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

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I. Introduction.

Contrary to Defendants' insistence, the issue before the Court is not whether Plaintiffs have a privilege to enter private property. Plaintiffs assert no such right and do not challenge Wyoming's pre-existing trespass laws. Instead, the question presented is whether Plaintiffs can be subject to special sanctions *because of their advocacy*. The answer is no.

By restricting the collection of "resource data," *i.e.*, data about land or land use, the Data Censorship Statutes target First Amendment protected activities. The statutes were passed to stop Plaintiff-Western Watersheds Project from advocating for environmental enforcement and regulatory reforms, Aplt. App. at A54-55, and originally "included, as an element of the wrongful conduct, submission of information to a governmental agency," State Defs.' Br. 6. After the district court's initial ruling, the state replaced that element with a prohibition on collecting resource data with "a legal description or [the] geographical coordinates of the location of the collection." Wyo. Stat. § 6-3-414(e)(i) & § 40-27-101(h)(i). This is the *exact* information needed for Wyoming's "agency-approved method" of environmental analysis and that conservation groups regularly rely on to develop petitions to the government. Plfs.' Opening Br. 30-31 (citing Aplt. App. at A60-61, A69-70, A89-90, A92-93). The current Data Censorship Statutes merely restrict an earlier "point[]" of the same "speech process" they previously directly

suppressed. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Thus, they continue to target First Amendment speech. *See, e.g.*, *Buehrle v. City of Key West*, 813 F.3d 973, 977 (11th Cir. 2015).

Defendants do not seriously dispute these facts. Rather, they argue that the statutes are valid because they also prevent trespass. However, the Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983). By employing the state's power against First Amendment protected activities, regardless of the statute's other ends, the government "casts a chill" over those freedoms, "giv[ing it] a broad censorial power" that the First Amendment is meant to restrict. *United States v. Alvarez*, 132 S. Ct. 2537, 2548 (2012) (plurality opinion). Indeed, the Court has explained that where, as here, a law "singles out" expressive activities for a "burden the State places on no other" activities, the First Amendment "presumptively places this sort of discrimination beyond the power of the government." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

If this Court were to accept that the state can single out First Amendment activities for sanction without constitutional concern, so long as the regulation also protects private land, Wyoming could just as easily enact additional prison terms

for trespassers carrying religious pamphlets or representing a political campaign. Further, there is no logical distinction between the authority Defendants assert and the power to sanction speech in connection with regulating any other conduct the state can legislate. Defendants' rule would enable the state to impose extra penalties on jaywalkers if they were on their way to meet with legislators. Such statutes might nominally protect some legitimate interest, but, just as here, the special penalties would hinge on a violator being engaged in the process of developing and presenting speech, suppressing expression. The state's decision to target speech is plainly intolerable and exactly what the First Amendment is meant to restrict.

Accordingly, the Data Collection Statutes are subject to the First Amendment even though they regulate some conduct that occurs on private land. Thus, the question becomes whether the statutes can survive First Amendment scrutiny. Again, the answer is no.

Contrary to Defendants' claims, the statutes are content based. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). They only apply to individuals that collect resource data, and specifically target citizens collecting that data to address environmental policies. Moreover, Defendants admit that, "of course," the statutes create no barriers to landowners or their allies gathering data to address their environmental concerns, only inhibiting the same advocacy by others. State Defs.'

Opp. 38. The Data Censorship Statutes "suppress, disadvantage [and] impose differential burdens upon speech," regarding a particular topic (the environment) and with a particular viewpoints (that which landowners chose not to permit), attacking "the heart of the First Amendment." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

As a result, regardless of what "forum" the data collection occurs in, strict scrutiny applies. *Summum v. Callaghan*, 130 F.3d 906, 917 (10th Cir. 1997). Defendants must prove the Data Censorship Statutes "are narrowly tailored to serve compelling state interests" in order for the statutes to be sustained. *Reed*, 135 S. Ct. at 2226 (quotation marks omitted).

