ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5255

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIAN J. KAREM,
Plaintiff-Appellee,

v.

DONALD J. TRUMP; STEPHANIE A. GRISHAM
Defendants-Appellants.

On Appeal from the
United States District Court for the District of Columbia
No. 19-cv-2514 (Hon. Rudolph Contreras)

BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 44 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and amici curiae

Except for the following amici, all parties, intervenors, and amici appearing before the district court and in this Court are listed in Appellant's brief: Reporters Committee for Freedom of the Press, ABC, Inc., ALM Media, LLC, American Society of Magazine Editors, The Associated Press, Association of Alternative Newsmedia, Atlantic Media, Inc., Cable News Network, Inc., Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., Free Press, Gannett Co., Inc., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, Maryland-Delaware-D.C. Press Association, The Media Institute, Media Law Resource Center, MediaNews Group Inc., National Freedom of Information Coalition, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, New England First Amendment Coalition, The New York Times Company, The News Leaders Association, News Media Alliance, Newsday LLC, Online News Association, PEN America, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders USA, Reuters News & Media Inc., Reveal from The Center for Investigative Reporting, The Seattle Times Company, Society of Environmental Journalists, Society of Professional

Journalists, Tribune Publishing Company, Tully Center for Free Speech, VICE Media, The Washington Post, and WNET.

B. Rulings under review

References to the rulings at issue appear in Appellant's brief.

C. Related cases

Counsel for amici are not aware of any related case pending before this Court or any other court.

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Reporters Committee for Freedom of the Press certifies that it is an unincorporated association of reporters and editors with no parent corporation and no stock.

ABC, Inc. is an indirect, wholly-owned subsidiary of The Walt Disney Company, a publicly traded corporation.

ALM Media, LLC is privately owned, and no publicly held corporation owns ten percent or more of its stock.

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The Media Law Resource Center has no parent corporation and issues no stock.

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The National Press Club is a not-for-profit corporation that has no parent company and issues no stock.

The National Press Club Journalism Institute is a not-for-profit corporation that has no parent company and issues no stock.

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The News Leaders Association has no parent corporation and does not issue any stock.

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Newsday LLC is a Delaware limited liability company whose members are Tillandsia Media Holdings LLC and Newsday Holdings LLC. Newsday Holdings LLC is an indirect subsidiary of Cablevision Systems Corporation. Cablevision Systems Corporation is (a) directly owned by Altice USA, Inc., a Delaware corporation which is publicly traded on the New York Stock Exchange and (b) indirectly owned by Altice N.V., a Netherlands public company.

Online News Association is a not-for-profit organization. It has no parent corporation, and no publicly traded corporation owns ten percent or more of its stock.

PEN American Center, Inc. has no parent or affiliate corporation.

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Radio Television Digital News Association is a nonprofit organization that has no parent company and issues no stock.

Reporters Without Borders USA is a nonprofit association with no parent corporation.

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The Society of Environmental Journalists is a 501(c)(3) non-profit educational organization. It has no parent corporation and issues no stock.

Society of Professional Journalists is a non-stock corporation with no parent company.

Tribune Publishing Company is a publicly held corporation. Merrick Media, LLC, Merrick Venture Management, LLC and Michael W. Ferro, Jr., together own over ten percent of Tribune Publishing Company's common stock. Nant Capital LLC, Dr. Patrick Soon-Shiong and California Capital Equity, LLC together own over ten percent of Tribune Publishing Company's stock.

The Tully Center for Free Speech is a subsidiary of Syracuse University.

VICE Media LLC is a wholly-owned subsidiary of Vice Holding Inc., which is a wholly-owned subsidiary of Vice Group Holding Inc. The Walt Disney Company is the only publicly held corporation that owns ten percent or more of Vice Group Holding Inc.'s stock.

WP Company LLC d/b/a The Washington Post is a wholly-owned subsidiary of Nash Holdings LLC, a holding company owned by Jeffrey P. Bezos. WP Company LLC and Nash Holdings LLC are both privately held companies with no securities in the hands of the public.

WNET is a not-for-profit organization, supported by private and public funds, that has no parent company and issues no stock.

