

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

Simon ATEBA,

Plaintiff,

v.

Karine JEAN-PIERRE,
in her official capacity as Press Secretary
to the President of the United States, *et al.*,

Defendants.

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

**PLAINTIFF'S REPLY IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

The White House has opened its doors to the press to facilitate news gathering and promote the dissemination of information about the President and his administration to the public. Despite designating parts of the White House grounds for this express purpose, Defendants make the remarkable argument that the First Amendment has no effect there. This position is untenable and only highlights the need for immediate injunctive relief pending the outcome of this litigation. This Court has safeguarded journalists' constitutional rights in prior administrations, and Mr. Ateba's exclusion from the White House briefing room is a First Amendment violation that requires immediate redress.

First, the hard pass regime adopted by the White House in May of this year violates the unbridled discretion doctrine. By opening up the White House to the press for the purpose of news gathering—including expedited access through the hard-pass system—the President has created a limited public forum. As a result, the White House must abide by First Amendment principles with respect to members of the public who wish to use the limited public forum for its intended purpose. This means the White House may not adopt an access requirement that delegates unbridled discretion to a government actor. What is more, because viewpoint discrimination and arbitrary treatment of the press are so constitutionally abhorrent, this same prohibition would apply even if the White House press areas were deemed to be a non-public forum.

Mr. Ateba has demonstrated that the new hard-pass system adopted by the White House violates the unbridled discretion doctrine. The Congressional Press Galleries' executive committees will only issue credentials to journalists they deem "reputable." This provision is vague and standardless, and it gives the executive committees unbridled discretion to pick and choose which journalists are worthy of a hard pass. And because the Congressional Press Galleries have no required deadline for processing press credential applications, they may keep journalists

such as Mr. Ateba in a prolonged state of limbo by taking no action on their applications. Subjecting White House hard-pass applicants to this requirement violates the First Amendment.

It does not matter that Mr. Ateba has yet to re-apply for a new hard pass. He knows he does not qualify under the White House's new criteria, so it would be futile for him to apply until he obtains press credentials from a Congressional Press Gallery. Indeed, it is black-letter law that a facial challenge to a credentialing regime premised on unbridled discretion does not require the applicant to apply for credentials before filing a lawsuit.

Second, Mr. Ateba has demonstrated that the White House changed its hard-pass criteria specifically to exclude him from maintaining hard-pass access. A hallmark of content-based regulation and viewpoint discrimination is the prohibition against targeting specific individuals with restrictions on their expressive activity. The timing of the changes to the hard-pass criteria follows the highly visible confrontations that Mr. Ateba had with the White House Press Secretary, which makes it clear that he was the impetus for the White House's decision.

Defendants' *ex post facto* insistence that the change in policy was simply aimed at improving White House security by stripping inactive journalists of their hard passes is implausible and belied by the policy itself. The May 5 policy makes no reference to "inactive passes" and the criteria adopted therein bear no direct relationship to whether a pass is in "active" use. The complete and total mismatch between Defendants' cursory proffered explanation and their actual activity raises heightened concerns that the explanation is pretextual.

While the White House would perhaps have been within its right to discipline Mr. Ateba under a neutral, generally applicable code of conduct, it did not do so. Instead, it changed the hard-pass criteria to specifically exclude Mr. Ateba from hard-pass access altogether. Targeting a journalist for exclusion based on their identity is the definition of viewpoint discrimination.

Third, the Secret Service violated the Administrative Procedure Act (“APA”) by cancelling Mr. Ateba’s hard pass. Tellingly, Defendants make no effort to justify the cancellation of Mr. Ateba’s pass, and thus implicitly concede that this action is arbitrary and capricious. Instead, Defendants argue that Secret Service actions are outside the scope of the APA because they relate to a White House policy. This misunderstands Mr. Ateba’s argument and the law. Mr. Ateba does not challenge the creation of White House policy; rather, he challenges its implementation by the Secret Service. Agency implementation of Presidential policy is reviewable under the APA.

The Secret Service implemented the White House Press Office policy by cancelling Mr. Ateba’s hard pass. The cancellation of Mr. Ateba’s hard pass represented the culmination of the agency’s decision-making regarding Mr. Ateba’s prior hard pass, and thus is a final agency action. The Secret Service has not (and cannot) presented an explanation for the cancellation of Mr. Ateba’s hard pass that is not arbitrary and capricious. Accordingly, the cancellation of Mr. Ateba’s hard pass violates the APA.