Defendants cannot carry this burden, nor have they tried. The only function Defendants claim the statutes serve is to enhance the deterrent effect of Wyoming's existing trespass laws. State Defs.' Br. 5. Defendants state that the Data Censorship Statutes are needed to "reduce the level of *mens rea*" and raise the penalties for unauthorized entry. *Id.* at 37. Such ends do not require Wyoming to restrict data collection, just entry. Where a state "fail[s] to look to less intrusive means of addressing its concerns," a law will not be considered tailored in any way. *McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014). Defendants' decision to pass "[a]n ordinance" disfavoring certain "topics" when no such law was necessary

is "precisely what the First Amendment forbids." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

The district court should be reversed and the Data Censorship Statutes declared unconstitutional.

II. The collection of resource data is protected by the First Amendment's freedom of speech.

By restricting data collection, the Data Censorship Statutes restrict speech, plain and simply. As previously explained, Plfs.' Opening Br. 24-29, the Supreme Court, this Court, and other circuits have all held that data collection is protected by the First Amendment. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557-58, 564-65 (2011) (restriction on obtaining pharmacy records content-based law); *U.S. W., Inc. v. F.C.C.*, 182 F.3d 1224, 1232-33 (10th Cir. 1999) (limitation on obtaining data to tailor commercial solicitations subject to First Amendment); *Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508, 1512-13 (10th Cir. 1994) (stating substantially the same); *Rideout v. Gardner*, 838 F.3d 65, 73-75 (1st Cir. 2016) (taking photos of ballots is political speech); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) ("The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech[.]").

These cases build on additional authority that explains that: (a) selecting what to collect and record is, itself, a form of protected expression, *see, e.g.*, Legal Scholars Amicus Br. 10-15 (citing authority), and (b) even if data collection is not itself expressive, it must be treated as speech because it is part of developing ideas and communicating arguments, Plfs.' Opening Br. 24-26; *see also, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 792 n.1 (2011) (First Amendment protects "creating, distributing, or consuming speech"); *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (government cannot target "composition[]" of speech); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (First Amendment provides for "flow of information" to enable "the formation of intelligent opinions" by the recipient); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061-62 (9th Cir. 2010) ("[I]n terms of the First Amendment protection afforded," courts have not and should not "draw[] a distinction between the process of creating" speech and the resulting speech.).

Defendants do not address this plethora of binding and persuasive authority. Indeed, the only one of these cases Defendants discuss is *Sorrell*, which they seek to distinguish on its facts. State Defs.' Br. 31-32. Rather than disputing that the Supreme Court treated data collection as speech, Defendants note that *Sorrell* involved a law that restricted data collection "from a willing seller," where, as here, a person on the way to collect data must come into contact with private land

"without permission." State Defs.' Br. 32 (emphasis removed). Yet, that detail had no bearing on *Sorrell*'s First Amendment analysis. *Sorrell* explained the fact that there was a willing seller was only "significant" for establishing state action, creating the potential for the First Amendment to apply. *Sorrell*, 564 U.S. at 568. The statute in *Sorrell* "imposed a restriction on access to information in private hands." *Id.* As a result, because there was a willing seller, a "private party faced a threat of legal punishment" under the challenged law. *Id*. Accordingly, the Court explained that in *Sorrell*, unlike in *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), it could "rule on the merits of [a] First Amendment claim." *Sorrell*, 564 U.S. at 568. With this background, the Court held that the First Amendment does not allow for limitations on the "use[] or disseminat[ion]" of data. *Id.* (quotation marks omitted).

Defendants' treatment of *Sorrell* also fails because the challenged provisions of the Data Censorship Statutes cast as broad a net as the statute at issue in *Sorrell*. The challenged provisions of the Data Censorship Statutes outlaw data collection on "adjacent or proximate land" that the collector *has permission* to enter, if, on the way, the data collector touches *other* land without permission. Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). Like in *Sorrell*, the Data Censorship Statutes restrict the gathering of information from a willing provider.

Defendants' other attempt to claim data collection is not protected by the First Amendment is to cite to two cases that predate all of Plaintiffs' Supreme Court precedent above, *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). State Defs.' Br. 18, 22-23. Defendants' depiction of this authority likewise fails to hold up. These cases concerned the First Amendment rights of prisoners, who are subject to "limitation[s] of many privileges and rights." *Pell*, 417 U.S. at 822 (quotation marks omitted). The Court held that a rule providing that only acquaintances, lawyers, and clergy would be able to physically access the prisoners did not violate the prisoners' freedom of speech because of the "available alternative means of communication." *Id.* at 823, 824 (quotation marks omitted). Further, the rule did not violate the freedom of the press because it was a generally applicable rule that did not single out the press, who continued to have "substantial access to California prisons and their inmates." *Id.* at 833; *see also* Plfs.' Opening Br. 37-39 (explaining that the Data Censorship Statutes are distinct from generally applicable laws). In other words, even in the unique context of prisons, the Court held First Amendment balancing *was* required for a restriction on the flow of information, just that the particular restriction was constitutional. *See also Saxbe*, 417 U.S. at 850 (case heard and decided same day as *Pell*, and held to be "constitutionally indistinguishable from *Pell*").

