No. 19-001

IN THE SUPREME COURT OF THE UNITED STATES

JED AKERS and NATIONAL CABLE CHANNEL,

Petitioners,

v.

LORNA K. FUENTES, President of the United States, et al.,

Respondents.

The petition for a writ of certiorari is granted. The parties are directed to brief the following questions:

(1) Does the revocation of an individual reporter's press pass conferring access to White House press briefings and certain White House facilities violate the First Amendment, when the Office of the President stated that it based its revocation on concerns about the individual raised in a law enforcement investigation?

(2) Whether the Office of the President may, consistent with the Due Process Clause of the Fifth Amendment, revoke an individual news reporter's press pass conferring access to White House press briefings and certain White House facilities without providing pre-deprivation notice and an opportunity to be heard?

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Docket No. 0018-12091

LORNA K. FUENTES, in her official capacity as President of the United States; MITSUKI MIYAWAKI, Chief of Staff to the President of the United States; TOBIAS ZIEGLER, Press Secretary to the President of the United States; THE UNITED STATES SECRET SERVICE; and KATE CHOPIN, Director of the United States Secret Service

Defendants-Appellants,

v.

JED AKERS and NATIONAL CABLE CHANNEL,

Plaintiffs-Appellees.

Before: CHIEF JUDGE SWANSON, JUDGE KNOPE, JUDGE SEBASTIAN

Opinion by CHIEF JUDGE SWANSON, joined by SEBASTIAN, J. Dissenting opinion filed by KNOPE, J

Defendants-Appellants appeal an order issued by the United States District Court for the District of Monroe finding that Defendants violated Plaintiffs-Appellees' First and Fifth Amendment rights by revoking the White House press pass that had been issued to Plaintiffs. We disagree, and for the reasons stated below, we **REVERSE** the district court's ruling.

Factual Background

Jed Akers is a reporter with the National Cable Channel. He is NCC's chief White House correspondent, meaning that he both reports on the White House and leads NCC's other White

House correspondents. Akers has been a White House correspondent since 2013, well before President Lorna K. Fuentes took office.

Members of the White House press corps receive what is called a "hard pass" that allows them to attend press briefings and access the White House and other presidential facilities, such as Air Force One. To obtain the hard pass, a reporter must apply for both White House press credentials and security clearance with the Secret Service, which includes a background check. Among other things, the hard pass allows reporters to attend press briefings and to work out of presidential facilities. Other reporters who cover the President only occasionally can apply for "day passes," which are granted at the discretion of the Press Secretary and allow for 24-hour access to press events after going through on-site security checks.

In 2015, Fuentes announced her bid for the Presidency. Then-candidate Fuentes ran on, among other things, a campaign promise to use legislation and government agencies for job creation, often referencing President Franklin D. Roosevelt's Works Progress Administration. This and other aspects of her platform were met with strong disdain from some of NCC's commentators. During the campaign, NCC on-air personality Rick Spence said, "a Fuentes administration would be a step away from American values and a leap towards socialism." Nevertheless, Fuentes was elected President.

On her first day in office, President Fuentes' administration announced that it was introducing its full employment bill, the "America Works Act," in Congress. On live TV that day, right before going to commercial, Spence said on NCC, seemingly unaware that his microphone was still on and that he was still on air, "I can't believe this is who we have as President. My mother would do a better job."

Akers delivered a follow-up report that day. He reported that Fuentes' administration was "attempting to bribe members of the opposite party to vote for the bill." President Fuentes did not ignore the story, but rather Tweeted that Akers "concocted the facts" and "should be fired." The Tweet included a GIF image of a martial artist, with Fuentes' face digitally edited over the martial artist's face, kicking a board with a superimposed NCC logo.

On December 1, 2018, President Fuentes was at Camp Esther, a retreat and "away White House," which has offices and a pressroom much like the West Wing of the White House in Washington, D.C. But unlike the White House, where reporters who have a hard pass *and* reporters who have a day pass are allowed to attend, only reporters with a hard pass may gain access to Camp Esther. Akers was part of the press gaggle that covered this trip to Camp Esther.

