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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

WESTERN WATERSHEDS PROJECT; NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION; and NATURAL RESOURCES DEFENSE COUNCIL, *Plaintiffs*,	)	
v.	)	Civil No. 15-cv-169-S
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*.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Subsections (c) of Wyoming's criminal and civil "Data Censorship Statutes," Wyo. Stat. §§ 6-3-414(c), 40-27-101(c)—the sole provisions at issue, which are identical in the two laws—"regulate protected speech under the First Amendment" and thus are subject to "constitutional scrutiny." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1192 (10th Cir. 2017). The Tenth Circuit remanded Plaintiffs' challenge to determine "the level of scrutiny to be applied and whether the statutes survive the appropriate review." *Id.* at 1197. Plaintiffs now seek summary judgment declaring subsections (c) unlawful and enjoining their enforcement. Subsections (c) are subject to strict scrutiny, but their plain text and Defendants' own evidence establish they cannot withstand any applicable review. Therefore, there is no dispute of material fact. The provisions cannot stand. Judgment should be entered for Plaintiffs.

Subsections (c) punish people who touch private property without permission, *only if* they subsequently engage in speech on "adjacent" land. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c).

According to how the statutes define their terms, the provisions only target a single type of speech—speech about land—when that speech is generated in a manner to be submitted to environmental agencies. *Id.* §§ 6-3-414(e)(i), (iv), 40-27-101(h)(i), (iii). Further, the provisions target speech only if it is not authorized by law or the private landowner. *Id.* Wyo. Stat. §§ 6-3-414(c)(ii), 40-27-101(c)(ii). Any one of these facts renders the provisions content-based or viewpoint discriminatory, making them subject to strict scrutiny and "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

Defendants do not come close to demonstrating any legitimate need for subsections (c); thus the laws cannot survive either strict *or* intermediate scrutiny. Defendants claim subsections (c) are designed to prevent "trespass." Muraskin Decl. Ex. A 6, 8 (State Defs.' interrogatory responses); *see also id.* Exs. B, C, D (County Defs.' interrogatory responses adopting the State

Defs.' responses). But, the natural and logical way to prevent trespass is to strengthen the state's preexisting, generally applicable trespass laws—which Plaintiffs do not challenge—not to target trespass only when it is associated with speech. *See* Wyo. Stat. § 6-3-303 (Wyoming's generally applicable criminal trespass statute); *Bellis v. Kersey*, 241 P.3d 818, 824-25 (Wyo. 2010) (Wyoming's generally applicable common law civil trespass rules). Defendants produced no evidence that there is any reason to single out trespass leading to speech—let alone speech that occurs on other property, not the property trespassed upon. A law targeting speech where a generally applicable law would suffice can never stand.

Unsurprisingly therefore, Defendants indicate they will rely on this Court's suggestion that its scrutiny is informed by "the forum of the expression," MTD Decision I, Dkt. No. 40, at 25, to argue Plaintiffs' challenge is "premature," thereby avoiding the merits, Muraskin Decl. Ex. E 2-3 (State Defs.' supplemental interrogatory responses). Yet laws like the Data Censorship Statutes that apply regardless of forum are not subject to "forum analysis." *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Moreover, even if this Court engaged in forum analysis, the Data Censorship Statutes are unconstitutional in all fora. Further still, Plaintiffs have identified open, public fora where they wish to engage in their speech and Defendants concede the statutes are not necessary to protect public fora. Muraskin Decl. Ex. E 2 (State Defs.' supplemental interrogatory responses). Forum analysis should not and cannot delay judgment on subsections (c). Subsections (c) are unconstitutional.

I. Undisputed Facts.

A. The Data Censorship Statutes text.

Subsections (c) of the Data Censorship Statutes create liability for "[c]ross[ing] private land to access adjacent or proximate land where [a person] collects resource data," if the resource

data-collector does not have authority "to cross the private land." Wyo. Stat. §§ 6-3-414(c), 40-27-101(c).

There are five key aspects to subsections (c).

First, "collecting resource data," is defined as having three elements: (a) gathering any "information"—including taking "a sample," "photograph," or notes; (b) that is about "land or land use," and (c) is collected with a "recording of a legal description or geographical coordinates of the location of the collection." Wyo. Stat. §§ 6-3-414(e), 40-27-101(h).

The last element reproduces requirements federal and state environmental agencies have for data submitted to inform their decision making. For instance, Wyoming's Department of Environmental Quality ("DEQ") requires water quality data submitted to the agency be submitted with the "GPS location" of each sample. Only then will the agency deem the sample of sufficient "quality" and consistent with Wyoming's "credible data law." Muraskin Decl. Ex. F (excerpts of Wyoming DEQ, *Manual of Standard Operating Procedures* (2017)). Accordingly, the Sampling and Analysis Plan DEQ entered into with Plaintiff Western Watersheds Project ("WWP") demands WWP provide the precise location of where data was gathered. *Id*. Ex. G. Likewise, Bureau of Land Management ("BLM"), EPA, Natural Resource Conservation Service, U.S. Army Corps of Engineers, U.S. Forest Service, and U.S. Geological Survey manuals all state that recording the precise location of data collection is a part of those agencies' protocols. *Id.* Exs. H-N (providing excerpts of these agencies' manuals).

