

**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 COMBINED MEMORANDUM IN SUPPORT OF SUMMARY
JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT**

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INTRODUCTION

The First Amendment prohibits the government from providing certain journalists preferential access to designated media areas in an arbitrary manner. The White House hard pass program does just that—it provides superior access to journalists the Congressional Press Galleries deem “of repute.” Because the Congressional Press Galleries make this “of repute” determination pursuant to their own unbridled discretion, the distinction is inherently arbitrary and in violation of the First Amendment. Moreover, it is irrational for the White House to condition preferential access based on receipt of a press pass from another branch of government. Mr. Ateba is entitled to summary judgment on his facial challenge to the hard pass program (Count I), whether the Court evaluates this claim under *Sherrill* or conducts a forum analysis.

The Secret Service also violated the Administrative Procedure Act (“APA”) by cancelling Mr. Ateba’s hard pass without sufficient explanation. Defendants make no effort to justify the cancellation of Mr. Ateba’s pass other than asserting the cancellation was pursuant to a White House directive. The APA demands more from a final agency action such as this one. Because the Secret Service did not provide a sufficient explanation, its actions were in contravention of the APA. Mr. Ateba is entitled to summary judgment on his APA claim (Count III).

Finally, Defendants are not entitled to summary judgment on Mr. Ateba’s claim for content-based and viewpoint discrimination (Count II). Because Mr. Ateba has not been afforded the opportunity to engage in discovery, it would be fundamentally unfair to enter summary judgment against him at this time. In any event, Mr. Ateba has raised a genuine issue of material fact in support of his allegation that the White House adopted its arbitrary credentialing scheme specifically to exclude him from obtaining a hard pass. Such a targeted attempt to exclude a specific journalist from obtaining expedited journalistic access is discriminatory and prohibited by the First Amendment.

BACKGROUND

I. ACCESS TO THE WHITE HOUSE PRESS AREA

The White House has opened its doors to the press as a point of access to the President and his administration. Compl. ¶¶ 22 (ECF 1). The Press Area includes the James S. Brady briefing room, press offices, the press apron, the North Grounds Stand Up Area, and the Driveway (referred to as “Pebble Beach”). Third Declaration of Nathan Fleischer ¶ 7 (“Fleischer Decl.”) (ECF 22-2). Only credentialed journalists can access the Press Area. *Id.* ¶ 6. To obtain credentials, applicants must apply with the White House Press Office and clear a security screening. *Id.* ¶¶ 6–15.

White House press credentials come in three forms: an appointment pass (which is not at issue here), a day pass, and a hard pass. *Id.* ¶ 6. While journalists holding either a day pass or a hard pass can each access the Press Area, these two credentials have significant differences. *Id.* ¶¶ 9–10. Day passes are good for one day only, and holders must apply for a pass by 5:00 p.m. the day before they seek access. Declaration of Simon Ateba (“Ateba Decl.”) ¶ 8 (ECF 18-1). And once at the White House, day pass holders must wait at the entry gate for a White House chaperone to escort them to the Press Area. Fleischer Decl. ¶ 8. Sometimes, these escorts can take up to 45 minutes to arrive. Second Declaration of Simon Ateba (“Second Ateba Decl.”) ¶ 12.b. Because the day pass requires these additional steps, it is effectively impossible to cover spontaneous newsworthy events. *Id.*; Ateba Decl. ¶¶ 9–11.

The hard pass is the primary press credential used by correspondents who regularly cover the White House. *Karem v. Trump*, 960 F.3d 656, 659 (D.C. Cir. 2020) (describing the hard pass as “special press credentials that allow on demand access to the White House complex”). With a hard pass, journalists have virtually unfettered access to the White House Press Area during business hours. Fleischer Decl. ¶ 7. Hard pass holders also are not required to wait for an escort. *Id.* For these reasons, the White House Correspondents Association describes the hard pass as “an essential tool for those who cover the White House.” Br. of *Amicus Curiae* The White House Correspondents’ Association, *Karem v. Trump*, Case No. 19-5255 (D.C. Cir. Jan. 13, 2020) at 3 (citation omitted), Request for Judicial Notice (“RJN”) Exhibit A.

II. MR. ATEBA'S COVERAGE AT THE WHITE HOUSE

Simon Ateba is the White House correspondent for *Today News Africa* (“TNA”). Compl. ¶¶ 18, 38.¹ Mr. Ateba has been a journalist for the past fifteen years, covering politics and current affairs in Africa and the United States during most of that time. *Id.* He has covered the White House and United States State Department for the past five years. *Id.*

Mr. Ateba became a White House Correspondent in 2018. *Id.* ¶ 39. For his first three years, Mr. Ateba used a day pass. *Id.* In February 2021, Mr. Ateba applied for, and received, a hard pass. *Id.* ¶ 40.² Mr. Ateba regularly writes articles for TNA, which requires him regularly to send written questions to the White House Press Office and to attend White House press briefings. *Id.*

Since obtaining a hard pass in 2021, Mr. Ateba has rarely received any response—or even acknowledgement—of his questions. *Id.* ¶ 42. Beginning around December 2021, Mr. Ateba began speaking up more assertively during press briefings. *Id.* ¶ 45. His interactions with Defendant Karine Jean-Pierre, the White House Press Secretary, garnered media attention. *Id.* ¶¶ 47–52.

III. THE REVISED HARD PASS CRITERIA

On May 5, 2023, the White House announced revisions to the hard pass program. Compl. Ex. A (Letter from White House Press Office to All Hard Pass Holders dated May 5, 2023) (the “May Letter”). The purpose of these revisions was to exclude Mr. Ateba from eligibility based on the content of his questions and the viewpoints expressed therein. *Id.* ¶ 54. The revisions included eligibility criteria that required all hard pass applicants to have “accreditation by a press gallery in either the Supreme Court, U.S. Senate, or U.S. House of Representatives.” *Id.* ¶ 55.³

The Supreme Court Press Gallery only issues press passes to journalists who cover the Court full time, which Mr. Ateba does not do. *Id.* ¶ 67. The Congressional Press Galleries regulate

¹ Mr. Ateba’s Complaint is verified and, thus, evidentiary. *Grimes v. District of Columbia.*, 794 F.3d 83, 94 n.5 (D.C. Cir. 2015).