The morning of the Camp Esther press briefing, the Senate failed to secure the votes it needed to move forward with a floor vote on the America Works Act, rendering its future prospects murky at best. The President Tweeted immediately after the announcement, saying that "[i]t's sad how some people in Congress only cease to believe in big government when it comes to helping other people."

During a press briefing that day, President Fuentes herself took to the pressroom podium to answer questions. When the President called on Akers at the press briefing, Akers referred to the President's already widely-recirculated Twitter posting from shortly after the Senate vote, and asked whether it was "really fair to impugn the motives" of Congress. Initially, the President answered by saying that these same Senators "never met a military job they don't like," at which point Akers asked again about whether the President thought "it's appropriate to question the motives of other elected officials." The President replied "Appropriate? Are you really asking me that? After . . . you know what? I know how you operate. You would just take my answers

and spin them as lies, just like you did with my space program." Akers responded: "I call them lies when they are lies."

The President cut Akers off, saying that he was a "terrible" journalist who should be "ashamed" of his reporting. Akers attempted to ask another question as other reporters attempted to jump in with their own. President Fuentes refused to take it. The Press Secretary, Tobias Ziegler, attempted to take the microphone from Akers, who initially did not release it. The President called out to Akers, "See? You just want the microphone for yourself. Let it go." Akers raised his voice, and replied: "How dare you?" But Akers let go of the microphone after another tug from Ziegler, who handed it to another reporter who had a question for the President.

Akers left the Camp Esther grounds during lunchtime that day, and when he returned, he was stopped at the Secret Service guard booth. The agent said that the Secret Service had received a report that Akers had injured another reporter at a recent cocktail party in Washington D.C. Akers denied this, and the agent allowed Akers to enter the Camp Esther press area, where he worked for the rest of the day.

The next morning, when Akers arrived at Camp Esther, two Secret Service agents stopped him at the guard booth and told him he would need to surrender his hard pass. He did so. At the morning press briefing, Press Secretary Ziegler informed the press corps that Akers' pass had been suspended pending an investigation into an alleged violent incident in which Akers had taken part. When asked further, Ziegler said there would be no further comment at that time. It was only the second time in the modern era of White House reporting that an administration took action against a reporter's press pass. The first time was in 1977, when the White House suspended a reporter's hard pass for one month, after catching the reporter digging

through a soon-to-be-shredded bin of paper in the Oval Office in an attempt to find classified government documents.

Later that day, NCC's CEO Zach Jefferies wrote a letter to Mitsuki Miyawaki, the White House chief of staff, requesting that Akers' hard pass be "reinstated immediately," noting that prior to the revocation, "no complaints were made to NCC, nor was any attempt made to reach anyone at NCC before taking this unlawful action." Jefferies further wrote that "This is clear viewpoint favoritism in an attempt for the White House to score political points." At a press briefing later that night, the President once again took the podium. In response to a question about Akers, the President said, "violent, disrespectful behavior is unacceptable, in the White House or anywhere else."

Shortly after, Akers and NCC filed suit in the District Court for the District of Monroe. Alleging First and Fifth Amendment violations, they asked for a temporary restraining order ("TRO") and a preliminary injunction requiring the immediate return of Akers' hard pass. After hearing argument, the District Court granted the TRO. In doing so, the District Court said it found persuasive the reasoning from *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977).

The parties agreed to a highly accelerated discovery plan, and thirteen days after entry of the TRO, the parties had completed their limited discovery and cross-moved for summary judgment. Again, following the D.C. Circuit's reasoning in *Sherill*, the District Court granted summary judgment for the plaintiffs. This appeal followed.

