce the Clauses against the President cannot be reconciled with this Court's precedents on Article III standing.

a. The panel majority first erred in adopting a theory of "competitor standing" that vitiated the injury-in-fact requirement. Not one of respondents even alleges any particularized instances where governmental customers have chosen or will choose to patronize hotels or restaurants affiliated with the President instead of their own (let alone *because of* the President's financial interests). See App., *infra*, 120a-121a, 128a-129a (Menashi, J., dissenting from the denial of rehearing en banc). To overcome that deficit, the panel adopted a capacious theory of competitor standing that recognizes an injury-in-fact whenever a defendant competes "over the exact same customer base" as the plaintiff, while "secur[ing]

an unlawful advantage." *Id.* at 15a (emphasis omitted). Put differently, in the panel's view, "economic competitors" have standing whenever they can "allege that, because of unlawful conduct, their rivals enjoy a competitive advantage in the marketplace." *Id.* at 13a.

The panel majority's sweeping conception of competitor standing is incompatible with this Court's precedents. Plaintiffs must allege "a distinct and palpable injury to [themselves]," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), not merely that a defendant "is violating the law," *Allen* v. *Wright*, 468 U.S. 737, 755 (1984). A rule under which one competitor in a diffuse market can challenge any legal violations by another competitor would eviscerate the requirement that the plaintiff itself suffer a concrete and particularized injury.

In appropriate circumstances, of course, a business can establish a sufficiently concrete injury from conduct concerning its economic competitors. But the so-called "competitor standing" doctrine "is an *application* of Article III standing principles, not a *relaxation* of them." *In re Trump*, 958 F.3d at 325 (Niemeyer, J., dissenting). In *Already*, this Court rejected "a boundless theory of standing" under which "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful"—a theory that the Court deemed "remarkable." 568 U.S. at 99. Instead, it explained that competitive injury must be "based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor." *Ibid.* That is, plaintiffs relying on a competitor-standing theory must plausibly allege not only that they operate in the same market as the defendant and that the defendant has received an

unlawful gain, but also that the defendant's gain will result in a personal injury to the plaintiffs.

Here, however, respondents challenge the conduct of a single defendant's businesses competing with plaintiffs' particular businesses over a tiny subset of governmental customers in a diffuse hospitality market. In those circumstances, no identifiable harm to respondents' specific businesses is "certainly impending." *Clapper*, 568 U.S. at 410 (citation omitted); see App., *infra*, 166a (Walker, J., statement in opposition to the denial of rehearing en banc) (noting that respondents alleged only "that a *different* competitor * * * who is not a plaintiff in this suit * * * lost identifiable business to the President's businesses").

b. Even if respondents could demonstrate that they themselves will lose some actual business to businesses affiliated with the President, the panel majority further erred in holding that any such injury is fairly traceable to the President's alleged violations of the Emoluments Clauses. This Court has "been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413. For example, in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court concluded that low-income plaintiffs lacked standing to challenge the government's grant of favorable tax treatment to nonprofit hospitals that offered only emergency-room services to indigent patients. The Court explained that it was "purely speculative" whether the plaintiffs' alleged denials of non-emergency hospital services "fairly can be traced to [the favorable tax treatment] or instead result from decisions made by the hospitals without regard to

the tax implications." *Id.* at 42-43. And it was likewise speculative that "a court-ordered return [to the prior tax] policy would result in [the plaintiffs'] receiving the hospital services they desire." *Id.* at 42.

The panel majority's chain of causation between the President's alleged acceptance of unlawful emoluments and respondents' alleged loss of business is similarly "speculative," *Simon*, 426 U.S. at 42, and requires significant "guesswork," *Clapper*, 568 U.S. at 413. Respondents' alleged loss of business depends on the independent decisions of third-party governmental customers who may choose the President's businesses for myriad reasons besides whether their patronage confers upon him some financial benefit. Indeed, as the panel dissent cogently explained, respondents' theory of harm rests on multiple levels of speculation. *First*, respondents must presume that certain governmental customers would not patronize the President's businesses but for his financial interests, despite the businesses' myriad other features—including their general association with the President and his family, which, on respondents' own theory, would still make patronizing those businesses a way of currying favor with the President. *Second*, respondents must presume that any such customers would otherwise patronize the venues in which respondents have a commercial interest, even though there are countless other venues in the New York City and Washington, D.C. regions that they could choose instead. And *third*, respondents must disregard or discount a countervailing effect—the possibility of other governmental customers who choose to patronize respondents' businesses because they wish to avoid the

President's business in light of his financial interests. See App., *infra*, 62a-70a (Walker, J., dissenting).

The speculativeness of this theory of harm is not mitigated by the specific statements invoked by the panel majority concerning foreign officials' desire to curry favor with the President. See App., *infra*, 31a. Those statements do not indicate that the foreign officials' decision to patronize Trump hotels and restaurants has anything to do with the President's *personal financial interest* in those establishments. Rather, "even if the President's personal gains * * * were removed from the calculus," "[f]oreign diplomats and state officials might, quite lawfully, still choose the Trump establishment over plaintiffs' establishments to attempt to curry favor with the President." *Id.* at 168a (Walker, J., statement in opposition to the denial of rehearing en banc); accord *In re Trump*, 928 F.3d 360, 376 (4th Cir. 2019) ("After all, the [Trump] Hotel would still be publicly associated with the President, would still bear his name, and would still financially benefit members of his family."), vacated on other grounds, 958 F.3d 274 (4th Cir. 2020) (en banc). And those statements certainly provide no basis to suggest that the foreign officials would have otherwise patronized respondents' establishments, or that there are not offsetting gains from foreign or domestic governmental officials who wish to refrain from any association with businesses in which the President has a financial interest.

2. In allowing respondents to continue to seek redress from Article III courts for the President's alleged violation of the Emoluments Clauses, the court of appeals exacerbated its error by vacating the district court's conclusion that respondents fall outside any

zone of interests protected by the Clauses. Even assuming that an individualized right to enforce the Emoluments Clauses in federal court could ever be recognized and a cause of action implied under Congress's grant of equity jurisdiction—though the government disagrees with those premises—respondents' asserted interests do not "fall within the zone of interests to be protected or regulated by the * * * constitutional guarantee in question." *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (citation and internal quotation marks omitted).

The "zone-of-interests" requirement limits the plaintiffs who "may invoke [a] cause of action" authorized by Congress. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129-130 (2014). It "serve[s] to limit the role of the courts in resolving public disputes" by asking "whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500. And it reflects the common-sense intuition that Congress does not intend to extend a cause of action to "plaintiffs who might technically be injured in an Article III sense but whose interests are unrelated" to the legal provisions they seek to enforce. *Thompson* v. *North Am. Stainless, LP*, 562 U.S. 170, 178 (2011).

Accordingly, this Court has explained that the zone-of-interests test is a "'requirement of general application,'" reflecting a "presum[ption]" about Congress's intent in authorizing causes of action. *Lexmark*, 572 U.S. at 129 (brackets and citation omitted). Under this Court's interpretation of the express cause of action in

the Administrative Procedure Act, 5 U.S.C. 702, a plaintiff's asserted interest need only be "arguably within the zone of interests" of the provision to be enforced; suit is foreclosed only where the asserted interest is "marginally related to or inconsistent with the purposes implicit in the [provision]." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 567 U.S. 209, 224, 225 (2012) (citations omitted). But when courts *infer* a cause of action under Congress's general grant of equity jurisdiction, see *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327-328 (2015), this Court has suggested that a more stringent test is appropriate, requiring that the provision at issue be intended for the "*especial* benefit" of the plaintiff seeking to enforce it, *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 400 n.16 (1987); see *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-285 (2002).

Under any version of the standard, though, respondents cannot satisfy the zone-of-interests requirement. As the district court observed, the Emoluments Clauses are prophylactic measures that were designed to "protect[] the new government from corruption and undue influence" by foreign or state governments. App., *infra*, 98a; see pp. 13-14, *supra*. And there is "simply no basis to conclude" that the Clauses were additionally intended to protect, or even arguably concerned about protecting, private enterprises from "competitive injur[ies]" suffered in seeking the business of foreign or state governmental officials. App., *infra*, 100a; accord *In re Trump*, 958 F.3d at 296-297 (Wilkinson, J., dissenting) (explaining that the Emoluments Clauses were "designed to prevent official corruption," not to "create

a new legal interest for parties to be protected from lawful competition").

Although the district court incorrectly labeled dismissal on zone-of-interests grounds as a defect in jurisdiction, see App., *infra*, 77a-79a, the panel majority nevertheless erred in vacating the district court's decision. The President filed a single motion to dismiss in the district court, raising both jurisdictional and non-jurisdictional grounds for dismissal. See D. Ct. Docs. 34, 35. And the district court's technical labeling error in no way affected its substantive analysis of the legal question. See App., *infra*, 97a-100a; cf. *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) ("Since nothing in the analysis of the courts below turned on the mistake, a remand would only require a new Rule 12(b)(6) label for the same Rule 12(b)(1) conclusion."). Accordingly, the panel majority should have affirmed the district court's dismissal on zone-of-interests grounds, as both the President and the judges dissenting from the denial of rehearing en banc urged. See App., *infra*, 137a-140a (Menashi, J., dissenting from the denial of rehearing en banc); cf. *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (explaining that the Court's "traditional rule * * * precludes a grant of certiorari only when the question presented was not *pressed or* passed upon below") (emphasis added; citation and internal quotation marks omitted). Indeed, as this Court has recognized, the district court could have properly decided the zone-of-interests question *before* any jurisdictional question. See *Tenet* v. *Doe*, 544 U.S. 1, 6 n.4 (2005); *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). And this Court itself may wish to do so, to avoid the need to reach a constitutional

standing question. See *Bond* v. *United States*, 572 U.S. 844, 855 (2014).

3. The extraordinary nature of this suit underscores the court of appeals' errors on the Article III standing and zone-of-interests questions. The federal courts have never judicially created a cause of action to enforce the Emoluments Clauses, let alone in a suit against the President in his official capacity. As Judge Menashi's dissent from the denial of rehearing en banc explained, the panel's Article III holding was premised in part on the mistaken assumption that the district court could "fashion[]" injunctive relief against the President in this case "along many different lines." App., *infra*, 131a (quoting 953 F.3d at 199); see *id.* at 33a.

The panel proposed, for example, that a court might order the President to "bar the Trump establishments from selling services to foreign and domestic governments," "to establish a blind trust or otherwise prevent him from receiving information about government patronage of his establishments," or to publicly disclose his "private business dealings with government officials." App., *infra*, 33a n.12. That proposal is misguided even on its own terms because such relief would not provide redress for the alleged violation of the Emoluments Clauses, which is the President's alleged *acceptance* of prohibited emoluments. And more fundamentally, such relief is not available against the President.

As this Court has explained, permitting injunctive relief against the President in his official capacity would violate the fundamental principle, rooted in the separation of powers, that federal courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, 71 U.S.

(4 Wall.) 475, 501 (1867); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 802-803 (1992) (opinion of O'Connor, J.); 505 U.S. at 826 (Scalia, J., concurring in part and concurring in the judgment). The panel majority failed to "grapple with th[at] separation-of-powers question" and instead "simply assume[d] that injunctive relief is available against the President in his official capacity." App., *infra*, 132a (Menashi, J., dissenting from the denial of rehearing en banc). In his statement in support of the denial of rehearing en banc, Judge Leval contended that relief was available "because this complaint has nothing to do with the President's exercise of his official duties." *Id.* at 176a. But that contention disregards both that respondents have sued the President solely in his official capacity and that "an obligation (*i.e.*, a duty) that derives from one's government position (*i.e.*, office)" is "an official duty." *In re Trump*, 958 F.3d at 299 (Wilkinson, J., dissenting). At a minimum, the serious doubts about respondents' ability to file suit and obtain ultimate relief against the President further militates in favor of "especially rigorous" scrutiny of whether respondents adequately pleaded "legally and judicially cognizable" injuries that justified bringing suit in the first place. *Raines*, 521 U.S. at 819-820.

B. The Panel's Decision Conflicts With Decisions From Other Courts Of Appeals Involving Standing Of Economic Competitors.

1. In addition to contravening this Court's clear admonition that the mere existence of economic competition is not a substitute for a concrete and particularized injury, see *Already*, 568 U.S. at 99, the panel's decision

conflicts with other courts of appeals' application of Article III standing principles in the context of economic competitors. Although other courts have concluded in certain circumstances that economic competitors may suffer a concrete injury when a defendant receives an unlawful benefit, those courts still require a showing that the defendant's gain will predictably harm the *particular* plaintiff. See App., *infra*, 125a (Menashi, J., dissenting from the denial of rehearing en banc) (explaining that "no other circuit assumes, as the majority opinion does, that 'economic logic' dictates a finding of personal harm whenever a competitor has an advantage"); *id.* at 170a (Walker, J., statement in opposition to the denial of rehearing en banc) (emphasizing "[t]he dissonance between our and other circuits' treatment of the competitor standing doctrine").

As discussed, the panel majority here concluded that, as a matter of "'economic logic,'" it was "sufficient[]" for Article III purposes "that [respondents] compete directly with Trump establishments and that the President's allegedly illegal acts favor [respondents'] competitors." App., *infra*, 14a (citation omitted). By contrast, at least three courts of appeals—the First, D.C., and Federal Circuits—have required, in considering the standing of competitors, that any "economic logic" dictate that the specific plaintiff will suffer a concrete injury. See *Adams* v. *Watson*, 10 F.3d 915, 923-924 (1st Cir. 1993) (requiring economic principles to demonstrate "a sufficient likelihood" of injury not just to a class of competitors but to "these individual [plaintiffs]") (emphasis omitted); *El Paso Natural Gas Co.* v. *FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995) ("The nub of the

'competitive standing' doctrine is that when a challenged agency action authorizes allegedly illegal transactions that will *almost surely cause petitioner* to lose business, there is no need to wait for injury from specific transactions to claim standing.") (emphasis added); *Canadian Lumber Trade Alliance* v. *United States*, 517 F.3d 1319, 1332 (Fed. Cir.) (explaining that "the doctrine of 'competitor standing'" depends "on economic logic to conclude that *a plaintiff will likely suffer* an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors") (emphasis added), cert. denied, 555 U.S. 819 (2008); see also App., *infra*, 161a (Walker, J., statement in opposition to the denial of rehearing en banc).

Because those courts require a showing of predictable injury to the specific plaintiff, they have denied the standing of competitors where the allegedly unlawful benefit does not dictate such an injury as a matter of economic logic. In *El Paso*, for example, the D.C. Circuit rejected the plaintiff's argument that the defendant "could enjoy a competitive advantage" if it were subject to state rather than federal regulation, absent evidence that "such a difference in regulatory burdens in fact exists" as would "demonstrat[e] 'injury in fact.'" 50 F.3d at 28; see, *e.g.*, *State Nat'l Bank of Big Spring* v. *Lew*, 795 F.3d 48, 55 (D.C. Cir. 2015) (opinion of Kavanaugh, J.) (holding that the plaintiff's "novel theory" involving a "reputational benefit" to a competitor was "simply too attenuated and speculative" to establish standing); *New World Radio, Inc.* v. *FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (holding that the plaintiff lacked standing to challenge agency action that was a "step in the direction of future competition" because the alleged

competitive injury was "too remote" and "depend[ed] on the independent actions of third parties"). As a result, even in those circuits that permit plaintiffs to invoke "economic logic" to demonstrate a concrete and particularized injury, courts would have demanded more than the minimal allegations about competition in the same market that the panel deemed sufficient here.

2. Moreover, the panel majority here reached a different result from the only other appellate decision that has addressed the competitor-standing question in the context of the Emoluments Clauses. In *In re Trump*, a panel of the Fourth Circuit specifically rejected "the theory that so long as a plaintiff competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met." 928 F.3d at 377. The Fourth Circuit panel likewise rejected the speculative theory that the President's assertedly unlawful "competitive advantage" actually "diverts business away from" the properties of competitors in the Washington, D.C. area. *Id.* at 375.

Although the en banc Fourth Circuit later vacated the panel's decision, it did so because it determined that the appellate court lacked jurisdiction in the particular circumstances of that case. See *In re Trump*, 958 F.3d at 282-285. No judge questioned the correctness of the panel's Article III analysis. And in a dissent from the en banc decision, Judge Niemeyer, joined by four other judges, criticized the Second Circuit panel here because its decision "simply reiterated the [Article III] causation standard at a highly general level and stated that there was 'a substantial likelihood that [the plaintiffs']

injury [was] the consequence of the challenged conduct.'" *Id.* at 327 (quoting 939 F.3d 131, 145) (second and third set of brackets in original). He further criticized the panel here for "strain[ing] unsuccessfully * * * to distinguish *Simon*" and "fail[ing] to explain * * * how a President's direct receipt of income from a hotel investment—as opposed to, for example, his family members' receipt of that income—could have skewed the market in his favor." *Ibid.*

C. The Panel's Decision Warrants Further Review, Particularly When Paired With The Parallel Fourth Circuit Decision

The panel decision warrants this Court's review. As explained, it contravenes this Court's Article III precedents, conflicts with decisions of other courts of appeals about the showing that an economic competitor must make to establish standing, and also presents an exceptionally important question about whether respondents are proper parties to assert an implied cause of action against the President to enforce the Emoluments Clauses. The separation of powers generally requires ensuring that only a proper plaintiff may invoke the Judiciary's power to decide cases and controversies. See *Raines*, 521 U.S. at 820. And that is "especially" true "when reaching the merits of the dispute would force [the federal courts] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Id.* at 819-820.

To be sure, the court of appeals' remand means that the district court still has the opportunity to dismiss this suit because respondents do not have a judicially cognizable claim within any zone of interests protected by

the Emoluments Clauses or a viable claim on the merits. See App., *infra*, 48a-49a, 79a n. But in these unusual circumstances, the fact that the courts below may reject this suit on other grounds does not counsel against this Court's review now. Any continuation of this suit creates serious separation-of-powers concerns, because the defendant is the President of the United States, in his official capacity, being sued under an implied cause of action without any authorization from Congress. The "President occupies a unique position in the constitutional scheme." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982). Accordingly, "the high respect that is owed to the office of the Chief Executive is a matter that should inform the conduct of the entire proceeding." *Cheney*, 542 U.S. at 385 (brackets, citation, and ellipsis omitted); see *Trump* v. *Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (granting review of a suit concerning the President that was "the first of its kind to reach this Court"). Such serious separation-of-powers concerns weigh in favor of this Court's prompt review at the earliest possible stage. Moreover, if the lower courts were to refuse to dismiss respondents' suit on other grounds, that could expose the President to intrusive discovery before he would have the opportunity to seek this Court's review, potentially necessitating a stay or other emergency relief.

In addition, the President is, contemporaneously with this petition, filing a petition for a writ of certiorari from the Fourth Circuit's en banc decision in *In re Trump*, 958 F.3d 274. In that case, this Court's review is especially critical because the President will otherwise be immediately subject to intrusive discovery into

his personal finances and the communications and activities of various Executive Branch agencies, without any finding by an appellate court that the extraordinary suit is even judicially cognizable. See Pet. at 22-25, *In re Trump*, *supra* (Sept. 9, 2020). The petition in *In re Trump* presents substantially the same Article III standing question that the panel majority incorrectly decided here, as well as the cause-of-action questions that the President pressed below. In that case, however, those questions were presented in a petition for mandamus in the court of appeals, rather than, as here, in a direct appeal. So granting this petition could obviate the need to resolve any additional complexities presented by the mandamus standard. Meanwhile, the panel majority in this case squarely decided only the Article III competitor-standing question, whereas the en banc Fourth Circuit also considered the President's arguments about the unavailability of an implied cause of action in equity against the President in his official capacity. So granting that petition will ensure that this Court has both the Article III and cause-of-action questions before it.

In sum, this Court should grant both petitions. That would best ensure the Court has before it the full complement of legal objections to these novel and fundamentally flawed suits against the President.[2]

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[2] By contrast, the Court should deny the pending petition in *Blumenthal* v. *Trump*, 949 F.3d 14 (D.C. Cir. 2020) (per curiam), No. 20-5 (filed July 6, 2020), in which the court of appeals correctly held that a Foreign Emoluments Clause suit by Members of Congress must be dismissed on legislative-standing grounds inapplicable here. See Br. in Opp. at 7-24, *Blumenthal*, *supra* (No. 20-5).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2020

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 18-474
August Term, 2018

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS UNITED, INC., JILL PHANEUF, AND ERIC GOODE, PLAINTIFFS-APPELLANTS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Argued: Oct. 30, 2018
Decided: Sept. 13, 2019

Before: JOHN M. WALKER, PIERRE N. LEVAL, CHRISTOPHER F. DRONEY, *Circuit Judges*.

Plaintiffs, who own and operate businesses in the hospitality industry, appeal from the dismissal of their lawsuit by the United States District Court for the Southern District of New York (George B. Daniels, *J.*). The district court dismissed Plaintiffs' suit on the grounds that Plaintiffs lack Article III standing, they fall outside the zone of interests of the Emoluments Clauses, their claims do not present a ripe case or controversy within the meaning of Article III, and the case presents a non-justiciable "political question." VACATED AND REMANDED.

LEVAL, Circuit Judge:

Plaintiffs—Eric Goode, a restaurateur and hotelier, and Restaurant Opportunities Center United ("ROC"), a non-partisan, member-based organization of restaurants and restaurant workers—appeal from the judgment of the United States District Court for the Southern District of New York (Daniels, J.) dismissing their complaint against Defendant Donald J. Trump, the President of the United States, for lack of subject matter jurisdiction. The complaint seeks declaratory and injunctive relief for the President's alleged violations of the Domestic and Foreign Emoluments Clauses of the United States Constitution. The President moved to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that Plaintiffs did not have standing to sue. The district court granted the motion, concluding that Plaintiffs lack Article III standing, they fall outside the zone of interests of the Emoluments Clauses, their claims do not present a ripe case or controversy within the meaning of Article III, and their suit is barred by the political question doctrine. For the reasons below, we vacate the judgment and remand for further proceedings.

A. BACKGROUND

Plaintiffs are in the hospitality industry.[1] Plaintiff Goode owns high-end hotels, restaurants, and event

[1] In proceedings before the district court, plaintiffs included Jill Phaneuf, who worked in the hospitality industry, and Citizens for Responsibility and Ethics in Washington (CREW), a non-profit government watchdog. In Plaintiffs' appellate briefing, CREW notified the court it is "no longer appealing the district court's judgment" that CREW lacks standing. Additionally, Phaneuf left the job wherein she allegedly competed with Defendant's businesses for

spaces in the New York City area. Plaintiff ROC counts among its members over 200 establishments, including high-end restaurants and event spaces in New York City and Washington, D.C. The Plaintiff establishments cater to foreign and domestic government clientele, and allege that they are direct competitors of hospitality properties owned by the President in Washington D.C. and New York City.

The complaint alleges that President Trump, operating through corporations, limited-liability companies, limited partnerships, and other business structures, is effectively the sole owner of restaurants, hotels, and event spaces, which are patronized by foreign and domestic government clientele. The President has announced that, since assuming office, he has turned over day-to-day management of his business empire to his children and established a trust to hold his business assets.[2] However, he maintains sole ownership, receives business updates at least quarterly,[3] and has the ability to obtain distributions from the trust at any time.[4] The facts alleged by Plaintiffs, together with those acknowledged by the President, support the inference that the revenues of the Trump establishments are substantially

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diplomatic clientele, and Plaintiffs acknowledge that she "no longer has Article III standing to pursue her claims, which sought only prospective relief."

[2] *Donald Trump's News Conference: Full Transcript and Video*, N.Y. Times (Jan. 11, 2017), http://nyti.ms/2jG86w8.

[3] Jennifer Calfas, *Eric Trump Says He'll Give the President Quarterly Updates on Business Empire*, Fortune (March 24, 2017), http://for.tn/2n2MRXa.

[4] Derek Kravitz & Al Shaw, *Trump Lawyer Confirms President Can Pull Money From His Businesses Whenever He Wants*, ProPublica (April 4, 2017, 5:53 PM), http://bit.ly/2o1OM1C.

(or are convertible into) personal revenues of the President.

i. Plaintiffs' Allegations

Stated generally, Plaintiffs allege that they have been and will be injured because foreign and domestic government entities that patronize Washington, D.C. and New York hotels, restaurants, and event spaces patronize Trump establishments (in preference to Plaintiffs' establishments) in the hope of enriching the President and earning a reward from him through official Presidential action favorable to their governments, and that such enrichment of the President by foreign and domestic government entities violates the Foreign and Domestic Emoluments Clauses. There are three principal categories of allegations.

First, Plaintiffs allege that they directly compete with the President's establishments for foreign, state, and federal government clientele. Second Amended Complaint (the "Complaint") ¶¶ 13-20. Plaintiffs support this allegation with extensive declarations from hospitality industry experts.[5] Rachel Roginsky, a hos-

[5] Where, as here, a defendant makes a "fact-based" 12(b)(1) motion to dismiss by "proffering evidence beyond the Pleading," the plaintiff may "need to come forward with evidence of [its] own to controvert that presented by defendant[.]" *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 57 (2d Cir. 2016) (*citing Exch. Nat'l Bank of Chi. v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976)). The President's motion to dismiss challenged not only the facial sufficiency of the complaint, but also the factual assertion that Plaintiffs' restaurants directly compete with Trump establishments. Thus, we

pitality consultant and professor at the Boston University School of Hospitality Administration, asserts that certain of Goode's hotels and one ROC member's hotel-restaurant are "[p]rimary competitors" with Trump SoHo and Trump International New York because they "market to and attract customers from essentially the same pool" given their "similar . . . location, facilities, services, amenities, class, image, and price." Roginsky Decl. ¶¶ 14-17. Dr. Christopher Muller, former Dean of the Boston University School of Hospitality Administration, identifies numerous of Plaintiffs' restaurants in the New York and Washington, D.C. areas that he asserts are "comparable" to various Trump establishments because they are within the same market "segment" and therefore directly compete with one another. Muller Decl. ¶¶ 24-29, 50-56, 67-75. Collectively, the two declarations identify more than a dozen of Plaintiffs' establishments, which, according to Roginsky and Muller, compete directly with roughly half a dozen Trump establishments over the same customer base, including foreign and domestic government customers. Owners of these establishments also submitted declarations attesting that their restaurants and hotels are frequented by foreign, state, and federal officials and that they compete directly with Trump establishments over this customer base. Goode Decl. ¶¶ 4, 23-24, 34, 36, 47-50; Colicchio Decl. ¶¶ 13-14, 20-21, 28-29. Plaintiffs' declarations include evidence of loss of government patronage from Plaintiffs' establishments after the presidential election. ROC alleges that its restaurant and restaurant-employee members have suffered injury due

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consider not only the allegations in the complaint but also the expert affidavits submitted in response to Defendant's fact-based motion to dismiss.

to "lost business, wages, and tips." Complaint ¶ 13. Specifically, James Mallios, managing partner at ROC member restaurant Amali, testifies that Amali regularly hosts dinners and events for government officials, including foreign leaders, Mallios Decl. ¶¶ 9, 20, 24-27, and that its tax-exempt sales declined after November 2016, reflecting a decline in government business. *Id.* ¶ 28.

Second, the Complaint cites statements by the President implicitly soliciting the patronage of government officials and apparently acknowledging that, in making governmental decisions, he favors governments that patronize his businesses. *See, e.g.*, Complaint ¶ 96 ("Trump said [of the Saudis, in the context of discussing trade negotiations], ' . . . They spend $40 million, $50 million. Am I supposed to dislike them? I like them very much.'"); *id.* ¶ 52 (responding to a question about the U.S.'s dispute with China over the South China Sea, "I do deals with [China] all the time. [China's largest bank] is a tenant of mine . . . "). The Complaint alleges that Trump businesses began investing in attracting foreign government business after the election, *id.* ¶¶ 60-63, and further that these efforts have succeeded in attracting post-election patronage from foreign governments. *Id.* ¶¶ 64-87.

Third, Plaintiffs allege that foreign governments have taken note of, and been influenced by, the message that enriching the President by giving patronage to his establishments earns his favor. Plaintiffs point to statements by foreign government officials quoted in newspaper articles, including one "Middle Eastern diplomat" who said, "Believe me, all the delegations will go [to Trump establishments]." *Id.* ¶ 62 (*quoting* Jonathan O'Connell & Mary Jordan, *For foreign diplomats,*

Trump hotel is place to be, WASH. POST (Nov. 18, 2016), http://wapo.st/2oPYggX). Another diplomat reportedly stated, "Why wouldn't I stay at his hotel blocks from the White House[?] . . . Isn't it rude to come to his city and say, 'I am staying at your competitor?'" *Id.* Plaintiffs also allege that foreign government official patronage of Trump establishments has increased since the President was elected. *Id.* ¶¶ 56, 60, 64, 68, 72, 79, 82. In particular, Plaintiffs point to one instance in which, shortly after the election, a foreign government switched the venue of an event from a competitor to a Trump establishment. *Id.* ¶ 74.

The Complaint asserts that the President's receipt of the revenues he derives from the patronage of foreign and domestic government entities violates the Foreign and Domestic Emoluments Clauses. *Id.* ¶ 1. The Foreign Emoluments Clause provides: "[N]o Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const., Art. I, § 9, Cl. 8. Congress has not consented to Defendant's receipt of the emoluments at issue here. Complaint ¶ 2. The Domestic Emoluments Clause provides: "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const., Art. II, § 1, Cl. 7.

The Complaint seeks both declaratory and injunctive relief. It seeks a declaration, *inter alia*, that, in these

circumstances, the patronage of foreign and domestic government entities of the President's establishments violates the Foreign and Domestic Emoluments Clauses. Complaint ¶ 20. As to injunctive relief, the Complaint asks the court to "enjoin[] Defendant from violating both Emoluments Clauses" and to "requir[e] Defendant to release financial records sufficient to confirm that Defendant is not engaging in any further transactions that would violate either Emoluments Clause." *Id.*

ii. Defendant's Motion to Dismiss

The President moved to dismiss the Complaint, arguing that Plaintiffs lacked Article III standing and fell outside the zone of interests of the Emoluments Clauses. As to standing, the President argued that Plaintiffs' "allegations of future injuries are premised upon a speculative chain of possibilities, including the decisions of third parties [i.e., prospective government customers] not before the Court." Defendant's Memorandum of Law in Support of the Motion to Dismiss, at 18-19. With respect to the specific evidence of lost government patronage, the President argued that the declarations do not "show that the decline was attributable to" government customers choosing Trump establishments, because the decline could have a different cause. Reply Memorandum of Law in Support of the Motion to Dismiss, at 6. The President did not contest the substance of Plaintiffs' expert testimony that certain of Plaintiffs' establishments compete directly with Trump establishments. As to the zone of interests, President Trump argued that because the Clauses were "intended to guard against the corruption of and foreign influence on federal officials and to ensure the independence of the President," Plaintiffs' alleged injuries "bear no relation

to the [Clauses'] core concerns," and thus Plaintiffs' claims should be dismissed. Defendant's Memorandum of Law in Support of the Motion to Dismiss, at 25-26.

iii. District Court Decision

The district court granted the President's motion to dismiss for lack of jurisdiction under Rule 12(b)(1). While recognizing that Plaintiffs' allegations, supported by expert declarations, satisfied the injury prong of the Article III standing inquiry, the district court found "Plaintiffs have failed to properly allege that Defendant's actions *caused* Plaintiffs competitive injury and that such an injury is *redressable* by this Court." *CREW et al. v. Trump*, 276 F. Supp. 3d 174, 185 (S.D.N.Y. 2017) (emphasis in original). The district court called it "wholly speculative" whether any lost business was "fairly traceable to Defendant's 'incentives' or instead results from government officials' independent desire to patronize Defendant's businesses." *Id.* at 186. Hypothesizing alternative explanations for Plaintiffs' injury, the district court opined that "interest in [Trump] properties" could have "generally increased since he became President" or Plaintiffs may "face a tougher competitive market overall." *Id.* Given that Plaintiffs failed to rule out these alternative explanations for their injury at the pleading stage, the district court concluded the "connection between [] Plaintiffs' alleged injury and Defendant's actions is too tenuous to satisfy Article III's causation requirement." *Id.* For the same reasons, the district court found the injury was not likely to be redressed by any relief the district court could offer. *Id.*

The district court also found that Plaintiffs lacked "prudential" standing. Reasoning that standing to sue under the Emoluments Clauses is limited to those parties the Clauses were meant to protect, the district court found that Plaintiffs fell outside the "zone of interests" of the Clauses. *Id.* at 187-88. The district court reasoned that "[n]othing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition." *Id.* at 187. Rather, the district court found, the Emoluments Clauses are meant to prevent corruption and foreign influence, and ensure the President's independence. *Id.* at 188. Contrasting this suit with one brought under the "generous review provisions of the [Administrative Procedure Act]," the district court stated that the zone of interests test "is *more* strictly applied when a plaintiff is proceeding under a constitutional . . . provision." *Id.* at 187 (emphasis in original) (*quoting Wyoming v. Oklahoma*, 502 U.S. 437, 469 (1992) (Scalia, J., dissenting)).[6] Because Plaintiffs are not vindicating an interest in uncorrupted, independent government, the district court reasoned, they do not have standing to sue under the Emoluments Clauses.

The district court also found that the suit must be dismissed on two additional grounds, neither of which was raised by the Defendant's motion. These were that the case presents a non-justiciable political question and that it is not ripe for adjudication. *Id.* at 193-95. Neither of these grounds is defended by the President on this appeal.

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[6] The district court appeared to mistakenly rely on Justice Scalia's dissent in *Wyoming* as if it were a statement by the majority about the proper application of the zone of interests test. *See infra* n.13.

B. DISCUSSION

A suit brought in federal court is "properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). To the extent that a district court's dismissal for lack of subject matter jurisdiction was based on the application of a rule of law,[7] an appellate court construes the allegations of the complaint in the light most favorable to Plaintiffs and reviews the district court's ruling *de novo*, meaning that our inquiry focuses on whether the rules of law were correctly applied. We conclude that the district court did not apply the law correctly in finding that it lacked jurisdiction to decide the case.

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[7] In some instances, a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) is based in part on factual findings. When such a dismissal is appealed, we review the relevant factual findings for clear error. *See Rent Stabilization Ass'n of City of New York v. Dinkins*, 5 F.3d 591, 594 (2d Cir. 1993). In this case, although the parties presented disputed factual issues to the district court by evidentiary submissions, the court did not purport to resolve disputed issues of fact or make factual findings. Its rulings were based only on the application of rules of law. Accordingly, our review is *de novo*. *Id.* ("If the trial court dismissed on the basis of the complaint alone or the complaint supplemented by undisputed facts evidenced in the record, our standard is *de novo* review[.]").

i. Article III Standing

Plaintiffs contend that the district court interpreted the law incorrectly in concluding that they lack standing to bring this action under Article III of the Constitution. There are three prongs to the standing inquiry under Article III. In order to successfully allege standing to bring a suit in federal court, a complaint must plausibly allege the following: *first*, that the plaintiff has suffered an "injury in fact," which the Supreme Court defines as "an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not [merely] conjectural or hypothetical," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted); *second*, that there is a "causal connection between the injury and the conduct complained of," which requires the injury to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;" *id.* (internal quotation marks and alterations omitted); and *third*, that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (internal quotation marks omitted). These three components of the Article III "case or controversy" requirement are designed to ensure that the "plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify [the] exercise of the court's remedial powers on his behalf." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1974) (internal quotation marks omitted).

We find that Plaintiffs satisfy all three prongs of Article III standing for the reasons set forth below.

a. Injury

The requirement that Plaintiffs adequately allege an *injury in fact* "serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14 (1973) (*citing, inter alia,* Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968) ("[A]n identifiable trifle is enough for standing to fight out a question of principle.")). Because this appeal arises at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

Plaintiffs' alleged injury meets the well-established Article III threshold for economic competitors who allege that, because of unlawful conduct, their rivals enjoy a competitive advantage in the marketplace. To make an adequate allegation of a competitive injury, plaintiffs must plausibly allege (1) that an illegal act bestows upon their competitors "some competitive advantage," *Fulani v. League of Women Voters Edu. Fund*, 882 F.2d 621, 626 (2d Cir. 1989); and (2) "that [they] personally compete[] in the same arena" as the unlawfully benefited competitor. *In re United States Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989). For standing purposes, it is not necessary to identify specific customers who switched to Plaintiffs' competitors; rather, competitor standing "relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when

the [defendant] acts in a way that increases competition or aids the plaintiff's competitors." *Canadian Lumber Trade Alliance v. United States,* 517 F.3d 1319, 1332 (Fed. Cir. 2008); *see also Cooper* v. *Tex. Alcoholic Beverage Comm'n,* 820 F.3d 730, 738 (5th Cir. 2016) ("It is a basic law of economics that increased competition leads to actual economic injury.") (internal quotation marks omitted); *Sherley v. Sebelius,* 610 F.3d 69, 72 (D.C. Cir. 2010) ("[I]ncreased competition almost surely injures a seller in one form or another[.]"); *Kerm Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004) ("A party seeking to establish standing on this basis must demonstrate that it is a direct and current competitor whose bottom line *may be adversely affected* by the challenged [] action.") (emphasis added) (internal quotation marks omitted).

