

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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Simon ATEBA,

*Plaintiff,*

v.

Karine JEAN-PIERRE, in her official  
capacity as White House Press Secretary, et al.)

*Defendants.*

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Case No. 1:23-cv-02321-JDB

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR  
PRELIMINARY INJUNCTION**

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## INTRODUCTION

The White House serves as both the President's residence and the offices of the President and his closest staff. Access to the White House grounds is tightly controlled to assure the safety and security of the President, his family, and staff, and also to limit disruption to the Executive's important work. One important aspect of the Executive's work is communicating with the public through the press—often through press conferences conducted in the White House. Journalists can access these press conferences either with a day pass or a so-called hard pass, which allows journalists access on an ongoing basis. Both passes let journalists access press conferences and other press spaces.

This spring, the White House Press Office informed journalists that existing hard passes would expire at the end of July, and that journalists would have to reapply for a hard pass or else use a day pass. Going forward, renewals and new issues would be governed by essentially the same policies that had been in effect in many prior administrations. These policies are objective and broadly applicable, and do not distinguish based on the views of the journalist. Plaintiff Simon Ateba never reapplied for a hard pass. Nonetheless, he now contends that he cannot qualify for a hard pass under these standards, and he seeks a preliminary injunction invalidating the new hard pass standards and reinstating his expired hard pass. The Court should deny Mr. Ateba's motion. The current standards do not discriminate based on journalists' views and do not leave the White House Press Office with excessive discretion in violation of the First Amendment. And while Mr. Ateba raises an Administrative Procedure Act claim against the Secret Service for its supposed role in promulgating the new policy, the Secret Service in fact played no role in the policy's issuance. Moreover, Mr. Ateba cannot demonstrate irreparable harm because he remains free to access the White House through the day pass system. The day pass system provides access to the same areas of the White House, and for the same times, as the hard pass—it only requires, at most, a few extra minutes to clear Secret Service security when entering the White House complex. Mr. Ateba has neither sought nor used a day pass since his hard pass expired, and the potential delay of a few minutes for him to enter the White House does not justify the extraordinary relief he seeks here.



## BACKGROUND

### I. White House Press Passes and the Hard Pass Policy

Many reporters cover the White House for a wide range of news outlets. Those reporters' access to the White House is managed by the White House Press Office, which is a component of the White House Office (also known as the "Office of the President") that is composed of the President's closest advisors.

Because the White House complex is subject to strict security requirements, access is tightly controlled. Reporters generally obtain access to facilities within the White House complex in one of two ways. The first is colloquially known as a "hard pass." These credentials provide "on-demand access to the White House complex," *see Kareem v. Trump*, 960 F.3d 656, 659 (D.C. Cir. 2020), for reporters who meet the applicable standards and satisfy applicable security checks. The second type of pass is known as a "day pass." This pass allows journalists to access the same areas of the White House grounds as a hard pass, during the same hours. Obtaining a day pass requires a journalist to complete a simple online form—the same form used for any visitor to the White House—where they provide basic biographical information such as name and date of birth to enable the Secret Service to perform a security review. Once at the White House, journalists with a day pass present themselves at a security checkpoint for verification, and, once escorted through security, can access the White House press areas and attend White House press briefings without further escort. In other words, once they have cleared security to enter the White House complex, a reporter's access is the same regardless of the pass they hold: there are no differences in whom they may talk to or what briefings they may attend based on pass type. *See* Decl. of Nathan Fleischer ¶¶ 6–7 ("Fleischer Decl"), attached as Exhibit 1. The only relevant difference is that reporters with a hard pass can get into the White House in a somewhat more expedited manner than they might otherwise be able; usually only a matter of a few minutes faster. *Id.* ¶ 9.

“[T]he hard-pass system has existed in similar form for decades.” *Karem*, 960 F.3d at 660. But under the now-rescinded policy, hard passes effectively did not expire and there were an excessive number in circulation—including many that were no longer in active use, leading to concerns with administrability and the security risks inherent in the ballooning number of passes that grant access to White House grounds. In the spring of 2023, the White House Press Office announced its “inten[t] to revise the policy on press hard passes to be consistent with that of prior administrations.” Compl., Ex. A, Letter from White House Press Office to All Hard Pass Holders (May 5, 2023), ECF No. 1-1 (“May Letter”).

Under the new policy (the “Hard Pass Policy”), applicants must meet six criteria:

1. Full-time employment with an organization whose principal business is news dissemination (If you are freelance, we will need letters from two news organizations describing your affiliation, or, if you freelance primarily for one organization, a letter from that organization describing the extent and duration of your relationship with the organization);
2. Physical address (either residential or professional) in the greater Washington, D.C. area;
3. Have accessed the White House campus at least once during the prior six months for work, or have proof of employment within the last three months to cover the White House;
4. Assignment to cover (or provide technical support in covering) the White House on a regular basis;
5. Accreditation by a press gallery in either the Supreme Court, U.S. Senate or U.S. House of Representatives; and
6. Willingness to submit to any necessary investigation by the U.S. Secret Service to determine eligibility for access to the White House complex, where Secret Service will determine eligibility based on whether the applicant presents a potential risk to the safety or security of the President, the Vice President, or the White House complex.

*Id.* at 1. The fifth criteria, “[a]ccreditation by a press gallery” in Congress, has been in place in some form since at least the Ford Administration, *see Sherrill v. Knight*, 569 F.2d 124, 129 n.19 (D.C. Cir. 1977), including during the Obama and Trump Administrations. *See* Decl. of Todd Joseph

Gillman ¶ 7, *Karem v. Trump*, No. 1:19-cv-2514, ECF No. 2-8 (D.D.C. Aug. 20, 2019) (describing requirements for hard pass as including “[a]ffirmation that you have a congressional press credential”). The Congressional press galleries require, among other things, that a person be a “bona fide resident correspondent[] of reputable standing, giving their chief attention to the gathering and reporting of news.” *See* Periodical Press Gallery, Rules & Regulations, House Periodical Press Gallery.<sup>1</sup> *See also Sherrill*, 569 F.2d at 130 (holding that certain notice and procedural requirements must be provided before denying a hard pass to a “bona fide Washington correspondent”).

The Hard Pass Policy stated that *all* existing hard passes would expire on July 31, 2023, and applicants had until that date to submit a renewal application that complied with the requirements of the Hard Pass Policy. As a result, the hard passes of “over 440 previously credentialed White House reporters” expired, Compl. ¶ 7, although those journalists can still submit requests to access the White House via the day pass process described above.

Along with the Hard Pass Policy, the White House simultaneously announced its expectation “that all hard pass holders will act in a professional manner while on White House grounds by respecting their colleagues, White House employees, and guests; observing stated restrictions on access to areas of the White House or credentialed events; and not impeding events or briefings on campus.” May Letter, at 2. This “Conduct Policy” made clear that “[a]bsent security concerns involving the United States Secret Service or other exigent circumstances,” the White House would provide a written warning before taking any action to revoke a hard pass. *Id.* Plaintiff does not challenge the Conduct Policy, and Plaintiff’s hard pass was not revoked under that policy.