² At that time, the White House did not require that hard pass holders be credentialed by another press gallery. Second Ateba Decl. ¶ 7.

³ The other provisions of the hard-pass policy are set forth in Mr. Ateba’s Complaint. Compl. ¶ 55.

Congressional press credentials. *Id.* ¶ 68. The executive committee for each press gallery is responsible for screening applicants and issuing credentials. *Id.* ¶ 70–71. These committees are comprised of journalists at established media outlets, most of which have deep roots in the Washington, D.C. media environment. *Id.* The committees only issue press credentials to correspondents they deem, in their sole discretion, to be “of repute in their profession.” *Id.* ¶ 72.⁴ These credentials typically must be renewed every two years, at the beginning of the new Congressional session. Second Ateba Decl. at ¶ 11.

On June 5, 2023, Mr. Ateba applied for credentials with the Senate Daily Press Gallery. Compl. ¶¶ 11, 76. On August 30, 2023, he was told that his application was being considered. Second Ateba Decl. ¶ 10. To date, Mr. Ateba has not been granted a Congressional Press Pass. *Id.*

LEGAL STANDARD

Summary judgment is appropriate “when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). For facial challenges to a statute or regulatory scheme, summary judgment is appropriate when the court can “resolve legal questions” sufficient to grant the requested relief. *Apprio, Inc. v. Zaccari*, No. CV 18-2180 (JDB), 2022 WL 971001, at *3 (D.D.C. Mar. 31, 2022). For fact-specific claims, “summary judgment is premature unless all parties have ‘had a full opportunity to conduct discovery.’” *Convertino v. U.S. Dep’t of Just.*, 684 F.3d 93, 99 (D.C. Cir. 2012).

ARGUMENT

I. MR. ATEBA IS ENTITLED TO SUMMARY JUDGMENT ON HIS FACIAL CHALLENGE TO THE HARD PASS PROGRAM

The First Amendment requires the government to act in a non-arbitrary manner. Any press credentialing scheme that regulates access to government property designated for the press must be neutral, objective, and free from arbitrary classifications. By providing certain journalists superior access to the designated Press Area based on whether the Congressional Press Galleries

⁴ See, e.g., Senate Daily Press Gallery, *Governing Rules*, available at <https://www.dailypress.senate.gov/membership/gallery-rules/> (Attached as RJN Ex. E).

determine they are “of repute,” the White House draws an arbitrary distinction prohibited by the First Amendment. This conclusion is true under both *Sherrill* and a forum analysis.

A. The First Amendment Prohibits Arbitrary Regulation of Access to Designated Press Facilities

The First Amendment protects the freedom of the press. U.S. Const. amend. 1; *see also Branzburg v. Hayes*, 408 U.S. 665, 707 (1972). This includes the freedom to engage in newsgathering, which is an essential component to press activity. *Branzburg*, 408 U.S. at 707 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”).

All members of the press have an equal right of access to government property that “historically has been open to the press and general public.” *Globe Newspaper Co. v. Super. Ct. for the Cnty. of Norfolk*, 457 U.S. 596, 605–06 (1982); *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936) (holding the government may not give preferential treatment to “a selected group” of the media). Distinguishing between classes of journalists is constitutionally suspect because it invites impermissible viewpoint discrimination. *Huminski v. Corsones*, 396 F.3d 53, 84 (2d Cir. 2005) (observing that “granting favorable treatment to certain members of the media allows the government to influence the type of substantive media coverage that public events will receive”) (cleaned up); *see also Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1026 (D.C. Cir. 1984) (holding “equality of protection regarding access applies [equally to] the institutional press and individuals”), *rev’d on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984). The government may distinguish between those engaging in press activity and those who are not, *Am. Broad. Cos. v. Cuomo (ABC)*, 570 F.2d 1080, 1083 (2d Cir. 1977), but arbitrary classification among those engaged in press activity is presumptively unconstitutional.⁵

This does not mean journalists have an unlimited right to conduct press activities. There is no First Amendment right to force the government to respond to press inquiries. *See The Baltimore*

⁵ *See generally*, Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology—From the Framing to Today*, 160 U. Pa. L. Rev. 459, 522 (2012) (discussing the historical origins of the Press Clause and its application to a class of activity, not individuals).

Sun Co. v. Ehrlich, 437 F.3d 410 (4th Cir. 2006) (holding the First Amendment rights of the press cannot serve as a mechanism to compel government speech). Nor does the First Amendment protect access to government property not usually open to the press. *See John K. MacIver Inst. for Pub. Pol’y, Inc. v. Evers*, 994 F.3d 602, 607, 612 (7th Cir. 2020) (holding no right to invitation-only interview in governor’s private conference room). But once the government opens government property to the press, it may not impose regulations that draw arbitrary distinctions between journalists. *Sherrill v. Knight*, 569 F.2d 124, 128 (D.C. Cir 1977); *see also Karem*, 960 F.3d at 660; *Getty Images News Servs. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112, 119 (D.D.C. 2002) (Bates, J.) (observing “equal access claims by the press warrant careful judicial scrutiny”).

B. The White House Hard Pass Program is Subject to the First Amendment

The White House hard pass program is subject to the First Amendment. The D.C. Circuit answered this question in *Sherrill* when it held the White House may not regulate access to the Press Area in an arbitrary manner. In addition, the Press Area is subject to the First Amendment under a forum analysis.

1. *White House press credentialing must not be arbitrary.*

The First Amendment prohibition against arbitrary treatment of the press applies to the White House hard pass program. *Sherrill*, 569 F.2d at 128. Because the “White House press facilities hav[e] been made publicly available as a source of information for newsmen,” access to these facilities cannot “be denied arbitrarily or for less than compelling reasons.” *Id.* at 129 (citations omitted); *see also Karem*, 960 F.3d at 660 (observing White House hard pass criteria are suspect when they are “unnecessarily vague and subject to ambiguous interpretation”); *CNN v. Trump*, 1:18-cv-02610-TJK, at *7:19–22 (D.D.C. Nov. 16, 2018), Transcript of Oral Decision (ECF 22) (“The court was very clear [in *Sherrill*] that the basis of [its decision] was rooted in the First Amendment and not the decision of any part of the executive branch to agree that *Sherrill* should be granted the press pass.”), RJN Exhibit B; *Cable News Network, Inc. v. Am. Broad. Cos, Inc.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981) (holding the “exclusion of television representatives

from White House pool coverage denies the public and the press their limited right of access, guaranteed by the First Amendment”).