The Complaint sufficiently alleges that Plaintiffs compete directly with Trump establishments and that the President's allegedly illegal acts favor Plaintiffs' competitors. Specifically, it alleges that Plaintiffs' establishments are harmed in their competition with Trump establishments because, despite being comparable in other relevant respects, the President's establishments offer government patrons something that Plaintiffs cannot: the opportunity, by enriching the President, to obtain favorable governmental treatment from the President and the Executive branch. It alleges that the marketplace is thus skewed in favor of Trump businesses because of his unlawful receipt of payments from government patrons. The Complaint, supported by expert declarations, alleges that this unlawful market skew has caused Plaintiffs economic harm in the form of lost patronage from government entities, and that such harm will continue in the future. For competitor standing, that is sufficient.

The President argues that Plaintiffs rely on a "boundless theory of standing" that the Supreme Court has rejected because it would find the Article III injury prong satisfied "*whenever* a competitor benefits from something allegedly unlawful. . . . " *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013). He argues that Plaintiffs' theory of injury is over-broad because it would "apply the presumption [of harm to competitors] *whenever* a party acts illegally and thereby distorts competition or the defendant's unlawful conduct confers a benefit on a plaintiff's competitor." Appellee's Br. at 31 (emphasis in original) (citing *Already*, 568 U.S. at 99). The Defendant, however, both mischaracterizes Plaintiffs' argument and misses the mark in analogizing the theory of injury in this case to the one the Supreme Court rejected in *Already*.

Plaintiffs do not argue that they are injured merely because a competitor benefits; rather, Plaintiffs allege that in competing over the *exact same customer base*, Trump establishments secure an unlawful advantage because giving patronage to Trump establishments offers, in addition to comparable services, the potential, by enriching the President, of securing his favor in governmental decisions. This unlawful market skew directly affects Plaintiffs' revenue and profits: Every dollar of government patronage drawn to Trump establishments by the hope of currying favor with the President is a lost dollar of revenue that might otherwise have gone to Plaintiffs.

These facts have little in common with *Already*. In *Already*, the Supreme Court considered whether Already, LLC could challenge the validity of Nike's "Air

Force 1" trademark despite the fact that Nike had issued a covenant that it would refrain from making any claims against Already based on the Air Force 1 trademark, and despite the fact that Already did not plan to sell any product that "would arguably infringe Nike's trademark yet fall outside the scope of the covenant." 568 U.S. at 95. The Court clarified that it was insufficient for standing purposes for Already to claim that any gain to Nike was Already's loss; rather, Already had to show "an injury more particularized and more concrete than the mere assertion that something unlawful benefited [its] competitor." *Id.* Because Already did not face any liability for past conduct arguably infringing the Air Force 1 trademark, and because Already had not plausibly alleged any other way in which the trademark's continued validity injured Already, Already lacked an Article III injury. Here, by contrast, the nature of the injury from the allegedly unlawful conduct is clear and concrete: The Complaint plainly asserts that the Plaintiff establishments are losing, and will continue to lose, business from government patrons based on the patrons' belief that they can obtain official Presidential favor by spending their money in a manner that enriches the President.

We conclude that Plaintiffs have satisfied the Article III requirement of alleging an injury in fact.

b. Causation

Plaintiffs also adequately allege that their injury is fairly *traceable* to the challenged conduct of the Defendant. To satisfy the "traceability" or "causation" prong of the Article III standing test, allegations must provide more than "unadorned speculation" to "connect their injury to the challenged actions." *Simon*, 426 U.S. at 44-

45. This, however, does not require ruling out all possible alternative explanations of a plaintiff's injury. The allegations of fact must plausibly support a "substantial likelihood" that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions (and that prospective relief could mitigate the harm). *Id.* at 45.

The district court demanded too much at the pleading stage by requiring allegations that dispel alternative possible explanations for Plaintiffs' injury. The district court identified various alternative theories that *could* explain a decline in Plaintiffs' business: a "general[] increase[]" of "interest in [Trump] properties . . . since he became President," *CREW*, 276 F. Supp. 3d at 186; the possibility that Trump establishments provide better "service, quality, location, price and other factors related to individual preference," *id.*; or "an increase in competition in their respective markets for business from all types of customers[.]" *Id.* The district court found Plaintiffs' pleadings inadequate because they failed to dispel these alternative explanations. In so doing, the district court effectively required plaintiffs to prove, pre-discovery, the facts necessary to win at trial. This was error. *See Lujan*, 504 U.S. at 561 (explaining that less is required to support standing at the pleading stage compared to "successive stages of the litigation," when the burden increases). Under the standard applied by the district court, it would be virtually impossible to plead a competitive injury, because a defendant would defeat standing merely by pointing to the possibility that customers' preference

for defendant's products or services was attributable to something other than the defendant's illegal conduct.[8]

Our precedents, and those of the Supreme Court, make clear that Plaintiffs' allegations are sufficient to plausibly assert a substantial likelihood that their injury is the consequence of the challenged conduct. In *Fulani*, we upheld the standing of a fringe, third-party presidential candidate to challenge the continued grant of tax exemption by the IRS to the League of Women Voters on the ground that the League had engaged in impermissible partisan activities by limiting participation in its televised presidential debates to members of the Republican and Democratic parties. 882 F.2d at 625. The League's criteria for inclusion required, in addition to membership in one of the two major parties, that a candidate be "significant." *Id.* at 625-26.

Fulani alleged that she was a "significant" candidate, who would have been included if not for the requirement of membership in either the Republican or Democratic

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[8] We also note that there is no logic to the district court's proposition that, because *some* government patrons might be drawn to Trump establishments by curiosity, this means that *none* of them patronize his establishments in the hope of currying the President's favor by enriching him. In the course of a year, there are thousands of instances in which government representatives patronize hotels and restaurants in New York and Washington. Undoubtedly there are many factors that will influence their selections. The likelihood that some choices of government representatives will be influenced by other factors such as general curiosity in no way undermines Plaintiffs' altogether plausible allegation of a substantial likelihood that, in some significant number of instances, government officials will choose Trump hotels and restaurants in the hope that spending their dollars at Trump establishments will influence the President in their favor in governmental decisions.

party. *Id.* at 626. In assessing her Article III standing, this court did not probe her allegation that she was a significant candidate despite its dubious merit. We ruled that she had established Article III standing, notwithstanding the obvious improbability that she would make it into the debates as a "significant" candidate. *Id.* ("For purposes of determining Fulani's standing to challenge whether the League's use of [the party membership] requirement was inconsistent with its section 501(c)(3) status, we accept Fulani's contention that she was a 'significant' candidate in this election. . . . "). To satisfy Article III standing, it was sufficient that she had plausibly alleged that she would have qualified. *See also Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (finding that a would-be intervenor had Article III standing to prosecute the appeal, where "[t]he district court's decision *could have* caused [an] injury [to the intervenor], and [the] appeal *could have* afforded relief that would have redressed that injury") (emphasis added).

The Supreme Court has repeatedly upheld the standing of a plaintiff-competitor who alleges a competitive injury caused by a defendant's unlawful conduct that skewed the market in another competitor's favor, notwithstanding other possible, or even likely, causes for the benefit going to the plaintiff's competition. The Supreme Court has explained that when, among competitors, an allegedly illegal "barrier [] makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier *need not allege that he would have obtained the benefit but for the barrier in order to establish standing*." *Northeastern Fla. Chapter of Associated Gen. Contractors of*

Am. v. City of Jacksonville, Fla., 508 U.S. 656, 666 (1993) (emphasis added); *see also id.* (explaining that an economic competitor meets the standing requirement by plausibly alleging "the inability to compete on an equal footing" without needing to allege the loss of any identifiable piece of business); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (upholding standing, based on loss of chance to compete equally, of white male applicant to program that reserved 16 of 100 spots for minority applicants); *Schulz*, 44 F.3d at 53 (finding that "under the well-established concept of competitors' standing," "the loss of opportunity to compete equally" is sufficient to establish standing) (internal citation and quotation marks omitted).

Plaintiffs satisfied this standard. The complaint adequately pleads a competitive injury of lost patronage directly traceable to the fact that the President's allegedly illegal conduct induces government patrons of the hospitality industry in Washington, D.C. and New York City to patronize Trump establishments in preference to Plaintiffs' establishments.

The district court found, and President Trump argues on appeal, that this case is analogous to *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1974). *See CREW*, 276 F. Supp. 3d at 185-86 ("The Court [in *Simon*] held that [the] alleged injury lacked traceability and redressability because of intervening causal factors. . . . [A]s in *Simon*, it is wholly speculative whether the Hospitality Plaintiffs' loss of business is fairly traceable to Defendant's 'incentives[.]'"). In *Simon*, indigent persons and their organizational representatives challenged an IRS revenue ruling that extended favorable tax treatment to non-profit hospitals that offered

only emergency room services to indigents, rather than offering services to indigents to the extent of the hospital's financial ability, alleging that "by extending tax benefits to such hospitals despite their refusals fully to serve the indigent, the defendants were 'encouraging' the hospitals to deny services." *Simon*, 426 U.S. at 33. This case is not analogous to *Simon*.

In *Simon*, the Court questioned whether the modification of the relevant tax rule actually influenced hospital policymaking regarding the scope of services provided to indigent patients, and therefore held that the plaintiffs had failed to establish a causal connection between the challenged IRS Ruling and the denials of service. Central to the Court's analysis was its skepticism that the previous IRS rule (or its modification) had a material, non-speculative effect on any given hospital's decision to offer non-emergency services to indigents, particularly when the "undetermined financial drain" arising from the costs of supplying such services may have outweighed the benefits of favorable tax treatment. *Id.* at 43. It was therefore "just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid" the costs of providing those services. *Id.* In view of the countervailing cost consideration which potentially offset the effects of the tax rules, and the plaintiff's failure to "establish . . . that [the] hospitals are [categorically] dependent upon [charitable] contributions," the Court reasoned that the causal link between the IRS ruling and the hospitals' decisions to deny services to the plaintiffs was little more than "unadorned speculation." *Id.* at 43-44. Accordingly, the Court held that the plaintiffs had failed to establish that reinstatement

of the previous rule would result in the change in hospital policy that would cure the plaintiffs' injury. *Id.* at 45-46.

Here, by contrast, the Complaint, supported by expert declarations, alleges that Plaintiffs' establishments offer services comparable to those offered at Trump establishments in every relevant respect, save one: Plaintiffs cannot offer government patrons the opportunity to obtain favorable treatment from the President and the Executive branch in governmental decisions. It is eminently plausible that if two establishments provide otherwise comparable services, but one establishment offers an inducement that the other cannot offer, then the inducement will attract at least some patronage that might otherwise have gone to the other establishment. The Complaint contains numerous factual allegations sufficient to support the conclusion that the President's receipt (and invitation) of allegedly illegal emoluments actually influences at least some government customers' purchasing decisions. And unlike in *Simon*, there is no reason to believe that the competitive skew caused by those patrons' desire to gain influence by patronizing the Trump establishments is offset or annulled by some countervailing consideration. *Simon* thus sheds little light on this case.

c. Redressability

We likewise find that Plaintiffs have adequately pleaded the redressability of their alleged injury, an issue that is closely related to the question of causation. When the injury alleged is caused by the illegal conduct, in many instances (at least where continuation of the illegal conduct will continue to cause harm), the cessation of the illegal conduct will be likely to at least diminish

further instance of the injury. Because Plaintiffs have successfully alleged a plausible likelihood that President Trump's conduct caused their injuries, and the injury is ongoing, it logically follows that relief would redress their injury—at least to some extent, which is all that Article III requires. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A plaintiff] need not show that a favorable decision will relieve his *every* injury.") (emphasis in original); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007) (finding redressability is satisfied where "risk of catastrophic harm" could be "reduced *to some extent* if petitioners received the relief they seek") (emphasis added).

The Complaint seeks injunctive relief requiring that the President cease the conduct that allegedly violates the Foreign and Domestic Emoluments Clauses. Plaintiffs have plausibly pleaded that the President's ownership of hospitality businesses that compete with them will induce government patrons of the hospitality industry to favor Trump businesses over those of the Plaintiffs so as to secure favorable governmental action from the President and Executive branch. This plausibly alleges that his cessation of the violation would eliminate the inducement to those patrons to favor his businesses, and would therefore eliminate, or at least diminish, the competitive injury that Plaintiffs suffer. These plausible allegations are sufficient to satisfy Article III's requirement of redressability.

d. The Fourth Circuit's In re Trump Decision and Judge Walker's Dissent

We recognize that our colleague Judge Walker disagrees, and that a panel of the Fourth Circuit has also reached the opposite conclusion in a closely analogous

case, *In re Donald J. Trump*, 928 F.3d 360 (4th Cir. 2019).[9] Judge Walker relies on substantially the same arguments as the Fourth Circuit panel in *In re Trump*. Respectfully, we do not find these arguments persuasive.

As a preliminary note, both opinions seem to be influenced by their perception that these lawsuits are politically motivated. Judge Walker asserts that this case is "deeply political" and emphasizes that "President Trump was democratically elected by the American people . . . with his business holdings and brand prominence in full view." *See infra.* The Fourth Circuit expressed skepticism as to "why [the plaintiffs] came to the court for relief in the first place," implying that their motivation was political and that this cast doubt on the federal court's jurisdiction. *In re Trump*, 928 F.3d at 377; *see also infra* (quoting *In re Trump*). While it is certainly possible that these lawsuits are fueled in part by political motivations, we do not understand the significance of that fact. It is true that a political motivation for a lawsuit, standing alone, is insufficient to confer

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[9] In that case, the District of Columbia and the State of Maryland brought similar claims against the President, alleging violations of the Foreign and Domestic Emoluments Clauses based on factual allegations almost identical to the allegations in this case. *Compare In re Trump*, 928 F.3d at 365-66 *with CREW*, 276 F. Supp. 3d at 182-83. The plaintiffs there argued that they had Article III standing based, *inter alia*, on their "interests in protecting the economic well-being of their residents, who, as competitors of the President, are injured by decreased business, wages, and tips resulting from economic and commercial activity diverted to the President's businesses," as well as based on their "interests as proprietors of businesses that compete with the President's businesses." *In re Trump*, 928 F.3d at 363 (internal quotation marks omitted).

Article III standing. *Cf. Flast v. Cohen*, 392 U.S. 83, 106 (1968) (noting that the "federal court[s] [cannot be used] as a forum in which to air [] generalized grievances about the conduct of government"). But while the existence of a political motivation for a lawsuit does not supply standing, nor does it defeat standing. "Standing under Article III . . . [depends on] an injury [that is] concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (citing *Horne v. Flores*, 557 U.S. 433, 445 (2009)). Whether a lawsuit has political motivations is irrelevant to these determinative issues.

1. Injury-in-Fact

With respect to the "injury-in-fact" requirement, Judge Walker correctly states that to establish an injury through the competitor standing doctrine, a plaintiff must show that she is a "direct competitor" of the defendant and an "actual or imminent increase in competition." *See infra* (citations omitted). As we conclude above, Plaintiffs have clearly met these standards. Judge Walker relies on the Supreme Court's decision in *Already*, 568 U.S. 85, as demonstrating that "competing businesses [do not] have standing to challenge [] unlawful action simply by virtue of their status as a direct competitor." *See infra* (citing *In re Trump*, 928 F.3d at 377).

We readily acknowledge that proposition, but we do not agree that it controls here. In their allegations, Plaintiffs go further than simply alleging that they directly compete with the Trump establishments; they plausibly allege precisely how the President's allegedly

unlawful conduct harms their ability to attract patrons to their establishments. *See, e.g.*, Complaint ¶ 14 ("As a competitor of restaurants located in Defendant's hotels and other properties . . . ROC United has been injured by these payments due to *lost business*. . . . ") (emphasis added); *id.* ¶ 199 ("Officials of foreign states and of the United States and various state and local governments have purchased and will use their government's funds to purchase food and services from one or more restaurants owned by Defendant, instead of from competing restaurants that are members of ROC United."). And as we point out above, *Already* involved very different circumstances; the plaintiffs in that case were unable to plausibly allege that Nike's trademark harmed—or threatened to harm—their business prospects. *See* 568 U.S. at 99.[10]

Judge Walker also "question[s] the expansive scope" of the competitor standing doctrine, and worries that our approach would confer standing, for example, on a restaurant whose competitor illegally obtained a bank loan or a large tax refund and used its ill-gotten proceeds to hire a better chef or to lower its prices, thereby exposing the plaintiff—restaurant to increased competition. *See infra.* Those hypotheticals are far beyond the scope of our ruling. A plaintiff who establishes an

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[10] The Fourth Circuit also criticized the plaintiffs for "rest[ing] on the theory that so long as a plaintiff competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met." *In re Trump*, 928 F.3d at 377. The Fourth Circuit rejected that "boundless theory of standing" based on the Supreme Court's holding in *Already*. *See id.* For the reasons expressed above, we do not believe that *Already* precludes Plaintiffs' theory of standing. *See supra.*

injury-in-fact by alleging direct competition and an "inability to compete [with the defendant] on an equal footing," *City of Jacksonville*, 508 U.S. at 666, must also establish that such injury is "fairly traceable to the defendant's allegedly unlawful conduct" and "likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). Here the connection between the alleged violations of law and Plaintiffs' harm is far more direct than in Judge Walker's hypothetical: It is precisely the President's receipt of allegedly illegal emoluments that constitutes Plaintiffs' competitive injury.

Lastly, Judge Walker seems to draw a rule that the competitor standing doctrine is limited to "three broad categories of cases"—agency cases, election cases, and unfair competition cases—and that this case "fits into none of [them]." *See infra*. He cites no authority for the proposition that the doctrine is limited to these three categories, and we see no reason why it should be. Even if it were, we note that Plaintiffs' theory of competitive injury in this case is structurally identical to the economic reasoning that often supports standing in the unfair competition context. *Id.* (noting that, in unfair competition cases, standing exists when the parties are "direct competitors" based on a presumption that "[s]ales gained by one are thus likely to come at the other's expense") (quoting *TrafficSchool.com, Inc. v. Edriver, Inc.*, 653 F.3d 820, 825 (9th Cir. 2011)).

2. Traceability

With respect to traceability, we agree with Judge Walker that "[u]nder the competitor-standing doctrine, . . . traceability flows readily from a competitive injury" and that "if the violation would necessarily harm

the plaintiff's competitive opportunities, then an unlawful edge to a competitor logically connects to that violation." *See infra* (citations omitted). But we do not understand Judge Walker's conclusion that traceability is lacking here because there are "simply too many variables at play . . . to allow the plaintiffs to rest solely on the bare assertion that the President's acceptance of emoluments has caused them competitive injury." *See infra*. The fact that there are "many different factors [that] influence [government officials'] decision making" does not foreclose Plaintiffs' plausible theory—supported by clear factual allegations—that the President's prior statements and his receipt of allegedly illegal emoluments unduly *influences* some government officials to patronize his establishments, thereby causing a competitive harm to Plaintiffs. *Id.* Judge Walker's suggestion that the existence of alternate explanations for the Plaintiffs' competitive injury defeats traceability would deny Article III standing to plaintiffs alleging antitrust, unfair competition, or trademark infringement claims who seek to enjoin conduct that unduly influences buyers in a marketplace. In each of these categories of cases, there exist "myriad reasons" why a consumer might favor a defendant's product, including, for example, "service, quality, location, price and other factors related to individual preference." *CREW*, 276 F. Supp. 3d. at 186. But these bona fide competitive reasons do not bar a plaintiff from demanding that a court enjoin illegal conduct that skews the marketplace by inserting an additional unlawful competitive advantage.

Similarly, the Fourth Circuit panel found that the *In re Trump* plaintiffs had failed to establish traceability because their "conclusion that government custom-

ers are patronizing the [Trump International] Hotel because the Hotel distributes profits or dividends to the President . . . requires speculation into the subjective motives of independent actors who are not before the court." 928 F.3d at 375. Such speculation, the court held, "undermin[es] a finding of causation." *Id.*[11] We respectfully disagree. That Plaintiffs' theory of harm results from decisions of third parties does not preclude finding the cognizable link between the challenged action and the alleged harm that Article III requires. *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.) ("It is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third parties."); *see also Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (holding that plaintiffs had Article III standing where their "theory of standing . . . relies [] on the predictable effect of Government action on the decisions of third parties") (citing, *inter alia*, *Block*, 793 F.2d at 1309)); *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997) (warning against "wrongly equat[ing] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation"). Virtually every suit for trademark infringement, unfair competition, or violation of the antitrust laws involves harm that results from the decisions of third-party customers. *See TrafficSchool*, 653 F.3d at 825 (noting that

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[11] The President makes the same argument on appeal in this case. *See* Appellee's Br. at 15-17 ("[P]laintiffs cannot establish traceability and redressability where the alleged injury-in-fact depends on the decisions of independent third parties whose actions the court can neither predict nor control.").

"[i]n a false advertising suit, a plaintiff establishes Article III injury if 'some consumers who bought the defendant['s] product under [a] mistaken belief' fostered by the defendant 'would have otherwise bought the plaintiff['s] product," and that such an injury may be proven by the "probable market behavior" of independent third parties) (quoting *Joint Stock Soc'y v. UDV N. Am., Inc.*, 266 F.3d 164, 177 (3d Cir. 2001); *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993)).

When the "injury hinges on the reactions of [] third parties [to the challenged conduct]," the plaintiff "need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018). For example, "common sense and basic economics," along with admissions from the third parties in question that the challenged action would "affect [their] business decisions," are generally enough to establish the requisite third-party causation. *Id.* at 105 (internal quotation marks and citations omitted).

Accordingly, to establish traceability, Plaintiffs need only establish a substantial likelihood that the President's receipt of emoluments—and his statements and actions impliedly soliciting such emoluments, *see, e.g.*, Complaint ¶¶ 52, 96—has some favorable effect on government officials' demand for the Trump establishments (and, by extension, some unfavorable effect on their demand for Plaintiffs' competing properties). Plaintiffs need not prove that *every* government official who chooses a Trump establishment does so to curry favor with the President by enriching him, nor need Plaintiffs prove that a particular government official chose or will

choose a Trump establishment for the sole or even the primary reason of earning the President's favor. *Dep't of Commerce*, 139 S. Ct. at 2566 (holding that "traceability is satisfied" when plaintiffs established that the third-party action leading to the alleged harm was "likely attributable *at least in part*" to the challenged action, noting that "Article III requires no more than *de facto* causality") (emphasis added) (internal quotation marks omitted). Plaintiffs need only plausibly allege that the President's receipt of emoluments generates an unlawful competitive advantage for the Trump establishments.

The allegations in the Complaint are sufficient to meet this burden. Plaintiffs point to statements by foreign diplomats that they and others in their position have been or will be motivated to choose Trump establishments to earn the President's favor, or to avoid his disfavor. *See, e.g.,* Complaint ¶¶ 62, 74. Moreover, the President's statements to the effect that he favors governments that spend money at his establishments increase the likelihood that government patrons will choose Trump establishments in the hopes of winning influence. *See, e.g., id.* ¶ 96 (alleging that the President publicly stated that he "very much" likes and "get[s] along great with" foreign officials who do business with him). Without the benefit of discovery, the Plaintiffs need not go further to establish causation for the purposes of Article III.

3. Redressability

Both Judge Walker's dissent and the Fourth Circuit's *In re Trump* opinion deny that any injunctive relief can be fashioned that would help Plaintiffs' predicament. *See In re Trump*, 928 F.3d at 376; *infra* ("[T]here

is no allegation that [the requested relief] would cause diplomatic patrons to book at other establishments."). The Fourth Circuit expressed the view that "even if government officials were patronizing [the President's] Hotel to curry [his] favor, there is no reason to conclude that they would cease doing so were the President enjoined from receiving income from the Hotel . . . [given that] the Hotel would still be publicly associated with the President, would still bear his name, and would still financially benefit members of his family." *In re Trump*, 928 F.3d at 376. Accordingly, the Fourth Circuit found that "the likelihood that an injunction . . . would not cause government officials to cease patronizing the Hotel demonstrates a lack of redressability." *Id.*

Again, we disagree. Where customers favor a defendant's product or service over that of a plaintiff because of that defendant's violation of law, which is often the case in trademark infringement, unfair competition, or antitrust cases, the mere possibility that customers might continue to favor the defendant's product or service after a court enjoins the violation does not defeat Article III standing. If it did, such claims could never be heard before Article III courts.

Plaintiffs' requested remedy need only remove from the equation the *improper* competitive advantage arising from the possibility that, by patronizing Trump establishments, government officials can earn favor from the President. "[C]ommon sense and basic economics" indicate that the elimination of any illegal competitive advantage that motivated government officials to give more business to the Trump establishments will cause

at least some to cease to give preference to those businesses, thereby redressing the claimed injury. *Nat. Res. Def. Council*, 894 F.3d at 104.

Moreover, the Fourth Circuit's suggestion that, notwithstanding a court's grant of the requested relief, some government officials would likely continue to patronize Trump establishments to curry the President's favor is besides the point. *In re Trump*, 928 F.3d at 376. The Supreme Court made clear in *Mass. v. EPA* that a remedy that "will not by itself reverse" the alleged injury would still satisfy the redressability requirement if it "reduced [that injury] to some extent." 549 U.S. at 525-26 (emphasis omitted); *see also Larson*, 456 U.S. at 243 n.15 ("[A plaintiff] need not show that a favorable decision will relieve his *every* injury.").

We see no justification for the assertion of Judge Walker and the Fourth Circuit that no injunction can be fashioned that would diminish the plaintiffs' injury. *See In re Trump*, 928 F.3d 376-77; *infra*. Injunctive relief could be fashioned along many different lines that would adequately reduce the incentive for government officials to patronize Trump establishments in the hope of currying favor with the President.[12]

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[12] For example, a court could bar the Trump establishments from selling services to foreign and domestic governments during the President's tenure in office, which would fully redress Plaintiffs' injury. A court could require the President to establish a blind trust or otherwise prevent him from receiving information about government patronage of his establishments, which could indicate to government officials that patronizing those establishments is no longer an effective way to earn Presidential favor. A court could require public disclosure of the President's private business dealings with government officials through the Trump establishments, which may discourage

4. Relevance of the Purpose of the Emoluments Clauses

Judge Walker also concludes that the "Emoluments Clauses . . . were never designed to, and nor do they, directly regulate the marketplace or the market player as it functions in the marketplace," and draws the inference that a plaintiff who seeks to enjoin a violation of the Emoluments Clauses cannot establish standing to sue if that plaintiff's injury is competitive in nature. *See infra.* This appears to confuse the question whether the Complaint sufficiently states a cause of action with the question of Article III standing. In *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-28 (2014), Justice Scalia's majority opinion clarified that the question "whether [a plaintiff] has a cause of action" is separate and distinct from the issue of whether the case "presents a case or controversy that is properly within federal courts' Article III jurisdiction." Neither this court, nor the Supreme Court (nor any other) has ruled that a competitive injury-in-fact, fairly traceable to the challenged action and likely redressable by the requested relief, fails to confer Article III standing unless the claims are based on a law specifically designed to regulate competition. Consideration of the purposes of the clauses may be relevant to whether the Complaint states an actionable claim, or whether a particular plaintiff is within the law's "zone of interests," *see infra*, but are not relevant to whether the Plaintiffs have met the three elements that

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Presidential action that appears to improperly reward such patronage. *Cf. Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (noting the tendency of disclosure requirements to "avoid the appearance of corruption by exposing [information] to the light of publicity").

form the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560.

We therefore conclude that Plaintiffs have satisfied the Article III requirements of traceability and redressability.

ii. Zone of Interests

The district court also erred in dismissing the Complaint on the theory that Plaintiffs' injuries fall outside the "zone of interests" of the Emoluments Clauses. This is for two reasons. First, the zone of interests test does not, as the district court believed, implicate the court's subject matter jurisdiction. Further, the Supreme Court's precedents make clear that Plaintiffs' injuries are not outside the zone of interests of the Emoluments Clauses.

Turning first to the question whether zone of interests is a test of Article III standing, the Supreme Court has recently clarified that it is not. In *Lexmark Int'l Inc. v. Static Control Components*, the Supreme Court, while acknowledging that past decisions had characterized the zone of interests test as part of a "'prudential' branch of standing," reconsidered the question and clarified both that the "prudential" label is a misnomer and that the test does not implicate Article III standing. 572 U.S. 118, 126-27 (2014). Rather, the Court explained that the test asks whether the plaintiff "has a cause of action under the [law]" on the basis of the facts alleged. *Id.* at 128. The Court emphasized that the test is not "jurisdictional" because "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction." *Id.* at 128 n.4 (internal quotation marks omitted). In *Bank of America v. City of Miami*,

137 S. Ct. 1296 (2017), the Court reaffirmed that the zone of interests test asks whether the complaint states an actionable claim under a statute (and not whether the plaintiff has standing and the court has subject matter jurisdiction). The *City of Miami* majority reiterated that the Article III standing requirements are injury, causation, and redressability, and reinforced *Lexmark*'s essential point that the zone of interests question is "whether the statute grants the plaintiff the cause of action that he asserts." *Id.* at 1302.

Accordingly, while it had previously been appropriate to consider whether plaintiffs fall within the zone of interests in deciding whether a plaintiff has standing and the court has subject matter jurisdiction, the Supreme Court has unambiguously rejected that approach. The district court thus misconstrued the nature of the zone of interests doctrine.

The district court's analysis erred on the merits as well. Every Supreme Court decision construing the zone of interests test as it pertains to competitors' suits supports the view that Plaintiffs satisfy the zone of interests test. Without exception, the Court has held that a plaintiff who sues to enforce a law that limits the activity of a competitor satisfies the zone of interests test even though the limiting law was not motivated by an intention to protect entities such as plaintiffs from competition. *See Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 495-96 (1998) (*NCUA*) ("[Defendants argue] that there is no evidence that Congress . . . was at all concerned with the competitive interests of commercial banks [such as plaintiffs], or indeed at all concerned with competition. . . . The difficulty with this argument is that similar

arguments were made unsuccessfully in [every case construing the zone of interests of a statute vis-à-vis a plaintiff competitor]."). After *Lexmark*, consistent with the longstanding view that the test is "not meant to be especially demanding," *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987), the Court reaffirmed that plaintiffs who allege secondary economic injuries due to conduct that violates a limiting law can satisfy the zone of interests test, notwithstanding that the statute violated was not intended to protect against the type of injury suffered by the plaintiffs. *City of Miami*, 137 S. Ct. at 1304-05 (finding that a municipality fell within the zone of interests of the Fair Housing Act where it alleges an injury due to discriminatory lending causing an increase in foreclosures, which allegedly cause decreased tax revenues and increased expenditures to remedy blight).

The line of cases supporting Plaintiffs' satisfaction of the zone of interests test stretches back to *Ass'n of Data Processing Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (*Data Processing*). In *Data Processing*, plaintiffs were sellers of data-processing services. *Id.* at 151. They sued to set aside a ruling of the Comptroller of the Currency, which allowed national banks to offer data-processing services to other banks and bank customers. *Id.* The complaint, alleging a violation of the Administrative Procedure Act, asserted that the Comptroller's rule inflicted a competitive injury on the plaintiffs by allowing banks to exceed the "legitimate scope of [bank] activities," as dictated by the National Bank Act and § 4 of the Bank Service Corporation Act. *Id.* at 157; *see also id.* at 155 ("No bank service corporation may engage in any activity other than the performance of bank services for banks."). The Court did not even consider whether the purpose of the statutory restriction was to

protect competitors. Despite noting that the statutes did not "in terms protect a specified group" from competition, the Court found the zone of interests test satisfied because "§ 4 arguably brings a competitor within the zone of interests protected by it." *Id.* at 156-57. The Court reasoned that the "general policy [of the statute]" of limiting banks' activities "is apparent" and permitted the claim to proceed because plaintiffs' "[financial] interests are directly affected by a broad or narrow interpretation of the Acts." *Id.* at 157. The Court concluded that plaintiffs were within the zone of interests because a party alleging a financial injury is a "reliable private attorney general to litigate the issues of the public interest. . . . " *Id.* at 154; *see also Arnold Tours, Inc. v. Camp*, 400 U.S. 45, 46 (1971) (clarifying that "*Data Processing* . . . did not rely on any legislative history showing that Congress desired to protect data processors" and finding plaintiff travel agencies who competed with banks are "arguably . . . within the zone of interests" of a limiting law despite the fact that Congress had not contemplated protecting their competitive interests) (internal quotation marks omitted).

The Court's next major zone of interests case, *Investment Company Institute v. Camp*, 401 U.S. 617 (1971) (*ICI*), is especially pertinent because the purpose of the statute involved there was similar in relevant respects to that of the Emoluments Clauses. The plaintiffs were investment companies that sought to enjoin a regulation promulgated by the Comptroller of the Currency which permitted banks to operate mutual funds. *Id.* at 618-19. Plaintiffs argued that the ruling violated § 21 of the Glass-Steagall Act, which made it unlawful "[f]or any person, firm, [or] corporation . . . engaged in the

business of issuing . . . securities, to engage at the same time to any extent whatever in the business of receiving deposits." 12 U.S.C. § 378(a). Discussing the purpose of Glass-Steagall, the Court concluded that "Congress [] had in mind . . . [the] hazards that arise when a commercial bank *goes beyond the business of acting as fiduciary* or managing agent and enters the investment banking business . . . by establishing an affiliate to hold and sell particular investments." *ICI*, 401 U.S. at 630 (emphasis added). The Court found that Congress's purpose in enacting § 21 was to prevent corruption of the banking function and impairment of the ability of banks to function impartially. *Id.* at 630-34; *cf. CREW*, 276 F. Supp. 3d at 187 (describing the purpose of the Emoluments Clauses as protecting uncorrupted, impartial, and independent governance). Notwithstanding that the intention of § 21 was to protect systemic integrity and was not even arguably intended to benefit competitors, the Court nonetheless found that the investment company plaintiffs were within its zone of interests. *ICI*, 401 U.S. at 621 ("There can be no real question . . . of the [plaintiff investment companies'] standing in the light of the *Data Processing* case."). The dissent argued that plaintiffs fell outside the zone of interests because "the Glass-Steagall Act [did not] evidence *any congressional concern for . . . freedom from competition*." *Id.* at 640 (Harlan, J., dissenting) (emphasis added). The majority of the Court rejected that argument without discussion. *See also Clarke*, 479 U.S. at 399-400 (1987) ("[T]here need be *no indication* of congressional purpose to benefit the would-be plaintiff.") (emphasis added).

NCUA also recognized competitor injury as within the zone of interests of the law that was allegedly violated, notwithstanding that the law was not intended to protect the plaintiffs in their competitor role. 522 U.S. 479. The plaintiffs were banks that challenged a revision in the interpretation of § 109 of the Federal Credit Union Act ("FCUA") by its administering agency, the National Credit Union Administration ("NCUA"). *Id.* at 483. Section 109 restricted federal credit union membership to "groups" that had a "common bond of occupation or association." 12 U.S.C. § 1759(b). The revision that the plaintiffs challenged extended membership eligibility to groups that lacked a single common bond between all members, if the credit union comprised multiple distinct employer sub-groups within which all members had a common bond. *NCUA*, 522 U.S. at 484. The plaintiffs contended that the NCUA's revised interpretation was contrary to the requirements of the Act. *Id.* at 483. The defendants sought dismissal of the suit on the ground that the competitive injury alleged by the plaintiff banks was outside the zone of interests sought to be protected by Congress in enacting the FCUA. The Supreme Court rejected defendants' argument, explaining that "[a]s competitors of federal credit unions, [the plaintiff banks] certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base." *Id.* at 493-94. In response to defendants' argument that the plaintiffs' injuries were outside the FCUA's zone of interests because "banks were simply not in the picture" when the relevant statute was drafted, the Court dismissed it as "irrelevant." *Id.* at 496, 499.