## **II. Mr. Ateba’s Failure to Reapply for a Hard Pass and Other Actions.**

Simon Ateba “is the White House correspondent for Today News Africa, a daily online news publication primarily covering American politics and relations between the United States and African countries.” Pl.’s Verified Compl. ¶ 3, ECF No. 1 (“Compl.”). Mr. Ateba has been a member of the

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<sup>1</sup> *Available at* <https://periodical.house.gov/accreditation/rules-and-regulations>.

White House press corps for five years. *Id.* For the first three of those years he used a day pass to access the White House; he had a hard pass from February 2021 through July 2023. *Id.* ¶¶ 39–40.

The Hard Pass Policy was announced on May 5, 2023. Mr. Ateba, who apparently was not already credentialed by any Congressional correspondents committee, applied for press credentials for the Senate Daily Press Gallery on June 5, 2023. *Id.* ¶ 76. His application has been neither granted nor denied. *Id.* Mr. Ateba never reapplied for a White House Hard Pass, and his pass has expired. *See* Errata, ECF No. 4.

On August 4, 2023, Mr. Ateba did request that “the White House Press delay termination of his hard pass” until his application to a congressional gallery was approved or denied, *id.*, but his Hard Pass had already expired at that point, and the White House declined the request. As he was again told then, Mr. Ateba remains free to access the White House using a day pass, *see* Aug. 6, 2023 email from White House Press Office to Today News Africa, attached as Exhibit 2. To date, however, he has not even requested such a day pass that would enable him to enter the White House and attend press briefings. Fleischer Decl. ¶ 14.

In Mr. Ateba’s telling, he has engaged in “assertive tactics” in the White House Press Room. Pl.’s Mot. for Prelim. Inj. 15, ECF No. 2 (“PI Mot.”). For example, on March 20, 2023, he “confronted the Press Secretary,” *id.*, at a briefing with the cast of the show *Ted Lasso*, Compl. ¶ 49. “Before the Press Secretary could finish the introduction, Mr. Ateba began speaking,” resulting in “shouts from other correspondents for ‘decorum.’” Compl. ¶ 49. As described in an article cited by Plaintiff in his complaint, his actions caused the briefing to “descend[] into ‘chaos.’” *Id.* ¶ 50 n.16. On other occasions, “Mr. Ateba interrupted a fellow correspondent during a daily press briefing . . . despite his fellow correspondents asking him to stop.” *Id.* ¶ 51. In late July, the White House warned Mr. Ateba that his conduct was unacceptable and that continued misconduct might result in revocation of his hard pass, *see* Compl. Ex. B, ECF No. 1-2, but the White House has not limited Mr. Ateba’s access to the press room because of his conduct.

## STANDARD OF REVIEW

A preliminary injunction is extraordinary relief; it is never granted as of right. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). The moving party must demonstrate all of the following factors by “a clear showing”: (1) likelihood of success on the merits; (2) irreparable harm in the absence of preliminary injunctive relief; (3) the balance of equities between the parties tips in favor of the moving party; and (4) preliminary relief serves the public interest. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019). The last two factors “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

## ARGUMENT

The White House’s policy of using objective, neutral, and clearly defined criteria to govern issuance of hard passes is plainly constitutional. Mr. Ateba challenges the policy on its face, since he has not yet sought a hard pass under these criteria, and the Senate Daily Press Gallery to which he has applied for a Congressional credential has not yet acted on his application. Moreover, because Mr. Ateba can still access White House press briefings and engage in newsgathering without a hard pass, he can show no irreparable injury, and the balance of equities and public interest strongly counsel against issuance of an injunction. Mr. Ateba has not satisfied, and indeed cannot satisfy, the prerequisites to obtaining preliminary injunctive relief. Accordingly, the Court should deny Plaintiff’s motion for a preliminary injunction.<sup>2</sup>

### I. Mr. Ateba is not likely to prevail on the merits.

Mr. Ateba raises three claims but is not likely to prevail on any of them, even crediting the facts as he alleges them. First, Mr. Ateba’s claim that the expiration of his hard pass constitutes viewpoint discrimination is belied by the undisputed facts. He does not dispute that his hard pass

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<sup>2</sup> In the interest of economy for the Court and parties, the Court can, and should, also dismiss the complaint and enter judgment for Defendants. *See Munaf v. Geren*, 553 U.S. 674, 691-92 (2008) (“Adjudication of the merits is most appropriate if the injunction rests on a question of law and it is plain that the plaintiff cannot prevail. In such cases, the defendant is entitled to judgment.”).

expired automatically and that he failed to apply for a new hard pass. Mr. Ateba points to no evidence that the Hard Pass Policy was adopted to target him. Moreover, even his implausible speculation suggests at most that his hard pass was revoked as a consequence of his repeated unprofessional conduct, not because of any viewpoint he holds or espoused. Indeed, Mr. Ateba fails even to identify what viewpoint he holds or is believed to hold. Second, Mr. Ateba’s claim that the policy vests too much discretion in the licensing authority ignores that, under the policy, the grant or denial of a hard pass is subject to wholly objective criteria; if an applicant satisfies those criteria, the applicant will receive a hard pass. Third, Mr. Ateba’s claim that the Secret Service violated the APA fails because Mr. Ateba’s hard pass expired by virtue of the *White House* policy, not because of any decision by the Secret Service. The APA does not apply to the White House Press Office, and Mr. Ateba cannot make an end-run around that limit by relying on the Secret Service’s ministerial role in physically issuing security credentials.

*A. The White House has not engaged in viewpoint or content discrimination against plaintiff.*

The new Hard Pass Policy adopts objective and facially neutral standards to govern the issuance of a hard pass. Plaintiff argues that the White House has “engag[ed] in content-based and viewpoint discrimination,”<sup>3</sup> PI Mot. at 14, by promulgating this facially neutral Hard Pass Policy—a policy that limits access to those “bona fide Washington correspondents” that *Sherrill* specifically references, 569 F.2d at 130. He is not likely to succeed on the claim that the issuance of the policy itself constitutes viewpoint discrimination.<sup>4</sup>

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<sup>3</sup> In the header of his brief, Plaintiff asserts that the White House has engaged in both viewpoint and content-based discrimination; but in the body of his brief, he presses only an argument based on viewpoint discrimination. Compare PI Mot. at 14, *with id.* at 15-17. Although such an argument would fail for the same reasons as the claim of viewpoint discrimination, the Court should not consider any content-based discrimination argument for purposes of Plaintiff’s motion. *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (“A party forfeits an argument by . . . [m]entioning [it] in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.” (citations omitted)).

<sup>4</sup> Because the Congressional committees have not denied his application, and because Plaintiff never applied for a White House hard pass, he cannot challenge a specific denial (a challenge to which is not ripe); he can challenge only the issuance of the policy itself.