Finally, Defendants’ attempts to discount Mr. Ateba’s irreparable harm are entirely without merit. The White House Correspondents’ Association itself acknowledges the day-pass process Defendants invoke as an alternative is cumbersome and impractical for any correspondent who regularly covers the President. A day pass holder must apply for the pass the night before and, on the day it is used, wait for an escort to take them to the White House Press areas. Every day that Mr. Ateba does not have a hard pass is another day in which his First Amendment rights are infringed, and he is at a competitive disadvantage to those who do.

The constitutional limitations for which Mr. Ateba advocates are exceedingly narrow. He does not argue that the White House is constitutionally obligated to maintain press access on its grounds. Instead, he argues that the President and his staff must abide by the First Amendment

once they choose to designate certain parts of the White House as regularly open to the press. And the First Amendment precludes the White House from adopting media-access requirements that delegate unbridled discretion to government officials housed in another branch of government. It also precludes the White House from targeting specific reporters for exclusion from the hard-pass program. Granting Mr. Ateba's motion would place only a *de minimus* burden on Defendants and would advance important First Amendment protections at the White House.

Similarly, the relief Mr. Ateba requests under the APA is narrow. Mr. Ateba is not questioning the general ability of the White House to make prospective rules for who gets a hard pass. But the Secret Service cannot implement those standards retroactively to cancel Mr. Ateba's hard pass without providing an explanation that satisfies an arbitrary and capricious standard.

ARGUMENT

I. MR. ATEBA IS LIKELY TO SUCCEED ON THE MERITS OF HIS CLAIMS

Defendants argue that it is constitutionally permissible for the executive committees of the Congressional Press Galleries to serve as the *de facto* gatekeepers of the White House hard pass. Opp'n at 10–18. Defendants also argue that the White House did not target Mr. Ateba with its changes to the hard-pass criteria. Neither argument is persuasive. Moreover, Defendants have provided *no* substantial contemporaneous explanation to justify the cancellation of Mr. Ateba's hard pass, in violation of the APA.

A. The White House Hard-Pass Criteria Violate the Unbridled Discretion Doctrine

According to Defendants, the First Amendment does not protect access to the White House under any circumstances, Opp'n at 18, and the unbridled discretion doctrine is therefore inapplicable “in this context,” *id.* at 11. Even if the unbridled discretion doctrine did apply, Defendants argue, the current hard-pass regime does not violate it. *Id.* at 13–15. Both arguments

are incorrect—the White House press areas are, at the very least, a limited public forum, and the White House has vested the Congressional Press Galleries with unbridled discretion to determine who may access it with a hard pass.

1. The First Amendment’s Unbridled Discretion Doctrine Applies to the White House Press Areas.

By opening up the White House press areas for the dedicated communicative purpose of news gathering, the President has invited First Amendment constraints. *See Sherrill v. Knight*, 569 F.2d 124, 128 (D.C. Cir. 1977) (holding “denial of a [hard pass]” can “infringe[] upon first amendment guarantees”).¹ Neither the Supreme Court nor the D.C. Circuit has held that a forum analysis is applicable to claims involving press access to government property. For the reasons stated in Mr. Ateba’s opening brief, Defendants acted in a manner that violates the First Amendment. But even if the First Amendment forum analysis is appropriate, Mr. Ateba would succeed on his claims because the White House press areas are a limited public forum.

A limited public forum is property the government has opened up for a specific communicative purpose. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). This includes government property opened for the purposes of media access and newsgathering. *See, e.g., TGP Commc’ns, LLC v. Sellers*, No. 22-16826, 2022 WL 17484331, at *4 (9th Cir. Dec. 5, 2022) (concluding that spaces opened by the government for press conferences are limited public

¹ Defendants cite *Zemel v. Rusk* for the proposition that “[a]ccess to the White House grounds is not protected under the First Amendment.” Opp’n at 11. But while *Zemel* observed that the First Amendment does not guarantee a right of access to the White House, *Zemel* did not consider the situation where the White House has voluntarily opened portions of its grounds to regular and sustained press activity. 381 U.S. 1, 17 (1965). That is precisely the case here. Defendants also cite *The Baltimore Sun v. Ehrlich* for the proposition that “the First Amendment imposes no restrictions on the standards” the President can use in deciding what journalists to speak with. Opp’n at 11. But *Ehrlich* held only that a government official’s refusal to entertain a reporter’s *questions* did not give rise to violation of the First Amendment. 437 F.3d 410, 413 (4th Cir. 2021). Here, by contrast, Mr. Ateba is seeking hard-pass *access to government property* specifically opened for the purpose of newsgathering. *Zemel* and *Ehrlich* are thus plainly distinguishable.