Sherrill forecloses Defendants’ argument that “[a]ccess to the White House is not protected by the First Amendment.” Defs’ Mem. in Supp. Mot. for Summ. J. (“Defs’ Mem.”) at 7. Because the White House has opened the Press Area for newsgathering, the First Amendment applies there.

2. *The White House Press Area is a limited public forum.*

The First Amendment also applies to the White House Press Area under a forum analysis. A limited public forum is government property that has been opened for a specific First Amendment purpose. *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The “touchstone” for determining whether government property is a limited public forum “is the government’s intent in establishing and maintaining the property.” *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1016 (D.C. Cir. 1988). The Court looks to “objective indicia of intent,” including the “nature of the property, its compatibility with expressive activity, and the consistent policy and practice of the government.” *Id.* (cleaned up). In limited public fora, regulation must be “reasonable in light of the purposes served by the forum” and “viewpoint [neutral].” *Rosenberger*, 515 U.S. at 829. Designated press areas are classic examples of limited public fora. *TGP Commc’ns, LLC v. Sellers*, No. 22-16826, 2022 WL 17484331, at *4 (9th Cir. Dec. 5, 2022) (recognizing designated press conference facilities as a limited public forum).

The White House Press Area is a limited public forum. By long practice, the White House created and has operated the Press Area for the purpose of allowing journalists access to the White House to communicate with the President and his staff and to gather and disseminate the news. *Sherrill*, 569 F.2d at 129. The Press Area is plainly compatible with that purpose. *Id.* The White House is not constitutionally obligated to “open its doors to the press, conduct press conferences, or operate press facilities.” *Id.* But because the White House voluntarily created a designated space for the purpose of engaging in First Amendment activity, it has created a limited public forum.

Defendants argue that forum analysis does not apply to Mr. Ateba’s claim because newsgathering is not communicative. *See* Defs’ Mem. at 7–8. But that argument contravenes

Supreme Court precedent; newsgathering is *per se* protected. *Branzburg*, 408 U.S. at 707 (noting that the First Amendment protects “seeking out the news”). Moreover, newsgathering at press briefings is communicative. Mr. Ateba speaks through his questions—broadcast on live television—which express a point of view regarding the events he thinks are worthy of discussion. Defendants cite *Price v. Garland*, but that case did not involve newsgathering at press briefings. 45 F.4th 1059 (D.C. Cir. 2022). Instead, the plaintiff in *Price* filmed footage for a documentary on government property without a permit. *Id.* at 1065. The plaintiff challenged the permit system, and the D.C. Circuit concluded that forum analysis did not apply because merely *filming* footage—as opposed to *displaying* footage—was merely a “step[] in the creation of speech.” *Id.* at 1071 n.3.

Unlike filming footage, which involves no communication to anyone else, Mr. Ateba’s questions at White House press briefings both constitute newsgathering and express his ideas about topics he believes are newsworthy to Ms. Jean-Pierre, others at the briefing, and millions of people around the world. As other courts have held, journalist participation in press conference is expressive, thus implicating forum analysis. *TGP Commc’ns*, 2022 WL 17484331, at *4 (noting that purpose of press briefings was to allow “speech on limited topics”); *Evers*, 994 F.3d at 610 (noting that “gathering information [at press briefings] for news dissemination” is a “form of expressive activity”). Indeed, *Price* distinguished *Evers* on this very point, observing that *Evers* “does not even deal with filming” but rather “gathering information for *news* dissemination.” *Id.* at 1071 n.2 (quoting *Evers*, 994 F.3d at 612 (emphasis in original)). Moreover, *Price* acknowledged that even filming footage could well be communicative in certain instances, such as “livestreaming” the event over a communications platform. *Id.* at 1071 n.3. Mr. Ateba regularly “live posts” the White House press briefings on social media to his over 500,000 followers. Second Ateba Decl. ¶ 3. Because “live posting” is indisputably expressive, forum analysis applies.

Defendants argue that if forum analysis applies, the White House Press Area is a non-public forum. *See* Defs’ Mem. at 8. But the cases Defendants cite are easily distinguishable. In *Evers*, the Seventh Circuit concluded that an “invitation-only” press interview in a private conference room that was “not . . . dedicated to open communication” was a non-public forum.

994 F.3d at 607, 610. Here, by contrast, the White House press briefings are not by invitation only, and the White House Press Area is an area specifically dedicated for newsgathering purposes.

In *Arkansas Education Television Commission v. Forbes*, the Supreme Court concluded that a public broadcaster’s candidate debate was a non-public forum because the broadcaster had not intended to make the debate open to “a class of speakers” (*i.e.*, all candidates in the election). 523 U.S. 666, 680 (1998). Instead, the broadcaster had only “allow[ed] selective access for individual speakers.” *Id.* at 679 (emphasis added). Here, the White House has not allowed only “selective access for individual speakers.” *Forbes*, 473 U.S. at 679. Rather, it has opened its press room to a “class of speakers”—those engaged in journalism who want to cover the White House.

And in *Bryant v. Gates*, the D.C. Circuit held that the advertising section of a Department of Defense newspaper—whose sole purpose was to “facilitate accomplishment of the command or installation mission”—was a non-public forum because it was not open for “any purpose other than to further these mission-oriented aims.” 532 F.3d 888, 896 (D.C. Cir. 2008). Here, the White House has opened its press area for generalized newsgathering purposes.

