Case No. 16-08083

In the United States Court of Appeals
for the Tenth Circuit

WESTERN WATERSHEDS PROJECT; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs-Appellants,

v.

PETER K. MICHAEL, in his official capacity as, Attorney General of Wyoming; TODD PARFITT, in his capacity as Director of the Wyoming, Department of Environment Quality; PATRICK J. LEBRUN, in his official capacity as County Attorney of Fremont County; JOSHUA SMITH, in his official capacity as County Attorney of Lincoln County, Wyoming; CLAY KAINER, in his official capacity as County and Prosecuting Attorney of Sublette County, Wyoming,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Wyoming
Judge Scott W. Skavdahl, Case No. 2:15-cv-00169-SWS

OPENING BRIEF OF APPELLANTS
ORAL ARGUMENT REQUESTED

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Western Watersheds Project
and National Press Photographers Association
(additional counsel listed on inside cover)

Leslie A. Brueckner
Public Justice, P.C.
555 12th St., Suite 1230
Oakland, CA 94607
(510) 622-8205
lbrueckner@publicjustice.net
Counsel for Western Watersheds Project and National Press Photographers Association

Justin Marceau
University of Denver Sturm College of Law
(for identification purposes only)
2255 East Evans Ave.
Denver, CO 80208
(303) 871-6000
jmarceau@law.du.edu
Counsel for Western Watersheds Project and National Press Photographers Association

Deepak Gupta,
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com
Counsel for National Press Photographers Association

Michael E. Wall,
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100
mwall@nrdc.org
Counsel for Natural Resources Defense Council, Inc.

Margaret Hsieh,
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
(212) 727-2700
mhsieh@nrdc.org
Counsel for Natural Resources Defense Council, Inc.

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
(307) 745-7979
reed@zarslaw.com
Counsel for Plaintiffs

CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants, Western Watersheds Project, National Press Photographers Association, and Natural Resources Defense Council, Inc. do not issue stock and have no parent corporations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Statutes

Regulations

STATEMENT OF RELATED CASES

There have been no prior appeals in this case and Plaintiffs know of no related appeals at this time.

I. JURISDICTIONAL STATEMENT.

This action was brought in the District of Wyoming pursuant to 42 U.S.C. § 1983, to prevent the enforcement of two related statutes that target First Amendment protected activities, referred to here as Wyoming's "Data Censorship Statutes." The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343. On July 6, 2016, the district court entered a decision and order dismissing Plaintiffs' First Amended Complaint. Plaintiffs filed their notice of appeal from that final judgment on August 2, 2016. This Court has jurisdiction pursuant to 28 U.S.C § 1291.

II. ISSUES PRESENTED.

The provisions of the criminal and civil Data Censorship Statutes challenged in this appeal make it unlawful to "[c]ross[] private land" without permission while en route to "collecting resource data" from public land. Wyo. Stat. § 6-3-414(c), § 40-27-101(c). "Resource data" is defined as data related "to land or land use." Wyo. Stat. § 6-3-414(e)(iv), § 40-27-101(e)(iv). "Collect" is defined as "preserv[ing] information," including through "sampl[ing]," "photograph[y]" or "other[]" means *if* the person *also* records "a legal description or geographical

coordinates of the location of the collection." Wyo. Stat. § 6-3-414(e)(i) & § 40-27-101(e)(i).[1]

The district court held that the statutes do not warrant any form of First Amendment scrutiny because they only create liability if a person "crosses" private land without permission. The issues presented on appeal are:

1. Whether statutes that penalize the collection of resource data on public land, and do so only when the data is preserved with "a legal description or geographical coordinates of the location of the collection," target First Amendment protected activities. *See, e.g.*, Aplt. App. at A102-06 (raising Plaintiffs' First Amendment claim), A155-64 (dismissing that claim).

---

[1] The criminal and civil Data Censorship Statutes, as amended in 2016, are reproduced in Appellants' Appendix at A174-76 and A179-81, respectively, and in the addendum at the end of this brief. The amendments are shown in full in Appellants' Appendix at A177-78 and A182-84.

In both the criminal and civil statutes, subsection (c)—the subsection challenged in this appeal—states, in full, that it is unlawful if a person "(i) Crosses private land to access adjacent or proximate land where he collects resource data; and (ii) Does not have: (A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or (B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land."

Both statutes state, in full, "'Resource data' means data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species"; and "'Collect' means to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection."

2. Whether the Data Censorship Statutes are insulated from First Amendment scrutiny because a violator must "cross" private land without permission, regardless of the fact that the statutes also target First Amendment protected activities. *See, e.g.*, *id.* at A102-06 (raising Plaintiffs' First Amendment claim), A155-64 (dismissing that claim).
3. Whether the manner in which the Data Censorship Statutes target data collection renders them content-based and viewpoint discriminatory, requiring strict scrutiny. *See*, *e.g.*, *id.* at A102-06 (raising Plaintiffs' First Amendment claim), A155-64 (dismissing that claim).
4. Whether Wyoming's asserted rationale for the Data Censorship Statutes, to discourage trespass on private property, satisfies strict scrutiny. *See, e.g.*, *id.* at A102-06 (raising Plaintiffs' First Amendment claim), A155-64 (dismissing that claim).
5. Whether, even if the Data Censorship Statutes are not content-based or viewpoint discriminatory, they still require and fail intermediate scrutiny because the statutes are not tailored to meet their stated goal. *See*, *e.g.*, *id.* at A102-06 (raising Plaintiffs' First Amendment claim), A155-64 (dismissing that claim).

III. INTRODUCTION.

Wyoming's Data Censorship Statutes were enacted to prevent activists from petitioning government agencies regarding land use and environmental policies. When the laws were first passed in 2015, they made it a crime and created civil liability to gather resource data from "open land" without permission, but *only if* that data was "submitted or intended to be submitted to any agency of the state or federal government." *See* Aplt. App. at A177-78.

The statutes were developed at the behest of the livestock industry to suppress the work of Plaintiff-Western Watersheds Project ("WWP"), a non-profit that gathers data from public lands to demonstrate the harm overgrazing causes to the environment. *Id.* at A54-55.[2] WWP had submitted such data to the Wyoming Department of Environmental Quality and the state found certain public waterways to be contaminated, restricting their use. *Id*. Several ranchers then sued WWP, alleging WWP had trespassed in order to collect the data. *Id.* Further, the livestock industry heavily lobbied for the Data Censorship Statutes to prevent WWP and others from obtaining additional data that would substantiate the need

[2] *See also* Trevor Graff, *Data Trespass Debate Questions Tenor of Longstanding Laws*, Casper Star-Tribute (Feb. 18, 2015), http://billingsgazette.com/news/state-and-regional/wyoming/data-trespass-debate-questions-tenor-of-longstanding-laws/article_b982cd68-7168-55ca-af17-2278ab534abe.html.

for further restrictions. *See id.* Legislators expressly stated they supported the bills to stop such environmental advocacy. *See*, *e.g.*, *id*.

Plaintiffs challenged the 2015 Data Censorship Statutes as unconstitutional content-based and viewpoint-discriminatory restrictions of speech. The district court all but agreed, denying Defendants' Motion to Dismiss because the court had "serious concerns" regarding the laws' constitutionality, as the statutes created liability for "collect[ing] and report[ing] data evidencing improper land use, or violations of environmental laws or regulations." *Id.* at A44, A50.

Wyoming's Legislature hurried to amend the statutes, but its changes were nothing more than window-dressing. The 2016 Data Censorship Statutes—the subject of this appeal—continue to punish people who collect data on public land. The amendments replaced the statutes' express prohibition on providing data to the government, with a prohibition on data collected with "a legal description or geographical coordinates of the location of the collection." Wyo. Stat. § 6-3-414(e)(i), § 40-27-101(h)(i). Yet, environmental advocates, including WWP, must gather the precise location of where their data was collected in order to develop and present their petitions to the government. Aplt. App. at A60-61, A69-70, A92-93. In other words, Wyoming merely exchanged its explicit prohibition on the collection of data intended to be communicated to the government for a

functionally equivalent prohibition on the collection of data in a manner so that data can be used in that advocacy.

The 2016 Data Censorship Statutes persist in targeting First Amendment speech. They seek to skew debates over land use and environmental policies by preventing certain types of speech on those polices from entering the marketplace. In fact, the Data Censorship Statutes are subject to the most stringent First Amendment scrutiny. They discriminate against speech based on its content and viewpoint, for instance, by their plain text, they only prohibit data collection related to a particular subject matter, land use. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Moreover, the statutes still stem from a "hostility . . . towards the underlying message" that will be expressed based on the data, meaning, regardless of their plain text, they must be treated as content based and viewpoint discriminatory. *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992).

The district court nonetheless granted Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. This was error on multiple levels. Most notably, the district court refused to even consider whether the 2016 Data Censorship Statutes restrict speech. It agreed that, like their predecessors, the 2016 Data Censorship Statutes chill data collection on public lands. Yet, it concluded this was irrelevant because in 2016 the legislature also added a requirement that the data collector had to "[c]ross[] private land" without permission on the way to

collecting data from "adjacent or proximate" public land. Wyo. Stat. § 6-3-414(c), § 40-27-101(c). According to the district court, the mere fact that a data collector has to pass over private land in order to access nearby public land immunizes the 2016 Data Censorship Statutes from all First Amendment review.

Yet, the First Amendment may not be so easily debased. The state may not suppress speech simply by linking a prohibition on First Amendment-protected activities to a prohibition on some unprotected conduct. The First Amendment applies whenever and however the state exercises its authority to target speech, because by targeting speech, the state chills speech.

Moreover, Wyoming's only justification for the Data Censorship Statutes was its claim that the statutes prevent trespass. But, there is no need for a law to regulate data collection on *public* land in order to secure landowners' *private* property rights. Further, Wyoming already has ample trespass laws, and entry onto private land en route to collect resource data from *public* land with the coordinates of where the data was collected—the only sort of "trespass" at issue here—will impose *no* increased harm to private property. Indeed, the only negative impact data collection on public land can have on private landowners is that data will demonstrate the landowner is harming *public* property, *i.e.* the data will generate protected political speech.

The Data Censorship Laws were unconstitutional when they were first passed. They remain unconstitutional today. The district court should be reversed.

IV. STATEMENT OF THE CASE.

A. The 2015 Data Censorship Statutes and Plaintiffs' Complaint.

The original 2015 versions of the Data Censorship Statutes created criminal and civil liability if a person "enter[ed] onto open land" to "collect[] resource data" without permission to gather that data. Aplt. App. at A177-79, A182-83 (Wyo. Stat. § 6-3-414(a)-(b) (2015), § 40-27-101(a)-(b) (2015)). "Resource data" was defined to mean "data relating to land or land use," such as "air, water [or] soil" samples or images or recordings of "animal species." *Id.* at A178 (Wyo. Stat. § 6-3-414(d)(iv) (2015)). "Collect" was defined to require two elements: (1) preserving the "samples," "photographs" or "other[] … information," and (2) "submitting" that data or intending that data to be to "submitted to any agency of the state or federal government." *Id.* (Wyo. Stat. § 6-3-414(d)(i) (2015)).[3] The 2015 Data Censorship Statutes prohibited the gathering of information about open lands without permission to do so, if, and only if the data was meant to be or actually was used by citizens in communications with their government regarding land or land use.

[3] In the 2015 statutes, the definitions only appeared in the criminal statute, but the parties and district court agreed they were meant to apply to both statutes. Aplt. App. at A15 n.2.

Creating a belt-and-suspenders approach, the 2015 Data Censorship Statutes further prohibited any data submitted to the government in violation of the statutes from being used in administrative or judicial proceedings and required that such data be expunged from public records. *Id.* at A177-78, A182-83 (Wyo. Stat. § 6-3-414(e)-(f) (2015), § 40-27-101(d)-(f) (2015)). The 2015 Data Censorship Statutes not only prohibited advocating to the government, but also stopped the government from considering activists' opinions in rulemakings or enforcement actions and from making them available to the public. *Id.*[4]

If the text of the statutes left any doubt that their purpose was to suppress advocacy regarding land use policies, Wyoming's legislature made this plain. As described above, the statutes were a reaction against WWP's data collection on public lands, which WWP used to advocate for limits on grazing to prevent pollution of public waters. *Id.* at A54-55. When the 2015 Data Censorship Statutes came up for consideration, one legislator expressly stated that the law would prohibit the "incident" that brought about the legislation. *See id.* at A55.

[4] For violating the statutes a person could be imprisoned for up-to a year and fined up-to $1,000, with additional penalties for repeat offenders. *Id.* A178 (Wyo. Stat. § 6-3-414(c) (2015)). That same person could also be civilly liable for "all consequential and economic damage proximately caused by the trespass," as well as the fees and costs of the civil litigation. *Id.* A183 (Wyo. Stat. § 40-27-101(c) (2015)).

The statutes exempted data collection for the purposes of assessing boundaries or property values, or carrying out the "official duties" of "peace officers." Aplt. App. at A178 (Wyo. Stat. § 6-3-414(d)(iv) (2015)).

Another legislator described how the statutes would also inhibit collecting data about the sage grouse, which would keep groups, such as Plaintiff-Natural Resources Defense Council ("NRDC"), from petitioning the federal government to protect the species' habitat under the Endangered Species Act. *Id.* at A107. Because Wyoming's legislators believed such regulatory petitions were developed by "evil," "nefarious," "extremists" groups to undermine the advancement of more important activities, the legislators explained the state needed to pass the Data Censorship Statutes to prevent such groups from engaging in their political advocacy. *Id.* at A55.

