

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| |) | |
| Simon ATEBA, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Case No. 1:23-cv-02321-JDB |
| |) | |
| Karine JEAN-PIERRE, in her official capacity as White House Press Secretary, et al.) |) | |
| |) | |
| <i>Defendants.</i> |) | |
| |) | |

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

For the reasons set forth in the attached Memorandum of Points and Authorities, Defendants hereby move for summary judgment. In addition to their Memorandum of Points and Authorities, Defendants have filed a proposed order with this motion.

Dated: September 20, 2023

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Simon ATEBA,

Plaintiff,

v.

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

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

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

This spring, the White House Press Office informed journalists that existing hard passes would expire at the end of July, and that journalists would have to reapply for a hard pass or else use a day pass. Going forward, renewals and new issues would be governed by essentially the same policies that had been in effect in many prior administrations. These policies are objective and broadly applicable, and do not distinguish based on the views of the journalist. Plaintiff Simon Ateba contends that he cannot qualify for a hard pass under these standards and seeks to invalidate the new hard pass standards. But he remains free to access the White House using the day pass system (and indeed he has done so). The Court should grant summary judgment to Defendants. The current standards do not discriminate based on journalists’ views and do not leave the White House Press Office with excessive discretion in violation of the First Amendment. And while Mr. Ateba raises an Administrative Procedure Act (APA) claim against the Secret Service for its role in deactivating Mr. Ateba’s hard pass, the Secret Service’s role in that respect was purely ministerial.

BACKGROUND

I. White House Press Passes and the Hard Pass Policy

Many reporters cover the White House for a wide range of news outlets. Those reporters’ access to the White House is managed by the White House Press Office, a department of the White House Office. Because the White House complex is subject to strict security requirements, access is tightly controlled. Reporters generally obtain access to facilities within the White House complex in one of two ways. The first is known as a “hard pass,” which provides “on-demand access to the White

House complex,” see *Karem v. Trump*, 960 F.3d 656, 659 (D.C. Cir. 2020), for reporters who meet the applicable standards and satisfy applicable security checks. The second type of pass, a “day pass,” allows journalists to access the same areas of the White House grounds as a hard pass, during the same hours. See Third. Decl. of Nathan Fleischer ¶¶ 6–8 (“Fleischer Decl.”), attached as Exhibit 1. Obtaining a day pass requires a journalist to complete a simple online form—the same form used for any visitor to the White House—where they provide basic biographical information such as name and date of birth to enable the Secret Service to perform a security review. *Id.* ¶ 9. Once at the White House, journalists with a day pass present themselves at a security checkpoint for verification, and, once escorted through security, can access the White House press areas and attend White House press briefings without further escort. In other words, once they have cleared security to enter the White House complex, a reporter’s access is the same regardless of the pass they hold: there are no differences in whom they may talk to or what briefings they may attend based on pass type. *Id.* ¶¶ 9–10. The only relevant difference is that reporters with a hard pass can get into the White House in a somewhat more expedited manner than they might otherwise be able—usually only a matter of a few minutes faster. *Id.* ¶ 9.

“[T]he hard-pass system has existed in similar form for decades.” *Karem*, 960 F.3d at 660. But under the now-rescinded policy, hard passes were automatically renewed and there were an excessive number in circulation—including many that were no longer in active use, leading to concerns with administrability and the security risks inherent in the ballooning number of passes that grant access to the White House. In May 2023, the White House Press Office announced its “inten[t] to revise the policy on press hard passes to be consistent with that of prior administrations.” Compl., Ex. A, Letter from White House Press Office to All Hard Pass Holders (May 5, 2023), ECF No. 1-1 (“May Letter”).

Under the new policy (the “Hard Pass Policy”), applicants must meet six criteria, the essence of which is that the applicant show (1) full time employment in journalism; (2) residence or employment in the D.C. area; (3) recent access to White House or recent assignment to White House beat; (4) current assignment to White House beat; (5) accreditation by Senate, House, or Supreme

Court press gallery; and (6) willingness to undergo Secret Service investigation. *See id.* at 1. The fifth criteria, “[a]ccreditation by a press gallery” in Congress, has been in place in some form since at least the Ford Administration, *see Sherrill v. Knight*, 569 F.2d 124, 129 n.19 (D.C. Cir. 1977), including during the Obama and Trump Administrations. *See* Decl. of Todd Joseph Gillman ¶ 7, *Karem v. Trump*, No. 1:19-cv-2514, ECF No. 2-8 (D.D.C. Aug. 20, 2019) (describing requirements for hard pass as including “[a]ffirmation that you have a congressional press credential”). The Congressional press galleries require, among other things, that a person be a “bona fide resident correspondent[] of reputable standing, giving their chief attention to the gathering and reporting of news.” *See* Periodical Press Gallery, Rules & Regulations, House Periodical Press Gallery.¹ *See also Sherrill*, 569 F.2d at 130 (holding that a “bona fide Washington correspondent” was entitled to certain procedural protections).

The Hard Pass Policy stated that *all* existing hard passes would expire on July 31, 2023, and applicants had until then to submit renewal applications that complied with the policy’s requirements. May Letter. As a result, the hard passes of “over 440 previously credentialed White House reporters” expired, Pl.’s Verified Compl. ¶ 7, ECF No. 1 (“Compl.”), although those journalists can still submit requests to access the White House via the day pass process described above, *see* May Letter.

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

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

II. Mr. Ateba's Failure to Reapply for a Hard Pass and Other Actions.

Simon Ateba “is the White House correspondent for Today News Africa, a daily online news publication primarily covering American politics and relations between the United States and African countries.” Compl. ¶ 3. Mr. Ateba has been a member of the White House press corps for five years. *Id.* For the first three of those years he used a day pass to access the White House; he had a hard pass from February 2021 through July 2023. *Id.* ¶¶ 39–40.

The White House Press Office announced the Hard Pass Policy on May 5, 2023. Mr. Ateba, who apparently was not already credentialed by any Congressional correspondents committee, then applied for press credentials for the Senate Daily Press Gallery. *Id.* ¶ 76. His application remains pending. *Id.* Mr. Ateba never reapplied for a Hard Pass, and his pass expired. *See* Errata, ECF No. 4.

On August 4, 2023, Mr. Ateba requested that “the White House Press delay termination of his hard pass” until his application to a congressional gallery was approved or denied, *id.*, but his Hard Pass had already expired at that point, and the White House declined the request. The White House Press Office reminded Mr. Ateba that he remains free to access the White House using a day pass, *see* Aug. 6, 2023 email from White House Press Office to Today News Africa, ECF No. 17-2. After Defendants filed their opposition to Mr. Ateba’s motion for a preliminary injunction, Mr. Ateba sought, and received, day passes to access the White House. *See* Fleischer Decl. ¶ 16.

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

STANDARD OF REVIEW

Summary judgment is warranted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Court does not “weigh the evidence and determine the truth of the matter” but instead must “determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Especially in a case like this, where the core challenge is a facial one, the Court’s essential role is to “resolve[] legal questions.” *Apprio, Inc. v. Zaccari*, No. CV 18-2180 (JDB), 2022 WL 971001, at *3 (D.D.C. Mar. 31, 2022). Although it must view “the evidence in the light most favorable to the non-moving party,” the Court should disregard “[a]ssertions that are ‘mere allegations’ or ‘conclusory statements’” when determining if there is a genuine dispute of material fact. *Id.* (quoting *Bonyer v. Dist. of Columbia*, 910 F. Supp. 2d 173, 189 (D.D.C. 2012)).