Second, in light of the statutes' definition of "collecting resource data," the Tenth Circuit held that subsections (c) restrict speech. *W. Watersheds Project*, 869 F.3d 1189. The Tenth Circuit explained that because "collecting resource data" encompasses "photograph[ing] animals," "tak[ing] notes about habitat conditions," and "sampl[ing] material" to "engage in

environmental advocacy," the statutes limit "speech creation." *Id.* at 1196-97. "[A] restriction [that] 'operate[s] at the front end of the speech process' [] falls within the ambit of the First Amendment." *Id.* at 1197 (quoting *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012)). "The fact that one aspect of the challenged statutes concerns private property"—that a violator must "cross" private property on the way to collect resource data elsewhere—"does not defeat the need for First Amendment scrutiny." *Id.* at 1195.

Third, subsections (c) only restrict collecting resource data (speech) if the speech occurs on land *other* than that of the aggrieved private land owner. Subsections (a) and (b) of the statutes prohibit: (a) "[e]nter[ing] onto private land for the purposes of collecting resource data" without permission; and (b) collecting resource data "from private land without" permission. Wyo. Stat. §§ 6-3-414(a)-(b), 40-27-101(a)-(b). These provisions regulate all efforts to collect data from the objecting private property owner's land. *Watersheds Project*, 869 F.3d at 1194. "In challenging subsections (c), plaintiffs do not assert a right to engage in" resource-data collection "on [the] private land" they "crossed" on the way to creating speech. *Id.*

Fourth, subsections (c) have no scienter requirement. They create liability exclusively based on the data collector "cross[ing]" onto the land of the aggrieved owner, whether or not the entrant did so accidentally or caused any damage to the property. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). Even inadvertent entry exposes a collector to jail time and financial penalties.

Fifth, liability is at the discretion of the private land owner. The Data Censorship Statutes only punish collecting resource data on "adjacent or proximate land" if a person touches private property on the way to collect data and the collector does not have "legal authorization" or "permission" "to cross the private land." Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). No liability results if the data collector's activities are authorized by law or the private land owner.

In sum, subsections (c) create liability only if a person engaged in a First Amendment protected activity—"collecting resource data" as it is defined in the statutes—on a separate parcel, but contacted private property on the way, without authorization.

B. The legislative history of the Data Censorship Statutes.

The legislative record underlying the Data Censorship Statutes reflects that the statutes target data collection to suppress environmental advocacy to government agencies.

When the statutes were first passed in 2015, they defined "collect" to mean gathering information about land use "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).

According to the Joint Judiciary Committees' Summary of Proceedings on the 2015 statutes, the lead witness before the legislature was a grazing association who wished to stop information from being "shared with governmental entities." Muraskin Decl. Ex. O 11 (all committee documents on proceedings). The only written testimony submitted in support of the statutes also came from that association, which claimed the laws were needed because data is often collected by "special interest groups … to influence public agency land use decisions," particularly "grazing privileges on federal lands." *Id.* Ex. O 26. One of the few exhibits submitted in support of the laws, and the only one addressing events preceding the laws, was a news article discussing a suit by ranchers against WWP, alleging WWP trespassed to gather facts "to advance [its] agenda" of reducing grazing on public lands. *Id.* Ex. O 61.

During the debates on the 2015 statutes, legislators stated they supported the statutes because they would stop environmental advocacy. Most notably, Senator Hicks—the drafter of the statutes for the Judiciary Committee, *id.* Ex. O 12—stated the statutes are "designed to" "hold back certain organizations," offering as an example organizations that might collect data

on sage grouse to protect it under the Endangered Species Act. Muraskin Decl. Ex. P Senate Jan. 19, 2015 audio file,2:17:36-2:19:41. [1] Senator Hicks later went on to argue for the statutes because of "egregious abuse of collecting these water quality data by third parties around the state of Wyoming, we've had to go to extraordinary measures." *Id.* Ex. P Senate Jan. 19, 2015 audio file, 2:40:31-2:40:40.

When Plaintiffs challenged those 2015 laws, this Court indicated it would closely scrutinize the statutes because they restricted "communicat[ion]" with "a governmental agency." MTD Decision I, Dkt. No. 40, at 4.

Immediately thereafter, the same legislature that passed the 2015 statutes—there had been no intervening election—amended them to remove the express prohibition on communication with the government, and rewrote the definitions so the statutes only apply to data collected with the details environmental agencies typically recommend or require. *Compare* Wyo. Stat. § 6-3-414(d)(i) (2015) *with* Wyo. Stat. § 6-3-414(e)(i).

No additional evidence or testimony was introduced with the amendments. Muraskin Decl. Ex. Q (committee folders for 2016 amendments). However, Senator Hicks, the amendments' lead sponsor, explained on the floor that the definition of collect had been rewritten to cover only data collected with "a legal description or coordinates" as such location information "would be a requirement for any data submissions." Muraskin Decl. Ex P Senate Feb. 16, 2016 audio file, 00:17:47-00:18:36. The following day, when Senator Hicks began to explain that amendments responded to "the legal challenge," the presiding officer admonished to "exercise care in how we reference these external issues." Muraskin Decl. Ex. P Senate Feb. 17, 2016 audio file, 00:40:38-00:42:57.