forums). While the government can regulate access to a limited public forum to ensure use consistent with its designated purpose, it must treat those for whom the forum was created as if it were a traditional public forum. *Id.* “Once it has opened a limited forum, . . . the [government] must respect the lawful boundaries it has itself set.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Assuming forum analysis applies, the White House press areas are a limited public forum. *TGP Commc’ns*, 2022 WL 17484331, at *4. The White House has opened certain parts of its grounds to the press for the dedicated communicative purpose of facilitating news gathering. *Rosenberger*, 515 U.S. at 829. The White House is under no obligation to maintain such access. But because it has chosen to do so, “the protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that [access] not be denied arbitrarily or for less than compelling reasons.” *Sherrill*, 569 F.2d at 129 (citations omitted).² Moreover, it is beyond dispute that the unbridled discretion doctrine applies in limited public forums. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975); *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Public Schools*, 457 F.3d 376, 386–87 (4th Cir. 2006) (collecting cases).

Even if the White House press areas were a non-public forum (and they are not),³ the unbridled discretion doctrine would still apply. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th

² Holding that the press areas are a limited public forum does nothing to undermine the government’s ability to keep the President, first family, and the White House staff safe. *See Opp’n* at 1. Mr. Ateba does not seek to enjoin the background check requirement for a hard pass or otherwise limit the Secret Service from doing its job.

³ Defendants cite *John K. MacIver Inst. for Public Policy, Inc. v. Evers* in support of its argument that the White House press room is a non-public forum, but that case is easily distinguishable. In *Evers*, the press event at issue was an “off the record,” “invitation-only” press briefing “not held on government property dedicated to open communication.” 994 F.3d 602, 607, 610 (7th Cir.), *cert. denied*, 142 S. Ct. 711 (2021). Such an event is not remotely akin to the White House press area.

Cir. 2012) (holding unbridled discretion doctrine applies in non-public forum); *Child Evangelism Fellowship*, 457 F.3d at 386–87 (same); *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) (same); *Griffin v. Sec’y of Veterans Affs.*, 288 F.3d 1309, 1324 (Fed. Cir. 2002). (“[T]he fact that the government may constitutionally impose content-based restrictions on speech in nonpublic fora does not insulate a regulation from an unbridled discretion challenge.”). Because the “Supreme Court has shaped the unbridled discretion doctrine with the prohibition on viewpoint discrimination in mind,” *Kaahumanu*, 682 F.3d at 806, “unbridled discretion is a component of the viewpoint-neutrality requirement,” *Southworth*, 307 F.3d at 579.

Whatever access requirement the White House chooses to adopt, it may not adopt rules that lend themselves to viewpoint discrimination and arbitrary restriction of access. *Lakewood*, 486 U.S. at 757 (“At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.”). Whether considered a limited public forum for newsgathering purposes or merely a non-public forum where the press gathers the news, the constitutional constraints are the same: viewpoint discrimination and unbridled discretion are prohibited. *Sherrill*, 569 F.2d at 129. Defendants have violated that requirement here.

2. The White House hard-pass requirements delegate decision-making discretion to government actors.

Defendants argue that because the Press Gallery executive committees determine whether a journalist is “reputable,” this discretionary decision cannot be attributed to the White House. *Opp’n* at 15–16. This argument fundamentally misconstrues the unbridled discretion doctrine.

Government action that “delegates overly broad licensing discretion” violates the First Amendment. *Lakewood*, 486 U.S. at 756 (quoting *Freedman v. Maryland*, 380 U.S. 51, 56, 85

(1965)). It does not matter that the White House itself does not wield the discretion. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (observing licensing scheme violates the First Amendment when it vests “unbridled discretion in *the decisionmaker*”) (emphasis added). The White House has delegated unbridled discretion to the Congressional Press Galleries, thus creating the threat of viewpoint discrimination and arbitrary issuance of press credentials. *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The very concerns the unbridled discretion doctrine is designed to protect against—the chilling effect created by the threat of arbitrary enforcement and the inability of courts to evaluate the legality of the licensing decision, *Lakewood*, 486 U.S. at 757–58—exist even if the White House itself is not the one wielding the discretion.

Moreover, the Congressional Press Galleries have no time limit within which they must issue press credentials.⁴ This also violates the First Amendment. *See FW/PBS, Inc.*, 493 U.S. at 227 (“Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.”).