Based on the Data Censorship Statutes' clear purpose and effect of suppressing land use and environmental advocacy, Plaintiffs alleged that the Data Censorship Statutes violated several constitutional provisions, including the First Amendment. *See id.* at A102. Plaintiffs named the state and county officials charged with enforcing the statutes as Defendants. The state Defendants moved to dismiss.[5]

B. The district court's initial decision.

The district court denied Defendants' Motion to Dismiss because it concluded the 2015 Data Censorship Statutes not only burdened speech, but were

[5] Plaintiffs agreed with the county officials that the state and county Defendants would present essentially identical arguments on the merits and thus the county Defendants did not need to submit a separate motion to dismiss.

likely designed to suppress speech. Discrediting Wyoming's claim that the statutes were meant to prevent trespass, the district court explained, the statutes did "not punish one who simply enter[ed] land without permission or authorization for any [] purpose," but instead punished that person only if he entered and "intend[ed] to communicate collected resource data to" a government agency. *Id.* at A16. Because "[d]eterring people from collecting resource data on public lands does nothing to deter people from" unpermitted entry, the court suggested that the statutes were not meant to "[p]rotect[] individual privacy," but rather to limit the development of information to be used in speech. *Id.* at A42. Indeed, the court explained, the legislative history detailed in Plaintiffs' Complaint was sufficient to suggest the state's "motive" in passing the statutes was to suppress speech, not protect privacy. *Id.* at A47 (quotation marks omitted).

The court's distrust of the statutes was further bolstered by the "fact [that] existing laws already seek to address" trespass. *Id.* at A43. Although Wyoming's trespass laws and the 2015 Data Censorship Statutes "are not identical"—the Data Censorship Statutes target "certain types of trespassers" on open land for special penalties—the close overlap between the two sets of statutes "'casts considerable doubt upon the proposition' that the challenged law was intended to prevent" trespass. *Id.* (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-37 (1973)). "A landowner already has avenues of redress against trespassers." *Id.*

Moreover, liability under the Data Censorship Statutes turned on whether the data collector could obtain permission to gather the data, enabling censorship of undesirable views: "If a person collects and submits data favorable" to the entity with rights over the land where the data was collected, there would likely be "no liability" because the collector would be permitted to engage in his or her conduct; a data collector was only likely to be liable if he "report[ed] data evidencing improper land use, or violating of environmental laws or regulations," for which the landowner was unlikely to give the collector permission to collect. *Id.* at A44.

For these reasons, the Data Censorship Statutes appeared to warrant the strict scrutiny required of "content or viewpoint discrimination." *Id.* at A43-44. The district court also observed that "[t]he Supreme Court has carved out a heightened protection for what it considers to be 'core political speech.'" *Id.* at A40 (citing *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999)). The 2015 statutes seemed designed to "impermissibly punish individuals for exercising their right to petition the government," falling within this particularly noxious category of laws. *Id.* at A45. Wyoming did not appear to be able make the showings needed to justify the statutes. *Id.* at A44.

C. The 2016 Amendments to the Data Censorship Statutes.

Immediately after the district court's decision, the same state legislature that passed the original Data Censorship Statutes—Wyoming's 63rd Legislature—

adopted amended versions of the civil and criminal statutes, the 2016 Data Censorship Statutes, codified at Wyoming Statute § 6-3-414 (establishing criminal liability) and § 40-27-101 (establishing civil liability).

The only provisions of the 2016 Data Censorship Statutes challenged in this appeal make it a crime and create liability if a person happens to "[c]ross[] private land" without permission to "collect[] resource data" from "adjacent or proximate land." Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). As the district court put it, subsection (c) "increase[s] [the] punishment for the unlawful entry of private lands en route to engage in protected activity," that is to engage in the "collection of resource data from public lands, or lands upon which an individual may rightfully engage in resource data collection." Aplt. App. at A159.

There are three key aspects to subsection (c). First, although the Wyoming legislature replaced the prohibition on collecting resource data from "open land" with language prohibiting resource data collection from "adjacent or proximate land," the function of subsection (c) is to create liability for collecting data on *public* land. Subsections (a) and (b) were added to prohibit entering onto private land to collect resource data from that private land. Wyo. Stat. § 6-3-414(a)-(b), § 40-27-101(a)-(b). Thus, the only purpose for subsection (c) is to maintain the threat of criminal and civil liability for those who collect resource data on public lands.

Second, liability under subsection (c) merely requires "entry" onto private land on the way to public land. The statutes contain no *mens rea* requirements, so any "entry," no matter how accidental, satisfies this requirement.

Third, liability depends on whether the data collector was permitted to "cross" the private land. The 2016 Data Censorship Statutes only punish people who enter private land without permission if they also engage in data collection on adjacent or proximate public land, but no liability results if the data collector acts on behalf of or with the consent of the private land owner.

In addition to modifying the elements, the 2016 amendments also altered the definition of "collect." "Collect" still involves two steps, but those are now: (1) "preserving" "samples," "photographs" or "other[] … information"; and (2) doing so with a "recording of a legal description or geographical coordinates of the location of the collection." Wyo. Stat. § 6-3-414(e)(i), § 40-27-101(h)(i). Rather than defining collect to mean the collection and submission of the data to the government, as the 2015 versions had done, the 2016 statutes now define collect to mean to collect in a manner that allows the location where the data was collected to be precisely identified at a later time.

The definition of resource data remains the same as it was in the 2015 statutes, "data relating to land or land use," Wyo. Stat. § 6-3-414(e)(iv); § 40-27-101(h)(iii), as do the penalties and exclusions.

D. Plaintiffs' Amended Complaint.

Plaintiffs amended their complaint to challenge the 2016 Data Censorship Statutes, alleging that they infringe on First Amendment rights in effectively the same way as the 2015 statutes. Aplt. App. at A51-111. In addition to the legislative history described above demonstrating Wyoming's 63rd Legislature's motive for the statutes, *see id.* at A54-55, the plain text of the amendments demonstrate the Data Censorship Statutes continue to target data collection to be used in advocacy regarding land use policies, *see*, *e.g.*, *id.* at A55-56. Part and parcel of submitting comments to state and federal agencies regarding land use regulations is gathering and preserving resource data with the geographical coordinates of where the data was collected—that is, collecting data in exactly the manner the statutes now single out for their restrictions. *See, e.g.*, *id.* at A60-61, A69-70.

Only when data is gathered in this manner can it be effectively used to support regulatory petitions concerning land use and environmental policies. For instance, prior to the Data Censorship Statutes being passed, NRDC had planned on deploying air quality monitoring stations on Wyoming public lands. *Id.* at A70. Knowing and recording the "GPS location of the air quality monitoring location[s]" "is an essential component of the" readings to be taken by those stations. *Id.* A69. NRDC needs to know the precise location of where this data is

collected to model where the air came from and thus what industrial and environmental conditions could impact the readings. *See id.* Only if NRDC can perform such analysis, can it use the data to support regulatory comments that "encourage stronger protections" against industrial air polluters. *See id.* at A69-70.

Likewise, when NRDC seeks to establish a species is endangered, entitling that species to protections under the Endangered Species Act, it relies on GPS units to record the precise location where members of the species are found. *Id.* at A92. NRDC must collect and preserve data that details exactly where it looked for and sighted the species, as this is what allows it to substantiate its claims about the extent of the species' population, compelling agencies to act. *See id*.

Similarly, to generate its comments under the Clean Water Act concerning the negative environmental impacts of grazing, WWP uses "Multiple Indicator Monitoring" of waterways in Wyoming, the "agency-approved method of measuring riparian health parameters." *Id.* at A89-90. Multiple Indicator Monitoring involves collecting the "GPS locations for" each data point. *See id*.[6]

[6] To ensure that they accurately report the news, press photographers' equipment also regularly records the "geographic location" of their shots. *Id.* at A65-66. Thus, the Data Censorship Statutes restrict not only the activities of the land use and environmental activists Wyoming intended to target, but also members of Plaintiff-National Press Photographers Association ("NPPA"), keeping them from informing the public about what is occurring on Wyoming's public lands. *Id.*

Moreover, because of the ways in which public and private land in Wyoming are intertwined, the fact that the 2016 Data Censorship Statutes require one to "cross" private land on the way to public land does nothing to limit the statutes' effect of suppressing resource data collection on public lands. *Id.* at A62, A93-96. In Wyoming, it is often all but impossible to determine where public property ends and private property begins so that one can avoid touching private property on the way to public property. *Id.* Therefore, because the statutes contain no *mens rea* requirements, creating liability if one even accidentally steps onto private land, the statutes chill data collections on public land. Wyo. Stat. § 6-3-414(c), § 40-27-101(c).

For example, the government has built and maintains roads across private property without securing public rights of way, nonetheless the roads are listed on public maps and regularly used by the public. Aplt. App. at A62. In some circumstances this occurs because the government itself is not aware the road crosses private land and thus is unaware a right of way is required. *Id.* In others, the government incorrectly believed it acquired the right of way, or had acquired the right of way, but failed to properly record it; which, in both instances, means the roads remain private property. *Id.* In at least one case, a landowner claimed the government properly recorded the right of way, but then built the road in another location. *Id.* at A63.

As a result, the only way a data collector seeking out data on public land could be assured he is accessing public property would be to identify what is public and what is private himself, by mapping boundaries and cross-referencing those with both land office records *and* unrecorded easements that exist only in the drawers of government offices. *Id.* at A62-63.

Accordingly, Plaintiffs' reasonable fear of liability under the 2016 Data Censorship Statutes inhibits their efforts to gather data from public land to carry out their missions and develop their petitions to the government. WWP has not collected up-to-date water samples to substantiate its comments on the need to limit grazing to protect water quality. *Id.* at A64. NRDC has not deployed its air quality monitoring stations on Wyoming public lands, despite beginning identical research in Montana. *Id.* at A70. NPPA's members have turned down assignments to photograph or record newsworthy events in Wyoming. *Id.* at A65-66.

E. The decision being appealed.

The district court dismissed the entirety of Plaintiffs' Amended Complaint based on its conclusion that the First Amendment simply does not apply to the 2016 Data Censorship Statutes. The court stated that because the Constitution "does not compel a private landowner to yield his property rights and right to privacy," any statute that contains a requirement that a violator access private

property without permission is free from First Amendment scrutiny, regardless of whether the statute also restricts speech. *Id.* at A155-56 (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)). "[T]he public does *not* have the right to cross private lands," and because, to violate the 2016 Data Censorship Statutes, one would have "cross" private land on the way to public land, the "statutes do nothing to the" constitutional rights of data collectors. *Id.* at A159 (emphasis in original). In so holding, the court analogized the Data Censorship Statutes to Wyoming laws that create additional penalties for those who "hunt, fish, or trap" on "private property." *Id.* at A167 (quotation marks omitted). The court opined that because those trespass laws and the Data Censorship Statutes share a common element—that the violator had to, at some point, enter private property—the state could use the same tools to regulate data collection on public land as it could to regulate hunting, fishing and trapping on private land. *Id*.

The court agreed that public lands in Wyoming intersect with private lands without markers or even records of where public land ends and private land begins. *Id.* at A156-57. However, it stated this did not impact its First Amendment analysis. *Id*.

Although the court acknowledged that it previously held the legislative history of the Data Censorship Statutes indicated a "desire to suppress certain

content," *id.* at A42-44, the court now held that the legislature was able to "'cure' a law originally enacted with unconstitutional animus" by amending the statutes, *id.* at A166 (citing *Hayden v. Paterson*, 594 F.3d 150, 162-69 (2d Cir. 2010); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc)). As a result, "the Court no longer ha[d] 'considerable doubt' as to the purpose of the revised statutes." *Id.*

Plaintiffs appealed, challenging the constitutionality of the provisions of the Data Censorship Statutes that create criminal and civil liability for "crossing" private land without permission if one goes on to collect data from public land. Wyo. Stat. § 6-3-414(c), § 40-27-101(c). Plaintiffs have limited their constitutional claims on appeal to their contention that § 6-3-414(c) and § 40-27-101(c) violate the First Amendment.

V. STANDARD OF REVIEW.

This court "review[s] *de novo* the district court's dismissal under [Federal Rule of Civil Procedure] 12(b)(6) for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) motion to dismiss may be granted only if it appears beyond a doubt that the plaintiff is unable to prove any set of facts entitling her to relief under her theory of recovery. All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true. The court must view all reasonable inferences in favor of the plaintiff, and the pleadings must be liberally construed.

The issue in reviewing the sufficiency of a complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support her claims." *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) (quotation marks and citations omitted).

VI. SUMMARY OF ARGUMENT.

Through their restrictions on resource data collection on public lands the Data Censorship Statutes unquestionably target speech. Laws restricting the development of information to be used in speech must be treated as if they regulate speech based on that information. "Whether government regulation applies to creating, distributing, or consuming speech makes no difference." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011). Therefore, the Data Censorship Statutes' restriction on data collection, which inhibits the formulation, construction, and presentation of opinions based on that data, attacks First Amendment freedoms. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994).

The plain text of Wyoming Statutes § 6-3-414(c) and § 40-27-101(c) makes clear the statutes were designed to interfere with citizens' participation in debates, particularly governmental decision making. By solely regulating data collected and "preserve[d]" with "a legal description or geographical coordinates of the location of the collection," the 2016 Data Collection Statutes are targeted at

information meant to be used to develop and support arguments, especially in administrative proceedings. *See* Wyo. Stat. § 6-3-414(e)(i), § 40-27-101(h)(i). This is the exact type of data collection land use and environmental advocates rely on in their petitions and comments to the government. *See* Aplt. App. at. A60-61, A69-70, A92-93. Moreover, key statutory schemes governing public lands invite citizens to develop this type of data to participate in rulemakings. Lest there be any doubt that the Data Censorship Statutes plain text means to restrict political advocacy, members of Wyoming's 63rd Legislature stated this was the statutes' goal.

As a result, the district court erred as a matter of law by asserting it did not need to perform any First Amendment analysis because the Data Censorship Statutes could protect private property. The very premise of the First Amendment is that it applies to all statutes that have the potential to limit speech. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). The district court was required, but failed to engage in the appropriate First Amendment scrutiny to determine whether the Data Censorship Statutes' claimed non-speech based goal justified their means. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (discussing how, even for commercial speech, subject to less exacting scrutiny, the First Amendment requires such balancing).