[1] *See also* Ratner Decl. ¶ 7 (noting WWP's work on protecting sage grouse); Umekubo Decl. ¶ 3 (noting NRDC's work on protecting sage grouse)

C. Defendants' support for the Data Censorship Statutes.

Defendants contend subsections (c) were passed as part of the government's efforts to protect "social welfare" by "discourag[ing] trespass," but they do not claim that data collection on adjacent property produces any harm to "property rights" distinct from the harm caused by "crossing private land without permission." Muraskin Decl. Ex. A 6, 8 (State Defs.' interrogatory responses). Instead, Defendants contend the statutes single out data collection because collectors "are so motivated by their desire to collect resource data that they do not respect private property rights." *Id*. at 9. Defendants point to nothing in the legislative record substantiating this claim. They rely on the testimony of five citizens developed for this suit. *Id*.

However, at deposition, Defendants' witnesses explained they have no basis to believe data collectors are more likely to trespass or harm their property than others. One witness testified that as much as "99 percent" of the people who "pass through the[] roads" on her property without permission are recreationalists, not data collectors, and she had no evidence data collectors are more likely to trespass than anyone else. Muraskin Decl. Ex. R 31:21-32:14, 43:3-13 (excerpt of McConnell Deposition). Another, Neils Hansen, stated he had "no idea how many people are crossing through" his property, but he did not believe he "had trouble with data trespassers," while he knew "oil and gas operators," "recreationalists," and federal and state employees cross his property. *Id.* Ex. S 34:22-35:4, 36:25-37:2, 44:4-6 (excerpts of Hansen depo); *see also id.* Ex. T 68:12-25 (excerpt of Woodland deposition) (stating data collectors are no more likely to trespass and trespassers' impacts are "the same for everyone"); *id.* Ex. U 34:4-22, 37:3-7 (excerpt of Schramm deposition) (listing types of trespassers and stating they all "have the same types of impacts"); *id.* Ex. V 32:18-33:7, 40:20-43:3 (excerpt of Zakotnik

deposition) (listing types of trespasser and stating it is "pretty hard to say" data collectors produce "any unique damage").

Mr. Hansen went on that the only damage caused by a purported data collector—who collected data on his, not adjacent property—was the act of gathering data, whereas *other* trespassers, with unknown motives, had engaged in theft and vandalism. *Id.* Ex. S 37:25-38:21, 66:14-20 (excerpts of Hansen depo). Thus, according to Mr. Hansen, "laws that doubled the penalties or jail time for all trespassers" would "possibly" be "better for" him. *Id.* Ex. S 44:7-10.

Defendants' witnesses stated they believe the Data Censorship Statutes are warranted to stop data collectors' advocacy. *Id.* Ex. R 41:18-24 (except of McConnell deposition) (data collection warrants increased penalties because data does "damage [to] my reputation"); *id.* Ex. V 43:7-15 (excerpt of Zakotnik deposition) (stating supported greater penalties for data collectors because of collectors' "agenda"); *id.* Ex. T 67:19-24 (excerpt of Woodland deposition) (stating the law should target data collectors because as a rancher "they have targeted us to put us out of business"); *id.* Ex. S 44:11-16 (excerpt of Hansen deposition) (stating the laws are necessary because data collectors portray ranchers "in a negative light").

D. The impact of the Data Censorship Statutes on Plaintiffs' speech.

Since the Data Censorship Statutes were passed, Plaintiffs have declined to develop environmental advocacy and other speech because they fear the statutes.

Before the statutes' enactment in 2015, WWP and NRDC surveyed Wyoming public lands to gather data showing the environmental impacts of land uses. WWP collected water samples, information regarding vegetative and streams conditions, and photos, with the aim of documenting the influence of livestock grazing on Wyoming public lands. Ratner Decl. ¶¶ 6-12; Molvar Decl. ¶ 7. NRDC collected information on the conditions of a variety of wildlife,

including the sage grouse and whitebark pine, and had planned to conduct air monitoring on public lands to study emissions from oil and gas extraction. *See* Buccino Decl. ¶¶ 4-6, 10-12; McKenney Decl. ¶¶ 2-4, Exs. A-B; Mordick Decl. ¶¶ 8-22; Umekubo Decl. ¶ 3. WWP and NRDC typically collected (and continue to collect) such data with the GPS coordinates of where the data was gathered, because they wish to use the data to inform agencies' decision making. *See* Buccino Decl. ¶¶ 6, 12; McKenney Decl. ¶ 4, Exs. A-B; Molvar Decl. ¶ 12; Mordick Decl. ¶¶ 15-24; Ratner Decl. ¶¶ 11, 19-27.

Presently, WWP is collecting less than half the data it collected in Wyoming before the statutes' passage. Ratner Decl. ¶¶ 29-30; *see also* Molvar. Decl. ¶ 10-11. There are numerous public lands it will not consider visiting because it fears inadvertently crossing onto private property without permission on the way. Ratner Decl. ¶ 38-39; *see also* Molvar Decl. ¶ ¶ 13-17.

Moreover, WWP has identified eleven sites on Wyoming public lands where it wishes to collect water quality, vegetative, and livestock data during the next collection season, but will not do so because of the Data Censorship Statutes. Ratner Decl. ¶¶ 42, 44-47; Molvar Decl. ¶ 21. In one instance, WWP's collection site sits in the midst of public land interspersed with unmarked private land, and thus fears it might unknowingly step onto private land on the way and violate the statutes. Ratner Decl. ¶ 46. In another seven instances, WWP has uncovered that BLM or U.S. Forest Service roads it must use to access certain sites cross private property, but WWP could not locate easements for those sections of road. *Id.* ¶ 47. WWP has been sued under Wyoming's general civil trespass law for using one of these roads. *Id.* ¶ 32. Yet, WWP would use these roads were it not for the Data Censorship Statutes, which solely subjects data collectors to the risk of extreme penalties for using paths all other citizens can rely on without those risks. *Id.* ¶¶ 32, 38, 42; *see also* Molvar Decl. ¶¶ 19-20. In three other instances, WWP has uncovered

conflicting government maps, some of which place its desired collection site on public property and some of which place the site on private property. Ratner Decl. ¶¶ 44-45. As a result, WWP fears even going near these boundaries because it cannot determine what is public and what is private and thus might misstep onto private land; but, WWP desires to collect at boundary locations and, absent the Data Censorship Statutes, would do so if it had a good faith belief it could conduct that sampling entirely on public land. *Id.* ¶¶ 41-45; Molvar Decl. ¶¶ 15-16, 19-21.