Defendants suggest that because journalists must comply with the hard-pass policy’s eligibility criteria, it is a non-public forum. Defs.’ Mem. at 8. But the existence of eligibility criteria does not turn a limited public forum into a non-public forum. *See e.g.*, *TGP Commc’ns*, 2022 WL 17484331, at*4; *see also Hopper v. City of Pasco*, 241 F.3d 1067, 1078 (9th Cir. 2001) (noting that the less “restrictive the criteria for admission” the more likely it is that a forum will be deemed to be a limited public forum). The same is true for the hard pass system at issue here. Indeed, Defendants later admit the criteria for access to the hard pass do not allow them to make “discretionary judgments,” Defs’ Mem. at 15, an admission that forecloses any argument the Press Area is not a limited public forum. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985) (concluding that non-“ministerial” admission criteria make the forum non-public) *Forbes*, 523 U.S. at 680; *see also Getty Images News Servs. Corp.*, 193 F. Supp. 2d at 120 (Bates, J.) (in holding Guantanamo Bay military base is not a public forum, observing that it is unlike the

White House Press Area, which is a “civilian facility for permanent accommodation of journalists engaged in day-to-day reporting of the President”).⁶

C. The White House Hard Pass Program Violates the First Amendment

Under either mode of analysis—*Sherrill* or forum analysis—the White House hard pass criteria violate the First Amendment for at least two reasons. First, the Congressional Press Galleries’ unbridled discretion to determine which journalists are “of repute” creates a special carve-out for the “institutional press,” which the First Amendment prohibits. Second, the requirement that hard pass applicants obtain credentials from another branch of government is arbitrary and unrelated to any legitimate government interest.

1. The “of repute” requirement violates the unbridled discretion doctrine and thus contravenes *Sherrill*.

The revised hard pass program is arbitrary, unreasonable, and viewpoint discriminatory in violation of *Sherrill* because it violates the unbridled discretion doctrine. Mr. Ateba is required to obtain the stamp of approval from a Congressional Press Gallery before he can obtain a hard pass. The Congressional Press Galleries require journalists be “of repute.” This requirement is standardless and susceptible to abuse in violation of the unbridled discretion doctrine.

For a licensing or credentialing scheme to pass constitutional muster, the eligibility criteria must have “definitive standards or other controlling guides governing the action” of the licensing official. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). The standards must be “narrowly drawn, reasonable and definite.” *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992). If the credentialing scheme “involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship . . . is too great” to be tolerated under the First Amendment. *Id.* at 131 (cleaned up); *see also City of Lakewood v. Plain Dealer Publ’n Co.*, 486 U.S. 750, 756 (1988) (holding licensing scheme unconstitutional when it

⁶ For reasons discussed in more detail below, it does not matter whether the White House Press Area is a limited public forum or a non-public forum. Defendants have violated the applicable forum rules regardless of how the Press Area is categorized.

“delegates overly broad licensing discretion” to a decisionmaker) (cleaned up); *Cox v. State of La.*, 379 U.S. 536, 557–58 (1965) (holding it is “clearly unconstitutional to enable a public official” to operate under “a statute providing a system of broad discretionary licensing power”). In addition, “a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible.” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990).

The White House hard pass program violates both of these principles. First, by issuing press credentials only to correspondents “of repute in their profession,” the Congressional Press Galleries—and by extension, the White House—regulate access to the hard pass based on a standardless criterion. See *McDaniel v. Lombardi*, 227 F. Supp. 3d 1032, 1039 (W.D. Mo. 2016) (holding “reputable” is impermissibly standardless and may not be used to classify journalists), *aff’d sub nom. McDaniel v. Precythe*, 897 F.3d 946 (8th Cir. 2018). Neither the White House nor the Congressional Press Galleries offer a definition of the phrase “of repute,” nor do they provide applicants any objective metrics by which they can measure whether their level of “repute” is sufficient. And Defendants make no effort whatsoever to define this phrase. Thus, the “of repute” requirement violates the unbridled discretion doctrine. See *Getty Images News Servs. Corp.*, 193 F. Supp. 2d at 120 (Bates, J.) (observing lack of “clear governing criteria” for obtaining press passes is “unreasonable”).

Defendants claim that the unbridled discretion doctrine only applies when there are “no standards at all,” Defs’ Mem. at 13, but this is not so. While it is certainly sufficient to trigger the doctrine that there be “no standards at all,” standards that are not “narrowly drawn, reasonable and definite” also violate the doctrine. *Forsyth Cnty.*, 505 U.S. at 133; see also *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (holding term “political” violated doctrine because it lacked “objective, workable standards”); *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431 (D.C. Cir. 2020) (same with respect to phrase “political . . . content”); *Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth.*, 901 F.3d 356, 372 (D.C. Cir. 2018) (remanding to district court to determine whether phrase “intended to influence members of the public regarding an issue on which there are varying opinions” violated the doctrine).

Defendants cite *Kovacs v. Cooper* for the proposition that the “of repute” standard is sufficiently definite, *see* Defs’ Mem. at 13, but that citation reveals the weakness of their argument. *Kovacs* involved a challenge to a noise ordinance that prohibited “loud and raucous” noise. 336 U.S. 77, 79 (1949). The Court recognized these were “abstract words,” but concluded that the “avowed and obvious purpose of these ordinances is to prohibit or minimize such sounds on or near the streets.” *Id.* at 81. Here, by contrast, it is unclear what “avowed and objective purpose” the “of repute” requirement serves or what that phrase is supposed to mean. Defendants never say.

Even if the “of repute” standard had a sufficiently definite meaning (and it does not), it would still be unconstitutional. The First Amendment prohibits the government from distinguishing between the “institutional press” and other members of the press. *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (rejecting “the proposition that the institutional press has any constitutional privilege beyond that of other speakers.”) (internal quotation marks and citations omitted). Any distinction based on whether a journalist is “of repute” is thus impermissible.

Second, the fact that the Congressional Press Galleries are not required to issue a decision within a required period of time renders the White House’s credentialing scheme unconstitutional. *FW/PBS*, 493 U.S. at 227 (“A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.”); *see also Citizens United v. Schneiderman*, 882 F.3d 374, 387 n.7 (2d Cir. 2018) (“Undue delay in approval amounts to an effective restriction.”). While some press gallery regulations provide a general timeframe in which an applicant can expect a response,⁷ this is not mandatory. Under the governing regulations, the Press Galleries can sit on an application indefinitely without providing the applicant a definitive decision. This, too, violates the unbridled discretion doctrine. *FW/PBS*, 493 U.S. at 226.