The government generally cannot regulate speech “based on ‘the specific motivating ideology or the opinion or perspective of the speaker.’” *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). But, as explained, the Hard Pass Policy at issue here is facially neutral and does not take account of journalists’ viewpoints. *See* May Letter at 1. To prevail, then, Mr. Ateba must show that the policy was “intended *sub silentio* to suppress the views of a particular party.” *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.* (“*AFDP*”), 901 F.3d 356, 365 (D.C. Cir. 2018).<sup>5</sup> But Plaintiff offers only implausible conjecture, and presents no evidence, that the White House issued the Hard Pass Policy with the specific intent of discriminating against Mr. Ateba’s viewpoint, *i.e.*, based on his “specific motivating ideology or [his] opinion or perspective.” *Reed*, 576 U.S. at 168.

Plaintiff first points to asserted “retrospective” evidence, which is “evidence from before the decision was taken to close the forum insofar as it may show whether the Government acted in order to suppress a disfavored view.” *AFDI*, 901 F.3d at 366. But Plaintiff fails to provide *any* evidence that his viewpoint was a motivating factor for the issuance of the Hard Pass Policy—indeed, he does not provide a basis to believe the Policy was targeted at him or identify his viewpoint or ideology at all. Instead, the evidence he does provide supports the opposite conclusion: that, to the extent Mr. Ateba was a factor at all, it was his *conduct* that was the basis for the decision.

Plaintiff notes that in the weeks before the Hard Pass Policy was issued, he “began to engage in more assertive tactics” during press briefings.<sup>6</sup> PI Mot. at 15. On March 20, 2023, he interrupted

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<sup>5</sup> Mr. Ateba does not allege selective enforcement of the facially neutral policy. *Cf. Frederick Douglass Found., Inc. v. Dist. of Columbia*, No. 21-7108, 2023 WL 5209556, at \*9 (D.C. Cir. Aug. 15, 2023) (addressing selective enforcement claims). With good reason: as Mr. Ateba acknowledges, the policy resulted in the expiration of hard passes for “over 440 previously credentialed White House reporters” who similarly did not apply for renewal or whose applications did not meet the policy’s requirements. *See* Compl. ¶ 7.

<sup>6</sup> To the extent that Plaintiff argues that the fact that the White House often does not “respond to” his questions, this is not evidence of viewpoint discrimination. *See* PI Mot. at 15. For one, by his own admission, this lack of response has occurred “[o]ver his five years as a White House correspondent,” Compl. ¶ 42, *i.e.*, over two Administrations (and five Press Secretaries) representing two different political parties. Second, government officials have no obligations to respond to particular reporters. *See Sherrill*, 569 F.2d at 129 (President may “grant interviews or briefings with selected journalists”);

the Press Secretary while she was introducing the cast of the show *Ted Lasso*, resulting in “shouts from other correspondents for ‘decorum.’” Compl. ¶ 49; *see also* PI Mot. at 15. Indeed, a news article he cites in his Complaint indicates that his actions caused the briefing to “descend[] into chaos.” Compl. ¶ 51 n.16. Plaintiff notes that “[t]he White House’s policy changes followed Mr. Ateba’s confrontations with the Press Secretary.” PI Mot. at 16. But even if this temporal linkage were relevant to show intent, *but see AFDI*, 901 F.3d at 366 (noting that claims based on sequencing are “less probative types of retrospective evidence”), his own allegations would show (at most) only that Plaintiff’s conduct in interrupting the Press Secretary and his fellow reporters and interfering with a press conference was the basis for the policy; not that his viewpoint was.<sup>7</sup> And, of course, many reporters have been critical of the White House, and yet Mr. Ateba does not allege that the Hard Pass Policy was issued to restrict their access (or that it had that effect), which is further indication that, to the extent Mr. Ateba was a motivator for this policy, the only thing that made him unique was his conduct.

Plaintiff also ignores that the White House adopted a separate Conduct Policy that specifically addressed the type of disruptive conduct Plaintiff had been engaging in. *See* May Letter at 2. That policy set forth the White House’s expectations that journalists would adhere to norms of professional conduct, and provided that violations of those expectations would be addressed by a written warning, an opportunity to respond, and—on repeated infractions—revocation of the journalist’s access to the White House. *Id.* This makes it implausible that the Hard Pass Policy was implemented for some impermissible effect, or even (permissibly) to address Mr. Ateba’s misconduct. There would have been

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*The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 413 (4th Cir. 2006). Third, this allegation does not logically follow: If the White House had historically ignored Plaintiff, there would be no basis for its change in policy *now*, except—as he himself argues—for his resort to disruptive behavior.

<sup>7</sup> Plaintiff also notes that on June 26, 2023, he “interrupted a fellow correspondent during a daily press briefing,” and “pressed forward with his questioning, despite his fellow correspondents asking him to stop.” Compl. ¶ 51; PI Mot. at 15. Again, this supports the assertion that, if anything, it was his behavior, not his views, that led to the Hard Pass Policy. But, in any event, behavior that happened two months *after* the Hard Pass Policy was announced cannot be “retrospective” evidence of viewpoint discrimination.



no need for the White House to use any policy on renewing hard passes to address Mr. Ateba's misbehavior because a separate policy—one consistent with *Sherrill* and *Karem* and which Mr. Ateba does not challenge—governs journalist misconduct. Indeed, the White House took the first step in this process by issuing Mr. Ateba a written warning just days before his hard pass would expire if he did not renew it—a step which would have been entirely unnecessary if the White House had planned to terminate Mr. Ateba's hard pass anyway. *See* Compl. Ex. B, ECF No. 1-2.

Plaintiff's effort to establish "prospective evidence of viewpoint discrimination" similarly fails. "In terms of prospective evidence, most relevant is a lack of evenhandedness in the Government's actions after the forum is closed." *AFDI*, 901 F.3d at 366. Plaintiff's sole proffer of such prospective evidence is that his hard pass—like that of 440 other journalists—expired under the policy; but as he himself concedes, he never even submitted an application to renew his hard pass or a request for an extension prior to the expiration date. *See* ECF No. 4. Plaintiff makes no attempt to show that those journalists whose hard passes also expired came from a single background or espoused disfavored viewpoints. He does not allege that the White House renewed hard passes for other journalists who either did not apply for a hard pass or could not meet the established criteria, much less that those journalists held any particular perspective. Nor can he show that he was singly targeted; rather, he concedes that "over 440" hard passes expired based on the Hard Pass Policy. *See* Compl. ¶ 7.

In short, there is no evidence that Plaintiff's views were at all relevant to the White House's action. He is not likely to succeed on his viewpoint discrimination claim.

*B. The new standards do not unconstitutionally vest discretion with White House officials.*

The Hard Pass Policy establishes six clear and objective standards for the White House Press Office to use when issuing hard passes. Mr. Ateba nonetheless contends that the fifth standard, "[a]ccreditation by a press gallery in either the Supreme Court, U.S. Senate or U.S. House of Representatives," leaves decisionmakers with an unconstitutional amount of discretion to deny a hard pass. Mr. Ateba has not shown, and cannot show, that he is likely to succeed on this claim. May Letter at 1.

