

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

**DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND REPLY IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff asserts a First Amendment right to expedited access to certain areas of the White House. There is no such right, and Plaintiff's efforts to convert the White House's management of its hard pass system into a First Amendment claim fail as a matter of law. The White House's neutral and objective criteria for issuing a hard pass, including its reliance on a third-party credentialing body, are reasonable and satisfy constitutional scrutiny. Plaintiff's Administrative Procedure Act claim against the Secret Service also fails as a matter of law; Plaintiff does not address the numerous cases explaining that an agency's ministerial acts under Presidential direction are not challengeable under the APA. And Plaintiff's efforts to avoid judgment on his viewpoint discrimination claim must be rejected: Plaintiff has not alleged a plausible theory of viewpoint discrimination; he is not entitled to a fishing expedition to try to reel one in.

ARGUMENT

I. Mr. Ateba still fails to identify any cognizable First Amendment injury.

Mr. Ateba fails to articulate a cognizable First Amendment injury that the Hard Pass Policy imposes upon him. *See* Pl.'s Opp'n, ECF No. 23, at 17-18. The First Amendment does not protect a right to "access" the hard pass system because that system is not itself a forum one accesses for expression or other First Amendment activities; it is one of various methods for controlling access to certain areas of the White House. And even assuming Mr. Ateba has a First Amendment right to access the press areas, he has not suffered any cognizable First Amendment injury because—unlike previous cases challenging White House press pass policies—he has not been denied access to those areas. As this Court has already observed, Mr. Ateba "can still access the White House with a day pass." Op. at 8, ECF No. 21; *see also id.* (noting that in *Karem v. Trump*, 960 F.3d 656, 665 (D.C. Cir. 2020), the reporter "was actually unable to access the White House"). All that is left for Plaintiff to assert, then, is a First Amendment right to *a particular means* of accessing areas of the White House that are not generally open to the public. But no such right exists, and Mr. Ateba identifies no authority to suggest otherwise.

Mr. Ateba suggests that the relative administrative burden of using the day pass system

constitutes a First Amendment injury. *See, e.g.*, Pl.’s Opp’n at 5. But encountering minor administrative burdens for access to White House press areas does not inflict cognizable First Amendment injuries. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality op.) (explaining that First Amendment “burden” cases are “concerned with the freedom of the media to *communicate* information once it is obtained,” not “access” to information); *id.* at 10 (“[N]othing in the Court’s holding [in *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)] implied a special privilege of *access* to information as distinguished from a right to publish information which has been obtained; *Grosjean* dealt only with government attempts to burden and restrain a newspaper’s communication with the public.”); *cf. Bell v. Wolfish*, 441 U.S. 520, 552 (1979) (“To the limited extent the rule might possibly increase the cost of obtaining published materials, this Court has held that where ‘other avenues’ remain available for the receipt of materials by inmates, the loss of ‘cost advantages does not fundamentally implicate *free speech* values.” (citation omitted)).

Nor does the fact that some journalists must use the day pass system inflict a cognizable First Amendment injury. Indeed, the cases Mr. Ateba cites for the proposition that the Government must treat all journalists identically stand for something else entirely: that journalists enjoy no greater (or lesser) right of access than does the public generally. *E.g., Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1025 (D.C. Cir.) (“We begin by noting that the Post’s status as a member of the institutional press gives it no greater constitutional interest in free expression than that held by individuals.”), *rev’d on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc). Other cases he cites are even less on point. *See Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 605 (1982) (criminal trials are open to the public, including journalists); *Huminski v. Corsones*, 396 F.3d 53, 83 (2d Cir. 2005) (similar).¹ Indeed,

¹ And as the Seventh Circuit has explained, *American Broadcasting Companies, Inc. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977)—which arose in the extraordinary posture of an oral ruling on an emergency basis and which conditioned the plaintiff’s access on other media companies’ not withdrawing from the event—is difficult to reconcile with modern First Amendment doctrine and of limited vitality today. *See John K. MacIver Inst. v. Evers*, 994 F.3d 602, 612-13 (7th Cir. 2021).

Plaintiff implicitly concedes that he does not mean that all journalists are entitled to the same access; he acknowledges, for example, that he is not entitled to access areas “not usually open to the press” even if other members of the press are able to do so. *See* Pl.’s Opp’n at 6 (citing *MacIver Inst.*, 994 F.2d at 607, 612).² *Cf. The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006) (no cognizable First Amendment injury from “differential treatment” of reporters such as “granting them unequal access to nonpublic information”).

Last, Mr. Ateba at times suggests that the protected activity at issue is “express[ing] his ideas about topics he believes are newsworthy” by asking his questions at a press briefing. Pl.’s Opp’n at 8. But he fails even to allege, much less show, that the day pass system that remains available to him prevents him from doing so. More fundamentally, and as he concedes, he has no First Amendment right to be called on to ask a question at a press briefing. Pl.’s Opp’n at 5.

Mr. Ateba’s failure to directly connect the loss of his hard pass to any specific and cognizable First Amendment injury is fatal to his facial challenge to the Hard Pass Policy.