The White House’s credentialing scheme is also uniquely susceptible to abuse. The Congressional Press Gallery executive committees are comprised of a group of journalists who

⁷ *See* Periodical Press Gallery, *Accreditation*, House Periodical Press Gallery <https://periodical.house.gov/accreditation> (noting that applications can take from six months to one year to process), RJN Exhibit D.

work for news outlets that have a strong institutional foothold in the Washington, D.C. media ecosystem. Compl. ¶ 71; *Congressional News Media and the House and Senate Press Galleries* 4, Congressional Research Service (April 13, 2017), RJN Exhibit C. These journalists are the “institutional press,” and like all journalists, they have a vested interest in limiting the level of competition in their industry. *Associated Press v. United States*, 326 U.S. 1, 17–20 (1945) (discussing interest in stifling competition among news outlets). By retaining the authority to decide which of their competition are sufficiently “of repute” to obtain a Congressional (and White House) hard pass—and to delay the decision indefinitely—these journalists have the unbridled discretion to limit their competition’s access to government property open to the press.

2. *The “of repute” requirement violates the unbridled discretion doctrine as incorporated into forum analysis.*

The revised hard-pass policy also violates forum analysis. Defendants do not dispute that the unbridled discretion doctrine applies in limited public fora, Defs’ Mem. at 9, and it plainly does. *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). Because the Press Area is a limited public forum, the unbridled discretion applies there.

Even if the White House Press Area were a non-public forum (and it is not), the unbridled discretion doctrine would still apply. In a non-public forum, just as in a limited public forum, the government may only regulate access if the regulation is “reasonable in light of the purposes served by the forum” and “viewpoint neutral.” *Cornelius*, 473 U.S. at 806. And in a non-public forum, just as in limited public fora, this reasonableness requirement imports the unbridled discretion doctrine. *Mansky*, 138 S.Ct. at 1891 (holding, in non-public forum, that an “indeterminate prohibition” that “carries with it the opportunity for abuse” violates the First Amendment); *see also Zukerman*, 961 F.3d at 449 (striking down rule in non-public forum because it was “simply too broad to guide the discretion of the [government’s content reviewers]); *Am. Freedom Def. Initiative*, 901 F.3d at 372 (remanding to district court to determine whether regulation in non-public forum was sufficiently determinate).

Citing to Supreme Court oral argument, Supreme Court briefing, and the lone dissent of a Supreme Court Justice, Defendants contend that unbridled discretion doctrine applies only in public fora. Defs' Mem. at 9–11. But one of the seminal cases explaining this doctrine—*FW/PBS*—did not involve a public forum at all. In *FW/PBS*, the Supreme Court held that a licensing scheme regulating use of *private property* violated the unbridled discretion doctrine. 493 U.S. at 223. Moreover, and as discussed, both the Supreme Court and the D.C. Circuit have recently confirmed that the unbridled discretion doctrine applies to non-public fora. *Mansky*, 138 S.Ct. at 1888 (applying unbridled discretion doctrine to non-public forum); *Zukerman*, 961 F.3d at 449 (same); *Am. Freedom Def. Initiative*, 901 F.3d at 372 (same). This forecloses any argument otherwise.

Contrary to Defendants' argument, applying the unbridled discretion doctrine to non-public fora is consistent with the rationale behind Supreme Court's forum jurisprudence. The purpose of the unbridled discretion doctrine is to preclude the government from being empowered to engage in viewpoint discrimination when requiring permission to engage in First Amendment activity. *Lakewood*, 486 U.S. at 763–64. It makes no difference if the First Amendment activity occurs in a traditional public forum, a designated public forum, a limited public forum, a non-public forum, or private property. Because licensing and credentialing regimes are prior restraints that threaten to inhibit the exercise of First Amendment rights through self-censorship, *id.* at 757, they must not be implemented in a way that gives the government unbridled discretion to regulate when those rights may be exercised. Indeed, to the best of Mr. Ateba's knowledge, every court to consider the question before *Mansky* held that the unbridled discretion doctrine applied in non-public fora. *Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012); *Child Evangelism Fellowship*, 457 F.3d at 386–87; *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002); *Griffin v. Sec'y of Veterans Affs.*, 288 F.3d 1309, 1324 (Fed. Cir. 2002). In light of *Mansky*, *Zuckerman*, and *American Freedom Defense Initiative*, that question is now settled.

3. *Requiring hard pass applicants to first obtain press credentials from another branch of government is arbitrary and unreasonable in violation of Sherrill and forum analysis.*

Independent from the unbridled discretion violation, the hard pass criteria are arbitrary and unreasonable in light of the purposes of the forum because they require applicants to obtain a press pass from another branch of government. Press credentialing criteria are arbitrary and unreasonable in violation of the First Amendment when they do not have a rational nexus with the government's compelling reason for the restriction. *Sherrill*, 569 F.2d at 129 (concluding withholding a White House "press pass must be based on a compelling governmental interest"); *Karem*, 960 F.3d at 660 (D.C. Cir. 2020); *Stevens v. N.Y. Racing Ass'n, Inc.*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987) (noting that "even if a restriction which affords different degrees of access to members of the press is not content-based, the limitation . . . must be rationally related to the accomplishment of [the government's] purpose.") (cleaned up); *Quad-City Cmty. News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 17 (S.D. Iowa 1971) ("Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional.").

While restricting Press Area access to "those engaged in journalism" is a legitimate reason for requiring press credentials, *see* Defs' Mem. at 11, requiring journalists first obtain credentials from another branch of government is an arbitrary and unreasonable way to achieve this interest. It is "irrational to require" these journalists to obtain press credentials from another branch of government in order to exercise their First Amendment rights at the White House. *See Craigmiles v. Giles*, 110 F. Supp. 2d 658, 664 (E.D. Tenn. 2000), *aff'd*, 312 F.3d 220 (6th Cir. 2002) (holding it is "irrational to require" businesses to obtain unnecessary licenses). Journalists covering the White House might not want to cover Congress or the Supreme Court. Requiring them to obtain the Supreme Court or Congress's official stamp of approval before engaging in First Amendment activity at the White House is arbitrary and unreasonable.