Following the Data Censorship Statutes' passage, NRDC declined to go forward with its air pollution study because it feared an inadvertent misstep on the way to or from the monitoring equipment onto private land could create liability under the statutes. Buccino Decl. ¶¶ 8-14. Likewise, while NRDC previously studied an area surrounding a wind-power facility in Carbon County, unmarked private land dots that area and thus the risk of liability under the Data Censorship Statutes from staff inadvertently touching that land deters NRDC from returning to collect data. Umekubo Decl. ¶ 4. With the enactment of the statutes, NRDC also removed—and has subsequently declined to repost—a request on its website that citizen scientists collect and report data on whitebark pine because NRDC fears citizens might misstep and expose themselves to liability. McKenney Decl. ¶¶ 3-4. Finally, an NRDC scientist called off a visit to an oil and gas production facility to record information regarding the facility's environmental impacts because, while one of the site's owners provided NRDC permission to access the site and the pathway to it, another owner stated it would not authorize access. NRDC could not resolve the differing claims, and despite NRDC's good-faith belief it had permission to access the land, an error would have exposed it to liability under the laws. Thus, NRDC decided to abandon the work, impairing its ability to collect data to submit to a government agency. Mordick Decl. ¶¶ 17-22.

Both NRDC and WWP use maps and GPS devices to avoid erroneously entering private property, but this does not alleviate the above concerns. *See, e.g.*, Buccino Decl. ¶¶ 7-9; Molvar Decl. ¶¶ 15-16; Ratner Decl. ¶¶ 19, 35, 37. Maps are at a scale that they do not always show where public roads edge onto private property or where a person would step from public land and paths onto private property. *See, e.g.*, Buccino Decl. ¶ 8; Ratner Decl. ¶¶ 35; Woods Decl. Ex. 1, at 5-6, 23-24 (expert report). Scientific studies have found that even sophisticated, dedicated GPS devices often do not achieve their stated levels of accuracy. Woods Decl. ¶ 8. In fact, the device can produce results tens to hundreds of feet off. *Id.* One peer-reviewed study of GPS devices found that between 5% and 35% of all readings were off by more than 65 feet; and some peer-reviewed studies have found maximum GPS location errors greater than 400 feet. *Id.* ¶ 8, Ex. 1 (expert report). Defendants disclosed no expert to contest Plaintiffs' evidence that it is not possible to use GPS "to consistently, accurately, and reliably determine, with reasonable certainty, whether a precise location is on private or public land." *Id.* ¶ 11.

In fact, NRDC's and WWP's concern that they could inadvertently misstep onto private property while attempting to gather environmental information from public lands are echoed by Wyoming officials. The Director of the University of Wyoming's Natural Diversity Database testified in connection with the 2015 statutes that despite his office's policy to obtain permission to access private land, "mistakes are possible" and therefore the legislature should "ensure that there is no prosecution for inadvertent trespass." Muraskin Decl. Ex. O 44 (committee documents on 2015 statutes). The Director of Wyoming's Game and Fish Department similarly testified that for his agency "accidental entry on private land may be an issue." *Id.* Ex. O 12.

For these reasons too, the Data Censorship Statutes have not only interfered with environmental advocacy, but also newsgathering. Plaintiff the National Press Photographers

Association ("NPPA") is a membership-based organization representing visual journalists. Osterreicher Decl. ¶ 6. NPPA's members' equipment—including that of NPPA Wyoming member and environmental reporter Angus Thuermer, Jr.—can capture GPS coordinates of where their images were taken. Thuermer Decl. ¶¶ 3, 6. Mr. Thuermer regularly employs this feature and also uses maps to identify and record exactly where his images were taken—and did so before the statutes were passed. He believes this is part of accurately recording news. *Id.* ¶¶ 6-11. Such details can also be used to integrate images into graphics on news websites. *Id.* ¶ 10.

Since the Data Censorship Statutes were amended, however, Mr. Thuermer has declined to gather images of sagebrush and fields for a story on New Fork Lake because he could not be certain there were easements allowing him to use the roads to access the area. *Id.* ¶ ¶ 12-13. He also declined to develop a story documenting the sage grouse in the Normally Pressured Lance gas field because he feared he might misstep onto private land. *Id.* ¶ 14. So long as the Data Censorship Statutes remain, if he cannot be certain he is in compliance, he will decline to take particular photos, or will change what image or information he is capturing regarding Wyoming public land. *Id.* ¶ 12-15. Mr. Thuermer covers news as it breaks and has limited resources. A statute that punishes unintentional entry onto private property, requiring him to know the details of all right of ways and the contours of all boundaries will curtail his coverage. *Id.*

II. Standard of Review.

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56 (a).