Moreover, regardless of Defendants' anemic case law, to contend that the data collection regulated by the Data Censorship Statutes is not protected by the First Amendment would ignore the realities of this case. *See* Plfs.' Opening Br. 29-33. The Data Censorship Statutes single out for regulation information needed to support advocacy about land use. The statutes target "preserv[ing] information" where the "data relate[s] to land or land use" *and* the data is "record[ed] [with] a legal description or geographical coordinates of the location of the collection." Wyo. Stat. § 6-3-414(e) & § 40-27-101(h). Put another way, the Data Censorship Statutes are aimed exclusively at data related to the environment, and then home in on the exact information Plaintiffs use and require for petitions on environmental regulations. *See, e.g.*, Aplt. App. at A89-93. The Data Censorship Statutes are not merely targeted at the gathering of information, but at preventing the collection of particular information that is essential to engage in speech. Because the statutes inhibit "creating" environmental advocacy, the First Amendment must apply. *Brown*, 564 U.S. at 792 n.1.

III. The Data Censorship Statutes' restriction on "crossing" private land does not immunize them from First Amendment scrutiny.

Defendants argue that the Data Censorship Statutes' are entirely immune from First Amendment scrutiny because they only apply if a violator, at some point, crosses onto private land, thereby they prevent trespass. This argument fails

right out of the starting gate. While Defendants state this Court should not "divorce" aspects of the Data Censorship Statutes from the whole, State Defs.' Br. 17, their argument depends on doing exactly that. Defendants focus on the statutes' single element prohibiting crossing onto private land without permission, and disregard the remaining components of the statutes, which restrict First Amendment protected activities. Defendants cite no case that sustains a law targeting speech because one aspect of that law could protect private land. This is not surprising; no such case exists.

Indeed, Defendants do not respond at all to *Watchtower Bible & Tract Society of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002), which rejects such an argument. *See also* Plfs.' Opening Br. 34-37 (discussing *Watchtower* and additional authority Defendants fail to dispute). *Watchtower* invalidated under the First Amendment a law prohibiting individuals "going in and upon private residential property" without permission to engage in advocacy, even though that law was intended to "protect[] [] residents' privacy." 536 U.S. 150, 154, 165 (2002) (quotation marks omitted).

The two cases Defendants cite instead, *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972), and *Zemel v. Rusk*, 381 U.S. 1 (1965)—which were also relied on by the district court—are inapposite. State Defs.' Br. 18-22. In *Lloyd*, the Court did not address the scope of the First Amendment's protections, because it concluded

there was no state action. That case concerned whether a private shopping mall could invoke a generally applicable trespass law to ban "the distribution of handbills." *Lloyd*, 407 U.S. at 556. The Court explained that the First Amendment does not cover the "action[s] by the owner of private property." *Id.* at 567. The *Lloyd* plaintiffs did not allege that the government in any way targeted speech either through the text of the trespass statute or the government's enforcement of it. *Id.* Therefore, *Lloyd* simply does not speak to the issue presented here, whether the governmental Defendants' power to enforce laws that Plaintiffs allege are designed to target First Amendment protected activities is constitutional. *See McGuire v. Reilly*, 386 F.3d 45, 60 (1st Cir. 2004) (the "threat that the statute will be enforced by state personnel" "can provide the requisite state action").

Defendants' other case, *Zemel*, 381 U.S. 1, concerned a ban on travel to Cuba that did not directly regulate a "First Amendment right." *Id.* at 16. It stands for the proposition that where a statute exclusively prohibits conduct *unprotected* by the First Amendment, that statute can survive even if, by restricting that conduct, the statute also indirectly limits speech. *Id.*

Nowhere does *Zemel* state, as Defendants acknowledge their argument requires, that restrictions on "access" are constitutional regardless of whether, as here, the statute also targets First Amendment protected activities. *See* State Defs.' Br. 21. As *S.H.A.R.K. v. Metro Parks Serving Summit County* explains, there is no

general police power to restrict access to land; to the contrary, the key inquiry is "whether the rule blocking access, is, itself constitutional," which depends on the specific characteristics of the law. 499 F.3d 553, 560 (6th Cir. 2007).

