

**NOT YET SCHEDULED FOR ORAL ARGUMENT****APPEAL NO. 24-5004****UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT**

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Simon Ateba,  
*Plaintiff-Appellant,*

v.

Karine Jean-Pierre, *et al.*,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Columbia

Case No. 1:23-cv-02321-JDB / Hon. John D. Bates

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**APPELLANT'S REPLY BRIEF**

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## **Certificate as to Parties, Rulings, and Related Cases**

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**B. Rulings Under Review**

The rulings at issue in this appeal are the Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment of the U.S. District Court for the District of Columbia, dated December 7, 2023.

**C. Related Cases**

Appellant is not aware of any related cases currently pending before this court.

**D. Corporate Disclosure Statement**

Appellant is an individual. Appellant has no parent companies, subsidiaries or affiliates with outstanding public securities.

## TABLE OF CONTENTS

INTRODUCTION .....	1
ARGUMENT .....	2
I. THE DISTRICT COURT CORRECTLY CONCLUDED MR. ATEBA SUFFERED FIRST AMENDMENT INJURY .....	2
A. Appellees’ revocation of Mr. Ateba’s hard pass burdens his First Amendment rights.....	2
B. <i>Price</i> does not apply to newsgathering at a designated press facility.....	4
II. APPELLEES MUST OPERATE THE PRESS AREA CONSISTENT WITH THE UNBRIDLED DISCRETION DOCTRINE .....	8
A. <i>Price</i> does not support the conclusion that the unbridled discretion doctrine is inapplicable at the Press Area.....	8
B. The unbridled discretion doctrine applies at the Press Area under forum analysis.....	10
1. The Press area is a limited public forum where the unbridled discretion doctrine applies.....	10
2. The unbridled discretion doctrine applies in nonpublic fora.....	13
C. The unbridled discretion doctrine is implicated by the decisions of the Congressional Press Galleries.....	14
III. THE HARD-PASS PROGRAM VIOLATES THE UNBRIDLED DISCRETION DOCTRINE .....	16
A. The “of repute” requirement lacks “objective, workable standards.” .....	16
1. Appellees’ argument is not supported by case law.....	19
2. Appellees’ argument is not supported by tradition.....	21
3. Appellees’ argument is not supported by analogy.....	23

B. The lack of deadlines violates the unbridled discretion doctrine. .... 24

C. The lack of judicial review violates the unbridled discretion doctrine. .... 26

IV. THE HARD-PASS PROGRAM IS OTHERWISE CONSTITUTIONALLY UNREASONABLE ..... 27

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

### Cases

<i>ACLU v. Wicomico County</i> , 999 F.2d 780 (4th Cir. 1993).....	4
<i>American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority</i> , 901 F.3d 356 (D.C. Cir. 2018).....	12, 13, 14
<i>Archdiocese of Washington v. Washington Metropolitan Area Transit Authority</i> , 897 F.3d 314, 323 (D.C. Cir. 2018).....	12
<i>Ark. Ed. Tele. Comm’n v. Forbes</i> , 523 U.S. 666 (1998) .....	10
<i>Atlanta J. &amp; Const. v. City of Atlanta Dep’t of Aviation</i> , 322 F.3d 1298 (11th Cir. 2003).....	14
<i>Baltimore Sun Company v. Ehrlich</i> , 437 F.3d 410 (4th Cir. 2006).....	4
<i>Bellion Spirits, LLC v. United States</i> , 7 F.4th 1201 (D.C. Cir. 2021).....	19
<i>Boardley v. Dep’t of the Interior</i> , 615 F.3d 508 (D.C. Cir. 2010).....	20
<i>Brown v. Ent. Merchants Ass’n</i> , 564 U.S. 786 (2011).....	6
<i>Bryant v. Gates</i> , 532 F.3d 888 (D.C. Cir. 2008).....	10, 12
<i>City of Lakewood v. Plain Dealer Publ’g Co.</i> , 486 U.S. 750 (1988) .....	7, 9
<i>Community for Creative Non-Violence v. Turner</i> , 893 F.2d 1387 (D.C. Cir. 1990).....	18
<i>Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.</i> , 601 U.S. 416 (2024) .....	22

<i>Consumers Union v. Periodical Correspondents' Association</i> , 515 F.2d 1341, 1346 (D.C. Cir. 1977) .....	15, 16, 20, 26
<i>Cornelius v. NAACP Legal Def. &amp; Educ. Fund, Inc.</i> , 473 U.S. 788 (1985) .....	11
<i>Cox v. Louisiana</i> , 379 U.S. 559 (1965) .....	19
<i>FEC v. Cruz</i> , 596 U.S. 289 (2022) .....	3, 6
<i>FW/PBS, Inc. v. City of Dallas</i> , 493 U.S. 215 (1990) .....	8, 25
<i>Genusa v. City of Peoria</i> , 619 F.2d 1203 (7th Cir. 1980).....	17
<i>Getty Images News Servs. Corp. v. Dep't of Def.</i> , 193 F. Supp. 2d 112 (D.D.C. 2002).....	9, 13
<i>Gospel Missions of Am. v. Bennett</i> , 951 F. Supp. 1429 (C.D. Cal. 1997).....	17
<i>Harrison v. PPG Industries, Inc.</i> , 446 U.S. 578 (1980) .....	14
<i>Jeannette Rankin Brigade v. Chief of Cap. Police</i> , 342 F. Supp. 575 (D.D.C. 1972), <i>aff'd</i> 409 U.S. 972 (1972) .....	23
<i>John K. MacIver Inst. v. Evers</i> , 994 F.3d 602 (7th Cir. 2021).....	9, 12, 20, 21
<i>Johnson v. Malcolm</i> , No. CV 20-1275 (DWF/BRT), 2020 WL 3491711 (D. Minn. June 26, 2020).....	13
<i>Kaahumanu v. Hawaii</i> , 682 F.3d 789 (9th Cir. 2012).....	14
<i>Karem v. Trump</i> , 960 F.3d 656 (D.C. Cir. 2020).....	2, 4, 5