II. The Hard Pass Policy is constitutional.

A hard pass is not required to access the White House press areas; as Plaintiff acknowledges, it is just one means of doing so. The White House—following decades of precedent—has reasonably limited that specific means to those journalists who are credentialed by an outside professional body, while directing those ineligible for a hard pass to the day pass system. Because the Hard Pass Policy does not exclude Mr. Ateba from the press areas, it does not matter how the press areas are classified (whether as a non-forum or nonpublic forum or limited forum). Nor does it matter whether the “unbridled discretion” doctrine properly applies in this context and, if so, whether the policy would violate it. Those questions would matter only if the Hard Pass Policy restricted Mr. Ateba’s First Amendment activities; it does not. Nonetheless, Mr. Ateba errs in his analysis of those issues.

² Plaintiff’s parenthetical description of *MacIver* is misleading. The governor was holding a press conference, not a briefing in his “private” conference room. *See id.* at 607 (describing four categories of events); *id.* at 610 (explaining which event type was at issue).

1. *Forum analysis is the wrong lens for assessing Plaintiff's First Amendment claim, but even if it were useful, only the standards applicable to a nonpublic forum apply.*

Mr. Ateba now contends that forum analysis is appropriate, *but see* PI Reply at 5, and that the White House press areas are a “limited public forum.” As Defendants previously explained, Defs.’ Mot., ECF No. 22-1, at 7, forum analysis is the wrong approach to analyzing the First Amendment claims in this context. Forum analysis does not remotely fit Mr. Ateba’s specific claim to access to a hard pass. But forum analysis also does not fit the broader context of access to the White House press areas: newsgathering is undoubtedly protected by the First Amendment, but it is not itself the kind of communicative activity for which forum analysis is apposite. *See Price v. Garland*, 45 F.4th 1059, 1070 (D.C. Cir. 2022); *see also Houchins*, 438 U.S. at 9-10 (distinguishing “freedom of the media to *communicate* information” from right to compel “access to it on demand”); *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (rejecting facial challenge when “[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses” but instead “nothing more than a governmental denial of access to information in its possession”).

But even if the Court were to apply forum analysis, the White House press areas would not properly be classified as a limited public forum, and the standards governing access to such a forum would not apply. A “limited public forum” is one where “the Government has ‘create[d] a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.’” *Price*, 45 F.4th at 1068 (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 470 (2009)). But the government has created only a nonpublic forum “when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, obtain permission to use it.” *Arkansas Education Television Commission v. Forbes*, 523 U.S. 666, 679 (1998) (citation omitted). To gain access to the White House, press members require individualized permission; the press areas, if any type of forum, are therefore a nonpublic one.

Mr. Ateba rejects the concept of limits on journalist access to the White House press areas, insisting instead that those areas are (and must be) open to anyone “engaged in journalism [and] who

want[s] to cover the White House,” Pl.’s Opp’n at 9.³ Under his view, the White House would be required to grant on-demand access via a hard pass to *anyone* who asserted that status—including, for example, anyone who posts about Executive Branch happenings on social media and describes themselves as a journalist. But as the Supreme Court has recognized, such an all-or-nothing view is ultimately counterproductive; if governments must choose between unrestricted access and no access, sometimes they will have to choose the latter and will thereby deprive the public of information that would otherwise have been available. *See Forbes*, 523 U.S. at 680 (allowing greater restrictions in nonpublic fora avoids an “all-or-nothing choice” where the government “might not open the property at all”). The press areas cannot, then, be a limited public forum in the way Mr. Ateba imagines.

2. *The unbridled discretion doctrine does not apply.*

Whether viewed outside the lens of forum analysis or as a nonpublic forum, the unbridled discretion doctrine does not apply. It is “[i]mplicit in the concept of the nonpublic forum” that the government retains “the right to make distinctions in access” based on “speaker identity.” *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 49 (1983) (rejecting claim to access to nonpublic forum where access required principal’s permission). Even restrictions which “may be impermissible in a public forum” are “inherent and inescapable in the process of limiting a nonpublic forum to activities compatible” with its intended purpose. *Id.* Here, that means limiting expedited access to credentialed journalists—a distinction “based on the *status*” of the journalists, “rather than their views.” *Id.*

As the Supreme Court made clear in *Forbes*, in a nonpublic forum the government is free to exercise broad discretion—even “nearly limitless discretion,” 523 U.S. at 686 (Stevens, J., dissenting)—when making decisions about who can access the nonpublic forum. *See* Defs.’ Mot. at 9-

³ It bears emphasis that Mr. Ateba is categorically mistaken in this regard. Hard pass access is limited to those who (unlike plaintiff) satisfy the published criteria—including possession of the requisite credential. Thus, even if the White House had created a limited public forum by allowing hard passes for certain journalists, Mr. Ateba would not fall within “the particular class” of people that forum is generally open to. *Cf. Sherrill v. Knight*, 569 F.2d 124, 129 & n.19 (D.C. Cir. 1977) (plaintiff there challenged denial of hard pass when he was a credentialed and “bona fide Washington-based journalist[]” to whom the press areas were understood to be open).