Defendants play a word game to suggest *S.H.A.R.K.* holds restrictions on access are not subject to the First Amendment, noting that the *S.H.A.R.K.* court inquired whether the plaintiffs "had a lawful right of access." State Defs.' Br. 23 (emphasis and quotation marks removed). *S.H.A.R.K.* goes on to state, however, that the "[f]irst" component of that inquiry is whether the law at issue "selectively delimits" a type of speech, because that would render it a presumptively invalid "[c]ontent-based restriction," even if there was no "right of access." 499 F.3d at 560-61.

Further still, *Zemel* is not helpful to Defendants because Supreme Court case law following *Zemel* held that even regulations that do *not* target First Amendment protected speech are subject to First Amendment scrutiny if they have the potential to interfere with speech. *See* Plfs.' Opening Br. 39-41 (citing authority). In fact, *Walsh v. Brady*, 927 F.2d 1229 (D.C. Cir. 1991), considered a First Amendment challenge to the Cuba embargo and explained it could not rely on *Zemel*, "because three years after *Zemel* the Supreme Court established" intermediate scrutiny applied to "government restrictions that are unrelated to the suppression of expression but that burden First Amendment freedoms incidentally." *Id.* at 1235.

Defendants' reliance on *Walsh* is error. State Defs.' Br. 32-34 (citing *Walsh*, 927 F.2d at 1236-37). Overlooking the above quoted section of *Walsh*, Defendants turn to the case's analysis of whether the embargo violated "the equal protection clause" because it exempted reporters, but not "poster importers," like Walsh. 927 F.2d at 1235. *Walsh* concluded the plaintiff could not claim unconstitutional discrimination, without altering the case's conclusion that First Amendment scrutiny was required, even of the generally applicable embargo. *Id.* at 1235.

In short, a state may not circumvent the First Amendment simply by linking a prohibition on speech with a restriction on accessing private land. It is a foundational First Amendment principle and an "example of why we permit facial challenges to statutes that burden expression" that "even minor punishments" for engaging in speech can chill protected activities. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002). Laws, like the Data Censorship Statutes, that "impos[e] criminal penalties on protected speech [are] a stark example of speech suppression," and thus are subject to the First Amendment. *Id.* Indeed, even laws that do not target speech, but may restrict speech, are subject to the First Amendment.

IV. The Data Censorship Statutes are content-based laws subject to strict scrutiny.

The Data Censorship Statutes are not only subject to First Amendment scrutiny, but to strict scrutiny. *See* Plfs.' Opening Br. 44-52. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional" and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2226 (quotation marks omitted). "Government regulation of speech is content based if a law applies to particular speech because of [(1)] the topic discussed or [(2)] the idea or message expressed." *Id.* at 2227. The plain text of the Data Censorship Statutes establishes they do both.

The statutes restrict First Amendment protected speech on particular topics. They regulate the gathering of information only when it relates to "land or land use." Wyo. Stat. § 6-3-414(e)(iv) & § 40-27-101(h)(iii). The statutes only regulate data collection if it concerns the environment.

Moreover, the statutes only regulate the collection of information on that topic when it is gathered 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). In this manner, the statutes restrict the gathering of environmental data in the format used for analysis, commentary, and petitioning regarding environmental regulations. *See, e.g.*, Aplt. App. at A89-93. Thus, the statutes "function[ally]"

restrict communications on environmental policies, which is constitutionally equivalent to restricting communications on that topic. *See Reed*, 135 S. Ct. at 2227.

