



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW
Washington, D.C. 20530

Tel: 202-616-5374

September 16, 2019

Patricia S. Connor
Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Via CM/ECF

RE: *In re Donald J. Trump*, No. 18-2486 (4th Cir.)

Dear Ms. Connor:

The en banc petitioners in this case have alerted this Court to a September 13, 2019 decision of the United States Court of Appeals for the Second Circuit. *CREW v. Trump*, No. 18-474. A divided panel of the Second Circuit determined that hospitality plaintiffs in that case had Article III standing to sue the President for alleged violations of the Foreign and Domestic Emoluments Clauses on a theory of “competitor standing.” *Compare* Slip Op. 17, *with* Dissenting Op. 25. The majority’s decision is erroneous, and it does not support en banc review of the correct decision of the unanimous panel here.

The Second Circuit panel majority did not dispute that the doctrine of competitor standing is not a relaxation of ordinary Article III principles, and it thus allows a plaintiff without any evidence of actual injury to sue only where economic logic makes it “almost sure[.]” that the plaintiff will lose business due to the competitor’s allegedly illegal activity. *E.g.*, *El Paso Nat. Gas Co. v. FERC*, 50 F.3d 23, 27 (D.C. Cir. 1995). For the reasons supplied in the panel’s opinion in this case, as well as the government’s opposition to rehearing (at 7-10), that standard is not met by the en banc petitioners here. Unlike an ordinary competitor-standing case, petitioners’ unusual theory of injury is factually idiosyncratic and rests on multiple levels of speculation; namely, they hypothesize injury merely because a handful of plaintiffs’ businesses compete to some extent with the defendant’s single hotel in a market with myriad other competitors, and where the allegedly unlawful activity concerns a tiny subset of customers (government patrons for whom the President’s financial interest in the hotel is a material consideration). *Accord* Dissenting Op. 16-17. Whereas the Second

Circuit panel majority failed to grapple with that fundamental point, the panel here properly recognized it, and this Court should not disturb its cogent decision.

Sincerely,

/s/ Martin Totaro
Martin Totaro

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2019, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Martin Totaro

Martin Totaro