10. The cases applying the unbridled discretion doctrine all concern standards governing expressive activity. *E.g.*, *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988) (doctrine applies “when a licensing statute allegedly vests unbridled discretion in a government official over whether to *permit or deny expressive activity*” (emphasis added)). As the Supreme Court has long recognized, the ability to *gather* the news enjoys more limited First Amendment protections than the right to *disseminate* the news. *See Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (the “right to speak and publish does not carry with it an unrestrained right to gather information”); *see also Houchins*, 438 U.S. at 9 (distinguishing between “freedom of the media to *communicate* information once it is obtained” from ability to “*compel* the government to provide the media with information or access” (emphasis in original)). It would be a “category error” to extend the unbridled discretion doctrine beyond its proper reach to standards used for who is allowed to access the White House for newsgathering. *Price*, 45 F.4th at 1068.

None of the cases that Mr. Ateba cites in supposed contravention of this argument require any different analysis. Those cases do not apply the unbridled discretion doctrine itself, but merely consider whether, in the specific circumstances before them, the challenged regulations were “reasonable” regulations of a nonpublic forum.⁴ *See, e.g., AFDI v. WMATA*, 901 F.3d 356, 372 (D.C. Cir. 2018) (distinguishing various inquiries). Moreover, in each of *Mansky*, *Zukerman*, and *AFDI*, the challenged policies regulated core First Amendment activity: the *expression* of ideas on apparel, postage stamps, and subway advertisements. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018) (the “difficulties” in application are “a serious matter when the whole point of the exercise is to prohibit the expression of political views”); *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 449 (D.C. Cir. 2020) (same); *AFDI*, 901 F.2d at 359-60 (plaintiff sought to “purchas[e] advertising space on transit authority property . . . to express its message on current events and public issues”). Unlike the policies at issue in those cases, the Hard Pass Policy does not restrict expression, but instead regulates one means of access to White House press areas for the purpose of newsgathering. Because this doctrine does not

⁴ *FW/PBS* is even further afield. That case concerned the government’s regulation of expression on the applicant’s *own* private property. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990).

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 at inception.

3. *Even if the unbridled discretion doctrine applies, the Hard Pass Policy does not permit unbridled discretion.*

Even if the doctrine were extended to this context, it would not preclude the White House's policy. At bottom, the White House is simply using, as one of several criteria for determining one means of access to the press areas, the judgment of a longstanding body of professional journalists. Because access to the White House press areas is limited to journalists, this is a reasonable and viewpoint neutral approach consistent with the nature and purpose of the alleged forum. Whether a journalist does or does not possess an accreditation from a press gallery is an objective standard that does not require the White House to assess applicants' credentials for itself and, accordingly, provides no opportunity for the White House to engage in viewpoint discrimination.

The White House is not responsible for the discretion exercised by the press galleries.⁵ Plaintiff previously disclaimed the argument that the press galleries act as the White House's agent, *see* PI Reply, ECF No. 18, at 9 n.6 (“[T]he state action doctrine, and not traditional principles of agency law, apply here.”), but now embraces it, Pl.'s Opp'n at 16 (“press galleries are agents of the White House”). The Court need not decide whether a *congressional* entity could ever act as the *Executive's* agent (*i.e.*, on behalf of the Executive and subject to its control); the press galleries here do not. Although the White House relies on their credentialing decisions, the press galleries do not exercise any power of the White House when making those decisions and are not subject to the White House's control. Rather, they have long operated and continue to operate independently of the White House. Separating the credentialing

⁵ Mr. Ateba has no real answer to the analogies posed in Defendants' motion concerning public access to Supreme Court arguments or limited access to an oncology conference. *Compare* Defs.' Mot. at 16, *with* Pl.'s Opp'n at 17. Plaintiff ignores the oncology hypothetical and asserts without elaboration that the Supreme Court context “bears little resemblance” to this case. But just like here, the Supreme Court allows some people an alternative, expedited means of attending the proceedings, based in part on third-party credentialing entities—state bars—that often examine applicants' “character and fitness” and withhold credentials based on broad standards. To the extent an analogy must be supported by evidence, the existence of the “bar line” is subject to judicial notice as a fact “generally known within the trial court's territorial jurisdiction.” Fed. R. Evid. 201(b)(1); *see also* U.S. Supreme Court, *Visitor's Guide to Oral Argument*, supremecourt.gov/visiting/visitorsguidetooralargument.aspx.

body from the regulating body, moreover, minimizes the concern about viewpoint discrimination that the unbridled discretion cases address. By denying itself the power to make the “of repute” judgment, the White House has eliminated any risk that it could engage in covert discrimination.