The Data Censorship Statutes also regulate data collection because of the message the data will be used to convey, meaning they are not only content-based, but viewpoint discriminatory, an especially "egregious form of content discrimination." *See Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The statutes only regulate individuals who contact private land without permission on their way to collect resource data from "adjacent or proximate land." Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). Thus, the statutes allow landowners and their allies to gather the exact data from neighboring public properties that they chill the plaintiff environmental groups from obtaining for fear that they will touch the private land en route to collecting public data. *See* Aplt. App. at A62-63, A93-96 (explaining how Wyoming's land records prevent Plaintiffs from determining what is private and what is public land, thwarting Plaintiffs' efforts to ensure they only contact public land).[1] The Data Censorship

[1] Defendants' and the district court's claim that Plaintiffs could use "'GPS tools'" to determine *where* they are standing, State Defs.' Br. 40 (quoting Aplt. App. at A157), fails to respond to the fact that Wyoming often does not provide a way to know *whether* that land is public or private. *See* Plfs.' Opening Br. 31-32.

Statutes regulate data collection in a manner that prevents conservationists' from developing their message, and promotes the perspective of landowners.

In fact, such viewpoint discrimination was a central reason why Wyoming enacted the Data Censorship Statutes, which provides an independent basis to treat the statutes as content-based. *See, e.g.*, *Reed*, 135 S. Ct. at 2227. Legislators described how the laws were needed to stop environmental petitions to restrict land use because they believed those objectives are "evil." Aplt. App. at A54-56 (Complaint allegations describing Wyoming's "purposes in enacting the Data Censorship Laws").

Without addressing any of Plaintiffs' authority to the contrary, Defendants insist the "animus" shown by these statements toward Plaintiffs' speech was nullified because the laws were amended less than a year later and there was no additional record of animosity. State Defs.' Br. 43. As Plaintiffs' detailed in their Opening Brief, 49-52, not only have courts explained a legislature cannot wipeout its legislative history through amending a law, but courts should have a particularly "'healthy skepticism'" when the legislature attempts to cover-up its earlier stated purpose through quick amendment. Plfs.' Opening Brief. 49-50 (quoting *Johnson v. Governor of State of Florida*, F.3d 1214, 1226 (11th Cir. 2005) (en banc)).

It was also inappropriate for Defendants and the district court to diminish the alleged facts as only representing the "frustration[s]" of "a few of the legislators."

State Defs.' Br. 43 (emphasis removed) (citing Aplt. App. at A165-66). At the motion to dismiss stage, Plaintiffs' detailed factual allegations supporting that the purpose of the Data Censorship Statutes was to suppress environmental advocacy were required to be treated as true. *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002) ("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.").

Supreme Court precedent directly undermines Defendants' additional claim that motive is only relevant under "the Equal Protection Clause of the Fourteenth Amendment." State Defs.' Br. 42. *Reed* states,

> Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that … were adopted by the government "because of disagreement with the message [the speech] conveys."

135 S. Ct. at 2227 (alteration in original) (quoting *Ward*, 491 U.S. at 791). As a result, Defendants' authority meant to show the Data Censorship Statutes do not warrant heightened scrutiny under the Equal Protection Clause is irrelevant. State Defs.' Br. 43-46. Plaintiffs are not claiming an equal protection violation, but properly raising why the statutes were adopted in connection with their First Amendment claim.

Defendants' fourth and final argument in the alternative, that the Data Censorship Statutes are not viewpoint discriminatory because they "apply just as equally to the State of Wyoming's Department of Environmental Quality" as they do to environmental advocates, State Defs.' Br. 31, is similarly misguided. Viewpoint discrimination does not require a law to be perfectly crafted to trample one perspective, rather it exists whenever a state sets out to "target … particular views." *Rosenberger*, 515 U.S. at 829. Defendants' argument does not contest that the statutes were designed to obstruct environmentalists' advocacy. That the statutes also affect the Wyoming Department of Environmental Quality only underscores that the statutes are content-based because they restrict speech on a particular topic, the environment.

V. The Data Censorship Statutes cannot survive strict scrutiny.

Defendants have not attempted to carry their burden to satisfy strict scrutiny by showing the Data Censorship Statutes are "narrowly tailored" to serve a compelling interest. *Reed*, 135 S. Ct. at 2226; *see also* Plfs.' Opening Br. 52-57 (discussing how the Data Censorship Statutes fail strict scrutiny). And they cannot.

The only rationale Defendants have ever offered for the statutes is that the laws would "discourage, and if necessary penalize, unauthorized trespass." State Defs.' Br. 5. Defendants allege Wyoming's pre-existing trespass laws are

insufficient because criminal liability only attaches if trespassers have "know[ledge]" that they are on private property, allowing trespassers to "escape any criminal liability if they remove themselves from the property once asked to do so." *Id.* at 35. Moreover, Defendants contend, the punishments provided under the existing criminal and civil trespass laws do not provide "a sufficient deterrent." *Id.* at 37.