ARGUMENT

The White House’s policy of using objective, neutral, and clearly defined criteria to govern issuance of hard passes is plainly constitutional. Mr. Ateba’s facial challenge to this policy fails; the White House is permitted to use such criteria when determining who can access White House grounds. Even if the unbridled discretion doctrine did apply in this context, the “bona fide” and “reputable” standards have through their long use “acquired a content that conveys to any interested person a sufficiently accurate concept” of what is required. *Kovacs v. Cooper*, 336 U.S. 77, 79 (1949).

Mr. Ateba’s other claims also fail: He does not even allege—much less proffer evidence—that the policy discriminates against him based on viewpoint; rather, his allegations suggest, at most, that his disruptive *conduct* was the basis of the Hard Pass Policy. Even if that were so (and it is not), actions based on disruptive conduct would not violate the First Amendment. And Mr. Ateba’s third claim, that the Secret Service violated the APA by allowing his hard pass to expire, also fails; the Secret Service has not taken any final agency action challengeable under the APA but has simply taken ministerial steps required by White House policies.

The undisputed facts—and indeed even the facts as asserted by Mr. Ateba—do not satisfy the elements of Mr. Ateba’s claims. The Court should therefore grant summary judgment to Defendants.

I. Because Mr. Ateba can still access the press area, he has no First Amendment injury.

Mr. Ateba’s central claim is that, as a journalist, he has a First Amendment right to a hard pass that enables expedited access to the White House. *See, e.g.*, Pl.’s Reply in Supp. of Mot. for Prelim. Inj. 18, ECF No. 18 (“PI Reply”) (“[T]he 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.”). But there is no First Amendment right to access the White House. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Rather, the D.C. Circuit has recognized that, given the First Amendment interests implicated, the Fifth Amendment imposes certain procedural requirements related to White House access. *See Sherrill*, 569 F.2d at 130; *Karem*, 960 F.3d at 665. Mr. Ateba does not allege any procedural due process violation here, nor could he.

More fundamentally, Mr. Ateba still has access to the White House through the day pass system. *See* Fleischer Decl. ¶ 17. Even if the Constitution guaranteed him access to the White House, *cf.* PI Reply at 1 (characterizing asserted First Amendment injury as “exclusion from the White House briefing room”), it surely does not specify the mechanism the White House must use to enable that access. To the extent that Mr. Ateba is inconvenienced by using day passes, such an injury does not rise to the level of a First Amendment violation. *Cf. The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 419–20 (4th Cir. 2006) (any harm to journalists from governor’s directive not speak with them and to exclude them was constitutionally *de minimis*); *Am. Civil Liberties Union of Md., Inc. v. Wicomico Cnty.*, 999 F.2d 780, 786 & n.6 (4th Cir. 1993) (any harm from revocation of expedited access to prisoners that “inconvenienced” legal aid organization was constitutionally *de minimis*). Because Mr. Ateba can still access the White House press areas, he has failed to allege, and cannot prove, a cognizable injury under the First Amendment.

II. The Hard Pass Policy is constitutional.

The Hard Pass Policy establishes six clear and objective standards for the White House Press Office to use when issuing hard passes. Mr. Ateba nonetheless contends that the fifth standard, “[a]ccreditation by a press gallery in either the Supreme Court, U.S. Senate or U.S. House of

Representatives,” leaves decisionmakers with an unconstitutional amount of discretion to deny a hard pass. This claim fails as a matter of law.

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

Access to the White House is not protected by the First Amendment. *Zemel*, 381 U.S. at 17. To the extent that First Amendment protections apply in this context at all, they do not include the full panoply of speech protective doctrines, such as the unbridled discretion doctrine, that apply in a public forum. Rather, the First Amendment requires only that regulations on access to the White House be reasonable and do not discriminate on the basis of viewpoint. The criteria to obtain a hard pass, including that pass holders obtain press credentials from a professional credentialing committee, are reasonable, viewpoint-neutral regulations that satisfy constitutional scrutiny.

1. Access to press areas is not subject to First Amendment forum analysis.

Forum analysis, and consequently the principle disfavoring “unbridled discretion” that Mr. Ateba invokes, are not applicable in this context. The hard pass program—which is the program to which Mr. Ateba actually seeks access—is obviously not a forum at all and journalists do not engage in First Amendment activity “in” the hard pass program. As explained above, *supra* section I, exclusion from the hard pass program does not constitute a First Amendment violation.

But forum analysis is also a poor fit for analyzing access to the White House briefing room more broadly. Mr. Ateba has disclaimed any right to be called on and have his questions answered, and instead contends that the First Amendment protects his “access to government property.” PI Reply at 5 n.1; *see also Ebrlich*, 437 F.3d at 413 (government officials may refuse to entertain a reporter’s questions); *Sherrill*, 569 F.2d at 129 (characterizing a hypothetical challenge to such selectivity as “unreasonable”). As the D.C. Circuit has explained, “forum analysis applies only to communicative activities, not to activities that, even if generally protected by the First Amendment, are not communicative.” *Price v. Garland*, 45 F.4th 1059, 1070 (D.C. Cir. 2022). It would be a “category error to apply the speech-protective rules of a public forum to regulation of an activity that involves merely a noncommunicative step in the production of speech.” *Id.* at 1069. *See also* PI Reply at 5 (Mr. Ateba himself observing that “[n]either the Supreme Court nor the D.C. Circuit has held that a forum analysis

is applicable to claims involving press access to government property” and doubting its applicability). Indeed, as the Third Circuit has explained, a “restriction on [a party’s] right to receive and record information” is not a regulation of “expressive activity” to which forum doctrines apply. *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999). Forum analysis is inapposite.

2. *If the White House is a forum, it is at most a nonpublic forum.*

Even if the access to the White House press area is appropriately analyzed as a First Amendment forum, it is, at most, a nonpublic forum. *United States v. Caputo*, 201 F. Supp. 3d 65, 70 (D.D.C. 2016); see *Am. Freedom Def. Initiative v. Wash. Metro. Area Transit Auth.* (“AFDP”), 901 F.3d 356, 364 (D.C. Cir. 2018) (nonpublic fora include “other Government-owned property where some speech is permitted”). When “the government permits only ‘selective access for individual speakers,’ then it creates a nonpublic forum.” *Bryant v. Gates*, 532 F.3d 888, 895 (D.C. Cir. 2008) (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679–80 (1998)); see also *John K. MacIver Inst. for Pub. Policy, Inc. v. Evers*, 994 F.3d 602, 609 (7th Cir. 2021) (in context of journalist access to press events, explaining that “[w]hen the government limits participation only to ‘appropriate’ participants or has extensive admission criteria, it has not created a public forum.” (quoting *Cornelius v. NAACP Legal & Educ. Fund, Inc.*, 473 U.S. 788, 804–05 (1985))). Mr. Ateba’s earlier contention that the White House press area is a limited public forum is mistaken: the government creates at most a nonpublic forum when, as here, access is “selective.” *Bryant*, 532 F.3d at 895. Thus, in *Cornelius*, for example, the government had consistently limited access to the Combined Federal Campaign charity drive to “appropriate” organizations which had to first seek permission to attend. See 473 U.S. at 804; see also *Forbes*, 523 U.S. 679-80 (discussing distinction and holding that candidate debate was a nonpublic forum). Here, access is limited to those who satisfy the six criteria or are otherwise invited; the White House has not generally opened its grounds to all comers or even to all journalists.²