The district court's error is all the more severe because the 2016 Data Censorship Statutes should have been subject to the strictest First Amendment scrutiny. Exactly like the earlier versions of the laws, the 2016 statutes disfavor speech with a particular content (that concerning land use) and a particular viewpoint (that of individuals believed to be working against the interests of private property holders and thus who cannot secure private property owners' permission to "cross" their land to collect public data).

Further, the statutes fail either strict or intermediate scrutiny. No law seeking to reduce entry onto private property ever needs to regulate data collection on public lands. The act of data collection on public land has no relationship whatsoever to any injury to private land. Indeed, the only harm the act of data collection on public land could cause to private land owners is through what that data collection will communicate about land use, and, under the First Amendment, a law can never be justified because it suppresses communication. Therefore, Wyoming Statutes § 6-3-414(c) and § 40-27-101(c), which only restrict data collection on public land, cannot stand.

VII. ARGUMENT.

A. The Data Censorship Statutes regulate First Amendment protected activities.

"Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Therefore, the First Amendment protects both the development of speech and the act of speaking. *See id.; see also Brown*, 564 U.S. at 792 n.1.

This is because the freedom of speech not only ensures free expression, it also prohibits government "coercion" of public "debate," such as efforts to limit what sorts of thoughts are "persuasi[ve]." *Turner Broad. Sys.*, 512 U.S. at 641; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (explaining the First Amendment applies to government efforts to direct the "composition[]" of expressions). Accordingly, the Amendment applies to laws that limit the "formation of intelligent opinions," just as it would apply to prohibitions on the expression of those opinions. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The government can no more regulate Beethoven's access to "strings and woodwinds" to prevent him from gathering his inspiration than it could regulate the release of his arrangements. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010). Laws that "abridg[e] the freedom of speech" can be laws that "suppress speech" or

"[l]aws enacted to control" what speech is produced in the first place. *Citizens United*, 558 U.S. at 336 (quotation marks omitted).

Thus, restrictions on data collection, which interfere with development of and support for opinions, have repeatedly been held to be constitutionally equivalent to restrictions on the articulation of opinions and thereby subject to the First Amendment. "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011).

The Data Censorship Statutes are emblematic of why the First Amendment protects such data collection. By restricting the collection of land use data—but only if it is collected with critical details, so that the data can be used in scientific assessments, to establish trends, and to demonstrate cause and effect—the Data Censorship Statutes make clear that they are not aimed at the act of collecting, but instead the resulting development of speech, especially advocacy before the state and federal agencies that regulate public land, which depends on such analysis. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972) (core to the First Amendment is the ability of citizens to "use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view"). The First Amendment must extend to restrictions like the Data

Censorship Statutes in order to protect the process of developing speech and thereby speaking itself.

i. Data collection that can be used to inform and formulate speech is protected by the First Amendment.

Data collection—which informs the collector whether to speak on certain topics, what positions to take, and how that speech should be composed—is an integral part of the speech process and thus has repeatedly received First Amendment protections. In *Lanphere & Urbaniak v. State of Colorado*, this Court concluded that a statue preventing people from "obtain[ing] [the] addresses of individuals facing prosecution for various traffic violations and DUI[s]" in order to "solicit[] business for pecuniary gain" targeted First Amendment protected activities. 21 F.3d 1508, 1510 & n.1 (10th Cir. 1994). Because the records not only contained identifying information, but also the specifics of the charge (like the data targeted here) the records would enable the recipients to select and refine their message, making the restriction on obtaining the records akin to a restriction on speech itself. *Id.* For instance, the records would enable "[h]ealth care providers" to identify who might desire "[t]reatment of alcohol abuse" and craft their solicitations to be more compelling based on that information. *See id.* at 1518 (Aldisert, J., dissenting on other grounds). Thus, this Court held that although "the Colorado Legislature theoretically ha[d] the power to deny access [to the records]

entirely," First Amendment rights were implicated by the "line drawing" in the law. *Id.* at 1512. Though the "records themselves do not constitute speech," a regulation that restricts who can mine the data to formulate speech, "does indeed evoke the First Amendment." *Id.* at 1512-13. This Court ultimately upheld the Colorado statute because the law only limited commercial speech, and thus warranted less stringent First Amendment scrutiny than the political speech at issue in this case. But, this Court held that by limiting who could obtain information that would determine whether and how they spoke, the law targeted First Amendment freedoms and thus First Amendment scrutiny was required.

Analogously, the First Circuit recently invalidated a statute prohibiting the taking of "digital image[s] or photograph[s]" of ballots. *Rideout v. Gardner*, 838 F.3d 65, 69 (1st Cir. 2016) (quotation marks omitted). The court held that by prohibiting the taking of the photographs, the statute was tantamount to prohibiting the "use of imagery of marked ballots," and thus was equivalent to a direct attack on political speech. *Id*. at 73. A law that prevents social media users from gathering evidence to share with others regarding whether and how they voted, particularly the type of evidence viewers would find most compelling, "affects voters who are engaged in core" First Amendment speech. *Id*. at 75. Making its reasoning applicable not only to photography, but also the other types of data collection covered by the Data Censorship Statutes, the First Circuit elaborated that

laws that limit the tools speakers can use to "'impart information'" or "'attract[] the attention of the audience'" suppress "'important communicative functions'" that are protected by the First Amendment. *Id*. (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985)).

Similarly, the Seventh Circuit has explained that just as the "First Amendment's guarantee of speech and press rights" applies if the state were to limit the "preservation" and "disseminat[ion]" of a recording, so too does the First Amendment apply to laws limiting the "*making* [of] an audio or audiovisual recording." *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (emphasis in original). "The right to publish or broadcast" a point of view "would be insecure, or largely ineffective if the antecedent act of *making* the recording is wholly unprotected." *Id.* (emphasis in original). Again, demonstrating that its analysis was not limited to the particular data at issue and, in fact, directly spoke to the type of data and speech regulated by the Data Censorship Statutes, the Seventh Circuit elaborated that the First Amendment must apply to restrictions on recordings because, otherwise, the state could regulate "note-taking" regarding "public event[s]" which would interfere with the "disseminat[ion of] a

report derived from the notes," "rais[ing] serious First Amendment concerns." *Id.* at 596.[7]

In short, data collection—be it in the form of taking photographs, making transcripts or gathering statistical evidence—can be an integral part of speaking. Because the First Amendment protects "creating, distributing, [and] consuming speech," it must cover such data collection. *Brown*, 564 U.S. at 792 n.1. The Data Censorship Statutes' effort to regulate and limit the development of data concerning land use that will inform, generate and support opinions and advocacy is a fundamental attack on the First Amendment, just as limiting the statements relying upon that data would be.

ii. The Data Censorship Statutes demonstrate how restrictions on gathering data interfere with speech.

The Data Censorship Statutes' history and plain text demonstrate that, by limiting data collection, they seek to undermine public debate and skew governmental decision making about public land use, directly implicating the First Amendment. When first passed, the *only* data that was targeted by the statutes was data to be used in government decision making. Aplt. App. at A177 (Wyo. Stat. § 6-3-414(d)(i) (2015)). The revised Data Censorship Statutes are slightly

[7] *See also United States v. Rarick*, 636 Fed. App'x 911, 917 (6th Cir.) (unpublished) (stating the regulations on "recording" "raise[] serious First Amendment concerns"), *cert. denied*, 136 S. Ct. 2403 (2016).

different in form, but not effect. The revised statutes modified the definition of "collect" to focus on land use data gathered in the exact manner activists use to develop and substantiate their arguments to the government—data collected and preserved with details that identify precisely where it was collected. *See, e.g.*, Aplt. App. at. A60-61, A69-70, A92-93. Thus, although the 2016 statutes removed the express prohibition on submitting data to the government, they did so through an amendment that specifically "dam[med] the source" of the expressions Wyoming had previously sought to suppress. *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015). The amended statutes suppress communication by targeting the type of data used to impart information. *See Rideout*, 838 F.3d at 75. It is for these reasons courts have not and, certainly here, should not "'draw[] a distinction between the process of creating a form of pure speech … and the product of these processes … in terms of the First Amendment protection afforded.'" *Buehrle*, 813 F.3d at 977 (quoting *Anderson*, 621 F.3d at 1061).

Federal statutes regulating public lands confirm that the Data Censorship Statutes undermine citizens' ability to participate in rulemakings. Environmental statutes invite people to submit data collected with the details that make the collection unlawful under the Data Censorship Statutes. For instance, the Clean Water Act requires state agencies to "actively solicit[] [] research" containing "field data" that the agencies can use to "evaluate," "model[]," and "analy[ze]"

pollutants in public waters. 40 C.F.R. § 130.7(a), (b)(5)(iii). Knowing precisely where pollutants are found in public waters is critical to pinpointing their source, tracking their movements, and devising solutions for their removal. Indeed, in Wyoming the "agency-approved method" for analyzing water health involves taking water samples with the "GPS location" of where the data was collected, the exact type of collection regulated by the Data Censorship Statutes. Aplt. App. at A89-90. Likewise, the Endangered Species Act allows individuals to "petition" to obtain protections for species, but only if they can present "substantial scientific" evidence supporting their claim of endangerment. 16 U.S.C. § 1533(b)(3)(A). The "scientific" analysis of a species' population involves recording instances where the species is spotted, with the precise location of where those observations occurred. *See* Aplt. App. at A92-93. In other words, it is not just that the 2016 Data Censorship Statutes employ a definition for data collection that mirrors the ongoing advocacy Wyoming wishes to stop, but the definition reflects the type of data collection federal land laws indicate collectors should undertake if they want to influence governmental decision making.

Moreover, because of the unique patchwork of public and private land throughout Wyoming, the restrictions imposed by the Data Censorship Statutes selectively prohibit advocacy. *See Wyoming v. Livingston*, 443 F.3d 1211, 1229 (10th Cir. 2006) (Wyoming is a "jumble of federal, state, and private land"). The

statutes allow speech from private property owners and their allies while effectively prohibiting it from land use and environmental advocates. The statutes make it a crime and create civil liability even if a person accidentally "crosses" private land without permission on the way to collect data from "adjacent or proximate" public land. Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). In Wyoming seemingly public roadways, leading to public property—roads built with public money and appearing on public maps—can actually be private—because the government has failed to secure or record the public's right of way—and there can be little or no way to determine one's right of use. *See* Aplt. App. at A62-63. Therefore, data collectors seeking out *public* data risk liability under the statutes, *except* private property owners who border public lands and those collectors who can obtain the private property owners' permission to cross on their way to public land. The statutes prohibit the formulation and thus presentation of speech by a particular type of data collector, one who does not own private property neighboring public land and who private landowners will not allow to cross their land even to get to public land. In other words, the statutes only prohibit data collection by those whose activities might be seen as antagonistic to private landowners.

The Data Censorship Statutes will warp public debate. The Data Censorship Statutes inhibit those who want to make their way to public lands to engage in the

specific activities that Plaintiffs allege and the statutory schemes demonstrate are part of political advocacy. On its own this would be inconsistent with the First Amendment, but it is particularly so here, where the statutes' selective restriction will "drive certain ideas or viewpoints from the marketplace." *Turner Broad. Sys.*, 512 U.S. at 641 (quotation marks omitted).

B. That the Data Censorship Statutes regulate access to private property does not insulate them from First Amendment scrutiny.

Because the Data Censorship Statutes target First Amendment protected activities, the district court's analysis contravened the Constitution's requirements. The court refused to apply any First Amendment scrutiny based on its view that because the statutes cover *some* conduct the state can constitutionally regulate (trespass), this insulates the *entirety* of the statutes from constitutional review. Aplt. App. at A159 ("[T]he public does *not* have the right to cross private lands (trespass) to engage in such [data collection]. … Therefore, the Court need not engage in further scrutiny of subsection (c)[.]" (emphasis in original)).

Not so. If, like the Data Censorship Statutes, a law targets First Amendment activities, the fact that it also regulates other conduct does not inoculate it against constitutional scrutiny. A state could not increase the penalties for speeding because the driver was on the way to a political rally without triggering the First Amendment. So too must the First Amendment apply to the Data Censorship

Statutes. None of the district court's cases are to the contrary. Indeed, even though they concern laws that only incidentally regulate speech—as opposed to laws, like the Data Censorship Statutes, that target First Amendment protected activities—each of the cases conducted the First Amendment scrutiny the district court refused to perform. The district court's analysis cannot stand.

i. Laws that restrict both speech and access to private property are still subject to First Amendment scrutiny.

The Supreme Court has held that laws that both regulate speech and restrict access to private property are subject to First Amendment scrutiny. In *Watchtower Bible & Tract Society of N.Y. v. Village of Stratton*, the Supreme Court invalidated a regulation that, like the Data Censorship Statutes, prohibited "going in and upon private residential property" without permission, because that restriction was coupled with a second, separate requirement, that the entrant also had to have the "purpose of promoting a[] cause" when he or she entered. 536 U.S. 150, 154-55 (2002). The Court agreed that the statute at issue in *Watchtower* "protect[ed] [] residents' privacy," but concluded that the law did not strike "an appropriate balance between the affected speech and the government interests." *Id.* at 165-66. In fact, because the law "cover[ed] so much speech" it attacked "the very notion of a free society." *Id*. Since a violator had to be engaged in First Amendment activities for the statute to apply, that he or she also had to violate the law's

restrictions on entry did nothing to negate the need for First Amendment scrutiny, or the "constitutional concerns." *Id*.

The district court disregarded *Watchtower* because it concluded data collection is not afforded the "elevated protection" that has been provided to "door-to-door canvassing and pamphleting of religious materials," the type of First Amendment activities at issue in *Watchtower*. Aplt. App. at A158 n.11. Assuming this is correct (as the case law above demonstrates, it is not), the value of the restricted speech is only a consideration in deciding what First Amendment scrutiny to apply, not whether the First Amendment applies. *See Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 98 (1977) (explaining that the social value of commercial speech will determine what type of scrutiny to apply).