<i>Kovacs v. Cooper</i> , 336 U.S. 77 (1949) .....	19
<i>Law Students Civil Rights Research Council, Inc. v. Wadmond</i> , 401 U.S. 154 (1971) .....	23
<i>Lewis v. Wilson</i> , 253 F.3d 1077 (8th Cir. 2001).....	14
<i>McDaniel v. Precythe</i> , 897 F.3d 946 (8th Cir. 2018).....	9
<i>Minn. Voters All. v. Mansky</i> , 585 U.S. 1 (2018) .....	13
<i>N.Y. State Rifle &amp; Pistol Ass’n, Inc. v. Bruen</i> , 597 U.S. 1 (2022) (cleaned up) .....	21, 22
<i>NLRB v. Noel Canning</i> , 573 U.S. 513 (2014) .....	22
<i>Price v. Garland</i> , 45 F. 4th 1059 (D.C. Cir. 2022).....	5, 6
<i>Quaker Action Grp. v. Hickel</i> , 421 F.2d 1111 (D.C. Cir. 1969).....	19
<i>Ramos v. Louisiana</i> , 590 U.S. 83 (2020) .....	22
<i>S.A. Restaurants, Inc. v. Deloney</i> , 909 F. Supp. 2d 881 (E.D. Mich. 2012) .....	17
<i>Sammartano v. First Judicial District Court</i> , 303 F.3d 959 (9th Cir. 2002).....	28
<i>Se. Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975) .....	10
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011).....	3



<i>Southworth v. Bd. of Regents of Univ. of Wisc. Sys.</i> , 307 F.3d 566 (7th Cir. 2002).....	7, 14, 15
<i>Stewart v. D.C. Armory Bd.</i> , 863 F.2d 1013 (D.C. Cir. 1988).....	12
<i>TGP Commc'ns, LLC v. Sellers</i> , No. 22-16826, 2022 WL 17484331 (9th Cir. Dec. 5, 2022).....	3, 5, 9, 13
<i>The Pocket Veto Case</i> , 279 U.S. 655 (1929) .....	22
<i>Thomas v. Chicago Park District</i> , 534 U.S. 316 (2002) .....	25
<i>United States v. Brewster</i> , 408 U.S. 501 (1972) .....	27
<i>United States v. Nassif</i> , 97 F.4th 968 (D.C. Cir. 2024).....	11
<i>Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.</i> , 640 F.3d 329 (8th Cir. 2011).....	14
<i>Zukerman v. U.S. Postal Serv.</i> , 961 F.3d 431 (D.C. Cir. 2020).....	13, 14
<b>Other</b>	
<i>Building an Audience Beyond Mainstream Media</i> , Claire Wang, NBCU Academy (Oct. 11, 2023), <a href="https://nbcuacademy.com/substack-newsletter-journalism/">https://nbcuacademy.com/substack-newsletter-journalism/</a> .....	24
<a href="https://www.dailypress.senate.gov/about/standing-committee-of-correspondents/">https://www.dailypress.senate.gov/about/standing-committee-of-correspondents/</a> 24	
<a href="https://www.merriam-webster.com/dictionary/repute">https://www.merriam-webster.com/dictionary/repute</a> .....	17
<i>Karem v. Trump</i> , No. 1:19-cv-02514-JMC, Complaint (ECF 1) .....	4
<i>Karem v. Trump</i> , No. 1:19-cv-02514-JMC, Declaration of Brian Karem (ECF 2-5).....	4

## INTRODUCTION

The guiding principle underlying the unbridled discretion doctrine is that vesting too much judgment in the gatekeepers of First Amendment activity unduly chills such activity and makes it impossible to determine whether the government is discriminating on the basis of viewpoint. Whether considered separately or together, three features of the White House’s hard-pass program implicate this doctrine—the indeterminacy of the Congressional Press Galleries’ “of repute” requirement, the lack of any deadlines for adjudicating Congressional press credential applications, and the fact that journalists are unable to seek meaningful judicial review of application denials.

Moreover, it is constitutionally unreasonable for the White House to require hard-pass holders to demonstrate a need for access to *Congress*. That requirement is entirely unrelated to the purpose of the Press Area, which is to facilitate newsgathering about the *President*. Indeed, the White House did away with the requirement that hard-pass holders have Congressional credentials for over two years, and it has made no showing that the reinstatement of that requirement was reasonably necessary to operate the Press Area.

The Court should reverse.

## ARGUMENT

### **I. THE DISTRICT COURT CORRECTLY CONCLUDED MR. ATEBA SUFFERED FIRST AMENDMENT INJURY**

Appellees argue Mr. Ateba’s injury—the loss of his hard pass and his consequent inability to access the Press Area with the special privileges granted by that pass—is not cognizable under the First Amendment. To be clear, Appellees do not contend Mr. Ateba lacks standing. Instead, Appellees’ argument is that Mr. Ateba’s conceded injury is not a *First Amendment* injury because (1) he can still enter the Press Area with a day pass; and (2) newsgathering is noncommunicative. The district court correctly rejected both arguments.

#### **A. Appellees’ revocation of Mr. Ateba’s hard pass burdens his First Amendment rights.**

As the district court recognized, the First Amendment provides “protections when journalists are denied [access to] areas the government has specifically opened to the press.” JA225. Indeed, in *Sherrill v. Knight*, this Court held that when the government opens the White House Press Area to the press, “the protection afforded newsgathering *under the first amendment* . . . requires that this access not be denied arbitrarily.” 569 F.2d at 129 (emphasis added); *see also Kareem v. Trump*, 960 F.3d 656, 665 (D.C. Cir. 2020) (noting revocation “of a hard pass[] implicates important *first amendment* rights” (emphasis added)). When Appellees revoked Mr. Ateba’s

hard pass, they deprived him of his right to equal access to the Press Area. Under *Sherrill* and *Karem*, this constitutes First Amendment injury.