Finally, even if the Court were to scrutinize the press galleries’ standards, they would pass constitutional muster. The phrase “of repute in their profession” is not constitutionally deficient simply because it is incapable of precise definition. Just like the standard that the D.C. Circuit endorsed in *Sherrill*—“potential source of physical danger to the President”—application of the standard may require “exercising expert judgment which frequently must be subjective in nature.” 569 F.2d at 130. But the term provides a meaningful basis for judgment: established norms of journalistic professionalism look to issues like avoidance of conflicts of interest and plagiarism. *See, e.g.*, Society of Professional Journalists, *Code of Ethics*, <https://www.spj.org/pdf/spj-code-of-ethics-poster.pdf>; Reuters, *Standards and Values*, <https://www.reutersagency.com/en/about/standards-values/>; *MacIver*, 994 F.3d at 606 (quoting credentialing criteria which elaborate on the “repute” standard). *McDaniel v. Lombardi*, which Mr. Ateba cites to suggest that “reputable” imparts too much discretion, is too far afield to guide the Court here. For one, that case arose outside the journalism context and the term’s associated meaning—it concerned the selection of “reputable citizens” to witness executions. For another, the district court held only that the absence of “direct evidence of viewpoint discrimination” did not warrant dismissal of a claim based on allegations that the prison director “has sole decision-making authority when selecting execution witnesses and there is no official policy for how that decision is made.” 227 F. Supp. 3d 1032, 1039 (W.D. Mo. 2016). And as the Eighth Circuit later explained, the director’s selection method in that case included expressly inquiring about applicants’ opposition or support for the death penalty. *McDaniel v. Precythe*, 897 F.3d 946, 948 (8th Cir. 2018).

Plaintiff’s remaining points fall flat. Mr. Ateba further contends that the Constitution prohibits the government from delineating among journalists. But the case he cites for that proposition offers no support. Rather, it rejects a claim that journalists—whether of the “institutional” variety or the “citizen” variety—have “any constitutional privilege beyond that of other speakers.” *See Citizens United*

v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010) (citation omitted). But that is precisely what Mr. Ateba seeks through this action: special access to the White House “beyond that” of the public at large.

The Court can easily dispose of Plaintiff’s theory of a procedural violation: the procedural requirements for a timely decision with expedited judicial review do not apply outside the limited context of a “prepublication license deemed a denial of liberty since the time of John Milton,” like a “classic censorship scheme.” *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322-23 (2002) (holding that procedural time limit requirements do not apply in unbridled discretion challenge to restriction on access to public forum); *see also Boardley v. U.S. Dep’t of Interior*, 615 F.3d 508, 518 (D.C. Cir. 2010).

The White House has properly limited expedited access to its press areas to credentialed journalists. Its policy—which, again, does not prevent Mr. Ateba from continuing to access the press areas—essentially mirrors the policy that has been in place for most of the last fifty years, and gives White House officials neutral and objective criteria to use when assessing requests for hard-pass access. The Court should enter judgment for Defendants on Plaintiff’s unbridled discretion claim.

III. The Court should reject efforts to add new claims in summary judgment briefing.

At various points, Plaintiff appears to make a claim based on the holdings of *Sherrill* and *Karem*. But those cases, despite their First Amendment overtones, are due process cases. *See Sherrill*, 569 F.2d at 130; *Karem*, 960 F.3d at 665. *Sherrill* required the publication of standards for issuing press passes and notice and an opportunity to be heard if a pass is denied. 569 F.2d at 130-31; *see also Acosta* Oral Decision, ECF No. 24-3, at 6:12-15 (explaining that *Sherrill* “stands for the Fifth Amendment’s due process clause protects a reporter’s First Amendment liberty interest in a White House press pass”); *id.* at 15:13-15 (“I want to make very clear . . . I have not determined that the First Amendment was violated here.”). The First Amendment interests at stake rendered the interest in a hard pass a “liberty interest” protected by the Fifth Amendment—the First Amendment did not itself dictate these procedures. This point was underscored by the D.C. Circuit in *Karem*, which explained that *Sherrill* requires that “a duly issued hard pass may not be suspended without due process.” 960 F.3d at 665. Regardless, any right that *Sherrill* recognized is limited to those who met the hard pass criteria—“bona

bona fide Washington-based journalists” who held the required congressional press credential that “verifies the ‘professional credentials’ of the applicant.” 569 F.2d at 129 & n.19. There is nothing “arbitrary” about limiting hard passes to individuals credentialed by an outside professional body. And in any event, Plaintiff does not and cannot bring a due process challenge to the Hard Pass Policy—he was provided notice of that policy before it was implemented and an opportunity to be heard, *see* May Letter, ECF No. 1-1—an opportunity he did not exercise.

Plaintiff also asserts, for the first time, a claim “[i]ndependent from the unbridled discretion” doctrine: that the “hard pass criteria are arbitrary and unreasonable” because they turn on credentialing decisions “from another branch of government.” Pl.’s Opp’n at 15. Plaintiff did not assert this claim in his Complaint, *see, e.g.*, Compl. ¶¶ 83-103 (listing claims for relief). A party cannot amend a pleading through summary judgment briefing. *He Depu v. Yahoo! Inc.*, 306 F. Supp. 3d 181, 189 n.5 (D.D.C. 2018). Regardless, this claim fails. It is not irrational for the White House to rely on an outside body of journalism professionals to assess the credentials of those seeking expedited access to the White House press areas; these entities have over a century of experience and their credentials are a reasonable heuristic for identifying bona fide journalists and ensuring the White House press areas are properly limited to those genuinely engaged in journalistic pursuits.