Nor are the executive committees of the Congressional Press Galleries “outside professional organizations” as Defendants assert. Opp’n at 12. Instead, they are government actors operating under the auspicious of Congress. Indeed, the D.C. Circuit has concluded that “[t]here can be no reasonable contention that [Congressional Press Galleries] were acting in a private capacity” in denying issuance of a Congressional press pass. *Consumers Union of U.S., Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341, 1350 (D.C. Cir. 1975). The Speaker of the House and the Senate Committee on Rules and Administration have delegated gatekeeping

⁴ Senate Daily Press Gallery Rules, <https://www.dailypress.senate.gov/membership/gallery-rules/> (last visited on Aug. 28, 2023).

authority to the Press Gallery executive committees to issue Congressional press passes. *Id.* These committees perform the “traditional and exclusive public function” of determining access to government property and there is a sufficiently close “nexus between the private party and the [government] such that the conduct should be attributed to the [government].” *Kolinske v. Lubbers*, 712 F.2d 471, 477 (D.C. Cir. 1983). Thus, the committees are government actors for this narrow purpose.⁵

Because the Congressional Press Gallery executive committees act as government actors when they perform the function of issuing Congressional press passes, the White House may not delegate unbridled discretion to them to gatekeep its own hard-pass access. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990) (“What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly.”). Giving committees of journalists authority to decide who is allowed a White House hard pass is the core evil against which the unbridled discretion doctrine was designed to protect.⁶

⁵ Contrary to Defendants’ suggestion, Opp’n at 12–13, this conclusion does not mean that all private licensing committees to whom governmental power is delegated must adhere to the First Amendment. The White House’s delegation of its authority to Press Galleries is not the same thing as a delegation to a character and fitness committee to regulate the practice of law or a medical board to regulate the practice of medicine because there is no First Amendment right to practice law or medicine, but freedom of the press is such a right. Therefore, the unbridled discretion doctrine is inapplicable in those contexts.

⁶ Defendants argue that this case is analogous to *General Building Contractors v. Pennsylvania*, Opp’n at 17, but the analogy is hopelessly flawed. In *General Building Contractors*, the Court applied traditional principles of agency law to hold that contractors and trade associations were not liable for a union’s discrimination against Black workers in violation of 42 U.S.C. § 1981. 458 U.S. 375, 392–97 (1982). This case, by contrast, involves the question of whether the government can be enjoined when it delegates a slice of its authority to an otherwise private actor in such a way that would violate the Constitution if the government retained that authority. As Defendants acknowledge by their citation to *Blum v. Yaretsky*, Opp’n at 17, the state action doctrine, and not traditional principles of agency law, apply here.

3. *The “reputable” requirement is impermissibly standardless.*

Defendants do not even attempt to explain how the Congressional Press Galleries’ requirement of “reputability” is constitutionally permissible. Opp’n at 13–15. Instead, Defendants posit that the “Constitution does not prohibit the use of standards” which are to “some degree subjective or require the exercise of judgment.” *Id.* at 15. But this argument ignores the significant potential for arbitrary and discriminatory decisions inherent in the “reputability” standard and in delegating White House’s press-credential access to committees of reporters who cover Congress.

The Press Galleries’ executive committees will only issue credentials to “reputable” journalists. Verified Compl. (“VC”) ¶ 72. This is a vague, standardless requirement that lends itself to unbridled discretion. *Lakewood*, 486 U.S. at 757. The executive committees can pick and choose to issue credentials based on their own subjective notion of “reputability.” The total discretion to decide which journalists are worthy of press credentials (based on no objective criteria) allows these government actors to engage in viewpoint discrimination and arbitrary decisions. The “reputability” requirement is the antithesis of “narrowly drawn, reasonable and definite standards” required of a credentialing regime. *Forsyth Cnty.*, 505 U.S. at 133.

Allowing committees of journalists to restrict their peers from covering the White House based on their unchecked determinations of who is or is not a reputable journalist creates the potential for tremendous harm. For example, NBC News published an article last year arguing that Fox News (one of its chief competitors) is “not news,” but is instead “a purveyor of propaganda and misinformation.” Dan Fromkin, “Fox News isn’t news,” NBC NEWS (Apr. 9, 2022), <https://www.nbcnews.com/think/opinion/fox-news-study-comparing-fox-cnn-highlights-cable-tvs-harm-rcna23620> (last visited Aug. 28, 2023). NBC News has every right to publish this opinion, but it should have no right to put its opinion into practice by excluding Fox News from

the White House. Yet Defendants argument would lead to the result that these committees of journalists should be authorized to do exactly that.