Put another way, "protected free speech interests" cannot be "subordinated" to enable non-speech-based regulations. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988). In *Bullfrog*, the issue was whether a regulation implementing an international "audio-visual materials" treaty violated the First Amendment because it provided that, to benefit from the treaty, the audio-visual materials needed to increase "goodwill" for the United States. *Id.* at 504. The *Bullfrog* court rejected the suggestion that the First Amendment could be pushed aside because the regulation implemented a treaty, and therefore sought to address "foreign policy concerns." *Id.* at 512. Because the regulation called for an

"inquiry into the content of the speech," the fact that it was needed to "obey[] [the United States'] international law obligations" was only pertinent to determining whether the regulation satisfied strict scrutiny. *Id.* (quotation marks omitted).

A foundational principle of the First Amendment is that laws that contain any speech-based element "pose the inherent risk" that through purpose or effect the laws will "suppress unpopular ideas or information or manipulate the public debate" without sufficiently "advance[ing] a legitimate regulatory goal" to warrant that intrusion on First Amendment values. *Turner Broad. Sys.*, 512 U.S. at 641. Accordingly, a court must look at the particular statute to determine whether it "'selectively [] delimit[s]'" constitutionally protected activities. *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 533, 560–61 (6th Cir. 2007) (quoting *D'Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1543 (D.R.I. 1986), *aff'd*, 815 F.2d 692 (1st Cir. 1987)) (alterations in original). If so, the First Amendment applies. The function of First Amendment scrutiny is then to weigh the "'lawful'" objectives of the statute against its infringement on First Amendment freedoms and resolve whether the constitutional objective is sufficiently "'substantial'" and the statute is structured to appropriately "'advance[] th[at] [] interest'" so the law can survive. *Rubin*, 514 U.S. at 482 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980)) (discussing a form of intermediate scrutiny). By allowing the Data

Censorship Statutes to stand simply because Wyoming could "prohibit access" to private lands, without engaging in First Amendment scrutiny to determine whether "the rule blocking access is, itself, constitutional," the district court engaged in what the Sixth Circuit has called a "circular endeavor." *S.H.A.R.K.*, 499 F.3d at 560–61. That the Data Censorship Statutes might protect private property rights may be pertinent to whether they pass First Amendment muster, but that certainly does not resolve the inquiry. The district court's contrary approach was entirely in error.

ii. The district court's authority concerned "generally applicable laws," which are wholly unlike the Data Censorship Statutes.

The cases on which the district court relied to avoid conducting a First Amendment review all concern "generally applicable laws" that are distinct from laws like those at issue here, which are "aimed at the exercise of speech or press rights as such." *See Am. Civil Liberties Union of Illinois*, 679 F.3d at 601-02 (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972), among others). Generally applicable laws apply equally to all members of the society regardless of their views or whether they are engaged in First Amendment protected activities. *Id*. Examples include the "doctrine of promissory estoppel," *id.*, and "copyright, labor, antitrust, and tax" laws, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 521 (4th Cir. 1999). Generally applicable laws are those that "appl[y] to the daily

transactions of [] citizens" and would have "the same force" whether the person is carrying out a First Amendment protected activity or not. *Id.* at 521 (quotation marks omitted) (citing *Branzburg*, 408 U.S. 665, among others).

Thus, in the cases cited by the district court the issue was *not* whether the government's direct regulation of First Amendment protected activities was constitutional (the issue presented here). Rather, in all of the district court's cases, the question was whether there needed to be exceptions to laws having no direct bearing on First Amendment rights, in order to facilitate speech inadvertently caught up in the laws' restrictions. *Zemel v. Rusk* concerned a ban on travel to Cuba and held that the government did not need to carve out exceptions to that ban because the plaintiff claimed such exceptions would facilitate the "free [] flow of information concerning that country." 381 U.S. 1, 16 (1965). In *Houchins v. KQED, Inc.* a broadcasting company sought and was denied "a special privilege" to access inmates in a county jail "over and above that of other persons." 438 U.S. 1, 3, 10 (1978). *Branzburg v. Hayes* refused to exempt reporters from having to respond to grand jury subpoenas based on the reporters' claim that this would increase "informants[']" comfort in "furnish[ing] newsworthy information in the future." 408 U.S. 665, 682 (1972). In each of these cases, there was no claim that the law singled out particular types of speech or speakers. Rather the plaintiff

demanded additional privileges on the basis they would aid speech. *Houchins*, 438 U.S. at 12 ("The issue is a claimed special privilege of access[.]").

For these reasons, although the "overarching question" with both generally applicable laws and laws targeting First Amendment rights can be characterized as whether the plaintiff "ha[s] a lawful right of access to the information" at issue, the treatment of generally applicable laws has "developed along distinctly different lines than have freedom of expression cases" because the former do not "selectively" limit First Amendment activities. *S.H.A.R.K.*, 499 F.3d at 559-61 (citing *Houchins*, 438 U.S. at 9-10, *Branzburg*, 408 U.S. at 684, among others). Generally applicable laws do not have the same potential to suppress unpopular ideas because the state is not using its authority to target First Amendment freedoms. The challenges cited by the district court resulted from the fact that restrictions on non-speech-based activities also impact people who are attempting to engage in speech. This is a far cry from analyzing whether the state can target an activity needed to engage in speech and thereby restrict the open marketplace of ideas. The district court relied on inapplicable cases to reach its incorrect result.

iii. Even if the Data Censorship Statutes were generally applicable laws, the district court still should have applied First Amendment scrutiny.

Even if the Data Censorship Statutes could properly be characterized as "generally applicable laws" (and they cannot), the district court still erred because

First Amendment scrutiny is required even of generally applicable laws that incidentally impact speech. As the Supreme Court stated, facially "generally applicable regulation[s]" that impact speech are still subject to "intermediate scrutiny." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). This principle was first announced in *United States v. O'Brien*, where the Supreme Court explained that content-neutral laws that regulate a "course of conduct" that *could* result in speech, can only survive if there is "a sufficiently important governmental interest in regulating the nonspeech element [to] justify [the] incidental limitations on First Amendment freedoms." 391 U.S. 367, 376 (1968). Thus, for example, this Court applied intermediate scrutiny to a "dress code" for massage parlors because the dress code had an "incidental limitation[] on First Amendment freedoms." *Mini Spas, Inc. v. S. Salt Lake City Corp.*, 810 F.2d 939, 941 (10th Cir. 1987) (applying *O'Brien*).

Indeed, the cases cited by the district court conducted such a First Amendment balancing. *See Houchins*, 438 U.S. at 12, 15 (explaining there are "a variety of ways" for reporters to obtain information about prisons and the restriction did not undermine an "essential" part of the "freedom to communicate or publish"); *Branzburg*, 408 U.S. at 697-98 (discussing the importance of grand jury testimony and that "history teaches" requiring such testimony will not

"undermine the freedom of the press to collect and disseminate news").[8] The only exception is *Zemel*, which was decided before the Supreme Court held in *O'Brien* that laws that "burden First Amendment freedoms incidentally" must survive First Amendment scrutiny. *Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (citing *Zemel* and *O'Brien*, 391 U.S. at 376). A later, essentially identical challenge to a travel restriction, on the basis that it would limit the development of information, required the restriction to pass intermediate scrutiny. *Id*.

Not only did the district court rely on inapplicable cases, but it failed to even carry out the analysis those decisions require. Generally applicable laws may be subject to less scrutiny, but they are nonetheless subject to First Amendment scrutiny. *Am. Civil Liberties Union of Ill.*, 679 F.3d at 602. The Data Censorship Statutes are subject to strict scrutiny because they are content based and viewpoint discriminatory. However, as explained below, the Data Censorship Statutes do not even survive the intermediate scrutiny required for generally applicable laws, thus the district court fatally erred.

[8] *See also Food Lion*, 194 F.3d at 521-22 (explaining the common law trespass rules at issue there properly furthered appropriate objectives and would not impact the "effective[ness]" of the media).

C. The Data Censorship Statutes warrant strict scrutiny, but cannot survive either strict or intermediate scrutiny.

Because the Data Censorship Statutes regulate First Amendment protected activities—a fact that cannot be ignored on the basis that the statutes also require one to "cross" private property on way to engaging in those activities—the necessary next step is to determine what scrutiny applies. *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008).

The Data Censorship Statutes are content-based and viewpoint discriminatory, *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015), the latter being an especially "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Thus, they require strict scrutiny. *Reed*, 135 S. Ct. at 2228.

By their plain text, the Data Censorship Statutes target speech on a particular topic, *i.e.*, land use, and speech delivered in a particular manner, *i.e.*, speech about land use that relies on data where the location the data was collected can be precisely identified. Further, by their plain text, the statutes target such speech only if it is delivered by a particular type of speaker, a data collector who cannot obtain permission from private landowners to cross adjacent or proximate land to gather data on public land. Moreover, the statutes were passed precisely because they discriminated in this manner and thus, regardless of their plain text, must be

treated as content based and viewpoint discriminatory. *Reed*, 135 S. Ct. at 2227-28. Each one of these facts is sufficient to render the statutes "presumptively unconstitutional" and require Wyoming to establish that the statutes "are narrowly tailored to serve compelling state interests" in order for them to survive. *Id.* at 2226.

The statutes cannot withstand such scrutiny. Regulating data collection on public land does nothing to protect private property, the only purported non-speech based rationale for the statutes. *See* Aplt. App. at A42. Specifically, the statutes cannot serve a compelling purpose because Wyoming already has criminal and civil trespass laws to protect private property. The only reason to pass additional penalties exclusively for data collectors who gather data on *public* land with the geographic coordinates of where the data was collected is to shield private property owners from speech demonstrating the need to protect *public* land, a justification the First Amendment prohibits. For similar reasons the statutes are not properly tailored. By targeting data collection on public land, rather than focusing on entry or harms to private property, the statutes leave unregulated wide swaths of potential harms to private property. The Data Censorship Statutes' claimed non-speech-based objective is nothing more than a façade. Thus not only do the statutes fail strict scrutiny, but also intermediate scrutiny. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 798-99 (1989).

i. The Data Censorship Statutes are content-based, viewpoint discriminatory.

In *Sorrell v. IMS Health Inc.*, the Supreme Court held that laws that prohibit the "disclosure … of" information that would form the basis of "speech with a particular content," are content-based. 564 U.S. 552, 563-64 (2011). Where that limitation on "disclosure" appears "in large part based on" what types of people will use the information to generate speech, the law is not just content-based, but also viewpoint discriminatory. *Id.* at 564.

Thus, *Sorrell* concluded a statute that set up barriers to prescription drug detailers—drug company representatives who visit doctors' offices—collecting "pharmacy records that reveal the prescribing practices of individual doctors" was content-based because it "disfavor[ed] marketing." 564 U.S. at 557, 564. The "practical effect" of the law was to hinder pharmaceutical companies from gathering "the background and purchasing preferences of their clientele," which would assist them in making the case for certain drugs. *Id*. at 558, 564-65. The laws thereby attacked the content of speech. *Id.* at 564. Moreover, because the law's prohibitions did not apply to other individuals, who could obtain the same prescriber-information, it was viewpoint discriminatory. *Id.* For example, the law allowed the information to be obtained for "educational" purposes. *Id.* The law restricted the development of information not just based on how the information

would be used, but how the speaker was expected to approach the information, as an advocate or academic.

To be clear, *Sorrell* would have come out the same if the law had only restricted access to prescriber information, without differentiating between who could access that information. *Sorrell*, 564 U.S. at 564-65. The plain text of a law need not establish an "obvious" content-based restriction by "defining [the] regulated speech by particular subject matter." *Reed*, 135 S. Ct. at 2227. Statutes that indicate they are making "subtle" "distinctions" in light of the "function or purpose" of the regulated First Amendment activity are just as nefarious. *Id*. Because a central function of the information at issue in *Sorrell* was to facilitate marketing, the statute would have still sought to regulate speech based on its content even if its text did not state the law was aimed at solicitations and solicitors. *Sorrell*, 564 U.S. at 564-65.

Likewise, to be viewpoint discriminatory, it was not necessary for the *Sorrell* statute to state its restrictions only applied to drug detailers. A law that expressly "treats all religions alike does not answer the critical question of whether viewpoint discrimination exists." *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996). If that law "disallow[s]" all "sectarian instruction," but "open[s] the doors" for other types of "instruction" it "intrinsically favors secularism at the expense of religion." *Id.* Viewpoint

discrimination occurs whenever there are additional barriers created for certain types of speakers. The statute need not say it is promoting certain views.

The plain text of § 6-3-414(c) and § 40-27-101(c) of the Data Censorship Statutes establish they regulate speech with a particular content, speech regarding land use. Indeed, the Data Censorship Statutes are not examples of "subtle" content-based laws. One can *only* violate § 6-3-414(c) and § 40-27-101(c) if one collects data about public land or land use. Wyo. Stat. §§ 6-3-414(e)(iv), 40-27-101(h)(iii). Since, for First Amendment purposes, here, data collection must be treated like speech based on that data, the statutes target speech on a particular "subject matter." *See Reed*, 135 S. Ct. at 2227. They would be no different if they were contingent on publishing, communicating, or discussing views on public land use.

Moreover, as explained above, because of the way in which the Data Censorship Statutes define "collect," data gathered with precise information regarding where it was collected, it is also apparent that the "function or purpose" of the statutes is to restrict speech about land use and the environment. *See Reed*, 135 S. Ct. at 2227. Therefore, even without their "obvious," express statement that the regulated data is only data about land or land use, through their definition of "collect" the plain text of the Data Censorship Statutes demonstrate they are content based.