1. *The professional credential standard is a constitutionally permissible regulation of what is, at most, a nonpublic forum.*

It is doubtful that the “unbridled discretion” doctrine applies in this context at all. Access to the White House grounds is not protected under the First Amendment, and *expedited* access certainly is not. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965). The D.C. Circuit has recognized that the President is free to decide which journalists he speaks with and that the First Amendment imposes no restrictions on the standards he uses in making those choices. *See Sherrill*, 569 F.2d at 129; *see also The Baltimore Sun v. Ehrlich*, 437 F.3d 410, 417–18 (4th Cir. 2006). Even while, in some circumstances, journalists may enjoy certain due process protections related to access to the White House, *see Sherrill*, 569 F.2d at 130; *Karem*, 960 F.3d at 665, Mr. Ateba cites no precedent suggesting that the First Amendment standing alone restricts the White House when it grants or limits access. Moreover, the denial of a hard pass—especially where, as here, a day pass remains available—does not infringe or limit the core First Amendment activities addressed in cases applying the unbridled discretion doctrine: Mr. Ateba does not allege that, absent a hard pass, he is prevented from speaking his mind, assembling in a public forum to demonstrate, publishing as he see fit, or distributing his speech or writing as he wishes. *Compare, e.g., City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750 (1988) (permit for distributing newspapers on sidewalks); *Forsyth Cnty. v. The Nationalist Movement*, 505 U.S. 123 (1992) (permit for assembly or parade). Indeed, he does not even allege that he is prevented from attending press briefings: he has the same access now as he did before the policy he challenges went into effect. *See* Fleischer Decl. ¶¶ 6–7.

To the extent that the White House’s administration of its voluntarily established press areas is subject to the First Amendment, the White House must retain at least the degree of regulatory latitude applicable in a nonpublic forum. *United States v. Caputo*, 201 F. Supp. 2d 65, 70 (D.D.C. 2016); *see AFDI*, 901 F.3d at 364 (nonpublic fora include “other Government-owned property where some speech is permitted”); *John K. MacIver Inst. for Pub. Policy, Inc. v. Evers*, 994 F.3d 602, 609 (7th Cir. 2021) (“When the government limits participation only to ‘appropriate’ participants or has extensive admission criteria, it has not created a public forum.” (quoting *Cornelius v. NAACP Legal & Educ.*

*Fund, Inc.*, 473 U.S. 788, 804–05 (1985))). In a nonpublic forum, “the Government has far more leeway to regulate speech: a restriction of speech in a nonpublic forum is examined only for reasonableness.’ This means that the restriction is constitutional if it is reasonable given ‘the purpose of the forum and all the surrounding circumstances.’” *Price v. Garland*, 45 F.4th 1059, 1069 (D.C. Cir. 2022) (internal citations omitted).

The core reasons for the unbridled discretion doctrine are not implicated in this distinct context of journalist access to a nonpublic forum, where restrictions need only be “reasonable” and limiting access to those credentialed by a professional committee is, plainly, reasonable. As the D.C. Circuit recognized in *Karem*, the White House “surely has a legitimate interest in maintaining a degree of control over media access to the White House complex.” 960 F.3d at 668. Implicit in that interest is the ability—in establishing the rules for the nonpublic forum—to limit the press areas to those engaged in journalism. *Cf. Sherrill*, 569 F.2d at 130 (explaining that White House had opened press areas only to bona fide journalists). There is nothing unreasonable, or remotely suspect, in relying on the credentialing decisions of outside professional organizations.<sup>8</sup> Indeed, as explained above, the White House has long done so—as have many other government entities. *See Congressional News Media and the House and Senate Press Galleries* 4, Congressional Research Service (April 13, 2017), available at <https://crsreports.congress.gov/product/pdf/R/R44816> (Congress has used professional correspondents committees since 1877); *see also, e.g.*, Capitol Correspondents Association of California, Mission, <http://www.ccac.us/>; Colorado Capitol Press Association, Benefits and Responsibilities of Membership, [https://leg.colorado.gov/sites/default/files/howtoapply\\_1.pdf](https://leg.colorado.gov/sites/default/files/howtoapply_1.pdf); Idaho Press Club, Capitol Correspondents Association, <https://idahopressclub.org/capitol-correspondents-association/>; NJPA, New Jersey Press Association, <http://www.njpa.org/press-identification>. And governments similarly consider judgments of professional credentialing bodies in other fields, like

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<sup>8</sup> Mr. Ateba also observes that the credentialing committees are made up of his colleagues in the press, but he offers no explanation why that would change the constitutional analysis or how assigning the task to government bureaucrats or political staff would lessen the risk of government censorship. *See* PI Mot. at 16-17.

state bar associations and medical boards, when making hiring and licensing decisions, for example.<sup>9</sup> Because the White House press areas are opened for journalistic purposes, a rule that limits access to credentialed journalists is entirely reasonable and wholly consistent with the First Amendment

2. *The Congressional Galleries’ standards do not leave the Committee with unconstitutional discretion.*

Mr. Ateba cannot prevail even if the unbridled discretion doctrine were applied. The First Amendment does in some circumstances prohibit the government from conditioning the exercise of core First Amendment freedoms on the “unbridled discretion” of a government official. *City of Lakewood*, 486 U.S. at 755. In *City of Lakewood*, for example, a local ordinance conditioned the installation of newspaper racks on public sidewalks on the mayor first authorizing the newsrack. *Id.* at 753. Because neither the law on its face nor any construction or practice provided any “limits on the mayor’s discretion,” *id.* at 769–70, there was an unacceptable risk that the “government official may decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker,” *id.* at 763–64. Similarly, in *Forsyth County v. The Nationalist Movement*, the Supreme Court considered an ordinance that required “a permit and a fee before authorizing public speaking, parades, or assemblies in ‘the archetype of a traditional public forum[.]’” 505 U.S. at 130 (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)). That statute was unconstitutional because there were no “narrowly drawn, reasonable and definite standards’ guiding the hand of the Forsyth Country administrator” when he set the permit fee, and therefore nothing “prevents the official from encouraging some views and discouraging others through the arbitrary application of fees.” 505 U.S. at 133 (citation omitted) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

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<sup>9</sup> The Virginia State Bar, for example, requires that applicants demonstrate to a board of attorneys that the applicant is “of honest demeanor and good moral character.” See Virginia Board of Bar Examiners, Character and Fitness Requirements, <https://barexam.virginia.gov/cf/cfreq.html>. Similarly, the American Board of Internal Medicine requires that doctors show “moral and ethical behavior in the clinical setting” before it will certify the physician. See American Board of Internal Medicine, Medical Oncology Policies, General Requirements, <https://www.abim.org/certification/policies/internal-medicine-subspecialty-policies/medical-oncology.aspx>.