Based on Defendants' statements, the logical (and necessary) solution would be to amend the existing trespass laws to reduce the *mens rea* requirements and raise the penalties. Defendants' goals could be achieved without any reference to data collection, merely by limiting the defenses and increasing the sanctions for *all* trespassers. Defendants' decision to instead "impos[e] unique limitations upon speakers," when another ordinance "would have precisely the same beneficial effect," establishes the statutes are not tailored and are unconstitutional. *R.A.V.*, 505 U.S. at 395-96.

Defendants' unsubstantiated assertion that "data collectors" are the only individuals requiring additional deterrence, even if true, has no bearing. State Defs.' Br. 35-36.[2] As this Court has explained, the essence of "narrow[]

[2] This Court has explained that the Government must submit evidence to establish a law is properly tailored, which Defendants certainly has not done at this motion to dismiss stage. *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1029 (10th Cir. 2008).

tailor[ing]" is that where the state's "purposes would be assured" without reference to the speech or speaker it must legislate in that manner, rather than by targeting First Amendment speech. *Chandler v. City of Arvada*, 292 F.3d 1236, 1244 (10th Cir. 2002). "[T]he only interest distinctively served by [a] content limitation," where one is not necessary, is to display "hostility" towards those views, running afoul of the First Amendment. *R.A.V.*, 505 U.S. at 396. In other words, even if Defendants are correct that only "data collectors" require additional deterrence to prevent trespass, because Defendants can deter data collectors from trespassing through passing a generally applicable trespass law—which would not single out First Amendment protected activities for special punishment—they must do so. By unnecessarily targeting speech, Defendants reveal their true goal: to chill speech.

Consistent with this, courts have explained that where the state goes out of its way to target particular speech, that not only undermines the claim that the statute is properly tailored, but also that it serves a legitimate government function—meaning the statute fails both requirements of strict scrutiny. Despite recognizing that its pre-existing trespass statutes will not deter "determined" trespassers, State Defs. Br. 35, Wyoming did not shore-up its laws against all future violators, only data collectors, leaving a potential "loophole" for others. *Chandler*, 292 F.3d at 1244. "[A] law cannot be regarded as protecting an interest

of the highest order" when it is "underinclusive." *Reed*, 135 S. Ct. at 2232 (quotation marks omitted).

* * *

In short, every aspect of the Data Censorship Statutes, from their rationale, to their history, to their current definition of data collection, demonstrates the statutes target specific types of speech, speakers and opinions. "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas[.]" *Turner Broad. Sys.*, 512 U.S. at 641; *see also R.A.V.*, 505 U.S. at 394 ("Selectivity" that "creates the possibility that the [defendant] is seeking to handicap the expression of particular ideas" "would alone be enough to render the ordinance presumptively invalid."). The First Amendment "does not countenance" such restrictions and "[o]ur precedents thus apply the most exacting scrutiny." *Turner Broad. Sys.*, 523 U.S. at 641-42. Defendants' statements reveal that they cannot carry their burden to show the statutes survive strict scrutiny, and thus the statutes are unconstitutional.

VI. The Data Censorship Statutes cannot survive intermediate scrutiny.

Although strict scrutiny applies, the Data Censorship Statutes likewise fail the only other conceivably applicable level of scrutiny, intermediate scrutiny. *See* Plfs.' Opening Br. 58-59. This Court and the Supreme Court have been clear that where a statute places "incidental limitations on First Amendment freedoms"

through regulating in a content-neutral manner that could impact the development of speech, the statute can only survive if the "'incidental restriction on [] First Amendment freedoms [are] no greater than is essential to the furtherance of th[e] interest.'" *Bushco v. Shurtleff*, 729 F.3d 1294, 1304 (10th Cir. 2013) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

There can be no question that, even if this Court holds that the Data Censorship Statutes are not content-based, they incidentally limit speech. Their restrictions on gathering information about land and land use will hamper communications about those issues. *McCullen*, 134 S. Ct. at 2536 (holding law required intermediate scrutiny because it made types of speech "substantially more difficult").