III. Argument.

A. Each plaintiff has standing to bring First Amendment claims.

For standing "a plaintiff must show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quotation marks omitted). But, there is "a 'low threshold'" for First Amendment injuries. *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (quoting *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14-15 (1st Cir.1996)). Even if a plaintiff has "never been prosecuted or actively threatened with prosecution" there is an "ongoing" First Amendment injury so long as it is reasonable to conclude the statute has a "*chilling effect* on his desire to exercise his First Amendment rights." *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003) (quotation marks omitted). "Generally, standing is found based on First Amendment violations where the rule, policy or law in question has explicitly prohibited or proscribed conduct on the part of the plaintiff." *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 711 (6th Cir. 2015).

Nonetheless, Defendants state they will contest Plaintiffs' standing on the basis that Plaintiffs face no "credible threat" of prosecution and thus any chill to their speech is not reasonable or actionable. Muraskin Decl. Ex. A 4 (State Defs.' interrogatory responses). Not so.

This Court applied the Tenth Circuit's three-part test to hold Plaintiffs' claim of chill was "credibl[e]" and "objective[ly]" reasonable when Plaintiffs challenged the 2015 statutes. MTD Decision I, Dkt. 40, at 10-11. That test provides Plaintiffs can demonstrate an injury by presenting "(1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no

intention to do so because of a credible threat that the statute will be enforced." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (emphasis removed).

Once again, Plaintiffs more than satisfy this test. Each Plaintiff demonstrates that before the statutes were passed its staff or members gathered information about Wyoming land with the GPS coordinates of where that data was collected. Buccino Decl. ¶¶ 5-6, 10; Molvar Decl. ¶¶ 7, 11-12; Mordick Decl. ¶¶ 8-23; Ratner Decl. ¶¶ 6-11, 19-27 Thuermer Decl. ¶¶ 6-11; Umekubo Decl. ¶ 3.[2] Plaintiffs evidence further shows that the statutes have stopped them or their members from gathering at least some of their desired data collection because they discovered they might inadvertently step or drive onto private property in the process of collecting the data. Buccino Decl. ¶¶ 7-10; Molvar Decl. ¶¶ 13-17; Mordick Decl. ¶¶ 18-23; Ratner Decl. ¶¶ 28-41; Thuermer Decl. ¶¶ 12-15; Umekubo Decl. ¶ 4. At the same time, because, in each of those instances, they make good faith efforts to ensure they are not trespassing, they would undertake the data collections were it not for the fact that the Data Censorship Statutes penalize unintended contact with private land. Buccino Decl. ¶¶ 7-11; Thuermer Decl. ¶¶ 12-15; Molvar Decl. ¶¶ 19-21; Mordick Decl. ¶ 24;Ratner Decl. ¶¶ 42-47; Umekubo Decl. ¶¶ 4-5.

This evidence showing how the Data Censorship Statutes have interfered with Plaintiffs' First Amendment protected activities is more than sufficient. Where, as here, a law makes the plaintiff's standard activities "'significant[ly] difficult[],'" that alone establishes that the plaintiff's decision to alter its conduct was in response to "a credible threat" of the law's

[2] An organization can represent its member's interests where the member has standing, the member's injury is related to the organization's purpose, and the member's participation is not required. *See, e.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343-44 (1977). For the reasons stated, NPPA's member has standing. Ensuring that its members can engage in visual journalism is expressly part of NPPA's mission, Osterreicher Decl. ¶ 7; *see also id.* ¶¶ 8-19, and "request[s] for declaratory and injunctive relief" do not require the member's individual participation. *Hunt*, 432 U.S. at 344. NPPA can proceed on its member's behalf.

enforcement and the plaintiff has been reasonably "chilled." *Am. Library Ass'n v. Barr*, 956 F.2d 1178, 1192-94 (D.C. Cir. 1992) (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 391 (1988)); *see also N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) ("A non-moribund statute that facially restrict[s] expressive activity by the class to which the plaintiff belongs presents such a credible threat, and a case or controversy thus exists in the absence of compelling evidence to the contrary." (quotation marks and brackets omitted)); *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1200 & n.41 (D. Utah 2017) (applying *Initiative & Referendum Institute* to find standing where organization merely expressed "interest" in engaging in conduct covered by statute, having previously done so elsewhere). Plaintiffs' prior, active efforts to collect data in Wyoming in the exact manner regulated by subsection (c), and their detailed descriptions of how they have concluded their activities could lead them to run afoul of the Data Censorship Statutes, which is keeping them from engaging in their data collection, establish the statutes are causing an injury.[3]

B. ***Subsections (c) are content-based and viewpoint discriminatory.***

Turning to the first merits issue, "the level of scrutiny," *W. Watersheds Project*, 869 F.3d at 1197, Supreme Court precedent establishes the Data Censorship Statutes are subject to strict

[3] Although Defendants have indicated they do not intend to contest that Plaintiffs' injury is traceable to Defendants and redressable through this action, *see* Muraskin Decl. Ex. A 3-4 (State Defs.' interrogatory responses), Plaintiffs note: Defendants are the officials charged with enforcing Wyoming's criminal laws, Wyo. Stat. §§ 9-1-603(a), 18-3-302(b), defending the constitutionality of Wyoming's statutes, *id.* §§ 9-1-603(a), 18-3-302(a)(i), and even regulating closed Wyoming lands that may abut open lands where Plaintiffs might wish to collect data, *see, e.g.*, *id.* §§ 9-1-603(a), 18-3-302(a)(i), 35-11-109; MTD Decision I Dkt. No. 40, at 14. Certainly the threat of these unconstitutional laws being enforced against Plaintiffs stems from Defendants' powers and can be redressed through declaring the laws unconstitutional and enjoining Defendants from acting. *See, e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (injury is traceable to and redressable through an injunction against the defendant if there is "a causal connection between the injury" and the defendant's conduct).

scrutiny. The statutes are content-based and, separately, viewpoint discriminatory. Either designation results in strict scrutiny. *Reed*, 135 S. Ct. at 2226-27.