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND THE SOURCE OF THEIR AUTHORITY TO FILE THIS BRIEF

Amici have obtained consent to file this brief from both parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2) and D.C. Circuit Rule 29(b).

Amici include the Reporters Committee for Freedom of the Press, ABC, Inc., ALM Media, LLC, American Society of Magazine Editors, The Associated Press, Association of Alternative Newsmedia, Atlantic Media, Inc., Cable News Network, Inc., Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., Free Press, Gannett Co., Inc., Inter American Press Association, International Documentary Assn., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, Maryland-Delaware-D.C. Press Association, The Media Institute, Media Law Resource Center, MediaNews Group Inc., National Freedom of Information Coalition, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, New England First Amendment Coalition, The New York Times Company, The News Leaders Association, News Media Alliance, Newsday LLC, Online News Association, PEN America, POLITICO LLC, Radio Television Digital News Association, Reporters Without Borders USA, Reuters News & Media Inc., Reveal from The Center for Investigative Reporting, The Seattle Times Company, Society of Environmental Journalists, Society of

Professional Journalists, Tribune Publishing Company, Tully Center for Free Speech, VICE Media, The Washington Post, and WNET.

The Reporters Committee is an unincorporated nonprofit association of reporters and editors dedicated to defending the First Amendment and newsgathering rights of the news media. Founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources, the Reporters Committee today serves as a leading voice for the legal interests of working journalists and news organizations.

As media organizations devoted to defending First Amendment freedoms, including the rights of journalists to gather and report the news, amici have a powerful interest in ensuring that the White House does not deny, suspend, or revoke the press passes of individual journalists without due process. Because decisions affecting such access have ramifications for all members of the news media, the issues presented in this case are of profound importance to amici. For this reason, in 1977, the Reporters Committee filed an amici brief along with the White House Correspondents Association and the National Press Club in *Sherrill v. Knight*, this Circuit's case holding that, before press passes may be denied, the White House must promulgate "explicit and meaningful" standards and provide an affected journalist notice and a hearing. 569 F.2d 124, 131 (D.C. Cir. 1977).

RULE 29(a)(4)(E) CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than amici, its members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(d) CERTIFICATION

Pursuant to D.C. Circuit Rule 29(d), amici certify that this brief is necessary to provide the perspective of media organizations and journalists. Amici have a strong interest in ensuring that the due process principles set forth more than four decades ago in *Sherrill* continue to protect journalists covering government officials, in the White House and beyond, and prevent the suspension of press credentials based on vague, ad hoc standards never previously articulated. Amici also have a special interest in the outcome of this case, given its potential impact on how other courts interpret *Sherrill*, which has been repeatedly cited over the years for the proposition that once the government has provided some members of the press the ability to cover government activities, it may not deny access to others without due process. *See infra* 34–35. Accordingly, amici submit this brief to address the important due process principles at stake and the vital interests they

serve—enabling the press to fulfill its constitutional role of informing the public and holding all branches of government accountable.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government seeks to renew a settled question for this Court of fundamental importance to the rights of the press and public under the First and Fifth Amendments: Whether a White House press secretary may suspend the press credentials of a journalist based on vague, ad hoc standards never previously articulated, thereby depriving that journalist of access to White House facilities and impairing his ability to report on the President of the United States. The Reporters Committee and 44 media organizations respectfully submit this amici brief to underscore for the Court the constitutional concerns posed by the suspension of a journalist's credentials without due process and urge the Court to affirm the district court's grant of a preliminary injunction under Circuit authority in *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), restoring Appellee's credentials.

This case arises from the White House Press Secretary Stephanie A. Grisham's thirty-day suspension of the press pass (often referred to as a "hard pass") of Plaintiff-Appellee Brian Karem, White House correspondent for *Playboy* magazine and a regular CNN contributor. Grisham issued her final decision on August 16, 2019, citing an incident that occurred more than a month earlier, on July 11, between Karem and Sebastian Gorka, a radio host and former advisor to

the President, following a "Social Media Summit" in the Rose Garden. JA139. In doing so, Grisham acknowledged the lack of "explicit rules" governing behavior by members of the press at White House events. JA109. Nevertheless, she decided to suspend Karem's press pass based on her conclusion that his behavior was "disruptive" and that it had, in her view, violated an unwritten but "widely-shared understanding" that members of the press "must act professionally, maintain decorum and order, and obey instructions from White House staff." JA146.