As stated above, the Supreme Court recently reaffirmed substantially the same position post-*Lexmark*. In *City of Miami*, the Court found that a plaintiff alleging an economic injury due to allegedly unlawful conduct was within the zone of interests of the law that regulated the conduct in question. 137 S. Ct. at 1304-05. The City had brought an action against housing lenders, alleging they had violated the Fair Housing Act ("FHA") by issuing risky mortgages on unfavorable terms to minority customers. *Id.* at 1301. The City claimed to have suffered economic injury from lost tax revenue and increased municipal expenses due to higher incidence of mortgage foreclosure and increased demand for services to remedy the resulting urban blight. *Id.* at 1302. The district court had dismissed the suit under Rule 12(b)(6) for failure to state a claim on the ground that "the harms alleged, being economic and not discriminatory, fell outside the zone of interests the FHA protects." *Id.* The Supreme Court rejected that position. It ruled that the City's "financial injuries fall within the zone of interests that the FHA protects." *Id.* at 1304. The Supreme Court reasoned that, notwithstanding the absence of any indication that the FHA was intended to protect municipal budgets, it was "highly relevant" that the lenders' conduct allegedly "diminish[ed] the City's property-tax revenue and increas[ed] demand for municipal services." *Id.* Thus, consistent with the longstanding view that a plaintiff's economic injury usually makes her a "reliable private attorney general to litigate the issues of the public interest," *Data Processing*, 397 U.S. at 154, the Supreme Court found the City's economic injuries to be within the zone of interests of the FHA. *See also Bennett*, 520 U.S. at 161 (finding that plaintiff ranchers who asserted

an economic injury from a new water management plan adopted by the Secretary of the Interior fell within the zone of interests of the Endangered Species Act "notwithstanding that the interests they seek to vindicate are *economic rather than environmental*") (emphasis added); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1075 (D.C. Cir. 1998) ("[The zone of interests] analysis focuses . . . on *those who in practice can be expected to police the interests* that the [law] protects.") (emphasis added).

While most cases addressing whether the plaintiff's injury is outside the zone of interests of the law alleged to be violated have concerned the zone of interests of a *statute*, and this suit alleges violations of the *Constitution*, we can see no reason why the reasoning of the precedents reviewed above are not equally applicable here. The one instance in which the Supreme Court has ruled on an argument resembling a zone of interests challenge to a Constitutional provision is consistent with the above precedents and suggests that our Plaintiffs satisfy the test. In *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), Wyoming brought suit against Oklahoma within the original jurisdiction of the Supreme Court, alleging that Oklahoma violated the Dormant Commerce Clause by passing a statute requiring that 10% of the coal used by coal-fired Oklahoma producers of electric power be mined in Oklahoma. Wyoming did not mine or sell coal. *Id.* at 442. The only injury Wyoming claimed as a result of the Oklahoma statue was a diminution in its tax revenues because Wyoming coal producers, which paid taxes to Wyoming, suffered diminution in the volume of coal they sold to Oklahoma producers of electric power. *Id.* at 447-48. Oklahoma sought to have the case dismissed on the ground that the tax loss alleged

by Wyoming was too remote from the Dormant Commerce Clause's purposes as well as too insignificant. *See id.* at 448, 455. The Court rejected Oklahoma's arguments and granted summary judgment in favor of Wyoming. *Id.* at 461.

The Supreme Court ruled that Wyoming's loss of tax revenue caused by Oklahoma's alleged violation of the Dormant Commerce Clause was a proper basis for Wyoming's suit, notwithstanding that its loss of tax revenue was remote from the purposes of the Dormant Commerce Clause. *See id.* at 448-50. The majority did not explicitly discuss the zone of interests test, but in upholding Wyoming's standing, it rejected the argument in Justice Scalia's dissent that Wyoming fell outside the zone of interests.[13] To the extent it considered whether the alleged injury was too remote from the activity proscribed by the Dormant Commerce Clause, it did so as part of its analysis of the injury and causation requirements of Article III. *Id.* at 448-49 (concluding that the alleged diminution in revenues was "directly linked" to the allegedly unlawful tax); *see also Bond v. United States*, 564 U.S. 211, 218 (2011) (explaining, in holding that an individual prosecuted under federal law has

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[13] Puzzlingly, the district court cited a passage from Justice Scalia's dissenting opinion in *Wyoming* seemingly as though it were the holding of the case and without recognizing that the Court's majority opinion implicitly rejected Justice Scalia's argument. Justice Scalia wrote in his dissent that the test is "*more* strictly applied when a plaintiff is proceeding under a constitutional . . . provision instead of the generous review provisions of the APA." *Wyoming*, 502 U.S. at 469 (Scalia, J., dissenting) (emphasis in original). The majority did not explicitly discuss this argument, but in upholding Wyoming's standing, it evidently rejected Justice Scalia's contention.

standing to bring a Tenth Amendment claim, that "[i]f . . . the person alleging injury is remote from the zone of interests a [law] protects, whether there is a legal injury at all and whether the particular litigant is one who may assert it can involve similar inquiries"); *INS v. Chadha*, 462 U.S. 919, 935-36 (1983) (holding that individual may challenge a "legislative veto" on separation-of-powers grounds).

Thus, while the district court may be correct that "[n]othing in the text or history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition[,]" *CREW*, 276 F. Supp. 3d at 187, these precedents make clear that the zone of interests test does not require the plaintiff to be an intended beneficiary of the law in question. Plaintiffs who are injured by the defendant's alleged violation of a limiting law may sue to enforce the limitation under the longstanding zone of interests test the Court has articulated.

iii. "Prudential Considerations"—Political Question and Ripeness

Plaintiffs also challenge the district court's dismissal of their Foreign Emoluments Clause claim on two further grounds: (i) that it presents a non-justiciable political question, and (ii) that the issues it raises are not ripe for adjudication. The district court described these as "prudential reasons" for dismissing the claim. *CREW*, 276 F. Supp. 3d at 193-95. These grounds were not argued by the President in his motion to dismiss, and

the Department of Justice, acting as counsel to the President, does not defend them in this appeal.[14] We do not find the district court's reasoning persuasive.

For both rulings, the district court relied on the fact that the Foreign Emoluments Clause bars the receipt of emoluments "without the Consent of Congress[.]" U.S. Const, art. I, § 9, cl. 8. For its non-justiciability ruling, the court reasoned that, as Congress is "the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, [the President's] conduct unlawfully infringes on that power." *CREW*, 276 F. Supp. 3d at 193. According to the district court's reasoning, the courts can never adjudicate whether the Clause has been violated because a suit alleging such a violation will always present a non-justiciable political question. We respectfully disagree and find Plaintiffs' arguments in rebuttal more persuasive.

The prohibition stated in the constitutional text renders the President's receipt of "emoluments" unlawful, unless Congress consents to it. In the undisputed absence of Congressional consent, the President has violated this provision of the Constitution, if, as charged by the Complaint, he has accepted what the Constitution describes as "emoluments." The federal courts have the responsibility to resolve "Cases and Controversies" arising under the Constitution and laws of the United

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[14] Notwithstanding that the President neither sought nor defends these aspects of the district court's ruling, we discuss them because of the obligation of federal courts to consider whether they have subject matter jurisdiction to adjudicate a dispute. *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994).

States. That responsibility entails finding the facts and interpreting the Constitution and laws. It is not affected by the Constitution's grant of authority to Congress to authorize the President to receive emoluments where Congress has not exercised that authority. The mere possibility that Congress *might* grant consent does not render the dispute non-justiciable. The district court's reasoning treated the Clause's authorization to Congress as if it said, "Congress alone shall have the authority to determine whether the President acts in violation of this Clause." It says nothing like that.

Furthermore, while challenges to complaints alleging the unconstitutionality of conduct that the Constitution gives Congress the power to authorize are relatively infrequent, they are not unprecedented. When such challenges have arisen, the federal courts, including the Supreme Court, have adjudicated them. *See, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994) (Dormant Commerce Clause); *Cuyler v. Adams*, 449 U.S. 433 (1981) (Compact Clause).

The district court also concluded that the dispute was not ripe for review. It reached that conclusion in reliance on the prospect of future Congressional action and on the reasoning of Justice Powell's concurrence in the Supreme Court's order of dismissal in *Goldwater v. Carter*, 444 U.S. 996 (1979).

Goldwater was a dispute over the Constitution's allocation of governmental power between two of the branches of our federal government. President Carter, in the exercise of his constitutional authority to conduct the foreign relations of the United States, and coincident with his recognition of the People's Republic of China as the "sole government of China," announced an

intention to abrogate a mutual defense treaty made in a previous administration with the Taiwanese government of the "Republic of China." *Goldwater v. Carter*, 617 F.2d 697, 700-01 (D.C. Cir. 1979), *vacated by* 444 U.S. 996. The Constitution empowers the President to make treaties and requires Senatorial consent before the treaties become effective; however, it says nothing about whether Senatorial consent is required to abrogate a treaty. Individual Members of Congress, who disagreed with President Carter's decision to abrogate the treaty, brought suit for declaratory and injunctive relief, contending that the President lacked authority to abrogate the treaty unilaterally without congressional consent.

Four Justices, through Justice Rehnquist's concurrence accompanying an order granting certiorari, vacating the judgment below, and remanding, voted to dismiss the suit on the ground that it raised a non-justiciable political question. *Goldwater,* 444 U.S. at 1002 (Rehnquist, J., concurring). Justice Rehnquist explained his view that the suit was non-justiciable "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President." *Id.*

The main thrust of Justice Powell's concurrence was to disagree with Justice Rehnquist's conclusion that such a dispute over the Constitution's allocation of governmental power is nonjusticiable. *Id.* at 996 (Powell, J., concurring). Justice Powell pointed to the need for a Supreme Court decision to break an otherwise paralyzing governmental stalemate. *Id.* Nonetheless, Justice Powell agreed with the decision to dismiss the

action—not because it was nonjusticiable, but rather because it was unripe, as the disputing branches had not yet reached the "impasse" that would justify their resorting to the courts to interpret the Constitution and break the stalemate. He emphasized the importance of not "encourag[ing] small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." *Id.*

The differences between this case and *Goldwater* are such that *Goldwater* does not provide useful guidance for resolving this dispute. The *Goldwater* litigation arose from a dispute over the allocation of Constitutional powers to two competing branches of government. The Congressional plaintiffs took the position that, by unilaterally abrogating a treaty, which had become effective by virtue of the Senate's exercise of consent, the President was acting illegally and in so doing, was undermining the Constitutional authority of the Senate. This interbranch clash in claims of governmental authority seemed to Justice Powell to offer a likelihood of ripening into either a political resolution or a need for adjudication to break a governmental impasse. The circumstances of this case are very different. There is no interbranch clash in claims of Constitutional authority in this case.[15] The Presidential conduct that is challenged by this suit is the President's private conduct. There is no claim on the part of the Congress, or any of its members, that the President's private conduct of his

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[15] Members of Congress have brought a separate action against President Trump, alleging violations of the Foreign Emoluments Clause, which is currently pending. *Blumenthal v. Trump*, 382 F. Supp. 3d 77 (D.D.C. 2019).

business affairs usurps power allocated to Congress by the Constitution. While the Constitution empowers Congress to legitimize a President's otherwise unlawful conduct, the President's conduct absent Congressional authorization does not usurp or challenge a Congressional prerogative. In fact, it is not members of Congress who are complaining. In this circumstance, in which Congress's defense of its Constitutional power is not at issue, there is no reason to expect or await either the impasse or the political resolution that Justice Powell saw as the justification for waiting in *Goldwater*. If the challenged conduct falls within what the Constitution describes as the receipt of "emoluments," the conduct is prohibited by the Constitution in the absence of congressional consent—and unlike in *Goldwater*, it is likely simply to continue to occur without a court ruling. This would not be as the result of a "political resolution," but simply because of the absence of an adjudicator to tell the President whether his conduct is, or is not, permitted by the Constitution he serves.

We therefore think the district court misconstrued Justice Powell's *Goldwater* concurrence in believing that it provided "particularly instructive" guidelines for the resolution of this case. *CREW*, 276 F. Supp. 3d at 194. Justice Powell's reasoning does not justify deferring adjudication to await a ripening that will not happen.

C. CONCLUSION

For the foregoing reasons, the judgment of the district court is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

JOHN M. WALKER, JR., *Circuit Judge*, dissenting:

I would affirm the district court. The remaining plaintiffs in this case have failed to specify that any actual injury was caused by the President's alleged violation of the Emoluments Clauses, or how this Court could redress such an injury. None of this matters, they say, because the competitor standing doctrine allows us to ignore these pleading failures and to find standing anyway. I disagree and would hold that the complaint fails to sufficiently allege Article III standing.

Invoking constitutional provisions never directly litigated in the 230-year history of our Republic prior to the Trump presidency, the plaintiffs in this case claim that the President has inflicted competitive injury on their businesses by maintaining ownership over the Trump Organization's high-end hotels and restaurants and accepting the business of foreign and state official clientele in contravention of both the Foreign Emoluments Clause[1] and the Domestic Emoluments Clause.[2] The plaintiffs, who are owners of other high-end hotels and restaurants in New York City and Washington, D.C.,[3]

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[1] "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. 1, § 9, cl. 8.

[2] "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7.

[3] Only two plaintiffs remain in the appeal: Eric Goode and ROC United. Goode is the owner of "several celebrated hotels, restau-

allege that their businesses have suffered because foreign and state government officials want what only the Trump-owned establishments can offer: "access to, influence on, and the good will of the President of the United States."[4]

As this case comes to us now, it is about constitutional standing, not the precise meaning of the Emoluments Clauses. The meaning of the Clauses may be addressed elsewhere in due course, but even in their unresolved state, a few (largely uncontroversial) observations about the Clauses are in order. First, nothing in the plain text of either Emoluments Clause addresses competition in the marketplace or the conduct of business competitors generally. And neither can the Clauses be considered sweeping anti-corruption provisions. Facially, the Foreign Emoluments Clause concerns only

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rants, bars, and event spaces in New York," which include the Maritime Hotel, the Bowery Hotel, the Ludlow Hotel, the Jane Hotel, and the Park, Waverly Inn, and Gemma restaurants. Compl. ¶ 228. ROC United is a nonprofit organization that advocates for wages and working conditions for restaurant workers; it is made up of restaurant members and restaurant-employee members. **[A66]** The complaint alleges that several of ROC United's restaurant members compete directly with the Trump International Hotel & Tower in New York, the Trump International Hotel Washington, D.C., and the restaurants inside the Trump Tower and Trump World Tower located in New York City. **[A67]** A declaration from an industry expert submitted by the plaintiffs names several restaurants associated with ROC United that compete directly with Trump-owned properties. In New York City, these establishments include: The Modern, Gramercy Tavern, Craft, and Riverpark. **[A312-15]** In Washington, D.C., the ROC United competitor restaurants are: the Riggsby, Minibar, Jaleo, Casolare Ristorante, and Zaytinya. **[A319-22]**

[4] Compl. ¶ 150.

the receipt of "emoluments" from foreign governments or their officials by those "holding any Office of Profit or Trust" on behalf of the United States and the Domestic Emoluments Clause only prohibits the President from receiving "emoluments" beyond the salary of the office from "the United States, or any or them." Neither Clause addresses the receipt of benefits (whether or not they are "emoluments") by the President from members of the public, private businesses, or private parties who seek government favors.[5] Thus neither competition nor ordinary corruption are targeted by the Clauses or lie anywhere near the heart of this case.

What is meant by the term "emolument" in the Emoluments Clauses has yet to be determined by any federal court. Regardless of whether the Emoluments Clauses encompass, as the plaintiffs have urged, anything of value,[6] or whether the Clauses capture a narrower range of exchanges,[7] the text and historical meaning plainly

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[5] *See* U.S. Const. art. I, § 9, cl. 8; art. II, § 1, cl. 7.

[6] *See* Appellants' Br. at 6-7; *see also* Norman L. Eisen, Richard Painter & Laurence H. Tribe, Brookings, *The Emoluments Clause: Its Text, Meaning, and Application to Donald J. Trump* 11 (Dec. 16, 2016), https://www.brookings.edu/wp-content/uploads/2016/12/gs_121616_emoluments-clause1.pdf (arguing that the Emoluments Clause warrants the "broadest possible construction to the payments it encompasses" and thus "unquestionably reaches any situation in which a federal officeholder receives money, items of value, or services from a foreign state"); Zephyr Teachout, Opinion, *Trump's Foreign Business Ties May Violate the Constitution*, N.Y. Times, Nov. 17, 2016, https://www.nytimes.com/roomfordebate/2016/11/17/would-trumps-foreign-business-ties-be-constitutional/trumps-foreign-business-ties-may-violate-the-constitution.

[7] *See* Amandeep S. Grewel, *The Foreign Emoluments Clause and the Chief Executive*, 102 Minn. L. Rev. 639, 641-42 (2017) (arguing

do not evidence concern for protecting fair competition in the marketplace.

Of course, none of these observations foreclose the possibility (however slim) that parties may pursue a private right of action (should such a right be recognized) to remedy commercial harms wrought by violations of the Emoluments Clauses or exclude the prospect that the Clauses as applied to a particular case could somehow affect market competition. Neither clause on its face, however, gives any indication that it is concerned with maintaining competition, or that it protects a right enforceable in the manner the plaintiffs have chosen to pursue.

Finally, this case is deeply political and thus finds itself in an area where federal courts ought to tread lightly. President Trump was democratically elected by the American people—and he was elected with his business holdings and brand prominence in full view. What's more, it is evident from the text of the Emoluments Clauses that they pertain to questions of separation of powers and, in particular, the relationship between the President and the Congress. Whether the courts should properly play any role pertaining to that

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that the Foreign Emoluments Clause covers only "office-related compensation"); *see also* Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 Ga. L. Rev. 1 (2017) (arguing that "emolument[s] in the Constitution meant compensation with financial value, received by reason of public office"); Eugene Kontorovich, Opinion, *Did George Washington Take 'Emoluments'?*, Wall St. J., Apr. 17, 2017, http://www.wsj.com/articles/did-george-washington-take-emoluments-1492123033 (arguing that George's Washington's private business dealings while in office cast doubt on whether President Trump's business holdings violate the Foreign Emoluments Clause).

relationship in the context of the Clauses will have to be determined in the future.

I.

Whatever the resolution of these various background questions, only one issue is before us now: have the plaintiffs sufficiently alleged constitutional standing to challenge the President's alleged violations of the Emoluments Clauses? The tripartite test for standing under Article III is well known: "an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[8] A plaintiff's obligation to meet this test is an immovable feature of our constitutional structure; constitutional standing is a "bedrock requirement" and "an irreducible minimum" without which there is no case or controversy under Article III of the Constitution.[9] And, the standing inquiry is "especially rigorous" when the dispute implicates, as it does here, the separation of powers.[10]

The plaintiffs, as the party invoking federal jurisdiction, bear the burden of establishing constitutional

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[8] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal quotation marks omitted) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

[9] *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 472 (1982); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 492-93 (2009) (articulating that Article III's "Cases" and "Controversies" requirement is a "fundamental limitation" and is "founded in concern about the proper—and properly limited—role of courts in a democratic society" (internal quotation marks and citations omitted)).

[10] *Clapper*, 568 U.S. at 408 (internal quotation marks omitted).

standing.[11] At the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element."[12] The "reviewing court[] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[13]

Here the pleadings do not particularize any direct injury actually caused by violations of the Emoluments Clauses, much less how such injury might actually be redressed by the courts. Rather, the plaintiffs (and the majority) rely entirely on a shortcut known as the competitor standing doctrine. This doctrine allows a competitor plaintiff the presumption of injury in fact, traceability, and redressability when the plaintiff is almost sure to suffer a competitive injury as a matter of "economic logic."[14]

The question of whether the competitor standing doctrine finds any traction in private suits brought under the Emoluments Clauses was recently addressed in *In re Donald J. Trump* by the Fourth Circuit, the first circuit to do so.[15] In that case, the District of Columbia and the State of Maryland sued the President alleging that he violated the Emoluments Clauses and that, among other injuries, those violations harmed their proprietary interests as businesses competing with the

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[11] *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016).

[12] *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

[13] *Warth*, 422 U.S. at 501.

[14] *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008).

[15] *In re Donald J. Trump*, 928 F.3d 360, 363, 366 (4th Cir. 2019).

Trump Organization.[16] The Fourth Circuit held, correctly in my view, that the plaintiffs could not invoke the competitor standing doctrine to achieve Article III standing.[17]

Injury in fact. The competitor standing doctrine "relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors."[18] The doctrine allows plaintiffs to proceed if the economically logical cause and effect between a government action and increased competition is strong enough to support an inference of injury in fact to the competitor, "even though empirical analysis might conceivably have provided a higher level of certainty."[19] Of course, this doctrinal exception does not excuse the plaintiff from satisfying all three Article III standing requirements; all it does is exempt the plaintiff from showing an actual or imminent injury when the alleged harm arises in a market context where the actual injury may be difficult to demonstrate but is almost sure to occur.[20] It bears repeating that the plaintiffs here rely on the competitor standing doctrine because they cannot show (and have not alleged) that they have suffered any particularized injury caused by the violations they allege.

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[16] *Id.* at 363.

[17] *Id.* at 377.

[18] *Canadian Lumber*, 517 F.3d at 1332 (citing *Clinton v. City of New York*, 524 U.S. 417, 433 (1998)).

[19] *Canadian Lumber*, 517 F.3d at 1333.

[20] *See, e.g., El Paso Nat. Gas Co. v. F.E.R.C*, 50 F.3d 23, 27 (D.C. Cir. 1995); *TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 825-26 (9th Cir. 2011).

Well-established precedent gives a competitor standing plaintiff latitude to allege competitive injury, but the competitive injury pleading exception, based as it is on economic logic, cannot be universally applied to every competitor. "[T]o establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit."[21] Other courts have correctly indicated that the plaintiff must be a "direct competitor[]."[22] The plaintiff must also show "an actual or imminent increase in competition, which increase [the court] recognize[s] will almost certainly cause an injury in fact."[23]

Taken in isolation, the phrase from Second Circuit precedent—injury is shown if the plaintiff "competes in the same arena"[24]—can be read to suggest that a minimal allegation of direct competition is sufficient. In light of this seemingly low injury-in-fact bar, the majority opinion maintains that the plaintiffs have met this standard.[25] I agree with the majority that our prior

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[21] *In re U.S. Catholic Conference* (USCC), 885 F.2d 1020, 1029 (2d Cir. 1989); **[JON (diss.), ALK, RJC]** *see also Ctr. for Reproductive Law & Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002). **[JMcL, PNL, SS]**

[22] *TrafficSchool*, 653 F.3d at 826; *see also Adams v. Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (noting that the Supreme Court's competitor standing cases "are all premised on a plaintiff's status as a direct competitor" (emphasis in original)).

[23] *Sherley v. Sebelius*, 610 F.3d 69, 73 (D.C. Cir. 2010); *see also Inv. Co. Inst. v. F.D.I.C.*, 815 F.2d 1540, 1543 (D.C. Cir. 1987) (competitor standing satisfied when increased competition "'plainly threatens' economic injury").

[24] USCC, 885 F.2d at 1029.

[25] *See* Maj. Op. 18.

cases are capable of this broad reading, but after the Supreme Court's decision in *Already, LLC v. Nike, Inc.*,[26] and upon close examination of the kinds of cases that have applied the competitor standing doctrine, it is more than evident to me that the doctrine does not, and should not, reach this case.

In *Already*, the plaintiff, a shoe company, sought to challenge one of Nike's trademarks even after Nike issued a broad covenant promising not to pursue trademark claims against potentially infringing Already products and any future similar products manufactured by Already.[27] The Court rejected the theory that Already had standing to challenge the validity of Nike's trademark simply because it was Nike's competitor: "Taken to its logical conclusion, the theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing."[28]

Already's theory of competitive injury was that the continued existence of Nike's allegedly unlawful mark, notwithstanding Nike's covenant with Already, deterred investment in its company, thereby placing Already at a competitive disadvantage.[29] Already argued that a large company like Nike used its allegedly invalid trademark

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[26] 568 U.S. 85 (2013).

[27] *Id.* at 88-89.

[28] *Id.* at 99.

[29] *Id.* at 97-99; *see also* Br. for Petitioner, *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) (No. 11-982), 2012 WL 3613367 at *33-34.

to "bully small innovators" and that Nike's broad covenant not to sue could not "eradicate" the market effect of a "registered but invalid mark."[30] Thus Already's theory of competitor standing did not turn on whether Already planned to create a shoe to compete with a particular Nike shoe not covered by the covenant not to sue,[31] but was instead a broader claim about competitive injury. Already's allegations of Nike's intimidation tactics, if true, would have had a negative competitive impact on Already's business. Nike's allegedly unlawful conduct, in other words, would have placed Already on an unlevel playing field.

In rejecting Already's claim that this type of competitive injury was sufficient to establish Article III standing, the Supreme Court was quite clear that such a "boundless theory" of competitor standing is unacceptable under Article III.[32] Not every competitive injury—even though a competitor's allegedly unlawful actions may in fact skew the competitive field to the plaintiff's disadvantage—gives a competitor standing to challenge that action.

The plaintiffs' claim in this case is very much like the competitor standing claim in *Already*. Already and Nike were competitors (albeit mismatched in size) in the athletic-shoe market.[33] Already's theory of competitive standing was that Nike's allegedly invalid trademark deterred investment in Already and thus improperly chilled competition in that market. In this case,

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[30] *Already*, 568 U.S. at 99, 98.

[31] *See* Maj. Op. 20-21.

[32] *Already*, 568 U.S. at 99

[33] *Id.* at 88.

the plaintiffs claim similarly that the President's alleged constitutional violations are unlawfully skewing the competitive environment to his advantage.

The majority distinguishes *Already* on the basis that the plaintiffs here compete with the Trump-owned properties for identical consumers.[34] But that is the wrong inquiry, and in any case does not distinguish this case from *Already*. Already and Nike competed for at least some identical consumers, "in the same arena";[35] otherwise, there would have been no competitor issue in the case. Competitors, by definition, are always seeking to attract buyers who want the same goods or services. It is necessary rather to ask whether that competition is such that the harm will likely occur, as a matter of economic logic, from the violation of law alleged. Here, there is no logical connection between the President's alleged receipt of emoluments and the competitive success of the Trump-owned businesses. With or without the President's receipt of "emoluments," there are myriad reasons why a non-Trump establishment would face the same competition.

Moreover, it cannot be the case that, every time a competitor achieves some benefit through allegedly unlawful conduct that has no direct relationship to competition, competing businesses have standing to challenge that unlawful action simply by virtue of their status as a direct competitor.[36] Any number of potential illegal actions by a business could cause its rivals to face stiffer

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[34] Maj. Op. 20-21.

[35] *USCC*, 885 F.2d at 1029.

[36] *See In re Donald J. Trump*, 928 F.3d at 377 ("At bottom, the [plaintiffs'] are left to rest on the theory that so long as a plaintiff

competition without giving rise to Article III standing. Take the example of an owner of a high-end restaurant in a competitive marketplace who fraudulently applies for and receives a bank loan from an FDIC-insured bank, or fraudulently applies for and receives a large tax refund. The restaurant's illegally obtained funds might allow it to achieve a market benefit available to no other competitor: the restaurant is able to hire a superior chef and undercut competitors on menu pricing. As a result, that restaurant's law-abiding competitors find themselves facing increased competition. But do the restaurant's competitors have competitor standing to hold the restaurant liable for its unlawful action simply because they "compete[] in the same arena"?[37] As the Supreme Court made clear in *Already*, the answer is no. The economic logic necessary for competitor standing is measured between the violation and the competitive harm, and in the hiring of the chef that economic logic is non-existent. Such is the situation here. The mere fact of competition is insufficient. Otherwise, courts would have to entertain every claim by a competitor in which the defendant received some unlawful benefit—a benefit unrelated to competition—simply because that benefit could have an effect on competition.

All of this leads me to question the expansive scope of our circuit's earlier precedent. To say that all a competitive injury requires is a showing that the plaintiff "competes in the same arena" conflicts with *Already*'s admonition that a market participant has not suffered

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competes in the same market as a defendant and the defendant enjoys an unlawful advantage, the requirements for Article III standing are met.").

[37] *USCC*, 885 F.2d at 1029.

constitutionally significant injury "whenever a competitor benefits from something allegedly unlawful."[38] Our formulation of this standing theory needs to be construed in light of the Supreme Court's limitations in *Already*. At any rate, even if our precedents required us to conclude that plaintiffs sufficiently alleged a competitive injury in fact, I have little doubt that they fail to satisfy the remaining, indispensable Article III requirements of traceability and redressability.

Traceability. For there to be Article III standing, the plaintiffs must plausibly allege that their injury is "*fairly traceable* to the challenged action of the defendant."[39] Under the competitor-standing doctrine, courts have typically found that traceability flows readily from a competitive injury.[40] In these cases causation logically follows given the nature of the violation: if the violation would necessarily harm the plaintiff's competitive opportunities, then an unlawful edge to a competitor logically connects to that violation.[41]

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[38] *Already*, 568 U.S. at 99.

[39] *Lujan*, 504 U.S. at 560 (emphasis added) (internal quotation marks omitted).

[40] *See Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206, 212 (D.C. Cir. 2013) (finding that causation and redressability are "easily satisfied" in a competitor standing case); *New World Radio, Inc. v. F.C.C.*, 294 F.3d 164, 172 (D.C. Cir. 2002) (noting that, in "garden variety competitor standing cases" the "chain of causation" is "firmly rooted in the basic law of economics" (internal quotation marks omitted)).

[41] *See Sherley*, 610 F.3d at 72 (competitive injury caused when "agencies lift regulatory restriction on [the plaintiff's] competitors or otherwise allow increased competition against them" (internal citation and quotation marks omitted)).

But, again, this case is no ordinary competitor standing case. The Emoluments Clauses do not regulate business or market activity *as* business or market activity, nor would their violation as a general matter be expected to affect competition.[42] Conventional competitor standing cases do not present difficult traceability questions precisely because the allegedly unlawful action is directed at markets or market behavior, and thus the connection between a market-affecting action and a market effect is tight. The Emoluments Clauses were never intended to regulate market behavior, and thus economic logic is absent.

The recognition that traffic increased at Trump-owned establishments following President Trump's election is not enough to show traceability. The plaintiffs must allege, beyond pure speculation, that the unlawful acceptance of emoluments from foreign and state government officials—not just the popularity of Trump-owned establishments for a myriad of reasons—is causing the plaintiffs' lost opportunity to compete on equal footing.[43] The plaintiffs have not plausibly alleged that the desire

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[42] *See infra* Part II.

[43] In *Schulz v. Williams*, we held that traceability was satisfied as long as the challenged action (a district court injunction, in that case) "could have caused [the plaintiffs'] injury." 44 F.3d 48, 53 (2d Cir. 1994). But the bar is not as low, *see* Maj. Op. at 24, as this isolated language suggests. In *Schulz*, there was no speculation that the district court's injunction caused the plaintiffs' alleged electoral injury because there was no other action to which the asserted injury could have been traced. *Schulz* does not stand for the proposition that any action that theoretically "could have" caused the plaintiffs' injury will suffice. At this stage, the plaintiffs must allege a plausible causal route, not merely a possible one.

to confer a relatively modest[44] financial benefit on the President is the driving force behind increased competition.[45] And this must be plausibly alleged because it stands to reason that diplomats who patronize high-end hotels and restaurants do not make their choices solely based on profit distribution, but as people with wide-ranging tastes and varying interests. The plaintiffs' and the President's establishments exist in a virtual sea of luxury hotels and restaurants[46] in which many different factors influence decision making and freely affect

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[44] The Trump Organization claims it donated approximately $150,000 in profit from foreign-government business to the U.S. Treasury in 2016 and approximately $191,000 in 2017 to offset financial gains to the President. Rebecca Ballhaus, *Trump Organization Details Level of Profits from Foreign Governments*, Wall St. J., Feb. 25, 2019, https://www.wsj.com/articles/trump-organization-details-level-of-profits-from-foreign-governments-11551116974. This is an infinitesimal amount in relation to the President's reported net worth of $3 billion in 2019. Shahien Nasiripour & Caleb Melby, *Trump's Net Worth Rises to $3 Billion Despite Business Setbacks*, Bloomberg, June 12, 2019, https://www.bloomberg.com/news/articles/2019-06-12/trump-s-net-worth-rises-to-3-billion-despite-business-setbacks. Of course, these specific amounts remain untested and unconfirmed.

[45] *See In re Donald J. Trump*, 928 F.3d at 375 ("To begin, the District and Maryland's theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends to the Presiden*t, rather than due to any of the Hotel's other characteristics. Such a conclusion, however, requires speculation into the subjective motives of independent actors who are not before the court, undermining a finding of causation." (emphasis in original) (citing *Clapper*, 568 U.S. at 413)).

[46] The plaintiffs' establishments, it should be noted, represent only a few of the many upscale restaurants and hotels located in New York City and Washington, D.C. By a rough count, there are ap-

competition. There are simply too many variables at play (name recognition, boasting rights, better food, better service, more comfortable beds, reputation for quality, location close to the seats of power, to name a few)[47] to allow the plaintiffs to rest solely on the bare assertion that the President's acceptance of emoluments has caused them competitive injury.

On this point, the majority criticizes the district court for an error it did not make: requiring the plaintiffs to

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proximately 115 five-star hotels in New York City and 47 in Washington D.C.. *See* Five Star Alliance, https://www.fivestaralliance.com. And when this lawsuit was filed in 2017, there were 77 Michelin star restaurants in New York City and 12 in Washington D.C. *See Michelin Guide 2017: New York's Best Restaurants*, Michelin Travel, https://travelguide.michelin.com/reportage/michelin-guide-2017-new-yorks-bestrestaurants; *Michelin Guide Washington 2017: 12 Restaurants Earn Stars*, Michelin Travel, https://travelguide.michelin.com/north-america/united-states/district-columbia/washington-dc/reportage/michelin-guide-washington-2017. This count does not include the numerous high-end restaurants—like the ROC United restaurants Craft, Riverpark, Casolare Ristorante, and Zaytinya—that are not Michelin-starred. None of these other establishments have joined in this lawsuit to account for any possible competitive deprivation.

[47] *See In re Donald J. Trump*, 928 F.3d at 376 ("And, even if government officials were patronizing the [Trump International] Hotel to curry the President's favor, there is no reason to conclude that they would cease doing so were the President enjoined from receiving income from the Hotel. After all, the Hotel would still be publicly associated with the President, would still bear his name, and would still financially benefit members of his family. In short, the link between government officials' patronage of the Hotel and the Hotel's payment of profits or dividends to the President himself is simply too attenuated.").

"dispel alternative possible explanations" for their asserted injury.[48] Of course, the majority is correct that a plaintiff need not disprove alternative causal routes, but the district court required of the plaintiffs no such thing. The district court instead listed factors that may influence whether a diplomatic patron will or will not frequent a Trump-owned property—"service, quality, location, price, and other factors related to individual preference"[49]—to illustrate why the causal chain in this case is speculative.

That the plaintiffs are not required to disprove alternative causation does not cure that they failed to plausibly allege *any* causal chain. I agree with the majority that "allegations of fact must plausibly support a 'substantial likelihood' that the plaintiff's injury was the consequence of the defendant's allegedly unlawful actions."[50] A review of the complaint, however, reveals few (if any) specific allegations that diplomatic patrons are motivated by the desire to confer emoluments on the President.[51] The most that is plausibly alleged is that Trump-owned properties attract diplomatic clientele, and that the President has publicly sought and encouraged such patronage.[52] But these allegations fall short

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[48] Maj. Op. 22-23.

[49] *Citizens for Responsibility & Ethics in Washington v. Trump*, 276 F. Supp. 3d 174, 185-86 (S.D.N.Y. 2017).

[50] Maj. Op. 22 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1974)).

[51] And, as the Fourth Circuit points out, "there is a distinct possibility . . . that certain government officials might *avoid* patronizing the [Trump International] Hotel because of the President's association with it." *In re Donald J. Trump*, 2019 928 F.3d at 376.

[52] Compl. ¶¶ 56, 58-87, 109, 196-97, 199-203, 206-11, 230-33.

of plausibly alleging (or permitting a reasonably plausible inference) that increased competition is caused by the President's acceptance of emoluments.

The plaintiffs rely on a Washington Post article in which diplomats are quoted stating that they and their colleagues will favor Trump-owned properties.[53] None of these statements reveal a specific motivation to confer a financial benefit on President Trump. They indicate nothing more than that the primary motivator is Trump brand loyalty. The plaintiffs' strongest argument cites a line from that same article: "In interviews with a dozen diplomats . . . some said spending money at Trump's hotel is an easy, friendly gesture to the new president."[54] This allegation is too scant to satisfy plaintiffs' burden to affirmatively plead that their competitive injury is traceable to the President's acceptance of emoluments.[55]

Even if a government official were actually motivated to "enrich[]"[56] the President by staying at a Trump-owned hotel, the plaintiffs must plausibly allege that it is the acceptance of emoluments that is unlawfully distorting competition. The plaintiffs must affirmatively allege that conferring a direct benefit on the President makes a material difference when placed alongside all of the

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[53] Appellants' Br. 38 ("Believe me, all the delegations will go there.") ("Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!'").

