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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' REPLY IN SUPPORT OF THEIR CROSS MOTION FOR SUMMARY JUDGMENT

Following Defendants' Opposition, Dkt. No. 104 ("Defs.' Opp."), it remains undisputed that subsections (c) only restrict Plaintiffs' speech because the speech is about "land or land use" and Defendants cannot introduce evidence that the laws are necessary or tailored. Defendants' efforts to sustain the laws rely on theories rejected by binding precedent they ignore. Subsections (c) cannot stand.

I. Defendants' attacks on Plaintiffs' standing ignore Tenth Circuit law.

Tellingly, while Defendants contest Plaintiffs' standing, they fail to address *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc)—cited extensively by Plaintiffs and this Court—which holds Plaintiffs are suffering an injury-in-fact if subsections (c) "chill[]" their speech by "discourag[ing]" them from speaking. *Id.* at 1089. As *Initiative & Referendum Institute* makes clear, a plaintiff's "chill" is "concrete and particularized," not "subjective," if the plaintiff *either* demonstrates it has "specific plans or intentions" it is not carrying out because of the statute's penalties for speech *or* the plaintiff produces evidence that (i) it has "engaged in the type of speech affected by the" statute in the past and (ii) is not developing plans to speak again because (iii) that speech could subject the plaintiff to the challenged law. *Id.* (quotation marks omitted).

Plaintiffs have introduced both types of evidence, and Defendants have introduced nothing to the contrary. Defs.' Opp. 2-4. Plaintiffs have described specific activities the laws led them to discontinue, and how the laws target speech Plaintiffs previously engaged in, which, if they were to engage in again, could subject them to the statutes' penalties, so they have refrained from similar activities. *See, e.g.*, Dkt. No. 96-1 ¶¶ 4-14; Dkt. No. 96-3 ¶¶ 7, 11-17, 20-22; Dkt. No. 96-4 ¶¶ 8-24; Dkt. No. 96-9 ¶¶ 28-31, 33-35, 37-47; Dkt. No. 96-10 ¶¶ 12-15; Dkt. No. 96-11 ¶¶ 3-5. No more is required.

Defendants incant a series of counter-arguments, pronouncing that Plaintiffs' standing is "conjectural," "self-inflicted," and "unsupported," Defs.' Opp. 2, but to the extent those protestations are not directly rejected by *Initiative & Referendum Institute*, they appear to rest entirely on a theory of Defendants' own invention: that a law can only "discourage" speech if it requires hard monetary expenditures to avoid the statutes' penalties. Defs.' Opp. 3. Defendants do not say how much money is required for standing except, for reasons Defendants do not explain, the expenditure of time and resources does not count. *Id.* at 3-4.

No such test exists. The seminal case holding plaintiffs may challenge laws that dissuade speech by imposing "significant and costly compliance measures" concerned a statute that required the plaintiffs to reshelf books, placing sexual material in separate sections of their stores. *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 389, 392 (1988).[1] As Plaintiffs' Opposition, Dkt. No. 103, at 9, explains, courts regularly entertain challenges to statutes that impose paperwork requirements to engage in speech. *See also Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965) (striking down law that required person to return postcard to government). There is "no support" in Tenth Circuit jurisprudence for the proposition that an injury must meet a particular "threshold"; rather, as "the Supreme Court has explained, 'an identifiable trifle is enough for standing to fight out a question of principle.'" *Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. RE-1*, 859 F.3d 1243, 1248 (10th Cir. 2017) (citation omitted). The First Amendment limits all types of government "coercion" that could "suppress unpopular ideas or information or manipulate the public debate." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

[1] Defendants plainly err in arguing *American Booksellers* is inapplicable because the plaintiffs there brought an overbreadth challenge among their other First Amendment claims. *See* Defs.' Opp. 3. A plaintiff pursuing an overbreadth challenge "still must show that they themselves have suffered some cognizable injury from the statute," *D.L.S. v. Utah*, 374 F.3d 971, 976 (10th Cir. 2004). The injury in *American Booksellers* was that the statute chilled the plaintiffs' speech. 484 U.S. at 393 & n.6 ("harm" there was "one of self-censorship").

Thus, First Amendment standing exists if a law "*hinder[s]*" speech in anyway thereby "discourag[ing]" it. *Initiative & Referendum Inst.*, 450 F.3d at 1092 (emphasis in original).

There is no dispute subsections (c) "suppress," "discourage," and "hinder" Plaintiffs' speech. Indeed Defendants concede subsections (c) "stop" Plaintiffs from covering breaking news concerning public lands because the laws require photographers to trace their steps and confirm they did not accidently touch private land on the way to the collection site before taking their photos. Dkt. No. 99, at 14; *see also* Dkt. No. 96-10 ¶¶ 12-13, 15 (NPPA member establishing subsections (c) stop this aspect of his speech); Dkt. 101-1, at 4-7 (Reporters Committee brief explaining statutes will stop news coverage).