Defendants point out that other government actors use the “reputability” standard, Opp’n at 15, but this fact does not help them. As an initial matter, Defendants cite no authority holding the standard is constitutionally adequate.⁷ Moreover, it appears other government actors use the standard because Congress does. *See, e.g., John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602, 606 (7th Cir.), *cert. denied*, 142 S. Ct. 711 (2021) (observing that “bona fide correspondent of repute in their profession” is an “established standards used by . . . the United States Congress”). But Congress may not be sued for its credentialing scheme under the Speech and Debate Clause. *See Consumers Union*, 515 F.2d at 1346. Thus, the fact that other government actors have adopted Congress’s scheme has no bearing on whether that scheme complies with the unbridled discretion doctrine when applied by other government actors. Instead, Congress’s immunity has resulted in a proliferation of this dubious press-credentialing criterion that carries the influential imprimatur of Congress.

In a footnote, Defendants suggest that the fact *Congress* may not be sued for its credentialing regime means that the *White House* may not be sued for its regime. Defendants cite no authority for this proposition, and it has no basis in logic. The Speech and Debate Clause does not apply to the President, nor does the Constitution otherwise insulate the President from judicial review when issuing White House press passes. It would violate the separation of powers doctrine

⁷ In *Evers*, the Governor of Wisconsin adopted this standard, but the plaintiff did not challenge it. Instead, the plaintiff in *Evers* argued only that the Governor discriminated against him on the basis of viewpoint and that members of the press must be treated equally. 994 F.3d at 611–614. Thus, *Evers* does not support Defendants’ argument that the standard is permissible.

to allow the President to insulate his actions from judicial review by the mere expedient of delegating decision-making authority to Congress.⁸

Defendants also tout the “reputable” requirement as a continuation of past practices by the White House. Opp’n at 1, 8, 25. But “historical patterns cannot justify contemporary violations of constitutional guarantees.” *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Thus, past administrations’ use of this requirement does not make it constitutional. Indeed, when the Ford Administration adopted this criterion, there were 1,200 different outlets credentialed to cover Congress. VC ¶ 74. *See also* Sarah J. Eckman, *Congressional News Media and the House and Senate Press Galleries*, Congressional Research Service, at 11 (April 13, 2017). As of 2016, there were only 600. *Id.* The constitutional infirmities and self-dealing inherent in this standard have led directly to this consolidation of press access.

Mr. Ateba seeks nothing more than a fair process for obtaining a White House hard pass. Until the White House adopts criteria that contain a definite standard, it will not comply with what the First Amendment requires.

B. The White House Targeted Mr. Ateba for Exclusion from the Hard-Pass Program

Mr. Ateba has demonstrated the White House specifically targeted him based on his viewpoint. The White House adopted hard-pass criteria it knew would specifically exclude Mr. Ateba from eligibility, and it did so because it wanted him to no longer have a hard pass.⁹ The

⁸ To be clear, Mr. Ateba seeks to enjoin the *White House’s* reliance on the Congressional Press Galleries as a component of its hard-pass system. He does not seek to enjoin *Congress’s* use of this credentialing process, regardless of its constitutional deficiencies.

⁹ *See* Steven Nelson, *White House unveils new press badge restrictions, rules for access*, NY Post (May 5, 2023), <https://nypost.com/2023/05/05/white-house-unveils-new-press-badge-restrictions-rules-for-access/> (noting that the White House’s new policy “is widely believed to be spurred by

White House announced its revisions just over a month after the infamous Ted Lasso incident in the briefing room. VC ¶ 49. This was the culmination of the White House’s frustration with Mr. Ateba, with the goal of the new hard-pass requirement being to exclude him from hard-pass access. This targeted government action is enough to demonstrate viewpoint discrimination.¹⁰

Even if the evidence did not raise the inference of viewpoint discrimination (and it does), it at least raises the inference that Defendants targeted Mr. Ateba because they do not deem him—and his questions—worthy of holding a hard pass. Accordingly, Defendants’ actions constitute discrimination based on the “identity of the speaker.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 351, 364 (2010) (“[The] First Amendment generally prohibits” regulation “based on the speaker’s identity.”). “Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, [the Supreme Court has] insisted that laws favoring some speakers over others demand strict scrutiny when the [government’s] speaker preference reflects a content preference.” *Reed v. Town of Gilbert*, 576 U.S. 155, 170 (2015) (cleaned up). The government violates the First Amendment if it takes any action to restrict an individual’s expressive freedom based solely on their identity. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (“If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”).

interest in stripping African journalist Simon Ateba of his access to the briefing room after a series of disruptions”).