Content-based laws are those that only apply to "particular speech because of the topic discussed." *Id*. at 2227. Laws that define the speech they regulate "by particular subject matter" are "obvious" examples. *Id*. Content-based laws can also be "more subtle," where the statute does not specify it is regulating a particular subject matter, but the way in which it is crafted demonstrates its "function or purpose" is to restrict speech on a particular topic. *Id*.

Viewpoint discrimination is an "egregious form of content discrimination," *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). It occurs where a law's limitations appear "in large part based on" the goals of the people engaging in the targeted speech. *Sorrell*, 564 U.S. at 564. A law "prohibiting all speech about war would be content discrimination," whereas one "specifically prohibiting only anti-war speech would be viewpoint discrimination." *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1289 (D. Colo. 2015).

i. Subsections (c)'s plain text establish they are content-based.

Two elements of subsections (c) render them content-based. First, subsections (c) only apply if a person is collecting data about "land or land use." Wyo. Stat. §§ 6-3-414(e)(iv), 40-27-101(h)(iii). The statutes define their reach based on the subject matter of the data collection, *i.e.*, the First Amendment protected activity. A person who engages in covered conduct to obtain a photo of an oil rig's impact on the Wyoming landscape would be subject to the statutes, but a person who engages in the same conduct to photograph worker safety on that rig would not.

Second, the Data Censorship Statutes define "collect" to mean data gathered 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 definition narrows the statutes' reach so their "function" is to

limit speech to environmental agencies. As explained above, the protocols that either must or should be followed so environmental agencies will credit the data submitted to them require a collector to gather data with these exact details. Muraskin Decl. Exs. F-N. The statutes' effect is to prevent environmental advocacy while allowing speech on other subjects to go on essentially unencumbered. The definition of "collect," while a more "subtle" restriction than the statutes' declaration that they only limit speech about land, also renders the statute content-based. *Reed*, 135 S. Ct. at 2227.

ii. Subsection (c)'s plain text establish they are viewpoint discriminatory.

The fact that statutes only apply to people who gather resource data on "adjacent" land without "legal authorization" or "permission [from] the owner … to cross the private land" on the way, separately, renders them viewpoint discriminatory. *See* Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). Liability is effectively limited to people who engage in First Amendment protected activities private landowners near the "adjacent" land find undesirable. The statutes create no liability for resource-data collection on public land by private landowners whose properties adjoin those lands, or their allies. The interests of the private landowner determine who can engage in the speech. MTD Decision I, Dkt. No. 40, at 32 (explaining equivalent provision in the 2015 statutes likely made them viewpoint discriminatory).

Numerous courts have recognized that providing a person with "unbridled discretion" to select what speech can occur is just a means to "hide unconstitutional viewpoint discrimination." *Child Evangelism Fellowship v. Montgomery Cty. Pub. Sch.*, 457 F.3d 376, 386 (4th Cir. 2006) (collecting cases). Here, because liability turns on whether landowners grant or withhold permission to cross, the statutes allow private landowners to decide whether or not they like the environmental advocacy associated with the data collection on nearby lands and censor speech

the landowners believe will harm their objectives. The laws' effect is to allow landowners' viewpoints to control the speech.

iii. The laws' history establishes they are content-based and viewpoint discriminatory.

Because the Data Censorship Statutes are "content based on [their] face," they would be "subject to strict scrutiny regardless of" whether the government had a "benign motive" in enacting them. *Reed*, 135 S. Ct. at 2228. But, the legislative history of these statutes both confirms the reading of the laws above, and provides a separate basis on which to conclude they are content-based and viewpoint discriminatory. *Cf. id*. at 2227 (providing laws' history can establish they are content-based, even if the laws are not "content based on their face").

In addition to the statements by legislators explaining they supported the laws because they would inhibit environmental advocacy, the record from the committees shows the laws were drafted in response to ranchers' ire at environmental groups, specifically WWP, using resource data to argue for grazing restrictions, Section I.B, *supra* (citing Muraskin Decl. Exs. P, O).

Plaintiffs acknowledge this Court suggested Wyoming's legislature "cure[d]" the unconstitutional motives underlying the 2015 statutes by amending them in 2016, MTD Decision II, Dkt. No. 62, at 23, but respectfully ask the Court to reconsider. The 2016 record is not in tension with the 2015 legislative history; at best it is silent, and, in fact, the lead sponsor of the 2016 amendments reiterated that the amendments target data in the form "require[d] for any data submissions." Section I.B, *supra* (citing Muraskin Decl. Exs. O-Q).

The Fourth Circuit recently held that where a law was originally "motivated by an impermissible discriminatory intent" and a later amendment effectuates the same end, the courts should subject the later statute to strict scrutiny. *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 240 (4th Cir. 2016). Case law on which this Court previously relied

states that where there is a temporal "proximity" between "intentional discrimination" and seemingly neutral legislative actions, courts should have a "healthy skepticism" of the amendments. *Johnson v. Governor*, 405 F.3d 1214, 1226 (11th Cir. 2005) (en banc). Here, unquestionably, there is proximity; the 2015 and 2016 laws were enacted by the *same* legislature.