This conclusion is true despite the fact Mr. Ateba can apply for a day pass. As the district court recognized, requiring Mr. Ateba “to use a day pass burdens [his] . . . access” to the Press Area because “a hard pass is a preferred form of access.” JA229. Specifically, journalists seeking a day pass must apply “each day” they wish to attend the Press Area. JA217. And “a day pass holder must wait on an escort, which can take up to forty-five minutes.” JA229. These burdens on Mr. Ateba’s right to engage in newsgathering constitute First Amendment injury. *FEC v. Cruz*, 596 U.S. 289, 305 (2022) (holding laws may not unduly “burden” First Amendment activity); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011) (noting the “distinction between laws burdening and laws banning speech is but a matter of degree” (citation omitted)). Indeed, the Ninth Circuit has held journalists suffer First Amendment harm from “exclusion . . . from [a press briefing area],” which is a harm that “cannot be rendered de minimis or otherwise mitigated by requiring [them] to avail themselves of a less desirable, even if somewhat effective, alternative.” *TGP Commc’ns, LLC v. Sellers*, No. 22-16826, 2022 WL 17484331, at \*6 (9th Cir. Dec. 5, 2022).

Indeed, this Court has already concluded the revocation of a hard pass constitutes First Amendment injury despite the possibility a journalist may apply for

a day pass. In *Karem*, this Court concluded the “denial of a hard pass[] implicates important first amendment rights.” 960 F.3d at 665. The Court arrived at this conclusion even though according to Mr. Karem’s own Complaint and testimony, the day-pass program was available to him. *See Karem v. Trump*, No. 1:19-cv-02514-JMC, Complaint (ECF 1) ¶ 24 (D.D.C.) (describing availability of day pass and alleging its inferiority vis-à-vis hard pass); *Karem v. Trump*, No. 1:19-cv-02514-JMC, Declaration of Brian Karem (ECF 2-5) ¶ 50 (same). *Karem* thus forecloses Appellees’ argument.

Appellees also invoke *Baltimore Sun Company v. Ehrlich* and *ACLU v. Wicomico County*, but those cases did not involve access restrictions at a designated press area. Instead, *Ehrlich* held a journalist did not have a First Amendment right to compel government employees to respond to press inquiries. 437 F.3d 410, 419–20 (4th Cir. 2006). And *Wicomico County* held a prison did not unlawfully retaliate against a paralegal by denying her expedited access to prisoners alleging wrongdoing. 999 F.2d 780, 785–86 & n.6 (4th Cir. 1993). These cases have no bearing on the First Amendment injury caused by burdens on access to a designated press area.

**B. *Price does not apply to newsgathering at a designated press facility.***

The Government also contends Mr. Ateba has not suffered First Amendment injury because newsgathering is merely “a noncommunicative step in the production

of speech.” Resp. Br. at 18 (quoting *Price v. Garland*, 45 F. 4th 1059, 1068 (D.C. Cir. 2022)). This argument fails for three reasons.

First, while *Price* held *filmmaking* was not sufficiently communicative to warrant application of First Amendment forum analysis, *Price* specifically distinguished *newsgathering* on the ground that newsgathering “serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.” 45 F. 4th at 1071–72 & n.2 (cleaned up). And while *Price* noted “[t]here [was] no historical right of access” to engage in filmmaking in public fora, *id.* at 1070, Appellees admit the White House opened the Press Area for the “purpose of . . . facilitat[ing] journalists’ coverage of the President.” Resp. Br. at 25. Accordingly, *Price* does not apply to newsgathering at the Press Area.

Second, as the district court recognized, the type of newsgathering that occurs at press briefings *is* communicative. Mr. Ateba speaks through his questions, “which express a point of view regarding the events he thinks are worthy of discussion.” JA228; *see also* JA236 (“White House press conferences involve a communicative exchange between the government and news reporters.”). And while Mr. Ateba does not have a right to be “given the floor” at press briefings, Resp. Br. at 20, this is immaterial. Mr. Ateba—like every journalist—has the right to ask questions at the briefing, subject to his adherence to a reasonable code of conduct. *See Karem*, 960 F.3d at 665; *see also TGP*, 2022 WL 17484331, at \*6 (noting whether the

government was required to “interact with” the plaintiff was irrelevant to whether the plaintiff was harmed by exclusion from press briefing). In addition, Mr. Ateba regularly “live posts” White House press briefings on social media, which involves posting his thoughts on the briefing. JA077 ¶ 3–4. This is also communicative.

Third, even if newsgathering were noncommunicative (and it is not), Appellees do not explain why the First Amendment—either through the Speech Clause or the Press Clause—does not protect against burdens on the right to *silently* gather news at a designated press area. Indeed, *Price* held only that First Amendment *forum analysis* does not apply to filmmaking; it did not hold restrictions on filmmaking were *beyond the reach of the First Amendment*. *Id.* at 1069, 1072 (holding restrictions on filmmaking must be viewpoint neutral and constitutionally reasonable). And outside of filmmaking, First Amendment jurisprudence generally does not distinguish among “creating, distributing, or consuming speech.” *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 793 n.1 (2011); *see also Cruz*, 596 U.S. 289 at 305 (concluding burden on election campaign’s repayment of personal funds violated First Amendment). Accordingly, burdens on newsgathering give rise to First Amendment injury.

Shifting tacks, Appellees argue that “even if the First Amendment protects [Mr.] Ateba’s ability to speak once [he is in the Press Area], his mode of entering the building—*i.e.*, with a day pass or a hard pass—is a noncommunicative,

preparatory step in the production of speech.” Resp. Br. at 21; *see also id.* at 23 (contending “[e]ntering the White House with a hard pass is not an expressive act governed by forum analysis”). This argument stretches *Price* far beyond its breaking point. *Every* use of a permit or license is “noncommunicative” in this sense of the word. If accepted, Appellees’ argument would impermissibly allow the government to discriminate among speakers in *every* permitting or licensing regime.