[54] Appellants' Reply Br. 12 (quoting Jonathan O'Connell & Mary Jordan, *For foreign diplomats, Trump hotel is place to be*, Wash. Post, Nov. 18, 2016).

[55] In my view, this is the case even after we accept the plaintiffs' (highly debatable) broad definition of emoluments.

[56] Maj. Op. 19, 21.

other reasons for patronizing Trump properties. Without allegations to that effect, the causal chain remains too speculative. To be sure, the plaintiffs need not disprove all alternative causal routes, but the plaintiffs still remain obligated to plead a causal chain that rises above speculation.[57] This they have not done.

Redressability. Finally, the plaintiffs must show that it is "likely . . . that the injury will be redressed by a favorable decision."[58] Like traceability, redressability frequently follows closely on the heels of a competitive injury in fact, but it is still a distinct component of Article III standing and must be plausibly alleged.

Wholly absent from the complaint are any plausible, non-conclusory allegations that the sought-after remedy will lessen the plaintiffs' competitive injury.[59] At the point in the complaint at which the reader might expect to be told how the remedy sought would redress the competitive injury, the reader is left empty-handed. The plaintiffs simply request that the court issue a declaratory judgment that broadly defines the Emoluments Clauses as the plaintiffs would like,[60] and ask for

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[57] *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976) ("[U]nadorned speculation will not suffice to invoke the federal judicial power.").

[58] *Lujan*, 504 U.S. at 561 (internal quotation marks omitted).

[59] *Iqbal*, 556 U.S. at 678.

[60] The plaintiffs request, among other things, that "Emolument . . . of any kind whatever" under the Foreign Emoluments Clause be defined to "cover anything of value," and "any other Emolument" in the Domestic Emoluments Clause be defined to encompass "monetary and non-monetary payments or transactions, transactions granting special treatment, and transactions above marginal cost. . . . " They ask the court to declare that the President's conduct violates both provisions. *See* Compl. VI(a).

"[i]njunctive relief, enjoining [the President] from violating the Foreign and Domestic Emoluments Clauses, as construed by this Court, and requiring [the President] to release financial records sufficient to confirm that [he] is not engaging in any further transactions that would violate the Emoluments Clauses."[61] As for how this relief will remedy the plaintiffs' competitive injury, the complaint only asserts in conclusory fashion that "the declaratory and injunctive relief . . . would provide a remedy for the many injuries described above."[62]

It comes as no surprise that the pleadings are insufficient as to redressability because they do not connect the relief requested to any effect on competition. The amicus brief by former national-security officials, relied upon by the plaintiffs,[63] cuts in the opposite direction from the argument that the plaintiffs use it to support. The brief highlights the plaintiffs' redressability problem, pointing out the obvious: "our adversaries and even our allies seek every advantage that is available on the international stage."[64] The various articles and statements cited by the plaintiffs demonstrate that diplomats choose to patronize Trump-owned properties for a variety of reasons—and most likely several reasons at the same time. None of them single out the conferral of emoluments. But, more to the point, there is no al-

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[61] Compl. VI(b). One suspects that obtaining the President's financial records may be the true reason for this lawsuit.

[62] Compl. ¶¶ 239; 243; *see also* Compl. ¶ 242.

[63] *See* Appellants' Reply Br. 12-13 (citing Br. of Former Nat'l Sec. Officials 21).

[64] Br. of Former Nat'l Sec. Officials 21.

legation that removing any one of the many possible incentives would cause diplomatic patrons to book at other establishments. To the contrary, as the former national-security officials point out, officials are likely to continue to seek "every advantage"—and continue to book at Trump-owned properties.

It is evident that the complaint fails to adequately plead redressability because it is virtually impossible to plausibly connect the purported cause of the plaintiffs' alleged harm to the remedy they claim to seek (but have not specified in the complaint)—an improved competitive environment. Even if "the mere possibility that customers might continue to favor the defendant's product or service after a court enjoins the violation does not defeat Article III standing,"[65] plaintiffs here have not particularized any causal connection between the alleged violation of the Emoluments Clauses and their market disadvantage. When plaintiffs come before a court unable to specify how the relief they seek will redress their injury, "one must wonder why they came to the court for relief in the first place."[66] In any event, the fact that the plaintiffs plainly fail to do so in the complaint is telling and is itself sufficient to defeat standing.

II.

As I have already noted, that the application of the competitor standing doctrine in this case will not satisfy the requirements of Article III standing is not surprising given the absence of economic logic between the violation alleged (the transgression of the Emoluments

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[65] Maj. Op. 42.

[66] *In re Donald J. Trump*, 928 F.3d at 377.

Clauses) and harm to the plaintiffs (competitive disadvantage). The nature of the cases in this area merits further elaboration. Only in certain categories has the economic logic been tight enough for courts to permit competitor-plaintiffs to shortcut the usual requirement of pleading injury in fact, traceability, and redressability with particularity. These cases fall generally into three categories: agency cases, election cases, and unfair competition cases. It is only within these three categories that the cases relied upon by the plaintiffs (and the majority) to support their competitive standing theory can be found. In each of these three categories, the challenged governmental action or non-action is directed at parties in their capacity as a market player. This emoluments case, by contrast, fits into none of these three categories, and it is not analogous to any of them.

Agency cases. The competitor standing doctrine originated with agency cases. The first of these cases before the Supreme Court, *Investment Company Institute v. Camp*, involved banking regulations that allowed new institutions to enter certain financial sectors.[67]

Following that decision, competitor standing cases premised on a challenge to agency action have become

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[67] *See Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1970) (investment companies had standing to challenge the regulation of national banks); *Clarke v. Secs. Indus. Ass'n*, 479 U.S. 388, 403 (1987) (competitor brokerage trade association had standing to sue over banking regulations); *Nat. Credit Union Admin. v. First Nat. Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (banks and bankers association had standing to sue over credit union regulations).

common.[68] In *Adams v. Watson*, the First Circuit held that out-of-state milk producers had competitive standing to challenge state dairy regulations.[69] In *Canadian Lumber Trade Alliance v. United States*, the Federal Circuit determined that Canadian wheat producers could employ competitor standing to challenge United States customs regulations designed to aid American wheat producers.[70] The D.C. Circuit, in *Sherley v. Sebelius,* held that adult stem cell researchers had competitive standing to challenge new regulations authorizing the National Institutes of Health to fund embryonic stem cell research.[71] I could go on.

In the agency context, where the government regulators are effectively choosing winners and losers in the marketplaces that they regulate, affording the plaintiff the presumption of injury, traceability, and redressability makes sense. There is no doubt, for example, that when the government allows a commercial bank to operate in a sector previously occupied only by investment firms,[72] the investment firms will suffer negative competitive effects because more actors occupy the field. In these cases, the challenged government action is directed at a *particular marketplace* with the aim of regulating one or more of the players in *that market* in some

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[68] Some cases in this category could fall under the broader heading of "governmental action." *See Clinton v. City of New York*, 524 U.S. 417, 432-33 (1998) (farmers' cooperative had competitor standing to challenge the President's line item veto of a bill provision that would have benefitted the cooperative).

[69] *Adams*, 10 F.3d at 920, 925.

[70] *Canadian Lumber*, 517 F.3d at 1332.

[71] *Sherley*, 610 F.3d at 73.

[72] *See, e.g.*, *Camp*, 401 U.S. at 620.

way. The government's decision to act in a way that gives a boost to some players in that market or allows a new player to enter it, will, as a matter of *economic logic*, be to the detriment of others.

Election cases. Competitor standing cases in the Second Circuit have arisen in the election context. In *Fulani v. League of Women Voters Education Fund*, the plaintiff, a presidential candidate, alleged that the League of Women Voters violated its tax-exempt status by hosting a primary debate that imposed certain admission requirements on the debate candidates, thereby causing the plaintiff-candidate a competitive injury when she was excluded from the debate.[73] We held that she had competitor standing to challenge the League's tax-exempt status.[74] The plaintiff in *Fulani* alleged that a law (aimed at preventing *political* abuse of an organization's tax-exempt status in the political marketplace) caused a competitive injury to her *political* candidacy which plainly would be redressed if she were permitted to debate. Her injury and its causation and redressability were self-evident as a matter of logic.

Likewise, *Schulz v. Williams* involved an action by the Libertarian Party to enjoin the operation of a New York election law that had blocked its candidates from getting on the state ballot.[75] The district judge granted the Libertarian Party an injunction. The competitor-intervenor Conservative Party appealed on the basis that the district court's injunction improperly placed

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[73] *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 624 (2d Cir. 1989). **[EVG, RJC, LWP]**

[74] *Id.* at 626.

[75] *Schulz*, 44 F.3d at 51-52.

Libertarian candidates on the ballot and thereby siphoned votes away from it.[76] We held that the intervenor-Conservative Party had standing to challenge the election law ruling that had allegedly caused it an electoral injury.[77]

Finally, in *In re U.S. Catholic Conference*, pro-choice advocates had competitive standing to challenge the tax-exempt status of the Catholic Church on the grounds that the Catholic Church had unlawfully engaged in partisan activities by campaigning for pro-life causes.[78] By logic parallel to the agency cases, in each election case the competitor-plaintiff sought to challenge election- related action that allegedly had an obvious and direct negative impact on the plaintiffs' own political activities.

Unfair competition cases. The third context in which the competitor standing doctrine has arisen is in unfair competition claims.[79] Courts routinely recognize constitutional standing for competitors seeking to redress antitrust injury.[80] Suits by competitors brought

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[76] *Id.* at 52-53.

[77] *Id.* at 53.

[78] *USCC*, 885 F.2d at 1022.

[79] *See TrafficSchool*, 653 F.3d at 825-26.

[80] *See, e.g.*, *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 449 (6th Cir. 2007) (en banc) (recognizing Article III standing for a plaintiff allegedly injured by a competitor's antitrust violations). The plaintiffs suggest that standing for competitors in these cases supports their broad proposition that "courts have upheld Article III standing when the illegal acts of private parties increase or distorted competition against a plaintiff" and evinces the doctrine's application in "many other contexts." Appellants' Br. 28-29. But the plaintiffs miss the thread that ties all three categories of cases together: eco-

under the Lanham Act are also commonly allowed based on competitor standing. In *TrafficSchool.com, Inc. v. Edriver, Inc.*, both parties ran online traffic-school courses in the same market. The plaintiff alleged that the defendant had engaged in false advertising in violation of Lanham Act and state unfair competition laws—a violation, unlike that here, that directly relates to competition.[81] The Ninth Circuit determined the competitor-plaintiff had standing because they were direct competitors and "[s]ales gained by one are thus likely to come at the other's expense."[82] This case exemplifies those cases in which, as a matter of economic logic, a competitor had standing to challenge a rival's noncompliance with laws plainly designed to regulate their competition in the common marketplace.

* * *

These are the three broad categories of cases in which courts have extended to plaintiffs a presumption of competitive injury based on common-sense market logic. The cases in each of these three categories deal with challenged regulations, laws, and actions that were directed at market players *in their role as market players*, which is the key determinant that may warrant utilization of the competitor standing exception. These cases stand for the proposition that competitive injury in fact, together with causation and redressability, can

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nomic logic. The same economic logic that connects agency, election, and unfair competition competitor standing cases is absent in this case.

[81] *Id.* at 824.

[82] *Id.* at 825.

be presumed when the plaintiff can point to some government action or inaction that *directly* regulates the conduct of a market player operating in the same market. In other words, plaintiffs in these cases were afforded competitor standing when they asserted a competitive injury as a result of an unlawful activity that was itself directly related to, and intended to regulate, the commercial or political marketplace.

The case before us is markedly different. The competitor standing suit against the President has little in common with these three categories of cases. Even accepting the plaintiffs' broad construction of the Emoluments Clauses, the Clauses were never designed to, and nor do they, directly regulate the marketplace or the market player as it functions in the marketplace. The Emoluments Clauses have never been characterized as market-oriented, no case has ever stretched the competitor standing exception this far, and, as is evident from the Supreme Court's decision in *Already*, such a stretch goes further than the competitor-standing pleading exception can bear.

In sum, because the plaintiffs lack standing to challenge the President's alleged acceptance of emoluments under either traditional standing principles or the competitor standing doctrine, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 18-474
August Term, 2018

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS UNITED, INC., JILL PHANEUF, AND ERIC GOODE, PLAINTIFFS-APPELLANTS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Argued: Oct. 30, 2018
Decided: Mar. 20, 2020

Before: JOHN M. WALKER, PIERRE N. LEVAL, *Circuit Judges*.[1]

PER CURIAM:

It is hereby ORDERED that the chapter of the panel opinion of September 13, 2019 captioned "Zone of Interests" is amended by deleting the passage from its fourth paragraph (beginning "The district court's analysis

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[1] Judge Christopher F. Droney, who was originally part of the panel assigned to hear this case, retired from the Court effective January 1, 2020. The remaining two members of the panel are in agreement regarding this order. *See* 28 U.S.C. § 46(d); 2d Cir. IOP E(b).

erred on the merits . . . ") to the end of the chapter. The chapter is further amended in the first and second paragraphs so that they are consistent with the above deletion, and at the end of the chapter by addition of a footnote acknowledging and explaining the deletion. The chapter in amended form shall read as follows:

ii. Zone of Interests

The district court also erred in its reliance on the zone of interests test as a basis for finding lack of jurisdiction. The Supreme Court has recently clarified that the zone of interests test is not a test of subject matter jurisdiction. In *Lexmark Int'l Inc. v. Static Control Components*, the Supreme Court, while acknowledging that past decisions had characterized the zone of interests test as part of a "'prudential' branch of standing," reconsidered the question and clarified both that the "prudential" label is a misnomer and that the test does not implicate Article III standing. 572 U.S. 118, 126-27 (2014). Rather, the Court explained that the test asks whether the plaintiff "has a cause of action under the [law]" on the basis of the facts alleged. *Id.* at 128. The Court emphasized that the test is not "jurisdictional" because "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction." *Id.* at 128 n.4 (internal quotation marks omitted). In *Bank of America v. City of Miami*, 137 S. Ct. 1296 (2017), the Court reaffirmed that the zone of interests test asks whether the complaint states an actionable claim under a statute (and not whether the plaintiff has standing and the court has subject matter jurisdiction). The *City of Miami* majority reiterated that the Article III standing requirements are injury,

causation, and redressability, and reinforced *Lexmark*'s essential point that the zone of interests question is "whether the statute grants the plaintiff the cause of action that he asserts." *Id.* at 1302.

Accordingly, while it had previously been appropriate to consider whether plaintiffs fall within the zone of interests in deciding whether a plaintiff has standing and the court has subject matter jurisdiction, the Supreme Court has unambiguously rejected that approach. The district court thus misconstrued the nature of the zone of interests doctrine.[FN]

Footnote—The original published version of this opinion contained, in this chapter, a discussion of the merits of the zone-of-interests question. That discussion is deleted in order that it not serve as a precedent on the question whether the Complaint states a claim upon which relief may be granted. Because, under *Lexmark*, the merits of the zone-of-interests question do not bear on the court's subject matter jurisdiction, that discussion had no pertinence to whether the district court erred in granting the President's motion under Rule 12(b)(1).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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17 Civ. 458 (GBD)

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS UNITED, INC., JILL PHANEUF, AND ERIC GOODE, PLAINTIFFS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 2, 2017]

MEMORANDUM DECISION AND ORDER

GEORGE B. DANIELS, United States District Judge:

Plaintiffs Citizens for Responsibility and Ethics in Washington ("CREW"), Restaurant Opportunities Centers United, Inc. ("ROC United"), Jill Phaneuf, and Eric Goode (collectively, "Plaintiffs"), bring this suit against Defendant Donald J. Trump, in his official capacity as President of the United States. (Second Amended Complaint ("SAC"), ECF No. 28, at 1.) Plaintiffs principally allege that Defendant's "vast, complicated, and secret" business interests are creating conflicts of interest and have resulted in unprecedented government in-

fluence in violation of the Domestic and Foreign Emoluments Clauses of the United States Constitution. (SAC ¶ 1 (citing U.S. Const. art. I, § 9, cl. 8 & art. II, § 1, cl. 7, respectively).) Plaintiffs seek (i) a declaratory judgment declaring that Defendant has violated and will continue to violate the Domestic and Foreign Emoluments Clauses; (ii) an injunction enjoining Defendant from violating the Emoluments Clauses; and (iii) an injunction requiring Defendant to release financial records in order to confirm that he is not engaging in further transactions that would violate the Emoluments Clauses. (*Id.* 20.)

Defendant argues that Plaintiffs lack standing to sue and moves to dismiss this lawsuit for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure Rule 12(b)(1). (Def.'s Mot. to Dismiss, ECF No. 34; Def.'s Mem. of Law in Supp. of Mot. to Dismiss ("Mot."), ECF No. 35, at 7.) Defendant also moves to dismiss this case for failure to state a claim under the Emoluments Clauses pursuant to Federal Rule of Civil Procedure Rule 12(b)(6). (*See* Mot. at 26.)

Defendant's motion to dismiss for lack of standing under Rule 12(b)(1) is GRANTED.[1]

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[1] Because Plaintiffs' claims are dismissed under Rule 12(b)(1), this Court does not reach the issue of whether Plaintiffs' allegations state a cause of action under either the Domestic or Foreign Emoluments Clauses, pursuant to Rule 12(b)(6). Nor does this Court address whether the payments at issue would constitute an emolument prohibited by either Clause.

I. FACTUAL BACKGROUND

A. The Parties

Plaintiff CREW is a nonprofit, nonpartisan government ethics watchdog organized under the laws of the State of Delaware. (SAC ¶ 21.) CREW's self-proclaimed mission is to "protect[] the rights of citizens to be informed about the activities of government officials, ensur[e] the integrity of government officials, protect[] [the] political system against corruption, and reduc[e] the influence of money in politics." *(Id.)* It seeks to advance that mission through a combination of research, advocacy, litigation, and education, all aimed at raising public awareness about the influence of outside special interests on public officials. (*Id.* ¶ 22.) For instance, CREW is involved in a project relating to campaign finance and ethics at the state-level, as well as researching and filing comments with government agencies related to rulemakings and other regulatory actions, and preparing reports on "money-in-politics issues." *(Id.* ¶¶ 166-67, 171.) CREW also analyzes tax returns of nonprofit groups engaged in political activities and publishes blog posts and reports to educate the public. (*Id.* ¶ 173.) In addition, during the last several election cycles, CREW has filed numerous administrative complaints with the Federal Election Commission and the Department of Justice alleging violations of campaign finance laws. (*Id.* ¶ 164.)

Plaintiff ROC United is a nonprofit, nonpartisan member-based organization organized under the laws of the State of New York. (*Id.* ¶ 28.) ROC United's members include nearly 25,000 restaurant employees, over 200 restaurants, and about 3,000 other dining establish-

ments. (*Id.* ¶ 11.) ROC United provides "job training, placement, leadership development, civic engagement, legal support, and policy advocacy" to help improve working conditions in the food service industry. *(Id.)* Through its RAISE project, ROC United works with restaurant owners to implement sustainable business models that support "high road" employer practices such as paying living wages, providing basic benefits, being environmentally sustainable, and providing safe and healthy workplaces. (*Id.* ¶ 181.) ROC United also owns and operates a restaurant in New York City and another in Detroit, with a forthcoming location in Washington, D.C. (*Id.* ¶ 28.)

Plaintiff Jill Phaneuf, a resident of Washington D.C., works with a hospitality company to book embassy functions and other events tied to foreign governments, as well as other events "in the Washington, D.C. market." (*Id.* ¶ 15.) In particular, Phaneuf books events for two Washington D.C. hotels—the Carlyle Hotel, located just north of Dupont Circle, and the Glover Park Hotel, located near the area that is colloquially referred to "Embassy Row." (*Id.* ¶ 15.) Phaneuf alleges that her compensation consists of a percentage of the gross receipts of the events she books. (*Id.*)

Plaintiff Eric Goode is a New York resident and the owner of several hotels, restaurants, bars, and event spaces in New York City. (*Id.* ¶ 18.) He owns the Maritime Hotel located in the Chelsea neighborhood, the Bowery Hotel and Ludlow Hotel, both of which are located in the Lower East Side, and the Jane Hotel in the Meatpacking District. (*Id.*) Goode also owns several restaurants located in the Bowery Hotel. (*Id.*) Goode

alleges that his hotels and restaurants have typically attracted business from foreign governments, as well as from federal and state government officials traveling on official business. (*Id.*)

Defendant Donald J. Trump is the President of the United States of America. Before he was elected President, Defendant amassed ownership and controlling interests in businesses throughout the country and around the world. Defendant is the sole owner of the Trump Organization LLC and The Trump Organization, Inc. (collectively, the "Trump Organization"). (*Id.* ¶ 42.) Defendant's corporations, limited-liability companies, limited partnerships, and other entities are loosely organized under the Trump Organization. (*Id.*)

On January 11, 2017, Defendant, then-President-elect, announced that he would turn over the "leadership and management" of the Trump Organization to his sons, Donald Trump, Jr. and Eric Trump. (*Id.* ¶ 43.) Defendant also announced that he would donate all profits from foreign governments' patronage of his businesses to the U.S. Treasury. (*Id.; see also Donald Trump's News Conference: Full Transcript and Video*, N.Y. Times (Jan. 11, 2017), http://nyti.ms/2jG86w8.) Although Defendant had established a trust to hold his business assets, Plaintiffs allege that Defendant continues to own and is permitted to take distributions from the trust at any time. (SAC ¶ 44.) Plaintiffs allege that Defendant continues to be informed of the Trump Organization's business activities and that Eric Trump provides business updates to Defendant on a quarterly basis. (*Id.*)

Through his various business entities, Defendant owns and receives payments from a number of properties and restaurant establishments in the United States. Of particular relevance here, Defendant owns the Trump International Hotel in Washington, D.C. and the BLT Prime, a restaurant located inside the hotel. (*Id.* ¶¶ 58-59.) He also owns Trump World Tower, a condominium high-rise building in New York City located near the United Nations. (*Id.* ¶ 90.) Trump Tower, a mixed-use skyscraper in New York City, and Trump Grill, a restaurant located inside the tower, are also among the properties owned by Defendant. (*Id.* ¶¶ 46-47, 56.)

B. Defendant's Alleged Violations of the Domestic and Foreign Emoluments Clauses

Plaintiffs allege that since Defendant's inauguration earlier this year, he has violated and continues to violate the Domestic and Foreign Emoluments Clauses of the Constitution due to the ownership and controlling interests he continues to hold in the Trump Organization and other entities, and the monies he receives as a result. (*Id.* ¶¶ 7, 42.)

The Domestic Emoluments Clause states that "[t]he President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7. That clause provides that the president's compensation for his services as president shall not change during his term in office, and prohibits him from drawing any additional compensation or salary from the federal or state governments.

The Foreign Emoluments Clause states in pertinent part that "no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. That clause provides that certain federal government officials shall not receive any form of gift or compensation from a foreign government without Congress's approval.[2]

Plaintiffs point to a number of examples of alleged violations of both the Domestic and Foreign Emoluments Clauses. For example, Plaintiffs allege that after the 2016 election, and under pressure from the Trump Organization, the Embassy of Kuwait in Washington D.C. moved its National Day celebration from the Four Seasons Hotel to the Trump International Hotel, spending an estimated $40,000 to $60,000 for the event. (SAC ¶¶ 72-74.) Other foreign diplomats and their agents have publicly expressed a desire to patronize the Trump International Hotel and other properties owned by Defendant to curry favor with the President. (*Id.* ¶¶ 57-89.) One press account quoted a "Middle Eastern diplomat" as saying, "[b]elieve me, all the delegations will go" to the Trump International Hotel. (*Id.* ¶ 62.) The same account quoted an "Asian diplomat" who explained, "[w]hy wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!' Isn't it rude to come to his city and say, 'I am staying at your competitor?'" (*Id.*)

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[2] For purposes of this motion, Defendant has conceded that he is subject to the Foreign Emoluments Clause. (*See* Tr. of Oral Arg., ECF No. 99, at 94:11-13; Ltr. to the Ct. from Brett A. Shumate dated October 25, 2017, ECF No. 98.)

Plaintiffs allege that, over the last two decades, the Kingdom of Saudi Arabia, as well as the Permanent Missions to the United Nations from India, Afghanistan, and Qatar purchased property at the Trump World Tower, paying anywhere from $4.5 million up to $8.375 million. (*Id.* ¶¶ 90-106.) Plaintiffs believe that these foreign entities continue to pay yearly common charges for building amenities amounting to tens of thousands of dollars each year. (*Id.*) Plaintiffs point out that none of these countries were included in Defendant's original or revised executive orders barring visitors from six Muslim-majority countries. (*Id.* ¶ 110.)

Plaintiffs allege that since 2006, Defendant has unsuccessfully sought trademark protection in China for the use of his name in connection with building construction services. After his application was rejected by China's Trademark Office, Defendant appealed to the Trademark Review and Adjudication Board, the Beijing Intermediate People's Court, and the Beijing High People's Court, to no avail. (*Id.* ¶ 111.) In December 2016, shortly after he was elected, Defendant spoke directly with the President of Taiwan, suggesting that the United States might abandon the "One China" policy that it had observed for decades. According to Plaintiffs, Defendant had previously suggested he would end the "One China" policy unless some benefit were received in exchange. (*Id.* ¶ 112.) On February 9, 2017, Defendant spoke with the President of China and pledged to honor the "One China" policy. Five days later, China reversed course and granted trademark protection for the "Trump" name. (*Id.* ¶¶ 113-14.) Plaintiffs also allege that the Industrial and Commercial Bank of China, a Chinese majority-state-owned entity, is one of the largest tenants of Trump Tower. (*Id.*¶ 49.)

Plaintiffs allege that the Trump International Hotel's lease with the General Services Administration ("GSA")—an independent agency of the United States, whose administrator is appointed by the president—violates the Domestic Emoluments Clause. (*Id.* ¶¶ 130-44.) Prior to taking office, GSA entered into a 60-year lease for what eventually became the site for the Trump International Hotel. (*Id.* ¶¶ 130-31.) Section 37.19 of the lease agreement provides that "[n]o . . . elected official of the Government of the United States . . . shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom." (*Id.* ¶ 132.) Plaintiffs allege that by virtue of his election, Defendant has been in breach of the lease since he took office on January 20, 2017. One week after Defendant released a proposed federal budget increasing GSA's funding while cutting nearly all other non-defense-related spending, GSA issued a letter indicating that, in its view, there were no compliance issues with respect to the lease. As of the date the SAC was filed, GSA has not made any effort to enforce the apparent breach against the Trump Organization. (*Id.* ¶¶ 135, 140-41, 145.)

Additionally, Plaintiffs contend that Defendant has also benefitted and will continue to benefit from payments to his hotels and restaurants by foreign governments and their agents, as well as federal, state, and local government officials. (*Id.* ¶¶ 200-01.)

Plaintiffs assert that they are injured by Defendant's alleged violations of the Emoluments Clauses. Phaneuf and Goode allege that due to Defendant's ongoing financial interest in hotels and restaurants receiving payments from governmental sources, they will suffer increased competition resulting in "loss of commission-

based income" and "loss of revenue[.]" (*See id.* ¶¶ 225, 227, 234.) Similarly, ROC United alleges that its restaurant and restaurant-employee members have suffered injury in the form of "lost business, wages, and tips." (*Id.* ¶ 13.) CREW claims it has been harmed by having to divert and expend its resources to counteract the alleged violations, impairing its ability to accomplish its mission. (*Id.* ¶ 15 3.)

II. LEGAL STANDARD UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1)

"Determining the existence of subject matter jurisdiction is a threshold inquiry[,] and a claim is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Austl. Bank Ltd.,* 547 F.3d 167, 170 (2d Cir. 2008) (quotation marks omitted), *aff'd,* 561U.S.247 (2010). The party invoking the benefit of federal jurisdiction bears the burden of establishing the existence of that jurisdiction. *Sharkey v. Quarantillo,* 541 F.3d 75, 82-83 (2d Cir. 2008) (citation omitted).

In deciding a motion to dismiss "pursuant to Rule 12(b)(1), . . . the Court must accept as true all material factual allegations in the complaint, but should refrain from drawing any inferences in favor of the party asserting jurisdiction." *People United for Children, Inc. v. City of New York,* 108 F. Supp. 2d 275, 283 (S.D.N.Y. 2000) (citing *Atl. Mut. Ins. Co. v. Balfour Maclaine Int'l Ltd.,* 968 F.2d 196, 198 (2d Cir. 1992)). "[U]nder Rule 12(b)(1), [a court is] permitted to rely on non-conclusory, non-hearsay statements outside the pleadings." *MES., Inc. v. Snell,* 712 F.3d 666, 671 (2d Cir. 2013).

III. STANDING

Central to the question of whether this Court has subject-matter jurisdiction over this case is whether Plaintiffs have legal standing to sue. *See Cortlandt St. Recovery Corp. v. Hellas Telecomms. I, S.a.r.l,* 790 F.3d 411, 416-17 (2d Cir. 2015). Indeed, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd,* 521 U.S. 811, 818 (1997). As the Supreme Court has explained, "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches[,]" *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 408 (2013), and "ensure[s] that federal courts do not exceed their authority as it has been traditionally understood." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016). Accordingly, the standing inquiry is "especially rigorous" where, as here, "reaching the merits of the dispute would force [this Court] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Clapper,* 568 U.S. at 408 (citation and quotation marks omitted).

The "irreducible constitutional minimum of standing" consists of three clements: "(1) 'an injury in fact' to 'a legally protected interest' that is both '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,' (2) 'a causal connection between the injury and the conduct complained of,' and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Crupar-Weinmann v. Paris Baguette Am., Inc.,* 861

F.3d 76, 79 (2d Cir. 2017) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). As the parties invoking this Court's jurisdiction, Plaintiffs bear the burden of establishing standing, and at the pleading stage, they must do so by "clearly alleg[ing] facts demonstrating each element." *Spokeo,* 136 S. Ct. at 1547 (citation omitted).

A. ROC United, Phaneuf, and Goode Lack Article III Standing

Defendant contends that Plaintiffs ROC United, Phaneuf, and Goode (the "Hospitality Plaintiffs") lack standing to bring their claims and that their alleged injuries do not fall within the zone of interests of the Emoluments Clauses. (Mot. at 8-26.)

1. The Hospitality Plaintiffs' Competitor Standing Argument Fails

The Hospitality Plaintiffs attempt to rely on the competitor standing doctrine to establish injury in fact. Defendant argues that these Plaintiffs lack competitor standing because they fail to establish that the challenged governmental activity has caused "an actual or imminent increase in competition, which increase . . . will almost certainly cause an injury in fact." (Mot. at 20-21 (citing *Sherley v. Sebelius,* 610 F.3d 69, 73 (D.C. Cir. 2010)).)

"The Supreme Court has found cognizable injuries to economic competitors." *In re US. Catholic Conference,* 885 F.2d 1020, 1029 (2d Cir. 1989) (citation omitted); *see Clarke v. Sec. Indus. Ass'n,* 479 U.S. 388, 403 (1987); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 152 (1970)). The doctrine of competitor standing recognizes that economic actors "suffer

[an] injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them." *Sherley,* 610 F.3d at 72 (citation and quotation marks omitted).

The doctrine traces its origin to a time when financial institutions started diversifying their service offerings and began competing with firms that had traditionally provided those services. For instance, in *Data Processing,* an association of data processing service providers challenged a ruling by the Comptroller of the Currency of the United States allowing banks to provide such services and compete in the same market. 397 U.S. at 151. The Court held that the association had standing to bring its claim because it properly alleged that the rule caused plaintiffs "injury in fact" in the form of future and actual loss of profits. *Id.* at 152; *see also Clarke,* 479 U.S. at 403 (granting standing to trade association composed of securities brokers, dealers, and underwriters to challenge governmental ruling that banks could act as discount brokers); *Inv. Co. Inst. v. Camp,* 401 U.S. 617, 620-21 (1971) (granting standing to association of open-end investment companies to challenge ruling that allowed bank entry into the field of collective investment funds); *Arnold Tours, Inc. v. Camp,* 400 U.S. 45, 46 (1970) (holding travel agents had standing to challenge ruling to permit banks to offer travel services).

The Hospitality Plaintiffs argue that the competitor standing doctrine only requires a plaintiff to "'show that he personally competes in the same arena' with the party to whom the defendant has unlawfully bestowed a benefit." (Pls.' Mem. of Law in Opp'n to Mot. ("Opp'n"), ECF No. 57, at 11.) They allege that they compete for

government business in the Washington D.C. and New York City restaurant and hotel markets and that they have and will be harmed "due to foreign states, the United States, or state or local governments patronizing establishments with financial connections to Defendant rather than" Plaintiffs. (*See* SAC ¶¶ 13, 17, 19, 194, 198, 227, 234.) Defendant argues that the Hospitality Plaintiffs' allegations are far too speculative to give rise to competitor standing and that they have failed to sufficiently allege that they "personally compete[]" with Defendant's hotels and restaurants. (Mot. at 21 (citing *U.S. Catholic Conference,* 885 F.2d at 1029).) In response, the Hospitality Plaintiffs cite declarations from, among others, Goode, ROC United's restaurant members, and industry experts explaining how and in which ways they compete with Defendant's businesses. (*See, e.g.,* Opp'n at 17-18.)

Plaintiffs have failed to properly allege that Defendant's actions *caused* Plaintiffs competitive injury and that such an injury is *redressable* by this Court. As noted, Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant," and for which "prospective relief will remove the harm." *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 45 (1976); *see also Liberty Glob. Logistics LLC v. U.S. Mar. Admin.,* No. 13-CV-0399 (ENV), 2014 WL 4388587, at *5-6 (E.D.N.Y. Sept. 5, 2014) (finding plaintiff had established an injury in fact due to the "well-established concept of competitors' standing" but nonetheless dismissing certain claims for lack of causation) (citation omitted).

In *Simon,* the plaintiffs were indigent individuals and organizations representing indigents who challenged an

IRS rule allowing favorable tax treatment to a nonprofit hospital that only offered emergency-room services to indigents. 426 U.S. at 28. The plaintiffs argued that the IRS rule caused them injury because it "encouraged" hospitals to deny other services to indigents. *Id.* at 42. The Court held that this alleged injury lacked traceability and redressability because of intervening causal factors. The Court found it "purely speculative whether . . . denials of service . . . [could] fairly . . . be traced to petitioners' 'encouragement' or instead result[ed] from decisions made by the hospitals without regard to the tax implications." *Id* at 42-43. The Court found it "equally speculative" to conclude that "victory in this suit would result in [plaintiffs] receiving the hospital treatment they desire." *Id.* at 43, 45-46. Rather than increasing access for indigent patients, hospitals could simply discontinue such programs altogether and become profit-funded institutions, thereby exacerbating plaintiffs' injury. *Id.* at 45-46.

Here, the Hospitality Plaintiffs argue that Defendant has adopted "policies and practices that powerfully *incentivize* government officials to patronize his properties in hopes of winning his affection." (Opp 'n at 16 (emphasis added).) Yet, as in *Simon,* it is wholly speculative whether the Hospitality Plaintiffs' loss of business is fairly traceable to Defendant's "incentives" or instead results from government officials' independent desire to patronize Defendant's businesses. Even before Defendant took office, he had amassed wealth and fame and was competing against the Hospitality Plaintiffs in the restaurant and hotel business. It is only natural that interest in his properties has generally increased since he became President. As such, despite

any alleged violation on Defendant's part, the Hospitality Plaintiffs may face a tougher competitive market overall. Aside from Defendant's public profile, there are a number of reasons why patrons may choose to visit Defendant's hotels and restaurants including service, quality, location, price and other factors related to individual preference. Therefore, the connection between the Hospitality Plaintiffs' alleged injury and Defendant's actions is too tenuous to satisfy Article Ill's causation requirement. *Bennett v. Spear,* 520 U.S. 154, 167 (1997) (to establish standing, "the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court") (citing *Lujan,* 504 U.S. at 560-61); *Clapper,* 568 U.S. at 413 ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.")

Moreover, the Hospitality Plaintiffs cannot establish "that it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett,* 520 U.S. at 167 (citation omitted). Plaintiffs seek an injunction preventing Defendant from violating the Emoluments Clauses. (SAC ¶ 120.) They argue that such injunction would "stop[] the source of intensified competition [and] provide redress." (Opp'n at 26.) Even if it were determined that the Defendant personally accepting any income from the Trump Organization's business with foreign and domestic governments was a violation of the Emoluments Clauses, it is entirely "speculative," *Bennett,* 520 U.S. at 167, what effect, if

any, an injunction would have on the competition Plaintiffs claim they face.[3]

Plaintiffs are likely facing an increase in competition in their respective markets for business from all types of customers—government and non-government customers alike—and there is no remedy this Court can fashion to level the playing field for Plaintiffs as it relates to overall competition. Were Defendant not to personally accept any income from government business, this Court would have no power to lessen the competition inherent in any patron's choice of hotel or restaurant. As explained more fully below, the Emoluments Clauses prohibit Defendant from receiving gifts and emoluments. They do not prohibit Defendant's businesses from competing directly with the Hospitality Plaintiffs. Furthermore, notwithstanding an injunction from this Court, Congress could still consent and allow Defendant to continue to accept payments from foreign governments in competition with Plaintiffs.