Karem filed a lawsuit challenging the suspension of his hard pass as a violation of his First Amendment and Fifth Amendment rights. The district court granted a preliminary injunction in his favor. *Karem v. Trump*, -- F. Supp. 3d --, 2019 WL 4169824, *1 (D.D.C. Sept. 3, 2019). Citing Grisham's failure "to provide fair notice of the fact that a hard pass could be suspended under these circumstances," the district court found that Karem "is likely to succeed on this due process claim[.]" *Id.*

The Constitution recognizes that a free press is necessary to keeping the public informed about government activity and protects the right of the press to gather and publish the news. Suspending a journalist's hard pass and denying that journalist access to White House press facilities deprives the public of reporting about presidents and their administrations and may only occur when stringent and

exacting First Amendment and due process requirements are satisfied. Under this Court's long-standing precedent, due process requires clear, articulated standards that are viewpoint- and content-neutral and put journalists on notice of what conduct will result in denial of their press passes. *Sherrill*, 569 F.2d at 129, 131.

The 43-year-old *Sherrill* rule has proven an effective approach that sets an appropriate balance between protecting the integrity of governmental functions and preserving robust coverage of those functions by the press. Press scrutiny of the White House, as presidential scholars agree, is an essential check in an era of a strong executive to promote democratic equilibrium between the branches and accountability of the executive to the electorate. *See, e.g.*, Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* 51–82 (2012) (arguing that the modern presidency, even with new post-9/11 powers, remains constrained in part through "accountability journalism"); Arthur Schlesinger, Jr., *The Imperial Presidency* xxviii (Mariner Books ed. 2004) ("The problem is to devise means of reconciling a strong and purposeful Presidency with equally strong and purposeful forms of democratic control [including the press]."). Further, preventing discriminatory or arbitrary denials of access remains all the more essential as the executive branch grows in size, scope, authority, and in its ability to frustrate scrutiny of its actions by either of the other branches of government or by the electorate. *See generally* Schlesinger, Jr., *supra* (surveying expansion of executive

authority); Info. Sec. Oversight O., Nat'l Archives and Records Admin., 2018 Report to the President 5 (noting that the government is producing petabytes of classified information each month and the "current [classification] framework is unsustainable").

For these reasons and given the clear lack of due process here, *Sherrill* requires affirmance of the district court's decision restoring Karem's hard pass.

ARGUMENT

I. The White House must provide meaningful due process before denying, suspending, or revoking a journalist's hard pass.

a. The Constitution requires appropriate notice of the grounds on which hard passes can be deprived and a meaningful opportunity to challenge the decision to do so.

It is well-settled that courts must uphold not only the substantive rights protected by the First Amendment but also "rigorously" enforce due process requirements, particularly when First Amendment rights are implicated. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) ("When speech is involved, rigorous adherence to [due process] requirements is necessary to ensure that ambiguity does not chill protected speech."). Accordingly, the government may not inhibit the exercise of First Amendment rights with laws or policies that are vague, nor may it apply such laws or policies in an arbitrary or discriminatory manner. *Id.* at 253. Before depriving a person of liberty or property, the government must provide fair notice of the law or policy and a

meaningful opportunity to challenge its application. *Id.*; *Sherrill*, 569 F.2d at 130–31.

This Court has made clear that these long-standing due process principles apply with full force when the White House denies press passes to journalists. In *Sherrill*, this Court held that because the White House voluntarily provides press facilities for correspondents who need to report from the White House, "the protection afforded newsgathering under the [F]irst [A]mendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons." 569 F.2d at 129 (citations omitted). The Court further held that because a journalist's interest in a White House press pass "is protected by the [F]irst [A]mendment," it may not be denied "without due process of law" in accordance with the Fifth Amendment. *Id.* at 130–31.