¹⁰ It is worth noting that Defendants included only a Secret Service declaration, but not a declaration from the Press Secretary or anyone else at the White House Press Office saying that excluding Mr. Ateba was not the primary purpose of changing the hard pass criteria. They easily could have if this were true, but they did not.

In addition, if the White House truly did revoke Mr. Ateba's hard pass due to his conduct as Defendants claim, *see* Opp'n at 8 (“[T]o the extent Mr. Ateba was a factor at all, it was his conduct that was the basis for the decision.”), he was given no notice of any decorum policy. Indeed, the White House did not have a written decorum policy prior to May 5, 2023—the same day it announced the new hard-pass requirement. If Defendants now contend that Mr. Ateba violated some non-existent code of conduct—which prompted the White House to adopt new rules targeted to exclude him specifically—then Mr. Ateba “lacked notice that his conduct” would lead to such a result. *Karem v. Trump*, 960 F.3d 656, 667 (D.C. Cir. 2020). At the very least, this is a violation of Mr. Ateba's Fifth Amendment rights. *Id.*

C. The Secret Service's Implementation of the White House Policy is Arbitrary and Capricious in Violation of the APA

Defendants make no effort to rebut Plaintiff's claim that the implementation of the White House Policy to cancel Mr. Ateba's hard pass is arbitrary and capricious. And for good reason. First, Defendants concede that prior to the May 5, 2023, policy announcement, “hard passes effectively did not expire.” Opp'n at 3. Second, Defendants' May 5, 2023, announcement of a policy provides *no* explanation or justification for the cancellation of pre-existing hard passes. Third, to the extent that Defendants offer *any ex post* explanation for the cancellation of preexisting hard passes, their explanation bears no rational relationship to Mr. Ateba's hard pass and is thus arbitrary and capricious. To wit, Defendants state “there were an excessive number [of hard passes] in circulation—including many that were no longer in active use.” Opp'n at 3. But Mr. Ateba's hard pass *was* in active use and Defendant's proffered criteria neither make reference nor bear any obvious connection to “active use.” The cancellation of Mr. Ateba's hard pass was arbitrary and capricious.

In an effort to avoid this obvious conclusion, Defendants make two procedural arguments. First, Defendants assert that “[t]he 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.” Opp’n at 19. This assertion misapprehends Plaintiff’s claim and the relevant law.

Plaintiff’s claim is that the *termination* of his preexisting hard pass violates the APA. *See* VC at ¶¶ 97–103. Thus, Plaintiff’s Third Claim for relief is an as-applied challenge to a specific agency action. It is not a facial challenge to the White House Policy. By misconstruing Plaintiff’s claim, Defendants seek to elide the legal distinction between facial challenges to presidential policies, such as Executive Orders, and challenges to agency actions implementing presidential policies. While Defendants are correct that presidential actions are generally outside of the scope of APA review, the *implementation* of a presidential policy by a federal agency is within the scope of the APA.

“Notwithstanding the inapplicability of the APA to presidential actions, ‘agency actions implementing a presidential action may be reviewed under the APA, even when the agency accomplishes a presidential directive.’” *Serv. Emp. Int’l Union Local 200 United v. Trump*, 420 F. Supp. 3d, 75 (W.D.N.Y. 2019) (quoting *Int’l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 665 (D. Md. 2019)); *see also Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (“[W]e doubt the validity of [the government’s] unsupported interpretation of the APA; that the Secretary’s regulations are based on the President’s Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.”) (citing *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993)); *O.A. v. Trump*, 404 F. Supp. 3d 109, 146 (D.D.C.

2019) (“The Court, moreover, need not pause over the fact that presidential actions are not themselves subject to APA review . . . because it is the Rule, and not the Proclamation, that has operative effect.”); *see also East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 770 (9th Cir. 2018) (“[T]he rule and [presidential] Proclamation together create an operative rule of decision for asylum eligibility. It is the substantive rule of decision, not the Rule itself, that the Organizations have challenged under the APA, and insofar as DOJ and DHS have incorporated the Proclamation by reference into the Rule, we may consider the validity of the agency’s proposed action.”); *Hawaii v. Trump*, 878 F.3d 662, 680 (9th Cir. 2017) (concluding APA review available where “Plaintiffs brought suit not just against the President, but also against the entities charged with carrying out his instructions”), *rev’d and remanded on other grounds*, 138 S. Ct. 2392 (2018).