Even if a journalist did seek to cover another branch of government along with the White House, requiring a press credential from the Congressional Press Galleries is not a legitimate prerequisite to obtaining a hard pass. Indeed, this criterion impermissibly creates special privileges for the “institutional press.” *Citizens United*, 558 U.S. at 352. Giving special, expedited access to journalists who satisfy the Congressional Press Galleries’ “of repute” requirement is transparent classification among journalists. Because the First Amendment prohibits the government from making such a distinction, the White House outsourced this decision to Congress—a plain attempt by the White House to immunize its credentialing scheme from suit. *See Consumers Union of U.S., Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341, 1346 (D.C. Cir. 1975) (holding the Speech and Debate Clause precludes an Article III court from reviewing Congress’s credentialing scheme). This is, by itself, an arbitrary and unreasonable credentialing requirement and impermissible under the First Amendment.

4. *The White House is responsible for its incorporation of a constitutionally infirm credentialing process.*

Defendants contend that Mr. Ateba may not sue the *White House* because it is the *Congressional Press Galleries* that regulate access to the White House Press Area. Defs’ Mem. at 15–17. This argument is meritless. As discussed, it is unreasonable for the White House to require journalists who want to cover the White House to also obtain credentials from the press galleries for another branch of government. Moreover, because the White House delegated authority to regulate access to its Press Area to the press galleries from the other branches of government, those press galleries are agents of the White House. *See Consumers Union*, 515 F.2d at 1350 (concluding “[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). These galleries 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).

Just as the Press Galleries are agents of Congress for purposes of Congressional press pass, they are agents of the White House for purposes of the White House hard pass.

Defendants argue that the White House's reliance on the Congressional Press Galleries' credentialing decisions to determine hard-pass eligibility is akin to the Supreme Court granting expedited oral argument access to members of its bar. Defs' Mem. at 16. This argument falls flat. As an initial matter, Defendants did not introduce the Supreme Court's alleged policy, so the Court may not consider it. In any event, Defendants' argument bears little resemblance to the facts of this case. Unlike conditioning White House access on Congressional or Supreme Court credentialing, it is rational for the Supreme Court to condition expedited access to its oral argument on being the member of its bar and the bar of a state. Moreover, there is no First Amendment right to be a member of the Supreme Court bar, just as there is no First Amendment right to practice law in a given state. *Leis v. Flynt*, 439 U.S. 438, 443 (1979) (collecting cases). Thus, the subjective determinations made through admission to the Supreme Court or state bar do not implicate the First Amendment. Finally, despite Defendants' hand-waiving, they do not cite a case holding that their hypothetical case would be subject to dismissal. If, in fact, one government delegates its credentialing decision to another in a field infused with First Amendment protections, there is no reason that the delegatee's actions should not be attributed to the delegator, particularly, as here, where delegator and delagatee are coordinate branches of the same government.

D. Mr. Ateba Has Suffered a Cognizable First Amendment Injury

Governmental action that "burdens" First Amendment activity inflicts a cognizable injury no less than governmental action that "prohibit[s]" such activity outright. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("[D]istinction between laws burdening and laws banning speech is but a matter of degree.") (citation omitted). Indeed, restrictions on First Amendment activity create cognizable harm even when they are "minimal." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes . . . injury.") (plurality op.); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006) (same). The denial of a hard pass—which constitutes a "liberty interest"

under the constitution—undoubtedly inflicts a cognizable injury redressable through judicial review. *Sherrill*, 569 F.2d at 131. Even a temporary denial of a hard pass gives rise to cognizable injury. *Karem*, 960 F.3d at 660 (30-day temporary denial).

For the reasons discussed, Defendants violated Mr. Ateba’s First Amendment rights when they revoked his hard pass. Mr. Ateba’s loss of this liberty interest—and the consequent loss of expedited access to the White House Press Area—plainly constitutes cognizable injury. *Sherrill*, 569 F.2d at 131; *Karem*, 960 F.3d at 660; *see also* Br. of *Amicus Curiae* The White House Correspondents’ Association, *Karem v. Trump*, Case No. 19-5255 (D.C. Cir. Jan. 13, 2020) at 3.

Defendants argue that Mr. Ateba has not suffered a cognizable injury because he is able to apply for a day pass. Defs’ Mem. at 6. But the possibility that Mr. Ateba may be able to *mitigate* his injury does not mean that he has not *suffered* an injury in the first place. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88–89 (D. Conn. 2009) (noting that a plaintiff who has mitigated his injury can “still have suffered in injury-in-fact” from defendants’ acts). Moreover, a day pass is not an adequate substitute for a hard pass. Mr. Ateba must apply for a day pass on a daily basis, is unable to cover spontaneous press briefings when breaking news occurs and must wait for a chaperone. For a White House correspondent trying to keep up with the competition, this inferior access is a significant burden.

The cases Defendants cite do not support their contention that Mr. Ateba has not suffered a First Amendment injury. Defs’ Mem. at 6. Neither case involve restriction of access to a designated press area. *Ehrlich*, 437 F.3d at 419–20 (holding journalists do not have a right to have government respond to press inquiries); *Am. Civil Liberties Union of Md., Inc. v. Wicomico Cnty.*, 999 F.2d 780, 786 & n.6 (4th Cir. 1993) (holding paralegal did not have right of expedited access to prison). These cases simply have no bearing on the First Amendment injury created by the denial of access (or restrictions on equal access) to *designated* press facilities.

* * *

For these reasons, Mr. Ateba is entitled to summary judgment on his First Amendment claim.

II. MR. ATEBA IS ENTITLED TO SUMMARY JUDGMENT ON HIS APA CLAIM

The Secret Service violated the Administrative Procedure Act (“APA”) by cancelling Mr. Ateba’s hard pass. The Secret Service is an “agency” for purposes of the APA. *See* 5 U.S.C. § 551(1). Prior to August 1, 2023, Mr. Ateba had an active hard pass. That hard pass had no expiration date. ECF No. 17 at 3 (Prior to the May 5, 2023, policy announcement, “hard passes effectively did not expire”). On August 1, 2023, Mr. Ateba’s hard pass was cancelled by the Secret Service. ECF No. 22-3 at 14. The cancellation of Mr. Ateba’s hard pass represents the culmination of the agency’s decision-making process. Once the hard pass was cancelled, there was no further administrative appeals process to contest the cancellation.