IV. Plaintiff’s APA claim is legally untenable.

Plaintiff concedes that the White House Press Office “issued the policy criteria” at issue here. Pl.’s Opp’n at 19. He does not contest that this White House Press Office policy stated that “all current press passes will expire on July 31,” May Letter at 1, and that because of that policy, his hard pass expired. And he does not contest that the White House Press Office is not subject to the APA.

As courts have repeatedly held—in authority Plaintiff completely ignores—“an agency’s action on behalf of the President, *involving discretionary authority committed to the President*, is ‘presidential’ and unreviewable under the APA.” *Detroit Int’l Bridge Co. v. Canada*, 189 F. Supp. 3d 85, 100 (D.D.C. 2016) (emphasis added) *aff’d*, 875 F.3d 1132 (D.C. Cir. 2017), *op. amended and superseded*, 883 F.3d 895 (D.C. Cir. 2018); *see also* Defs.’ Mot. at 23 (collecting cases). That distinction resolves this case. The President,

through the White House Press Office, has the independent and uncontested authority to set the non-security standards for White House press passes. And while agency action undertaken at the President's direction may sometimes be reviewable under the APA, a Presidential directive to an agency to implement his *own* discretionary authority is not. When the Secret Service activates or deactivates a hard pass, it is effectuating the White House's decision, not its own. Neither the White House's decision itself nor the Secret Service's subsequent implementation of that decision is reviewable under the APA. To conclude otherwise would eviscerate the APA's exception for the President, *see Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992), and would constitute "a potentially serious congressional intrusion into the conduct of the President's daily operations." *Judicial Watch, Inc. v. United States Secret Service*, 726 F.3d 208, 226 (D.C. Cir. 2013).

Plaintiff's contention that "agency actions implementing a presidential action may be reviewed under the APA, even when the agency accomplishes a presidential directive," Pl.'s Opp'n at 19 (quoting, *e.g.*, *SEIU Local 200 United v. Trump*, 420 F. Supp. 3d 65, 75 (W.D.N.Y. 2019)), is entirely misplaced. Those cases are inapposite. They hold that, when the President directs agencies to exercise *their* authority, the agencies' exercise of their own authority in the form of a regulation or other final agency action is not insulated from review merely because the President started that process. *See SEIU*, 420 F. Supp. 3d at 75 ("while a court cannot review a presidential proclamation under the APA, it can review the validity of a rule that incorporates that proclamation"). All the cases Plaintiff cites are in that context: the agencies are not exercising the President's authority, but their own. *See Chamber of Comm. v. Reich*, 74 F.3d 1322, 1326 (D.C. Cir. 1996) (suggesting that challenge to Department of Labor regulations is reviewable if those regulations "flesh out" an Executive Order); *O.A. v. Trump*, 404 F. Supp. 3d 109, 146 (D.D.C. 2019) (challenge to agency rule could be challenged under the APA).

Two final points. First, while the Secret Service does have an "independent statutory and regulatory role in providing for the security of the President," Pl.'s Opp'n at 20, Plaintiff's hard pass expired at the direction of the White House Press Office; it was not terminated because of any Secret Service security determination. *See* Third Fleischer Decl. ¶¶ 16-17. Second, Plaintiff's statement that

the White House’s determination that hard passes would expire on July 31 is *Secret Service* final agency action because “the Secret Service’s termination of Mr. Ateba’s hard pass is the final word,” Pl.’s Opp’n at 21, misses the point. For an action to be “final agency action” it must be the consummation of the *agency*’s decision-making process *and* one which determines rights or obligations or from which “legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted). Plaintiff never explains how the *White House*’s decision to deactivate unexpired hard passes constitutes the consummation of the *Secret Service*’s “decision-making process,” or how the Secret Service’s mechanical implementation of that decision is an action with “legal consequences”—as is his burden.

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

The White House did not engage in viewpoint or content discrimination in establishing the Hard Pass Policy. Plaintiff’s assertions to the contrary are not plausible even in light of his *pled* allegations—much less his evidentiary showings—and his attempt to forestall summary judgment to conduct discovery should be rejected as a fishing expedition unsupported by a viable complaint.

1. *There are no disputes of material fact and the Court should enter judgment in the Government’s favor.*

Plaintiff does not contest that the Hard Pass Policy is facially neutral, or that he must show that the policy was “intended *sub silentio* to suppress the *views* of a particular party.” *AFDI*, 901 F.3d at 365 (emphasis added); Pl.’s Opp’n at 23. Plaintiff is wrong, however, to say that Defendants “bear the burden of proof” of *disproving* his First Amendment claim. Pl.’s Opp’n at 23. Rather, the “plaintiff bears the ‘burden of proving a constitutional violation.’” *Aref v. Holder*, 953 F. Supp. 2d 133, 147 (D.D.C. 2013) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998)). Plaintiff puts the cart before the horse because he has not *pled* facts establishing—and cannot show—viewpoint or content discrimination; only at that time would the burden shift to the government to justify its action under the applicable scrutiny standard.