I. First Amendment Claim

As a threshold matter, Akers' activities are protected by the First Amendment. He is a reporter covering a Presidential administration for a national news network, and he asserts that the government took action that restricted his ability to do so. That is protected speech. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001) (news media that used intercepted conversations protected by First Amendment).

But that "merely begins our inquiry. Even protected speech is not equally permissible in all times and places." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985). "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Id.* at 1799-1800. Here, the government has restricted Akers' access to speak on government property. This Court has established a set of "forum analysis" rules for such situations.

The initial step is to determine what type of forum the government property is. There are three options. First, a public forum is government property that "have immemorially been held in trust for the use of the public," such as sidewalks and public parks. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). In these traditional public fora, a government may enforce a content-based "exclusion" of speech if it serves a "compelling state interest" and is "narrowly drawn to achieve that end." *Id.* at 45. Also, a government may enforce content-neutral restrictions on speech in these fora if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*

Second, a "designated" public forum is one that the government "has opened for use by the public as a place for expressive activity." *Id. See Int'l Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (labeling explicitly the intermediate category of public forum the "designated" public forum). In these fora, "[r]easonable time, place and manner regulations are permissible." *Perry*, 460 U.S. at 45. The government may create these fora "for use by certain speakers, or for the discussion for certain subjects." *Cornelius*, 473 U.S. at 802. The government must be viewpoint-neutral and reasonable within these fora. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98, 106–107 (2001).

Third, a nonpublic forum is government property that the government has not opened for use by the public. The government in this situation retains the ability to act like a "private owner of property." *Perry*, 460 U.S. at 46. Speech restrictions in these fora "must survive only a much more limited review"— the government "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Where a property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all for purposes of First Amendment analysis. *See Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666 (1998).

The parties disagree about what forum the Camp Esther press facilities fall under. The parties also disagree about whether the appropriate test has been met.

A. Nonpublic Forum

The press facilities are a nonpublic forum because the government acts like a proprietor, even when media members are present. The President is entitled to plenary control over

Executive Branch facilities, including those at Camp Esther. As the Supreme Court held long ago, citizens do not have a First Amendment right to access the White House, even if that principle "diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). And the Supreme Court has held that the press is not entitled to special treatment. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 352 (2010). Therefore, the President maintains plenary control over the press facilities located on property owned and controlled by the Executive Branch. *See Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

Indeed, the purpose of the press facilities is to enable *the government* to communicate to *the public*. Sure, the White House uses the media as a conduit. But it does not mean that the White House established the press facilities to "promote the free exchange of ideas" between citizens. *Krishna*, 505 U.S. at 682. Even when the forum involves core political speech, the forum is not necessarily a public or designated public forum. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998) (political candidate debate was nonpublic forum).[1]

Nevertheless, we recognize that the government cannot engage in viewpoint discrimination or unreasonable actions within a nonpublic forum. We accordingly proceed in the analysis.

B. Discriminatory Intent

We hold that the Defendants did not engage in impermissible viewpoint discrimination. We have no business looking beyond the President's stated justification, at least where, as here,

[1] The dissent suggests that strict scrutiny might apply because the White House kicked out Akers, who was a member of the class of persons for whom the forum was created. We disagree. First, the Supreme Court language in *Forbes* is dicta. Second, the Camp Esther press room is not "generally available" in the way that *Forbes* contemplated. Third, strict scrutiny would not be fatal here: security of the President is a compelling reason, and excluding the reporter who infringes on the President's security from the same room as the President is narrowly tailored.

the justification has a reasonable basis in reality. Even if we are allowed to invade the Executive Branch's domain, journalists are not entitled to perfectly equal treatment, and the circumstantial evidence here is not sufficient to show discriminatory intent.