² Of course, even if Mr. Ateba were correct that the White House had created a “limited public forum,” the government would be required only to adhere to “the lawful boundaries it has itself set” in creating the forum—*i.e.*, enforcing the very terms of the Hard Pass Policy that Mr. Ateba seeks to avoid. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995); see also *Sherrill*, 569 F.2d at

3. *The principle against unbridled discretion does not apply here.*

Whether a nonpublic forum or not a forum at all, the unbridled discretion doctrine is inapposite. When forum analysis does not apply, the “highly-protective rules of a traditional forum are inapplicable” and the activity “is subject to the same degree of regulation as it would be in a nonpublic forum.” *Price*, 45 F.4th at 1071-72. And in a nonpublic forum, “the Government has far more leeway to regulate speech,” *id.* at 1069; a “restriction must not discriminate against speech on the basis of viewpoint, and the restrictions must be reasonable in light of the purpose served by the forum,” *id.* at 1072 (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)).

The unbridled discretion doctrine arose in the context of restrictions on core First Amendment activity in traditional public forums. It allows facial challenges—which are ordinarily disfavored—to discretionary permitting regimes in order to protect core, expressive First Amendment activities in public forums from even the risk of viewpoint discrimination. *See, e.g., City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 755–56 (1988) (“[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny *expressive activity*, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license.” (emphasis added)). “All of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside the setting of a public forum.” *Griffin v. Sec’y of Veterans Affs.*, 288 F.3d 1309, 1321 (Fed. Cir. 2002); *see id.* at 1325 (concluding the doctrine does not preclude unbridled permitting discretion at government cemeteries).

Indeed, application of this doctrine to nonpublic fora is inconsistent with the Supreme Court’s decision in *Arkansas Education Television Commission v. Forbes*. The Supreme Court there held that a congressional candidate debate hosted by a public broadcaster was a nonpublic forum, where restrictions “must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.” 523 U.S. at 682. The public broadcaster excluded the plaintiff from

129 & n.19 (requiring certain procedures before a “bona fide” journalist who concededly met the criteria for access—including congressional press credentials—could be denied access).

the debate as an exercise of its “journalistic discretion” because he was not “a serious candidate.” *Id.* at 682-83. The Supreme Court rejected the candidate’s challenge to his exclusion, without discussion of the unbridled discretion doctrine—notwithstanding that it was the plaintiff’s central point at oral argument and the basis for the dissenting justices’ contrary conclusion. *See id.* at 683-84 (Stevens, J., dissenting) (criticizing the majority for upholding the “ad hoc decision” of the broadcaster in contravention of the unbridled discretion doctrine); *see also id.* at 686 (describing “nearly limitless discretion” of broadcaster to exclude candidates); *id.* at 689-95; *Forbes*, Brief of Pet’r, No. 96-779, 1997 WL 365332, at *44-46 (July 12, 1996) (arguing that exclusion violated unbridled discretion doctrine); *Forbes*, Tr. of Oral Arg., No. 96-779, 1997 WL 664266 (Oct. 8, 1997) (including the term “unfettered discretion” and variants a dozen times). The Supreme Court has therefore rejected Mr. Ateba’s contention that the unbridled discretion doctrine applies to nonpublic forums.

Notwithstanding *Forbes*, courts in other circuits have sometimes extended the doctrine to nonpublic forums. *See, e.g., Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012). Those cases are mistaken, given *Forbes*. *See Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 337 (8th Cir. 2011) (plaintiff’s contention that unbridled discretion doctrine applies even in nonpublic forum “cannot be squared with the Supreme Court’s decision in *Forbes*”). As the D.C. Circuit has explained, courts must remain wary of “extending the public forum doctrine ‘in a mechanical way’ to contexts that meaningfully differ from those in which the doctrine has traditionally been applied.” *Price*, 45 F.4th at 1068. The core reasons for the unbridled discretion doctrine—which, again, permits a facial challenge in the absence of actual viewpoint discrimination—are not implicated in the distinct context of journalist access to what is, at most, a nonpublic forum. *Cf. Griffin*, 288 F.3d at 1323 (refusing “to apply the unbridled discretion doctrine mechanically . . . because restrictions in nonpublic fora may be reasonable if they are aimed at preserving the property for the purpose to which it is dedicated”). And not only is this not a public forum, Mr. Ateba’s alleged interest in accessing the White House to receive information is a “noncommunicative step in the production” of core protected speech—he seeks to attend press briefings to gather information he might then include or

analyze in later speech or publication. *Price*, 45 F.4th at 1068. As the D.C. Circuit has held, “it would be a category error to apply the speech-protective rules of a public forum” to claims like Mr. Ateba’s. *Id.* Indeed, Mr. Ateba does not even allege that he is prevented from attending press briefings: he has the same access now as he did before the policy he challenges went into effect. *See* Fleischer Decl. ¶¶ 6–7. Because this doctrine does not apply in the context of access to White House press areas (much less to the specific context of *expedited* access), Mr. Ateba’s first claim fails as a matter of law.

4. The hard pass criteria are neutral and reasonable regulations.

These principles defeat Mr. Ateba’s first claim. Any First Amendment protections that apply in this context do not include the “heightened protection of communicative activities” such as the unbridled discretion doctrine, but instead impose only “the same ‘reasonableness’ standard that applies to restrictions on first amendment activity in a nonpublic forum.” *Price*, 45 F.4th at 1070, 1072.

The regulation at issue here—limiting hard pass access to those credentialed by a professional committee of journalists—is plainly reasonable given the purpose of White House briefings and the limits that must exist, for reasons of security and government efficiency, on access to the White House. And that is all the more true given the alternative means of accessing the White House through the day pass system. As the D.C. Circuit recognized in *Karem*, the White House “surely has a legitimate interest in maintaining a degree of control over media access to the White House complex.” 960 F.3d at 668. Implicit in that interest is the ability—in establishing the rules for the nonpublic forum—to limit the press areas to those engaged in journalism. *Cf. Sherrill*, 569 F.2d at 130 (explaining that White House had opened press areas only to bona fide journalists). There is nothing unreasonable, or remotely suspect, in relying on the credentialing decisions of outside professional organizations. Indeed, as explained above, the White House has long done so—as have many other government entities. *See Congressional News Media and the House and Senate Press Galleries* 4, Congressional Research Service (April 13, 2017), available at <https://crsreports.congress.gov/product/pdf/R/R44816> (Congress has used professional correspondents committees since 1877); *see also, e.g.*, Defs.’ Opp’n to Pl.’s Mot. for Prelim. Inj. 12, ECF No. 17 (citing other examples). Because the White House press

areas are open only to (certain) journalists, a rule that limits access to credentialed journalists is reasonable and consistent with the Constitution.