Regardless, the Data Censorship Statutes plain text demonstrates that, for three separate reasons, they should be subject to strict scrutiny, with the legislative history providing just another reason to reach that same conclusion.

C. Subsections (c) cannot withstand strict scrutiny.

Because the Data Censorship Statutes are content-based, they are presumed 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)). As this Court previously explained, this means the government must establish it employed the "least restrictive means to further a compelling interest." MTD Decision I, Dkt. No. 40, at 27. Defendants' own evidence, as well as the Data Censorship Statutes' text show subsections (c) neither serve a compelling interest nor are narrowly tailored to achieving the stated interest.

"[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)). According to Defendants, the only "legitimate government interests" subsections (c) serve is to "discourage[] trespass and [] preserv[e] property rights." Muraskin Decl. Ex. A 6 (State Defs.' interrogatory responses). Yet, they acknowledge that

engaging in the regulated speech (data collection) produces no harm to property rights. *Id*. at 8-10. Indeed, by definition, this must be the case, subsections (c) only regulate those who engage in speech on land other than that of the aggrieved owner after they cross the owner's land—the speech is entirely separate from the harm of "trespass." Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). Moreover, per Defendants' witnesses, prior to the statutes' passage, data collectors were not particularly common or harmful trespassers. Section I.C, *supra* (citing Muraskin Decl. Exs. R-V). Therefore, if Wyoming wanted to protect the "supposedly vital interests" of property rights, subsections (c) should not have singled data collectors. By focusing exclusively on data collectors, the statutes leave the "appreciable damage" of all other trespassers—which there is no basis to believe should be treated differently than damage by data collectors—unregulated by subsections (c)'s rules. Therefore, the statutes' true objective cannot be to "protect private property" and no sufficient governmental interest justifies the laws. *See Chandler v. City of Arvada, Colorado*, 292 F.3d 1236, 1244 (10th Cir. 2002) (law leaving "loophole" to accomplishing purported end fails strict scrutiny).

For similar reasons, the statutes are not narrowly tailored. There is no need to regulate *speech* (data collection)—particularly speech that occurs on *adjacent* property— to achieve Defendants' claimed end of curtailing trespass. *See id.* (striking down a law where the government's "purposes would be assured" without it targeting speech); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) (striking down content-neutral 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").

If Wyoming's generally applicable trespass laws are insufficient to protect private property, the State could increase their deterrence by increasing those generally applicable laws'

penalties. Doing so would ensure all trespassers would also be deterred, including *non*-data collectors who Defendants' witnesses identify as the major culprits. Section I.C, *supra* (citing Muraskin Decl. Exs. R-V). Certainly, Wyoming loses nothing by proceeding in this manner. *See Animal Legal Def. Fund*, 263 F. Supp. 3d at 1213 (striking down law that failed to "address the exact same allegedly harmful conduct when undertaken by anyone other than" the targeted speaker). "[T]he only interest distinctively served by [a] content limitation," if another law "would have precisely the same beneficial effect," is to display "hostility" towards those views, which is "precisely what the First Amendment forbids," and makes the law "plainly" not tailored. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

D. The Data Censorship Statutes also fail intermediate scrutiny.

Because subsections (c) target speech, were the Court to conclude they are not content-based, it would still need to apply intermediate scrutiny, which the Data Censorship Statutes also fail. As the Supreme Court explained, even if an act is "content neutral" and the government claims the law needs to regulate speech because the "speech is associated with particular problems," the law "still must be 'narrowly tailored to serve a significant governmental interest.'" *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). This means the law cannot stand unless there is a "close fit" between the stated "end" of the statute and the "means" of restricting speech. *Id.* The failure "to look to less intrusive means of addressing [the] concern" without regulating speech, including "generic," generally applicable laws that would accomplish the same end without referencing speech, is fatal. *Id.* at 2538-39.

Therefore, largely for the reasons given above, the Data Censorship Statutes must fall. A generic, generally applicable law punishing entry onto private land without permission would

achieve Wyoming's purported purpose, to stop trespass. Thus, there is not a "close fit" between the decision to regulate speech and the state's purported end. *See id*.

Moreover, under intermediate scrutiny, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540. It is not sufficient to "simply to say that other approaches have not worked." *Id.* Yet, this is exactly how Defendants proceed. They disclose no evidence that Wyoming could not protect private property without targeting speech. Muraskin Decl. Ex. A 7, 9-10 (State Defs.' interrogatory responses). In fact, what evidence they possess—their witnesses' testimony—shows that a "less intrusive means" would have *better* addressed Wyoming's "concern" [4]; to the extent Wyoming's pre-existing trespass laws were not "sufficient," Defendants' witnesses explain this is because they do not deter other types of trespassers, rather than data collectors. Section I.C, *supra* (citing Muraskin Decl. Exs. R-V). Defendants state that the Data Censorship Statutes "show[] a belief on the part of the legislature that" Wyoming's general trespass laws were not "sufficient" "to prevent trespass ... by data collectors" Muraskin Decl. Ex. A 10 (State Defs.' interrogatory responses). But, they point to no evidence substantiating this "belief." *Id*. The absence of any support for the statute is sufficient to undermine the laws.