First, we have no need to look beyond the President's actions if the President's actions "can reasonably be understood to result from a justification independent of unconstitutional grounds." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018). Here, the President's actions were a result of safety and security concerns. Akers was involved in a physical altercation. And it does seem that he is no fan of the President. But that is irrelevant to the inquiry. The Executive Branch determined that allowing him unfettered access to the President's private grounds was unsafe. But it is not the judiciary's job to second-guess the Secret Service's determination. *See id.* at 2422 ("[T]he Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving sensitive and weighty interests …."); *cf. Dep't of the Navy v. Egan*, 484 U.S. 518 (1988) (holding that courts cannot review Executive Branch "security decisions" about clearances).

Second, even if we are wrong on that initial point, journalists are not entitled to equal access. "No Supreme Court … case has held that reporters have a constitutional right of equal or nondiscriminatory access to government information that need not otherwise be made available to the public." *Snyder v. Ringgold*, 133 F.3d 917, 1998 WL 12528, at *3 (4th Cir. 1998) (unpublished). The First Amendment protects the right to speak, and Akers may continue to do so. But there is nothing that entitles Akers to precisely the same treatment from his sources as every other reporter. *See Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 413 (4th Cir. 2006). Otherwise, the President's ability to invite only certain reporters to a discussion in the Oval Office, or a press secretary's decision to talk to a "gaggle" of reporters rather than the entire

herd, would be called into question. *See Snyder*, 1998 WL 12528 at *2 (holding that journalist whose coverage upset government official, leading official to be "single[d] out for access restrictions" regarding interviews and obtaining information, did not show clearly established First Amendment right was violated). The dissent worries about chilling speech, but if we invade the President's domain now, the result may be chilling *all* speech if the President concludes that it's easier to shut down press facilities entirely. *See Ark. Educ.*, 523 U.S. at 681.

The dissent's contrary assertion introduces serious line-drawing problems into the equation. This is not a situation where the White House has singled out a particular subset of views for exclusion. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993). Other reporters with Akers' general perspective and viewpoint are still permitted to attend press conferences. Inevitably, not every journalist can attend a press conference—the room would be overflowing. The White House sometimes must make selections on who can cover it, and deserves wide berth to do so on its own property. *See Getty Images News Servs. Corp. v. Dep't of Def.*, 193 F. Supp. 2d 112, 120 (D.D.C. 2002) (no discrimination where reporter was excluded from "access" that "is necessarily limited by the logistical support and resources that" government can provide); *Raycom Nation, Inc. v. Campbell*, 361 F. Supp. 2d 679, 685 (N.D. Ohio 2004). A government can surely choose not to grant interviews to particular media entities, even if that decision is a result of that media entity's reporting. What is the constitutional difference between not granting an individual interview to a reporter and not granting access to a group interview to that same reporter? There is none.

Third, and finally, even if we indulge the dissent in considering the circumstantial evidence, we cannot say it rises to the level of pretext. Sure, Akers and the President had a testy exchange. They aren't the first President and journalist to have a frosty relationship. Moreover,

the White House may not have had a written policy, but the core justification for the exclusion did not change: The White House wants to ensure the President's safety and believes Akers poses a threat. Revoking a press pass is rare, but not unheard of. If we followed the dissent's desire to flex our judicial supremacy by calling this pretext, we would only be opening the door to courts being called on to police the daily give-and-take between public officials and reporters, an area that is best left to the discretion of the President. We should not "plant the seed of a constitutional case" in every interaction between journalists and public officials. *See Connick v. Myers*, 461 U.S. 138, 149 (1983).

C. Reasonableness

Turning to the last part of the analysis, we find the White House's exclusion was reasonable. There is no question that excluding a safety threat to the President is reasonable. Even indulging the dissent's fiction that the security threat is pretextual, we cannot conclude that the Defendants acted unreasonably here. The government's "interest in avoiding controversy that would disrupt the workplace and adversely affect" the activities happening within the forum is sufficient to exclude the disruptive speech. *Cornelius*, 473 U.S. at 809. Even if Akers does not pose a security threat, his questions certainly "disrupt" the press conferences and "adversely affect" the legitimate interests of everyone else in the forum—both the President, who needs the ability to maintain decorum and deliver answers to the American public without undue interruption, and the other reporters, who need the room to have some sense of order if they want to be able to ask questions to hold the administration accountable. *See id.* at 810.