B. The Congressional Galleries' standards do not leave the Committee with unconstitutional discretion.

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

But the standards set by the Press Galleries do not leave those professional credentialing bodies with an unconstitutional degree of discretion. The various Press Galleries set explicit, public standards that govern issuance of a credential, such as that the applicants be “bona fide resident correspondents of reputable standing, giving their chief attention to the gathering and reporting of news,” and that they are “employed by periodicals that regularly publish a substantial volume of news material of either general, economic, industrial, technical, cultural, or trade character.”³ The doctrine

³ See, e.g., Periodical Press Gallery, Rules and Regulations, <https://periodical.house.gov/accreditation/rules-and-regulations>.

relied on by Mr. Ateba, by contrast, prohibits only “unbounded” or “unbridled” discretion in permitting and licensing decisions, *e.g.*, *City of Lakewood*, 486 U.S. at 755. In *City of Lakewood* there were no standards at all guiding the mayor’s discretion to allow a newsrack; in *Saia v. New York* there were no standards at all to guide the police chief’s discretion to allow use of a loudspeaker, 334 U.S. 558, 560 (1948); in *Cox v. Louisiana* there were no standards at all for local officials’ determinations of which assemblies to permit or prohibit, 379 U.S. 536, 556 (1965); in *Niemotko* there were no standards at all for the park commissioner to grant permits for use of a park, 340 U.S. at 272.

The Constitution does not prohibit the use of standards, even where those standards are to some degree subjective or require the exercise of judgment. Thus, in *Sherrill*, for example, the D.C. Circuit recognized that presidential security “does not lend itself to detailed articulation of narrow and specific standards” and that a standard remained permissible even if it required “exercising expert judgment which frequently must be subjective in nature[.]” 569 F.2d at 130. And in *Kovacs v. Cooper*, the Supreme Court rejected with “only a passing reference” the contention that the standard “loud and raucous” was too vague and thus afforded licensors excessive discretion. 336 U.S. 77, 79 (1949). While these were concededly “abstract words,” they had “through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.” *Id.*; *see also Cox v. Louisiana*, 379 U.S. 559, 568-69 (1965) (statute prohibiting demonstrations “near” a courthouse did not leave enforcement officials excessive discretion); *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1213 (D.C. Cir. 2021) (constitutionally adequate meaning in a standard requiring health claims to be “adequately substantiated”).

Mr. Ateba’s contention that the committees’ “bona fide” and “repute” standards leave unconstitutional discretion to deny a credential is therefore without merit. Mr. Ateba’s assertion that this determination is “inherently subjective,” PI Mot. at 20, is legally inadequate to state a claim. As illustrated, the D.C. Circuit endorsed the use of a “subjective” standard in *Sherrill* that required the exercise of “judgment.” 569 F.2d at 130. Indeed, *Sherrill* premised its holding—and any right it established—on the fact that the plaintiff-journalist was a “bona fide Washington correspondent,”

thus necessarily implying that the phrase conveyed adequate meaning. *See* 569 F.2d at 130 (holding certain due process protections applied to denial of hard pass to a “bona fide Washington correspondent”); *id.* at 129 n.19 (explaining that “bona fide” label is tied to congressional press credentials). This Court, too, has tentatively endorsed the use of published, subjective standards for allocating press access. *See Getty Images News Servs. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002) (Bates, J.). Other courts have endorsed the use of similar standards. *See Evers*, 994 F.3d at 606 (affirming against First Amendment challenge standards that asked whether the journalist was “a bona fide correspondent of repute in their profession”). The terms “bona fide” and “reputable” are—like the “abstract” but constitutional term “loud and raucous”—of adequate historical and legal pedigree to provide “a sufficiently accurate concept” of what is required of applicants. *Kovacs*, 336 U.S. at 79; *see Congressional News Media and the House and Senate Press Galleries* 14, Congressional Research Service (April 13, 2017), *available at* <https://crsreports.congress.gov/product/pdf/R/R44816> (explaining that the rules and need for standards date to the late 1800s).

Even under the doctrine Mr. Ateba invokes, the rules would pass constitutional muster. Defendants are entitled to judgment on this claim.

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

Mr. Ateba’s claim fails for another, more fundamental reason: the Hard Pass Policy does not assign Defendants or others in the White House discretion to deny a hard pass where the criteria (including the security review) are satisfied. This case is therefore entirely unlike those where courts have found a danger that governmental authorities would use their discretion to disfavor certain viewpoints. In *City of Lakewood*, for example, the Court explained that presuming that “the mayor will act in good faith” is “the very presumption that the doctrine forbidding unbridled discretion disallows.” 486 U.S. at 770. In the absence of “standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or the viewpoint of the speaker.” *Id.* at 763–64; *see also Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002) (“Where the licensing official enjoys unduly broad discretion in determining whether

to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content.”). To “curtail that risk,” the law or policy “must contain ‘narrow, objective, and definite standards to guide the licensing authority.’” *Forsyth Cnty.*, 505 U.S. at 131 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969)).

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

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

Implicitly conceding that Defendants do not have excess discretion under the policy, Mr. Ateba has instead argued that the committees of journalists that oversee the Congressional press galleries—and who are not parties to this case—exercise unconstitutional discretion. But these professional credentialing bodies are not the White House, and Mr. Ateba does not, and cannot, allege that the White House uses these credentialing bodies to achieve an unconstitutional end or uses them with knowledge that they will inflict a constitutional injury. Indeed, Mr. Ateba makes no effort to attribute the decisions of these professional committees to the White House.

Generally, one entity cannot be held legally responsible for the acts of another; instead, a plaintiff must sue the entity that he alleges violates his rights. Mr. Ateba has contended that the state action doctrine allows him to sue the White House for the actions of these non-parties.⁴ But under state action doctrine, a government defendant “can be held responsible for a private decision only when it” either (1) “has exercised coercive power or has provided such significant encouragement,

⁴ *See* PI Reply at 9 & n.6. Plaintiff also disclaimed any argument that the credentialing committees act as the White House’s agent. *Id.*

either overt or covert, that the choice must in law be deemed to be that of the” government, or (2) “the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the State.’” *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974)). Mr. Ateba does not allege that the White House is in any way coercing or pressuring the Gallery Committees to act a certain way on his (or any other journalist’s) application.

Nor can journalist credentialing decisions be considered an exclusive prerogative of government. And Mr. Ateba’s attempts to distinguish this context from that of, for example, bar associations, fall flat. Supreme Court arguments, for example, are open to the public—but Supreme Court rules grant expedited access to members of the Supreme Court bar, membership in which is contingent on membership in a state bar association. Under Mr. Ateba’s theory, the Supreme Court violates the First Amendment by conditioning expedited access to its arguments on another entity’s discretionary judgment about an individual’s “good moral character.” Similarly, the Food and Drug Administration would not violate the First Amendment by hosting a conference on cancer treatments but limiting admission to those certified by the relevant medical boards—even though those boards might assess applicants’ “moral and ethical behavior.”⁵

The state action doctrine therefore does not permit Mr. Ateba to attribute the actions of the credentialing committees to the White House. Instead, Mr. Ateba must rely on the fact that the Press Galleries are themselves acting on behalf of a government entity—Congress. But he has not sued Congress, or the credentialing committees themselves (and cannot, *Consumers Union of United States, Inc. v. Periodical Correspondents’ Ass’n*, 515 F.2d 1341, 1351 (D.C. Cir. 1975)). Mr. Ateba has pointed to no

⁵ The Virginia State Bar, for example, requires that applicants demonstrate to a board of attorneys that the applicant is “of honest demeanor and good moral character.” See Virginia Board of Bar Examiners, Character and Fitness Requirements, <https://barexam.virginia.gov/cf/cfreq.html>. Similarly, the American Board of Internal Medicine requires that doctors show “moral and ethical behavior in the clinical setting” before it will certify the physician. See American Board of Internal Medicine, Medical Oncology Policies, General Requirements, <https://www.abim.org/certification/policies/internal-medicine-subspecialty-policies/medical-oncology.aspx>.

doctrine that would allow him to challenge a non-party's policies when that party's independent actions are not attributable in law to the parties being sued.