But the standards set by the Press Galleries do not leave those professional credentialing bodies with an unconstitutional degree of discretion. The various Press Galleries set explicit, public standards that govern issuance of a credential, such as that the applicants be “bona fide resident correspondents of reputable standing, giving their chief attention to the gathering and reporting of news,” and that they are “employed by periodicals that regularly publish a substantial volume of news material of either general, economic, industrial, technical, cultural, or trade character.”<sup>10</sup> The doctrine relied on by Mr. Ateba, by contrast, prohibits only “unbounded” or “unbridled” discretion in permitting and licensing decisions, *e.g.*, *City of Lakewood*, 486 U.S. at 755. In *City of Lakewood* there were no standards at all guiding the mayor’s discretion to allow a newsrack; in *Saia v. New York* there were no standards at all to guide the police chief’s discretion to allow use of a loudspeaker, 334 U.S. 558, 560 (1948); in *Cox v. Louisiana* there were no standards at all for local officials’ determinations of which assemblies to permit or prohibit, 379 U.S. 536, 556 (1965); in *Niemotko* there were no standards at all for the park commissioner to grant permits for use of a park, 340 U.S. at 272.

The Constitution does not prohibit the use of standards, even where those standards are to some degree subjective or require the exercise of judgment. Thus, in *Sherrill*, for example, the D.C. Circuit recognized that presidential security “does not lend itself to detailed articulation of narrow and specific standards” and that a standard remained permissible even if it required “exercising expert judgment which frequently must be subjective in nature[.]” 569 F.2d at 130. And in *Kovacs v. Cooper*, the Supreme Court rejected with “only a passing reference” the contention that the standard “loud and raucous” was too vague and thus afforded licensors excessive discretion. 336 U.S. 77, 79 (1949). While these were concededly “abstract words,” they had “through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.” *Id.*

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<sup>10</sup> See, *e.g.*, Periodical Press Gallery, Rules and Regulations, <https://periodical.house.gov/accreditation/rules-and-regulations>; United States Senate Periodical Press Gallery Rules, Gallery Rules, <https://www.periodicalpress.senate.gov/gallery-rules/>; U.S. Senate Press Gallery, Governing Rules, <https://www.dailypress.senate.gov/membership/gallery-rules/>.

Mr. Ateba’s contention that the committees’ “bona fide” and “repute” standards leave unconstitutional discretion to deny a credential is therefore without merit. Mr. Ateba’s assertion that this determination is “inherently subjective,” PI Mot. at 20, is legally inadequate to state a claim. As illustrated, the D.C. Circuit endorsed the use of a “subjective” standard in *Sherrill* that required the exercise of “judgment.” 569 F.2d at 130. Indeed, *Sherrill* premised its holding—and any right it established—on the fact that the plaintiff-journalist was a “bona fide Washington correspondent,” thus necessarily implying that the phrase conveyed adequate meaning. *See Sherrill*, 569 F.2d at 130 (holding certain due process protections applied to denial of hard pass to a “bona fide Washington correspondent”). This Court, too, has tentatively endorsed the use of published standards for allocating press access. *See Getty Images News Servs. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002) (Bates, J.) (stating Court’s belief that “need for a mix of media; preference for media organizations that consistently reach a large audience; interest in participation by international news media; and interest in participation by regional news media . . . may well be reasonable and may provide a sufficient core for a policy of deciding how often particular media organizations get to travel to Guantanamo Bay”). Other courts have endorsed the use of similar standards. *See Evers*, 994 F.3d at 606 (affirming against First Amendment challenge standards that asked whether the journalist was “a bona fide correspondent of repute in their profession”). The terms “bona fide” and “reputable” are of adequate historical and legal pedigree to provide “a sufficiently accurate concept” of what is required of applicants. *Kovacs*, 336 U.S. at 79; *see Congressional News Media and the House and Senate Press Galleries* 14, Congressional Research Service (April 13, 2017), available at <https://crsreports.congress.gov/product/pdf/R/R44816> (explaining that the rules and need for standards date to the late 1800s). Even under the doctrine Mr. Ateba invokes, the rules would pass constitutional muster.

3. *The White House does not exercise discretion, much less unbridled discretion, under the policy.*

Mr. Ateba’s claim fails for another, more fundamental reason: the Hard Pass Policy does not assign Defendants or others in the White House discretion to deny a hard pass where the criteria

(including the security review) are satisfied. This case is therefore entirely unlike those where courts have found a danger that governmental authorities would use their discretion to disfavor certain viewpoints. In *City of Lakewood*, for example, the Court explained that presuming that “the mayor will act in good faith” is “the very presumption that the doctrine forbidding unbridled discretion disallows.” 486 U.S. at 770. In the absence of “standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker.” *Id.* at 763–64; *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (“Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.”). To “curtail that risk,” the law or policy “must contain ‘narrow, objective, and definite standards to guide the licensing authority.’” *Forsyth Cnty.*, 505 U.S. at 131 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969)).

Here, by contrast, the White House’s policy eliminates that danger by using six clear and definite standards that are not amenable to discretionary judgments. *See supra* at 3; May Letter at 1. An applicant for a hard pass either does or does not possess the requisite accreditation; White House press staff have no discretion to independently assess the validity or wisdom of that professional qualification. If an applicant satisfies the criteria, the press office may not deny the hard pass. The officials Mr. Ateba has sued, then, have no opportunity to engage in the content or viewpoint discrimination that the “unbridled discretion” doctrine seeks to eliminate. Mr. Ateba therefore cannot prevail on his claim that Defendants unconstitutionally retain too much discretion under the policy.

4. *Mr. Ateba cannot sue the White House to challenge the Press Galleries’ actions.*

Implicitly conceding that Defendants do not have excess discretion under the policy, Mr. Ateba instead argues that the committees of journalists that oversee the Congressional press galleries—and who are not parties to this case—exercise unconstitutional discretion. But these professional credentialing bodies are not the White House, and Mr. Ateba does not, and cannot, allege that the White House uses these credentialing bodies to achieve an unconstitutional end or uses them

with knowledge that they will inflict a constitutional injury. Indeed, Mr. Ateba makes no effort to attribute the decisions of these professional committees to the White House. The general rule, of course, is that one entity cannot be held responsible for the acts of another; instead, a plaintiff must sue the entity that he alleges violates his rights. There are limited exceptions to this rule, but Mr. Ateba does not identify any that would apply here.

Thus, for example, the government “can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the” government. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). But Mr. Ateba does not allege that the White House is in any way coercing or pressuring the Gallery Committees to act a certain way on his (or any other journalist’s) application.

And one actor may sometimes be held to account for acts of its agents, but such implied liability is often unavailable in the context of constitutional wrongs, where a violation usually requires some degree of intentionality. The Supreme Court’s decision in *General Building Contractors Association v. Pennsylvania* offers a useful analogy. There, private contractors had engaged a local union to provide them with employees, and that union in turn discriminated on the basis of race. 458 U.S. 375, 381 (1982). The union was liable under federal civil rights laws prohibiting discrimination. *Id.* But the district court also found the contractors liable—even though the hiring hall system was neutral on its face and the evidence showed that the contractors did not intend to discriminate by using the hiring hall—because they had “delegated an important aspect of their hiring procedure to the union,” and the union, “in effectuating the delegation, intentionally discriminated or, alternatively, produced a discriminatory impact.” *Id.* at 382. The Supreme Court reversed because liability under the civil rights law required *intentional* discrimination, *id.* at 391 (both Equal Protection Clause and § 1981 “can be violated only by purposeful discrimination”), and the union could not fairly be said to be acting as the contractors’ agent, *id.* at 393.