By explaining Wyoming's only objective is to stop trespass, *see, e.g.*, State Defs.' Br. 5, 34-37, Defendants in essence concede the statutes' restriction on speech cannot pass intermediate scrutiny. If a generally applicable prohibition preventing entry onto private land without permission would have achieved Wyoming's end, the restriction on speech was not "essential" and intermediate scrutiny required Wyoming to have passed that law, rather than regulate speech. *See McCullen*, 134 S. Ct. at 2538.

Without citing any First Amendment authority, Defendants argue the Data Censorship Statutes are acceptable because they reflect the "costs to private

property owners" of the unwanted entry. State Defs.' Br. 42. It is unclear how this argument could ever satisfy intermediate scrutiny. Again, through generally applicable statutes Wyoming could provide for damages (and even penalties) for harm to private land without targeting speech. *McClullen*, 134 S. Ct. at 2538-40 (fact that state's "chosen route is easier" is not sufficient).

Perhaps more importantly, Defendants' rationalization is unsustainable because resource data collection—as opposed to crossing private land—produces no harm to the aggrieved landowner. With the challenged provisions of the Data Censorship Statutes, data collection does not occur on the land of the objecting landowner, but on "adjacent or proximate land." Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). The data collection takes nothing additional from the landowner.

Defendants' attempt to imbue the Data Censorship Statutes with a sense of constitutionality by associating them with a Wyoming statute that restricts entry onto private land for the purpose of hunting, State Defs.' Br. 36 (citing Wyo. Stat. § 23-3-305(b)), just demonstrates how much of a blind eye their arguments require. Defendants state that the "only meaningful difference" between the laws is that the latter is triggered because the violator "want[s] to obtain an animal" and the Data Censorship Statutes are triggered if a person "want[s] to obtain data." *Id.* In other words, the hunting statute prohibits the gathering of items that are typically used for sale or consumption, while the Data Censorship Statutes prohibit the gathering

of facts that inform the gatherer and "are the beginning point for much of [] speech." *Sorrell*, 564 U.S. at 570. This distinction is meaningful indeed. It is the very reason Plaintiffs' authority establishes the First Amendment applies to the Data Censorship Statutes, but would not regulate the hunting law.

Because, here, the state has chosen to make the "very basis" for differential treatment under the Data Censorship Statutes whether or not a person is engaged in First Amendment protected activities, the decision to punish speech must be properly justified, otherwise the state reveals that its only true objective is the unconstitutional suppression of undesirable opinions. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30 (1993). Where, as here, regulating speech does not even help facilitate the state's claimed non-speech objective this shows the statute fails intermediate scrutiny and, in fact, was never content neutral at all, but content based. *Id.*

VII. "Forum analysis" is inapplicable and the forum implicated would not alter the need for strict scrutiny.

Likely because the Data Censorship Statutes fail First Amendment scrutiny, Defendants seek to avoid the analysis altogether by arguing that one needs to know "what type of forum[s]" are implicated by the data collection before deciding on the laws' constitutionality, thus this suit is "premature." State Defs. Br. 24. This argument fails on at least two levels.

First, "forum analysis" is inapplicable because, here, the government is acting to restrict First Amendment activities anywhere they occur. "Forum analysis" exists to provide the government the power of property owners "'to preserve the property *under its control* for the use to which it is lawfully dedicated.'" *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (emphasis added) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)). Put another way, "[w]e have [] used what we have called 'forum analysis' to evaluate government restrictions on purely private speech that occurs on *government property*" in order to determine whether the government can exclude activities on *that* property. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (emphasis added).

Correspondingly, where a restriction is not part of the government acting as property owner—and thus limited to regulating speech on government property—but rather part of the government acting as sovereign to target speech everywhere, forum analysis is inappropriate. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.1(f) (Hornbook Series 8th ed. 2010). For instance, *Reed* struck down a law prohibiting the display of certain signs "anywhere within the Town" without ever considering what forums were implicated. 135 S. Ct. at 2224. Likewise, *R.A.V.* held a law "facially unconstitutional" that prohibited placing

objects on "public or private property." 505 U.S. at 380-81 (quotation marks omitted).