Moreover, contrary to Defendants’ assertion, the Secret Service does not merely act on behalf of the President in a matter concerning discretionary authority committed to the President. *See* Opp’n at 28. As Defendants’ acknowledge, the Secret Service has an independent statutory and regulatory role in providing for the security of the President that is not committed exclusively to the President’s discretion. *See* 31 C.F.R. § 409.1 (“In granting or denying a request for a security clearance made in response to an application for a White House press pass, officials of the *Secret Service* will be guided solely by the principle of whether the applicant presents a potential source of physical danger to the President and/or the family of the President so serious as to justify his or her exclusion from White House press privileges.”) (emphasis added); *see also* Declaration of Nathan Fleischer, Assistant to the Special Agent in Charge, Presidential Protective Division, United States Secret Service (ECF 17-1) (acknowledging the Secret Service’s statutory role in protecting the White House, President, Vice President, and their immediate families); 18 U.S.C.

§ 3056 (describing the Secret Service’s power to protect certain individuals); 18 U.S.C. § 3056A (describing the Secret Service’s power to protect certain locations).

While the White House may have issued the policy criteria upon which the Secret Service cancelled Mr. Ateba’s hard pass, the Secret Service is the agency that implemented it. In doing so, the Secret Service is subject to the APA.

Second, Defendants claim that the termination of Mr. Ateba’s hard pass is not a final agency action. Opp’n at 22. Defendants again misconstrue Mr. Ateba’s APA claim to pertain to the *issuance* of a hard pass, rather than its *revocation*. *Id.* (“Mechanically *issuing* press credentials satisfies neither of these standards” for determining a final agency action) (emphasis added). Plaintiff’s APA claim is not challenging the *issuance* of hard passes; it is challenging the termination of Plaintiff’s preexisting hard pass.

Several facts are beyond dispute. Plaintiff had a hard pass to access the White House. Plaintiff’s hard pass had no specific expiration date prior to at least May 5, 2023. *See* Opp’n at 3 (acknowledging that “hard passes effectively did not expire”). And the Secret Service cancelled Plaintiff’s preexisting hard pass on or about July 31, 2023.

Whether or not Plaintiff can apply for a new hard pass or a White House day pass is immaterial. Plaintiff *had* a hard pass before and now does not. The cancellation of that pass occurred pursuant to a change in agency policy. And the cancellation of that pass is a final agency action—there is nothing else for the agency to decide because the hard pass Plaintiff had before July 31, 2023, no longer is valid.

The Secret Service is an agency subject to APA review, even when implementing presidential actions. The cancellation of Plaintiff’s pre-existing hard pass is a final agency action that represents a change in the agency’s position, and Defendants’ Opposition offers only a cursory

post hoc justification for the May 5 policy—a glut of hard passes that were “no longer in active use”—that is inapplicable to Plaintiff, who actively used his hard pass.

For these reasons, Defendants have violated the APA by cancelling Mr. Ateba’s pre-existing hard pass.

II. DEFENDANTS FAIL TO REBUT MR. ATEBA’S SHOWING OF IRREPARABLE HARM

Defendants do not rebut Mr. Ateba’s clear showing of irreparable harm as a result of losing his hard pass. Opp’n at 23–25. Deprivation of “First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Branch v. F.C.C.*, 824 F.2d 37, 40 (D.C. Cir. 1987) (quoting *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality op.)). As explained above, the White House’s revocation of Mr. Ateba’s hard pass—and the new process for obtaining a new hard pass—violate Mr. Ateba’s First Amendment rights. *See Karem*, 960 F.3d at 665 (quoting *Sherrill*, 569 F.2d at 130) (cleaned up)). The constitutional injury Mr. Ateba is suffering as a result of the White House’s actions is, by itself, sufficient to obtain a preliminary injunction.

What is more, Mr. Ateba’s irreparable harm is not limited to the deprivation of his constitutional rights. The White House Correspondents’ Association has argued to the D.C. Circuit that the White House hard pass is “critical for anyone who reports regularly on the White House.” Brief of Amicus Curiae The White House Correspondents’ Association in Support of Appellee Seeking Affirmance, *Karem v. Trump*, Case No. 19-5255 (D.C. Cir. Jan. 13, 2020) (“*Karem* Amicus Brief”) at 3 (citation omitted). Indeed, “without the access that a hard pass grants, a White House correspondent cannot effectively perform his or her duties, which include providing the public with on-the-spot-news coverage of unforeseen and unscheduled events, along with cataloguing the daily activities of the head of the executive branch.” *Id.* Without a hard pass, Mr. Ateba is at a “competitive disadvantage” with respect to other White House correspondents who

work for other media outlets. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 411 (9th Cir. 2015) (“A rule putting plaintiffs at a competitive disadvantage constitutes irreparable harm”). Mr. Ateba’s competition gets more—and more efficient—access to the White House press areas and the President. Every day that Mr. Ateba is deprived of a hard pass is an additional day that this competitive disadvantage continues.