Similarly, here, even if the White House could fairly be said to have “delegated an important aspect” of its access decisions to an outside entity, that outside entity’s alleged constitutional



violations—at least on these facts—cannot be attributed to the White House. A plaintiff seeking to do so would have to show far more, such as that the White House either controlled the Press Galleries’ decisionmaking, *Blum*, 457 U.S. at 1004, or that the White House knew that, despite their facially neutral criteria, the Galleries discriminated based on viewpoint and the White House nonetheless continued using them, *see Gen. Bldg Contractors Ass’n*, 458 U.S. at 382–83.

But Mr. Ateba can make neither showing. For one, there is no allegation that the White House in any way controls the Galleries’ credentialing decisions. Indeed, the Press Galleries exist within a wholly separate branch of government. *See Consumers Union of U. S., Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341, 1350 (D.C. Cir. 1975) (holding that such committees act as extensions of Congress).<sup>11</sup> For another, Mr. Ateba does not even allege, much less make a clear showing, that the Gallery Committees in fact act arbitrarily or engage in any sort of viewpoint discrimination. After all, the Gallery Committee that Mr. Ateba has applied to may still grant his application. The current policy is not some novel creation of this Administration. Indeed—and further undermining Mr. Ateba’s suggestion that the White House adopted the policy to target him—the current policy mirrors the policies in place during the Trump and Obama Administrations and the policy that the D.C. Circuit left undisturbed in *Sherrill* in the 1970s. *See* 569 F.2d at 131 n.22 (hard pass available if, among other requirements, the journalist “has obtained House and Senate press credentials”).

In sum, there is no First Amendment right to access the White House, and the White House in voluntarily establishing press facilities as a nonpublic forum is entitled to limit access to those facilities to bona fide journalists as defined by professional credentialing bodies. *Id.* at 129 (citing *Zemel v. Rusk*, 381 U.S. 1, 17 (1965)). The Hard Pass Policy does not leave White House press officials with

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<sup>11</sup> This suggests another obstacle to Mr. Ateba’s claim: The D.C. Circuit has already held that these committees’ actions are immune from judicial inquiry because they are protected by the speech and debate clause. *Consumers Union*, 515 F.2d at 1351; *see also Schreiber v. Holmes*, No. CIV.A.1:96CV01287RMU, 1997 WL 527341, at \*4 (D.D.C. Aug. 18, 1997), *aff’d*, 203 F.3d 53 (D.C. Cir. 1999) (similar); *Pettingell v. Exec. Comm. of Correspondents*, No. CIV.A. 85-2742, 1986 WL 8569, at \*2 (D.D.C. Mar. 31, 1986) (similar). Mr. Ateba cannot make an end-run around that immunity by suing the White House instead of the bodies that, he alleges, violate the Constitution.

discretion to deny a hard pass, much less unbridled discretion, but instead leaves credentialing decisions to professional organizations applying long-settled criteria. Mr. Ateba's second claim fails.

*C. The Secret Service did not violate the APA.*

Plaintiff is not likely to succeed in his Administrative Procedure Act (APA) challenge to the Hard Pass Policy. The policy is not subject to review under APA standards because it was issued and effectuated by the White House Press Office, a component of the White House Office that is not subject to the APA. *See, e.g., Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). Plaintiff cannot circumvent those limitations on APA review by bringing his claim against the Secret Service, an entity that played no role in the creation of the Hard Pass Policy, in generating the list of press members that the White House Press Office authorizes for a hard pass, or in setting any non-security related criteria for entry. *See* Fleischer Decl. ¶ 12.

The White House Press Office, not the Secret Service, was responsible for issuing the Hard Pass Policy. As the May 5 policy announcement makes clear, the "policy on press hard passes" was revised by "the White House." May Letter at 1. That letter further makes clear that specific information will need to be submitted to the White House Press Office's e-mail inbox, *id.*, and that a hard pass will be granted "upon confirmation from the Press Office" that the applicant meets the relevant criteria, *id.* at 2. Furthermore, "comments or questions regarding the proposed policy" would be submitted to the White House Press Office's e-mail. *Id.* In short, the Hard Pass Policy was drafted by the Press Office. *See also* Fleischer Decl. ¶ 12 ("The Secret Service has no role in generating the list of press members that the White House Press Office authorizes for a hard press pass."), *id.* ¶ 13 ("The Secret Service has not changed its policy, procedure, or position with respect to its role in the issuance of press passes of any type.").

Contrary to Mr. Ateba's suggestion, the Secret Service did not "enact[] a policy change that led to the expiration of [Mr. Ateba's] hard pass." PI Mot. at 21. "The Secret Service has not changed its policy, procedure, or position with respect to its role in the issuance of press passes of any type." Fleischer Decl. ¶ 13. The Secret Service's role is limited to conducting a security investigation for those

seeking to access the White House complex. *See* May Letter at 1, Fleischer Decl. ¶ 12, *see also* 18 U.S.C.

§§ 3056, 3056A. But Mr. Ateba’s hard pass was not cancelled based on security review; rather it expired (as did *all* unexpired hard passes), and he elected not to reapply. The Secret Service had nothing to do with this decision, and Mr. Ateba is not challenging any security-related determinations.

To the extent that Mr. Ateba argues that the Hard Pass Policy is nonetheless a Secret Service policy reviewable under the APA because the Secret Service “ultimately issues the hard pass,” PI Mot. at 22, *i.e.*, mechanically issues a physical pass and admits its holder into the White House Complex, that argument, too, fails. Rather, the policy determination at issue here was made by an entity—the White House Press Office—that is not subject to the APA. The fact that an entity that is subject to the APA—the Secret Service—may have played an administrative role in carrying out that decision does not transform the decision into an action subject to the APA.