Defendants argue that Plaintiffs could engage in less time-sensitive data collections by searching county, state, and federal records to identify where they can collect resource data and how they can reach those sites, Defs.' Opp. 3-4, but this contention does not alter Plaintiffs' standing. This laborious process does nothing to alleviate the chill on NPPA's members, who Defendants admit are stopped from covering breaking news. "[T]he presence of one party with standing is sufficient." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). Moreover, the research Defendants suggest Plaintiffs should undertake—which Plaintiffs would have to repeat for each data collection site—far exceeds what the Supreme Court and Tenth Circuit have deemed sufficient for standing. *See, e.g.*, *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 754 n.2, 755-56 (1988) (standing to challenge law that requires permit application without fees); Ratner Reply Decl. ¶ 18 (initial searches of records would require six weeks of time and thousands of dollars in hard costs). Finally, Plaintiffs' uncontested evidence is that county, state, and federal records are often inaccurate and incomplete. Dkt. No. 96-9 ¶¶ 33-34, 47; *see also* Muraskin Reply Decl. Ex. CC (Hinckley deposition transcript);

Ratner Reply Decl. ¶¶ 13-15. Accordingly, Defendants elsewhere admit subsections (c) require Plaintiffs to abandon certain data collection sites or hire helicopters, horses, or the like to avoid stepping onto private land. Dkt. No. 99, at 16. That is a plainly significant burden that discourages and even stops Plaintiffs' speech—it even imposes hard costs.

II. Defendants' claim that subsections (c) are content neutral ignores the laws' text.

Defendants mistakenly argue subsections (c) are content-neutral statutes subject to intermediate scrutiny, not content-based laws subject to strict scrutiny by insisting this Court should focus on what "the Legislature was concerned with" in passing the laws, rather than the laws' text. Defs.' Opp. 8-9. This approach was rejected by *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Indeed, Defendants fail to acknowledge the government in *Reed* made the *exact* argument Defendants do here: that *Ward v. Rock Against Racism* indicates "even if [a law] expressly draws distinctions based on the [] communicative content," if it is "justified without reference to the content of the speech" the law is "content-neutral." *Reed*, 135 S. Ct. at 2228 (quotation marks omitted). The *Reed* Court disagreed, explaining this would "skip[] the crucial first step … determining whether the law is content neutral on its face." *Id.* "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive[.]" *Id.*

Subsections (c)'s text places "burdens upon speech because of its content" and thus the laws are, by definition, content-based, as Defendants' authority states. *Turner Broad. Sys.*, 512 U.S. at 642. Subsections (c) only restrict resource-data collection (speech) if the data concerns "land or land use." Wyo. Stat. §§ 6-3-414(c), (e)(iv); 40-27-101(c), (h)(iii). Defendants' unsupported statements that the statutes are only "concerned with the manner" of data collection are false. Defs.' Opp. 7, 8. The statutes apply only to speech with a specific content and thus are content-based.

Hill v. Colorado, 530 U.S. 703 (2000), on which Defendants also rely, Defs.' Opp. 9-10, confirms this. *Hill* explained the law at issue there was content-neutral because it applied to "a course of conduct"—*e.g.*, "protest[s]"—regardless of "what words were spoken." *Hill*, 530 U.S. at 721. This distinguished the law in *Hill* from a "statute [that] placed a prohibition on discussion of particular topics," such as "labor disputes," which the Court stated "would be [a] constitutionally repugnant" content-based law. *Id.* at 721-23.

Under *Hill*, subsections (c) could only be content-neutral if they were as Defendants pretend them to be: exclusively targeted at the manner of data collection. Yet, subsections (c) regulate data collection only if that collection concerns data on "land or land use." To enforce subsections (c) one needs to know exactly what data was collected. That makes them content-based. *Id.* at 721 ("need to know exactly what words were spoken" makes law content-based).

Defendants' claim that subsections (c) apply regardless of what the data "might reveal," Defs.' Opp. 10, does not save the laws. "It is, of course, no answer" that a content-based statute "does not discriminate on the basis of the [] viewpoint." *Hill*, 530 U.S. at 723 n.31 (quotation marks omitted).[2]

While the above is sufficient to classify the laws as content-based, Defendants do not meaningfully dispute that another aspect of subsections (c) also renders them viewpoint discriminatory, a yet more "egregious" limitation on speech. *Reed*, 135 S. Ct. at 2229 (quotation marks omitted). Defendants seem to concede that subsections (c)'s text empowers individuals to

[2] Defendants also fail to undermine Plaintiffs' separate argument that the statutes' definition of "collect" makes them content-based. The laws define "collect" to mean gathering data with the GPS coordinates of the collection, the precise details Wyoming's Department of Environmental Quality *requires* for data submitted to it. Dkt. No. 96 ("Plfs.' Br.") 3. Defendants mistakenly argue this cannot render subsections (c) content-based because such data can also be used for other purposes. Defs.' Opp. 11. Yet, if a statute "defin[es] regulated speech by its function" it is content-based, even if this "more subtle" restriction does not have as clear boundaries as restrictions of "particular subject matter[s]." *Reed*, 135 S. Ct. at 2227.