Also, Akers does not need to access the press facility to do his job. He can meet sources outside the grounds or, really, anywhere else. Nobody is stopping him from continuing to report on the administration; he can deliver reports on NCC and write articles without any interference

from the government. He can still watch any press briefings he may not be able to attend live by live-streaming them or by accessing the video later. His viewers receive the same information from him (not to mention, the public remains quite capable of turning to any other news outlet that has a press pass for the same information). Akers has plenty of alternatives available, which supports the government's ability to meet its burden on this prong. *See Perry*, 460 U.S. at 53. This is not one of the "[r]are[]" instances where the government forum "provide[s] the only means of contact with a particular audience." *Cornelius*, 473 U.S. at 809. The dissent misguidedly believes Akers needs full access to Camp Esther's press facilities, but that is not so.

Finally, the majority contends that the government could restrict Akers' speech in less restrictive ways, such as allowing him to maintain his press pass but simply refusing to call on him at press conferences. But the "reasonableness" inquiry does not require the "most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808. Indeed, in *Cornelius*, the Supreme Court upheld the outright exclusion of the speaker from the forum as reasonable. So, too, here. It was perfectly reasonable for the White House to tell Akers that he cannot enjoy fully the privileges of a press pass. Accordingly, we find that the Defendants did not violate Akers' First Amendment rights.

II. Due Process Claim

Akers also claims that he was deprived of the hard pass in violation of the Fifth Amendment's Due Process Clause. Undoubtedly, the revocation of the hard pass constitutes state action, so the only question is whether the hard pass constitutes a liberty or property interest protected by the Due Process Clause, and if so, what kind of process is due to Akers to protect it.

See, e.g., *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Victory v. Pataki*, 814 F.3d 47, 59 (2d Cir. 2016).

As we have already found that Defendants did not violate Akers' First Amendment rights, we must conclude that Akers was not deprived of the liberty interest he claims to have had owing to the hard pass. To the extent the dissent argues otherwise, we fail to see the merit in the contention. The dissent cites *Sherrill v. Knight*, 569 F.2d 124, 131 n.22 (D.C. Cir. 1977), in which the D.C. Circuit reserved in dicta the possibility that "the substance of the property interest" in a White House press pass might "involve[] first amendment values to the degree of an entitlement." We simply do not see the logic of this statement, for if the first amendment does not protect an interest in the press pass, then some lesser, "first amendment-tinged" interest in the press pass similarly could not be entitled to constitutional protection.

Similarly, a hard pass is not property protected within the meaning of the Due Process Clause. Due process-protected property interests "are defined by existing rules or understandings that stem from an independent source" of law. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). But no positive law suggests that a press pass is a due process-protected property interest. Indeed, the applicable regulations only discuss the process for application of a press pass, with nothing being said of its denial. *See* 31 C.F.R. § 409.1; 409.2. No regulations speak to revocation, which suggests the Defendant's retained broad discretion to revoke as is necessary to protect the President. This makes sense, because while custom and understanding may create a due process protected interest, they cannot do so in a situation like this, where certainly everyone who comes near the President understands that the Secret Service will act swiftly and decisively to secure the President and her staff. *Cf. Renbarger v. Lockhart*, 921 F.2d 1032, 1034 (10th Cir. 1990). At most, then, Akers had a mere license to

enter Camp Esther, which is private government property. This situation suggests a mere license to use another's property, which every first-year law student knows is a freely revocable interest. Restatement (First) of Property § 519 (1944).[2]

Even assuming *arguendo* that Akers was deprived of some Due Process-protected interest, it would not follow that he is entitled to pre-deprivation notice and an opportunity to be heard. The hallmark of due process is flexibility. "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest." *McElroy*, 367 U.S at 894-95. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481(1972). Under the familiar *Mathews* factors, we assess what process is due by considering "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