The President and his senior advisors, including the White House Press Office, are not subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (the President is not subject to the APA). It is black-letter law that the APA’s definition of “agency,” and thus the scope of the APA’s mandates, does not extend to entities within the Executive Office of the President whose “sole function [is] to advise and assist the President.” *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971); *see also Kissinger v. Reps. Comm. for Freedom of the Press*, 455 U.S. 136, 156 (1980); *Citizens for Responsibility & Ethics in Wash. v. Off. of Admin.*, 566 F.3d 219, 223–24 (2009).<sup>12</sup> The White House Office does not fall within the APA’s scope. *See Sculimbrene v. Reno*, 158 F. Supp. 2d 26, 29 (D.D.C. 2001); *Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F. Supp. 3d 61, 65 (D.D.C. 2019). Nor, as is most relevant here, is the White House Press Office. *Wang v. Exec. Off. of the President*, No. 07-0891 (JR) 2008 WL 180189, at \*1 (D.D.C. Jan. 18, 2008). The Hard Pass Policy therefore cannot be

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<sup>12</sup> *Soucie* applied the definition of “agency” currently found in 5 U.S.C. § 551(1). The remaining case law emerged following FOIA’s definition of “agency” after that definition was amended in 1974. In amending FOIA, “Congress thus incorporated in FOIA the APA definition, . . . and added the FOIA definition of agency to expand, rather than limit, its coverage.” *Cotton v. Heyman*, 63 F.3d 1115, 1121 (D.C. Cir. 1995); *see also* 5 U.S.C. §§ 551(1), 552(f). Accordingly, an entity that is not an agency under the FOIA is also not an agency under the APA.

challenged under the APA as unreasonable, or otherwise, PI Mot. at 21–22, because its promulgating entity is not subject to the APA.

Nor can Plaintiff challenge those White House actions indirectly through the Secret Service—an agency that applied no discretion, and merely effectuates the White House’s action. *See* Fleischer Decl. ¶ 11. When an agency is carrying out “action on behalf of the President, involving discretionary authority committed to the President,” such as the invitation of members of the press into the White House by the Press Office, that action is “‘presidential’ and unreviewable under the APA.” *Detroit Int’l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) *aff’d*, 875 F.3d 1132 (D.C. Cir. 2017), *op. amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 402–03 (D. Md. 2011) (similar), *aff’d*, 698 F.3d 171 (4th Cir. 2012); *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 28–29 (D.D.C. 2001) (similar, as to action by the Forest Service “carrying out directives of the President”), *aff’d*, 306 F.3d 1138 (D.C. Cir. 2002).

The D.C. Circuit applied essentially these principles to reach the same conclusion in *Judicial Watch Inc. v. United States Secret Service*, 726 F.3d 208 (D.C. Cir. 2013), a case involving whether White House access records constituted agency records under the Freedom of Information Act (FOIA). (As noted above, FOIA applies a similar, but broader, definition of “agency” than does the APA.) “Congress requires the President to accept the protection of the Secret Service.” *Jud. Watch, Inc.*, 726 F.3d at 225 (citing 18 U.S.C. § 3056(a)). “And in order to protect the President, the Secret Service must monitor and control access to the building in which the President lives and works.” *Id.* To fulfill those responsibilities, the Secret Service created a log of records of persons who visited the White House Office (among other components), a log that would not be available under FOIA if requested directly from the White House because the White House Office is not an agency for purposes of FOIA (or the APA). *See id.* at 224. The D.C. Circuit noted that Congress’s exclusion of the “papers of the President (and his advisors) from the coverage of FOIA was quite intentional,” and that “where Congress has intentionally excluded a governmental entity from the Act, we have been unwilling to conclude that documents or information of that entity can be obtained indirectly, by filing a FOIA

request with an entity that *is* covered under the statute.” *Id.* at 225. This result was necessary to avoid separation of powers concerns, notably a “potentially serious congressional intrusion into the conduct of the President’s daily operations.” *Id.* at 226.

The same logic—and result—attaches here. To protect the President, the Secret Service must physically control access to the White House campus; and doing that requires issuing physical passes and ensuring that they work properly. The Secret Service is not exercising independent judgment about whether to issue those passes or creating the criteria by which they are issued—it is simply enabling the President’s staff to fulfill their responsibilities. Under *Judicial Watch*, because those policies are being created and executed by an entity not subject to the APA, those policies cannot be challenged indirectly under the APA by virtue of the Secret Service’s (statutorily mandated) protective role.<sup>13</sup>

Finally, even if the purely mechanical action of issuing a credential were not categorically exempt from APA review as Presidential action, that action would not be “final agency action” as is necessary to obtain review under the APA. Under the APA, the challenged action must be “final,” *i.e.*, it must mark “the ‘consummation’ of the agency’s decisionmaking process,” and “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation omitted). “[P]ractical consequences” are not sufficient. *Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Comm’n*, 324 F.3d 726, 732 (D.C. Cir. 2003). Mechanically issuing press credentials satisfies neither of these standards. First, the issuance does not mark the consummation of the *Secret Service’s* “decisionmaking process,” rather, if anything, it marks the consummation of the *White House Press Office’s* decisionmaking process. *See* Fleischer Decl. ¶ 12 (“The Secret Service has no role in generating the list of press members that the

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<sup>13</sup> Indeed, were it otherwise, Plaintiff’s argument would lead to absurd results. For example, the U.S. Marshals Service provides physical security to the federal courts and “retains final authority regarding security requirements for the judicial branch of the Federal Government.” *See* 28 U.S.C. § 566(e, i). The federal judiciary, however, is not subject to the APA. *See* 5 U.S.C. § 551(1)(B). It would raise serious separation of powers concerns to permit a litigant challenging a federal judge’s refusal to hire a law clerk—an action unreviewable under the APA—to sue the Marshals Service on the theory that the Service refused to issue the credentials necessary for that would-be clerk to enter chambers. Yet that is in essence what Plaintiff seeks to do here.

White House Press Office authorizes for a hard press pass.”). But even if it were, there are only, at most, practical consequences from that issuance—the Secret Service does not determine whether Plaintiff, or any applicant, has the right to enter the White House (absent security concerns not at issue here); the White House itself makes that determination. And the legal decision to grant entry is the White House’s—which is why the White House is sued for press action determinations. *See Karem*, 960 F.3d 656. Accordingly, regardless of the legal theory applied, Mr. Ateba cannot succeed in his APA action against the Secret Service.

## II. Mr. Ateba has not alleged, much less made a clear showing of, irreparable harm.

A clear showing of irreparable harm is an “independent prerequisite” to obtain a preliminary injunction. *Mylan Lab’s Ltd. v. U.S. Food & Drug Admin.*, 910 F. Supp. 2d 299, 305 (D.D.C. 2012) (Bates, J.). To meet this standard, a plaintiff must demonstrate that, absent the relief requested, he faces an injury that is “both certain and great,” “actual” and “not theoretical,” and “of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (cleaned up). The plaintiff must also show that “the alleged harm will directly result from the action which the [plaintiff] seeks to enjoin,” as “the court must decide whether the harm will *in fact* occur.” *Id.*; *see also Winter*, 555 U.S. at 22 (“Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.”).