"authoriz[e]" speech with which they agree while subjecting other speech to the statutes' penalties, Wyo. Stat. §§ 6-3-414(c); 40-27-101(c), and do not deny that courts regularly hold statutes providing individuals discretion over what speech can occur to be viewpoint discriminatory, Defs.' Opp. 13. Defendants theorize subsections (c) are distinct because private landowners, not public officials, are provided that discretion. Defs.' Opp. 13. But, there is no reason to think private individuals will exercise this power differently. *See* Dkt. No. 40 ("MTD Decision I") 32 (explaining law empowering private land owners to choose who is punished "appears to simply be a façade for content or viewpoint discrimination"). Defendants' claim that private individuals are typically entitled to exclude people from their property misses the point. *See* Defs.' Opp. 13. The question is not what actions a landowner can take. Plaintiffs do not challenge Wyoming's generally applicable trespass laws. Instead, the issue is what scrutiny is required of subsections (c), which target the First Amendment rights. Wyoming has crafted subsections (c) to empower people to selectively suppress speech. Strict scrutiny is required.[3]

III. Defendants have not carried their burden under strict (or intermediate) scrutiny.

To satisfy any level of First Amendment review, Defendants must carry their burden to "build[] a record to clearly … justify the state interest" in passing the laws *and* that the statutes are properly tailored. *U.S. West, Inc. v. Fed. Commc'n Comm'n*, 182 F.3d 1224, 1234, 1239 (10th Cir. 1999). Indeed, another decision Defendants fail to address, explains that to establish a

[3] While the Court need look no further than subsections (c)'s text, Defendants also fail to substantively dispute that the Data Censorship Statutes were passed for viewpoint- and content-discriminatory reasons. Defs.' Opp. 14. Defendants claim that history is irrelevant, *id.*, but *Reed* makes clear that if subsections (c) text is content-neutral then the "government motive" in passing the law is relevant. 135 S. Ct. at 2229. For the reasons stated in Plaintiffs' Motion, the full legislative history, extending back to the statutes' passage in 2015 is relevant and establishes the laws are content-based and viewpoint discriminatory. Plfs.' Br. 18-19. Contrary to Defendants' suggestion, it is wholly appropriate for the Court to draw from equal protection case law that also analyzes legislators' motives to reach this conclusion. *See* Defs.' Opp. 14.

law is sufficiently tailored the state must prove it first attempted to "seriously address[] the problem" through means other than targeting speech and those efforts proved ineffective. *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014). "[I]t is not enough for [the state] simply to say that other approaches have not worked." *Id.*

Defendants do not even try to carry these burdens. Their entire case rests on their counsel's assertions, without any evidence. Defs.' Opp. 18, 21-22; *see also U.S. West, Inc.*, 182 F.3d at 1239 (government's "speculation" insufficient to carry burden). Put another way, while Defendants attack Plaintiffs' "logic" regarding what Wyoming could have done instead of passing subsections (c), Defs.' Opp. 18, Plaintiffs did not need to prove there were alternatives. Defendants needed to prove there weren't. They did not attempt that showing, and that is fatal.

Moreover, it is unclear how Defendants could have carried their burden had they tried. The purported purpose of subsections (c) is to stop people from "crossing private property without permission." Defs.' Opp. 18. Yet, the record shows that by only targeting "crossings" associated with resource-data collection Wyoming focused on a tiny portion of all "crossings without permission." Dkt. No. 97, Exs. R-V. Where a law "leaves appreciable damage to th[e] supposedly vital interest unprohibited" that undercuts the claim it serves a meaningful government interest. *Reed*, 135 S. Ct. at 2232 (quotation marks omitted). It is also well established a statute is not properly tailored when it is "underinclusive," failing to address the "same allegedly harmful conduct" by others not engaged in the targeted speech. *Animal Legal Defense Fund v. Herbert*, 263 F. Supp. 3d 1193, 1213 (D. Utah 2017).[4] If subsections (c) were

[4] Without addressing *Animal Legal Defense Fund*, Defendants claim that a law can only be underinclusive if the state should have restricted more *speech* to accomplish its ends, and a law is not underinclusive if the state should have restricted other *conduct* to accomplish its objective. Defs. Opp. 17. Incorrect. Defendants' own authority calls a restriction on "ritual animal sacrifices" that "failed to regulate vast swaths of *conduct* that similarly diminished [the]

constitutional, then a state could also increase penalties solely for those speeding drivers en route to a climate change rally, by theorizing that this might reduce accidents. Such a "selective" approach, when unjustified by "some basis for distinguishing" between the regulated and unregulated activities, is unconstitutional, even if it "may in some small way" achieve the state's end. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426, 428 (1993).