In sum, there is no First Amendment right to access the White House, and the White House in establishing press facilities is entitled to limit access to those facilities to bona fide journalists as defined by professional credentialing bodies. *Sherrill*, 569 F.2d at 129. The Hard Pass Policy—which closely mirrors both the policy that the D.C. Circuit left undisturbed in *Sherrill* in the 1970s, *see id.* at 131 n.22, and also the policies in place during the Trump and Obama Administrations—does not leave White House press officials with discretion to deny a hard pass, much less unbridled discretion, but instead leaves credentialing decisions to professional organizations applying long-settled criteria. Mr. Ateba's claim fails and Defendants are entitled to judgment.

III. The White House has not engaged in viewpoint or content discrimination.

The new Hard Pass Policy adopts objective and facially neutral standards to govern the issuance of a hard pass. Plaintiff argues that the White House has engaged in “content-based regulation and viewpoint discrimination,”⁶ Compl. ¶ 91, by promulgating this facially neutral Hard Pass Policy—a policy that limits access to those “bona fide Washington correspondents” that *Sherrill* specifically references, 569 F.2d at 130. His argument appears not to be that the Hard Pass Policy on its face engages in viewpoint discrimination, but that the policy itself was imposed “to intentionally prevent Mr. Ateba from obtaining hard pass access,” and that the White House “did so by adopting

⁶ The Second Claim for Relief alleges only a claim for “Viewpoint Discrimination,” although the complaint also references a “content-based regulation,” without elaboration. *See* Compl. ¶ 91. The Complaint does not otherwise assert a claim for content discrimination, nor did the PI Motion. *See generally* Compl.; PI Mot. Although such an argument would fail for the same reasons as the claim of viewpoint discrimination, the Court should not consider any content-based discrimination argument because Plaintiff has not properly alleged it. *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) (“A party forfeits an argument by . . . [m]entioning [it] in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones.”).

credentialing criteria specifically designed to exclude Mr. Ateba from eligibility.” Compl. ¶ 91. He cannot show that the issuance of the policy itself constitutes viewpoint or content discrimination.⁷

The government generally cannot regulate speech “based on ‘the specific motivating ideology or the opinion or perspective of the speaker.’” *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). But, as explained, the Hard Pass Policy at issue here is facially neutral and does not take account of journalists’ viewpoints. *See* May Letter at 1. To prevail, then, Mr. Ateba must show that the policy was “intended *sub silentio* to suppress the views of a particular party.” *AFDI*, 901 F.3d at 365. But Plaintiff offers only implausible conjecture, and presents no evidence, that the White House issued the Hard Pass Policy with the specific intent of discriminating against Mr. Ateba’s (unspecified) viewpoint, *i.e.*, based on his “specific motivating ideology or [his] opinion or perspective.” *Reed*, 576 U.S. at 168. His assertions are not sufficient to survive a motion for summary judgment. *See Apprio*, 2022 WL 971001, at *3.

Absent “direct evidence of viewpoint discrimination,” which is not present here, courts have established two ways of showing that the government had discriminatory intent to “suppress a disfavored view,” “retrospective” and “prospective” evidence. *AFDI*, 901 F.3d at 366. Mr. Ateba can show neither. “[R]etrospective” evidence is “evidence from before the decision was taken to close the forum insofar as it may show whether the Government acted in order to suppress a disfavored view.” *Id.* But Mr. Ateba fails to provide *any* evidence that his viewpoint was a motivating factor for the issuance of the Hard Pass Policy—indeed, he does not provide a basis to believe the Policy was targeted at his viewpoint or even identify his viewpoint or ideology. Instead, the allegations he makes support the opposite conclusion: that, to the extent Mr. Ateba was a factor at all, it was his *conduct* that was the basis for the decision.

In his PI briefing and in his Complaint, Mr. Ateba notes that in the weeks before the Hard Pass Policy was issued, he “began to engage in more assertive tactics” during press briefings. PI Mot.

⁷ Because the Congressional committees have not denied his application, and because Plaintiff never applied for a White House hard pass, he cannot challenge a specific denial (a challenge to which would not be ripe); he can challenge only the issuance of the policy itself.

at 15; Compl. ¶¶ 45-51. On March 20, 2023, he interrupted the Press Secretary while she was introducing the cast of the show *Ted Lasso*, resulting in “shouts from other correspondents for ‘decorum.’” Compl. ¶ 49; *see also* PI Mot. at 15. Plaintiff notes that “[t]he White House’s policy changes followed Mr. Ateba’s confrontations with the Press Secretary.” PI Mot. at 16. But even if this temporal linkage were relevant to show intent, *but see AFDI*, 901 F.3d at 366 (noting that claims based on sequencing are “less probative types of retrospective evidence”), his own allegations would show (at most) only that Plaintiff’s conduct in interrupting the Press Secretary and his fellow reporters and interfering with a press conference was the basis for the policy, not that his viewpoint was.⁸ And, of course, many reporters have been critical of the White House, and yet Mr. Ateba does not allege that the Hard Pass Policy was issued to restrict their access (or had that effect).

Furthermore, the premise of Mr. Ateba’s argument is apparently that the White House “adopt[ed] credentialing criteria specifically designed to exclude Mr. Ateba from eligibility.” Compl. ¶ 91. But there is no evidence supporting this allegation. This wholly speculative contention is especially implausible given that the Hard Pass Policy uses essentially the same credentialing standards as have been in effect for decades. Mr. Ateba does not provide evidence—indeed, he does not even allege—that the White House knew that it was impossible for him to be credentialed by one of those organizations (something that still cannot be established, since Mr. Ateba’s application is apparently still pending), much less that it implemented the policy based on that knowledge. And even if that were true—and there is no evidence that it is—there is no evidence that it was Mr. Ateba’s viewpoint, as opposed to his behavior, that was the basis for that action.

Mr. Ateba also ignores that the White House adopted a separate Conduct Policy that specifically addressed the type of disruptive conduct he had been engaging in. *See* May Letter at 2.

⁸ Plaintiff also notes that on June 26, 2023, he “interrupted a fellow correspondent during a daily press briefing,” and “pressed forward with his questioning, despite his fellow correspondents asking him to stop.” Compl. ¶ 51; PI Mot. at 15. Again, this supports the assertion that, if anything, it was his behavior, not his views, that led to the Hard Pass Policy. But, in any event, behavior that happened two months *after* the Hard Pass Policy was announced cannot be “retrospective” evidence of viewpoint discrimination.