First, Plaintiff does not actually allege—must less establish—viewpoint or content discrimination. “[V]iewpoint discrimination . . . occurs when a government regulation ‘targets not subject matter, but particular views taken by speakers on a subject.’ Viewpoint discrimination is based on ‘the specific motivating ideology or the opinion or perspective of the speaker.’” *True the Vote, Inc.*

v. IRS, 831 F.3d 551, 560 (D.C. Cir. 2016) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 929 (1995)). “Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). At no point does Plaintiff establish or even allege facts showing that the Government issued the Hard Pass Policy because of his ideology, opinion, perspective, ideas, or message. He never even explains what those views are. *See* Defs.’ Mot. at 18. He does not allege that the Government took action against him because he expressed a particular viewpoint or represents a particular perspective. Rather, even if Plaintiff could establish that Government intended to take action against him, the most the sole allegations (and evidence) that he presents could suggest is that the action was based on his *behavior* at a press conference, not based on his ideology. *See* Pl.’s Opp’n at 24. Even if that had been the basis for the decision to issue the Hard Pass Policy (as opposed to the Conduct Policy), it is not viewpoint or content discrimination to take action based on a “content-neutral desire to present [a person’s] badgering, constant interruptions, and disregard for the rules of decorum,” *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 281 (3d Cir. 2004).

Second, even assuming that he could bring a viewpoint discrimination claim absent allegations that the Government discriminated against him because of his viewpoint, Plaintiff fails to plead facts, much less present evidence, that the Hard Pass Policy was adopted with the “inten[t] *sub silentio* to suppress [his] views.” *AFDI*, 901 F.3d at 365. He first argues that the almost seven-week gap between his conduct at the *Ted Lasso* press conference and the issuance of the Hard Pass Policy establishes “temporal proximity” that establishes “an inference of discrimination.” Pl.’s Opp’n at 24. But the cases he cites involve Title VII’s burden-shifting framework, not viewpoint discrimination, and those cases have been superseded by more recent D.C. Circuit case law emphasizing that “mere temporal proximity . . . support[s] an inference of causation ‘only when the two events are very close in time.’” *Pueschel v. Chao*, 955 F.3d 163, 167 (D.C. Cir. 2020) (citation omitted). There is no indication that employment case law applies here. Moreover, the D.C. Circuit has cautioned that “[t]he specific sequence of events leading up to the challenged decision” is the relevant, albeit “less probative,”

standard for retrospective evidence of viewpoint discrimination. *AFDI*, 901 F.3d at 366. Here, the White House was simply re-establishing essentially the same hard pass standards that have been in place for most of the White House’s recent history, Defs.’ Mot. at 3, which is not evidence of an unexplained departure from the “normal procedural sequence.” *AFDI*, 901 F.3d at 366.

The only other piece of retrospective evidence Plaintiff offers is a *New York Post* article for the proposition that “the change was ‘widely believed to be spurred by interest in stripping African journalist Simon Ateba of his access to the briefing room.’” Pl.’s Opp’n at 24. This article is hearsay several times over, and moreover hearsay about other people’s speculation. *See* Fed. R. Evid. 802 (hearsay); Fed. R. Evid. 601 (personal knowledge). “[S]heer hearsay . . . counts for nothing on summary judgment.” *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007) (citation omitted). Even if it were admissible, it doesn’t support Plaintiff’s point—rather, it refers to the separate White House *Conduct* Policy, and even then it states that “people involved in discussions said that White House staff had talked about making changes even before Ateba became a minor celebrity.”⁶ And of course, nowhere does it say anything about Plaintiff’s viewpoint or the content of his reporting.

Plaintiff provides no evidence of, or even allegations of, prospective evidence, the “most relevant [of which] is a lack of evenhandedness in the Government actions after the forum is closed.” *AFDI*, 901 F.3d at 366. He does not allege, much less present, facts indicating that other journalists who shared his views—whatever they are—were similarly unable to renew their hard passes—despite pleading that the hard passes of over 440 other journalists also expired. Compl. ¶ 7. He states that he has not received a credential from a Congressional Press Gallery, Pl.’s Opp’n at 24, but he pleads no facts and provides no evidence to raise even a suspicion that the White House would have known he couldn’t receive a credential (indeed, his application has not even been denied), much less selected that credential—which dates back to at least *Sherrill*—on that basis. Such an allegation is not plausible. And he has no response to the fact that the White House imposed a *separate* Conduct Policy at the

⁶ Steven Nelson, White House unveils new press badge restrictions, rules for access, *The New York Post* (May 5, 2023), <https://nypost.com/2023/05/05/white-house-unveils-new-press-badge-restrictions-rules-for-access>.

same time, which would allow for action based on his behavior, and which makes it even more implausible that the Hard Pass Policy was implemented for an impermissible reason.⁷