The plain text of the Data Censorship Statutes also demonstrates they are viewpoint discriminatory, because the statutes' regulations advantage the perspective of private land owners abutting public land over that of others. The statutes limit their restrictions to those who, even inadvertently, "cross" adjacent or proximate private property without permission to collect data from public land. *See* Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). They do not, in contrast, restrict private landowners whose properties adjoin public land from collecting data from those public lands. Nor do they punish people who can obtain private landowners' permission to cross those landowners' property to collect data on nearby public land. Just as in *Sorrell* or *Church on the Rock*, how one is seen as approaching the material—from the viewpoint of a surrounding landowner or another—will determine whether one is able to gather information for speech. If anything, the viewpoint discrimination here is more severe. In *Sorrell* and *Church on the Rock* the speech that was allowed under the laws could be characterized as speech on related, but distinct issues from the speech that was restricted—the statutes restricted marking rather than academic discussions and religious rather than historical instruction, respectively. Here, the Data Censorship Statutes enables those representing the interests of private property owners to develop the political

speech, comments on land use policies, that the statutes prohibit others from pursuing, based entirely on their perspective.[9]

In addition to the plain text of the Data Censorship Statutes, the laws are also subject to strict scrutiny because of the motivations underlying the statutes' passage. Laws that "were adopted by the government 'because of disagreement with the message [the speech] conveys'" should be treated as content based, even if (unlike here) they are not "content based on their face." *Reed*, 135 S. Ct. at 2227-28 (quoting *Ward*, 491 U.S. at 791) (alteration in *Reed*); *see also Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418 (2016) (explaining "motive" matters for First Amendment purposes).

[9] The district court dismissed *Sorrell* as inapplicable because that case "did not involve obtaining the information through illegal means." Aplt. App. at A156 n.9. But, the data collection made unlawful by the Data Censorship Statutes would not necessarily have been illegal except for the statutes. As described below, Wyoming's criminal trespass law requires the violator *know* he is entering private property, unlike the Data Censorship Statutes, which prohibit accidental trespass. *See* Wyo. Stat. § 6-3-303. Accordingly, the district court's reasoning was circular. Data collection regulated by the Data Censorship Statutes is only unlawful if the statutes survive the requisite constitutional analysis.

The district court's statement also misses the point. *Sorrell* recognized the act of gathering information to develop speech is protected by the First Amendment. That *Sorrell* involved a restriction on data collection where one would need to purchase, rather than physically collect the data does not negate *Sorrell*'s holding that a restriction on obtaining data used for a particular type of speech, by a particular type of speaker, is a content-based, viewpoint-discriminatory law.

The Data Censorship Statutes' legislative history establishes they were passed to suppress the work of conservation groups because the legislature believed such groups' perspective worked against the interest of private landowners and businesses, and the legislature wanted to privilege the views of the latter over those of the former. Aplt. App. at A54-55, A107-08.[10] The objective and justification for the Data Censorship Statutes was to stop expressions by people with particular viewpoints so that debates would be skewed towards the interests of industry over the environment.

The district court held that the Wyoming legislature "cure[d]" the fact that the statutes were enacted with "unconstitutional animus" towards a particular viewpoint because the same legislature that originally passed the statutes amended them to enact the 2016 versions, without creating an additional record of legislators' desires to suppress speech. Aplt. App. at A165-66. However, law makers do not get a "do-over" every time they amend a statute. To the contrary, *Johnson v. Governor of State of Florida* explains that courts should have a

[10] Defendants argued below that the legislative history could not be considered because each individual statement was only an expression of particular legislators and not all of the individuals who voted on the bills. This argument is in tension with *Reed*, which explained courts must examine the "'justifi[cation]'" for laws. *Reed*, 135 S. Ct. at 2227 (quoting *Ward*, 491 U.S. at 791). Moreover, in this posture, the district court was required to take as true Plaintiffs' detailed factual allegations that the Data Censorship Statutes were justified based on the content and message of the restricted speech.

"healthy skepticism" of a legislature's motives when there is "proximity" between evidence of "intentional discrimination" and more, seemingly neutral actions. 405 F.3d 1214, 1226 (11th Cir. 2005) (en banc); *see also Hayden v. Paterson*, 594 F.3d 150, 165-66 (2d Cir. 2010) (explaining courts need to look at surrounding "circumstances" to determine whether the plaintiff states a claim that the legislature acted out of animus).

The only reason the cases cited by the district court did not impute the discriminatory motive from one version of the law to another was the extreme expanses of time between the two enactments. In *Johnson*, the plaintiffs argued that a 1968 felon disenfranchisement law was tainted with unconstitutional racial animus because it amended an 1868 disenfranchisement law passed during reconstruction. 405 F.3d at 1219-20. The Eleventh Circuit explained that where a challenged "provision was passed one hundred years after the alleged intentional discrimination," and thus was not an extension of "earlier *de jure* [segregation] measures," any discrimination motivating the 1868 provision could not be said to underlay the 1968 law. 405 F.3d 1214, 1225–26 (11th Cir. 2005). Similarly, in *Hayden*, the plaintiffs alleged that a different felon disenfranchisement law, the final version of which was adopted in 1894, should be struck down based on racial animus contained in the debates surrounding the 1867 and earlier versions of the law. 594 F.3d at 157-59. The plaintiff's mere assertion that this quarter-century

gap was irrelevant was insufficient to sustain the allegation that the legislature enacted the later law for the same reasons it passed the earlier versions. *Id.* at 159.

These cases support holding that the current Data Censorship Statutes are motivated by the same discriminatory purpose as their predecessors. The time between the Data Censorship Statutes' original passage and revision is so short that both sets of statutes were passed by the *same* legislature. The timeline also provides the strong inference that the amended versions were designed to undermine the district court's first decision by obfuscating the statutes' purpose, while accomplishing the same ends. *See* Aplt. App. at A52. The courts should have much more than a healthy skepticism of the legislature's purpose in amending the Data Censorship Statutes.

In nearly identical circumstances, the Fourth Circuit recently held that earlier discriminatory intent continued to taint a law amended soon after it was passed. In *North Carolina State Conference of NAACP v. McCrory*, the court held that all of the challenged provisions of a 2015 voter identification law enacted "with racially discriminatory intent" needed to be struck down even though, immediately after the Fourth Circuit issued a preliminary injunction against the law, the state "Assembly [] amended" one of the challenged provisions to carve out an "exception." 831 F.3d 204, 219, 240 (4th Cir. 2016). The Fourth Circuit explained there was not even a need to remand to consider whether "the

amendment lessens the discriminatory effect" because the court needed to ensure that laws originally motivated by "impermissible discriminatory intent … do not impose any lingering burden." *Id.* at 240.

In sum, § 6-3-414(c) and § 40-27-101(c) are content-based, viewpoint-discriminatory laws for any one of three reasons: (1) the plain text targets speech with a particular content, speech regarding public land use informed by data from those public lands; (2) the plain text of the statutes establish their restrictions only apply to individuals or groups who cannot obtain permission from adjacent or proximate private landowners to gather the data for such speech, ensuring that the restrictions will only inhibit speech if it works against landowners' interests; and (3) the legislative history demonstrates these are the exact objectives the statutes were designed to achieve.

ii. The Data Censorship Statutes fail strict scrutiny.

Because the Data Censorship Statutes are content-based and viewpoint discriminatory, they are presumed to be unconstitutional and "can stand only if … 'the Government [] prove[s] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed*, 135 S. Ct. at 2231 (quoting *Az. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)).

Defendants did not even attempt to satisfy this standard before the district court and cannot do so here, or on remand. The statutes neither serve a compelling state interest nor are they narrowly tailored because there is no need for Wyoming to regulate speech to achieve its claimed objective. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (striking down a law because the government had "various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech"). Indeed the *only* reason for the Data Censorship Statutes restriction of data collection on public land is to restrict speech.

The sole rationale offered for the statutes was that they would protect private property from unwanted intrusion. Yet, Wyoming already has both civil and criminal trespass laws to accomplish this end. Wyo. Stat. § 6-3-303 (criminal trespass statute); *Bellis v. Kersey*, 241 P.3d 818, 824-25 (Wyo. 2010) (explaining Wyoming's common law civil trespass rules). Indeed, the existing trespass laws restrict entry onto private property in largely the same ways as the Data Censorship Statutes. Wyoming's civil trespass law provides for "at least nominal damages" whenever there is any "invasion" of private property, regardless of whether it was knowing or accidental. *Bellis*, 241 P.3d at 824-25 (quotation marks omitted). Wyoming's criminal trespass law makes it unlawful to enter private property "'knowing [one] is not authorized'" to be there. *Salisbury Livestock Co. v.*

Colorado Cent. Credit Union, 793 P.2d 470, 476 n.5 (Wyo. 1990) (quoting Wyo. Stat. 6–3–303(a)). To establish a "'knowing'" entry, a landowner only needs to have provided notice that a person was accessing private property without permission by posting "'signs reasonably likely to come to the attention of intruders.'" *Id.* (quoting Wyo. Stat. 6–3–303(a)). In other words, the only conceivable increased protections created by the Data Censorship Statutes is to expand the damages obtainable against accidental trespassers who are in the process of collecting resource data, and to remove the requirement that a landowner needs to post reasonable signs in order to hold a trespasser who collects data on public land criminally liable. This sort of extra-deterrence is hardly a compelling governmental interest.

Moreover, it is inexplicable how a trespasser who violates § 6-3-414(c) and § 40-27-101(c) imposes any special harm to private property rights warranting such extra-deterrence. These data collectors are not even taking their samples or photographs on the private property, but rather merely moving through that property to get to another location, making it impossible to see how they would impose greater harms on private property than any other trespasser. Certainly a data collector who sets out to collect data on public land with precise information identifying where the data was collected would impose no greater harm on private property than any other person seeking to gather information from public land, but

the Data Censorship Statutes only target the former. "[A] 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Reed*, 135 S. Ct. at 2232 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).

In addition, because restricting data collection on *public* land does nothing to reduce property owners' burdens in enforcing criminal laws or increase the deterrent effect of civil trespass statutes, the Data Censorship Statutes are not properly tailored to achieve their ends. The restriction on data collection on public lands does not facilitate more effective trespass laws. If the state truly believes that to protect private property it needs to increase penalties and reduce the *mens rea* requirements of existing trespass laws, its response should have been to revise the laws for all trespassers. If the trespass laws are ineffective, there is no reason that the state would not seek to make them effective for all, not single out a particular type of trespasser for more "effective" regulation. Because the Data Censorship Statutes are "hopelessly underinclusive," they are not "narrowly tailored" to achieve a non-speech-based end. *See id*. at 2231-32. Instead, by only seeking to increase the penalties for trespass when that trespass is associated with data collected with the precision needed to formulate regulatory petitions, the state actually indicates it is targeting data collection (speech) rather than trespass.

The district court found significant that Wyoming has passed other "statute[s] to prevent a particular problematic sort of trespass." Aplt. App. at A167. The state has enacted additional penalties for people who enter onto private property to "'hunt, fish, or trap without permission.'" *Id.* (quoting Wyo. Stat. § 23-3-305(b)). Yet, that the state can pass a law that targets certain activities when they are connected with trespass does not address whether the state can target *First Amendment protected activities* simply by connecting them to trespass. The fact that the state can pass a regulation that has not been shown to directly or incidentally regulate speech tells one nothing about whether the state can pass a regulation that does impact speech. The entire objective of the First Amendment, and particularly strict scrutiny, is to limit the mechanisms the state might otherwise have, if those mechanisms are used to target speech.

Indeed, the district court's reliance on these special trespass statutes is ironic because with hunters, fishers and trappers the trespassers are imposing a special, greater harm than other trespassers by taking the private property owners' resources. The only special injury created to private property owners from trespassers who go on to collect data from adjacent or proximate public lands is that data contributes to public discourse and policy making, the exact activities the First Amendment protects. Therefore, the comparison between the laws

underscores that the Data Censorship Statutes are not really responding to the harms of trespass, but are instead a reaction against speech.

Properly applying First Amendment scrutiny also undermines the district court's suggestion that Plaintiffs are asking landowners to "yield" their property rights to Plaintiff's First Amendment rights. *See* Aplt. App. at A156. Had the state passed a law uniformly regulating access to private property—even had that law increased the penalties for entry and removed the requirement that the trespasser had to have any knowledge that he or she was entering private property—the same First Amendment concerns would not be present. Plaintiffs' claim that the Data Censorship Statutes cannot stand does not stem from the state's purported efforts to limit trespass, but from the fact that the state has tied those restrictions to a regulation of First Amendment protected activities.

In short, the Data Censorship Statutes target speech based on its message and messenger, therefore strict scrutiny applies. It is Defendants' obligation to demonstrate the Data Censorship Statutes' regulation of First Amendment freedoms is required to achieve the statutes' purported non-speech based objectives. Defendants have not done so. The statutes do not even achieve their claimed objective to protect private property. Instead, the only plausible purpose to the statutes' restriction on public data collection is to inhibit speech.

iii. The Data Censorship Statutes cannot survive intermediate scrutiny.

Finally, as noted above, even if the Data Censorship Statutes are not subject to strict scrutiny, because they at least incidentally restrict First Amendment protected activities, they must pass intermediate scrutiny. *See Ward*, 491 U.S. at 791, 798; *O'Brien*, 391 U.S. at 376. The Supreme Court has explained that to survive intermediate scrutiny, a statute must achieve its non-speech-related objectives in a "direct and effective way." *Ward*, 491 U.S. at 800. "Absent" the impact on the First Amendment protected activities, the government's "interest would have been served less well." *Id.*

On this basis, the Supreme Court held unconstitutional a statute that required the removal of "news racks" containing advertisements, supposedly to reduce the clutter on sidewalks. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993). The Court assumed that the commercial racks that were removed contained speech of less First Amendment value than the racks that were allowed to stay. *Id.* at 423-24. However, the Court explained this was irrelevant, because the value of the speech communicated through the racks "bears no relationship *whatsoever*" to the non-speech-based interest the government stated it was attempting to achieve, to reduce clutter. *Id.* (emphasis in original). This not only established the statute could not survive intermediate scrutiny, but also proved the

law was actually content-based. *Id.* at 429. Rather than "limit the total number of news racks" to further the content-neutral "interest[] in safety and esthetics," the government had chosen to only limit one kind of speech that contributed to the clutter, making its ban "selective" and content based. *Id.* at 428-29.