Thus, while a court order enjoining Defendant may stop his alleged constitutional violations, it would not ultimately redress the Hospitality Plaintiffs' alleged competitive injuries.[4]

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[3] For example, even if Defendant honored his pledge to establish a trust and donate all profits from foreign governments' business to the U.S. Treasury, (Mot. at 5; *see also* SAC ¶¶ 43-44), foreign government officials may still patronize Defendant's restaurants and hotels.

[4] ROC United contends that it has associational standing to bring this lawsuit because it has alleged that its members have been "injured by the [D]efendant's distortion of competition." (Opp'n at 24-25.) To have associational standing, a plaintiff organization must

2. The Hospitality Plaintiffs' Competitive Injuries Do Not Fall Within the Zone of Interests of the Emoluments Clauses

The zone of interests doctrine demonstrates that the Hospitality Plaintiffs are not the right parties to bring a claim under the Emoluments Clauses. Beyond the Article III requirements, "the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982). "One of these is the requirement that the plaintiff establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the zone of interests sought to be protected by the statut[e] [or constitutional guarantee] whose violation forms the legal basis for his complaint." *Wyoming v. Oklahoma,* 502 U.S. 437, 468-69 (1992) (emphases in original) (citation and quotation marks omitted). While it is true that the "zone of interests" test first appeared in cases brought under the Administrative Procedure Act, 5 U.S.C. § 702, *see Data Processing,* 397 U.S. at 153, the Supreme Court has "made clear that the same test similarly applies to claims under the Constitution in general[.]" *Wyoming,* 502 U.S. at 469. In

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meet the following requirements: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977). ROC United lacks associational standing because none of its members—neither the restaurants nor restaurant workers—allege an injury in fact caused by Defendant's alleged Emoluments Clause violations that will likely be redressed by a favorable decision.

fact, the Supreme Court has "indicated that it is *more* strictly applied when a plaintiff is proceeding under a constitutional . . . provision instead of the generous review provisions of the APA." *Id.* (emphasis in original) (citation and quotation marks omitted).

Nothing in the text or the history of the Emoluments Clauses suggests that the Framers intended these provisions to protect anyone from competition. The prohibitions contained in these Clauses arose from the Framers' concern with protecting the new government from corruption and undue influence. Indeed, at the time of the Founding, the new republic was conscious of the European custom of bestowing gifts and money on foreign officials. The Framers, who fought a war to gain their independence from British rule, wanted government officials to avoid future undue influence. As Edmund J. Randolph explained at the Virginia Ratifying Convention,

> The [Foreign Emoluments Clause] restrains any person in office from accepting of any present or emolument, title or office, from any foreign prince or state. . . . This restriction is provided to prevent corruption.

Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 465-66 (2d ed. 1891); (*see also* Br. of Former Gov't Ethics Officers as Amici Curiae Supporting Pls., ECF No. 71-1, at 1 (stating that the Clauses "are an important check on corruption, and a beacon for good governance.").)

The Framers were not only concerned with foreign corruption, but they were also wary of undue influence

from within. To ensure the president's independence from the states and additional financial incentives from the federal government, the Framers included in the Constitution the Domestic Emoluments Clause. That clause was meant to ensure that the president has "no pecuniary inducement to renounce or desert the independence intended for him by the Constitution." The Federalist No. 73 (Alexander Hamilton). Evidently, the Framers were concerned that

> [T]he legislature, with a discretionary power over the salary and emoluments of the [president], could render him as obsequious to their will as they might think proper to make him. They might, in most cases, either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations.

Id. The Clause also helps to ensure presidential impartiality among the states given that"[n]either the Union, nor any of its members, will be at liberty to give, nor will he be at liberty to receive, any other emolument than that which may have been determined by the first act." *Id.*

Given this history, there can be no doubt that the intended purpose of the Foreign Emoluments Clause was to prevent official corruption and foreign influence, while the Domestic Emoluments Clause was meant to ensure presidential independence. Therefore, the Hospitality Plaintiffs' theory that the Clauses protect them from increased competition in the market for government business must be rejected, especially when (1) the Clauses offer no protection from increased competition in the market for *non-government* business and (2)

with Congressional consent, the Constitution allows federal officials to accept foreign gifts and emoluments, *regardless* of its effect on competition. With Congress's consent, the Hospitality Plaintiffs could still face increased competition in the market for foreign government business but would have no cognizable claim to redress in court. There is simply no basis to conclude that the Hospitality Plaintiffs' alleged competitive injury falls within the zone of interests that the Emoluments Clauses sought to protect.

The Hospitality Plaintiffs therefore lack Article III standing.

B. CREW Fails to Adequately Allege an Injury In Fact

Defendant contends that Plaintiff CREW's claims should be dismissed because it has failed to adequately allege an injury in fact and thus also lacks standing to sue. (Mot. at 8.) An organization like CREW can have standing in one of two ways. As noted, an organization may have associational standing to sue on behalf of its members if some particular member of the organization would have had standing to bring the suit individually. *N.Y. Civil Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012). Alternatively, an organization "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). "Under this theory of 'organizational' standing, the organization is just another person—albeit a legal person—seeking to vindicate a right." *N.Y. Civil Liberties Union*, 684 F.3d at 294. In either case, "the organization must 'meet the same standing test that applies to individuals by showing [an] actual or threatened injury in fact that

is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.'" *Irish Lesbian & Gay Org. v. Guiliani,* 143 F.3d 638, 649 (2d Cir. 1998) (quoting *Spann v. Colonial Vill., Inc.,* 899 F.2d 24, 27 (D.C. Cir. 1990)). In other words, "[a]n organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III." *Simon,* 426 U.S. at 40.

CREW does not allege that it has any members whose interests it seeks to represent here, nor does it otherwise purport to have associational standing. Rather, it asserts it has standing to bring this action because it suffers an injury in its own right, namely a "diversion[] of CREW's communications, legal, and research resources . . . and [the] impairment of its programmatic functions." (Opp'n at 27.) CREW claims that by accepting payments to his businesses that are "rarely public," Defendant has deprived it of information concerning the financial support he receives from various governmental sources, "necessitating time consuming, more expensive, and less effective research to maintain its work." (*Id.*) CREW also asserts that it has had to devote significant resources to identify and counteract Defendant's alleged violations of the Emoluments Clauses, including through the use of "every member of CREW's research team on a near-daily basis" and "the hiring of two additional senior attorneys," as well as its efforts to explain the alleged violations to stakeholders, including the press, and assist and counsel others in counteracting Defendant's alleged violations. (*Id.* at 28.) CREW claims that these expenditures have all come "at the detriment of CREW's efforts to perform

mission-critical work that it would otherwise perform." (*Id.*)

Defendant argues that CREW lacks standing because it fails to allege sufficient injury in fact resulting from Defendant's alleged violations of the Emoluments Clauses. (Mot. at 8.) In particular, Defendant claims that CREW's voluntary diversion of resources, and the type of injury it claims to have suffered as a result, is "self-inflicted" and too abstract to confer standing. (*Id.* at 8-9.)

CREW's organizational standing argument relies principally on the Supreme Court's decision in *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), and its progeny. In *Havens,* Housing Opportunities Made Equal ("HOME"), a nonprofit corporation, brought suit alleging that the defendants tried to steer members of racial and ethnic groups to buildings occupied primarily by members of the same groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups in violation of the Fair Housing Act of 1968. *Id.* at 366-67 & n.1. The organization's mission was to increase equal opportunity in housing through, among other ways, operating a housing counseling service and investigating and referring complaints concerning housing discrimination. HOME argued that it had standing because these activities were frustrated by the defendants' conduct. *Id.* at 368-69. The Court held that HOME would suffer an injury in fact if the defendants' racial steering practices "perceptibly impaired" its ability to provide counseling and referring services to its members: "[s]uch concrete and demonstrable injury to the organization's activities —with the consequent drain on the organization's

resources—constitutes far more than simply a setback to the organization's abstract social interests[.]" *Id.* at 379.

Following *Havens,* the Second Circuit has held that an organization has standing where the defendant's conduct or policy interferes with or burdens an organization's ability to carry out its usual activities. *See, e.g., Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay,* 868 F.3d 104, 110 (2d Cir. 2017) ("[I]f the Ordinance achieves one of its principal objectives-disbursement of day laborers—[the organization] will inevitably face increased difficulty in meeting with and organizing those laborers."); *NY Civil Liberties Union,* 684 F.3d at 295 (the organization's ability to represent its clients in administrative hearings was "impeded" by the defendant's policy barring public access to such hearings). These decisions found organizational standing under *Havens* appropriate where there was a clear, articulable nexus between the challenged conduct or policy and its effects on the organization's ability to carry out specific functions within its purview.

Other Second Circuit decisions have extended *Havens* beyond the circumstance where an organization's activities are impaired *per se.* Those cases establish that an organization has standing where it is forced to expend resources to prevent some adverse or harmful consequence on a well-defined and particularized class of individuals. *See, e.g., Centro,* 868 F.3d at 110 (a local ordinance regulating the ability of day laborers to solicit employment will "force" the organization to expend greater resources since "if the laborers are dispersed, it will be more costly to reach them"); *Olsen v. Stark*

Homes, Inc., 759 F.3d 140, 158 (2d Cir. 2014) (the plaintiff, a nonprofit corporation devoted to fair-housing advocacy and counseling, expended resources to investigate its clients' housing discrimination claims and advocate on their behalf); *Mental Disability Law Clinic, Touro Law Ctr. v. Hogan*, 519 F. App'x 714, 716-17 (2d Cir. 2013) (the plaintiff organization expended resources to challenge the state mental health agency's policy of asserting counterclaims for outstanding treatment charges against patients who sued the agency and thereby discouraged patients from bringing such suits). Though the plaintiff organizations in these cases each pressed somewhat different claims, the common thread is clear: an organization was compelled to act, "with a consequent drain on [its] resources[,]" *Havens*, 455 U.S. at 379, to remedy and counter the adverse consequences flowing from the defendant's conduct or policy. Put differently, the organization's expenditure of resources is prompted by a desire to prevent or limit some harm to a "legally protected interest." *Lujan*, 504 U.S. at 560.

Here, CREW fails to allege either that Defendant's actions have impeded its ability to perform a particular mission-related activity, or that it was forced to expend resources to counteract and remedy the adverse consequences or harmful effects of Defendant's conduct. As noted, the plaintiff organizations in the cases cited by CREW were all driven to expend resources they would not have otherwise spent to avert or remedy some harm to a definable class of protected interests—for example, the right of individuals to pursue housing free from discrimination, or of day laborers to solicit employment-caused by the defendant's actions or policies. CREW, by contrast, may have diverted some of its resources to

address conduct it may consider unconstitutional, but which has caused no legally cognizable adverse consequences, tangible or otherwise, necessitating the expenditure of organizational resources.[5] *See New York v. U.S. Army Corps of Eng'rs*, 896 F. Supp. 2d 180, 195 (E.D.N.Y. 2012) (rejecting argument that organization was injured by having to divert resources where "no one's concrete interests [were] invaded, [and thus] there [was] no initial injury to counter"). CREW has therefore failed to allege that it has been "perceptibly impaired" by Defendant's actions. *Havens*, 455 U.S. at 379. Divorced from any concrete and legally cognizable impact caused by Defendant's conduct, CREW' s allegations of injury amount to no more than an "abstract concern with a subject that could be affected by an adjudication." *Simon*, 426 U.S. at 40. As the Supreme Court has made clear, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient" to confer standing on an organization. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

To be sure, CREW alleges that the time, money, and attention it has diverted to this litigation from other projects have placed a significant drain on its limited resources. But such an allegation, by itself, is insufficient

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[5] Although CREW's co-plaintiffs allege personal harm in the form of increased competition, as explained above, those injuries are not legally cognizable since they are neither fairly traceable to Defendant's conduct, nor are they capable of being redressed by a favorable decision on the merits. Moreover, as explained above, the harm they allege falls outside the Emoluments Clauses' zone of interests since increased competition is not an interest that those Clauses were designed to protect. *See* Part III.A.2.

to establish an injury in fact. CREW's decision to investigate and challenge Defendant's actions under the Domestic and Foreign Emoluments Clauses at the expense of its other initiatives reflects a choice about where and how to allocate its resources—one that almost all organizations with finite resources have to make.[6] (*See* SAC ¶ 175 ("[I]t is essential that CREW *prioritize* Defendant's violations of the Emoluments Clauses and conflicts of interest over those of lower level officials") (emphasis added).) If CREW could satisfy the standing requirement on this basis alone, it is difficult to see how any organization that claims it has directed resources to one project rather than another would not automatically have standing to sue. Under CREW's unbounded definition of standing, for example, a news organization could sue the President by alleging that one or more of his statements forced it to divert resources away from a different story it might have pursued. Surely something more is required to satisfy Article III standing, particularly where, as here, the plaintiff organization purports to be acting on behalf of the public as a whole. (*See id.* ¶ 154.)

Moreover, CREW's entire reason for being is to investigate and combat corruption and reduce the influence of money in politics through, among other things, education, advocacy, and litigation. (*Id.* ¶¶ 21-22.) CREW is thus not wasting resources by educating the

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[6] Similarly unavailing are CREW's allegations that it has had to expend resources responding to press inquiries. Again, those allegations concerning where and how CREW allocates its resources are insufficient to constitute a legally cognizable injury in fact insofar as they are entirely self-inflicted and not borne out of CREW's need to remedy any particular adverse consequence or harmful effect of Defendant's conduct.

public and issuing statements concerning the effects of Defendant's alleged constitutional violations or even by filing suit; this is exactly *how* an organization like CREW spends its resources in the ordinary course. It therefore stands to reason that spending resources to investigate and challenge Defendant's alleged violations of the Domestic and Foreign Emoluments Clauses does not itself impose on CREW a concrete or particularized injury. *See Doe v. Vill. of Mamaroneck,* 462 F. Supp. 2d 520, 542 (S.D.N.Y. 2006); *Small v. Gen. Nutrition Cos., Inc.,* 388 F. Supp. 2d 83, 95 (E.D.N.Y. 2005).

The Second Circuit's decision in *Ragin v. Harry Macklowe Real Estate Co.,* 6 F.3d 898 (2d Cir. 1993), which CREW relies on, (Opp'n at 28-29), does not suggest a contrary result. In *Ragin,* the plaintiff organization brought suit under the Fair Housing Act challenging the defendant's racially discriminatory advertising practices. 6 F.3d at 901. The court found that the organization had standing because it "was forced" to spend time investigating and remedying the advertisements, including through filing an administrative complaint and a lawsuit in federal court, which prevented it from devoting more time and energy to its "regular tasks" of providing counseling and referral services. *Id.* at 905. In addition, the court noted, "[t]hat *some* of the [organization's] time was spent exclusively on litigating this action [did] not deprive [it] of standing." *Id.* (emphasis added). Here, CREW alleges that it was injured by having to divert resources to investigate and counteract Defendant's constitutional violations. But nearly *all* of the resources it expended were either in anticipation or direct furtherance of this litigation. *Ragin* is thus distinguishable.

Nnebe v. Daus, 644 F.3d 147 (2d Cir. 2011), is similarly distinguishable. There, the plaintiff organization brought suit under 42 U.S.C. § 1983 and the First and Fourteenth Amendments challenging an administrative rule pursuant to which taxi drivers' licenses were automatically suspended upon arrest for certain enumerated criminal charges. 644 F.3d at 149. The court recognized a circuit split on the issue of whether "litigation expenses alone [can] constitute damage sufficient to support standing" but reaffirmed *Ragin* as "good law" and observed that contrary decisions were "largely concerned with the capacity of organizations to 'manufacture' standing by bringing a suit." *Id.* (citations omitted). One such case, for example, involved a claim by an organization that it "suffered palpable injury when it was forced to divert resources to investigat[e] . . . classified advertisements placed in the defendant newspapers . . . for evidence of discrimination." *Id.* (quoting *Fair Hous. Council of Suburban Phila. v. Montgomery Newspapers*, 141 F.3d 71, 78 (3d Cir. 1998)). In *Nnebe*, the court noted that the plaintiff organization was not "trolling for grounds to litigate" but rather "allocated resources to assist drivers only when another party—the City—ha[d] initiated proceedings against one of its members." 644 F.3d at 157-58.

Unlike the plaintiff organization in *Nnebe*, CREW did not expend resources in response to an "unbidden injury." *Centro*, 868 F.3d at 122 (Jacobs, J., dissenting). Rather, it sought out and voluntarily undertook efforts to investigate, research, and ultimately bring suit over Defendant's allegedly unlawful conduct, raising the prospect of manufactured standing, about which courts are justifiably concerned. *See Steel Co. v. Citi-*

zens for a Better Env't, 523 U.S. 83, 107 (1998) ("Obviously, . . . a plaintiff cannot achieve standing to litigate a substantive issue for the cost of bringing suit."); *Spann,* 899 F.2d at 27 ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit. Were the rule otherwise, any litigant could create injury in fact by bringing a case, and Article III would present no real limitation.") (Ginsburg, J.).

Since Plaintiff CREW has failed to adequately plead a cognizable injury in fact, it lacks standing to sue under Article III.

IV. PRUDENTIAL CONSIDERATIONS

In addition to the other grounds upon which he seeks dismissal, Defendant argues that Plaintiffs' claims under the Foreign Emoluments Clause should be dismissed for certain prudential reasons. First, Defendant argues that Plaintiffs' claims are better left resolved through the "political process," rather than the courts, because Congress is "far better equipped" to address whether Defendant's particular activities violate the Foreign Emoluments Clause. (Opp'n at 50.) Defendant points out that Congress has more tools at its disposal, including the ability to legislate and consent to Foreign Emoluments Clause violations. (*Id.*)

Defendant seems to argue, without explicitly stating so, that the "political question" doctrine bars Plaintiffs' claims. The doctrine would suggest that Plaintiffs' suit presents a political issue that should be resolved between Congress and the President, without any preemptive interference from the Judiciary.

Plaintiffs' Foreign Emoluments Clause claims do implicate political question concerns. The political question doctrine has its roots in the separation of powers and is ultimately a doctrine of justiciability. It bars courts from deciding cases that are inappropriate for judicial resolution based on a lack of judicial authority or competence, or other prudential considerations. As originally articulated by the Supreme Court in *Baker v. Carr*, a case may be dismissed on the basis of the political question doctrine if there exists: "[1] a textually demonstrable constitutional commitment of the issue [at hand] to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. 186, 217 (1962).

Each of these factors may serve as an independent ground for dismissal. *See Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004). The first factor addresses a court's legal authority to resolve the particular issue presented, the second and third focus on the Judiciary's competence to do so, and the final three concern prudential considerations that may counsel against a court's resolution of the issue. The *Baker* factors are generally viewed as being listed in descending order of importance. *Vieth*, 541 U.S. at 278. In fact, cases applying *Baker* have placed a disproportionate emphasis on the first two

factors. *See Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (collecting cases).

Here, the issue presented under the Foreign Emoluments Clause is whether Defendant can continue to receive income from his business with foreign governments without the consent of Congress. As the explicit language of the Foreign Emoluments Clause makes clear, this is an issue committed exclusively to Congress. As the only political branch with the power to consent to violations of the Foreign Emoluments Clause, Congress is the appropriate body to determine whether, and to what extent, Defendant's conduct unlawfully infringes on that power. If Congress determines that an infringement has occurred, it is up to Congress to decide whether to challenge or acquiesce to Defendant's conduct. As such, this case presents a non-justiciable political question.

Defendant also suggests that Plaintiffs' case should be dismissed because Congress has yet to take any action with respect to Defendant's alleged violations of the Foreign Emoluments Clause. Defendant notes that if Congress wanted to do something about Defendant's conduct, it could. (Opp'n at 50.) Congress could, for example, enact legislation codifying its views by statute or expand the Constitution's conflict-of-interest protections. (*Id.*) But, because Congress has yet to take any action with respect to Defendant's alleged violations, Defendant contends that Plaintiffs' Foreign Emoluments Clause claims are premature. (*See id.*)

Plaintiffs' Foreign Emoluments Clause claims are indeed not ripe for judicial review. Ripeness is a different justiciability doctrine designed to prevent courts from prematurely adjudicating cases. *See Abbot Labs.*

v. Gardner, 387 U.S. 136, 148-49 (1976). In *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell articulated a test to be used in cases involving a confrontation between the legislative and executive branches to determine whether the issue presented was ripe for review, which is particularly instructive here. In that case, members of Congress brought suit against President Carter after he announced his intention to unilaterally terminate a mutual defense treaty between the United States and Taiwan. *Goldwater v. Carter*, 617 F.2d 697, 700-01 (D.C. Cir. 1979), *vacated*, 444 U.S. 996 (1979). The plaintiffs there claimed that such action, without ratification from the Senate, infringed upon Congress's treaty power. *Id.* The D.C. Circuit reversed the lower court's ruling and held that the President did not exceed his constitutional authority in terminating the treaty. *Id.* at 709.

In remanding the case with instructions to dismiss the complaint, Justice Powell stated that "a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority." *Goldwater*, 444 U.S. at 996. He noted further that "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." *Id.* In the *Goldwater* case, Justice Powell explained that no such impasse had been reached because Congress had yet to take any action either denouncing or approving the President's actions.[7] *Id.* at 998.

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[7] Subsequent cases have followed Justice Powell's reasoning in *Goldwater* in dismissing a case on ripeness grounds. *See, e.g., Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985)

Here, Plaintiffs' suit implicates a similar concern regarding a conflict between two coequal branches of government that has yet to mature. As indicated earlier, the Foreign Emoluments Clause makes clear that Congress, and Congress alone, has the authority to consent to violations of that clause. Plaintiffs' principal allegation is that Defendant has completely ignored this balance of power by continuing to accept emoluments without Congressional approval. (SAC ¶¶ 39-42.) As such, this case involves a conflict between Congress and the President in which this Court should not interfere unless and until Congress has asserted its authority and taken some sort of action with respect to Defendant's alleged constitutional violations of its consent power. [8]

At this stage, it would be "both premature and presumptuous for [a court] to render a decision on the issue of [whether Congress's consent] is required at this time or in the near future when . . . Congress itself has provided no indication whether it deems such [consent] either necessary, on the one hand, or imprudent, on the other." *Dellums v. Bush*, 752 F. Supp. 1141, 1149-50 (D.D.C. 1990). If Congress wishes to confront Defendant over a perceived violation of the Foreign Emoluments Clause, it can take action. However, if it chooses not to, "it is not [this Court's] task to do so." *Goldwater*, 444 U.S. at 998. This Court will not tell Congress

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(Ginsburg, J., concurring); *Dellums v. Bush*, 752 F. Supp. 1141, 1149-51 (D.D.C.1990); *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987).

[8] Congress is not a potted plant. It is a co-equal branch of the federal government with the power to act as a body in response to Defendant's alleged Foreign Emoluments Clause violations, if it chooses to do so.

how it should or should not assert its power in responding to Defendant's alleged violations of the Foreign Emoluments Clause. In short, unless and until Congress speaks on this issue, Plaintiffs' Foreign Emoluments Clause claims are not ripe for adjudication.

V. CONCLUSION

Defendant's motion to dismiss is GRANTED. Accordingly, Plaintiffs' claims and this case are DISMISSED.

Dated: New York, New York

Dec. 21, 2017

SO ORDERED

/s/ GEORGE B. DANIELS
GEORGE B. DANIELS
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-474-cv

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, RESTAURANT OPPORTUNITIES CENTERS UNITED, INC., JILL PHANEUF, ERIC GOODE, PLAINTIFFS-APPELLANTS

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Filed: Aug. 17, 2020

Present: ROBERT A. KATZMANN, *Chief Judge*, JOSÉ A. CABRANES, ROSEMARY S. POOLER, PETER W. HALL, DEBRA ANN LIVINGSTON, DENNY CHIN, RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, RICHARD J. SULLIVAN, JOSEPH F. BIANCO, WILLIAM J. NARDINI, STEVEN J. MENASHI, *Circuit Judges*.

Following disposition of this appeal on September 13, 2019, a judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

JOSÉ A. CABRANES, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

STEVEN J. MENASHI, *Circuit Judge*, joined by Debra Ann Livingston and Richard J. Sullivan, *Circuit Judge*s, dissents by opinion from the denial of rehearing *en banc*.

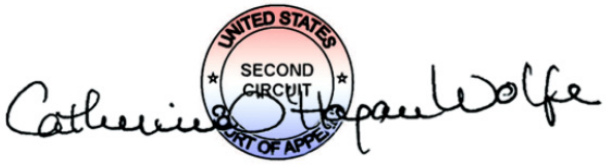
JOHN M. WALKER, JR., *Circuit Judge*, filed a statement with respect to the denial of rehearing *en banc*.

PIERRE N. LEVAL, *Circuit Judge*, filed a statement with respect to the denial of rehearing *en banc*.

MICHAEL H. PARK, *Circuit Judge*, took no part in the consideration or decision of this petition.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, CLERK



JOSÉ A. CABRANES, *Circuit Judge*, dissenting from the order denying rehearing en banc:

I respectfully dissent from the order denying rehearing of this case en banc.[1]

We have missed an opportunity to address en banc a "question of exceptional importance," Fed. R. App. P. 35(a)(2), regarding the limits of the judicial power under Article III of the Constitution in addressing a constitutional claim against a President. The exceptional importance of the case is beyond dispute and its portentousness, which made rehearing en banc appropriate, is effectively captured in Judge Walker's "Statement" in response to the order denying rehearing en banc and Judge Menashi's comprehensive discussion of the principles of Article III standing.

As Justice Robert H. Jackson aptly reminded us, "because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute [a true case or controversy]." *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952); *see also Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 135 (2011) (noting that Justice Jackson's opinion in *Doremus* "reiterated the foundational role that Article III standing plays in our separation of powers"). We are not authorized to review a constitutional violation unless there is an adequate showing that the party bringing the lawsuit is in fact sustaining or "is immediately in danger of sustaining some direct injury," such as a "direct dollars-and-cents injury," as a result of

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[1] I have not solicited concurrences for my opinion.

the challenged unconstitutional conduct by the President. *Doremus*, 342 U.S. at 434 (internal quotation marks omitted) (quoting *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923)).

It is worth underscoring that only the threshold question of plaintiffs' constitutional standing at the pleading stage has been resolved by our Court. We are far from the finish line—the resolution of the merits of the plaintiffs' claims lies before us. On remand, the District Court will need to determine whether the operative complaint in this case states a claim upon which relief can be granted. In conducting this inquiry, the District Court likely will need to address various issues that have yet to be resolved by the Court of Appeals, including whether: (1) the Foreign and Domestic Emoluments Clauses in the Constitution create a privately enforceable right of action against the President; and (2) the plaintiffs' asserted interests fall within the zone of interests protected by the Emoluments Clauses. In carefully addressing these threshold issues on remand, at the motion-to-dismiss stage, the District Court will be able to determine in the first instance whether the case should be dismissed on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6).

MENASHI, *Circuit Judge*, joined by LIVINGSTON and SULLIVAN, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

The owner of several New York-based hotels and restaurants, along with an association of restaurants and restaurant workers, sued the President of the United States alleging violations of the Emoluments Clauses of the Constitution. These restauranteurs seek a judicial declaration that the President is acting unconstitutionally and an injunction restraining him from doing so. To invoke the judicial power against any defendant, a plaintiff must establish standing to sue—meaning that there is a concrete case or controversy between the plaintiff and the defendant. "[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The standing requirement "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). For that reason, when a plaintiff asks a court "to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional," the standing inquiry must be "especially rigorous." *Id.* Yet the majority opinion not only relaxes the ordinary rules of standing; it abandons those rules altogether. Accordingly, I dissent from the denial of rehearing *en banc*.

To establish standing, a plaintiff must show that he or she suffered an injury traceable to the defendant's conduct that the court could redress. Here, the restauranteurs argue that the President's continued interest

in the Trump Organization gives Trump-affiliated businesses an advantage in attracting customers who work for foreign or state governments—because those customers think that eating at a Trump-affiliated restaurant or staying at a Trump-affiliated hotel will enrich the President and thereby curry favor with him.

Are there plausible allegations of this? The majority opinion believes so; it cites a press report about foreign diplomats planning to patronize the Trump International Hotel in Washington D.C.[1] The majority also relies on the allegation, based on another press report, that the Embassy of Kuwait moved an event to the Trump International from the Four Seasons after the President was elected.[2] But the Four Seasons Hotel is not suing the President. In fact, no owner of any hotel in Washington D.C. is a plaintiff in this case, and the plaintiffs here cannot sue on behalf of parties not before the court. "Injured parties 'usually will be the best proponents of their own rights,'" and if "'the holders of those rights do not wish to assert them,' third parties are not normally entitled to step into their shoes." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479 (2006) (internal citation and alteration omitted).

So why does the majority opinion discuss injuries to Washington-based hotels that are not plaintiffs in this case? Because the actual plaintiffs have no evidence of their own injury. They have only a *theory* of injury, which goes like this: Officials from foreign and state

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[1] *Citizens for Responsibility & Ethics in Wash. v. Trump*, 953 F.3d 178, 186 (2d Cir. 2019), *as amended* (Mar. 20, 2020) (citing Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel Is Place To Be*, WASH. POST (Nov. 18, 2016)).

[2] *Id.* at 187 (citing Second Am. Compl. ("Compl.") ¶ 74).

governments would normally eat at (for example) Amali, a Mediterranean restaurant on the Upper East Side of Manhattan that is affiliated with one of the plaintiffs. But because those officials want to curry favor with the President by enriching him with emoluments, they instead eat at (for example) Jean-Georges, a French restaurant located at the Trump International Hotel on the Upper West Side.[3] Does President Trump even own Jean-Georges? The complaint does not allege that he does. No matter. The complaint alleges that the business from foreign and state government officials dining at restaurants on Trump properties is so extensive that it "affects the amount of rent that [the President] is able to charge," thereby enriching the President.[4]

Is it really the case that foreign and state government officials are abandoning the plaintiffs' establishments in favor of restaurants located at Trump properties in the hopes of enhancing the President's rental income? It's *possible*, though one might justifiably be skeptical. But if the jurisdiction of the court hinges on the answer to that question, one might think the court would require the plaintiffs to identify some evidence that at least one official has actually chosen a Trump-located restaurant over one of the plaintiffs' restaurants for an emoluments-based reason. But the plaintiffs have no such evidence, and the majority opinion does not think it is necessary. Instead, the majority opinion

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[3] Compl. ¶ 196 ("Trump International Hotel & Tower New York includes restaurants Jean-George[s] and Nougatine."); Mallios Decl. ¶ 4 (declaration of owner of Amali that his restaurant competes with Jean-Georges, among other restaurants); *see also CREW*, 953 F.3d at 186 (relying on the Mallios Declaration).

[4] Compl. ¶ 109.

finds the plaintiffs' theory of injury so clearly compelling as a matter of "economic logic" that the court can dispense with the normal requirement that standing be based on a concrete injury rather than a speculative one.

No precept of logic or economics holds that foreign and state government officials will necessarily alter their dining preferences at high-end Manhattan restaurants out of a single-minded desire to give the President additional leverage in lease negotiations with restaurants he does not own. It's possible, perhaps, that this has happened or will happen. But to establish standing, a plaintiff must demonstrate an injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted). If the injury is not certain or "certainly impending" but merely "possible," the requirements of Article III are not met. *Clapper*, 568 U.S. at 409 (emphasis omitted). The "[r]elaxation of standing requirements is directly related to the expansion of judicial power" beyond review of cases and controversies toward evaluating government actions that the plaintiffs happen to oppose. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring). Because that expansion of judicial power is inconsistent with Article III—and for other reasons discussed below—I dissent from the denial of rehearing *en banc*.

A. Competitor Standing

Rehearing is needed, first and foremost, to "secure or maintain uniformity of the court's decisions" on the competitor-standing doctrine. Fed. R. App. P. 35(a)(1). This court has spoken inconsistently about the showing a competitor must make to establish that its injury is

"actual or imminent" and "fairly traceable" to the defendant's conduct rather than conjectural or hypothetical. *Clapper*, 568 U.S. at 409. This court has said, for example, that "in order to establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit" but at the same time the court was concerned that by merely "asserting that an advantage to one competitor adversely handicaps the others, plaintiffs have not pleaded that they were personally" harmed. *In re U.S. Catholic Conference*, 885 F.2d 1020, 1029-30 (2d Cir. 1989) (worrying that "a competitor advocate theory of standing" would "lack a limiting principle, and would effectively give standing to any spectator who supported a given side in public political debate").[5] In subsequent cases on competitor standing, this court adopted the first part of the *Catholic Conference* formulation without expressing the same concern that a plaintiff ought to show personal harm beyond mere advantage to a competitor. "In order to 'satisfy the rule that he was personally disadvantaged,'" the court said, "a plaintiff must

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[5] In *Catholic Conference*, the court concluded that the plaintiffs were not electioneering competitors with the Catholic Church, 885 F.2d at 1029, but also concluded that they lacked standing as competitors in public advocacy because of a lack of a concrete injury, *see id.* at 1030 ("It may be argued that to qualify as competitor advocates plaintiffs need not go so far as to run for office or lobby; rather, they may simply advocate the pro-choice cause and stop short of supporting candidates. But that argument fails to answer the nagging question of why these individuals and organizations are then the appropriate parties to call a halt to the alleged wrongdoing. It is obvious that plaintiffs express their pro-choice views strongly and articulately. Yet such strongly held beliefs are not a substitute for injury in fact.").

'show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit.'" *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 197 (2d Cir. 2002) (concluding that it was enough to establish standing that "an advocacy organization . . . competes with . . . groups engaged in advocacy around the very same issues" and the government "bestowed a benefit on plaintiffs' competitive adversaries").

The majority opinion in this case repeats the relaxed standard without the concern for establishing personal harm: "To make an adequate allegation of a competitive injury, plaintiffs must plausibly allege (1) that an illegal act bestows upon their competitors 'some competitive advantage,' and (2) 'that they personally compete in the same arena' as the unlawfully benefited competitor." *CREW*, 953 F.3d at 190 (internal citation omitted). This idea—that a plaintiff may establish standing by showing an advantage to a competitor without needing to show any personal harm to oneself—finds some support in previous Second Circuit case law. But it is irreconcilable with the Supreme Court's instruction that an injury must be "concrete," "particularized," and "certainly impending." *Clapper*, 568 U.S. at 409.[6]

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[6] This court already took a questionable turn when it applied case law applicable to economic competitors to the political arena with "a theory that this Court has dubbed 'competitive advocate standing.'" *Bush*, 304 F.3d at 197 ("We have acknowledged the possibility that a plaintiff may have standing to bring an equal protection claim where the government's allocation of a particular benefit 'creates an uneven playing field' for organizations advocating their views in the public arena."); *Catholic Conference*, 885 F.2d at 1030 ("Although the foregoing cases conferred standing to economic competitors, political competitors arguably should fare as well.").

Perhaps recognizing that Supreme Court precedent requires a more concrete showing, the majority opinion cites cases from other circuits to support its assertion that personal harm exists here as a matter of "economic logic." 953 F.3d at 190 (citing cases from the Fifth, D.C., and Federal Circuits). But no other circuit assumes, as the majority opinion does, that "economic logic" dictates a finding of personal harm whenever a competitor has an advantage. Even the cases on which the majority opinion relies demonstrate that other courts require a greater showing than the relaxed standard. In *KERM, Inc. v. FCC*, 353 F.3d 57 (D.C. Cir. 2004), the court said that "[w]hile a party that is 'likely to be financially injured' by a Commission decision may have competitor standing to challenge Commission actions under the Act, *that party must make a concrete showing that it is in fact likely to suffer financial injury as a result of the challenged action*." *Id.* at 60-61 (internal citations omitted and emphasis added). The D.C. Circuit specifically said it was not enough for a plaintiff to rely only on allegations that government action had provided a competitor with a competitive advantage:

> KERM might have satisfied the requirements of competitor standing if it had introduced evidence that KAYH's broadcast of the disputed announcements resulted in lost advertising revenues for

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The majority opinion now applies this watered-down theory of standing from the political context back to economic competitors. But as the Supreme Court has recently explained, standing must be "based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 99 (2013).

> KERM or otherwise adversely affected KERM's financial interests. KERM offered no such evidence. Rather, KERM vaguely asserts only that it competes with KAYH and that its own radio stations serve much of the same audience as KAYH. Such "[b]are allegations are insufficient . . . to establish a petitioner's standing to seek judicial review of administrative action."