2. *There is no basis for discovery under Rule 56(d).*

Plaintiff seeks to forestall summary judgment here on the basis that he requires additional information through discovery in order to defeat Defendants' motion. This plea fails. Rule 56(d) does not authorize a "fishing expedition." *Am. Ctr. for Law & Just. v. U.S. Dep't of State*, 289 F. Supp. 3d 81, 91 (D.D.C. 2018) (citation omitted). A plaintiff is not entitled to pursue discovery on a legally invalid claim. *See, e.g., Jeffries v. Barr*, 965 F.3d 843, 868 (D.C. Cir. 2020) (Pillard, J., concurring in part and dissenting in part) ("[A] plaintiff who has stated a *legally viable claim* has a right to take discovery into matters in the opposing party's control.") (emphasis added); *Phillips v. Brock & Scott, PLLC*, 2017 WL 3226866, at *6 (D.M.D. July 28, 2017) ("Plaintiff must first properly allege a claim upon which relief can be granted before discovery ensues."). Plaintiff fails even to plead facts stating a claim of viewpoint or content discrimination: he never pleads facts that, taken as true, would establish that the Government discriminated against him based on his viewpoint or content—as Defendants show above and would have shown via a motion to dismiss had this case proceeded in the ordinary course. Plaintiff is thus not entitled to any discovery.

CONCLUSION

The Court should deny Plaintiff's motion for partial summary judgment and enter judgment for Defendants on all counts.

⁷ In passing, Plaintiff appears to challenge the Conduct Policy under *Sherrill*. *See* Pl.'s Opp'n at 25. But the Conduct Policy is not challenged in his complaint and was not the basis for his pass's expiration. And, in any event, Plaintiff was provided notice and an opportunity to be heard regarding the Conduct Policy, *see* May Letter, an opportunity he did not pursue.

Dated: October 11, 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

**DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE DISPUTE**

Pursuant to LCvR 7(h), Defendants submit their response to Plaintiff's Statement of Material Facts As To Which There Is No Genuine Dispute, ECF No. 23-3.

1. The White House has opened its doors to the press as a point of access to the President and his administration. Compl. (ECF 1) ¶ 22. 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).	1. The first sentence is undisputed to the extent that the White House has a process for issuing passes for access to the White House Complex, including to members of the press. Fleischer Decl. ¶ 6. The second sentence is undisputed.
2. 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 ("1st Ateba Decl.") ¶ 8 (ECF 18-1).	2. Defendants do not dispute that day passes are good for one day only, and that holders are instructed to apply for a pass by 5:00pm the day before they seek access. Defendants dispute this sentence to the extent that the White House has provided day passes upon same-day request, including to Mr. Ateba. Second Declaration of Nathan Fleischer ¶¶ 2-3 (ECF 19-2).
3. 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.	3. Undisputed.

4. Sometimes, chaperones who escort day pass holders to the White House Press Area can take up to 45 minutes to arrive. Declaration of Simon Ateba, dated October 4, 2023 (“2d Ateba Decl.”) ¶ 12.b.	4. Undisputed to the extent that chaperones are available at the top of every hour and the waiting period will depend on when during the hour the guest arrives. <i>See</i> Aug. 6, 2023 email, ECF No. 17-2.
5. The additional steps required to access the White House Press Area with a day pass makes it effectively impossible to cover spontaneous newsworthy events. 2d Ateba Decl. ¶ 12.b; Declaration of Simon Ateba, dated August 29, 2023 (ECF No. 18-1) (“1st Ateba Decl.”) ¶¶ 9–11.	5. Disputed. <i>See</i> Supplemental Declaration of Nathan Fleisher (ECF 19-2) ¶¶ 2-3 (Plaintiff submitted request for day pass at 11am and was granted access that same day); Aug. 28 Email of Allyson Bayless (providing Plaintiff one week worth of day passes access links in advance); Mem. Op., at 9 (ECF 21) (“Further, it is possible he would miss an event occurring on short notice because he had not requested credentials in advance. But this latter result may be avoided if Ateba applies for a week’s worth of day passes in advance, even if he is unsure whether he will use them.”).
6. The White House Correspondents Association has described the hard pass as “an essential tool for those who cover the White House.” Br. of Amicus Curiae The White House Correspondents’ Association, <i>Karem v. Trump</i> , Case No. 19-5255 (D.C. Cir. Jan. 13, 2020) at 3 (citation omitted).	6. Undisputed only to the extent that the sentence accurately includes a quote from an amicus brief submitted in separate litigation. Disputed based on the authorities cited in Defendants’ response to Plaintiff’s Material Fact 5, <i>supra</i> .
7. Mr. Ateba applied for and received a hard pass in February 2021. Verified Complaint (“VC”) at ¶ 40.	7. Undisputed.
8. Mr. Ateba’s hard pass “effectively” had no expiration date. ECF No. 17 at 3. It was not scheduled to expire and would automatically renew so long as he continued covering the White House. VC at ¶ 63.	8. Disputed, but immaterial.
9. Since obtaining a hard pass in 2021, Mr. Ateba has rarely received any response—or even acknowledgement—of his questions. VC ¶ 42.	9. Disputed, as “rarely” is undefined. Further, this statement is immaterial as Plaintiff concedes he has no right to ask a question. <i>See</i> Pl.’s Opp’n at. 18.
10. On May 5, 2023—mere weeks after the March 20 “Ted Lasso” incident (a particularly heated confrontation between Mr. Ateba and Defendant Jean-Pierre)—the White House Press Office announced a new policy containing criteria for obtaining and maintaining a hard pass. VC at ¶ 54; VC at Ex. A (ECF No. 1-1), Letter from White House Press Office to All Hard Pass Holders (May 5, 2023). This announcement provided no	10. The first sentence is undisputed, with the exception of “particularly heated confrontation,” which is undefined. The second sentence characterizes the May 5, 2023 letter, which speaks for itself. Defendants dispute any characterization inconsistent with the terms of the letter.