The Data Censorship Statutes suffer from the same defect as the regulation at issue in *City of Cincinnati*. The Government's stated interest is to protect private property. However, the regulations it has enacted and that are challenged here restrict activities that do not occur on private property, but public land. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). A law that modified existing trespass laws to increase their penalties and reduce their elements would just as well serve Wyoming's non-speech-based interests as the Data Censorship Statutes. Wyoming's decision to increase the penalties for accidental trespass for data collectors is a "selective" approach to the stated problem, demonstrating the statutes are content based. The Data Censorship Statutes cannot survive intermediate scrutiny and should be struck down as the content-based statutes they are.[11]

[11] If this Court were to conclude intermediate scrutiny applied and that there are circumstances in which the Data Censorship Statutes could survive such scrutiny, the instant case would still need to be reversed and remanded because, when applying intermediate scrutiny, this Court requires the government to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

VIII. CONCLUSION.

Plaintiffs respectfully request the decision below be reversed, which this Court can do for at least three different reasons: (1) The district court focused exclusively on the fact that a violator has to "cross" private land to gather data from public land, failing to even consider whether the Data Censorship Statutes' separate regulation of data collection mandates First Amendment scrutiny, an inquiry the district court was required to undertake; (2) Data collection, particularly data collection on public lands in a manner to preserve the data and record precisely where it came from, is protected by the First Amendment, mandating the First Amendment scrutiny the district court failed to apply; and (3) By setting out to target data collection and particularly those data collectors who could not obtain permission from private landowners to engage in data collection, the Data Censorship Statutes are content-based and viewpoint-discriminatory restrictions that are presumptively invalid and can only stand if Defendants establish the laws satisfy strict scrutiny, a burden they cannot carry. The district court's decision establishes a dangerous precedent that if the state ties a restriction on First Amendment freedoms to a purported protection of private property rights, the Constitution no longer applies. This holding is in direct tension with

---

Heideman v. S. Salt Lake City, 348 F.3d 1182, 1197 (10th Cir. 2003) (quotation marks omitted). The parties were not allowed to develop or contest such evidence below.

controlling Supreme Court precedent and, here, will facilitate the suppression of core political speech. The analysis and outcome below require reversal.

IX. REQUEST FOR ORAL ARGUMENT.

Plaintiffs respectfully request oral argument because the Data Censorship Statutes infringe on constitutional rights and the decision below provides state legislatures a means to do an end-run around the First Amendment. Plaintiffs believe the court would benefit from a discussion of the extensive case law cited herein, establishing the numerous, compounding errors in the decision below.

November 14, 2016

Respectfully submitted,

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Western Watersheds Project and National Press Photographers Association

Leslie A. Brueckner
Public Justice, P.C.
555 12th St., Suite 1230
Oakland, CA 94607
(510) 622-8205
lbrueckner@publicjustice.net
Counsel for Western Watersheds Project and National Press Photographers Association

Justin Marceau
University of Denver Sturm College of Law
(for identification purposes only)
2255 East Evans Ave.
Denver, CO 80208
(303) 871-6000
jmarceau@law.du.edu
Counsel for Western Watersheds Project and National Press Photographers Association

Deepak Gupta,
Gupta Wessler PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com
Counsel for National Press Photographers Association

Michael E. Wall,
Natural Resources Defense Council
111 Sutter Street, 21st Floor
San Francisco, CA 94104
(415) 875-6100
mwall@nrdc.org
Counsel for Natural Resources Defense Council, Inc.

Margaret Hsieh,
Natural Resources Defense Council
40 West 20th Street
New York, NY 10011
(212) 727-2700
mhsieh@nrdc.org
Counsel for Natural Resources Defense Council, Inc.

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
(307) 745-7979
reed@zarslaw.com
Counsel for Plaintiffs

X. ADDENDUM OF STATUTORY TEXT

Wyoming Statute § 6-3-414.

Trespassing to unlawfully collect resource data; unlawful collection of resource data

(a) A person is guilty of trespassing to unlawfully collect resource data from private land if he:

(i) Enters onto private land for the purpose of collecting resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(b) A person is guilty of unlawfully collecting resource data if he enters onto private land and collects resource data from private land without:

(i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person is guilty of trespassing to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

(d) Crimes committed under subsection (a), (b) or (c) of this section are punishable as follows:

(i) By imprisonment for not more than one (1) year, a fine of not more than one thousand dollars ($1,000.00), or both;

(ii) By imprisonment for not less than ten (10) days nor more than one (1) year, a fine of not more than five thousand dollars ($5,000.00), or both, if the person has previously been convicted of trespassing to unlawfully collect resource data or unlawfully collecting resource data.

(e) As used in this section:

(i) “Collect” means to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection;

(ii) Repealed by Laws 2016, ch. 117, § 2, eff. March 15, 2016.

(iii) “Peace officer” means as defined by W.S. 7-2-101;

(iv) “Resource data” means data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species. “Resource data” does not include data:

(A) For surveying to determine property boundaries or the location of survey monuments;

(B) Used by a state or local governmental entity to assess property values;

(C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.

(f) No resource data collected on private land in violation of this section is admissible in evidence in any civil, criminal or administrative proceeding, other than a prosecution for violation of this section or a civil action against the violator.

(g) Resource data collected on private land in violation of this section in the possession of any governmental entity as defined by W.S. 1-39-103(a)(i) shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.

Wyoming Statute § 40-27-101

Trespass to unlawfully collect resource data; unlawful collection of resource data

(a) A person commits a civil trespass to unlawfully collect resource data from private land if he:

(i) Enters onto private land for the purpose of collecting resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(b) A person commits a civil trespass of unlawfully collecting resource data if he enters onto private land and collects resource data from private land without:

(i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person commits a civil trespass to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

(d) A person who trespasses to unlawfully collect resource data, a person who unlawfully collects resource data or a person who trespasses to access adjacent or proximate land under this section shall be liable in a civil action by the owner or lessee of the land for all consequential and economic damages proximately caused by the trespass. In a civil action brought under this section, in addition to damages, a successful claimant shall be awarded litigation costs. For purposes of this subsection, "litigation costs" shall include, but is not limited to, court costs, expert witness fees, other witness fees, costs associated with depositions and discovery, reasonable attorney fees and the reasonably necessary costs of identifying the trespasser, of obtaining effective service of process on the trespasser and of successfully effecting the collection of any judgment against the trespasser.

(e) Repealed by Laws 2016, ch. 115, § 2, eff. March 15, 2016.

(f) Resource data unlawfully collected on private land under this section is not admissible in evidence in any civil, criminal or administrative proceeding, other than a civil action for trespassing under this section or a criminal prosecution for trespassing under W.S. 6-3-414.

(g) Resource data unlawfully collected on private land under this section in the possession of any governmental entity as defined by W.S. 1-39-103(a)(i) shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.

(h) As used in this section:

(i) "Collect" means to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection;

(ii) "Peace officer" means as defined by W.S. 7-2-101;

(iii) "Resource data" means data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species. "Resource data" does not include data:

(A) For surveying to determine property boundaries or the location of survey monuments;

(B) Used by a state or local governmental entity to assess property values;

(C) Collected or intended to be collected by a peace officer while engaged in the lawful performance of his official duties.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains 13,931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

[ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font; or

[ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: November 14, 2016 /s/ David S. Muraskin

David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Western Watersheds Project and National Press Photographers Association

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, AVG 2013, and according to the program are free of viruses.

/s/ David S. Muraskin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the November 14, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

James Kaste james.kaste@wyo.gov
Erik Petersen erik.petersen@wyo.gov
Attorneys for State Defendants

Richard Rideout rsrideout@qwestoffice.net
Attorney for County Attorneys of Fremont and Lincoln County

Matt Gaffney matt.gaffney@sublettewyo.com
Attorney for County and Prosecuting Attorney of Sublette Count

DATED this November 14, 2016.

/s/ David S. Muraskin
David S. Muraskin
Public Justice, P.C.
1620 L St. NW, Suite 630
Washington, DC 20036
(202) 861-5245
dmuraskin@publicjustice.net
Counsel for Western Watersheds Project and National Press Photographers Association

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; NATURAL RESOURCES DEFENSE COUNCIL, INC., PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.; and CENTER FOR FOOD SAFETY,

Plaintiffs,

vs.

PETER K. MICHAEL, in his official capacity as Attorney General of Wyoming; TODD PARFITT, in his official capacity as Director of the Wyoming Department of Environmental Quality; PATRICK J. LEBRUN, in his official capacity as County Attorney of Fremont County, Wyoming; JOSHUA SMITH, in his official capacity as County Attorney of Lincoln County, Wyoming; CLAY KAINER, in his official capacity as County and Prosecuting Attorney of Sublette County, Wyoming,

Defendants.

Case No. 15-CV-00169-SWS

ORDER GRANTING MOTION TO DISMISS

The above-captioned matter comes before the Court on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint for failure to state a claim upon which relief may be granted. (ECF No. 58). For those reasons set forth below the Court finds Defendants' Motion should be granted.

I. BACKGROUND

Plaintiffs Western Watersheds Project (Western Watersheds), National Press Photographers Association (NPPA), National Resource Defense Council (NRDC), People for the Ethical Treatment of Animals (PETA), and, Center for Food Safety (CFS), are interest groups aimed at protecting and advocating for animals, wildlife, and the environment. Plaintiffs initiated this action last fall, challenging the constitutionality of a pair of trespass statutes passed by the Wyoming legislature prohibiting the collection of "resource data" on "open lands" without express permission or authorization. Defendants Michael, Parfitt, and Governor Matt Mead moved to dismiss Plaintiffs' complaint, arguing, *inter alia*, it failed to state any plausible claims. After briefing and oral arguments, this Court granted in part and denied in part the motion to dismiss, noting its concern as to the validity of at least certain portions of the statutes. (Ord. on MTD, ECF No. 40). Subsequently, the Wyoming legislature amended the statutes. Plaintiffs then amended their complaint, which Defendants Michael and Parfitt now move to dismiss.

A. 2015 Statutes

In 2015, the Wyoming legislature enacted a pair of statutes, WYO. STAT. §§ 6-3-414; 40-27-10[1] (2015), addressing "Trespass to Collect Resource Data." The statutes prohibited unauthorized entrants on "open land"[2] from collecting or recording information relating to land and land use[3] and then submitting that information to a

[1] The civil statute was originally codified at §40-26-101. It was recodified at § 40-27-101.
[2] "Open land" was defined as land outside the exterior boundaries of a city, town, or state-approved subdivision. WYO. STAT. § 6-3-414(d)(ii) (2015).
[3] "Resource data" was defined as "data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat,

governmental agency. One statute imposed criminal penalties including fines and possible jail time, WYO. STAT. § 6-3-414 (2015), while the other imposed civil liability for consequential and economic damages caused by the trespass, WYO. STAT. §40-27-101 (2015). One subsection of the statutes appeared to relate to *public* lands, WYO. STAT. §§ 6-3-414(a); 40-27-101(a)[4], while another subsection related to *private* lands, WYO. STAT. §§ 6-3-414(b); 40-27-101(b).[5] "Collect" was defined as "to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form from open land which is submitted or intended to be submitted to any agency of the state or federal government." WYO. STAT. § 6-3-414(d)(i) (2015).

Thus, to violate the 2015 statutes, an individual would have had to: (1) enter "open land" (private or public) to collect resource data without an ownership interest, authorization, or permission to enter *or* to collect such data; (2) somehow record or

---

vegetation or animal species," excepting from the definition various information collected by governments or law enforcement. WYO. STAT. § 6-3-414(d)(iv) (2015).

[4] A person would be subjected to criminal and/or civil liability under this subsection "if he:

> (i) Enter[ed] onto open land for the purpose of collecting resource data; and
> (ii) D[id] not have:
> > (A) An ownership interest in the real property or statutory, contractual or other legal authorization to enter or access the land to collect resource data; or
> > (B) Written or verbal permission of the owner, lessee or agent of the owner to enter or access the land to collect the specified resource data."

WYO. STAT. §§ 6-3-414(a); 40-27-101(a) (2015).

[5] A person would be criminally and/or civilly liable under this section "if he enter[ed] onto private open land and collects resource data without:

> (i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or
> (ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the land to collect the specified resource data."

WYO. STAT. §§ 6-3-414(b); 40-27-101(b) (2015).

preserve data about the land or land use, and; (3) intend to submit, or actually submit, such data to a governmental agency. Any information obtained in violation of the statutes could not be used in any civil, criminal, or administrative proceedings (unless it was a civil action or criminal prosecution under the statutes), and such information which had been submitted to a governmental entity had to be expunged. WYO. STAT. §§ 6-3-414(e), (f); 40-27-101(d), (e), (f) (2015).

In their original complaint, Plaintiffs argued the 2015 statutes: (1) violated the Petition Clause of the First Amendment; (2) violated the Free Speech Clause of the First Amendment; (3) were preempted by federal laws; and (4) violated the Equal Protection Clause of the Fourteenth Amendment. Defendants Peter K. Michael, Todd Parfitt, and Matthew Mead moved to dismiss Plaintiffs' claims, arguing Plaintiffs lacked standing to challenge the civil statute and failed to state a claim as to all causes of action. Additionally, the State Defendants argued Governor Matthew Mead was an improper party.

After hearing oral arguments, the Court issued a written order, wherein it held Plaintiffs: (1) had standing to challenge the civil statute; (2) stated a plausible First Amendment Free Speech and Petition claim; (3) stated a plausible Equal Protection claim; (4) failed to state a Supremacy Clause or preemption claim, and; (5) failed to state a claim against Defendant Governor Matthew Mead. The Court was primarily concerned about the statutes' application to activities on public lands, as restricting the public's activities on such lands was unrelated to deterring trespassing. Also concerning was the

fact that the 2015 statutes targeted the submission, or intended submission, of data to governmental agencies.

B. 2016 Statutes

In 2016, the Wyoming legislature amended the two previously challenged statutes. As with the 2015 versions, the revised statutes are nearly identical, with one still imposing criminal punishment, WYO. STAT. § 6-3-414 (2016), and the other, civil liability, WYO. STAT. § 40-27-101 (2016). The revised statutes still define "resource data" as "data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species," with certain exceptions for certain governmental and law enforcement matters. WYO. STAT. §§ 6-3-414 (e)(iv); 40-27-101(h)(iii) (2016).[6] The new statutes clarify they apply only to entry onto private lands (eliminating any reference to "open lands"), and no longer require data be submitted or intended to be submitted to a governmental agency. The definition of "collect" has been modified to mean "to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection." WYO. STAT. §§ 6-3-414(e)(i); 40-27-101(h)(i) (2016).