Here, the third *Mathews* factor very clearly subsumes the others. Much of the Supreme Court's case law strongly supports the proposition that when the Executive Branch has near-

[2] We find perplexing the dissent's argument that the revocation of the hard pass denies Akers his profession. The revocation only "denie[s] h[im] the opportunity to work at one . . . specific" location. *Cf. Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 896 (1961). He can report on Camp Esther or the White House from outside the White House, especially given that he has other NCC colleagues who still retain their hard passes inside. Perhaps more importantly, Akers' claimed expectancy interest turns on an expectancy that government action won't interfere with his ability to engage in private employment. This is *Lochner*-era logic, and it certainly is neither persuasive nor binding anymore. *Compare, e.g.*, *Truax v. Raich*, 239 U.S. 33, 38 (1915) *with Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 326 (1938).

plenary authority over a matter, as it undoubtedly does when it comes to the security of the President and her staff, due process does not require pre-deprivation notice and a hearing. *See, e.g.*, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 340-343 (1909); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).[3] A holding to the contrary would mean that the Secret Service must, before it can protect the President, subject itself to the procedural rigors that a private litigant would. That would be absurd.

Accordingly, the judgment of the District Court is reversed.

[3] Indeed, the D.C. Circuit case that both the District Court and the dissent relied on goes out of its way to say that it "did not involve . . . standards relating to the security of the President." *Sherrill*, 569 F.2d at 129 (D.C. Cir. 1977).

KNOPE, J., *dissenting*:

The majority subjugates the First Amendment and the Due Process Clause in the name of deferring to the President. But the Constitution applies fully in this case, where a member of the media had his press pass revoked, and therefore saw his freedom of speech abridged for discriminatory reasons. I disagree with the majority at every step.

I. First Amendment claim

A. Designated Public Forum

The Camp Esther press facilities are certainly not traditional public fora such as sidewalks and parks, where the public at large has historically been able to exercise their First Amendment rights. But neither is Camp Esther's press facility completely closed off as if it were private property. The White House has "opened" its own property "for use" by "certain speakers"—journalists. Reporters may enter the facilities to attend press conferences, meet with sources, and work on location, all at the invitation of the government. *See Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) ("[T]he White House has voluntarily decided to establish press facilities for correspondents who need to report therefrom.").

The majority argues that the government has the right to maintain control of its property. But this is not like an airport, whose primary purpose is (hopefully) efficient air travel, not speech. *Krishna*, 505 U.S. at 681-83. The Camp Esther press facilities host *the press*, whose entire job is to conduct First Amendment activities. Just as the government in *Lamb's Chapel* opened up its school property when it "need not," thereby creating a designated public forum, 508 U.S. at 391, the White House opened up its Camp Esther facilities to the media at large

when it needed not. Accordingly, the Camp Esther press facility is a designated public forum. And Akers is certainly "a member of the class of speakers for whose especial benefit the forum was created." *Cornelius*, 473 U.S. at 806. Arguably, this should subject the government action to strict scrutiny, *see Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 667 (1998) ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."), which the government would likely fail to survive. But I'm willing to fight on the majority's own field. Even under the general two-prong test of designated public fora and nonpublic fora, the Defendants' actions are unconstitutional.

B. Discriminatory Intent

A government may exclude certain "content" from a designated public forum "if it preserves the purposes of that limited forum." *Rosenberger*, 515 U.S. at 830. But it cannot engage in "viewpoint discrimination." *Id.*

Here, the government told Akers that it was revoking his press pass for security reasons. That is a content-neutral reason; it does not distinguish among Akers' speech and anyone else's speech. And promoting the safety and security of the President and other administration employees is a significant government interest. *Watts v. United States*, 394 U.S. 705, 707 (1969). But that is not the beginning and the end of the analysis, as the majority concludes by refusing to look seriously beyond the President's proffered reasons. The President's actions under review do not come in the national security realm, and Supreme Court precedent dictates that we should not settle for a government's proffered justification if evidence casts doubt on it.