Second, forum analysis does not alter the fact that strict scrutiny is required for the Data Censorship Statutes. It is well established that viewpoint discrimination is "presumed impermissible," and subject to strict scrutiny, regardless of the forum implicated. *Summum,* 130 F.3d at 917 (quotation marks omitted). Even were forum analysis to apply, it only lessens the scrutiny of non-viewpoint discriminatory, content-based laws if the restrictions are needed to "preserve[] the purpose of the forum[s]." *Id.* The Data Censorship Statutes are viewpoint discriminatory, seeking to restrict the speech of environmentalists while allowing equivalent speech by landowners. Yet, even if this Court were to conclude the statutes are not viewpoint discriminatory and are solely content-based, the content-based restriction (limiting data collection) plainly is not necessary to "preserve the purpose of the forum" because the Data Censorship Statutes allow data collection by some, just not others.

In short, delaying resolution of Plaintiffs' claims to employ forum analysis would be error because the Data Censorship Statutes use the state's power to broadly restrict First Amendment protected activities on all types of land and the Data Censorship Statutes would require strict scrutiny regardless of what forums are implicated.

VIII. The secondary effects doctrine does not apply to or salvage the statutes.

In a final gambit to salvage the laws, Defendants cite *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)—concerning a zoning ordinance limiting the placement of "adult motion picture theaters," *id.* at 43—to claim the Data Censorship Statutes do not "fit" within traditional scrutiny analysis because they target data collection in order to stop secondary effects associated with that collection, State Defs.' Br. 28-30. This argument fails for at least three reasons.

First, *Renton*'s doctrine requires Defendants to establish the restriction on speech is "unrelated to the suppression of free expression" and "designed" exclusively to accomplish non-speech based objectives, "not to suppress the expression of unpopular views." 475 U.S. at 49.[3] For the reasons stated above, this requirement cannot be met. There is no need to regulate data collection in order to achieve Wyoming's purported end of increasing the deterrent value of existing trespass laws.

Indeed, with the challenged provisions of the Data Censorship Statutes, restricting data collection is not even a reasonable proxy for protecting private

[3] In this manner, *Renton* provides another example of how legislative motive is relevant to First Amendment claims, not just claims under the Equal Protection Clause. *See also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1197-1200 (10th Cir. 2003) (discussing legislative record).

land. The challenged provisions of the Data Censorship Statutes do not restrict data collection on the property of the aggrieved landowner, but on "adjacent or proximate land." *See also* Wyo. Stat. § 6-3-414(c) & § 40-27-101(c). Therefore, they operate by restricting data collection *and* restricting crossing private land, *id.*, meaning the prohibition on data collection is entirely unnecessary to prevent entry and its sole function is to prohibit speech.

Second, it is Defendants' burden to establish the secondary effects doctrine applies, a burden they certainly cannot have carried before any evidence has been submitted. *See Abilene Retail No. 30, Inc. v. Bd. of Comm'rs of Dickinson Cty.*, 492 F.3d 1164, 1173-78 (10th Cir. 2007).

Third, even were Defendants to actually establish the secondary effects doctrine applies, falling within the doctrine does not sustain a law; rather "the test set forth in *City of Renton*" requires the law to "survive intermediate scrutiny." *Abilene Retail No. 30*, 492 F.3d at 1173. As elaborated above, the Data Censorship Statutes cannot pass this test.[4]

[4] There is also a question as to whether *Renton*'s doctrine can apply to speech other than the "sexually explicit" speech at issue in that case. 475 U.S. at 49; *see also* Joshua P. Davis & Joshua D. Rosenberg, *The Inherent Structure of Free Speech Law*, 19 Wm. & Mary Bill Rts. J. 131, 154-55 (2010); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 Pepp. L. Rev. 723, 727 (2001) (quoting Laurence H. Tribe, *American Constitutional Law* 954 (2d ed. 1988)).

IX. Conclusion.

Defendants' Opposition, just like the district court decision below, is based on the fallacy that because the Data Censorship Statutes limit access to private land they can freely regulate First Amendment protected activities. To the contrary, because the statutes selectively punish people who engage in data collection, and data collection—particularly as regulated by the Data Censorship Statutes—is part and parcel of speech, the statutes mandate First Amendment scrutiny. Defendants have offered no basis to conclude the statutes could survive any applicable level of scrutiny, and they have certainly not carried their burden to show how the statutes could survive the requisite strict scrutiny. The district court should be reversed.

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Respectfully submitted,

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I HEREBY CERTIFY that on the January 17, 2017, 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:

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