As this Court stated in *Sherrill*, due process requires the White House to "articulate and publish an explicit and meaningful standard governing denial of White House press passes" in *advance* of any press pass denials. *Id.* at 131; *see also Getty Images News Servs. v. Dep't of Defense*, 193 F. Supp. 2d 112, 121 (D.D.C. 2002) ("[W]here public officials employ criteria that are either vague or completely unknown, the party affected has no way of knowing how to achieve compliance with the criteria nor even of challenging them as being improper.") (internal citation, ellipses omitted).

Although the White House need not give a "detailed articulation of narrow and specific standards or precise identification of all the factors which may be taken into account," vague and ambiguous justifications for denials, like general references to "decorum" and "professionalism" do not suffice. 569 F.2d at 130 (rejecting Secret Service's proffered reason for denying press pass based on "reasons of security," finding that phrase "unnecessarily vague and subject to ambiguous interpretation").

Due process also requires the White House to provide "notice to the unsuccessful applicant of the factual bases for denial with an opportunity to rebut" and a "final statement of denial and the reasons therefore." *Id.* at 131. Together, these requirements ensure that the denial of a press pass is not "based on arbitrary or less than compelling reasons" and "that the agency has neither taken additional, undisclosed information into account, nor responded irrationally to matters put forward by way of rebuttal or explanation." *Id.* at 131.[1]

[1] As this Court recognized in *Sherrill*, the due process requirements of explicit standards and sufficient process are additional First Amendment safeguards over and above the flat prohibition on "arbitrary or content-based criteria for press pass issuance." 569 F.2d at 129. In other words, were a court to find that the suspension or denial of a hard pass was based on disfavor for a particular journalist's reporting, even an explicit, public standard, and notice and an opportunity to contest a denial of access, would violate the First Amendment.

b. Well-established void-for-vagueness doctrine supports the district court's determination that the suspension of Karem's hard pass violated his due process rights.

The Supreme Court's extensive jurisprudence underscoring the need for due process, particularly in First Amendment cases, supports this Court's analysis in *Sherrill*. As the Supreme Court has explained, "the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television Stations*, 567 U.S. at 253 (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108–109 (1972)).

To the first point, it is a "fundamental principle in our legal system" that laws or regulations "must give fair notice" of what conduct is required or proscribed. *Fox Television Stations*, 567 U.S. at 253 (citations omitted). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment" and "requires the invalidation of laws that are impermissibly vague." *Id.* As the Supreme Court has explained:

> A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."

Id. (citations omitted). Thus, a person may not be punished under a policy created *after* the fact, of which the person had no notice at the relevant time. *Id.* at 254 (finding that television networks could not be penalized by the Federal Communications Commission for a policy adopted after the relevant broadcasts).

This "fair notice" principle applies with even greater force when government policies "touch upon sensitive areas of basic First Amendment freedoms." *Id.* (internal citations and quotation marks omitted). This is because laws that "inhibit the exercise" of such rights "inevitably lead citizens to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (internal citations, ellipses omitted). Chilling the exercise of such rights contravenes this country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, "[t]he right to speak freely and to promote diversity of ideas . . . is . . . one of the chief distinctions that sets us apart from totalitarian regimes." *Ashton v. Kentucky*, 384 U.S. 195, 199 (1966). Accordingly, when the scope of a law or regulation "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (citing, *inter alia*, *Grayned*, 408 U.S. at 109); *see also Ashton*, 384 U.S. at 200 (explaining that

when a law implicates First Amendment rights, "we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer").

These principles also apply where—as here—the punishment does not include criminal penalties but some other deprivation of liberty or property. *See, e.g.*, *Sessions v. Dimaya*, -- U.S. --, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring) ("This Court has already expressly held that a 'stringent vagueness test' should apply to at least some civil laws—those abridging basic First Amendment freedoms.'") (citing *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). The Supreme Court "has made clear, too, that due process protections against vague laws are 'not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.'" *Id.* at 1229 (quoting *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966)) (noting that today's civil penalties are "routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies," including "remedies that strip persons of their professional licenses and livelihoods"). The Supreme Court has applied these "rigorous" due process requirements in other contexts, including to a federal agency's change in its indecency regulations governing broadcast stations. *Fox Television Stations*, 567 U.S. at 253–54. The interests at stake here—the press's ability to vigorously cover the White House with fair

notice of the conduct that could lead to suspension or revocation of a hard pass—are no less compelling. *See* Part II *infra.*