That policy set forth the White House’s expectations that journalists would adhere to norms of professional conduct, and provided that violations of those expectations would be addressed by a written warning, an opportunity to respond, and—on repeated infractions—revocation of the journalist’s access to the White House. *Id.* This, too, makes it implausible that the Hard Pass Policy was implemented for some impermissible effect, or to address Mr. Ateba’s misconduct. There would have been no need for the White House to use any policy on renewing hard passes to address Mr. Ateba’s misbehavior because a separate policy—one consistent with *Sherrill* and *Karem* and which Mr. Ateba does not challenge—governs journalist misconduct. Indeed, the White House took the first step in this process by issuing Mr. Ateba a written warning shortly before his hard pass would expire—a step which would have been entirely unnecessary if the White House had planned to terminate his hard pass anyway. *See* Compl. Ex. B, ECF No. 1-2. And, as this Court has noted, even absent a hard pass, the White House has continued to provide Mr. Ateba day pass access, which allows him to “cover most if not all press briefings, allowing him to gather the news and deliver it effectively to his readers.” Mem. Op. & Order 12, ECF No. 21; *see also* Fleischer Decl. ¶ 17.

Plaintiff’s effort to establish “prospective evidence of viewpoint discrimination” similarly fails. “In terms of prospective evidence, most relevant is a lack of evenhandedness in the Government’s actions after the forum is closed.” *AFDI*, 901 F.3d at 366. The sole proffer of such prospective evidence is that his hard pass—like that of more than 440 other journalists—expired under the policy; but as he himself concedes, he never even submitted an application to renew his hard pass or a request for an extension prior to the expiration date. *See* ECF No. 4. Mr. Ateba makes no attempt to show that those journalists whose hard passes also expired came from a single background or espoused disfavored viewpoints. He does not allege that the White House renewed hard passes for other journalists who either did not apply for a hard pass or could not meet the established criteria, much less that those journalists held any particular perspective. Nor can he show that he was singly targeted; rather, he concedes that “over 440” hard passes expired based on the Hard Pass Policy. *See* Compl. ¶ 7; *see also* Fleischer Decl. ¶ 15.

In short, there is no evidence that the White House established the new hard pass criteria because of Mr. Ateba's viewpoint. Defendants are entitled to judgment on his viewpoint discrimination claim.

III. The Secret Service did not violate the APA.

The White House Press Office, not the Secret Service, makes the non-security decisions about which journalists can access the White House. Because of this basic fact, Mr. Ateba's APA challenge to the Hard Pass Policy cannot succeed. The policy is not subject to review under APA standards because it was issued and effectuated by the White House Press Office, a department of the White House Office that is not subject to the APA. *See, e.g., Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971). Plaintiff cannot circumvent those limitations on APA review by bringing his claim against the Secret Service, an entity that merely administered the Hard Pass Policy and played no role in generating the list of press members that the White House Press Office authorizes for a hard pass, or in setting any non-security related criteria for entry. *See* Fleischer Decl. ¶¶ 13–15.

The White House Press Office, not the Secret Service, was responsible for issuing the Hard Pass Policy. As the May 5 policy announcement makes clear, the “policy on press hard passes” was revised by “the White House.” May Letter at 1. That letter further makes clear that “under the policy, all current press passes will expire on July 31,” that specific information will need to be submitted to the White House Press Office's e-mail inbox, *id.*, and that a hard pass will be granted “upon confirmation from the Press Office” that the applicant meets the relevant criteria, *id.* at 2. Furthermore, “comments or questions regarding the proposed policy” would be submitted to the White House Press Office's e-mail. *Id.* In short, the Hard Pass Policy—including the part of the policy that stated that “all current press hard passes will expire on July 31”—is a Press Office policy. *See also* Fleischer Decl. ¶ 13 (“The Secret Service has no role in generating the list of press members that the White House Press Office authorizes for a hard press pass.”). The Secret Service's role is limited to conducting a security investigation for those seeking to access the White House complex. *See* May Letter at 1; Fleischer Decl. ¶ 13; *see also* 18 U.S.C. §§ 3056, 3056A. But Mr. Ateba's hard pass was not

cancelled based on security review; rather it expired (as did *all* unrenewed hard passes) because of the White House’s policy. The Secret Service had nothing to do with this decision, and Mr. Ateba is not challenging any security-related determinations.

To the extent that Mr. Ateba argues that the Hard Pass Policy is nonetheless a Secret Service policy reviewable under the APA because the Secret Service ultimately “terminated Mr. Ateba’s hard pass,” Compl. ¶ 98, since it is the entity that mechanically issues or deactivates a physical pass and admits or denies its holder into the White House Complex, that argument, too, fails. Rather, the policy determination at issue here—that Mr. Ateba’s press pass (and all non-renewed press passes) would expire at the end of July—was made by an entity—the White House Press Office—that is not subject to the APA. That an entity subject to the APA—the Secret Service—may have played an administrative role in carrying out the decision does not transform it into one subject to the APA.

The President and his senior advisors, including the White House Press Office, are not subject to the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). The APA’s definition of “agency,” and thus the scope of the APA’s mandates, does not extend to entities within the Executive Office of the President whose “sole function [is] to advise and assist the President.” *Soucie*, 448 F.2d at 1075; *see also Kissinger v. Reps. Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980); *Citizens for Responsibility & Ethics in Wash. v. Off. of Admin.*, 566 F.3d 219, 223–24 (2009).⁹ The White House Office does not fall within the APA’s scope. *See Sculimbrene v. Reno*, 158 F. Supp. 2d 26, 29 (D.D.C. 2001); *Democracy Forward Found. v. White House Off. of Am. Innovation*, 356 F. Supp. 3d 61, 65 (D.D.C. 2019). Nor, as is most relevant here, is the White House Press Office. *Wang v. Exec. Off. of the President*, No. 07-0891 (JR) 2008 WL 180189, at *1 (D.D.C. Jan. 18, 2008). The Hard Pass Policy—including the

⁹ *Soucie* applied the definition of “agency” currently found in 5 U.S.C. § 551(1). The remaining case law emerged following FOIA’s definition of “agency” after that definition was amended in 1974. In amending FOIA, “Congress thus incorporated in FOIA the APA definition, . . . and added the FOIA definition of agency to expand, rather than limit, its coverage.” *Cotton v. Heyman*, 63 F.3d 1115, 1121 (D.C. Cir. 1995); *see also* 5 U.S.C. §§ 551(1), 552(f). Accordingly, an entity that is not an agency under the FOIA is also not an agency under the APA.

decision to have all hard passes expire at the end of July—thus cannot be challenged under the APA, Compl. ¶¶ 101-02, because its promulgating entity is not subject to the APA.

Nor can Plaintiff challenge those White House actions indirectly through the Secret Service—an agency that applied no discretion, and merely effectuates the White House’s action. *See* Fleischer Decl. ¶¶ 11–13. When an agency is carrying out “action on behalf of the President, involving discretionary authority committed to the President,” such as the invitation of members of the press into the White House by the Press Office, that action is “‘presidential’ and unreviewable under the APA.” *Detroit Int’l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) *aff’d*, 875 F.3d 1132 (D.C. Cir. 2017), *op. amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 402–03 (D. Md. 2011) (similar), *aff’d*, 698 F.3d 171 (4th Cir. 2012); *Tulare Cnty. v. Bush*, 185 F. Supp. 2d 18, 28–29 (D.D.C. 2001) (similar, as to action by the Forest Service “carrying out directives of the President”), *aff’d*, 306 F.3d 1138 (D.C. Cir. 2002).