In *Cornelius*, the Supreme Court suggested that the "existence of reasonable grounds for limiting access to a nonpublic forum … will not save a regulation that is in reality a façade for viewpoint-based discrimination." 472 U.S. at 811. How to determine that is an unsettled question in this particular First Amendment context, but courts have generally been "guided" by familiar approaches in other areas of the law. *See Am. Freedom Def. Initiative v. WMATA*, 901 F.3d 356, 365-68 (D.C. Cir. 2018); *see also Christian Legal Soc. Chapter of the Univ. of Calif. v. Martinez*, 561 U.S. 661, 736 (Alito, J., dissenting) (discussing how "evidence in the record" shows facially viewpoint-neutral policy was factually discriminatory). The evidence in this record displays a discriminatory motive that cannot be permitted under the First Amendment. Reporters deserve equal, nondiscriminatory access to the government to do their job, *see Sherrill*, 569 F.2d at 129; *ABC v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977), and Akers did not receive such access.

First, "statements by government officials on the reasons for an action can indicate an improper motive." *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 87 (1st Cir. 2004). Here, President Fuentes and the reporter have an openly contentious relationship, which begs the question of whether the President was searching for the opportunity to punish Akers. The President publicly called for Akers to be fired; it stands to reason that she tried to effectively make NCC's decision for it by prohibiting Akers from effectively covering her administration.

Second, the government has not enforced its purported rules frequently over the years—only once, in fact. Akers has done nothing unprecedented, and unlike the other reporter whose press was suspended, a much narrower punishment than the full revocation that occurred here, his alleged misconduct occurred *off the job*. The history of nonenforcement of its purported rules

suggests a cover-up. *See Pitt. League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cty.*, 653 F.3d 290, 297 (3d Cir. 2011).

Third, the troubling suggestion that the White House selectively and without merit applied a security policy to stop Akers from doing his job for the benefit of the American public is even more concerning when there was a lack of clearly announced standards in the first place. *See OSU Student Alliance v. Ray*, 699 F.3d 1053, 1064 (9th Cir. 2012). The ability for the Government to issue post hoc rationalizations to conceal the suppression of protected speech is too great to abide.

The combined evidence in this case shows that the Administration discriminated "based upon the content of the journalist's publications." *Stevens v. N.Y. Racing Ass'n, Inc.*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987). That it cannot do. The First Amendment "prohibits government officials from subjecting an individual to retaliatory actions … for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). Doing so will chill speech. "Avoiding the appearance of political favoritism" is a "valid justification" for restricting speech in a forum. *Cornelius*, 473 U.S. at 809. Here, the government did the polar opposite; it restricted speech *because* of political favoritism. That is textbook viewpoint discrimination in violation of the First Amendment.

C. Reasonableness

Even if the Government excluded Akers for viewpoint-neutral reasons, its revocation of the press pass was not reasonable. First, even if the fact that the Government revoked Akers' press pass for his off-the-job incident, there is no "fit" between the means and ends. I do not see how the Government can say that an alleged fight at a cocktail party threatens the President.

Surely, the Government does not expect Akers to try to fight the President at the next press conference, with Secret Service and other security detail all around. Restricting Akers' access does not serve the asserted governmental interests. *See NAACP v. City of Philadelphia*, 834 F.3d 435, 445-46 (3d Cir. 2016). Further, the Government need not narrowly tailor its restriction, but it still must be reasonable. There is no reason that the Government cannot restrict Akers' access to Camp Esther in a way that is less harmful to his First Amendment rights.