Mr. Ateba has not alleged any injury that satisfies the high burden applicable when seeking preliminary injunctive relief. Certainly, a bona fide journalist’s access to the White House press areas “implicates important first amendment rights,” *Karem*, 960 F.3d at 665 (quoting *Sherrill*, 569 F.2d at 130) (cleaned up), but “entry into the White House” is not itself “a First Amendment right” even if it would increase “opportunities to gather information,” *Zemel*, 381 U.S. at 17. This case is therefore unlike either *Sherrill* or *Karem*, on which Mr. Ateba erroneously relies, because in those cases the irreparable harm was the denial of access without adequate notice and process. *See Karem*, 960 F.3d at 667–68 (explaining that *Karem* demonstrated the “precise harm” accepted in *Sherrill*: “a violation of

Fifth Amendment due process rights” that warranted an order requiring “notice, opportunity to be heard and a final written statement of the bases of denial” and publication of “explicit and meaningful standards governing denial of White House press passes”); *see also id.* at 665 (explaining that a “particularly stringent” notice test applied because First Amendment rights were implicated). Mr. Ateba cannot demonstrate such harm here because the White House issued this policy months in advance and gave Mr. Ateba an opportunity to apply for a renewal of his hard pass—something he has not done—while simultaneously setting forth the standards and procedures that would govern both issuance of a hard pass in the first instance and revocation of a hard pass once granted—essentially the very relief that the D.C. Circuit found appropriate in both *Karem* and *Sherrill*.

But perhaps more fundamentally, Mr. Ateba cannot demonstrate irreparable injury because he has not actually lost the First Amendment right he asserts: Mr. Ateba can still access White House press events using the day pass system. The day pass system allows journalists to access White House grounds on essentially the same terms as a hard pass, seventeen hours a day, by filling out a simple online form so the Secret Service can perform a security review.<sup>14</sup> Fleischer Decl. ¶ 8. The only difference is that it might take a few minutes longer to clear security with a day pass than a hard pass, *see* Fleischer Decl. ¶ 9, but the potential of a few minutes delay does not constitute “certain and great” injury, *Wis. Gas*, 758 F.2d at 674. Mr. Ateba is therefore simply wrong to call this “extremely limited” access, PI Mot. at 23, and he has not even attempted to show that he requires greater access than the day pass provides. In short, to the extent Mr. Ateba’s claim of First Amendment injury is based on access to the White House, he still has such access as he did before his hard pass expired—unlike in *Sherrill* and *Karem*, where the journalists were prohibited from accessing the White House campus entirely.

Thus, even if the First Amendment did grant journalists a right of access to the White House (and it does not), Mr. Ateba’s rights in that regard remain intact. Mr. Ateba asserts, without evidence,

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<sup>14</sup> White House records do not show that Mr. Ateba has either sought or used a day pass since his hard pass has expired, Fleischer Decl. ¶ 14, undermining both his claim that access to the White House is essential to his job and his insistence that he will be irreparably harmed absent extraordinary relief.

that the day pass system is less convenient for him, but that does not constitute a violation of any right to engage in news-gathering activity. Mr. Ateba's mere assertion, without elaboration, that using the day pass system has made his job "exceedingly more difficult," Compl. ¶ 81, is inadequate to carry his burden on a motion for a preliminary injunction. And any contention that being directed to the day pass system presents an injury "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm," *Wis. Gas*, 758 F.2d at 674 (cleaned up), is inconsistent with Mr. Ateba's simultaneous assertions that he managed under the day pass system for his first three years as a White House correspondent, Compl. ¶ 39, and that he will continue to do his job now, *id.* ¶ 81. Indeed, Mr. Ateba does not allege that use of the day pass system is immediately problematic; instead, he alleges only that it will become "untenable" in the "long term." *Id.* ¶ 12. To the extent that Mr. Ateba suffers any cognizable injury at all, *but see The Baltimore Sun Co.*, 437 F.3d at 416–18, it is not one that warrants extraordinary relief in the form of a preliminary injunction.

### **III. The equities and public interest weigh against an injunction.**

The public has an undoubted interest in the security of the White House grounds. The previous hard pass policy undermined that interest by allowing credentials to remain valid indefinitely and by allowing an excessive number of hard passes to be issued. *See Kareem*, 960 F.3d at 668 ("[T]he White House surely has a legitimate interest in maintaining a degree of control over media access to the White House complex."). In May 2023, the White House announced that it would implement neutral, objective standards to govern hard passes. The policy now in place—essentially the same as that of previous administrations—improves the administrability of the hard pass system without resort to an ad hoc, discretionary system that might present the very constitutional concerns Mr. Ateba (erroneously) projects onto the actual policy. And the new policy preserves broad press access by still allowing those without a hard pass to attend press briefings and other events through the day pass system. Both the government and the public have an interest in implementing this policy and ensuring the orderly conduct of government operations without undue interference.



Through this action, Mr. Ateba seeks special treatment that would set him apart from his peers by allowing him to obtain a hard pass even when he cannot meet the same neutral and objective standards that other journalists must satisfy. Mr. Ateba has not yet even applied for a hard pass, and neither has the Senate Daily Press Gallery yet acted on Mr. Ateba's application for Senate credentials. No injunction should issue when the underlying administrative process has not played out and where that process might well extinguish any claim Mr. Ateba has. The equities and public interest weigh against an order that raises one journalist's status above others while undermining the orderly administration of processes for accessing the White House.

Moreover, Mr. Ateba remains able to engage in newsgathering activities—including by attending White House press briefings—even without a hard pass. Indeed, Mr. Ateba alleges that he did just that for his first three years as a White House correspondent. *See* Compl. ¶¶ 12, 39. Mr. Ateba asserts, without elaboration, that using the daily access system is “untenable long term,” *id.* ¶ 12, but he does not develop that assertion and offers no reason why emergency relief is needed now.

Indeed, the Fourth Circuit has held that when a plaintiff remains able to engage in the protected activity, even if through a less convenient means, any constitutional injury is *de minimis*. In *The Baltimore Sun Co. v. Ehrlich*, for example, the Fourth Circuit heard a challenge to the Maryland governor's directive to his entire administration that employees cease all communications with two specific journalists whose coverage the administration objected to. 437 F.3d at 418. One journalist was excluded from or not invited to at least two press briefings. *See id.* at 414. The Fourth Circuit rejected the journalists' challenge to the governor's action. The court explained that the journalists could still perform their newsgathering activities, even if the loss of access to many sources hindered that function, and that consequently any harm was constitutionally *de minimis* so as to preclude a claim of First Amendment retaliation, *id.* at 419–20. Similarly, in *ACLU v. Wicomico County*, the Fourth Circuit rejected arguments that a prison violated a legal services organization's rights when it rescinded the organization's special access privileges because the organization had used information gleaned through those privileges to file a lawsuit. 999 F.2d 780, 786 (4th Cir. 1993). Even though the prison's “decision

to withdraw from its special arrangement”—because the organization filed the lawsuit—may have “inconvenienced” the organization, “it did not chill, impair, or deny their exercise of First Amendment rights” because the organization’s employees remained free to communicate with clients through other, less convenient means. *Id.* at 786. Any injury was *de minimis*. *Id.* at 786 n.6.

The equities do not support an injunction that entitles Mr. Ateba to special treatment and disrupts the orderly administration of the system for controlling White House access, especially when he remains free to continue to pursue the protected activity—including attending press conferences—through at most marginally less convenient means.

### CONCLUSION

The Court should deny Plaintiff’s motion for a preliminary injunction.

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Respectfully submitted,

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