The cancellation of Mr. Ateba’s hard pass was arbitrary and capricious. Defendants make no effort to demonstrate that it was not. Defs’ Mem. at 21–25. Defendants’ May 5, 2023, announcement of the new hard-pass policy provides *no* explanation or justification for the cancellation of pre-existing hard passes. Finally, the *ex-post* explanation for the adoption of the May 5, 2023 policy proffered by Defendants in this litigation—concern that there was “an excessive number [of hard passes] in circulation . . . including many that were no longer in active use”—makes no sense as applied to Mr. Ateba, who *did* actively use his hard pass. Thus, the Secret Service violated the APA by cancelling Mr. Ateba’s hard pass.

In an effort to avoid this conclusion, Defendants make two claims: First, that “the policy is not subject to review under the APA because it was issued and effectuated by the White House Press Office,” Defs’ Mem. at 21, and second, that the cancellation of Mr. Ateba’s hard pass is not a final agency action. Both arguments fail.

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. “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)) (emphasis added); *see also Chamber of Comm. 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.”).⁸

Defendants suggest that this precedent is inapposite because the Secret Service was acting at the direction of White House officials and did not engage in “independent action.” Defs’ Mem. at 24. This logic would create an exception that swallows the rule of the APA. As the head of the executive branch, the President has broad authority to direct agencies to take all manner of actions. It would come as quite the surprise to many previous Presidents that all they need to do to insulate agency action from APA review is direct the desired outcome.

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* Defs’ Mem. at 23. 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; *see also* Fleisher Decl. at ¶ 3 (acknowledging the Secret Service’s

⁸ *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 br[ought] 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).

statutory role in protecting the White House, President, Vice President, and their immediate families); 18 U.S.C. §§ 3056, 3056A.

Defendants claim that the termination of Mr. Ateba's hard pass is not a final agency action. Defs' Mem. at 24. This is merely another way of reiterating Defendants' first argument and fails for the same reason. Defs' Mem. at 25 (claiming that there is no final agency action because the White House, not the Secret Service, has the right to enter the premises). Defendants do not (and cannot) dispute that the Secret Service's termination of Mr. Ateba's hard pass is the final word.

The Secret Service is a federal agency. It acted as an agency in implementing a White House policy decision. The termination of Mr. Ateba's hard pass was a final agency action; Mr. Ateba's hard pass was terminated, it no longer works, and there is no further administrative appeal process. Finally, Defendants failed to contest Mr. Ateba's assertion that the Secret Service's cancellation of Mr. Ateba's preexisting hard pass is arbitrary and capricious. Defendants violated the APA by cancelling Mr. Ateba's pre-existing hard pass.

III. THE COURT SHOULD DENY SUMMARY JUDGMENT TO DEFENDANTS ON MR. ATEBA'S CONTENT AND VIEWPOINT DISCRIMINATION CLAIM

Finally, Defendants are not entitled to summary judgment on Mr. Ateba's second claim for relief, which alleges that Defendants violated the First Amendment by engaging in discrimination against him based on the content of his speech and his viewpoint. Compl. ¶¶ 90–95.⁹

A. The Court should deny the Motion as to Count II because Mr. Ateba has not been afforded the opportunity to take discovery.

⁹ Defendants suggest Mr. Ateba waived his claim that Defendants discriminated against him based on the content of his speech by failing to include the phrase "content based" in the parenthetical describing this claim and by failing to raise the issue in his preliminary injunction motion. This argument is borderline frivolous. Mr. Ateba's Complaint plainly alleges Defendants' actions amounted to a "content-based regulation," Compl. ¶ 91, and the Complaint's factual recitation otherwise makes clear that Mr. Ateba is alleging both content-based and viewpoint discrimination, *Id.* ¶¶ 54–59. This is sufficient to raise the claim. Moreover, a party does not waive a claim by failing to fully brief it at the preliminary injunction phase. *See, e.g., Murphy v. Collier*, 468 F. Supp. 3d 872, 877 (S.D. Tex. 2020) (rejecting this same argument).

While Counts I and III turn largely on legal issues that can be adjudicated based on the record as it now stands, Mr. Ateba's claim that Defendants engaged in content-based and viewpoint discrimination is a fact-intensive claim. Because Mr. Ateba has not had the opportunity to conduct discovery on this issue, and because he would be prejudiced by adjudicating summary judgment without discovery, the Court should deny Defendants' Motion as premature pursuant to Federal Rule of Civil Procedure 56(d)(2).

“Summary judgment usually ‘is premature unless all parties have had a full opportunity to conduct discovery[.]’” *Haynes v. District of Columbia Water & Sewer Auth.*, 924 F.3d 519, 530 (D.C. Cir. 2019) (quoting *Convertino v. U.S. Dep’t of Justice*, 684 F.3d 93, 99 (D.C. Cir. 2012)). “If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to obtain affidavits or declarations or to take discovery[.]” Fed. R. Civ. P. 56(d)(2). To obtain relief under Rule 56(d), a party must: “(1) ‘outline the particular facts [the party] intends to discover and describe why those facts are necessary to the litigation’; (2) explain why the party could not produce those facts in opposition to the pending summary-judgment motion; and (3) ‘show [that] the information is in fact discoverable.’” *Jeffries v. Barr*, 965 F.3d 843, 855 (D.C. Cir. 2020) (quoting *Convertino*, 684 F.3d at 99–100).

Mr. Ateba satisfies all three factors under Rule 56(d)(2). First, Mr. Ateba has outlined the particular facts he intends to discover, which relate to why Defendants changed the White House's hard pass policy such that Mr. Ateba lost his hard pass and could not obtain a new one. *See* Declaration of Jesse D. Franklin-Murdock, dated October 4, 2023 (“Franklin-Murdock Decl.”), ¶ 4. Specifically, Mr. Ateba intends to conduct discovery relating to the following topics: (a) why Defendants cancelled existing hard passes; (b) why Defendants believed that the previous hard pass credentialing system posed a security risk, if they did indeed believe that; (c) why Defendants adopted the hard pass credentialing criteria now in effect; (d) information about whether other journalists were disruptive and how Defendants handled those disruptions. *Id.* ¶ 5. These facts will bear on the issue of whether the government “acted in order to suppress a disfavored view”—*i.e.*,

the content and viewpoint of Mr. Ateba's speech. *See Am. Freedom Def. Initiative v. Washington Metro. Area Transit Auth.*, 901 F.3d 356, 365–66 (D.C. Cir. 2018).