Id. at 61 (relied on in *CREW*, 953 F.3d at 190).

KERM followed prior D.C. Circuit precedent that declined to apply the competitor-standing doctrine where the plaintiffs' causal chain "depends on the independent actions of third parties," as "distinguish[ed] . . . from the garden variety competitor standing cases which require a court to simply acknowledge a chain of causation firmly rooted in the basic law of economics." *New World Radio v. FCC*, 294 F.3d 164, 172 (D.C. Cir. 2002) (internal quotation marks omitted).

The majority opinion also relies on *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319 (Fed. Cir. 2008). In that case, the Federal Circuit explained that a plaintiff could properly "invoke the doctrine of 'competitor standing,' which relies on economic logic to conclude that a plaintiff will likely suffer an injury-in-fact when the government acts in a way that increases competition or aids the plaintiff's competitors," only after the court below had "conducted a two-day evidentiary hearing devoted to the question of injury-in-fact" that involved "expert testimony . . . concerning the types of economic injury that were likely to result from government subsidization of a competitor." *Id.* at 1332-33 (relied on in *CREW*, 953 F.3d at 190).

These cases do not say that a plaintiff is personally harmed as a matter of economic logic whenever that plaintiff's competitor in the same market receives a benefit. Rather, the cases say that when a competitor receives a benefit, the plaintiff *may* be able to show that personal harm follows as a matter of economic logic. But the plaintiff must make that showing. The court should not simply assume that economic logic compels a finding of personal harm every time a plaintiff and defendant are competitors in the same market.

Thus, the majority opinion relies on Second Circuit precedent to hold that a plaintiff need only meet the relaxed standard to establish competitor standing, and then it relies on non-circuit precedent to hold that once competitor standing has been established, a concrete injury traceable to the defendant has necessarily been demonstrated as a matter of economic logic. But these two lines of cases are incompatible. The "economic logic" cases require the plaintiff to demonstrate that it will "likely" or "almost surely"[7] suffer personal harm as a result of the challenged actions, while the relaxed standard takes personal harm for granted.

The majority opinion in this case did not require a showing that the competition "almost surely" caused the alleged injury. Rather, the majority thought it was enough for the alleged competitive injury to consist of

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[7] *See El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27-28 (D.C. Cir. 1995) ("The nub of the 'competitive standing' doctrine is that when a challenged agency action authorizes allegedly illegal transactions that will *almost surely* cause petitioner to lose business, there is no need to wait for injury from specific transactions to claim standing. . . . [In the absence of such certainty, a plaintiff is] required to allege facts demonstrating 'injury in fact.'") (emphasis added).

"revenue that *might* otherwise have gone to Plaintiffs" and may be one among several "other possible, or even likely, causes for the benefit going to the plaintiff's competition." *CREW*, 953 F.3d at 191, 192 (emphasis added). There is simply no way to reconcile the standard the majority applied here with the Supreme Court's holding that an injury must be "certainly impending" rather than merely "possible." *Clapper*, 568 U.S. at 409.[8]

As noted, standing must be "based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor." *Already*, 568 U.S. at 99; *see also In re Trump*, 958 F.3d at 294 (Wilkinson, J., dissenting) ("Generally speaking, freestanding 'competitive injuries' do not constitute legal wrongs traditionally redressable by the courts."). But that is precisely the showing the majority opinion held to be sufficient in this case. And the facts of this case show why such a theoretical "injury" is insufficient—because it is not at all clear that foreign and state government officials are choosing to eat at Jean-Georges rather than Amali, or to stay at the Trump SoHo New York rather than the Maritime Hotel

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[8] *See also In re Trump*, 958 F.3d 274, 327 (4th Cir. 2020) (*en banc*) (Niemeyer, J., dissenting) (criticizing the majority opinion in *CREW* because "rather than analyzing how the New York properties' distribution of income to the President gives those properties a competitive advantage over their competitors, the Second Circuit simply reiterated the causation standard at a highly general level and stated that there was 'a substantial likelihood that [the plaintiffs'] injury [was] the consequence of the challenged conduct'" and because it "failed to explain . . . how a President's direct receipt of income from a hotel investment—as opposed to, for example, his family members' receipt of that income—could have skewed the market in his favor").

in Chelsea,[9] because these officials want to enrich the President.[10] The plaintiffs have not identified even a single instance of that occurring. As the district court sensibly noted, "it is wholly speculative whether the Hospitality Plaintiffs' loss of business is fairly traceable to Defendant's 'incentives' [i.e. 'patroniz[ing] his properties in hopes of winning his affection'] or instead results from government officials' independent desire to patronize Defendant's businesses." *Citizens for Responsibility & Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017).[11]

Markets vary in terms of whether increased competition will yield harm. In a single-transaction market with 1000 buyers and two sellers, we might expect an unfairly advantaged seller to take some business from its competitor. But in a market with one buyer and

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[9] Compl. ¶ 228.

[10] *See In re Trump*, 958 F.3d at 326 (Niemeyer, J., dissenting) (noting that the "theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends to the President*, rather than due to a more general interest in currying favor with the President or because of the Hotel's branding or other characteristics. Such a conclusion, however, is not only economically illogical, but it also requires speculation into the subjective motives of independent actors who are not before the court, thus precluding a finding of causation").

[11] "Standing . . . is not an ingenious academic exercise in the conceivable but requires a factual showing of perceptible harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) (internal quotation marks and alterations omitted). In the context of associational standing, the Supreme Court has rejected "probabilistic standing" and "required plaintiffs . . . to identify members who have suffered the requisite harm," even when it was accepted that such a person "likely" exists. *Id.*

1000 sellers, we know for sure that even if a seller has been unfairly advantaged, at least 998 of the other sellers have not suffered an injury because the buyer was not choosing them anyway. Is the market for serving meals to foreign and state government officials more like the first example or the second? The majority opinion is not even interested in the question because it simply assumes that whenever businesses compete over the "same customer base," an advantage for one is an injury to all the others. *CREW*, 953 F.3d at 190. That is indefensible.[12] "[F]or a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013).

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[12] In his statement respecting the denial of rehearing *en banc*, Judge Leval asserts that this dissent "posits" that the market for high-end restaurants and hotels is one with many sellers and few buyers. As you can see, this dissent posits no such thing. Rather, it points out that the majority opinion did not even consider the question, impermissibly assuming—regardless of any concrete showing about market features—that a benefit to one competitor injures all the others. Judge Leval now insists that "there are nearly 200 nations in the world (and 50 states), many of which send delegates to Washington or New York." But the majority opinion cited no evidence that representatives of any government—let alone "many of" those 200 countries and 50 states—have patronized the plaintiffs' restaurants and have shifted their business in order to enrich the President. Judge Leval's statement supplies speculation about the potential buyers in the marketplace to take the place of the "concrete injury" that Article III requires. *Lujan*, 504 U.S. at 572. But "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal quotation marks and alteration omitted).

I would grant the petition for rehearing *en banc* and hold that standing requires a showing of personal harm rather than mere advantage to a competitor.

B. Injunctive Relief Against the President

Rehearing is warranted also to address whether and when injunctive relief may be granted directly against the President. The majority opinion concludes that the plaintiffs' claims are redressable because the district court could fashion various types of injunctive relief against the President, *see CREW*, 953 F.3d at 199 n.12, but the opinion never even acknowledges the disputed antecedent question of the extent to which a court may issue injunctive relief against the President. This is "a question of exceptional importance" that deserves express consideration. Fed. R. App. P. 35(a)(2).

The majority opinion holds that the plaintiffs have established redressability because "[i]njunctive relief could be fashioned along many different lines that would adequately reduce the incentive for government officials to patronize Trump establishments in the hope of currying favor with the President." *CREW*, 953 F.3d at 199. The opinion then suggests in a footnote that the district court could (1)"bar the Trump establishments from selling services to foreign and domestic governments during the President's tenure in office"; (2)"require the President to establish a blind trust or otherwise prevent him from receiving information about government patronage of his establishments"; or (3) "require public disclosure of the President's private business dealings with government officials through the Trump establishments." *Id.* at 199 n.12.

As the case is currently structured, each of these forms of injunctive relief would run directly against the President because the President, in his official capacity, is the sole defendant. So we are talking about the district court ordering the President to direct his businesses to refuse to host diplomatic guests, to sell his assets and to place the proceeds into a blind trust, not to discuss with foreign officials where they have lodged or eaten, or to direct his hotels to announce to the public whenever a foreign or state official stays there. The majority opinion's suggestion that a district court might award such relief is so radical that the plaintiffs suing the President over emoluments in a separate case have disavowed it.[13]

Other courts have concluded that such relief is not available. For example, in a case challenging religious displays at presidential inaugurations, the D.C. Circuit concluded the plaintiffs lacked standing because any relief that could redress the alleged injury would need to take the form of an injunction against the President and "[w]ith regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief." *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (internal citation omitted). In this case, by contrast, the majority opinion does not grapple with the separation-of-powers question but simply assumes that injunctive relief is available against the President in his official capacity. To be

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[13] *See* Oral Argument Audio Recording at 1:14:13 to 1:14:16, *In re Trump*, No. 18-2486 (4th Cir. Dec. 12, 2019) (counsel for plaintiffs stating "I'm not advancing what the Second Circuit had in its footnote").

sure, the government argued to this court that such relief is not available, Brief for Appellee 42-43, but the majority opinion did not even pause to consider the government's arguments.

The Supreme Court has long held that courts have "no jurisdiction of a bill to enjoin the President in the performance of his official duties" that are discretionary. *Mississippi v. Johnson*, 71 U.S. 475, 501 (1866). That case, as well as the plurality opinion in *Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992), left open the question whether courts have jurisdiction to enjoin the President for duties that are "ministerial." Several lower courts, however, have held or suggested that courts lack jurisdiction to order injunctive relief directly against the President even for so-called ministerial acts. *See, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 977-78 (D.C. Cir. 1996); *Lovitky v. Trump*, No. 19-1454, 2019 WL 3068344, at *10 (D.D.C. July 12, 2019) ("Notwithstanding some lingering uncertainty, the Court takes Supreme Court and recent Circuit decisions as supplying enough direction: This Court should not grant mandamus, injunctive, or declaratory relief against a sitting President to require performance of a ministerial duty."), *aff'd in part, vacated in part on other grounds*, 949 F.3d 753 (D.C. Cir. 2020).[14]

Justice Scalia suggested that the proper inquiry should not be whether the duty is discretionary or min-

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[14] *See also In re Trump*, 958 F.3d at 299 (Wilkinson, J., dissenting) (arguing that "compliance with the Emoluments Clauses is not a 'ministerial duty'" and noting that, regardless, "the federal courts have never sustained an injunction" that required the President to perform a ministerial duty).

isterial but whether a court would be ordering the President "to exercise the 'executive Power' in a judicially prescribed fashion." *Franklin*, 505 U.S. at 826 (Scalia, J., concurring); *see also Swan*, 100 F.3d at 989-90 (Silberman, J., concurring). In Justice Scalia's view, telling the President how to exercise the executive power would be tantamount to telling a member of Congress to vote to pass or repeal a particular law. *Franklin*, 505 U.S. at 826 (Scalia, J., concurring).[15]

It is not immediately obvious whether the injunctions the majority opinion hypothesizes would direct the exercise of the executive power. On the one hand, owning a business is a private function; on the other hand, ordering affairs to avoid emoluments is a duty that applies to the President only because he is the President, U.S. Const. art. II, § 7, or because he may be a "Person holding an[] Office of Profit or Trust under" the United States, *id*. art. I, § 9.[16] That the plaintiffs have sued the President only in his official capacity at least suggests that the sought-after relief relates to his official powers. But even if one were confident that the injunction related to the President's personal conduct, an "interbranch conflict . . . does not vanish simply because"

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[15] Justice Scalia's view was not limited to injunctive relief. He noted that "[f]or similar reasons, I think we cannot issue a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court." *Franklin*, 505 U.S. at 827 (Scalia, J., concurring).

[16] That is, assuming the Foreign Emoluments Clause applies to the President. *Compare* Amici Br. of Former National Security Officials at 13-17 (arguing the clause applies to the President), *with* Amici Br. of Seth Barrett Tillman & the Judicial Education Project at 16-25 (arguing it does not).

legal process relates to "personal" matters "or because the President [was] sued in his personal capacity. The President is the only person who alone composes a branch of government," and therefore "'[t]he interest of the man' is often 'connected with the constitutional rights of the place.'" *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2034 (2020) (quoting *The Federalist* No. 51). The court's authority to issue injunctive relief in this case presents a difficult and important question regarding the separation of powers. The majority opinion should have addressed that question instead of assuming it away.[17]

Even if injunctive relief were not available, that does not "in any way suggest[] that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." *Franklin*, 505 U.S. at 828 (Scalia, J., concurring). For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court found presidential action unconstitutional but then approved

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[17] The Fourth Circuit's *en banc* majority opinion concluded that such relief could be issued against the President because the Emoluments Clauses impose a restraint on his behavior rather than an affirmative duty to execute the law and because complying with the Clauses is a ministerial function. *In re Trump*, 958 F.3d at 288. There is some reason to doubt those conclusions. *See id.* at 299-300 (Wilkinson, J., dissenting); *id.* at 324 (Niemeyer, J., dissenting); *see also Swan*, 100 F.3d at 990 (Silberman, J., concurring) (noting that "whether such an order is phrased as an injunction—ordering the President not to take an allegedly illegal act—or positively—to perform a legally obliged duty—it trenches on the President's 'executive and political' duties"). But at least the Fourth Circuit, unlike this court, put forward a rationale for its decision.

injunctive relief only against the Secretary of Commerce. *Id.* at 584, 587-89.[18] By analogy in this case, a plaintiff who loses a government contract due to favoritism that results from illegal emoluments might be able to sue the agency or inferior executive officer who is responsible for awarding the contract in order to redress the Emoluments Clause violation. Doing so would avoid the need to consider injunctive relief against the President. This more conventional approach might also indicate who the proper plaintiff would be in a case such as this.

The question of whether and when a court can issue injunctive relief against the President is squarely raised in this case and is undoubtedly an issue of "exceptional importance." Fed. R. App. P. 35(a)(2). The majority opinion resolved it without analysis. It deserves more consideration than that.

C. Zone of Interests

On rehearing, the panel has commendably removed the portion of its opinion addressing the zone-of-interests test on the merits. *See CREW*, 953 F.3d at 200 n.13. In doing so, the panel recognized that it was mistaken to opine on the merits of the zone-of-interests test when its only point was that the test goes not to subject matter jurisdiction but to the availability of a cause of action. The panel emphasizes that it deleted that discussion so as not to create "a precedent on the question whether

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[18] *See also Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 579 (S.D.N.Y. 2018) (declining to "resolve the question of whether injunctive relief may be awarded against the President" and recognizing that "courts should normally direct legal process to a lower Executive official"), *aff'd*, 928 F.3d 226 (2d Cir. 2019).

the Complaint states a claim upon which relief may be granted." *Id.* In other words, the court holds only that the district court erred in treating the zone-of-interests analysis as a reason for dismissal under Rule 12(b)(1), and the district court remains free to re-instate its zone-of-interests analysis when considering dismissal under Rule 12(b)(6).

That is a welcome change because the district court's zone-of-interests analysis was correct on the merits. The district court rightly concluded that the zone-of-interests inquiry is narrower where, as here, the suit is based on an implied cause of action under the Constitution rather than under the generous review provisions provided by the Administrative Procedure Act. *CREW*, 276 F. Supp. 3d at 187.[19] The prior majority opinion unfairly criticized that conclusion and faulted the district court for relying on Justice Scalia's dissent in *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).[20] But that passage from Justice Scalia's dissent simply described

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[19] *See also In re Trump*, 958 F.3d at 296-97 (Wilkinson, J., dissenting) ("[T]he government action complained of here is not 'agency' action subject to the 'generous' review provisions of the APA.").

[20] *See Citizens for Responsibility & Ethics in Wash. v. Trump*, 939 F.3d 131, 157 n.13 (2d Cir. 2019) ("Puzzlingly, the district court cited a passage from Justice Scalia's dissenting opinion in *Wyoming* seemingly as though it were the holding of the case."). A vestige of this unfair criticism remains in the revised opinion, *see CREW*, 953 F.3d at 188 n.6 ("The district court appeared to mistakenly rely on Justice Scalia's dissent in *Wyoming* as if it were a statement by the majority about the proper application of the zone of interests test."), though this passage in the revised opinion cross-references a portion of the opinion that has now been deleted.

what the Supreme Court had stated in *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987)—that "the invocation of the 'zone of interest' test" in a constitutional case "should not be taken to mean that the standing inquiry under whatever constitutional or statutory provision a plaintiff asserts is the same as it would be if the 'generous review provisions' of the APA apply." *Id.* at 400 n.16. The *Clarke* Court went on to explain that the "difference made by the APA can be readily seen by comparing the 'zone of interest' decisions" in APA cases "with cases in which a private right of action under a statute is asserted in conditions that make the APA inapplicable." *Id.* In non-APA cases, the Court "was requiring more from the would-be plaintiffs . . . than a showing that their interests were arguably within the zone protected or regulated" by the statute. *Id.*

The Supreme Court has since reaffirmed that proposition from *Clarke*. *See Bennett v. Spear*, 520 U.S. 154, 163 (1997) ("We have made clear . . . that the breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes.") (quoting *Clarke*, 479 U.S. at 400 n.16).

The original panel opinion erroneously concluded that the Supreme Court has rejected the distinction that Justice Scalia described.[21] As a result, the opinion treated zone-of-interests cases under the APA as applicable

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[21] *CREW*, 939 F.3d at 157 n.13 (concluding that, even though "[t]he majority [in *Wyoming*] did not explicitly discuss this argument," it must have "rejected Justice Scalia's contention").

precedents in a case arising under the Constitution.[22] For example, it described the Supreme Court's holding in *Lexmark International, Inc. v. Static Control Components*, 572 U.S. 118 (2014), as extending "the longstanding view that the [zone-of-interests] test is 'not meant to be especially demanding.'" *CREW*, 939 F.3d at 154 (quoting *Clarke*, 479 U.S. at 399). But the Court has been careful to qualify this statement: "We have said, *in the APA context*, that the test is not 'especially demanding.'" *Lexmark*, 572 U.S. at 130 (emphasis added). The original panel opinion described *Bank of America Corp. v. City of Miami*, 137 S. Ct. 1296, 1304 (2017), as "consistent with the longstanding view that a plaintiff's economic injury usually makes her a 'reliable private attorney general to litigate the issues of the public interest.'" *CREW*, 939 F.3d at 156 (quoting *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154 (1970)). The *Bank of America* case does not mention a "private attorney general," but it does emphasize that the Court was there considering a statutory cause of action under a scheme that "showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Bank of Am. Corp.*, 137 S. Ct. at 1298. We do not have such a statutory scheme in this case. Instead, we have parties relying on an implied constitutional cause of action and a grievance against the President. *But see Richardson*, 418

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[22] *Id.* at 157 ("While most cases addressing whether the plaintiff's injury is outside the zone of interests of the law alleged to be violated have concerned the zone of interests of a *statute*, and this suit alleges violations of the *Constitution*, we can see no reason why the reasoning of the precedents reviewed above are not equally applicable here.").

U.S. at 175 (noting that a party may not "employ a federal court as a forum in which to air his generalized grievances about the conduct of government").

On remand, the district court is free to reconsider the zone of interests in the context of whether the plaintiffs state a claim for relief under Rule 12(b)(6). The district court correctly followed the Supreme Court's instruction that the zone-of-interests inquiry requires a court to consider whether the plaintiffs are within "the class for whose *especial* benefit" the provision was adopted. *Clarke*, 479 U.S. at 400 n.16.[23]

D. Judge Leval's Statement Respecting the Denial of Rehearing

By relaxing the constitutional limits on judicial authority, the standards adopted in the majority opinion would "convert the Judiciary into an open forum for the resolution of political or ideological disputes." *Richardson*, 418 U.S. at 192 (Powell, J., concurring). The opinion "opens the door to litigation as a tool of harassment of a coordinate branch with notions of competitor standing so wide and injury-in-fact so loose that litigants can virtually haul the Presidency into court at their pleasure." *In re Trump*, 958 F.3d at 291 (Wilkinson, J., dissenting). If there were any remaining doubts about this result, one need only review the statement that

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[23] *See also In re Trump*, 958 F.3d at 297 (Wilkinson, J., dissenting) (noting that the Emoluments Clauses are "structural provisions of the Constitution designed to prevent official corruption"); *id.* at 322 (Niemeyer, J., dissenting) (noting that the Clauses "are structural provisions concerned with public corruption and undue influence").

Judge Leval has filed in support of the majority opinion (hereinafter "statement").

1. Official Acts

The statement insists that this dissent relies on a conclusion that the President's interest in hotels and restaurants is an official act. That is incorrect. This dissent argues that the majority opinion fails to apply even those standing requirements applicable to litigation between private parties, and this dissent does not reach any conclusion about whether compliance with the Emoluments Clauses is an official act. It expressly declines to take a position on this difficult question, instead identifying it as an issue the majority opinion failed to address despite summarily concluding that injunctive relief was available against the President. As Part B explains, "It is not immediately obvious whether the injunctions the majority opinion hypothesizes would direct the exercise of the executive power. On the one hand, owning a business is a private function; on the other hand, ordering affairs to avoid emoluments is a duty that applies to the President only because he is the President or because he may be a 'Person holding an[] Office of Profit or Trust under' the United States" (internal citations omitted). The majority opinion should have addressed this issue and considered the propriety of injunctive relief—even if that relief affected only the President's "personal" affairs. *Mazars USA*, 140 S. Ct. at 2034.

Judge Leval now seems convinced that the majority's hypothesized remedial injunctions would run against the President only in his private capacity. Or, rather, his statement takes the position that, when it comes to the Emoluments Clauses, the President is engaging in

"private conduct" while in his "official capacity." The statement's new theory says "[t]here is no inconsistency in recognizing that a President's personal receipt of moneys is private conduct, notwithstanding a complaint's naming the President in his official capacity because his office is what renders that private conduct unlawful." This state of affairs is so obvious, says the statement, that it would actually be "illogical[] [to] view[] the naming of the President 'in his official capacity' as necessarily meaning that the conduct complained of was official conduct."

This theory is intended to justify, retroactively, the unsupported conclusions in the majority opinion. Yet it only strengthens the case for rehearing. The Supreme Court has explained that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (internal citation omitted). But it turns out that the majority opinion, without expressly saying so, authorized an official-capacity suit that seeks remedies against the President personally. If this is what the majority was thinking, then it should have provided at least a little analysis to justify this striking departure from established practice and precedent.

It would have been unprecedented enough for the majority to claim authority—for the first time—to issue injunctive relief against the President. But now we learn that it has done so in a lawsuit the form of which has never been seen before: the official-capacity-but-private-conduct suit. The statement insists it knows of no precedent that would *preclude* such relief. But in

the absence of any prior case in which this or any other "federal appellate court has allowed a claim premised on this mode of relief to move forward," the majority might have paused to explain the source of this new authority. *In re Trump*, 958 F.3d at 297 (Wilkinson, J., dissenting). "[H]istory is especially instructive when one branch of government claims a novel power against another—such as the judiciary asserting the authority to enjoin the chief executive—but cannot point to a single instance of having used it." *Id.* at 298.[24]

The Supreme Court has said that a "grant of injunctive relief against the President himself is extraordinary, and should have raised judicial eyebrows." *Franklin*, 505 U.S. at 802. But the majority opinion did not even blink before authorizing such relief. As it stands, the majority opinion provides no reasoning at all for its dramatic holding that a court could order the President to sell all his assets. There are substantial reasons for believing the statement is wrong that compliance with the Emoluments Clauses has "nothing to do with the President's exercise of his official duties."[25] But the

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[24] Even suits involving a President's' purely private conduct—that is, his engaging in private conduct in a private capacity—require special consideration. *See Mazars*, 140 S. Ct. at 2035 ("No one can say that the controversy here is less significant to the relationship between the branches simply because it involves personal [matters]."); *Clinton v. Jones*, 520 U.S. 681, 702 (1997) (noting that "in the more than 200-year history of the Republic, only three sitting Presidents have been subjected to suits for their private actions" and that such suits must be "properly managed by the District Court" to avoid "occupy[ing] any substantial amount of [the President's] time").

[25] *See In re Trump*, 958 F.3d at 299 (Wilkinson, J., dissenting) (arguing that "[c]ompliance with the Emoluments Clauses is an official

majority opinion's neglect of this issue—the lack of any rationale at all, let alone one with which the dissenters might agree—is what justifies *en banc* rehearing in this case.[26]

It would have been especially helpful for the majority to include some analysis on this point in its opinion because Judge Leval's newfound theory contradicts the allegations in the complaint. The plaintiffs insist no fewer than three times that they are suing the President only "in his official capacity as President of the United States."[27] The complaint alleges that President Trump is "'an officer . . . of the United States . . . *acting in his official capacity or under color of legal authority*.'"[28] And it further alleges—three more times—that the President "has used his official position as President to generate business to his hotel properties and their restaurants from officials of foreign states, the United States, and/or state and local governments."[29]

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duty of the presidency—it is a legal requirement that applies to the President by virtue of the very fact he is President, binding on him only for the duration of his time in office," and "because 'the President is the executive department,' to control him, in any official capacity, is to control the executive branch itself") (quoting *Johnson*, 71 U.S. at 500).

[26] The intense debate on this issue between the nine-judge majority and six-judge dissent in the Fourth Circuit's recent *en banc* decision makes it all the more surprising that the majority here decided not to provide any analysis on the question of judicial authority to issue injunctive relief against the President. *See In re Trump*, 958 F.3d at 288-89 (nine-judge majority); *id.* at 297-302 (Wilkinson, J., dissenting, joined by five other judges).

[27] Compl. coversheet; *id.* at 1; *id.* ¶ 31.

[28] *Id.* ¶ 33 (emphasis added).

[29] *Id.* ¶¶ 202, 211, 219.

It was obviously important to the plaintiffs that they were challenging acts taken in an official capacity and that relief be sought against the President in his official capacity. That is the consistent approach among plaintiffs in every suit alleging violations of the Emoluments Clauses against the President, and the courts that have found standing in those cases have done so for claims against the President specifically in his official capacity.[30] But now we learn from the statement that the

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[30] *See District of Columbia v. Trump*, 291 F. Supp. 3d 725, 747 (D. Md. 2018) ("The Court is satisfied that Plaintiffs may properly bring this action against the President in his official capacity."), *aff'd sub nom. In re Trump*, 958 F.3d at 280 & n.1, 288-89; *Blumenthal v. Trump*, 373 F. Supp. 3d 191, 193 (D.D.C. 2019) ("[T]he Court held that plaintiffs . . . had standing to sue defendant Donald J. Trump in his official capacity as President of the United States."), *vacated as moot*, 949 F.3d 14 (D.C. Cir. 2020).

The statement relies on the Maryland case for the proposition that the claims under the Emoluments Clauses run against the President in his private rather than official capacity. But that reliance is misplaced. After sustaining the claims against the President in his official capacity, the district court suggested that the claims against the President in his private capacity be dismissed, and the plaintiffs voluntarily dismissed those claims. *See District of Columbia v. Trump*, 930 F.3d 209, 212 (4th Cir. 2019) (recounting this procedural history). So the plaintiffs in that case, like the plaintiffs in this one and in the D.D.C. case, have specifically decided to pursue claims against the President only in his official capacity. The Fourth Circuit's *en banc* majority concluded that the case could proceed against the President solely in his official capacity and dismissed an appeal brought by the President in his private capacity. *See In re Trump*, 958 F.3d at 280 n.1; *District of Columbia v. Trump*, 959 F.3d 126, 129 (4th Cir. 2020) (*en banc*).

The statement also asserts that the President "conceded" in the Maryland case that the claims had nothing to do with his official duties. The President there disputed the plaintiffs' definition of "emolument," arguing that it should not reach income received from

majority opinion implicitly rejected the plaintiffs' allegations in their complaint and departed from every other court to consider such claims by concluding—without providing any reasoning at all—that the President violates the Emoluments Clauses only when acting privately (though, perhaps, somehow still in his official capacity). The statement assumes that the dissenters must disagree. But the argument for rehearing *en banc* is not that this previously unstated argument about the Emoluments Clauses is necessarily incorrect; it's that the court should resolve the issue openly and directly rather than covertly and implicitly. The authority to issue injunctive relief against the President is a matter of exceptional importance to which the majority opinion devoted scant attention, despite it having been raised by the parties—and despite the parties and other courts reaching a different conclusion than what we have now been told underlies the majority opinion.[31]

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businesses that had nothing to do with his official duties. Memorandum in Support of Defendant's Motion to Dismiss at 30-50, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018), ECF No. 21-1. Nowhere did the United States or the President concede that compliance with the Emoluments Clauses is private conduct. In fact, the United States argued that "Plaintiffs can state no individual-capacity claim because the Emoluments Clauses do not even apply to the President in his individual capacity." Statement of Interest of the United States at 4, *Trump*, 315 F. Supp. 3d 875, ECF No. 100. The President said that "the Court's suggestion that this dispute has 'nothing' to do with the Defendant's 'performance of his duties as president' was mistaken." Memorandum in Support of Motion to Dismiss on Behalf of Defendant in His Individual Capacity at 14-15, *Trump*, 315 F. Supp. 3d 875, ECF No. 112-1.

[31] The statement says that this dissent construes the complaint in the manner least favorable to the plaintiffs, but it construes the complaint only in the most natural way, based on its repeated references

The new discoveries do not end there. The statement at first appears to disagree with those precedents limiting the court's authority to enjoin the President in his official capacity. But then, a mere two paragraphs later, the statement recognizes the authority of precisely those precedents limiting, as the statement itself puts it, "the power of the courts to direct a President's conduct of the business of the United States." The statement does not dispute those precedents but argues the precedents do not apply because the President is acting quasi-privately here. So there turns out not to be any actual disagreement that the courts have limited authority to enjoin the President's official acts. The only disagreement is over the statement's new discovery

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to actions taken in an official capacity, rather than applying an unstated and novel distinction between official capacity and official conduct, as the statement does.

The statement also inaccurately claims that this dissent argues the plaintiffs should not be allowed to amend their complaint to add claims against the President in his private capacity. If the plaintiffs can support their claim under the statement's new theory of the law, then by all means they should seek leave to amend. But how would they know to do that? The statement, issued more than three years after the operative complaint was filed, is the first time that anyone in this case has suggested that the President should have been sued in his private capacity. As the statement now reveals, the majority opinion treated the complaint as having been amended—without stating that it was doing so and without even requiring an actual amendment. But the President is not represented in this case in his private capacity, so this detail would seem to have large implications by requiring the appearance of new counsel and additional dispositive motions practice in the district court. It should not go unaddressed; a "statement" by a single judge respecting the order denying *en banc* rehearing is not an adequate substitute for consideration by the court. The *en banc* court should have decided to clarify this hopelessly confused issue on rehearing.

of an official-but-still-private capacity in which the President might act.

Taken on its own terms, the statement's legal analysis is not compelling. It argues that even though a court normally will redress an injury arising from unlawful presidential action "by issuing relief against an inferior executive officer," this case is unique because "there are no inferior executive officers against whom the plaintiffs could seek declaratory or injunctive relief that would redress their injuries." But that ignores Part B of this dissent, which explains that "a plaintiff who loses a government contract due to favoritism that results from illegal emoluments might be able to sue the agency or inferior executive officer who is responsible for awarding the contract in order to redress the Emoluments Clause violation." It's true that such relief would not redress the injuries alleged by the plaintiffs in this case, but that only highlights an additional flaw in the plaintiffs' case: they have not alleged an injury, such as harm from corrupt favoritism, that the Emoluments Clauses are designed to prevent. Rather than seeking redress for official corruption or undue influence in government, these plaintiffs effectively seek to vindicate an alleged constitutional right to fairness in the restaurant industry.

By remaining so intent on entertaining this particular lawsuit by these particular plaintiffs, the statement misses the obvious: a different set of plaintiffs alleging a more concrete injury might appropriately bring suit. Instead, the statement implies that if the plaintiffs in this case do not have standing, then it must be that re-

dress is unavailable. That's a false choice, and it is inconsistent with applicable precedents on standing.[32] "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974).

2. Competitor Standing

It is not until the twelfth page that the statement gets to the central issue—competitor standing—and its discussion is revealing. The statement doubles down on the majority opinion's reliance on a *Washington Post* article about the Trump International Hotel in Washington D.C.—even though no plaintiff in this case owns or is otherwise associated with a hotel in Washington D.C.[33] The statement then conspicuously moves from

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[32] The Supreme Court has been "unwilling to assume that injured parties are nonexistent simply because they have not joined respondents in their suit." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 489 (1982).

[33] The statement claims that its references to the Washington hotel serve to demonstrate the injury that New York hotels might suffer. But we cannot assume injury to New York hotels just because there may be injury to a hotel in Washington. "[S]tanding is not dispensed in gross" but must be established for each claim and for each plaintiff. *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1650 (2017). The district court in the Maryland case recognized an injury to competitors of the Trump International Hotel but dismissed claims based on "Trump Organization operations outside the District of Columbia" because "[t]here appears to be no 'actual or imminent' injury to either Plaintiff" from such activity. *District of Columbia*, 291 F. Supp. 3d at 742. Whether that court was right or wrong, at least it fulfilled its obligation to identify an injury for all claims and plaintiffs. The majority opinion, by contrast, extrapolates from one non-plaintiff in Washington to find standing for all participants in a different marketplace in New York.

concrete facts about non-plaintiffs to abstract truisms in order to justify standing for the actual plaintiffs: "the opportunity to procure the President's favor or avoid his disfavor is a highly significant motivator for a foreign diplomat or a state representative." Well, of course it is. But that general proposition does not establish that diplomatic officials in New York are lunching on *foie gras* at Jean-Georges when they really would rather have falafel at Amali.[34]

According to the statement, it doesn't matter. The statement hypothesizes that surely there must be an injury somewhere because "there are nearly 200 nations in the world (and 50 states), many of which send delegates to Washington or New York, where they become buyers whose business" *might* be directed to high-end Manhattan restaurants associated with the President as long as he is allegedly receiving emoluments but *might* go to different restaurants if the President were to transfer his interests in those properties to his children or to someone else. Perhaps some diplomats might behave this way, as the statement speculates. It is *possible*, however unlikely. But the majority opinion cites nothing that would give anyone a reason to believe that, say, Norway or Nevada have dispatched or will dispatch delegations to New York City to eat at Jean-Georges in the hope of enriching the President. The majority simply assumes that because there are lots of possible

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[34] The statement admits that standing would not exist if "the advantage derived by the defendant from illegal conduct was small, and the likelihood was low that potential customers would be aware of it, much less motivated by that advantage to prefer the defendant over a plaintiff." Individual dining choices by foreign and state officials among Manhattan restaurants would seem to fall into this category.

diplomats, at least some of them must be thinking about their dinner choices the way it hypothesizes. Yet "[t]he law of averages is not a substitute for standing." *Valley Forge Christian Coll.*, 454 U.S. at 489.[35] Pointing to a large number of theoretical lost customers is not enough for Article III injury; "allegations of *possible* future injury are not sufficient." *Clapper*, 568 U.S. at 409 (internal quotation marks and alteration omitted).[36]

The statement's resort to such speculation is inconsistent with the requirement that the "plaintiff[s] must 'clearly allege facts demonstrating' each element" of Article III standing. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The statement suggests these post-hoc rationalizations are fine because surely the dissenters did not seek *en banc* rehearing to "express[] a wish for a new opinion supporting the same conclusion with better reasons." But because the majority opinion now serves as a precedent for future cases, its lack of good reasons is a serious problem. An opinion of the court ought to justify its conclusion with reasons grounded in

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[35] *See also United States v. Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 688-89 (1973) ("[P]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.").

[36] One of the plaintiffs is an association of restaurants. "In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm—surely not a difficult task here, when so many [customers] are alleged to have been [lost]." *Summers*, 555 U.S. at 499. And yet the majority opinion does not ask that plaintiff to identify a single lost customer.

precedent. It certainly is the dissenters' position that the majority opinion's departure from precedent requiring would-be plaintiffs to establish a concrete rather than a speculative injury justifies *en banc* rehearing—regardless of the opinion's ultimate conclusion. If, as the statement implies, there exists a more compelling justification for the same conclusion that the majority failed to articulate, then the court should consider that justification on rehearing.