To the second point, the Supreme Court has underscored the need for "precision and guidance" in the articulation of laws and regulations that implicate First Amendment interests to prevent their arbitrary and discriminatory enforcement. *Fox Television Stations*, 567 U.S. at 253; *see also Dimaya*, 138 S. Ct. at 1223 (Gorsuch, J., concurring) ("Vague laws invite arbitrary power."). The Supreme Court has thus repeatedly struck down laws that prohibited conduct based on wholly subjective judgments. *See, e.g.*, *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870–71 (1997) (finding prohibition on "indecent" communications on the Internet unconstitutionally vague under the First Amendment); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (finding ordinance that criminalized "annoying" conduct on sidewalks unconstitutionally vague, explaining that "[c]onduct that annoys some people does not annoy others"); *Giaccio*, 382 U.S. at 404 (rejecting state's attempt to impose court costs on acquitted defendant based on jury finding that he had committed "'some misconduct' less than that charged against him"); *Baggett v. Bullitt*, 377 U.S. 360, 368 (1964) (striking down law requiring teachers to swear they were not "subversive" based on broad and vague definition).

Such laws invite abuse by giving government officials "unbridled

discretion" in deciding whom to penalize. *See also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) (striking down ordinance requiring newspaper publishers to obtain annual permits to place racks on public sidewalks because it gave too much discretion to mayor in granting or denying permits). In *Smith*, for example, the Supreme Court struck down a law that prohibited "treat[ing]" the flag "contemptuously," explaining that "[s]tatutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." 415 U.S. at 575. The Court stressed that "[l]egislatures may not so abdicate their responsibilities" and cautioned "against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat,'" concluding that when vague language permits selective enforcement, "there is a denial of due process." *Id.* at 575–76; *Grayned*, 408 U.S. at 108–09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.").

The First Amendment thus requires "explicit" limits on such discretion, and the availability of judicial review "cannot substitute for concrete standards to guide the decision-maker's discretion." *City of Lakewood*, 486 U.S. at 770–71 (citation omitted). In addition, the government's assurance that it will act in good faith does not remedy the constitutional infirmity. *Id.* at 770 (finding that courts

may not "presume[] the mayor will act in good faith and adhere to standards absent from the ordinance's face" for "this is the very presumption that the doctrine forbidding unbridled discretion disallows"); *Fox Television Stations*, 567 U.S. at 255 ("Just as in the First Amendment context, the due process protection against vague regulations does not leave regulated parties at the mercy of *noblesse oblige*.") (internal citation, quotation marks, brackets, ellipses omitted).

c. The White House must articulate guidance *before* depriving a journalist of a hard pass, and it did not do so here, in violation of *Sherrill*.

Viewing these principles together and in conjunction with the long-standing rule in *Sherrill*, it is clear that the White House is required to articulate a credentialing policy *before* applying that policy to deny, suspend, or revoke press passes. The policy must be clear and provide "precision and guidance" to avoid giving the White House unbridled discretion and to limit the potential for retaliatory and discriminatory denials of press passes. These standards must be consistently and equitably applied.

Here, the White House acknowledged that it "had not previously thought that a set of explicit rules was necessary to govern behavior by members of the press at White House press events." JA109. Thus, even assuming the conduct cited by the White House could constitutionally support the suspension of Karem's hard pass had explicit and meaningful standards for reporter conduct been in place,

the absence of any such standards means that the suspension violated this Court's settled law.