Appellees also point out that Mr. Ateba “has not alleged that seeking entry to the White House through a day pass has ever prevented him from speaking at press conferences.” Resp. Br. at 20; *see also id.* at 32 (noting “the hard pass criteria does not restrict expression”). But this does not matter. As the district court recognized, the burdens on Mr. Ateba’s right to engage in newsgathering caused by the revocation of his hard pass create the distinct “risk of self-censorship.” JA236 (quoting *Southworth v. Bd. of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 576 (7th Cir. 2002)). Moreover, Mr. Ateba’s challenge to the hard pass program is facial, so whether he has actually been denied the opportunity to speak is irrelevant. *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759 (1988) (holding plaintiff need not apply under unlawful licensing regime to challenge it).

In the end, Appellees *admit* the First Amendment prohibits viewpoint discrimination in the issuance of hard passes. Resp. Br. at 22 n.5. But because the hard-pass criteria fail to impose meaningful guardrails against viewpoint



discrimination, they are *per se* viewpoint discriminatory. *See* Op. Br. at 34–35 (collecting cases). Thus, Appellees’ admission establishes Mr. Ateba has suffered a cognizable First Amendment injury.

## II. APPELLEES MUST OPERATE THE PRESS AREA CONSISTENT WITH THE UNBRIDLED DISCRETION DOCTRINE

Appellees argue the unbridled discretion doctrine does not apply at the Press Area. But as the district court concluded, at the very least, the baseline First Amendment requirement of constitutional reasonableness obligates Appellees to operate the Press Area consistent with that doctrine. JA237. While there is more than one analytic route to the conclusion that the unbridled discretion doctrine applies at the Press Area, it plainly does.

### A. *Price* does not support the conclusion that the unbridled discretion doctrine is inapplicable at the Press Area.

Appellees argue the unbridled discretion doctrine does not apply at the Press Area because, under *Price*, forum analysis does not apply to newsgathering there. Resp. Br. at 23. But the unbridled discretion doctrine is not limited to First Amendment fora. Instead, that doctrine applies anytime the government imposes a prior restraint on First Amendment activity, even First Amendment activity occurring on private property. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224–30 (1990) (plurality op.) (applying unbridled discretion doctrine to licensing scheme regulating private businesses). Because the hard-pass program constitutes a

prior restraint on newsgathering, the unbridled discretion doctrine applies at the Press Area regardless of its forum status.

Moreover, as discussed, *Price*'s holding that forum analysis does not apply to filmmaking does not extend to newsgathering at the Press Area. Indeed, every Circuit that has considered the question has concluded forum analysis applies to newsgathering at press briefings. *TGP*, 2022 WL 17484331, \*4 (holding designated press area was limited public forum); *John K. MacIver Inst. v. Evers*, 994 F.3d 602, 611–12 (7th Cir. 2021) (concluding forum analysis governs “who has the right of access to government property to engage in . . . gathering information for news dissemination”).

Further, even if newsgathering were noncommunicative, the Supreme Court has held the unbridled discretion doctrine applies to laws that, while not burdening expression themselves, nevertheless burden activity with “a close enough nexus to expression, or to conduct commonly associated with expression” that they “pose a real and substantial threat of . . . censorship.” *City of Lakewood*, 486 U.S. at 759. As the district court recognized, newsgathering at the Press Area satisfies this test. JA236. *See also McDaniel v. Precythe*, 897 F.3d 946 (8th Cir. 2018) (holding unbridled discretion doctrine applied to regulation of newsgathering); *Getty Images News Servs. Corp. v. Dep’t of Def.*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002) (same). Accordingly, the unbridled discretion doctrine applies at the Press Area.

**B. The unbridled discretion doctrine applies at the Press Area under forum analysis.**

Appellees next argue that if forum analysis applies, the Press Area is a nonpublic forum, and the unbridled discretion doctrine does not apply at nonpublic fora.<sup>1</sup> This argument also fails.

1. *The Press area is a limited public forum where the unbridled discretion doctrine applies.*

Appellees assert the Press Area, a limited public forum, is a nonpublic forum because journalists must obtain “permi[ssion]” from the White House to access it. Resp. Br. at 24 (quoting *Bryant v. Gates*, 532 F.3d 888, 895 (D.C. Cir. 2008)). But this fact does not make a forum nonpublic. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 549 (1975) (holding theater was limited public forum despite the fact users were required to seek permission from the relevant officials to use it). Rather, the question is whether the government intends to open the forum to “a *class* of speakers” as opposed to allowing “selective access for *individual* speakers” on an individualized basis. *Ark. Ed. Tele. Comm’n v. Forbes*, 523 U.S. 666, 679 (1998) (emphasis added).

Here, the White House has, by specific designation, opened the Press Room to a “class of speakers”—*i.e.*, journalists who want to cover the White House and

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<sup>1</sup> At places, Appellees suggest that the relevant forum is not the Press Area but the hard-pass system. Resp. Br. at 22–23. This framing is incorrect. The hard-pass system is merely the primary way journalists access government property that has been opened for their use. Appellees’ argument would be like saying a permit system that regulates speech in a park is the forum, not the park. That is plainly wrong.

who satisfy the admission criteria. And as Appellees admit, they do not make “discretion[ary]” judgments about which journalists are allowed admission. Resp. Br. at 35. This admission forecloses Appellees’ argument. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985) (concluding non-“ministerial” admission criteria make the forum nonpublic).

To be sure, the *Congressional Press Galleries* have discretion to determine which journalists are worthy of Congressional press credentials. But because the *White House*—the ultimate decisionmaker regarding the Press Area—lacks this discretion, the Press Area is not nonpublic. While the White House’s reliance on the Congressional Press Galleries’ decisions violates the unbridled discretion doctrine, that reliance does not make the Press Area nonpublic. *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Sch.*, 457 F.3d 376, 389 (4th Cir. 2006) (“*CEF*”) (holding classifications based on unbridled discretion may not serve as the basis for exclusion).