The revised statutes contain three proscriptive subsections:

[6] The revised civil statute added a definition subsection, WYO. STAT. § 40-27-101(h) (2016). The 2015 version did not contain a definition subsection. This amendment is not consequential, however, as the Court held in its previous order that the definitions from the criminal statute, WYO. STAT. § 6-3-414(d) (2015), applied equally to the civil statute. (Ord. on Mot. to Dis., ECF No. 40, at p. 3, n. 2).

(a) A person [is guilty of trespassing/commits a civil trespass] to unlawfully collect resource data from private land if he:

(i) Enters onto private land for the purpose of collecting resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(b) A person [is guilty/commits a civil trespass] of unlawfully collecting resource data if he enters onto private land and collects resource data from private land without:

(i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person [is guilty of trespassing/commits a civil trespass] to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.

WYO. STAT. §§ 6-3-414(a)-(c); 40-27-101(a)-(c) (2016).

Thus, a person can violate the revised statutes in one of three ways: (1) if he enters private land with the purpose of collecting resource data and without authorization or permission to enter the land or specific permission to collect resource data; (2) if he enters private land and actually collects resource data without authorization or permission to enter the land or specific permission to collect resource data, or; (3) if he crosses private land without authorization or permission to do so and collects resource data.[7]

As with the 2015 versions of the statutes, an individual must have permission not only to enter private lands, but enter them for the purpose of collecting specific resource data. A first-time offender under the revised criminal statute faces imprisonment for not more than one (1) year, a fine of not more than $1,000, or both. WYO. STAT. § 6-3-414(d)(i) (2016). A repeat offender of subsections (a) or (b) of the criminal statute faces imprisonment for not less than ten (10) days, but not more than one (1) year, a fine of not more than $5,000, or both.[8] Under the civil statute, one who violates the statute is liable in a civil action by the owner or lessee of the land for all consequential and economic damages proximately caused by the trespass. WYO. STAT. § 40-27-101(d) (2016). The violator will also be liable for litigation costs, reasonable attorney fees and costs. *Id.*

The revised statutes prohibit the use of resource data collected in violation of the

---

[7] The Court refers to "authorization or permission," noting, however, the relevant statutory provisions read:

> "An ownership interest in the real property or statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or
> Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data."

WYO. STAT. §§ 6-3-414(a)(ii)(A)-(B), (b)(i)-(ii), (c)(ii)(A)-(B); 40-27-101((a)(ii)(A)-(B), (b)(i)-(ii), (c)(ii)(A)-(B).

[8] This provision excludes a heightened punishment for repeat offenders under subsection (c) of the statute, wherein a person is guilty of crossing private property without authorization to collect resource data on adjacent lands.

statutes in any civil, criminal, or administrative proceeding, other than to prosecute a person under either statute. WYO. STAT. §§ 6-3-414(f); 40-27-101(f) (2016). Also, any data in possession of any Wyoming governmental entity which was collected in violation of the statutes must be expunged by the entity. WYO. STAT. §§ 6-3-414(g); 40-27-101(g) (2016).

C. Amended Complaint

On April 11, 2016, Plaintiffs amended their complaint, arguing even as revised, the statutes are unconstitutional as applied to them, as well as on their face. (Amend. Compl. ECF No. 54). Plaintiffs' amended complaint presents two constitutional causes of action: Free Speech and Equal Protection.

i. Free Speech

Plaintiffs assert the revised statutes infringe upon their First Amendment rights and are "unconstitutional on their face and as applied to Plaintiffs' collection of resource data" as well "as applied to a host of other activities." (*Id.* at ¶ 90).

Plaintiffs provide numerous examples of desired data-collection activities that they, their members, and other "whistleblowers" and "citizen scientists," have refrained from engaging in out of fear of criminal prosecution or civil liability under the revised statutes. Plaintiffs assert "it is difficult to determine whether a road that appears open to the public, and which the pubic routinely makes use of, crosses private land, and if it does so, whether a public right of way exists over that road." (*Id.* at ¶ 81). Plaintiffs and their members argue they are chilled from engaging in their data collection activities, even on public lands, out of fear of unintentionally stepping onto private lands, or using a road

which "unbeknownst to Plaintiffs or their staff, crosses private land across which there exists no public right of way." (*Id.* at ¶ 82). Western Watersheds asserts "the fact that the boundary between public and private lands is often entirely unmarked in Wyoming has compelled [it] to suspend such activities." (*Id.* at ¶ 82(b)). Plaintiffs also assert they are chilled because it is uncertain who must grant them permission when land has multiple owners with different ownership interests. (*Id.* at ¶ 82(d)).

Plaintiffs argue the statutes are content and viewpoint based and discriminate against speech (or the creation of speech) which is critical of land use with no legitimate state interest or justification for doing so. They assert the laws are content-based because they only seek to punish the collection of certain types of information, i.e., resource data. Plaintiffs also argue the statutes are viewpoint-based, as they "effectively grant the landowner, lessee, or landowner's agent the power to authorize or prohibit who can gather information about land and land use for communication to the public or government." (*Id.* at ¶ 88).

Plaintiffs also argue the statutes are unconstitutionally overbroad, lacking "any plainly legitimate sweep." (*Id.* at ¶ 90 (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010))). Plaintiffs provide three examples to support their overbreadth argument: a child taking a picture with her cellphone on her neighbor's property, which she has permission to be upon; a traveler, who enters private land in response to a cry for help, discovers a fire, and records the location using GPS on her phone, and; the hiker who records and reports illegal activities occurring on private property. (*Id.* at ¶ 91). They claim any person who takes a picture with his cell phone after entering or crossing private

land, knowingly or inadvertently, without express permission to do so, would be liable and subject to criminal charges.

Finally, Plaintiffs assert the statute prohibit governmental agencies from using and considering truthful information. (*Id.* at ¶¶ 95-96). They claim because the statutes still contain an expungement provision, even if a person is willing to risk criminal prosecution or civil liability and violate the statutes in order to provide data to governmental agencies, the agency is still precluded from considering it.

ii. Equal Protection

Plaintiffs assert the revised statutes violate their Equal Protection rights by distinguishing between the purposes and intent of entrants on private property, punishing only those seeking to collect resource data. (*Id.* at ¶ 114). They also argue the statutes violate their Equal protection rights by burdening the fundamental right of freedom of speech without serving any legitimate government interest. (*Id.* at ¶¶ 115-16). Finally, Plaintiffs maintain the statutes violate their Equal Protection rights because they were promulgated out of animus. They argue the statutes are aimed at chilling the efforts of those persons who disapprove of various land-uses and gather and communicate information to governmental agencies to further the implementation of environmental laws. (*Id.* at ¶ 118).

D. Motion to Dismiss

Defendants Peter Michael and Todd Parfitt (State Defendants) now move to dismiss the Amended Complaint, asserting Plaintiffs fail to state either a First Amendment Free Speech or Fourteenth Amendment Equal Protection claim. (Mot. to.

Dismiss, ECF No. 58). State Defendants assert the revised statutes do not regulate protected expressive activity and therefore do not trigger the First Amendment. Alternatively, State Defendants argue even if the Court were to find the statutes regulated protected activity, the statutes only implicate private lands, upon which Plaintiffs have no right to exercise expressive activities. State Defendants assert to the extent the Court finds the statutes *do* implicate lands other than private lands, an evaluation of the constitutionality of the statutes as applied to such lands is impossible to consider in the abstract.

State Defendants assert Plaintiffs fail to state an Equal Protections claim, as the revised statutes do not target a suspect class or burden a fundamental right, and can survive rational basis scrutiny. Additionally, they argue the statutes were not promulgated out of animus, or alternatively, that any animus related to the 2015 statutes has been cured.

I. STANDARD OF REVIEW

Faced with a motion to dismiss a claim under F.R.C.P. 12(b)(6), the Court accepts as true all well-pleaded facts in the complaint, and draws all reasonable inferences therefrom in the light most favorable to the plaintiffs. *Leverington v. City of Colorado Springs*, 643 F.3d 719, 723 (10th Cir. 2011) (citation omitted). The Court disregards any conclusory statements or conclusions of law. *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011). The "complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

(2007)). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Kansas Penn*, 656 F.3d at 1215.

II. DISCUSSION

A. First Amendment

The threshold question in a First Amendment Free Speech analysis is to ask whether the challenged governmental action regulates protected activity: if not, the Court "need go no further." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 797 (1985). Here, Plaintiffs assert that because the revised statutes restrict their ability to "create" speech, i.e., gather data, the statutes regulate protected activity and are subject to at least some level of scrutiny. The Supreme Court has recognized "creation and dissemination of speech" may be "speech" within the meaning of the First Amendment. *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2667 (2011). Even so, it has refused recognize *all* "creation" of speech as protected expressive activity for purposes of the First Amendment. *See, Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (holding plaintiffs did not have First Amendment right to unrestricted access to prisoners, noting the right to gather news does not compel private persons or governments to supply such information); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (holding a First Amendment right was not involved based upon a travel ban which restricted the plaintiff's ability to visit Cuba and collect information, noting "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."). The court does not view "creation" of speech in a vacuum; the right to "create" speech via access to

information is protected activity only if conducted "by means within the law." *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972).[9]

In this case, Plaintiffs challenge the statutes based upon their restriction of creation of speech by illegal means. Plaintiffs' First Amendment right to create speech does not carry with it an exemption from other principles of law, or the legal rights of others. Plaintiffs' desire to access certain information, no matter how important or sacrosanct they believe the information to be, does not compel a private landowner to yield his property rights and right to privacy.

Plaintiffs' asserted inability to determine their location and land ownership during data collection creates somewhat of a conundrum. The Amended Complaint presents an exhaustive list of data collection activities they have engaged in in the past, and have recently refrained from engaging in. (Amend. Compl. ECF No. 54, at ¶¶ 19-53, 79-83). These activities involve collecting water samples, recording locations of purported environmental or permitting violations, photographing and recording the location of wildlife, monitoring air-quality near oil and gas developments and recording locations of violations, etc. Each of these activities involves Plaintiffs and their members determining and recording the locations (by GPS or other means) of purported environmental violations or data findings. The ability to pinpoint and record the location of alleged environmental violations is essential to Plaintiffs' mission and goals. Coincidentally, the

[9] Plaintiffs gain no support from *Sorrell*, as that case did not involve obtaining the information through illegal means. 131 S.Ct. 2653. The provider of information was aware, and willing. In this case, private landowners may grant permission, but until such permission or authorization is obtained, they are not a willing provider of the information Plaintiffs' seek.

same information would be essential to a successful prosecution or civil action brought under these statutes.

To say Plaintiffs are incapable of utilizing the same GPS tools, methods, and research to determine their own location during, and en route to, such data collection activities is borderline disingenuous. Plaintiffs acknowledge they have had to conduct surveys in the past to determine boundaries or rights-of-way. (Amend. Compl. ECF No. 54, at ¶ 13). To the extent the government does not have, or is uncertain of, public right-of-ways on particular routes or roads, it has the ability to clarify and obtain such rights.[10] In any event, any perceived burden or hardship associated with determining property rights does not translate into a First Amendment right to go upon lands, blissfully ignorant of their ownership.

The lack of public First Amendment rights upon private property is not new or novel. The Supreme Court has repeatedly cognized the *absence* of a First Amendment right to engage in speech on the private property of another. *See e.g., Lloyd Corp., LTD. v. Tanner*, 407 U.S. 551, 567-68 (holding First Amendment did not require a private corporation to allow handbill distribution on its private property); *Hudgens v. NLRB*, 424 U.S. 507, 509 (1976) (holding employer was not required to permit workers to picket on company property); *Cornelius*, 473 U.S. at 801 ("[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment

[10] This logic applies equally to Plaintiffs' argument that they are uncertain whose authorization or permission they are required to obtain to collect resource data on private lands. It is not uncommon for multiple individuals to have property interests in a parcel of land. A real property interest holder cannot convey a greater interest than he owns. To the extent Plaintiffs or others seek to engage in an activity upon a parcel of land, they must determine who holds what rights in order to have adequate authorization.

concerns . . . ."). Contrary to Plaintiffs' assertion, the fact the state promulgated the restriction in this instance, as opposed to the private landowners in *Lloyd* or *Hudgens*, is of no consequence. The source of the restriction does not change the fact a person has no First Amendment right to engage in speech on the private property of another. The statutes leave it to the private landowner whether to grant permission to others to collect resource data upon his land.[11] To the extent such permission or authorization is granted, the state imposes no restriction.

In short, there is no First Amendment right to trespass upon private property for the purpose of collecting resource data. This does not end the Court's analysis, however. As noted above, the revised statutes contain three proscriptive subsections, two of which apply strictly to collection of resource data on private lands. *See* WYO. STAT. §§ 6-3-414(a), (b); 40-27-101(a), (b). These subsections, therefore, do not warrant any further First Amendment analysis. The third subsection, however, arguably involves collection of resource data from public lands, or lands upon which an individual may rightfully engage in resource data collection. WYO. STAT. §§ 6-3-414(c); 40-27-101(c). Even so, to subject this subsection of the statutes to First Amendment scrutiny is premature.