contemporaneous explanation or justification for the new policy.	
11. The New York Post reported the White House’s change to its hard pass policy was “widely believed to be spurred by interest in stripping African journalist Simon Ateba of his access to the briefing room.” VC ¶ 7, Ex. D.	11. Disputed. The statement is inadmissible hearsay within hearsay, FRE 802, and the article’s author evidently lacks personal knowledge of the statement, FRE 602. Furthermore, the article referred to the separate White House Conduct Policy, and further reported that “people involved in discussions said that White House staff had talked about making changes even before Ateba became a minor celebrity.” Steven Nelson, White House unveils new press badge restrictions, rules for access, The New York Post (May 5, 2023), https://nypost.com/2023/05/05/white-house-unveils-new-press-badgerestrictions-rules-for-access .
12. On or about August 1, 2023, The U.S. Secret Service terminated Mr. Ateba’s preexisting hard pass. Def. Statement of Material Facts (ECF No. 22-3) at ¶ 14. As of August 1, 2023, Mr. Ateba’s prior hard pass no longer provided access to the White House complex.	12. Undisputed.
13. The May 5 policy required journalists to obtain press credentials from either the Supreme Court Press Gallery or one of the Congressional Press Galleries. VC at Ex. A.	13. Undisputed.
14. The Supreme Court Press Gallery only issues press passes to journalists who cover the Court full time, which Mr. Ateba does not do. VC ¶ 67.	14. Undisputed
15. The Congressional Press Galleries regulate press credentials in Congress. The executive committee for each press gallery is responsible for screening applicants and issuing credentials. These committees are comprised of journalists at established media outlets, most of which have deep roots in the Washington, D.C. media environment. The committees only issue press credentials to correspondents they deem, in their sole discretion, to be “of repute in their profession.” VC ¶¶ 68, 70–71. 72.	15. The first sentence is undisputed. The second sentence is undisputed. The third sentence is disputed to the extent that “established media outlets” and “deep roots” are undefined. The fourth sentence is disputed to the extent that it does not accurately reflect the full standards for credentialing. Defendants refer the Court to those standards for a full and accurate reflection of their terms. <i>See, e.g.</i> , https://periodical.house.gov/accreditation/rules-and-regulations .
16. Congressional Press Gallery credentials typically must be renewed every two years, at the beginning of the new Congressional session. 2d Ateba Decl. at ¶ 11.	16. Undisputed.

17. On June 5, 2023, Mr. Ateba applied for credentials with the Senate Daily Press Gallery. VC ¶¶ 11, 76.	17. Undisputed.
18. On August 30, 2023, Mr. Ateba received notice that his application was under consideration. 2d Ateba Decl. ¶ 10.	18. Undisputed.
19. To date, Mr. Ateba has not been granted a Congressional Press Pass. 2d Ateba Decl. ¶ 10.	19. Undisputed.
20. 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. VC ¶¶ 49–50.	20. Disputed to the extent that “tense exchange and national media attention” are undefined, otherwise admitted.
21. Mr. Ateba regularly “live posts” the White House press briefings on X (formerly Twitter) to his over 500,000 followers. 2d Ateba Decl. ¶ 4.	21. Disputed to the extent that “regularly” and “live posts” are undefined. Admitted to the extent that Mr. Ateba posts on X (formally Twitter).
22. The Congressional Press Gallery executive committees are comprised of a group of journalists who work for news outlets that have a strong institutional foothold in the Washington, D.C. media ecosystem. VC ¶ 71; 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 (discussing the composition of the Congressional Press Galleries executive committees).	22. Disputed to the extent that “strong institutional foothold in the Washington, D.C. media ecosystem” is undefined. Otherwise undisputed.
23. The Secret Service has a statutory role in protective the White House, President, Vice President, and their immediate families. Fleisher Decl. at ¶ 3.	23. Undisputed.

Dated: October 11, 2023

Respectfully submitted,

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

_____)	
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>)	
_____)	

[PROPOSED] ORDER

Upon consideration of the Plaintiff's Cross-Motion for Partial Summary Judgment and for Discovery, ECF No. 23-5, any opposition and/or reply thereto, and the entire record, it is hereby ORDERED that the Motion is DENIED.

SO ORDERED.

Judge John D. Bates