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 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

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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).

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 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.

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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.

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 '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").

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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.").

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]

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,

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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."). 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).

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 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 "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]

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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).

[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

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 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

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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").

[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").

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 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

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[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.*

[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"

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).

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

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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).

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

[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").

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 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]

[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'"

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

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and noting that, regardless, "the federal courts have never sustained an injunction" that required the President to perform a ministerial duty).

[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).

President's personal conduct, an "interbranch conflict … does not vanish simply because" 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 injunctive relief only against the Secretary of

[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.

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 the Complaint states a claim upon which relief may be granted." *Id.* In other words, the court holds only that the district

[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).

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 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

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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.

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 precedents in a case arising under the Constitution.[22] For example, it described the Supreme Court's holding

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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").

[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

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 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

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of the *Constitution*, we can see no reason why the reasoning of the precedents reviewed above are not equally applicable here.").

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 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

[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").

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]

[24] Even suits involving a President's' purely private conduct—that is, his engaging in private conduct in a private capacity—require special

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 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]

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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 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

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]

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

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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.

[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

the statement that the majority opinion implicitly rejected the plaintiffs' allegations in their complaint and departed from every

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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 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.

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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[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 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

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 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

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"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.

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 redress 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

[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

then conspicuously moves from 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

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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.

[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.

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 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

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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.

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 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]

[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

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 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

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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).

[38] See the statement's footnote 19.

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. 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

[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.").

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 noncompliance 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

[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.").

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 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

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

on their factual allegations about lost business. As discussed throughout this dissent and in the separate 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.*