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

result was necessary to avoid separation of powers concerns, notably a “potentially serious congressional intrusion into the conduct of the President’s daily operations.” *Id.* at 226.

The same logic and result attach here. To protect the President, the Secret Service must physically control access to the White House—and doing that requires issuing physical passes and ensuring that they work properly. The Secret Service is not exercising independent judgment about whether to issue those passes or creating the criteria by which they are issued—it is simply enabling the President’s staff to fulfill their responsibilities.¹⁰ Under *Judicial Watch*, because those policies are being created and executed by an entity not subject to the APA, those policies cannot be challenged indirectly under the APA by virtue of the Secret Service’s (statutorily mandated) protective role.

This basic difference distinguishes the cases cited in Plaintiff’s reply brief in support of his preliminary injunction motion. *See* PI Reply at 15-16. In those cases, the agency action challenged—even if motivated by a Presidential direction—reflected independent action of the agency (usually in the form of rulemaking subject to 5 U.S.C. § 553), and it was that action that was challenged. Here, the action challenged is that of the President’s key staff—to decide who does or does not have a hard pass, and by extension, whom to invite inside the White House—not that of the agency mechanically implementing that direction. Again, just as in *Judicial Watch*, the President must, in some cases, act through other entities—he cannot carry out all of his discretionary actions by himself. But that does not convert those discretionary actions into agency actions challengeable under the APA.

Finally, even if the purely mechanical action of issuing a credential were not categorically exempt from APA review as Presidential action, that action would not be “final agency action” as is necessary to obtain review under the APA. Under the APA, the challenged action must be “final,” *i.e.*, it must mark “the ‘consummation’ of the agency’s decisionmaking process,” and “the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will

¹⁰ As Plaintiff noted in his reply, *see* PI Reply at 16-17, the Secret Service role does play a role in determining whether individuals pose security threats, and thus cannot gain entry to the White House for that basis. But that is not the basis for the action challenged here; indeed, Mr. Ateba has entered the White House West Wing on numerous instances since his hard pass expired.

flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (citation omitted). “[P]ractical consequences” are not sufficient. *Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Comm’n*, 324 F.3d 726, 732 (D.C. Cir. 2003). Mechanically issuing or revoking press credentials satisfies neither of these standards. First, the issuance does not mark the consummation of the *Secret Service’s* “decisionmaking process,” rather, if anything, it marks the consummation of the *White House Press Office’s* decisionmaking process. *See* Fleischer Decl. ¶ 13 (“The Secret Service has no role in generating the list of press members that the White House Press Office authorizes for a hard press pass.”). But even if it were, there are only, at most, practical consequences from that issuance—the Secret Service does not determine whether Plaintiff, or any applicant, has the right to enter the White House (absent security concerns not at issue here); the White House itself makes that determination. And the legal decision to grant entry is the White House’s—which is why the White House is sued for press action determinations. *See Kareem*, 960 F.3d 656. Accordingly, regardless of the legal theory applied, Mr. Ateba cannot succeed in his APA action against the Secret Service.

CONCLUSION

The Court should grant summary judgment to Defendants.

Dated: September 20, 2023

Respectfully submitted,

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LESLEY FARBY
Assistant Director
Federal Programs Branch

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Counsel for Defendants

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

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| _____ |) | |
| Simon ATEBA, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Case No. 1:23-cv-02321-JDB |
| |) | |
| Karine JEAN-PIERRE, in her official |) | |
| capacity as White House Press Secretary, |) | |
| et al. |) | |
| |) | |
| <i>Defendants.</i> |) | |
| _____ |) | |

**THIRD DECLARATION OF NATHAN FLEISCHER
ASSISTANT TO THE SPECIAL AGENT IN CHARGE
PRESIDENTIAL PROTECTIVE DIVISION
UNITED STATES SECRET SERVICE**

I, Nathan Fleischer, do hereby declare, subject to penalty of perjury pursuant to 28 U.S.C. § 1746, as follows:

1. I previously submitted a declaration in support of Defendants’ Opposition to the Plaintiff’s Motion for a Preliminary Injunction, ECF No. 17-1, as well as a supplemental declaration in support of Defendants’ Surreply in Opposition to the Plaintiff’s Motion for a Preliminary Injunction, ECF No. 19-2. I have been asked to file this declaration in support of Defendants’ Motion for Summary Judgment.
2. I make the statements in this declaration in support of Defendants’ Opposition to the Plaintiff’s Motion for a Preliminary Injunction based on my own knowledge and

experience and upon review of information provided to me in my official capacity by others who work in the United States Secret Service.

3. The United States Secret Service (Secret Service) is a protective and law enforcement agency operating under the provisions of Title 18 of the United States Code, sections 3056 and 3056A. The Secret Service is charged with responsibility for the protection of the President and Vice President of the United States and their immediate families, former Presidents of the United States and their spouses, major Presidential and Vice-Presidential candidates, foreign heads of state visiting in the United States, and other high-level governmental officials as designated by statute or by the President. This responsibility is accomplished through both physical protection and the investigation of potential threats to these protectees.
4. I am currently employed as the Assistant to the Special Agent in Charge in the Worker and Visitor Entry System (WAVES) Section of the Presidential Protective Division. I have held that position since June 19, 2022. As the Assistant to the Special Agent in Charge in the WAVES Section of the Presidential Protective Division, I have supervisory responsibility over WAVES. The WAVES section is responsible for the processing and reviewing of all requests for entry to the White House Complex, as well as the issuance of all White House Complex security passes.
5. I have been employed by the Secret Service as a special agent for over fifteen years. Prior to becoming the Assistant to the Special Agent in Charge in the WAVES Section of the Presidential Protective Division, I worked as an Assistant to the

Special Agent in Charge in the Counter Assault Division of the Special Operations Division. I have also served as a member of Counter Assault Team for six years and as an instructor for the Counter Assault program. Prior to that time, I worked in the Washington Field Office as a special agent conducting investigations of financial crimes and performing a variety of protection assignments.

White House Complex Entry Passes and Processes

6. In furtherance of the protective mission, the Secret Service issues passes to those individuals seeking access to the White House Complex. There are three types of press passes that can be issued for access to the White House complex. These are the permanent press pass (sometimes called a “hard” pass), a temporary press pass (sometimes called a “day” pass), and an appointment press pass, which is not at issue here.
7. A hard pass allows a member of the press to access the White House Complex between the hours of 0530-2230. With a hard pass, the press member is authorized to access press offices, the press apron, the North Grounds Stand Up Area, and the Driveway (referred to as “Pebble Beach”) (collectively the “Press Area”).
8. A day pass also allows a member of the press to access the White House Complex between the hours of 0530-2230. With a day pass, the press member must initially be escorted from the entrance checkpoint to the Press Area, but once there has access to the same areas as those press members with a hard pass. The press member does not need to be escorted once they have entered the Press Area.