The statement, instead, repeats the majority opinion's reliance on cases such as *Block v. Meese*, 793 F.2d 1303 (D.C. Cir. 1986), and *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), for the proposition that the plaintiffs' "theory of standing relies on the predictable effect of Government action on the decisions of third parties." *CREW*, 953 F.3d at 197 (alterations omitted). That reliance conflicts with the statement's new insistence that the challenged conduct has "nothing to do" with government action. And neither case involves competitor standing, which one would have thought was the "theory of standing" on which the majority opinion and the plaintiffs rely.[37]

The statement—like the majority opinion—continually looks outside the competitor-standing context for support because, within that context, we learn that plaintiffs may not invoke the competitor-standing

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[37] Even so, "[t]he President's personal receipt of income from [some businesses] surely does not have a predictable effect on the decisions of third parties as to whether to patronize [those businesses] nor a predictable effect of skewing the market in which the plaintiffs allegedly compete." *In re Trump*, 958 F.3d at 327 (Niemeyer, J., dissenting).

doctrine with a "'chain of events' argument" that "depends on the independent actions of third parties" because such an argument distinguishes this case "from the 'garden variety competitor standing cases' which require a court to simply acknowledge a chain of causation 'firmly rooted in the basic law of economics.'" *New World Radio*, 294 F.3d at 172. The plaintiffs' theory in this case, dependent on a speculative chain of causation about diplomats' dining choices in New York City, bears no resemblance to a normal competitor-standing case.

Rather than rely on speculation about Norwegian lobbyists eating out at fancy Manhattan restaurants—and on inapposite cases that do not involve competitor standing—I would follow cases that address competitor standing, which must be "based on an injury more particularized and more concrete than the mere assertion that something unlawful benefited the plaintiff's competitor." *Already*, 568 U.S. at 99. The statement struggles mightily to sidestep these precedents. "Puzzlingly, the [statement] cite[s] a passage from Justice [Breyer's] dissenting opinion in [*Clapper*] seemingly as though it were the holding of the case," *CREW*, 939 F.3d at 158 n.13,[38] and then argues that the Court's majority did not mean what it said in its opinion because, in a footnote, the Court acknowledged that it had used different language in other opinions.

But in that very footnote the Supreme Court explained that "plaintiffs bear the burden of pleading and proving concrete facts showing that the defendant's actual action has caused the substantial risk of harm.

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[38] See the statement's footnote 19.

Plaintiffs cannot rely on speculation about 'the unfettered choices made by independent actors not before the court.'" *Clapper*, 568 U.S. at 414 n.5 (quoting *Lujan*, 504 U.S. at 562). It was on precisely this basis that the district court concluded that "it is wholly speculative whether the Hospitality Plaintiffs' loss of business is fairly traceable to Defendant's 'incentives' or instead results from government officials' independent desire to patronize Defendant's businesses." *CREW*, 276 F. Supp. 3d at 186.[39] Whether you call it a "substantial risk" of harm or a "certainly impending" harm, the plaintiffs have not demonstrated an injury sufficient to confer standing. The district court properly applied standing precedents while the majority opinion looks to inapposite cases to support its novel holding on competitor standing.

The statement also invokes antitrust and trademark precedents, but those cases provide no support for the majority opinion's new theory of competitor standing because—as the statement acknowledges—the requisite injuries in such cases are defined by statute while in this case the plaintiffs pursue an implied constitutional cause of action to redress the President's alleged non-

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[39] *See also In re Trump*, 958 F.3d at 326 (Niemeyer, J., dissenting) ("[T]he District and Maryland's theory of proprietary harm hinges on the conclusion that government customers are patronizing the Hotel *because the Hotel distributes profits or dividends to the President*, rather than due to a more general interest in currying favor with the President or because of the Hotel's branding or other characteristics. Such a conclusion, however, is not only economically illogical, but it also requires speculation into the subjective motives of independent actors who are not before the court, thus precluding a finding of causation.").

compliance with law. It is well established that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Spokeo*, 136 S. Ct. at 1549; *Nash v. Califano*, 613 F.2d 10, 14 (2d Cir. 1980) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.").[40] In this case—unlike cases premised on antitrust, trademark, and unfair-trade-practices statutes—the plaintiffs can point to no statutory or other legal right the violation of which might serve as an injury to them. Thus, not only do the plaintiffs fail to allege facts establishing an actual rather than hypothetical injury, *see Lujan*, 504 U.S. at 560, they also cannot identify any "statutes creating legal rights, the invasion of which creates standing" in this case, *id.* at 578 (noting that "injury to a company's interest in marketing its product free from competition," for example, was "inadequate in law" to confer standing until Congress made it "legally cognizable" by statute).

Of course, the mere alleged violation of the Emoluments Clauses cannot itself serve as an Article III injury. "[A]n injury amounting only to the alleged violation of a right to have the Government act in accordance with law [is] not judicially cognizable," *id.* at 575, and Congress may not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts," *id.* at 577. Nor do the Emoluments Clauses confer on the plaintiffs a particularized interest the violation of which

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[40] *See also Huff v. TeleCheck Servs.*, 923 F.3d 458, 469 (6th Cir. 2019) ("Whatever is true of Congress's power to create standing by statute would seem to hold for state legislatures as well.").

might create standing in the absence of an otherwise cognizable concrete injury. *Id.* at 578. It is undisputed that the Emoluments Clauses do not give the plaintiffs a right to be free from the competition they allege causes them harm, and indeed they allege no unlawful conduct on the part of the businesses with which they compete. The Emoluments Clauses allegedly oblige the President, as President, to avoid receiving certain forms of income. The interest of the plaintiffs in the President's compliance with the Emoluments Clauses is therefore "common to all members of the public" and would be an "impermissible 'generalized grievance'" if it were claimed to be the basis of the plaintiffs' standing. *Id.* at 575.

The statement obscures this point by questioning the role of Congress in defining injuries and suggesting there is confusion between standing and whether an injury is within a statute's zone of interests. No doubt, there are some tensions within the doctrine.[41] But this case is not difficult. We know that "the Court has recognized Congress's authority to create new rights that allow individuals to be free from competitive injury" and that in such contexts "the violation of a private statutory right constitutes an injury-in-fact" for standing purposes. *Jeffries v. Volume Servs. Am.*, 928 F.3d 1059, 1069 (D.C. Cir. 2019) (Rogers, J., concurring in part and concurring in the judgment). Unlike the statutory contexts the statement identifies, the plaintiffs here identify no such right conferred by the legislature and must rely on their factual allegations about lost business. As discussed throughout this dissent and in the separate

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[41] *See generally* William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197 (2016).

dissent of Judge Cabranes and statement of Judge Walker, those allegations are insufficient.

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For these reasons, I dissent from the denial of rehearing *en banc*.

JOHN M. WALKER, JR., Senior Circuit Judge

Statement in Opposition to the Denial of *En Banc* Rehearing[1]

The Second Circuit should have voted to rehear this case *en banc*.

The panel majority decided that plaintiffs, a co-owner of restaurants and hotels in New York and an organization that includes establishments in New York and Washington, D.C., have standing to assert an implied private right of action against the President in his official capacity for violating the Foreign[2] and Domestic[3] Emoluments Clauses of the Constitution. That decision misinterpreted the doctrine of competitor standing and impermissibly extended it to a wholly novel context. In doing so, the panel failed to address the tension in our circuit law (which is inconsistent with the law in our sister

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[1] Although, as a senior judge, I have no vote on whether to rehear a case *en banc*, Fed R. App. P. 35(a), and thus cannot dissent, this court is currently reviewing whether, as a matter of court practice, a senior judge that was on the panel may file a statement on the denial of *en banc* rehearing. In the meantime, a ruling by the chief judge, with the concurrence of the court's active judges, has permitted such a statement pending the outcome of the review.

[2] "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. 1, § 9, cl. 8.

[3] "The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them." U.S. Const. art. II, § 1, cl. 7.

circuits) and contradicted binding Supreme Court precedent requiring a plaintiff to demonstrate more than a mere unlawful advantage to a competitor in order to invoke the competitor standing doctrine.

If that were not enough, this case warranted *en banc* review because of its exceptional national importance. The interpretation and application of the Emoluments Clauses, including the threshold question of whether private actors have Article III standing to enforce the Clauses, raise constitutional questions of first impression in this circuit and in the federal courts nationwide. This case, along with the ongoing Fourth Circuit case with parallel theories of injury,[4] will determine whether Trump business competitors have Article III standing to sue despite no showing of actual or imminent injury traceable to the President's receipt of emoluments, or how the cessation of emoluments would redress any

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[4] In the Fourth Circuit case, the District of Columbia and the State of Maryland sued the President in his official capacity on the same theory of injury advanced in this lawsuit. After holding that plaintiffs had standing to sue with respect to the Trump International Hotel in Washington, D.C., *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 732 (D. Md. 2018), the district court declined to certify that question for interlocutory appeal, *District of Columbia v. Trump*, 344 F. Supp. 3d 828, 844 (D. Md. 2018). The Fourth Circuit (*en banc*) denied the President's mandamus petition to direct the district court either to certify the interlocutory appeal or to dismiss the complaint. *In re Trump*, No. 18-2486, 2020 WL 2479139 (4th Cir. May 14, 2020).

such injury.[5] A novel question of such profound national importance, involving the President and the separation of powers, warranted *en banc* review.

I.

The panel majority misconceived the competitor standing doctrine and, in doing so, violated the fundamental tenets of Article III standing. The majority held that plaintiffs have shown traceable competitive injury by adequately alleging that (i) they "personally compete[] in the same arena" as the Trump establishments[6] and that (ii) an illegal act—here, an alleged violation of the Emoluments Clauses—bestowed "some competitive advantage" on Trump establishments.[7] The majority was wrong. Contrary to the majority's holding, plaintiffs may not avail themselves of the competitor standing doctrine without a showing of actual or imminent injury.

The competitor standing doctrine does not relax the basic requirements of Article III standing that "an injury must be concrete, particularized, and actual or im-

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[5] Legislators in the House and Senate brought a third suit in the D.C. Circuit, alleging that the President's failure to seek congressional approval for his receipt of emoluments, despite the Clauses' requirement of such approval, deprived them of their right to vote and thereby caused them an Article III injury. The D.C. Circuit recently held that the plaintiffs lacked standing for want of a cognizable injury. *Blumenthal, et al. v. Trump*, 949 F.3d 14, 19 (D.C. Cir. 2020) (per curiam).

[6] Maj. op. 17 (quoting *In re U.S. Catholic Conference*, 885 F.2d 1020, 1029 (2d Cir. 1989)).

[7] *Id.* (quoting *Fulani v. League of Women Voters Edu. Fund*, 882 F.2d 621, 626 (2d Cir. 1989)).

minent; fairly traceable to the challenged action; and redressable by a favorable ruling."[8] Rather, the doctrine affords a plaintiff-competitor the presumptions of injury, traceability, and redressability in certain discrete contexts in which "economic logic"[9] tells us that an unlawful benefit, bestowed upon a defendant-competitor as the result of some government action or violation of a rule, will predictably cause the plaintiff-competitor to suffer an injury in fact.[10] This showing of a likelihood of personal injury to the plaintiffs is critical, and has been required not only by the Supreme Court but also

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[8] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (citing *Horne v. Flores*, 557 U.S. 443, 445 (2009)).

[9] *Canadian Lumber Trade All. v. United States*, 517 F.3d 1319, 1332 (Fed. Cir. 2008); *see also Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (citing *Canadian Lumber* for this "economic logic" requirement).

[10] Although the required degree of certainty varies across circuits, our sister circuits have consistently maintained that a competitor must demonstrate that the defendant's unlawful gain will, *with some degree of certainty*, cause the plaintiff to suffer an injury in fact. The First Circuit has required "sufficient likelihood" of specific harm to the plaintiff. *Adams v. Watson*, 10 F.3d 915, 923 (1st Cir. 1993). The Federal Circuit has required a showing that the plaintiff will "likely suffer" an injury in fact. *Canadian Lumber*, 517 F.3d at 1332. The D.C. Circuit has explained that the "nub" of the competitor standing doctrine is that the challenged action will "almost surely cause petitioner to lose business." *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995). But no matter the level of certainty required, if that certainty is absent, no economic logic exists, and the competitor standing doctrine cannot supply the concrete and imminent injury necessary for Article III standing.

by our sister circuits.[11] Yet the majority has omitted that requirement from its analysis entirely.

This court has been inconsistent in requiring a showing of personal injury. As Judge Menashi observes in his dissent, this court has previously announced two different versions of the competitor standing doctrine without reconciling the differences. The earlier, stricter version appropriately requires a plaintiff-competitor to make two showings. First, "to establish an injury as a competitor a plaintiff must show that he personally competes in the same arena with the party to whom the government has bestowed the assertedly illegal benefit."[12] Second, and critically, a plaintiff must also show personal disadvantage beyond baldly "asserting that an advantage to one competitor adversely handicaps the others."[13] Together, these requirements make clear that plaintiffs invoking competitor standing must plausibly plead not only that they compete in the same arena as the defendant who received an unlawful advantage, *but also* that they were personally harmed.

In later cases, this court has left the personal harm requirement out of the competitor standing test. That

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[11] *See Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013) (rejecting plaintiff's theory that, under the competitor standing doctrine, "a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful"); *see, e.g.*, *El Paso Nat. Gas Co.*, 50 F.3d at 28 ("We therefore caution that even if El Paso were 'competing' with the LDCs in Mexico, that would not necessarily bring petitioners within the ambit of our 'competitor standing' cases. El Paso would still be required to allege facts demonstrating 'injury in fact.'").

[12] *In re U.S. Catholic Conference*, 885 F.2d at 1029.

[13] *Id.* at 1030.

version collapses the original test by allowing a plaintiff to fulfill the second requirement (personal harm) simply by fulfilling the first (competition plus unlawful advantage to the defendant). This was enough to satisfy the panel majority in this case, but it has not satisfied the Supreme Court. In *Already, LLC v. Nike, Inc.*,[14] Already, a maker of athletic shoes, claimed standing to challenge the validity of a Nike trademark on the basis that it was Nike's competitor in the athletic shoe market. Already sought to challenge the trademark even after Nike had issued a covenant not to bring trademark claims against Already for present or future products that potentially infringed the trademark.[15] Already's theory of competitive injury was that the continued existence of Nike's allegedly unlawful mark, notwithstanding the covenant, deterred investment in its company, thereby placing Already at a competitive disadvantage. The Court explicitly rejected that theory, explaining that "[t]aken to its logical conclusion, [Already's] theory seems to be that a market participant is injured for Article III purposes whenever a competitor benefits from something allegedly unlawful—whether a trademark, the awarding of a contract, a landlord-tenant arrangement, or so on. We have never accepted such a boundless theory of standing."[16]

The *Already* court viewed the competitor standing doctrine as an application—not a relaxation—of the "irreducible constitutional minimum of standing" required by Article III.[17] The personal injury requirement is

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[14] 568 U.S. 85 (2013).

[15] *See id.* at 88-89.

[16] *Id.* at 99.

[17] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

necessary to ensure that a plaintiff-competitor's injury is "actual or imminent" and "fairly traceable" to the defendant's actions.[18] To be sure, in some circumstances, competitive injury is so predictable and certain that we can say, as a matter of economic logic, that it will "almost surely" occur,[19] or that the plaintiffs will "likely suffer" an injury in fact,[20] or that there is a "sufficient likelihood" of personal injury[21]—whatever degree of certainty is required by a particular circuit. But only then does the competitor standing doctrine permit a plaintiff to show standing without making a specific showing of injury. Plaintiffs have simply not shown that those circumstances are present in this case.

Rather, plaintiffs have failed to plead facts that show that economic logic connects the alleged emoluments to President Trump (the share of profits personally received by the President from hotel bookings or restaurant patronage by foreign and state officials) to any decrease in plaintiffs' business. As Judge Menashi aptly observes, this market is the very opposite of one with 1,000 buyers and two sellers. There, economic logic dictates that an unfair advantage to seller A will almost surely harm seller B, such as might be true of the competition between Boeing and Airbus.[22] Here, in contrast, plaintiffs and defendant compete in a diverse hotel

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[18] *Id.* (alterations omitted).

[19] *El Paso Nat. Gas Co.*, 50 F.3d at 27.

[20] *Canadian Lumber*, 517 F.3d at 1332.

[21] *Adams*, 10 F.3d at 923.

[22] The competition between Boeing and Airbus has been characterized as a duopoly, with those two companies accounting for ninety-nine percent of the large plane market. *See, e.g.*, Praveen Duddu,

and restaurant market with many sellers and many variables. In this context, plaintiffs have not shown that an unlawful benefit to a Trump business from increased patronage, much less the President's personal share, is sufficiently likely[23] (let alone almost sure)[24] to cause harm to plaintiffs' businesses. As the district court correctly observed, myriad factors such as "service, quality, location, price and other factors related to individual preference"[25] might influence a foreign or state official's independent third-party decision whether to patronize a Trump business.[26] With so many variables at play, the challenged conduct of a single defendant competing
over a small set of customers in a virtual sea of luxury hotels and restaurants will not be "almost sure[]"[27] or even "sufficient[ly] like[ly]"[28] to cause plaintiffs harm. The fact that it possibly could is not enough, and plaintiffs have not alleged anything more.

Airbus vs Boeing: A Tale of Two Rivals, AEROSPACE TECHNOLOGY, Jan. 31, 2020, https://www.aerospace-technology.com/features/airbus-vs-boeing/; Kate Sprague, *Why the Airbus-Boeing Duopoly Dominate 99% of the Large Plane Market*, CNBC, Jan. 26, 2019, https://www.cnbc.com/2019/01/25/why-the-airbus-boeing-companies-dominate-99percent-of-the-large-plane-market.html.

[23] *See Adams*, 10 F.3d at 923.

[24] *See El Paso Nat. Gas Co.*, 50 F.3d at 27.

[25] *Citizens for Responsibility & Ethics in Washington, et al. v. Trump*, 276 F. Supp. 3d 174, 186 (S.D.N.Y. 2017).

[26] *See Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (stating that a federal court acts only to redress injury traceable to the defendant "and not injury that results from the independent action of some third party not before the court").

[27] *El Paso Nat. Gas Co.*, 50 F.3d at 27.

[28] *Adams*, 10 F.3d at 923.

In the absence of compelling economic logic, plaintiffs could marshal specific evidence to show that they were personally harmed by the unlawful benefit conferred on their competitor. But plaintiffs here have failed to allege a "concrete, particularized, and actual or imminent" injury in fact under the standard Article III requirements.[29] Plaintiffs have also failed to identify any particularized disadvantage, or an instance in which government customers chose to patronize the President's hotels and restaurants instead of their own. This failure is underscored by plaintiffs' own complaint, which does allege that a *different* competitor, the Four Seasons—who is not a plaintiff in this suit—lost identifiable business to the President's businesses when the government of Kuwait cancelled its reservations and switched to a Trump hotel. But plaintiffs make no similar allegation of their own personal injury, and they are not purporting to sue on behalf of anyone else who allegedly suffered such a loss.

The competitor standing doctrine does not permit a plaintiff to end-run around Article III's requirements of injury, traceability, and redressability simply because a competitor in the same market has received an allegedly unlawful benefit. Because this watered-down standing requirement now appears to be the law of the circuit, this case should have been reheard *en banc*.

II.

In my panel dissent, I postulated a hypothetical that shows the absence of the required economic logic in this case: a competitor plaintiff who sues a competing restaurant that used a fraudulently obtained bank loan or

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[29] *Monsanto*, 561 U.S. at 149.

tax refund to improve its business, such as by hiring a new chef or lowering prices, thereby increasing its market competitiveness. The majority denied that its approach would confer competitor standing in my hypothetical because "[a] plaintiff who establishes an injury-in-fact by alleging direct competition and an inability to compete with the defendant on an equal footing must also establish that such injury is fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[30] That cursory response simply restated the basic rules of Article III standing, which are met neither by my hypothetical nor by the facts in this case; it does nothing to show how my hypothetical would not lead to a finding of competitor standing under the majority's conception of the doctrine.

The majority's response is especially incongruous with the structure and purpose of the competitor standing doctrine itself. That doctrine affords a plaintiff the presumptions of injury, traceability, and redressability to alleviate the requirement of a specific showing where doing so would be difficult in certain competitive contexts. So, it makes no sense to say that, in a case properly applying the competitor standing doctrine, a separate requirement to show traceability and redressability would prevent my hypothetical plaintiff from showing standing.

The majority's effort to distinguish this case from my hypothetical is also fundamentally flawed in that it mis-

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[30] Maj. op. 34 (internal quotation marks, citations, and modifications omitted).

characterizes the harm that plaintiffs allege. The majority concludes that the "connection between the alleged violations of law and Plaintiffs' harm is far more direct" than it is in my hypothetical, because it is "precisely the President's receipt of allegedly illegal emoluments that constitutes Plaintiffs' competitive injury."[31] Not so. Plaintiffs nowhere allege that whatever injury they claim was caused *by the President's receipt of emoluments*. Instead, on the facts as plaintiffs have alleged them, it is not the conferral of emoluments that causes harm to plaintiffs' businesses, but instead foreign and state officials' preference to patronize Trump establishments rather than plaintiffs' own.

Those harms are distinct. The one that plaintiffs have alleged could easily persist absent any conferral of emoluments—that is, even if the President's personal gains from the patronage of foreign and state officials were removed from the calculus. Foreign diplomats and state officials might, quite lawfully, still choose the Trump establishment over plaintiffs' establishments to attempt to curry favor with the President. Plaintiffs point to a Washington Post article revealing that certain diplomats stated in interviews that "spending money at Trump's hotel is an easy, friendly gesture to the new president"[32]—but nothing in the article says the friendliness of the gesture is tied to the President's personal receipt of profits from that patronage. Indeed, a group

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[31] *Id.* at 34-35.

[32] Appellants' Reply Br. 12 (quoting Jonathan O'Connell & Mary Jordan, *For Foreign Diplomats, Trump Hotel Is Place to Be*, WASH. POST, Nov. 18, 2016, https://www.washingtonpost.com/business/capitalbusiness/2016/11/18/9da9c572-ad18-11e6-977a-1030f822fc35_story.html.

of former national security officials writing as *amici curiae* warned that foreign officials, attempting to "curry favor through private business relations with senior U.S. officials," will "seek to use all available rewards or incentives to influence the behavior of other nations."[33] Regardless of whether any of their money finds its way into the President's pocket, foreign diplomats can still come to Washington or New York and, when they meet the President, tell him that they are staying at Trump hotels and dining at Trump restaurants. That ingratiation, not the supposed emoluments themselves, is what plaintiffs have alleged to be the source of any adversity against their business. But ingratiation is not an emolument. And if the emoluments are stopped, nothing suggests that the ingratiation will not remain.[34]

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[33] Brief of Former National Security Officials as Amici Curiae Supporting Plaintiffs-Appellants, *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 18-474, 2019 WL 8165708 (2d Cir. Sept. 13, 2019), *as amended* (Mar. 3, 2020) (no. 18-474).

[34] The Trump Organization publicly claims to have remitted profits from foreign-government business to the U.S. Treasury: approximately $150,000 in 2016 and $191,000 in 2017. *See* Rebecca Ballhaus, *Trump Organization Details Level of Profits from Foreign Governments*, WALL ST. J., Feb. 25, 2019, https://www.wsj.com/articles/trump-organization-details-level-of-profitsfrom-foreign-governments-11551116974. This is an infinitesimal amount in relation to the President's reported net worth of $3 billion in 2019. *See* Shahien Nasiripour & Caleb Melby, *Trump's Net Worth Rises to $3 Billion Despite Business Setbacks*, BLOOMBERG, June 12, 2019, https://www.bloomberg.com/news/articles/2019-06-12/trump-s-net-worth-rises-to-3-billion-despite-businesssetbacks. Although these specific amounts remain untested and unconfirmed, the public claim of remittal undermines any argument that foreign officials' desire to confer a relatively modest financial benefit on the President is the driv-

III.

Apart from the confusion caused by the panel majority's misapplication of the competitor standing doctrine, *en banc* rehearing should have been ordered for another reason. Plaintiffs have sued the President in his official capacity and are seeking injunctive relief against him in that capacity. The Supreme Court has made clear that the standing inquiry is "especially rigorous" where, as here, the dispute implicates the separation of powers.[35] This weighty and complex suit should not be permitted to proceed based on plaintiffs' speculation and conjecture that the President's receipt of a share of profits for meals and lodging, from a limited group of people, is causing them competitive harm. And, as Judge Menashi observes, because it is questionable that this court (or any court) is empowered to order the injunctive relief against the President that the panel majority posits—but that plaintiffs never specifically asked for in their pleadings, that relief may not be available at all.

Interpretation and application of the Emoluments Clauses is entirely novel in this circuit and in the federal courts nationwide. The unprecedented application of the competitor standing doctrine in a situation where economic logic is absent invites uncertainty and impermissibly waters down the Article III standing requirements. The dissonance between our and other circuits' treatment of the competitor standing doctrine only exacerbates that uncertainty. Equally, if not more important,

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ing force behind increased competition. And plaintiffs have not alleged or anywhere argued that business from foreign officials to the Trump Organization has decreased as a result of that remittal.

[35] *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997).

the case asserts standing to invoke judicial authority in an implied private right of action under the Constitution against the President in his official capacity. In this new and highly significant area of law, this court has a responsibility to do everything it can to address the confusion over the standing doctrine that this case has fostered. Granting *en banc* review would have fulfilled that responsibility.

PIERRE N. LEVAL, *Circuit Judge*: Statement in Support of the Denial of *En Banc* Rehearing

Article III of the Constitution limits the jurisdiction of federal courts to "cases" and "controversies," thus requiring that there be real and concrete adversity between the parties, so that courts not be empowered to give advisory opinions on hypothetical disputes. *See Baker v. Carr*, 369 U.S. 186, 204 (1962) (Article III standing "assure[s] that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult [] questions"). On a daily basis, federal courts adjudicate disputes among competitors involving claimed violations of federal and state law (including antitrust, unfair competition, trademark, false advertising, and false designation of origin) based on allegations of *substantial risk* of competitive injury no different than what the plaintiffs have alleged here. Judge Menashi does not dispute this. *See generally CREW v. Trump*, __ F.3d __ (2d Cir. 2020) (Menashi, J., dissenting from denial of rehearing *en banc*) (hereinafter "Menashi Dissent"). Nonetheless, he argues that, at least for this case, nothing short of certainty of injury can satisfy Article III;[1] and that precedents finding sufficient adversity to support exercise of jurisdiction over claims expressly authorized by legislative texts have no pertinence because those claims derive from statutes, while this one is based on the Constitution, *id.* at 34-35.

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[1] Menashi Dissent at 4 ("If the injury is not certain or 'certainly impending' . . . the requirements of Article III are not met." (citation omitted)).

Judge Menashi also characterizes President Trump's indisputably private sales of hotel and restaurant services to foreign and domestic governments (and his receipt of revenues from those sales) as "actions taken by one of the other two branches of the Federal Government," *id.* at 1, and suggests that a court's declaration that such sales violate the Emoluments Clauses might amount to impermissibly instructing the President how to carry out the duties of his office, *id.* at 15. In this Statement, I respond to Judge Menashi's arguments.

I.

Suggesting that the courts have neither jurisdiction nor authority to instruct the President on how to conduct the business of the Executive Branch, Judge Menashi questions whether a ruling for the plaintiffs in this case would be instructing the President "how to exercise the executive power," an act "tantamount to telling a member of Congress to vote to pass or repeal a particular law." *Id.* at 15 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 826-27 (1992) (Scalia, J., concurring)). Putting aside whether courts have jurisdiction to hear a suit seeking an injunction or declaratory relief against the President on the grounds that his official acts on behalf of the United States violate the Constitution, the proposition has no application to this case, which questions the lawfulness of the President's purely private conduct of selling hotel and restaurant services. The Foreign Emoluments Clause forbids any "Person holding any Office of Profit or Trust" of the United States from "accept[ing] any . . . Emolument . . . of any kind whatever, from any . . . foreign State." U.S. CONST. art. I, § 9, cl. 8. The Domestic Emoluments Clause provides that "the President . . . shall

not receive within [the period of his presidency] any other Emolument [other than his presidential salary] from the United States, or any of them." U.S. CONST. art. II, § 1, cl. 7. The theory of the complaint is that, in his personal receipt of payments by foreign states and domestic state governments to his establishments, the President violates the prohibitions of those clauses of the Constitution. The complaint does not challenge anything the President has done or will do on behalf of the United States. It challenges only the President's private conduct. Indeed, if those payments from domestic or foreign governments were accepted by the President *on behalf of the United States*, so that those payments went into the federal treasury, rather than enriching President Trump, they would not be an emolument *of the President* and would not even arguably violate the Constitution.

In support of his argument that the courts have no jurisdiction to hear this case, Judge Menashi cites a number of precedents that have no pertinence to this complaint because they involved the question of the power of the courts to direct a President's conduct *of the business of the United States*. The Supreme Court's 1866 decision in *Mississippi v. Johnson* related to whether the federal courts may "enjoin the President in the performance of his official duties." 71 U.S. 475, 501 (1866). In that case, the State of Mississippi sought to enjoin the President from using the power of the Executive Branch to enforce an allegedly unconstitutional law. *Id.* at 497-98. Likewise, in *Franklin v. Massachusetts*, the plaintiffs sought a court order declaring the President's exercise of Executive power to be unlawful and requiring the President and his subordinates to

conduct the duties of the Executive Branch in a particular manner. 505 U.S. 788, 790-91 (1992).[2] In that case,

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[2] As Judge Menashi notes, *see* Menashi Dissent at 16-17, in most cases, a court may redress an injury arising from unlawful Presidential action by issuing relief against an inferior executive offer. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-89 (1952) (declaring President Truman's executive order directing the seizure of steel mills unlawful where the defendant was Truman's Secretary of Commerce); *Franklin*, 505 U.S. at 803 ("[W]e need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary [of Commerce] alone."). In this case, however, because the President's allegedly unlawful acts are personal acts done for his own benefit and not in the name of, or for the benefit of, the United States, there are no inferior executive officers against whom the plaintiffs could seek declaratory or injunctive relief that would redress their injuries. *See Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (noting that in "rare instances . . . only injunctive relief against the President himself will redress [the plaintiffs'] injury"). This fact, however, does not mean that the plaintiffs' injuries are beyond the reach of judicial redress. *See Nat'l Treasury Emp. Union v. Nixon*, 492 F.2d 587, 613 (D.C. Cir. 1974) ("[I]t would be exalting form over substance if the President's acts were held to be beyond the reach of judicial scrutiny when he himself is the defendant, but held within judicial control when he . . . has delegated the performance of duties to federal officials subordinate to [him] and one or more of them can be named as a defendant.").

Judge Menashi also contends that my observation that injunctive or declaratory relief against an inferior executive officer cannot redress the plaintiffs' injuries "highlights a[] [] flaw in the plaintiffs' case: they have not alleged an injury . . . that the Emoluments Clauses are designed to prevent." Menashi Dissent at 29. I see no logic in the argument. The question whether the plaintiffs are at substantial risk of injury is entirely distinct from whether the injury may be redressed by relief against an inferior officer or only by relief against the President himself, and whether the plaintiffs' injury falls within the concerns of the Emoluments Clauses.

the plaintiff challenged a decision of the President relating to how overseas federal employees are counted in the census for purposes of the apportionment of state representatives to the House of Representatives. *Id.* at 790-91. And *Swan v. Clinton* questioned whether the President had used his Executive power unlawfully by removing from office a member of the Board of the National Credit Union Administration without cause, and sought an injunction directing the President to reinstate the plaintiff. 100 F.3d 973, 975-77 (D.C. Cir. 1996).

Those authorities have no pertinence to this case because this complaint has nothing to do with the President's exercise of his official duties. The judicial order sought by the plaintiffs pertains only to the President's personal behavior. What the plaintiffs seek is not at all like "telling a member of Congress to vote to pass or repeal a particular law." Menashi Dissent at 15.[3]

Lastly, Judge Menashi says I imply that the plaintiffs must have satisfied Article III because "if [they] have no standing to sue, no one would have standing." *Id.* I make no such argument. I say only that the plaintiffs have established standing under well-established Article III standards, and that the unavailability of relief from an inferior officer does not in any way negate the likelihood of injury to the plaintiffs sufficient to establish federal court jurisdiction.

[3] Indeed, during the course of the Emoluments Clause suit filed against the President in the District of Maryland, the President conceded that, by challenging his receipt of revenues from his hotel and restaurant establishments, plaintiffs based their claims on the President's "private business pursuits . . . having nothing to do with the President's service as President." Memorandum in Support of Defendant's Motion to Dismiss at 30, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-01596), Dkt. No. 21-1. The President's later filing in the same case, cited by Judge

A grant of declaratory or injunctive relief would affect only the President's private, unofficial business dealings; it would in no way "interfer[e] with the exercise of Executive discretion." *Johnson*, 71 U.S. at 501. Nor would it "requir[e] [the President] to exercise the 'executive Power' in a judicially prescribed fashion," *Franklin*, 505 U.S. at 826 (Scalia, J., concurring), or pose any "danger[] of intrusion on the authority and functions of the Executive Branch," *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).[4] I know no authoritative precedent that would preclude court-ordered relief should the plaintiffs prevail on the merits, and there is no reason to suggest that a judicial order affecting the President's personal receipt of revenues from his hotel businesses would impermissibly interfere with the exercise of Executive power. *See Clinton v. Jones*, 520 U.S. 681, 701-05 (1997) (concluding that "the federal courts have power to de-

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Menashi, *see* Menashi Dissent at 25 n.30, did not contradict this earlier concession. *See* Memorandum in Support of Motion to Dismiss on Behalf of Defendant in His Official Capacity at 14-15, *Trump*, 315 F. Supp. 3d 875, Dkt. No. 112-1. That filing argued that the district court was "mistaken" to conclude that "this dispute has 'nothing' to do with" the President's official duties only because "[h]ad the President not been elected, and thereby assumed the duties of that office, no claim would lie against him under the Emoluments Clauses." *Id.* It is entirely correct that the alleged unlawfulness of the President's sale of hotel and restaurant services depends on his holding office as an officer of the United States. But it in no way follows from that fact that his sales of restaurant and hotel services are official acts done on behalf of the United States.

[4] *See In re Trump*, 958 F.3d 274, 288 (4th Cir. 2020) (en banc) ("The duty to obey [the Emoluments Clauses] . . . flows from the President's status as head of the Executive Branch, but this duty to obey neither constitutes an official executive prerogative nor impedes any official executive function.").

termine the legality of [the President's] unofficial conduct" because "[t]he litigation of questions that relate entirely to the unofficial conduct of the individual who happens to be the President poses no perceptible risk of misallocation of either judicial power or executive power").[5]

II.

While the conduct addressed by the complaint is wholly private and not official, it is of course true that what renders that private conduct illegal under the theory of the complaint is the fact that the beneficiary of the emoluments holds "[an] Office of Profit or Trust" in the government of the United States, U.S. CONST. art. I, § 9, cl. 8 (Foreign Emoluments Clause), indeed holds the office of the President, U.S. CONST. art. II, § 1, cl. 7 (Domestic Emoluments Clause). Presumably for that reason, the attorneys for the plaintiffs named President

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[5] *Cf. Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (affirming the district court's grant of declaratory relief holding that the President's "blocking" of several plaintiffs from his Twitter account violated the First Amendment), *reh'g denied*, 953 F.3d 216; Complaint at ¶ 16, *Knight v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17:-cv-05205) ("Defendant Donald Trump . . . is sued in his official capacity only."); *see also Nixon v. Fitzgerald*, 457 U.S. 731, 753-54 (1982) ("It is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.") (citing, *inter alia*, *United States v. Nixon*, 418 U.S. 683 (1974)); *Halperin v. Kissinger*, 606 F.2d 1192, 1211-12 (D.C. Cir. 1979) ("[A] proper regard for separation of powers does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from each other.").

Trump as a defendant "in his official capacity," reflecting the recognition that, were Mr. Trump not a federal office holder, his receipt of emoluments from domestic or foreign governments would not fall within the restrictions of the Constitution. Judge Menashi interprets the complaint's statement that it sues the President "in his official capacity" to mean that the complaint seeks judicial orders that would control the actions of the President in the exercise of his "official powers," which Judge Menashi contends is beyond the court's jurisdiction. *See* Menashi Dissent at 15. Judge Menashi further asserts that our treatment of the complaint as challenging personal, non-official acts of the President is inconsistent with the plaintiffs' "deci[sion] to pursue claims against the President only in his official capacity." *Id.* at 25 n.30. The complaint's naming of the President in his "official capacity" is arguably necessary because it is the President's official capacity as an officer of the United States that renders his private conduct illegal under the theory of the complaint.[6] It does not follow from naming the President in his official capacity that the suit is directed against official conduct of the President, or that the conduct the plaintiffs challenge must be characterized as "official" business of the Executive Branch.[7] Judge Menashi's suggestion to the

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[6] Indeed, in seeking dismissal of a similar suit before the District of Maryland, the President argued that there was "no cause of action against the President in his individual capacity under the Emoluments Clauses." Memorandum in Support of Motion to Dismiss on Behalf of Defendant in His Individual Capacity at 14-17, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-01596), Dkt. No. 112-1.

