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 AMICUS CURIAE THE WHITE HOUSE CORRESPONDENTS' ASSOCIATION IN SUPPORT OF APPELLEE SEEKING AFFIRMANCE

George A. Lehner, Esq.
Eli Segal, Esq.*
PEPPER HAMILTON LLP
Hamilton Square
600 Fourteenth Street, N.W.
Washington, D.C. 20005-2004
Phone: 202.220.1416
lehnerg@pepperlaw.com
segale@pepperlaw.com
Counsel for Amicus Curiae White House Correspondents' Association
**Of counsel*

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

A. Parties and amici curiae

All parties, intervenors, and amici appearing before the district court and in this Court, to date, are listed in Appellant's brief.

B. Rulings under review

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

C. Related cases

Counsel for the White House Correspondents' Association are not aware of any related case pending before this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the White House Correspondents' Association certifies that it is a nonprofit organization with no parent company, no subsidiaries, and no stock.

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

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the White House Correspondents' Association certifies that its counsel, Pepper Hamilton LLP, 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 the White House Correspondents' Association, its members, or counsel—contributed money that was intended to fund preparing or submitting the brief.

CIRCUIT RULE 29(d) CERTIFICATION

The White House Correspondents' Association certifies that the filing of this brief is necessary to adequately represent the unique interests of, and provide the unique perspective of, its members—the individuals who cover the White House day in and day out and who would be impacted most directly if the Court were to accept the Defendants' position that the White House Press Secretary can take away a hard pass from any White House correspondent whose conduct she might deem "unprofessional."

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I. SOURCE OF AUTHORITY

Amicus curiae the White House Correspondents' Association has obtained consent to file this brief from all parties and therefore may file it pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(b).

II. IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae is the White House Correspondents' Association ("WHCA"), a nonprofit association incorporated in the District of Columbia, whose primary mission is to advocate for the newsgathering rights of the press on behalf of journalists who cover the White House and on behalf of Americans who rely on the press to provide information about the activities of their elected officials. Founded over 100 years ago, in February 1914, the WHCA has consistently and effectively worked to ensure that the men and women who gather and report the news from the White House have the ability to seek answers from powerful officials, up to and including the President of the United States. The WHCA has 439 regular members and 152 associate members who represent over 100 different print, television, radio, and online journalism outlets.

The WHCA was founded on the belief, as expressed by this country's Founders and enshrined in the First Amendment, that an independent news media is vital to the health of the republic. The ability of the people to effectively govern themselves depends upon a free press' vigorous and regular coverage of those who

hold power in trust. When government officials—including the President of the United States and his Press Secretary here—attempt to restrict, curtail, intimidate, or silence the press in its newsgathering activities, the rights of the people and the press, as guaranteed by the First Amendment, are infringed, and our democratic form of government is placed in jeopardy.

Plaintiff and the district court have outlined in compelling detail the constitutional violations caused by the actions of the President and Press Secretary in connection with the suspension of Plaintiff's hard pass. Amicus WHCA submits this brief, as authorized by its Board, to highlight the extent and breadth of the danger posed to all White House journalists, and to the American public, if the Court accepted the Defendants' unprecedented assertion that the White House Press Secretary may exclude from the White House any journalist whose conduct she might deem "unprofessional."

III. SUMMARY OF ARGUMENT

The Defendants contend that the White House Press Secretary should have absolute discretion to strip a hard pass—an essential tool for those who cover the White House—from any White House correspondent whose conduct she might deem "unprofessional." As discussed below, the Court should reject this dangerous legal position as unworkable and unconstitutional for at least three reasons. First, whether a particular journalist's conduct in a particular situation is

"unprofessional" is largely subjective. Second, journalistic "professionalism" is highly context-dependent. And third, particularly in the current climate, empowering the Press Secretary to be the "professionalism" arbiter would risk severely chilling White House correspondents from providing the White House reporting on which our democracy depends. After all, knowing that the Press Secretary could eliminate their ability to do their job just by classifying their conduct as "unprofessional," would White House correspondents necessarily feel comfortable asking tough or aggressive questions or reporting information that could reflect negatively on the administration?

IV. ARGUMENT

As explained by Todd J. Gillman—a WHCA Board Member and Washington Bureau Chief for *The Dallas Morning News*—in his Declaration attached to Plaintiff's injunction papers, "[a] hard pass is critical for anyone who reports regularly on the White House." JA77-79 (Gillman Decl. at ¶¶ 1, 2, 9). It is no exaggeration to say that, without the access that a hard pass grants, a White House correspondent cannot effectively perform his or her duties, which include providing the public with on-the-spot news coverage of unforeseen and unscheduled events, along with cataloguing the daily activities of the head of the executive branch. *See* JA827-828 (Mem. Op. at 21-22). Yet the President and his Press Secretary assert that the Press Secretary may take away any White House

correspondent's hard pass as long as she (and she alone) deems that person's conduct "unprofessional." Appellants' Br. at 22-25. Moreover, they contend that the Press Secretary's "professionalism" decision is not subject to judicial review. *See id.* at 34-35.