The cases Appellees cite are easily distinguishable. In *United States v. Nassif*, this Court held the interior of the Capitol was a nonpublic forum because there was “no evidence that Congress intended to open any portion of the Capitol buildings as a public forum for assembly and discourse.” 97 F.4th 968, 976 (D.C. Cir. 2024). In *Archdiocese of Washington v. Washington Metropolitan Area Transit Authority*, this Court held WMATA’s advertising space was a nonpublic forum because the

WMATA had “made a considered decision . . . to close its advertising space to specific subjects.” 897 F.3d 314, 323 (D.C. Cir. 2018), *cited with approval in American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 901 F.3d 356, 364 (D.C. Cir. 2018) (“*AFDP*”). And in *Bryant*, this Court held the advertising section of a military newspaper was a nonpublic forum because the government did not “intend[] to open the [newspaper] for [non-military] expressive use.” 532 F.3d at 295. Here, by contrast, the White House has opened the Press Area for the purpose of “facilitat[ing] journalists’ coverage of the President.” Resp. Br. at 25. By “establishing and maintaining” the Press Area for this purpose, the White House has created a limited public forum. *Stewart v. D.C. Armory Bd.*, 863 F.2d 1013, 1016 (D.C. Cir. 1988).

Appellees argue *MacIver* supports their characterization of the Press Area as a nonpublic forum, but *MacIver* does not help Appellees. There, the Seventh Circuit held a government press conference (1) to which only select journalists were invited and (2) that was held in a private “conference room” and not “government property dedicated to open communication” was a nonpublic forum. 994 F.3d at 607, 610. The private event at issue in *MacIver* was obviously vastly different from press briefings at the Press Area.

Appellees also try to minimize the Ninth Circuit’s holding in *TGP* that governmental press briefings constitute a limited public forum, 2022 WL 17484331,

at \*3, but those efforts fail. True, the Ninth Circuit went on to affirm the district court's finding that the government had engaged in viewpoint discrimination, *id.* at \*5, but this fact in no way undermines its holding that the press briefings were a limited public forum. *See also Johnson v. Malcolm*, No. CV 20-1275 (DWF/BRT), 2020 WL 3491711, at \*6 (D. Minn. June 26, 2020) (holding government press briefing was limited public forum).

2. *The unbridled discretion doctrine applies in nonpublic fora.*

As the district court concluded, even if the Press Area were a nonpublic forum, the unbridled discretion doctrine would nonetheless apply. JA234–237 (citing, *inter alia*, *Minn. Voters All. v. Mansky*, 585 U.S. 1, 21 (2018); *Zukerman v. U.S. Postal Serv.*, 961 F.3d 431, 449 (D.C. Cir. 2020); *AFDI*, 901 F.3d at 373); *see also Getty Images*, 193 F. Supp. 2d at 120 (applying unbridled discretion doctrine regardless of forum status).

Appellees assert applying the unbridled discretion doctrine in nonpublic fora would be inconsistent with *Forbes*. But the majority opinion in *Forbes* does not so much as reference the unbridled discretion doctrine, either by name or by concept. Undeterred, Appellees nevertheless ask the Court make inferences about the meaning of the majority opinion based on Justice Stevens' solo dissent, the parties' briefs, and oral argument in that case. Resp. Br. at 28–29. But the Court should not invoke a “dog that did not bark” theory even with respect to the interpretation of

statutes, *see Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980), much less Supreme Court opinions.

In any event, the unbridled discretion doctrine is not inconsistent with the concept of a nonpublic forum. True, the government has some leeway in deciding who may participate in a nonpublic forum. *CEF*, 457 F.3d at 387. But “this does not insulate restrictions on [First Amendment activity in] nonpublic . . . forums from an unbridled discretion challenge.” *Id.* Indeed, even before *Mansky*, it appears every Circuit that addressed the question held the unbridled discretion doctrine applied in nonpublic fora. *Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012); *CEF*, 457 F.3d at 386–87; *Atlanta J. & Const. v. City of Atlanta Dep’t of Aviation*, 322 F.3d 1298, 1311 (11th Cir. 2003); *Southworth*, 307 F.3d at 580; *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001).<sup>2</sup> And after *Mansky*, it is now settled that the unbridled discretion doctrine applies in nonpublic fora. *Zukerman*, 961 F.3d at 449; *AFDI*, 901 F.3d at 373.

**C. The unbridled discretion doctrine is implicated by the decisions of the Congressional Press Galleries.**

Appellees argue the unbridled discretion doctrine is not implicated because the Congressional Press Galleries—and not the White House—determine eligibility

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<sup>2</sup> Appellees cite a later Eighth Circuit case, *Victory Through Jesus Sports Ministry Found. v. Lee’s Summit R-7 Sch. Dist.*, 640 F.3d 329, 337 (8th Cir. 2011), for the proposition that the unbridled discretion doctrine does not apply in nonpublic fora, but that decision contradicts *Lewis*.

for Congressional press credentials. But the district court correctly concluded the White House may not regulate access to the Press Area in a way that allows hard-pass applications to be decided based on the unbridled discretion of the Congressional Press Galleries, even if the White House itself is not the government actor exercising discretion. JA238. *See also Southworth*, 307 F.3d at 580–81 (holding students subject to mandatory fee regime had standing to sue public university for granting unbridled discretion to student government to determine how fees were spent).