Although the government now argues that a letter, dated Nov. 19, 2018, from the White House to CNN White House correspondent James Acosta should have put Karem on notice that he was required to adhere to "professional journalistic norms," Br. 23, the district court properly rejected this claim. The court explained, among other things, that "the letter's language . . . is ambiguous as to whether the White House even intended to regulate events other than formal press conferences"[2] and that, in any event, a standard based on "professional journalistic norms" is "unnecessarily vague and subject to ambiguous interpretation." 2019 WL 4169824, *7–8 (quoting *Sherrill*, 569 F.2d at 130). Indeed, the term "professionalism" is "inherently subjective and context-dependent," *id.* at *8, and precisely the type of nebulous standard that fails to provide notice of what conduct

[2] The letter states in relevant part:

> We are . . . mindful that a more elaborate set of rules might be devised, including, for example, specific provisions for journalist conduct in the open (non-press room) areas of the White House and for Air Force One. At this time, we have decided not to frame such rules in the hope that professional journalistic norms will suffice to regulate conduct in those places.

JA693.

is prohibited, giving government officials unbridled discretion to apply it in an arbitrary or discriminatory manner. *See* Part II.b *supra*.

II. *Sherrill's* requirement that denials or suspensions of hard passes be pursuant to publicly known "explicit and meaningful" standards is essential for an informed electorate and accountable executive branch.

The legal and public policy considerations here go beyond the facts of this case. The rule this Court articulated in *Sherrill* serves profound First Amendment interests in holding the executive branch accountable through an informed and engaged electorate. The news media's constitutionally protected newsgathering rights—which advance the public's right to know—demand that when the government attempts to deny access to a particular journalist, it must act pursuant to transparent, content- and viewpoint-neutral rules that provide adequate notice of the types of conduct that will lead to denial.

To be clear, a compelling government interest may exist in granting or denying hard passes to journalists based on either security concerns or an "interest in the orderly conduct of White House administrative activities." *See* Br. Amici Curiae of the Reporters Committee for Freedom of the Press[,] the Officers of the White House Correspondents Association [and] the National Press Club in Support of Appellees at 31, *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), https://www.rcfp.org/briefs-comments/sherrill-v-knight. However, while an interest in addressing an immediate and significant disruption to White House

operations may be legitimate, that interest is "not as great" as are concerns around presidential safety or national security. *See id.* (citing *Kovach v. Maddux*, 238 F. Supp. 835, 840, 844 (M.D. Tenn. 1965)) (acknowledging interest in legislature conducting "proceedings according to orderly procedures" but insisting that a restriction on First Amendment activities must be limited to cases where "danger to a legitimate state interest is serious, direct and immediate"). Accordingly, when restricting access to persons who "seriously disrupt" White House activities, the government must establish a "*serious* and *imminent* threat" before denying press access. *See id.* at 8-9, 32 (emphases added). In all cases, however, exclusions must be viewpoint- and content-neutral, and must be based on established and "published" standards that provide an aggrieved person notice and an opportunity for a hearing. *See id.* at 8.

These fundamental due process protections carry special weight with respect to reporters covering the executive branch. The framers were aware that while an executive branch—helmed by a single, "vigorous" chief executive—would best serve to bolster the "energy" of the executive function, the nature of presidential power, characterized as it is by "[d]ecision, activity, secrecy, and dispatch," carried threats to public accountability. The Federalist No. 70, at 427 (Alexander Hamilton) (Bantam Classic 2d ed. 2003); *see also* Daniel N. Hoffman, *Governmental Secrecy and the Founding Fathers* 30, 270 n.45 (1981)

(summarizing debates over tension between "vigor," "secrecy," "dispatch," and presidential accountability to the public). In many cases, the only mechanism by which the electorate can gain visibility into presidential affairs is through the day in, day out work of the press.

Importantly, the modern executive branch claims greater authorities than other branches in withholding government information from public scrutiny. The President may classify information, for instance, which imposes civil and criminal penalties on its unauthorized disclosure. *See, e.g.*, Exec. Order No. 13,526, 75 Fed. Reg. 707 (Dec. 29, 2009); 18 U.S.C. § 793 (2016). Over the past two administrations, the Justice Department has sought to use those powers to punish journalistic sources at a significantly increased rate. *See* Gabe Rottman, *Government Leaks to the Press Are Crucial to Our Democracy. So Why Are We Suddenly Punishing Them So Harshly?*, TIME (Nov. 1, 2018), https://perma.cc/PQ8N-V2BU; Gabe Rottman, et al., *Federal Cases Involving Unauthorized Disclosures to the News Media, 1778 to the Present*, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/resources/leak investigations-chart/. The Supreme Court has recognized that the President may also claim some degree of executive privilege, which can insulate other executive action from congressional oversight and from judicial attempts to compel the production of information. *See United States v. Nixon*, 418 U.S. 683 (1974).