Defendants claim the day pass is an acceptable substitute for a hard pass, Opp’n at 24, but this distorts reality. While the day pass certainly provides journalists with access to the press areas, it comes with additional restrictions and requires cumbersome hoop jumping that hard-pass holders avoid. *See* Declaration of Simon Ateba dated August 28, 2023 (“Ateba Decl.”) ¶ 7–11, (attached hereto as Exhibit A). For example, a journalist must apply for a day pass by approximately 5:00 p.m. the night before its intended use and even then, he or she must have an escort from the front entrance to the press areas. *Id.* ¶ 8. Sometimes, day-pass holders have to wait for nearly a half an hour for an escort to arrive. *Id.* ¶ 11. *See also* Fleischer Decl. ¶ 9. Mr. Ateba’s constitutional injury is not “rendered de minimis or otherwise mitigated by requiring [him] to avail [himself] of a less desirable, even if somewhat effective, alternative.” *TGP Commc’ns*, 2022 WL 17484331, at *6.

Defendants also argue Mr. Ateba has not shown irreparable injury because he did not apply for a renewed hard pass and he has not applied for a day pass since August 1, the date his hard pass expired. Opp’n at 24 n.14. This argument is disingenuous. First, Mr. Ateba’s failure to apply for a renewed hard pass is immaterial because the only reason he did not apply is that he knows he does not currently qualify under the White House’s new criteria. Ateba Decl. ¶ 6. Because it would be futile for him to apply with the White House until he obtains press credentials from a Congressional Press Gallery, his failure to apply with the White House does not undermine his showing of harm. *Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1286 (D.C. Cir. 2016) (holding that

failure to apply for government benefit does not defeat standing where the application “would have been futile”) (cleaned up); *Mahoney v. United States Capitol Police Bd.*, No. CV 21-2314 (JEB), 2023 WL 2770430, at *10 (D.D.C. Apr. 4, 2023) (noting that denial-of-access claims are ripe when denial “is all but certain”). Second, as Defendants well know, Mr. Ateba has not applied for a day pass because the White House has only held two press briefings since August 1. Ateba Decl. ¶ 11. And for those two briefings, Mr. Ateba did not learn of them in time to request a day pass—which he had to do by 5:00 pm the day before. *Id.* Mr. Ateba intends to apply for day passes as a stopgap to allow his coverage to continue—albeit in a heavily restricted manner. *Id.* Mr. Ateba’s inability to obtain a day pass for the briefings that have occurred confirms he is suffering irreparable harm.¹¹

Every day that Mr. Ateba no longer has a hard pass is another day in which he is irreparably harmed. Violation of his constitutional rights is ongoing, and he is now at a competitive disadvantage to the other White House journalists who are allowed to have hard-pass access. Their increased level of access—and ease with which it is obtained—allows them to engage in more efficient and effective newsgathering. Mr. Ateba is suffering irreparable injury as a result.

III. THE OTHER INJUNCTION FACTORS WEIGH IN MR. ATEBA’S FAVOR

Finally, the other injunction factors plainly weigh in Mr. Ateba’s favor. Absent an injunction, he will continue to be deprived of access to a hard pass, which is essential for any White House correspondent. By contrast, granting Mr. Ateba’s requested relief would merely require the White House to remove the requirement that hard-pass applicants first have credentials from Congress or the Supreme Court. Removal of this one criterion is both easy to accomplish and

¹¹ In addition to the two events noted in the text, the White House held a press briefing on August 28, 2023, which was after Defendants filed their Response in Opposition to Mr. Ateba’s Motion for a Preliminary Injunction. Ateba Decl. ¶ 14–17. Mr. Ateba attempted to obtain a hard pass for the August 28 press briefing, but he was unable to do so because of vague instructions from the White House. *Id.*

will not create any material burden on the White House beyond the need to process more applications for hard passes. And granting injunctive relief is also in the public interest. The public always benefits from protection of constitutional rights. *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). The addition of a more diverse and robust White House press corps advances the public interest as well. While the White House insists that its hard pass credentialing system is a security measure, there is no evidence that restoring Mr. Ateba's hard pass or removing the challenged criterion will pose any colorable security risk.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Ateba's motion for a preliminary injunction.

Dated: August 29, 2023

Respectfully submitted,

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