[7] *See District of Columbia v. Trump*, 291 F. Supp. 3d 725, 746-47 (D. Md. 2018) (dismissing the argument that, because President

contrary construes the complaint as meaning something it obviously does not mean. There is no inconsistency in recognizing that a President's personal receipt of moneys is private conduct, notwithstanding a complaint's naming the President in his official capacity because his office is what renders that private conduct unlawful.[8]

Trump was sued in his "official capacity," the suit "amounts to a suit against the United States" because "it is clear that the gist of [plaintiffs' Emoluments Clauses challenges] is that the President's purported receipt of emoluments . . . has nothing at all to do with his 'official duties'"), *mandamus denied on reh'g sub nom. In re Trump*, 958 F.3d 274 (4th Cir. 2020) (en banc).

[8] Judge Menashi seeks to support his argument by citation to the Supreme Court's recent statement that, in the context of an intervention by President Trump to quash congressional subpoenas for his personal records, the "interbranch conflict [between Congress and the Executive] does not vanish simply because the subpoenas seek personal papers." *See* Menashi Dissent at 15-16, 22, 23 n.24 (quoting *Trump v. Mazars USA, LLP,* 140 S. Ct. 2019, 2034 (2020)). But that statement must be read in context. The Court's separation-of-powers analysis in *Mazars* stemmed from its concern that, without "limits on the congressional power to subpoena the President's personal records," Congress could abuse its power to secure information needed to legislate, instead using that power to "harass" the President. 140 S. Ct. at 2034. Accordingly, one of the Court's primary concerns was to ensure the subpoenas at issue were justified by (and narrowly tailored to) a "valid legislative purpose"—and were not impermissible attempts to "inquire into [the President's] private affairs" or to "expose for the sake of exposure." *See id.* at 2031-32. In that context, the fact that the subpoenas were for "personal papers" rather than official ones posed "a *heightened* risk of such impermissible purposes," and therefore of a separation-of-powers problem, "precisely because of the documents' personal nature and their less evident connection to a legislative task." *Id.* at 2035 (emphasis added).

Further, if the complaint is ambiguous as to whether it challenges official or personal acts of the President, it is the obligation of courts in assessing the legal sufficiency of a complaint to construe ambiguities in the manner most favorable to the plaintiff. *See Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005) (noting that, when considering a motion to dismiss under Rule 12(b)(1), the court must "construe all ambiguities" and "draw[] all inferences in [the] plaintiff's favor" (citations and internal quotation marks omitted)). This is to preserve the complaint notwithstanding that a possible, but not necessarily correct, meaning of an ambiguous passage would require its dismissal. By construing an ambiguity in the complaint in the manner least favorable to the plaintiff so as to require its dismissal, Judge Menashi disregards the basic principle that

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That point does not support Judge Menashi's argument, which questions whether the federal courts have the power to adjudicate whether the President's purely private conduct is unlawful. Indeed, the *Mazars* Court explicitly distinguished the separation-of-powers concerns raised by a congressional subpoena from the constitutional concerns raised by judicial proceedings against the President, *see id.* at 2034 (citing *In re Sealed Case*, 121 F.3d 729, 753 (D.C. Cir. 1997)), and reaffirmed its prior unanimous opinion in *Clinton v. Jones* holding that a sitting president is amenable to civil litigation particularly where, as here, "there is no possibility that the decision will curtail the scope of the official powers of the Executive Branch." 520 U.S. at 701; *see also Mazars*, 140 S. Ct. at 2036 (citing *Clinton*). While in *Mazars* the personal nature of the papers subpoenaed by Congress made it *less* likely the subpoenas fell within Congress's legitimate authority, here the personal nature of President Trump's operation of his private business makes it all the *more* likely that adjudication of the dispute will not involve the court in any inappropriate interference with Executive prerogative. *See Clinton*, 520 U.S. at 701.

we are required to do the opposite in considering a motion to dismiss. In any event, even if the plaintiffs' decision to sue President Trump "in his official capacity" somehow required treating the complaint as directed against the exercise of the President's official powers notwithstanding its obvious contrary intention, the plaintiffs should be allowed to amend their complaint to state that President Trump is sued "in both his official and his personal capacities." Rule 15(a)(2) of the Federal Rules of Civil Procedure provides, "The court should freely give leave [to amend a complaint] when justice so requires."[9]

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[9] Judge Menashi objects to the suggestion that, if it were necessary in order for this suit to proceed, the plaintiffs should be permitted to amend the complaint to explicitly name the President in his individual capacity. He argues that this would "have large implications" because the President does not have counsel to represent him in his individual capacity. Menashi Dissent at 27 n.31. But the President could simply retain counsel for that purpose. Although the suit has been pending for over 3 years, it has not yet reached its first substantive phase. Up to now the litigation has been entirely consumed with whether it may be heard by the court. In a similar case before the District of Maryland, after the court granted the plaintiffs leave to amend their complaint to add the President "in his individual capacity," the President promptly retained counsel for that purpose. *See* Notice of Appearance, *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018) (No. 8:17-cv-01596), Dkt. No. 109.

Judge Menashi further argues that the majority opinion impermissibly "treated the complaint as having been amended—without stating that it was doing so and without even requiring an actual amendment." Menashi Dissent at 27 n.31. He is mistaken. The majority opinion did not deem it necessary for the plaintiffs to amend the complaint to state a claim that falls within the jurisdiction of a federal court. Neither this statement, nor the majority opinion, treats the complaint as if it had been amended. I merely observe that, if the district court illogically viewed the naming of the President "in

III.

Judges Walker and Menashi contend that our finding of standing depends on relaxation of the Article III standard to the point that *any* advantage realized by a defendant would give standing to all competitors. The justification for the panel opinion's finding of standing, however, was that the facts alleged persuasively show a very substantial likelihood of injury to the Trump competitors. Judge Walker acknowledges that when injury to a plaintiff competitor will "likely" result from the defendant's conduct, that is sufficient to establish standing.[10] No relaxation of that standard is required to recognize that injury to competitors of the Trump establishments in the field of high-end, luxury hotels and restaurants will likely result from the powerful motivation

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his official capacity" as necessarily meaning that the conduct complained of was official conduct and that this took the complaint outside the scope of the court's jurisdiction, the proper ruling for the district court would have been to allow the plaintiffs to amend the complaint to clarify that the conduct from which it seeks relief is private conduct.

[10] Judge Walker's statement asserts, "To be sure, in some circumstances, competitive injury is so predictable and certain that we can say, as a matter of economic logic, that it will 'almost surely' occur, *or that the plaintiffs will 'likely suffer' an injury in fact*, or that there is a 'sufficient likelihood' of personal injury—whatever degree of certainty is required by a particular circuit. But only then does the competitor standing doctrine permit a plaintiff to show standing without making a specific showing of injury." *CREW v. Trump*, __ F.3d __ (2d Cir. 2020) (Walker, J., statement on denial of rehearing *en banc*, at 3) (hereinafter "Walker Statement") (emphasis added) (citations omitted). As discussed below, Judge Walker's suggestion that a plaintiff's likelihood of future injury must be at or near "certainty" misstates the standard for establishing an Article III injury-in-fact. *See infra*.

of governmental patrons to curry favor with the President by spending money in his establishments.

The logic supporting a substantial likelihood of injury to competitors of the Trump hotels and restaurants is simple and compelling. With respect to the Foreign Emoluments Clause claim, the President exercises control over the foreign relations of the United States, negotiates its treaties, in many regards sets the terms of trade with foreign nations,[11] and presides over its Armed Forces. As the United States is the richest and most powerful nation in the world, provides foreign aid and military defense support to many nations, and provides the richest markets for the sale of products made all over the world, there is scarcely a nation that does not seek benefits from the United States in its diplomatic dealings. Governments and their diplomats from all over the world perceive it as crucial to their success in diplomacy with the United States to secure the personal goodwill of the President and avoid the risk of incurring his displeasure. The President's favor is a lucrative prize for a foreign diplomat whose visits to our country often have the purpose of seeking some favorable action from the government which the President largely controls. It is therefore the business of a diplomat, whose mission depends on such favorable action, to use any available means to seek the President's favor and to avoid the risk of displeasing him. It is an "accepted

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[11] *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 550-51 (1976) (discussing the President's power, under Section 232(b) of the Trade Expansion Act of 1962, to "take such action . . . to adjust the imports of [articles of commerce by imposing quotas and tariffs] . . . [so that they do not] threaten to impair the national security").

tenet of modern statecraft" that diplomats will "seek to use all available rewards or incentives to influence" the President. Brief of Former National Security Officials as Amici Curiae at 25-26, *CREW v. Trump*, 953 F.3d 178 (2d Cir. 2019) (No. 18-474). In addition, the President, according to the allegations of the complaint, has announced to the world his favoritism for nations that patronize his businesses.[12] It follows with undeniable logic that the envoys of foreign nations, who are free to choose otherwise equivalent venues, will be strongly motivated to choose the President's establishments, so as to advance their objective of currying the President's favor, and to avoid the risk of displeasing him by choosing his competitors. This likelihood is substantiated not only by obvious logic but by the complaint's references to explicit statements of foreign diplomats. One of those diplomats, quoted in the Washington Post, stated: "Why wouldn't I stay at his hotel blocks from the White House, so I can tell the new president, 'I love your new hotel!' Isn't it rude to come to his city and say, 'I am staying at your competitor?'" Second Am. Compl. ¶ 62. Another said: "Believe me, all the delegations will go there." *Id.*[13] Similar economic logic explains why representatives of states of the United States will likely be

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[12] *See* Second Am. Compl. ¶ 96 ("Trump said [of the Saudis, in the context of discussing trade negotiations], ' . . . They spend $40 million, $50 million. Am I supposed to dislike them? I like them very much.'"); *id.* ¶ 52 (quoting the President's response to a question about the U.S.'s dispute with China over the South China Sea: "I do deals with [China] all the time. [China's largest bank] is a tenant of mine. . . . ").

[13] Judge Menashi faults me for citing these statements because they relate to the President's hotel in Washington D.C., and because "no plaintiff in this case owns or is otherwise associated with a hotel

motivated to make choices that will please the President, rather than offend him.

Judges Walker and Menashi dismiss the plaintiffs' theory of injury as too speculative and not "so predictable and certain that we can say, as a matter of economic logic" that plaintiffs will suffer harm. Walker Statement at 3.[14] But neither Judge Menashi nor Judge Walker offer reasons to dispute the seemingly obvious proposition

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in Washington D.C." Menashi Dissent at 29. That is beside the point. The plaintiffs compete with Trump hotels in New York City, *see* Second Am. Compl. ¶¶ 196-97, 228, and with Trump restaurants in both New York City and Washington, D.C., *id.* ¶¶ 182, 191, 196. These statements support the commonsense and logical proposition that the possibility of influencing the President by spending money at his establishments will be a powerful motivation for domestic and foreign government officials to patronize his businesses in preference to those of competitors.

[14] Judge Menashi suggests that the fact that the plaintiffs do not point to a verified instance in which they themselves lost business to a Trump establishment as a result of the challenged conduct means that in all likelihood they have not and will not suffer an injury. Menashi Dissent at 3, 10, 11 n.12. This argument overlooks the fact that the three-year-old complaint we now consider was filed in May 2017, less than five months after Mr. Trump assumed the presidency. In any case, the plaintiffs were under no obligation to include in their complaint evidence that they have *already* suffered injury because Article III clearly confers standing based on a substantial likelihood of *future* injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that the plaintiff's injury must be "actual *or* imminent" (emphasis added) (citation omitted)); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565-66 (2019) (upholding standing based on the plaintiffs' showing that the reinstatement of a citizenship question on the census would cause a likely future injury to the plaintiffs by "depress[ing] the census response rate and lead-[ing] to an inaccurate population count"). Moreover, Judge Menashi's argument overlooks Justice Scalia's clarification that "general

that the opportunity to procure the President's favor or avoid his disfavor is a highly significant motivator for a foreign diplomat or a state representative. It is precisely the significance of that competitive advantage that makes the plaintiffs' theory of injury plausible and supports the conclusion that the plaintiffs are substantially likely to suffer economic injury as a result of the conduct they challenge.

The logic that supports the likelihood that governmental customers will be motivated by the opportunity to attempt to curry the President's favor by spending money at his establishments does not at all depend on the proposition, as Judges Walker and Menashi argue, that *any* advantage realized by a competitor as a result of allegedly illegal conduct is sufficient to establish standing. What is involved in the plaintiffs' allegations is an advantage (derived by the defendant from allegedly illegal conduct) that will be clearly perceptible to governmental customers, and will provide them with a strong incentive to patronize the President's establishments in preference to the plaintiffs'. It is not only eminently plausible but highly likely that foreign diplomats and state representatives will be motivated to spend their money at President Trump's hotels and restaurants precisely because of the hope that doing so will earn favor with him and avoid displeasing him, and that at least some of those officials would have otherwise patronized the plaintiffs' establishments. In a case where the advantage derived by the defendant from illegal conduct was small, and the likelihood was low that potential customers would be aware of it, much less motivated by

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factual allegations of injury" suffice at the pleading stage. *Lujan*, 504 U.S. at 561.

that advantage to prefer the defendant over a plaintiff, those circumstances would not support a substantial likelihood that the challenged conduct would cause the plaintiff injury, and should not support a finding of standing. But the present allegations are far removed from that.[15]

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[15] Judge Walker undertakes to prove the "the absence of the required economic logic in this case" by a hypothetical case, in which the plaintiff, a restaurant, "sues a competing restaurant that used a fraudulently obtained bank loan or tax refund to improve its business, such as by hiring a new chef or lowering prices, thereby increasing its market competitiveness." Walker Statement at 5. Judge Walker's reasoning seems to be that such a case obviously does not involve an injury that is traceable to the defendant's fraud and is therefore not within our Article III jurisdiction.

Judge Walker's hypothetical, however, proves little because it is silent as to the crucial fact of the *significance* of the competing restaurant's unlawfully obtained advantage to its competitive position. If the proceeds from his hypothetical defendant's fraud were small, or enabled only marginal improvements in service or small reductions in prices, the circumstances would not support a substantial likelihood that customers would perceive the differences, much less choose the defendant's restaurant over the plaintiff's because of those differences.

On the other hand, if the proceeds of the defendant's fraud enabled him to offer a restaurant of obviously better quality at substantially similar prices, or a similar restaurant at markedly lower prices, then there would be a far stronger showing of likelihood that the defendant's illegal conduct would cause injury to the plaintiff. Whether there is a substantial likelihood that the defendants' illegal conduct will cause injury to competitors depends on detailed analysis of the facts. In our case, the allegations support a strong inference of likely resultant harm. Judge Walker's hypothetical case does not supply sufficient facts to support such an inference.

What makes his case even more confusing is that Judge Walker's hypothetical complaint would obviously be dismissed *on the merits* because the fraud laws do not afford a remedy to one who is injured in

IV.

Judge Walker and Menashi make two more arguments regarding the competitor standing doctrine, which I believe have no force. First, they argue, based on the Supreme Court's decision in *Already, LLC v. Nike, Inc.*, 568 U.S. 85 (2013), and this court's decision in *In re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989), that our ruling was premised on an overly permissive standard and failed to reconcile a perceived discrepancy in Second Circuit case law. They rely on *Already* and *Catholic Conference* as showing that a plaintiff does not establish Article III standing by merely "asserting that an advantage to one competitor adversely handicaps the others," and that a court may not assume, merely based on such an assertion, that the plaintiff will suffer harm as a result of her competitor's advantage. Walker Statement at 2. They assert that a plaintiff "must [instead] make that showing" affirmatively. Menashi Dissent at 8.

Our panel decision was not to the contrary. We did not rely on a *mere assertion* of a likelihood that the plaintiffs would suffer harm. To the contrary, as explained at length above, our finding of a substantial likelihood of injury to the plaintiffs was based on analysis of factual allegations that persuasively support that conclusion. *Already* and *Catholic Conference* do not cast

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that fashion. The Supreme Court has warned us not to confuse the insufficiency of a complaint on the merits with lack of Article III standing. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 253 (2010) ("Subject-matter jurisdiction . . . refers to a tribunal's power to hear a case. It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." (citations and internal quotation marks omitted)).

any doubt on the logic that supports the likelihood of the plaintiffs' injury in our case. The difference between those cases and this one is that in those cases there was no likelihood that the plaintiffs would suffer injury resulting from the challenged conduct.

In *Already*, the petitioner, Already, LLC, which competed with the respondent Nike, Inc. in footwear, sought to invalidate a Nike trademark on which Nike had asserted a claim against Already. 568 U.S. at 88. Nike, however, later abandoned its trademark claim and issued a "Covenant Not to Sue," "promis[ing] that [it] would not raise against Already or any affiliated entity any trademark or unfair competition claim based on any of Already's existing footwear designs, or any future Already designs that constituted a 'colorable imitation' of Already's current products." *Id.* at 88-89. The Supreme Court concluded, on the basis of that covenant, that it was "absolutely clear" that Nike could not be reasonably be expected to again raise a similar trademark challenge. *Id.* at 100. The facts thus showed no likelihood that Already would suffer injury from Nike's challenged trademark.[16]

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[16] As Judge Walker notes, one of Already's alternative theories of competitive injury was that "so long as Nike remains free to assert its trademark, investors will be apprehensive about investing in Already." 568 U.S. at 96; *see also* Walker Statement at 3. The Supreme Court rejected this theory, explaining that any investor concerns about Nike's assertion of trademark claims against Already were "conjectural or hypothetical" given the existence of the covenant that precluded this possibility, 568 U.S. at 97, apparently using the adjectives "conjectural" and "hypothetical" to mean predictions without factual or logical basis. Here, by contrast, especially as the complaint alleges that the President has openly proclaimed his preference for those who patronize his businesses, government officials'

Similarly, in *Catholic Conference,* our court found no likelihood that the plaintiffs would suffer a competitive injury from the defendant's unlawful conduct because the plaintiffs and the party that enjoyed the allegedly unlawful benefit did not compete. 885 F.2d at 1029-30 (explaining that the "fatal flaw" in plaintiffs' standing argument is that "they are not competitors" with the party enjoying the allegedly unlawful benefit). An advantage to an alleged competitor was not likely to cause a disadvantage to the plaintiffs if, in fact, they are not in competition against each other.

There is a clear strong difference between our case, on the one hand, and *Already* and *Catholic Conference.* Whereas in our case the alleged facts logically support a substantial likelihood that the plaintiffs will be harmed by the defendant's alleged misconduct, in *Already* and *Catholic Conference* the facts showed that there was no such likelihood. Neither case undermines the substantial likelihood, based on the facts asserted in the complaint, that the President's alleged violation of the Emoluments Clauses will cause harm to the plaintiffs. Second, Judge Menashi argues that the plaintiffs' theory of

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likely choice to patronize the President's establishments over those of the plaintiffs in order to curry his favor would not be based on mere "conjectur[e]."

Another of Already's theories of competitive injury was that, notwithstanding the absence of a reasonable possibility that Nike would assert its trademark against Already, Already had standing to challenge that trademark due to its status "as a company engaged in the business of designing and marketing athletic shoes." *Id.* at 98 (alterations omitted). It was in this context that the Court stated that a plaintiff must do more than allege that "a competitor benefits from something allegedly unlawful," and clarified that "[w]e have never accepted such a boundless theory of standing." *Id.* at 99.

injury is insufficient as a matter of "economic logic" because the market in which the plaintiffs compete has too few buyers (*i.e.* government patrons) and too many sellers (*i.e.* high-end hotels and restaurants) to permit a court to conclude that the plaintiffs—rather than other hotel and restaurant competitors—are harmed by the President's conduct. In a "single transaction market," he explains, in which one seller obtains an unfair advantage over competitors, it is more reasonable to assume that a different, competing seller suffers an injury as a result of that unfair advantage if the market has 1,000 buyers and only two sellers, than if the market has 1,000 sellers and only one buyer. Menashi Dissent at 11. He posits that the high-end market in which the Trump hotels and restaurants compete with the plaintiffs' might be more like the latter, so that there would be no reason to expect that the inducement to governments to favor Trump establishments causes harm to the plaintiffs. Judge Menashi points to no factual basis to support his proposition. Given the fact that there are nearly 200 nations in the world (and 50 states), many of which send delegates to Washington or New York, where they become buyers whose business the Trump establishments seek, I doubt Judge Menashi's speculation that the ratio of buyers to high-end luxury hotels and restaurants that compete with Trump establishments would look anything like a market of "one buyer and 1000 sellers." *Id.* In any event, this makes no difference because, as explained below in Part V of this statement, our conclusion that the plaintiffs have pleaded likelihood of concrete competitor injury sufficient to satisfy Article III is in conformity with conventional daily decisions of federal courts to entertain suits

alleging antitrust violations, false advertising, false designations of origin, and unfair competition.[17]

V.

In assailing the panel opinion's analysis of the plaintiff's theory of competitive injury, Judge Menashi asserts that the Supreme Court has held that, to meet the requirements of Article III, an imminent injury must be "certainly impending"—or, alternatively, that the challenged conduct must 'almost surely" have caused the plaintiffs harm. Menashi Dissent at 4. He cites to the Supreme court's opinion in *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), in which the Court stated that a plaintiff can establish Article III standing based on an imminent injury by showing that her threatened injury is "certainly impending" rather than merely "possible." *Id.* at 409. The *Clapper* opinion, however, acknowledged that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is *literally certain* that the harms they identify will come about," and that a "substantial risk" of harm will suffice. *Id.* at 414 n.5.[18]

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[17] Judge Menashi complains that I gratuitously and incorrectly attribute to him a view that "the market for high-end restaurants and hotels is one with many sellers and few buyers," when in fact, he asserts, his only point was to note the majority's lack of interest in the question. Menashi Dissent at 11 & n.12. If I have misread his argument, I apologize. But, especially as this passage of his dissent calls the majority's conclusion "indefensible" and impermissibl[e], *id.*, I read it as suggesting that a proper exploration of the buyer-seller ratio would have shown the majority that its conclusion was erroneous. I do not interpret his vote for *en banc* rehearing as expressing a wish for a new opinion supporting the same conclusion with better reasons.

[18] Judge Menashi further points out that, in *Clapper*, the Supreme Court stated that a plaintiff "cannot rely on speculation about 'the

Indeed, the Supreme Court has often expressed the governing standard without any reference to "certainty," but requiring only a "realistic danger" or a "substantial risk" of harm. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a *realistic danger* of sustaining a direct injury as a result of the statute's operation or enforcement." (emphasis added)).[19] One year after *Clapper*, Justice Thomas, writing for a unanimous Court, asserted that an allegation of imminent injury qualifies as an Article III injury-in-fact *either* "if the threatened injury is 'certainly impending'" *or* if "there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citing *Clapper*, 568 U.S. at 414 n.5). Still more recently, the Supreme Court has explained

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unfettered choices made by independent actors not before the court'" to establish standing. 568 U.S. at 414 n.5 (citation omitted); Menashi Dissent at 34. However, as explained in the majority opinion, "[t]hat Plaintiffs' theory of harm results from decisions of third parties does not preclude finding the cognizable link between the challenged action and the alleged harm that Article III requires." 953 F.3d at 197-98; *see also Dep't of Commerce,* 139 S. Ct. at 2566 (holding that plaintiffs had Article III standing where their "theory of standing . . . relies [] on the predictable effect of [the challenged action] on the decisions of third parties"); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.) ("It is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons.").

[19] As Justice Breyer's dissenting opinion explained in *Clapper*, "*certainty* is not, and has never been, the touchstone of standing," and "federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing [harm] that [is] reasonably likely or highly likely, but not absolutely certain, to take place." 568 U.S. at 431 (Breyer, J., dissenting).

that a "risk of real harm" can satisfy the injury-in-fact requirement of Article III. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).[20] And in *Department of Commerce v. New York*, the Court upheld Article III standing based on a "sufficient likelihood" of "future injur[y]." 139 S. Ct. 2551, 2565 (2019). These holdings make clear that certainty of impending injury is not necessary to establish Article III jurisdiction.[21]

Moreover, if "certainly impending" injury were necessary, hardly ever would a competitor's suit for antitrust violation, trademark infringement, false designation of origin, false advertising, or unfair competition be heard in federal court.[22] In most such cases, there is

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[20] The *Spokeo* opinion added, "[T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure." 136 S. Ct. at 1549.

[21] *Cf. Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104 (2d Cir. 2018) ("[Plaintiffs] need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test [for Article III purposes]." (quoting *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990))).

[22] In *POM Wonderful LLC v. Coca-Cola Co.*, for example, the Supreme Court allowed a false advertising claim to proceed based on defendant's allegedly deceptive use of the words "pomegranate blueberry" on its juice packaging. 573 U.S. 102, 110 (2014). The plaintiff's theory of harm was that customers would likely buy the defendant's product in preference to plaintiff's in the mistaken belief that the defendant's juice, like the plaintiff's, contained predominantly pomegranate juice. *Id.* There were no doubt innumerable reasons why some customers might have favored the defendant's product regardless of the defendant's allegedly false claims. The Supreme Court nonetheless upheld the sufficiency of pleading without questioning the plaintiff's Article III standing.

no less likelihood than here that customers would patronize the alleged offender regardless of the offending conduct because of better service or quality, lower prices, dependence on the defendant's goodwill, or other motivations. Making a related argument, Judges Walker and Menashi suggest that standing is necessarily defeated by the possibility that government patrons might choose Trump establishments for a variety of reasons *other than* their desire to curry favor with the President, such as "service, quality, location, price and other factors related to individual preference." *See* Walker Statement at 4; Menashi Dissent at 10. It is of course true that some government customers might choose Trump hotels and restaurants for other reasons. That is true in virtually all cases of competitor standing. If it were clear that customers would choose the defendant over the plaintiff regardless of the defendant's allegedly illegal activity—*i.e.* that the challenged conduct *could not affect* customer decision-making—then there would be no likelihood that the defendant's illegal conduct would cause the plaintiffs injury, and the plaintiffs would have no Article III standing. Such a claim would fail for the same sorts of reasons as defeated Already's claim in the Supreme Court. *Already*, 568 U.S. at 100. But the mere possibility of that circumstance does not affect the plaintiff's Article III standing so long as the facts show a substantial likelihood that the defendant's conduct will cause the plaintiff injury.

Where a plaintiff brings a trademark infringement claim, for example, alleging that a competitor is using the plaintiff's trademark on similar goods, the federal courts exercise jurisdiction without need for allegation or proof, to a certainty, that the plaintiff has lost or will lose business or suffer harm as a result. A substantial

likelihood that the defendant's conduct will inflict harm is sufficient, and a mere possibility that some customers may choose the defendant's product over the plaintiff's for reasons unrelated to the challenged conduct does not defeat standing.[23] Indeed, the federal trademark statute expressly authorizes a claim where the defendant's conduct is "*likely to* cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1)(a)-(b) (emphasis added). Were the federal courts to adopt the "certainty" standard as necessary to establish Article III jurisdiction, or reject all cases in which the possibility exists that customers might choose the defendant over the plaintiff for reasons other than the defendant's unlawful conduct, antitrust, trademark, false advertising, and unfair competition litigation would virtually disappear from the federal court dockets.

Judge Menashi dismisses as irrelevant the fact that the injury alleged by these plaintiffs would satisfy Article III in antitrust, trademark, false designation of origin, false advertising, and unfair competition cases. *See* Menashi Dissent at 34-35. He quotes from *Spokeo*, 136 S. Ct. at 1549, "Congress has the power to define injuries . . . that will give rise to a case or controversy where none existed before," and argues that our jurisdiction over those federal claims depends on the fact that Congress has passed a statute creating a cause

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[23] *See Johnson & Johnson v. Carter-Wallace, Inc.*, 631 F.2d 186, 190-91 (2d Cir. 1980) (holding that because the parties were "competitors in a relevant market," and because the plaintiff had shown a "logical causal connection between the alleged false advertising and its own sales position," the plaintiff had established statutory standing under the Lanham Act).

of action, which elevated the injury resulting from its violation into one that can satisfy Article III. *Id.* at 35. Accordingly, he argues, injuries in such cases satisfy Article III only because they are "defined by statute," *id.*, and those precedents therefore "provide no support" for the exercise of jurisdiction in this case because the plaintiffs here "cannot identify any 'statutes creating legal rights, the invasion of which creates standing.'" *Id.* (quoting *Lujan*, 504 U.S. at 578). He further contends that the Emoluments Clauses do not provide these plaintiffs a "right to be free from the competition they allege causes them harm," and that, because the plaintiffs cannot point to any "statutory or other legal right[s] the violation of which might serve as an injury to them," their interest in the President's compliance with the Emoluments Clauses is a mere "generalized grievance" that must be viewed as on the same inadequate footing as a citizen suit seeking to vindicate the right to "have the Government act in accordance with law." *Id.* at 35 (quoting *Lujan*, 504 U.S. at 575).

The flaws in this reasoning seem to be numerous. To begin, Judge Menashi is mistaken that our ability under Article III to exercise jurisdiction over lawsuits alleging violations of federal unfair competition laws (*i.e.* antitrust, trademark, and false advertising cases) depends on Congress having exercised its ability to "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 35 (quoting *Spokeo*, 136 S. Ct. at 1549). While it is undoubtedly true, as stated in *Spokeo*, that "Congress may elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," 136 S. Ct. at 1549 (alteration in original)

(quoting *Lujan,* 504 U.S. at 578), there is neither a logical nor legal basis for Judge Menashi's apparent corollary that injury to a plaintiff's business interests inflicted by a competitor's conduct can satisfy the adversity requirement of Article III only if the claim is statutory.[24] Federal courts exercise jurisdiction over similar state law claims, *common law* as well as statutory, on the basis of precisely the same form and degree of likelihood of competitive injury—that is, the loss of business resulting from the conduct of a competitor.[25] Our adjudication of these state common law claims is incom-

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[24] Particularly because competitive economic injuries, like the injuries alleged here, "have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

[25] *See, e.g., Lemberg Law, LLC v. eGeneration Marketing, Inc.*, No. 3:18-cv-570, 2020 WL 2813177, at *4 (D. Conn. Mar. 29, 2020) (exercising jurisdiction over a state law deceptive practices claim brought by a law firm alleging that the defendant "deceive[d] . . . Plaintiff's customers and potential customers[] into believing that Defendants are lawyers" (internal quotation marks omitted)); *Merck Eprova AG v. Gnosis S.p.A.*, 901 F. Supp. 2d 436, 449 (S.D.N.Y. 2012) (Sullivan, J.) (holding that a plaintiff has Article III standing—but not statutory standing—to bring state law false advertising claims because "a manufacturer . . . is injured [for Article III purposes] when a competitor falsely advertises that its chemically distinct product is identical to the manufacturer's product"). Federal courts also exercise jurisdiction over claims asserting novel forms of injury—*e.g.*, hot news misappropriation—without regard for whether such injuries have been recognized by statute. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231-32 (1918) (adjudicating a common law claim for misappropriation of breaking news articles brought by The Associated Press against a competing news provider); *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 457 (S.D.N.Y. 2009) (exercising jurisdiction over a similar state law "hot news" misappropriation claim).

patible with Judge Menashi's proposition that our jurisdiction over similar federal claims depends on a statutory enactment. *See* Menashi Dissent at 34-35. To the contrary, it tends to confirm that likelihood of competitive injury can satisfy the adversity requirement of Article III, regardless of whether the plaintiff's claim arises under a federal statute, a state statute, state common law, or the Constitution.

As for Judge Menashi's contention that an injury that satisfies Article III if it results from violation of a right explicitly stated in a federal statute will not necessarily satisfy Article III if it results from violation of a right allegedly implied in the Constitution, Justice Scalia forcefully stated in *Lujan*, "there is absolutely no basis for making the Article III injury turn on the source of the asserted right." 504 U.S. at 576. Whether a claim of competitive injury satisfies the adversity requirements of Article III turns on the substantiality and degree of likelihood of injury, and not on whether the injury resulted from a violation of federal, as opposed to state, law, or whether the asserted right is expressly stated or implied in the legislative writing.

Judge Menashi further argues that "the Emoluments Clauses do not give plaintiffs a right to be free from the competition they allege causes them harm," Menashi Dissent at 36, and that, without a "legal right the violation of which may serve as an injury to them," *id.* at 35, they cannot satisfy the requirements of Article III. This argument depends on reasoning that has been expressly repudiated by the Supreme Court. While in the 1930s the Supreme Court dismissed several cases for lack of standing on the grounds that a plaintiff whose

injury was the result of "lawful competition" has not suffered violation of a "legal interest" or a "legal right," *Ala. Power Co. v. Ickes*, 302 U.S. 464, 479-83 (1938) (dismissing case brought by power company alleging that federal officials harmed its business by unlawfully supplying loans and grants to its competitors); *see also Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 140 (1939), the Court decisively repudiated that approach 30 years later, clarifying that "the existence or non-existence of a 'legal interest' is a matter quite distinct from the problem of standing" and instead "goes to the merits," *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,* 397 U.S. 150, 153 & n.1 (1970); *see also id.* at 152 (holding that "[t]here can be no doubt" that the plaintiffs have Article III standing because they "allege that competition [resulting from the challenged regulation] might entail some future loss of profits for [them]"). Indeed, the Supreme Court, speaking through Justice Scalia, has made clear that whether a complaint states an actionable claim, and whether the court has jurisdiction to adjudicate the claim, are wholly separate questions. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-28 (2014) (explaining that "whether [the plaintiff] has a cause of action" is separate from whether the complaint "presents a case or controversy that is properly within federal courts' Article III jurisdiction"). "[I]t is well settled," the Court stated in *Bell v. Hood*, "that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. 678, 682 (1946); *see also Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal." (internal quotation marks

and citation omitted)); *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979) (criticizing the Court of Appeals for "confus[ing] the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action").

Finally, Judge Menashi notes that "the mere alleged violation of the Emoluments Clauses cannot itself serve as an Article III injury," and that the Clauses do not "confer on the plaintiffs a particularized interest the violation of which might create standing *in the absence of an otherwise cognizable concrete injury*." Menashi Dissent at 36 (emphasis added). I completely agree that a violation of the Emoluments Clauses does not, by itself, confer standing, and agree as well that a mere "generalized grievance" is insufficient. But Judge Menashi goes on to assert that these plaintiffs' only interest "in the President's compliance with the Emoluments Clauses" is "common to all members of the public." *Id.* at 36 (quoting *Lujan*, 504 U.S. at 575). This argument sweeps under the rug the plaintiffs' entirely plausible allegation that, as a result of the President's conduct, their businesses will suffer a direct and particularized economic injury: specifically, a diminution of business revenues. As the Supreme Court explained in *Sierra Club v. Morton*, harm to a plaintiff's "competitive position" in the marketplace is precisely the type of "palpable economic injur[y]" that "ha[s] long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision [permitting suit]." 405 U.S. at 733-34. It is the plaintiffs' "palpable economic injury"—not an "impermissible generalized grievance," Menashi Dissent at 36,—that supports exercise of jurisdiction here.

VI.

Judge Menashi asserts that the standards adopted in the panel opinion and in this statement would have the consequence of "convert[ing] the Judiciary into an open forum for the resolution of political or ideological disputes." Menashi Dissent at 21.[26] He suggests no reason why that should be the case, and I can see none. The panel opinion and my Statement simply apply well established Supreme Court precedent to the facts alleged in the complaint. The same precedents and logic support Article III standing in numerous other cases concerning commercial disputes between private competitors. That the President is the defendant in this suit is not a reason to depart from these well-established

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[26] Judge Menashi's formulation is quoted from Justice Powell's concurring opinion in *United States v. Richardson*, 418 U.S. 166, 192 (1974). That case was nothing like this one. In *Richardson*, a taxpayer sought a judicial declaration that the CIA violated the Constitution by failing to disclose certain expenditures. *Id.* at 167-70. The Supreme Court held that the taxpayer lacked a "personal stake in the outcome" of his lawsuit. *Id.* at 179-80. Justice Powell concurred, arguing that the Court should have gone further and disavowed a more permissive approach to standing that the Court had adopted in prior precedents. *Id.* at 180 (Powell, J., concurring). Justice Powell noted his agreement with other precedents in which the Court had rejected "taxpayer or citizen standing where the plaintiff has nothing at stake other than his interest as a taxpayer or a citizen" as a result of its "antipathy to efforts to convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *Id.* at 192. Justice Powell's words simply expressed the well-accepted principle that a "generalized grievance . . . common to all members of the public" is insufficient to establish standing. *Id.* at 176-77. They have no conceivable bearing on a suit by operators of hotels and restaurants claiming that they are suffering and will suffer losses of business because of allegedly illegal conduct of a competitor.

principles of jurisdiction, nor does it justify the contention that the panel's faithful application of those principles in support of its finding of subject matter jurisdiction would alter or expand the role of the judiciary or have any political or ideological consequences.