9. A day pass is acquired by filling out a link to the WAVES system that is generated by the White House Press Office. The Secret Service does not have a role in determining who the White House Press Office invites to fill out a WAVES link. An applicant will fill out a form that requires biographical data such as the press member's full name, date of birth, and social security number. This is the same process utilized by routine visitors to the White House Complex. Once the USSS conducts the necessary security checks, the press member is then cleared to enter the White House Complex.
10. As a practical matter, a press member with a day pass may not get through the security checkpoint as quickly as those press members with a hard pass because the Uniformed Division Officer must check the press member's photo identification against the identifying information provided in the WAVES system. On average, it may take one minute longer and rarely would it exceed two minutes longer for those press members with a day press pass to clear security than those with a hard pass. Once through security, the press member with a day pass might also need to wait for his or her escort to arrive at the checkpoint to escort them to the Press Area.

The Secret Service's Role in the Issuance of Hard Passes

11. With respect to the issuance of hard passes, the White House Press Office provides the United States Secret Service WAVES section with a list of the names and requisite personal identifying information of those members of the press that have met the Press Office's criteria for obtaining or renewing a hard pass to the White House Complex.

12. The Secret Service WAVES Section performs the necessary security checks with respect to those members of the press on the hard pass list provided by the Press Office. If an individual member of the press successfully passes the security screening, and does not currently possess a hard pass, the White House Press Office will make an appointment for that press member to come to the White House Pass Office, which is operated by the Secret Service, to have their picture taken in order to create a hard pass. If the press person has an existing hard pass, the WAVES section will renew the existing hard pass by extending the expiration date in WAVES.
13. The Secret Service has no role in generating the list of press members that the White House Press Office authorizes for a hard pass. The Secret Service's role in the process of authorizing entry into the White House complex is limited to conducting the necessary security checks and the issuance/renewal of the physical hard pass to the individual press member.
14. The Secret Service has not changed its policy, procedure, or position with respect to its role in the issuance of press passes of any type.
15. On August 1, 2023, the White House Press Office instructed the Secret Service to deactivate the hard passes that did not meet the White House Press Office's requirements for renewal, including Mr. Ateba's. Approximately 500 hard passes were deactivated.

Simon Ateba's Access to the White House Complex

16. Simon Ateba did not seek to obtain a day pass to enter the White House Complex between when his hard pass expired on July 31, 2023 and when he submitted a

WAVES request the morning of Monday, August 28, 2023. Mr. Ateba was authorized through the WAVES system to access the White House Complex that same date, although he did not access the White House Complex that day.

17. Since August 28, 2023, Mr. Ateba has requested day pass access to the White House and he was authorized through the WAVES system to access the White House Complex each time he sought entry. I further understand that Mr. Ateba entered the White House on several of those occasions.

APA Claim

18. I have been advised that Count III of Plaintiff's complaint alleges that the Secret Service violated the Administrative Procedure Act by deactivating Mr. Ateba's hard pass. The Secret Service did not make any decision to deny Mr. Ateba a hard pass; rather, the White House Press Office included Mr. Ateba's name on a list of hard passes that did not meet the requirements for renewal under the existing hard pass guidelines. The Secret Service deactivated unrenewed hard passes, including Mr. Ateba's, at the White House Press Office's direction.

In accordance with 28 U.S.C. § 1746, I hereby certify and declare under penalty of perjury that the foregoing is true and correct.

9/19/2023

Date

Nathan Fleischer

Nathan Fleischer
Assistant to the Special Agent in Charge
Presidential Protective Division
United States Secret Service

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| |) | |
| Simon ATEBA, |) | |
| |) | |
| <i>Plaintiff,</i> |) | |
| |) | |
| v. |) | Case No. 1:23-cv-02321-JDB |
| |) | |
| Karine JEAN-PIERRE, in her official capacity as White House Press Secretary, et al.) |) | |
| |) | |
| <i>Defendants.</i> |) | |
| |) | |

**DEFENDANTS’ STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7(h), Defendants submit this Statement of Material Facts as to Which There is No Genuine Dispute.

1. White House press access is determined by the White House Press Office, Third Fleischer Decl. ¶¶ 9, 11, subject to a U.S. Secret Service security review, *id.* ¶¶ 9, 12.

2. To access the White House to attend press briefings, journalists must obtain a press pass. There are three types of press passes: (1) a “permanent press pass,” sometimes called a “hard pass”; (2) a “temporary press pass,” sometimes called a “day pass”; and (3) an appointment press pass. *Id.* ¶ 6.

3. To obtain a day pass, a journalist must complete a brief online form for each day that he seeks access, and then must be escorted through security. *Id.* ¶¶ 8-10.

4. To obtain a hard pass, a journalist must satisfy the White House Press Office’s established criteria and pass the U.S. Secret Service security review. *Id.* ¶¶ 11-13.

5. A hard pass and a day pass allow the pass holder to access the same areas of the White House complex for the same hours. *Id.* ¶¶ 7-8.

6. Plaintiff Simon Ateba is a journalist for Today News Africa and has covered the White House for five years. Pl.'s Verified Compl. ¶ 3, ECF No. 1 ("Compl."). As a journalist covering the White House, he sometimes attends briefings in the White House briefing room. *Id.* ¶ 41.

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

8. On May 5, 2023, the White House announced that existing hard passes would expire on July 31, 2023, and that renewal applications must demonstrate compliance with six criteria. Compl., Ex. A, Letter from White House Press Office to All Hard Pass Holders (May 5, 2023), ECF No. 1-1 ("May Letter").

9. Those six criteria are:

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

Service will determine eligibility based on whether the applicant presents a potential risk to the safety or security of the President, the Vice President, or the White House complex.

See May Letter.

10. On May 5, 2023, simultaneous to the Hard Pass Policy, the White House also announced a “Conduct Policy” that outlined procedures for revoking a hard pass based on a journalist’s conduct at the White House. *See* May Letter.

11. On June 26, 2023, Mr. Ateba caused a disruption at the White House press briefing. Compl. ¶ 51.

12. On July 11, 2023, The White House Press Office issued a formal warning letter to Mr. Ateba under the Conduct Policy. The letter advised Mr. Ateba that his conduct at the June 26, 2023, press briefing was unacceptable and that future disruptions may result in suspension or revocation of his hard pass. *See* Compl. Ex. B, ECF No. 1-2.

13. Mr. Ateba did not submit an application to renew his hard pass before it expired. Pl.’s Notice of Errata for Verified Compl., ECF No. 4.

14. On August 1, 2023, the White House Press Office directed the Secret Service to deactivate the hard passes for approximately 500 journalists who had not met the requirements for renewal. Mr. Ateba was among those whose hard passes the White House Press Office instructed the Secret Service to deactivate. Third Fleischer Decl. ¶ 15.

15. Mr. Ateba remains able to access the White House using the “day pass” system, and has done so since his hard pass was deactivated. Fleischer Decl. ¶ 17.

Dated: September 20, 2023

Respectfully submitted,

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Assistant Director
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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| Simon ATEBA, |) | |
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| Karine JEAN-PIERRE, in her official |) | |
| capacity as White House Press Secretary, et al.) |) | |
| |) | |
| <i>Defendants.</i> |) | |
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[PROPOSED] ORDER

Upon consideration of the Defendants' Motion for Summary Judgment, any opposition and/or reply thereto, and the entire record, it is hereby ORDERED that the Motion is GRANTED and that judgment be entered in favor of Defendants on all counts.

SO ORDERED.

Judge John D. Bates