For these and other reasons, courts have consistently and repeatedly pointed to the crucial role of the press, and the First Amendment's protections for newsgathering, in holding the office of the President, in particular, accountable. In the context of foreign affairs, for instance, Justice Stewart affirmed the centrality of the press as a constitutional check in the *Pentagon Papers* case:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.

N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring); *see also Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048, 1052 (D.D.C. 1974) ("This Court regards the [press's right to report on government affairs] as among this nation's most sacred protections against tyranny and oppression at the hand of the Executive . . . ."). Justice Stewart grounded this observation in the reality of the President's "enormous power in the two related areas of national defense and international relations[,]" which is "largely unchecked by the Legislative and Judicial branches" and "has been pressed to the very hilt since the advent of the nuclear missile age." 403 U.S. at 727.

In "many situations, the President's decisions are reviewable by no one except the electorate." Br. Amici Curiae, *Sherrill*, *supra* at 13. Amici Reporters Committee and the National Press Club, as well as the White House Correspondents Association, filed an amici brief four decades ago in *Sherrill*, stressing that "[p]ress coverage of the highest public official in the land, the President, and the Administration, is important because of the great discretion and power which is vested in him to determine matters of public policy . . . ." *Id.* And for the news media to fulfill its "vital function" in our democratic system, *id.* at 14, it must be free of arbitrary denial of access to White House facilities, briefings, press conferences, and other official events so that journalists can convey to the public the news and information they gather on White House grounds.

White House reporters therefore play a key role in the press's ability to function as a check on the executive branch, and ease of physical access to the building is central to a White House reporter's job. *See id.* at 4 ("The White House press facilities represent perhaps the single most important resource in terms both of quantity and quality of news for the press in Washington.").

Importantly, the *Sherrill* rule has survived through seven presidential administrations. It is now cited by courts in this Circuit and across the country for the proposition that once the government has provided some members of the press the ability to cover government activities, under the First Amendment it may not

deny access to others without due process. *See, e.g.*, *Cable News Network, Inc. v. Trump*, No. 18-cv-2610, Dkt. No. 22 at 6-13 (D.D.C. Nov. 16, 2018) (oral ruling); *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 281 (S.D.N.Y. 2019) ("'[T]he denial of a [police-issued press] pass potentially infringes upon [F]irst [A]mendment guarantees,' including a journalist's right to gather news on equal terms with her fellow journalists.") (quoting *Sherrill*, 569 F.2d at 128); *Telemundo of Los Angeles v. City of Los Angeles*, 283 F. Supp. 2d 1095, 1102 (C.D. Cal. 2007) ("[D]iscriminatory access to . . . information is generally violative of the First Amendment."); *El Dia, Inc. v. Hernandez-Colon*, 783 F. Supp. 15, 25–28 (D.P.R. 1991), *rev'd and remanded on other grounds*, 963 F.2d 488 (1st Cir. 1992) (applying *Sherrill* in finding executive order limiting access to public documents violated First Amendment); *Cable News Network, Inc. v. Am. Broad. Co.*, 518 F. Supp. 1238, 1244 (N.D. Ga. 1982) (granting injunctive relief preventing implementation of policy of excluding television media, but not print, from "limited coverage" White House events).

The rule established by this Court in *Sherrill* thus protects First Amendment and due process interests that are of profound importance for democratic governance and an informed electorate. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a

free press cannot be regarded otherwise than with grave concern."). Rigorous enforcement of that rule is necessary to protect the free flow of information to the electorate and to ensure that all branches of government remain answerable to the public.

CONCLUSION

For the foregoing reasons, due process requires affirmance of the district court's decision restoring Karem's hard pass.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because this brief contains 5,210 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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Dated: January 13, 2020
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I caused the foregoing BRIEF OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 44 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE to be filed with the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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