Appellees also claim the unbridled discretion doctrine does not apply because that doctrine applies only to “government censorship,” and, they contend, the Congressional Press Galleries are private actors. Resp. Br. at 36 (emphasis in original). But the Congressional Press Galleries are government actors when they adjudicate Congressional credentialing decisions. In *Consumers Union v. Periodical Correspondents’ Association*, this Court recognized Congressional press credentialing “involves matters committed by the Constitution” to Congress. 515 F.2d 1341, 1346 (D.C. Cir. 1977). And because Congress “delegated” its credentialing authority to the Congressional Press Galleries, those galleries are “agents” of Congress “acting within the sphere of legitimate legislative activity.” *Id.*



at 1350, 1347. Accordingly, “[t]here can be no reasonable contention that [the Congressional Press Galleries act] in a private capacity.” *Id.* at 1350.<sup>3</sup>

### III. THE HARD-PASS PROGRAM VIOLATES THE UNBRIDLED DISCRETION DOCTRINE

Three aspects of the hard pass program—whether considered in isolation or together—chill speech and render it uniquely susceptible to viewpoint discrimination in violation of the unbridled discretion doctrine: (1) the nebulous “of repute” requirement; (2) the lack of a deadline by which a hard pass must be issued; and (3) the lack of effective judicial review.

#### A. The “of repute” requirement lacks “objective, workable standards.”

Appellees argue the “of repute” requirement means the applicant must be “working as a journalist reporting news, rather than an interested party seeking to influence Congress.” Resp. Br. at 43. But as Mr. Ateba has explained, this argument renders the “of repute” standard superfluous. Op. Br. at 28, 31. The “of repute” standard is found in the *first* Congressional press credentialing criteria. JA147 (“A bona fide correspondent of repute in their profession.”). The *fifth and sixth* criteria provide the journalist must “[n]ot be engaged in any lobbying or paid advocacy” and

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<sup>3</sup> For this reason, Appellees’ hypothetical in which a newspaper editor removes a reporter from the White House beat is plainly inapposite. Resp. Br. at 37. In that hypothetical, the editor is not an “agent” of Congress, *Consumers Union*, 515 F.2d at 1350, while the Congressional Press Galleries are.

must be “[e]ditorially independent of any” lobbying group. JA148. Because the fifth and sixth criteria account for the concern the journalist might be a lobbyist in disguise, Appellees’ interpretation impermissibly reads the “of repute” requirement to be a legal nullity.

Moreover, the phrase “of repute” generally means “the character or status commonly ascribed to an individual” or “the state of being favorably known.” <https://www.merriam-webster.com/dictionary/repute> (last visited on July 28, 2024). Appellees give no account for why journalists’ character, status, or reputation in their profession is determined *only* by whether they are seeking to influence Congress. And to the extent the “of repute” requirement is broader than that—which it assuredly is—it violates the unbridled discretion doctrine. *See Genusa v. City of Peoria*, 619 F.2d 1203, 1217 (7th Cir. 1980) (holding phrase “good moral character and reputation” violated unbridled discretion doctrine); *S.A. Restaurants, Inc. v. Deloney*, 909 F. Supp. 2d 881, 900 (E.D. Mich. 2012) (similar); *Gospel Missions of Am. v. Bennett*, 951 F. Supp. 1429, 1451 (C.D. Cal. 1997) (similar).

Appellees assert that “well-established practice” supports their interpretive gloss on the “of repute” requirement. Resp. Br. at 43. But this assertion is entirely devoid of evidentiary support. The sources Appellees cite all discuss the purpose of the Congressional press credentialing requirements *writ large*, not the *specific meaning* of the “of repute” requirement. *Id.* Appellees do not cite a shred of evidence

supporting their argument that the “of repute” requirement *itself* has anything to do with whether the journalist is a lobbyist. Nor do they cite a shred of evidence showing the Congressional Press Galleries—whom Appellees do not represent—would be bound by such an interpretation. Thus, the “of repute” requirement “provides no standard at all.” *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1395 (D.C. Cir. 1990) (quotation marks omitted).

Moreover, there are no court decisions interpreting the Congressional Press Galleries’ application of the “of repute” requirement from which the Court could draw an acquired meaning. And the appeal process for denials of Congressional press credentialing applications—to the Speaker of the House or the Senate Committee on Rules and Administration, JA131—does not result in written decisions either. Further, there is no reason to believe the Speaker and the Senate are even bound by the “of repute” requirement in adjudicating appeals, which adds a further layer of discretionary governmental decision making.

Appellees suggest *Sherrill* somehow relaxed the unbridled discretion doctrine at the Press Area because it concluded a “detailed articulation” of the eligibility criteria was not required. Resp. Br. at 38 (quoting 569 F.2d at 128). But *Sherrill* was discussing the criteria applicable to *Presidential safety*, an area in which courts must be “appropriately deferential” to the Secret Service and rely on their “expert judgment” in making safety determinations. 569 F.2d at 130; *see also Quaker Action*

*Grp. v. Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969) (“[C]ourts must listen with the utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President[.]”). Indeed, *Sherrill* specifically noted Mr. Sherrill did not challenge the White House’s requirement that he obtain Congressional press credentials before obtaining a hard pass. *Id.* at 130 n.19. There is no justification for giving the Congressional Press Galleries deference vis-à-vis the definiteness of the “of repute” requirement.

1. *Appellees’ argument is not supported by case law.*

Appellees cite a handful of cases holding various statutes regulating First Amendment activity were sufficiently definite. But those cases involved language less capacious than the “of repute” requirement, language that had acquired an ascertainable meaning by long use, or regulatory paradigms in which the regulated entity could seek clarification regarding the meaning of the language at issue. *Cox v. Louisiana*, 379 U.S. 559, 569 (1965) (holding prohibition of demonstrations “near a building” sufficiently definite); *Kovacs v. Cooper*, 336 U.S. 77, 79 (1949) (concluding prohibition of “loud and raucous” demonstrations had “through daily use acquired a content that conveys . . . a sufficiently accurate concept of what is forbidden”); *Bellion Spirits, LLC v. United States*, 7 F.4th 1201, 1213 (D.C. Cir. 2021) (holding requirement that product labeling be “adequately substantiated” sufficiently definite where agency allowed regulated entities to “seek a ruling”

whether their statements violated the prohibition); *Boardley v. Dep't of the Interior*, 615 F.3d 508, 517 (D.C. Cir. 2010) (holding prohibition of activity presenting “clear and present danger to the public health or safety” sufficiently definite). None of these cases approved a standard anywhere near as vague and subjective as the “of repute” requirement.