The Defendants' position is deeply troubling to WHCA's members, as it should be to the public at large, and WHCA urges this Court to follow the district court's lead in roundly rejecting it. Indeed, arming the White House Press Secretary—the President's agent for dealing with the press, an institution that he has branded an "enemy of the people" and purveyor of "fake news," Appellee's Br. at 10—with absolute discretion to deny White House access based on such a vague "professionalism" standard would threaten the free flow of information about the President and his administration that is so crucial to the functioning of our democratic system. The Defendants insist that "[t]he concept of professionalism reflects expectations of professional conduct understood and adhered to by millions of Americans every day," and that there is therefore no problem with having the continued possession of a hard pass turn on the Press Secretary's administration of that "concept." Appellants' Br. at 29. The Defendants are wrong. For at least three reasons, the "the-Press-Secretary-thinks-it's-unprofessional" barometer for which they advocate is both unworkable and unconstitutional for White House correspondents.

First, whether a particular journalist's conduct in a particular situation is "professional" or "unprofessional" is largely subjective. Conduct in the course of newsgathering that one person classifies as the former, another person could easily classify as the latter. As the district court put it, "[s]uch abstract concepts may at times indicate what is allowed and disallowed at the furthest margins, but they do not clearly define what is forbidden or permitted in common practice within those margins." *See* JA822 (Mem. Op. at 16). For example, questioning of the President or a White House aide that appears overbearing, rude, or harassing—and therefore "unprofessional"—to one observer might reasonably be viewed by another as simply the dogged pursuit of the truth.

Second, along with being subjective, journalistic "professionalism" is highly context-dependent. The district court correctly noted that White House events "vary greatly in character" and that "[w]hat is deemed 'professional' behavior in the context of a state dinner may be very different from what is considered 'professional' behavior during a performance by James Brown." JA823 (Mem. Op. at 17). And in this administration—with the elimination of the daily press briefing, Appellee's Br. at 9—White House correspondents must rely almost exclusively on an unpredictable hodgepodge of informal, freewheeling, and often chaotic questioning opportunities that do not lend themselves to any sort of uniform "professionalism" standard.

Third, making the Press Secretary the "professionalism" arbiter compounds these problems exponentially. The relationship between the press and the White House is, by design, adversarial. As the Supreme Court put it, "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials, and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). During the current administration, that adversarial relationship has, of course, risen to a new and disturbing level. The President regularly doles out to the media reproaches of "fake news" and "enemy of the people" and has even endorsed violence against reporters. Appellee's Br. at 10.

By all appearances, in the eyes of the President and his administration, asking tough questions, bringing to light abuses of power, and airing criticisms of the administration is "unprofessional"—indeed, treasonous—press conduct. But in the eyes of the press and the Supreme Court, such conduct is precisely what the job of a journalist demands.

A framework that permits the White House Press Secretary—an agent of the President—to exclude a journalist from the White House based on her own evaluation of that journalist's "professionalism" thus leaves White House correspondents with an untenable, unconstitutional, speech-chilling choice: avoid

any newsgathering activity that might tend to offend the President or raise the ire of one of his senior aides, on the one hand, or risk losing the access required to effectively do their job, on the other hand In the Press Secretary's own words, she suspended Mr. Karem's hard pass in order to "*deter* Mr. Karem and other members of the press" from engaging in further conduct that she might deem unprofessional. JA at 146-47 (Aug. 16, 2019 Grisham Letter at 8-9) (emphasis added). That desired and likely "deter[rent]"—AKA chilling—effect makes it essential that this Court affirm the district court and thereby help ensure the continued free flow of information from and about the White House to the millions of people who depend on it to decide the future course of the republic.

V. CONCLUSION

For all of these reasons, the White House Correspondents' Association requests that the Court affirm the district court's decision and reject the Defendants' dangerous legal position.

Dated: January 13, 2020

Respectfully submitted,

/s/ George A. Lehner

George A. Lehner
PEPPER HAMILTON LLP
Hamilton Square
600 Fourteenth Street, N.W.
Washington, D.C. 20005-2004
Phone: 202.220.1416
Fax: 202.220.1665
lehnerg@pepperlaw.com

Eli Segal
PEPPER HAMILTON LLP
3000 Two Logan Square
Eighteenth & Arch Streets
Philadelphia, PA 19103-2799
Phone: 215.981.4239
Fax: 215.981.4750
segale@pepperlaw.com

Counsel for Amicus Curiae White House Correspondents' Association

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 1506 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(f).

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.

Dated: January 13, 2020

/s/ George A. Lehner
George A. Lehner
Counsel for Amicus Curiae White House Correspondents' Association

CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2020, I caused the foregoing Brief of Amicus Curiae the White House Correspondents' Association in Support of Appellee Seeking Affirmance to be filed with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: January 13, 2020

Respectfully submitted,

/s/ George A. Lehner
George A. Lehner
Counsel for Amicus Curiae White House Correspondents' Association