II. Due Process Claim

Because Akers was deprived of his First Amendment liberty interest, he has a due process protected interest. But even if he had no liberty interest at stake, he would still have a property interest in his hard pass itself. The majority errs where it fails to recognize this. That property interest in the hard pass is informed by First Amendment values, *but even if it were not*, Akers would have a property interest owing to the fact that he was able to go to the White House or some other presidential facility nearly every day to do his work since he first got his hard pass in 2013. This undoubtedly rises to the level of an "entitlement . . . created by the consistent, positive action of government officials." *Sherrill*, 569 F.2d at 131 n.22. After all, the hallmark of a due process protected interest is whether a person is "losing what one has" rather than "not getting what one wants." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 10 (1979) (quoting Henry Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267, 1296 (1975)).

Government policy for decades has been to allow reporters to have and use their hard passes. Akers, like the rest of the White House press corps, depends on this for his livelihood. It should be obvious that, as a White House correspondent, Akers needs his hard pass to do his job.

It allows him not just the ability to attend press briefings, but also the ability to take impromptu meetings with staffers at various presidential facilities, and the ability to work out of the press cubicles. "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971).

Beyond that, case law holds that if the government takes action against a person to "seriously damage his standing and associations in his community . . . notice and an opportunity to be heard are essential." *Bd. of Regents v. Roth*, 408 U.S. 564, 573(1972) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). Here, Akers' ability to work in his chosen profession has been greatly damaged, because Defendants have portrayed him publicly as a violent person who threatens the safety of the people he is employed to cover. This is a black mark against him that will follow him through his career. The majority downplays this, reasoning that Akers can still lead the NCC White House team from offsite. But as every lawyer should know, one can glean so much more meaning from an in-person interaction than one can ever from an accurate transcript.

Given the expectancy interest at play, the next step is to determine what process is due. The majority is right that, in general, we look to *Mathews* balancing to determine the value of additional procedures, but their balance is applied incorrectly. The Government's interest in ensuring the President's safety is surely great, but the majority's summary "*arguendo*" account of due process requirements misconstrues what pre-deprivation notice and a hearing would protect. The "private interest that will be affected by the official action," *Mathews*, 424 U.S. at 335, is not a wholly private interest at all. Akers' hard pass is surely *his* hard pass, and it allows him to engage in his career, but more importantly, it is intertwined with the Constitution's and the public's interest in having a free press, and one that may even have conflicting views.

Because of this, the second *Mathews* factor, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," *id.*, must look to *both* the value to Akers and the value to the public of a First Amendment interest. To state it plainly, the problem in this case is the animosity between the President and NCC. The statements President Fuentes have made, suggest governmental disregard of one of the core American principles. Although "[a] secret motive stirs up no strife" for First Amendment purposes, *see McCreary Cty. V. ACLU*, 545 U.S. 844, 863 (2005), publicly suspect motives are a problem. The value of pre-deprivation procedures here would thus be twofold. First, Akers would have the private benefit of notice as to why he may lose his press pass prior to losing it; and second, Defendants would have to reduce their contention against Akers to a form that clarifies to the public where the current administration stands on the First Amendment principles.

As the majority recognizes, the D.C. Circuit in *Sherill* did make clear it was not dealing with a case where the government had claimed the security of the President was at stake. *See* 569 F.2d at 129. But from there, the majority seems to suggest that finding for Akers is equivalent to telling the Secret Service it must draft a complaint before it can push the President out of the way of an active shooter. That could not be more wrong. Pre-deprivation process does not mean a full-on evidentiary hearing in the style of *Kelly*. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). An adequate hearing may well just be one that takes place on Akers' way past the Camp Esther guard booth one day. But the majority is so fearful of the phrase "security risk" that it finds no process could ever be due. All the government need do to avoid process is proclaim a security risk. This misses the whole point of procedural due process, which

is to ensure accuracy. *See Mathews*, 424 U.S. at 344 n.28. In the end, the majority overlooks the core purpose of procedural due process, ensuring that a citizen's reasonable reliance is not frustrated by arbitrary government action.

I would affirm.