Appellees suggest this Court impliedly blessed the “of repute” requirement in *Consumers Union* by referring, in dicta, to the plaintiff’s challenge there as “tenuous.” Resp. Br. at 38. But the plaintiff in *Consumers Union* did not challenge the “of repute” requirement. Rather, it challenged a rule providing entities must be “owned and operated independently of any industry, business, association, or institution” to be eligible for Congressional press credentials. 515 F.2d at 1343 (cleaned up). Thus, *Consumers Union*’s dicta has no persuasive value here.

Appellees argue *MacIver* affirmed the “of repute” requirement, but the rules at issue in *MacIver* were critically different from those at issue here. In *MacIver*, the plain text of the “of repute” requirement in the rules at issue there included four separate concepts: prohibitions on (1) “conflicts of interest”; (2) “associations that would compromise journalistic integrity”; (3) “political involvement”; and (4) “special interests to influence coverage.” 994 F.3d at 606. Here, by contrast, the Daily Press Gallery rules contain none of these textual limitations of the “of repute” requirement. Indeed, these limitations are contemplated in the *other* criteria.

Moreover, *MacIver* relied on the fact that the “of repute” requirement at issue there was similar to the one used in Congressional press credentialing. *Id.* But because the Congressional Press Galleries’ rules are not subject to direct judicial review under *Consumers Union*, *MacIver* does nothing more than create an unwarranted tautology that Appellees ask this Court to perpetuate.

2. *Appellees’ argument is not supported by tradition.*

Unable to support their argument with text, acquired meaning, or precedent, Appellees instead pepper their brief with reminders that the Congressional Press Galleries first used some version of the “of repute” requirement in 1888. But Mr. Ateba has not sued the *Congressional Press Galleries*. Rather, he challenges the *White House’s* decision to make issuance of a Press Area hard pass dependent on obtaining Congressional press credentials. As Appellees acknowledge, the record allows the inference that the White House required hard-pass applicants to have Congressional press credentials no sooner than 1975. Resp. Br. at 53. This “tradition” is far too short to inform the First Amendment’s meaning. It is only “where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic” that the “practice should guide . . . interpretation of an ambiguous constitutional provision.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 36 (2022) (cleaned up).

Moreover, the fact the Congressional Press Galleries began using a variation of the “of repute” requirement in 1888—approximately 100 years after the Founding—also has little bearing on the original meaning of the First Amendment. *Id.* Courts must “guard against giving postenactment history more weight than it can rightly bear” in the absence of evidence “from immediately after . . . ratification.” *Id.* at 35 (cleaned up); *see also Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416, 442 (2024) (Kagan, J., concurring) (noting tradition is probative when consistent with “founding era practice”). In addition, this case does not involve questions regarding the separation of powers, where inferences drawn by long government practice are at their strongest. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (looking to tradition where “the interpretive questions . . . concern the allocation of power between two elected branches of Government”); *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929). And considering the Congressional Press Galleries’ use of the “of repute” requirement is insulated from judicial review, the Court cannot conclude the public has “acquiesced” to its use. *Noel Canning*, 573 U.S. at 524.

Rather than support the legality of a government practice, a practice’s long history often just means the government has been violating individuals’ constitutional rights for a long time. *See, e.g., Ramos v. Louisiana*, 590 U.S. 83, 87–88 (2020) (holding unconstitutional state practice originating in 1898); *Jeannette*

*Rankin Brigade v. Chief of Cap. Police*, 342 F. Supp. 575 (D.D.C. 1972), *aff'd* 409 U.S. 972 (1972) (enjoining federal statute enacted in 1882). This is such a case.

3. *Appellees' argument is not supported by analogy.*

Appellees also attempt to analogize the White House's requirement that press-pass holders have Congressional press credentials to a hypothetical DOJ or FDA convention limiting participants to licensed attorneys or doctors. Resp. Br. at 36. The analogy fails. The Supreme Court has held the legal standards applied in state-based licensing regimes for specialized professionals are generally constitutionally valid due to the acquired meaning gained through case-by-case adjudications and court decisions interpreting those standards. *See, e.g., Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159 & n.11 (1971). Accordingly, there is no reason to think such licensing regimes result in censorship. The Congressional press credentialing regime, by contrast, is infected—textually and structurally—with characteristics that allow censorship to thrive. Moreover, while limiting a convention to licensed practitioners would generally comply with the requirement of constitutional reasonableness, there is no state-based licensing requirement for journalists, and, for reasons discussed below, *infra* at 27–28, it is constitutionally unreasonable for the *White House* to require press-pass holders to hold *Congressional* press credentials.



It is no answer to assert the Congressional press corps has an equal balance of “conservative” or “liberal” members. Resp. Br. at 46. As Mr. Ateba has explained, Op. Br. at 43–44, the Congressional Press Galleries’ executive committee members are susceptible to viewpoint discrimination against journalists who work for small competitors, like Today News Africa. The “of repute” standard fails to impose meaningful guardrails on the committee members’ discretion in adjudicating applications for Congressional press credentials.<sup>4</sup>

**B. The lack of deadlines violates the unbridled discretion doctrine.**

Appellees argue the lack of deadlines in the Congressional press credentialing process is not fatal to the hard-pass program because that program “does not regulate [Mr.] Ateba’s expression.” Resp. Br. at 47; *see also id.* at 50–51. But as Mr. Ateba

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<sup>4</sup> Appellees contend that the consolidation of outlets with Congressional press credentials reflects larger industry trends, but it is unlikely that small media outlets had a White House correspondent before being acquired by larger outlets. Moreover, the rise of social media has caused a boom in independent journalism, *see* Claire Wang, *Building an Audience Beyond Mainstream Media*, NBCU Academy (Oct. 11, 2023), <https://nbcuacademy.com/substack-newsletter-journalism/>, but this boom has not resulted in a similar increase in the number of media outlets with journalists holding Congressional press credentials.