Second, Mr. Ateba could not produce these facts because the information is in the exclusive possession of Ms. Jean-Pierre and the White House Press Office, and he has not yet been permitted to take discovery. The Court has not yet set a scheduling conference under Federal Rule of Civil Procedure 16(b), and discovery has not otherwise been authorized. Franklin-Murdock Decl. ¶ 7.

Third, this information is discoverable through routine means. Mr. Ateba intends to take discovery regarding the subjects outlined above by (a) propounding interrogatories regarding the witnesses, decisionmakers, and documents relevant to this claim; (b) propounding requests for production of documents on Defendants regarding communications and other documents relevant to this claim; (c) deposing Ms. Jean-Pierre and any other individuals who played a substantial role in the events underlying this claim; and (d) as necessary, issuing subpoenas to third parties to obtain further documents and testimony relevant to this claim. Franklin-Murdock Decl. ¶ 8.

B. There is a genuine issue of material of fact as to whether Defendants engaged in content-based and viewpoint discrimination.

Even without the benefit of discovery, Mr. Ateba has introduced sufficient evidence to withstand Defendants' Motion. Because “the government rarely . . . admits it is engaging in . . . discrimination,” both retrospective evidence that the government “acted in order to suppress” disfavored speech and prospective evidence of “what happened” after the policy change at issue are relevant to the issue. *Am. Freedom Def. Initiative*, 901 F.3d at 365–66 (quoting *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004)). Moreover, because of the important First Amendment interests involved, Defendants bear the burden of proving that their exclusion of Mr. Ateba was permissible. *Sherrill*, 569 F.2d at 128 n.14 (noting that government must make “compelling showing” justifying denial of White House press pass) (quotations omitted); *Forbes*, 523 U.S. at 677 (observing government must satisfy strict scrutiny when government excludes speaker from class for whom limited public forum was open). Here, Mr. Ateba has introduced

sufficient retrospective and prospective evidence of discrimination sufficient to create a genuine issue of material fact.

The various public incidents in which Mr. Ateba confronted the Press Secretary about her refusal to engage with him resulted in a tense exchange and national media attention. Compl. ¶¶ 49–50. On May 5, 2023—mere weeks after the March 20 “Ted Lasso” incident—the White House announced changes to its hard pass eligibility requirements. *Id.* ¶ 54. The temporal proximity of these events alone gives rise to an inference of discrimination. *See Childs–Pierce v. Utility Workers Union of Am.*, 383 F. Supp. 2d 60, 76 (D.D.C. 2005) (holding that that “nine weeks is sufficient to establish causation” in employment retaliation claim); *see also McIntyre v. Peters*, 460 F. Supp. 2d 125, 133 (D.D.C. 2006) (noting the “[t]his Court has often followed a three-month rule to establish causation on the basis of temporal proximity alone” for employment retaliation claims). Moreover, the *New York Post* reported the change was “widely believed to be spurred by interest in stripping African journalist Simon Ateba of his access to the briefing room.” Compl ¶ 7.

In addition, the White House’s discrimination against Mr. Ateba is further evidenced by the fact that it accomplished its goal of precluding him from obtaining a hard pass. On June 5, 2023, Mr. Ateba applied for credentials with the Senate Daily Press Gallery, but he has yet to receive that pass. While Mr. Ateba wants to reapply for a White House hard pass, *id.*, his lack of accreditation by a Supreme Court or Congressional Press Gallery makes him ineligible. Compl. ¶ 55. Defendants argue that policy change is not evidence of discrimination because “the hard pass Policy uses essentially the same credentialling standards as have been in effect for decades.” Defs’ Mem. at 19. But Defendants did not only change the criteria; they also terminated *existing* hard passes. These two changes, working in tandem, caused Mr. Ateba to lose his hard pass.

The most notable part of Defendants’ Motion is what it does *not* say. Defendants nowhere explain why they changed the rules so that Mr. Ateba could not obtain a new hard pass. It would have been straightforward for Defendants to submit a sworn statement asserting that they did not engage in discrimination coupled with a plausible alternative explanation for their actions. But Defendants did not offer such evidence, a failure that is particularly glaring considering that

Defendants bear the burden of proof on this issue. On these facts, Mr. Ateba has raised a genuine issue of material fact that Defendants' actions were discriminatory against him.

Finally, Defendants suggest that they did not violate Mr. Ateba's First Amendment rights because their actions were based on his conduct. Defs' Mem. at 18. But this argument is nothing more than a repackaged version of Defendants' factual assertion that they did not discriminate against Mr. Ateba based on his speech. For the reasons already discussed, it would be premature for the Court to adjudicate this argument without affording Mr. Ateba the ability to take discovery.

Even if the White House did revoke Mr. Ateba's hard pass due to his conduct, as Defendants suggest, the manner in which Defendants did so violates both the First and Fifth Amendments. Mr. Ateba was not on notice of any decorum policy, Defendants' did not explain their reasons for applying such a policy against him, and he was not given an opportunity to rebut Defendants' conclusion. Indeed, the White House did not even *have* a written decorum policy prior to May 5, 2023—the same day it announced the new hard-pass requirement. Compl. ¶ 59. If, as Defendants suggest, Mr. Ateba's conduct prompted the White House to adopt new rules targeted to exclude him, Defendants failed to provide him “notice, opportunity to be heard, and a final written statement [of its reasons]” in violation of both the “first and fifth amendments.” *Sherrill*, 569 F.2d at 132. For these reasons, the Court should deny Defendants' Motion as to Count II.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Ateba's motion for Summary Judgment, enter judgment in Mr. Ateba's favor on Counts I and III, and deny Defendants' motion in full.

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Respectfully submitted,

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