E. "Forum analysis" is inapplicable, and even if were this Court should strike down subsections (c).

The analysis above resolves this case. Subsections (c) must be struck down under strict or intermediate scrutiny. But, Defendants have said they will argue this suit is "premature" because

[4] The Tenth Circuit has questioned whether such "post-hoc rationalizations" can ever be sufficient to sustain a law. *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) (Gorsuch, J.) (quotation marks omitted).

this Court must also engage in so-called "forum analysis"—considering where the speech occurs. Muraskin Decl. Ex. E 2-3 (State Defs.' supplemental interrogatory responses). Defendants are incorrect as a matter of law and fact.

i. Forum analysis is not appropriate.

Contrary to Defendants' suggestion, the forum where the speech takes place is irrelevant to this case. The Supreme Court has explained the "forum based approach" arises only when courts are "assessing restrictions that the government seeks to place on the use of its property." *Int'l Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)). In other words, forum analysis is necessary when the government passes restrictions on speech and the purpose of the restriction is to "manag[e]" a government's "internal operations." *Id*. Forum analysis is intended to provide the government flexibility to regulate speech when the government is acting as a "proprietor," *i.e*., acting as a private landowner to limit what is occurring on its land so that the government can put its property to its desired uses. *Id*. In contrast, courts do not engage in forum analysis when the government is "acting as lawmaker with the power to regulate or license," such as by passing a broad law that seeks to further the government's political agenda and is not limited to regulating activity on government property. *Id*.; *see also* John E. Nowak & Ronald D. Rotunda, Constitutional Law § 16.1(f) (Hornbook Series 8th ed. 2010) ("When government restricts speech on property that it owns … the Court will analyze the restrictions on speech in terms of the type of forum[.]").

Accordingly, when governments enact laws applicable across multiple fora, acting as regulators rather than proprietors, the Supreme Court has struck them down without engaging in forum analysis. *See R.A.V.*, 505 U.S. at 380-81 (holding law prohibiting placing signs on "public

or private property" "facially unconstitutional" without mentioning forum analysis (quotation marks omitted)); *Reed* 135 S. Ct. at 2224-25, 2227 (striking law treating signs differently on a variety of public and private property without forum analysis).

Subsections (c) are not limited to regulating Wyoming state property. They regulate crossing any private land and engaging in data collection (speech) on *all* adjacent lands, including federal lands. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). They do not facilitate Wyoming's objectives as a "proprietor" and are not subject to forum analysis.

Indeed, Defendants have insisted the Data Censorship Statutes objective is not to restrict activities on state land, but to "prevent the harm of trespass to private property" generally by those who wish to "access [all] adjacent land." Muraskin Decl. Ex. A 8, 10 (State Defs.' interrogatory responses). Forum is irrelevant to that function or the laws' unconstitutionality.

ii. Even under "forum analysis," subsections (c) should be struck down.

Even if this Court engaged in forum analysis, the Data Censorship Statutes should still be struck down in full or, at the least, as applied.

If the Court concludes the Data Censorship Statutes are content-based or viewpoint discriminatory they cannot stand in any fora. The Tenth Circuit has held that content-based laws that are subject to forum analysis can only stand if the restrictions are needed to "preserve[] the purpose of the forum[s]." *Summum*, 130 F.3d at 917. Defendants have disclaimed any argument that the Data Censorship Statutes are necessary to preserve the purposes of a forum. Muraskin Decl. Ex. E 2 (State Defs.' supplemental interrogatory responses). For viewpoint discriminatory laws, the Court need not even engage in that inquiry. The Tenth Circuit has held they are subject to strict scrutiny whether or not they "preserve" the forum. *Summum,* 130 F.3d at 917. As explained in Section III.C above, subsections (c) fail this inquiry.

Were the Court to hold the Data Censorship Statutes are content-neutral and subject to forum analysis, it should still hold subsections (c) unconstitutional as applied. Plaintiffs have identified open, public lands where they wish to collect data, but are not doing so because they fear running afoul of the Data Censorship Statutes. Buccino Decl. ¶¶ 8-14; Mordick Decl. ¶¶ 7-24; Molvar Decl. ¶ 21; Ratner Decl. ¶¶ 42-47; Thuermer Decl. ¶¶ 12-14; Umekbuo ¶¶ 3-5. Where a statute restricts speech on traditional or designated public fora, courts will only uphold content-neutral laws if they are "'narrowly tailored to serve a significant government interest.'" *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1145 (10th Cir. 2001) (quoting *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286 (10th Cir. 1999)). This is the same scrutiny applied to other content-neutral laws. *Id*. at 1148 (the law will only stand if the "'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" (quoting *Ward*, 491 U.S. at 799)). As laid out in Section III.D, the Data Censorship Statutes fail this test.

In sum, at most, "forum analysis" alters the scope of the relief to which Plaintiffs are entitled and, in actuality, it is a red herring because it does not apply to laws like the Data Censorship Statutes, purportedly enacted to protect private, not government property.

IV. Conclusion.

This Court should hold that subsections (c) of the Data Censorship Statutes violate the First Amendment and enjoin the provisions' enforcement throughout Wyoming. At the least, the Court should hold subsections (c) cannot be applied to Plaintiffs' resource-data collection on public land, particularly at the locations they have identified their speech is being chilled.

Submitted this 30th day of May, 2018.

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CERTIFICATE OF SERVICE

I, David Muraskin, HEREBY CERTIFY that on the 30th day of May, 2018, I filed the foregoing electronically through the CM/ECF system, which caused counsel for all parties to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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