To say a regulation restricts activity presupposes that one has the right to engage in such activity in a particular manner. Certainly Plaintiffs and other members of the

[11] Plaintiffs cite *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 160 (2002) to support their position that the Supreme Court has applied First Amendment analysis to regulations of the public's right to engage in speech on private property. That case is distinguishable, however, as it dealt with door-to-door canvassing and pamphletting of religious materials. The Supreme Court has found hand distribution of religious literature to occupy "the same high estate under the First Amendment as [ ] worship in the churches and preaching from the pulpits." *Murdock v. Pennsylvania*, 319 U.S. 105, 108-09 (1943). No such elevated protection has been afforded collection of "resource data."

public are entitled to be upon public lands for various purposes, some arguably including "collecting resource data." However, the public does *not* have the right to cross private lands (trespass) to engage in such activities. The Supreme Court "has never held that a trespasser or uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Lloyd*, 407 U.S. at 568. Likewise, it has never held a trespasser has the right to cross private property to engage in such activities. The revised statutes do nothing to the legal rights of members of the public; they only emphasize and increase punishment for the unlawful entry of private lands en route to engage in protected activity. This "restriction" is already in place by virtue of principles of real property ownership and existing concepts of trespass. The statutes are not "time, place, or manner" restrictions as that term is contemplated by First Amendment precedent. Therefore, the Court need not engage in further scrutiny of subsection (c), as it does not "restrict" or "regulate" a protected First Amendment activity as contemplated by the line of Free Speech precedent addressing "time, place, and manner" restrictions.

Plaintiffs' Amended Complaint also asserts a facial overbreadth First Amendment challenge. To assert a facial overbreadth claim, a plaintiff must demonstrate that the challenged law (1) "could never be applied in a valid manner," or (2) that even though it may be validly applied to some, "it nevertheless is so broad that it may inhibit the constitutionally protected speech of third parties." *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 11 (1988) (citations omitted). Plaintiffs' overbreadth challenge appears to fall under the latter category, providing the three above-mentioned examples

of third parties who would be liable under the statutes, notwithstanding the apparent innocence or justification of their activities.

"The 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'" *United States v. Williams*, 553 U.S. 285, 301 (2008) (quoting *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)). The court must find "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *N.Y. State Club Ass'n, Inc.*, 487 U.S. at 11 (citation omitted). The claimant bears the burden of demonstrating the law's application to protected speech is substantially overbroad, not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications. *Virginia v. Hicks*, 539 U.S. 113, 119-120 (2003) (citations omitted). The overbreadth doctrine is "strong medicine," used "sparingly" and applied only as "a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Such medicine is not warranted in this case.

When a statute is aimed at regulating conduct—as opposed to "pure speech"—the court's overbreadth inquiry must account for the state's legitimate interest in enforcing its "otherwise valid criminal law." *Id.* at 615. A statute regulating conduct, "if too broadly worded, may deter protected speech to some unknown extent." *Id.* Even so, "there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Id.* "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically

addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Virginia v. Hicks*, 539 U.S. 113, 124 (2003).

Here, the revised statutes are aimed at regulating the conduct of trespass by imposing the burden upon an entrant to know the ownership interests of the land he enters or crosses. Plaintiffs' three examples are predictions at best, which do not justify invalidating the statutes on their face. As to Plaintiffs' first example, logically a neighbor who permits a child to enter his property would also permit the child to take a picture. To the extent the neighbor does not wish to grant the child permission to take pictures, that is his prerogative. A basic concept of property law taught to first year law students is that property rights are like a bundle of sticks and can be divided in terms of dimension, duration, and scope. If a landowner wishes to grant access or use of his property for a limited purpose, he has every right to do so. As noted by the Supreme Court in *PruneYard Shopping Center v. Robins*, one of the essential sticks in the bundle of property rights is the right to exclude others. 447 U.S. 74, 82 (1980) (citing *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979)).

As to Plaintiffs' second and third examples, nothing indicates a reasonable person would refrain from reporting an emergency or illegal activity by virtue of the new statutes. In fact, as noted by State Defendants in their Reply Brief (ECF No. 63, at n. 4), either of the individuals in Plaintiffs' second and third examples could report their findings without violating the revised statutes. The definition of "collect" is "to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location

of the collection." WYO. STAT. §§ 6-3-414(e)(i); 40-27-101(h)(i) (2016). Simply calling emergency personnel, or verbally reporting findings to law enforcement, even providing geographical coordinates, would not violate the revised statutes.

When interpreting statutory language, the court relies upon the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words. *Yates v. United States*, 135 S.Ct. 1074, 1085 (2015). Under the canon *ejusdem generis*, "[w]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (citations omitted).

In this instance, the general phrase "otherwise preserve information" must be read in connection with the specific preceding words. The specific verbs used in the definition of "collect" require some form of physical or tangible recording. Making a mental note is not similar enough to be encompassed by "otherwise preserve." Therefore, merely reporting what one witnessed is not prohibited by the revised statutes. This interpretation of the statutes likewise weakens any argument that the statutes completely preclude whistleblowers from reporting what they witness or find based upon memory.[12]

[12] Plaintiffs assert the creation of an audiovisual recording is protected speech, citing *Animal Legal Defense Fund v. Otter*, 118 F. Supp. 3d 1195, 1205 (D. Idaho 2015) (*ALDF II*) (finding the restriction of audiovisual recording in agricultural facilities to be an impermissible restriction on speech of whistleblowers). The Court respectfully disagrees. There is no precedent to support the premise that whistleblowers somehow have an elevated First Amendment right to make audiovisual recordings on private property without permission. No matter how virtuous or important one may view a whistleblower's motives or actions, the ends do not justify the means of trespass.

In sum, Plaintiffs fall far short of demonstrating a realistic danger of a substantial suppression of speech. Even more importantly, the fact the statutes are aimed at conduct, rather than speech itself, the Court cannot, with confidence, justify invalidating the statute on their face, prohibiting the State of Wyoming from enforcing the statute against conduct (i.e., trespassing) which it is entitled to proscribe. *Broadrick*, 413 U.S. at 615.

Plaintiffs' assert the revised statutes expungement provisions (WYO. STAT. §§ 6-3-414(g); 40-27-101(g)), violate the First Amendment because they prevent agencies from considering truthful and accurate information. The Supreme Court has repeatedly refused to define what protections should be afforded the publication of truthful information. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001). The Supreme Court's practice has been to only analyze restrictions of the publication of truthful information on a case-by-case "as-applied" basis. *See, e.g., id.*; *Landmark Comm., Inc. v. Virginia*, 435 U.S. 829, 838 (1978); *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989). Because this Court is not faced with an "as-applied" challenge to the expungement provisions of the revised statutes, it will follow the Supreme Court's lead and declines to engage in further First Amendment analysis.

In conclusion, the revised statutes do not regulate protected First Amendment activity and therefore are not subject to further scrutiny. There is no constitutionally protected First Amendment right to enter upon the private lands of another for the purposes of collecting data. Plaintiffs fail to demonstrate the statutes are facially overbroad. The Court, following Supreme Court precedent, declines to conduct a facial analysis of the statutes' expungement provisions. Therefore, Plaintiffs cannot maintain a

Free Speech First Amendment challenge and State Defendants' motion to dismiss must be granted.

B. Equal Protection

Plaintiffs assert the revised statutes violate the Equal Protection Clause by: (1) targeting persons entering open land seeking to collect resource data rather than entering land for other purposes; (2) burdening a fundamental right without serving a legitimate government interest, and; (3) also because they were promulgated out of animus.

The Equal Protection Clause of the Fourteenth Amendment states "No State shall . . . deny any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. 14, sec. 1. "The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citations omitted). Unless a classification burdens a fundamental right or "proceed[s] along suspect lines," it is presumptively valid, subject only to rational basis scrutiny. *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993). A classification is not impermissible simply because it "is not made with mathematical nicety or because in practice it results in some inequality." *Romer*, 517 U.S. at 631 (citations omitted). Under the rational basis test, a legislative classification will be upheld if it "advance[s] a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* at 632. The law must be "narrow enough in scope and grounded

in a sufficient factual context" for the court "to ascertain some relation between the classification and the purpose served." *Id.* at 632-33.

If the law burdens a fundamental right or targets a suspect class, however, it is subject to strict scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 n. 3 (1976). Strict scrutiny requires laws to be suitably tailored to serve a compelling state interest. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Free speech is a recognized fundamental right, which, in part, Plaintiffs base their Equal Protection challenge upon. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336, n. 1 (1995).

The revised statutes "classify" entrants of private property based upon the actual or intended conduct the entrant engages in. As noted above, subsections (a) and (b) of the statutes clearly do not involve a First Amendment right, and therefore do not burden Plaintiffs' fundamental right of Free Speech. Similarly, subsection (c) (relating to crossing of private land to collect resource data on adjacent lands) does not "burden" Plaintiffs' First Amendment rights as that word is intended by the Supreme Court. Therefore, the revised statutes are not subject to strict scrutiny by virtue of the rights burdened.

The Court does not find the statutes were promulgated out of animus toward Plaintiffs' groups or members. First, although some comments during the legislative session for the 2015 versions of WYO. STAT. §§ 6-3-414 and 40-27-101 expressed frustrations or outright dislike for environmental groups, or other particular interest groups or viewpoints, such comments cannot be said to taint the motivations of all legislators. "What motivates one legislator to make a speech about a statute is not

necessarily what motivates scores of others to enact it, and the stakes are sufficient high for [the court] to eschew guesswork." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Additionally, these comments were made during the promulgation of the 2015 versions of the statutes. In any event, legislatures may "cure" a law originally enacted with unconstitutional animus. *See e.g., Hayden v. Paterson*, 594 F.3d 150, 162-69 (2d Cir. 2010); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1223 (11th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1015 (2005) ("Florida's felon disenfranchisement provision is constitutional because it was substantively altered and reenacted in 1968 in the absence of any evidence of racial bias.").

As noted in this Court's prior order, the Supreme Court has held when a law purports to protect an interest already protected by existing law, courts have reason to be suspicious of the legislature's actual intent. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 536-37 (1973). Upon further review of Wyoming's trespass laws, as well as taking into consideration the amendments to the statutes (removing its application to public lands), the Court no longer has "considerable doubt" as to the purposes of the revised statutes. As clarified by State Defendants in the latest Motion to Dismiss, the revised statutes are distinguishable from Wyoming's preexisting criminal trespass statute and common law trespass. Although the statutes may aim to prevent trespassing, they operate in a different manner than existing law, and seek to provide a more effective deterrent to protect private property rights. To violate Wyoming's existing criminal trespass statute, WYO. STAT. §6-3-303, an entrant must enter or remain on the land of another, with knowledge that he has no right to do so, or after being notified to leave or not trespass.

Notice can be given through personal communication or postage of signs. Constituents raised the issue to legislators that individuals seeking to collect resource data were trespassing upon their private lands, but could not be charged under the existing criminal statutes. In other words, the existing criminal trespass statutes were not adequate deterrents for these trespassers. "If the sanctions that presently attach to a violation [of a law] do not provide sufficient deterrence, perhaps those sanctions should be made more severe." *Bartnicki v. Vopper*, 532 US. 514, 529 (2001). That is what the Wyoming Legislature has done in this case.

This is not the first time Wyoming has enacted a statute to prevent a particular problematic sort of trespass. Wyoming's anti-trespass hunting statute provides, "[n]o person shall enter upon the private property of any person to hunt, fish, or trap without permission of the owner or person in charge of the property." WYO. STAT. § 23-3-305(b). Similar to Plaintiffs and their members,

> Hunters may unintentionally stray off public lands onto private lands. Anglers, due to a lack of skill in reading maps or GPS units, may think they are on public land but soon find they are not when a rancher confronts them in a field. Regardless of intent, there are only two elements that must be shown in a violation of this statute—that the hunter, angler or trapper was on the private land in question without permission and that he was hunting, fishing or trapping.

Bruce Scigliano, *Trespass to Hunt, Fish or Trap: An Example of a Strict Liability Law*, WYO. LAWYER, June 2016. While Plaintiffs may disagree that their trespassing is problematic, that is a policy choice the Wyoming Legislature has made.

Although the Court expressed concerns with the 2015 versions of the statutes, those concerns have been resolved by the recent amendments. First, the revised statutes

eliminate any reference to "open lands," which the Court found imposed liability for conduct engaged in while completely on public lands. Secondly, the revised statutes eliminate any requirement that the data be submitted or intended to be submitted to a governmental agency. As revised, the statutes are aimed completely at deterring trespassing. The instant case is distinguishable from *Moreno*, as the targeted individuals by the amendment to the statute in that case would not be further deterred. 413 U.S. at 536-37. In that case, there was no evidence the existing provisions in the statute, purportedly aimed at preventing the same abuses, were inadequate. Here, there is strong evidence, based upon Plaintiffs' own admissions, that existing trespass laws do not deter them from entering private lands to collect data or to access other lands to collect data. Therefore, the Court finds the "doubt" which plagued the amendment in *Moreno* does not plague the revised statutes in this case. Finally, unlike in *Animal Defense Fund v. Otter*, 118 F. Supp. 3d 1195 (D. Idaho, Aug. 3, 2015), Wyoming's revised statutes preclude trespassing to collect any resource data, regardless of whether that data is favorable or unfavorable to the owner.

The revised statutes were not promulgated out of animus toward a particular group, and do not burden a fundamental right. Therefore, the statutes must rationally further some legitimate governmental interest. *Romer*, 517 U.S. at 632. As previously noted, protecting private property rights is a legitimate government interest. Current trespass statutes were not adequately deterring those, such as Plaintiffs, seeking to collect resource data, from entering or crossing (trespassing upon) private property. Under the revised statutes, those wishing to collect resource data are charged with knowing where

they are while engaging in data collection. Thus, the statutes rationally relate to the interest of protecting private property rights. The statutes pass the rational basis test and therefore do not violate the Equal Protections Clause of the Fourteenth Amendment. Accordingly, Plaintiffs' second cause of action must also be dismissed.

III. CONCLUSION

Plaintiffs' claims are erroneously premised upon their perceived First Amendment right to trespass upon private property to collect resource data. No such constitutional right exists. To the contrary, the United States Supreme Court "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned." *Lloyd Corp., Limited, supra* at 568. The ends, no matter how critical or important to a public concern, do not justify the means, violating private property rights. Accordingly, Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted. Therefore, Defendants' Motion to Dismiss is hereby GRANTED.

Dated this 6th day of July, 2016.

Scott W. Skavdahl
United States District Judge