In any event, the Daily Press Gallery’s Correspondents Committee—the committee that is (still) adjudicating Mr. Ateba’s application for Congressional press credentials—is composed of reporters who work for the Associated Press, Washington Post, States Newsroom, Pittsburgh Post Gazette, and Connecticut Mirror, *see* <https://www.dailypress.senate.gov/about/standing-committee-of-correspondents/> (last visited on July 28, 2024), all of which are large media outlets. These facts, while not necessary to Mr. Ateba’s claim, support the inference that the Congressional press credentialing process is susceptible to censorship.

has explained, *Price* does not apply to newsgathering at the Press Area; newsgathering at press briefings is expressive; and, in any event, newsgathering is sufficiently close to expression that the unbridled discretion doctrine applies.

Appellees also argue deadlines in content-neutral licensing regimes are not required after *Thomas v. Chicago Park District*, but they fail to grapple with the fact that, because of the indeterminacy of the “of repute” requirement, the Congressional Press Gallery rules are *per se* viewpoint discriminatory. Op. Br. at 34–35 (collecting cases). Moreover, contrary to Appellees’ suggestion, *Thomas* did not reject the requirement that *licensing decisions* must have deadlines in content-neutral licensing regimes. Instead, *Thomas* held content-neutral regimes need not have deadlines for “*judicial review*.” 534 U.S. 316, 322 (2002) (emphasis added). Even content-neutral licensing regimes require strict deadlines on licensing decisions lest they result in the “unconstitutional suppression” of First Amendment activity. *FW/PBS*, 493 U.S. at 228 (plurality op.).

It is true that Mr. Ateba may attend Press Area press briefings with a day pass. But requiring him to use this inferior means of access burdens his right to engage in newsgathering and discourages him from speaking at press briefings and elsewhere while he awaits the Daily Press Gallery’s determination of whether he is sufficiently “of repute.”

**C. The lack of judicial review violates the unbridled discretion doctrine.**

Appellees argue Mr. Ateba forfeited his argument that the lack of effective judicial review over Congressional press credentialing decisions renders the hard-pass program unconstitutional. Appellees are wrong. In his opening summary judgment brief, Mr. Ateba argued the hard-pass program was unconstitutional because “the White House outsourced [press credentialing] to Congress [in an] attempt . . . to immunize its credentialing scheme from suit.” Pl.’s Mem. Supp. Mot. Summ. J. / Opp’n to Defs.’ Mot. Summ. J. at 16. In his reply, Mr. Ateba argued the hard-pass program was “inadequate” because it was not “subject to effective judicial review.” Pl.’s Reply Supp. Mot. Summ. J. at 5. At oral argument, counsel for Mr. Ateba argued Appellees had “outsource[d] their filtering mechanism to a body that is completely immune from suit,” thus improperly avoiding “judicial review of their decisions.” JA 155–56. And the district court acknowledged Mr. Ateba argued “the lack of judicial review” rendered the hard-pass regime unconstitutional. *Id.* at 157. Mr. Ateba clearly preserved this argument.

Appellees argue judicial review might be available under *Consumers Union*, but that argument fails. Latching on to a single phrase in that case, Appellees suggest applicants might have a claim when the Congressional Press Galleries engage in “bad faith or illegal conduct.” Resp. Br. at 51–52 (quoting 515 F.2d at 1348). But as the very next sentence makes clear, this phrase excludes “acts that occur in the

regular course of the legislative process.” 515 F.2d at 1348 (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). The Congressional Press Galleries’ credentialing decisions—even those that are allegedly unconstitutional—occur in the “regular course of the legislative process.” Thus, those decisions are insulated from judicial review, a fact that renders the hard-pass regime in violation of the unbridled discretion doctrine.

#### **IV. THE HARD-PASS PROGRAM IS OTHERWISE CONSTITUTIONALLY UNREASONABLE**

Appellees do not address Mr. Ateba’s argument that the hard-pass program is constitutionally unreasonable because it requires White House correspondents to show they “require[] on-site access to congressional members and staff.” Op. Br. at 41. Instead, Appellees build a strawman, arguing there is “no reason to believe that [Mr.] Ateba’s desire to cover the White House would preclude him from being credentialed by the congressional galleries.” Resp. Br. at 54. The Court should not be fooled. Put simply, Mr. Ateba’s argument is that in light of the Press Area’s purpose—“facilitat[ing] journalists’ coverage of *the President*,” Resp. Br. at 25 (emphasis added)—it is constitutionally unreasonable to require a hard-pass applicant show he requires on-site access to *Congress*. To this, Appellees have no response.

Moreover, if, as Appellees suggest, some journalists have been able to obtain Congressional press credentials without making this showing, that fact does not help

Appellees. Instead, considering the textual and structural flaws in the Congressional Press Galleries' rules, it raises the inference that the Galleries are applying those rules in a viewpoint discriminatory manner.

Finally, the fact the White House did not require Congressional press credentials as a prerequisite to the hard-pass program from February 2021 to July 31, 2023, JA078 ¶¶ 6–7, closes the door on any argument that this requirement is constitutionally reasonable. The record contains no evidence that lifting this requirement negatively affected the White House's operation of the Press Area in any way. Constitutional reasonableness requires the government to demonstrate the restriction on First Amendment activity "reasonably fulfills a legitimate need." *Sammartano v. First Judicial District Court*, 303 F.3d 959, 967 (9th Cir. 2002). On these facts, Appellees cannot make this showing.

### **CONCLUSION**

This Court should REVERSE the judgment of the district court with respect to Count I of Mr. Ateba's complaint.

Respectfully submitted,

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July 29, 2024

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) and Circuit Rule 28(c) because this brief contains 6,497 words, excluding the parts exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Office 365.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 29, 2024, I electronically filed the foregoing Certificate with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

/s/ Josh Dixon

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