Consistent with this, Defendants err in claiming that they can establish that subsections (c) advance a sufficient governmental interest by declaring the laws will do something to protect private property. *See* Defs.' Opp. 15-17, 21. The Tenth Circuit explained "the government cannot satisfy" that it has a substantial interest in a regulation "by merely asserting a broad interest in privacy"; it must "justif[y]" pursuing that interest through this particular law. *U.S. West*, 182 F.3d at 1235. Even courts that "recognize that protection of individual privacy is a substantial government interest" in general have explained that, where, as here, there are "other privacy protections," the state must produce evidence on which the "[l]egislature … reli[ed]" proving the pre-existing laws are insufficient and the additional statute targeting speech was necessary to achieve the state's end. *Wollschlaeger v. Governor*, 848 F.3d 1293, 1314 (11th Cir. 2017) (en banc). Defendants have produced *no* evidence Wyoming's pre-existing trespass laws were insufficient to protect privacy because they could not deter resource-data collectors. Defendants cite a handful of statements—on which the legislature did *not* rely, as they were gathered after this suit—by people who are unable to say whether they could have used Wyoming's pre-existing laws to punish the few trespasses by data collectors they could identify. Muraskin Decl Exs. R-V; Dkt. No. 103-1 Exs. Y-BB. Defendants have shown no need for these laws.

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asserted interest[] in public health," such as hunting and fishing, a "textbook illustration" of an underinclusive, untailored law. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543-47 (1993)) (emphasis added).

Defendants are also incorrect in asserting subsections (c) are "tailored" because they hypothesize that had Wyoming passed a "generally-applicable, strict liability trespass law" it would have incidentally restricted the same amount of speech as subsections (c). Defs.' Opp. 1, 18-19. This ignores that underinclusive laws are not tailored. *See, e.g.*, *Animal Legal Defense Fund*, 263 F. Supp. 3d at 1213. Moreover, *McCullen* explained Massachusetts had to advance its goal of limiting "harassment" and "intimidation" of patients entering abortion clinics through laws "prohibit[ing] obstructing access" and "following" patients, rather than laws prohibiting "leafleting," "education," or "counseling." 134 S. Ct. at 2525, 2538 (quotation marks omitted). The state must restrict conduct rather than speech if it can.[5] Finally, Defendants' argument can only prevail if Wyoming needed to enact a generally applicable law equivalent to subsections (c). Because Wyoming never considered any alternatives to attacking speech, that is impossible to know and that means the laws fail. *Id.* at 2540 (state must "demonstrate that alternative measures … would fail to achieve" interest).

IV. Defendants' arguments prove forum has no role here.

Finally, Defendants' insistence that "forum analysis" applies to laws other than those focused on protecting government property is head scratching. *See* Plfs.' Br. 2, 22-25; Plfs.' Opp. 3-4, 21-23. This contention rests on their observation that forum analysis has been applied to laws governing polling places. Defs.' Opp. 5. But, no matter what building a polling place is in, it *is*, "at least on Election Day, government-controlled property." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1886 (2018); *see also id.* at 1885 (forum analysis applies to restrictions "only in

[5] Defendants' discussion of *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), acknowledges that, in the context of strict scrutiny, the state must regulate conduct instead of speech unless it can establish the restriction on speech is "necessary." *See* Defs.' Opp. 19-20. Defendants try to distinguish *R.A.V.* as involving viewpoint discrimination, which they claim this case does not. *Id.* Yet, *McCullen* demonstrates, the same principles apply under intermediate scrutiny.

a specific location," government property). And, as Defendants acknowledge, their authority only applied forum analysis to areas surrounding polling places because the Court concluded the restriction was aimed at "sidewalks," government property. Defs.' Opp. 5; *see also Minn. Voters All.*, 138 S. Ct. at 1886 (Defendants' case concerns speech on "public sidewalks and streets").

Moreover, even if forum analysis applied, Defendants do not rebut (or address) the controlling precedent that content-based laws can only stand in "limited or nonpublic for[a]," and only then if they "preserve[] the purpose of the forum." *Summum v. Callaghan*, 130 F.3d 906, 917 (10th Cir. 1997). Here, Defendants do not dispute that they have disclaimed subsections (c) preserve the purpose of any fora. Dkt. No. 97 Ex. E 2. Thus, the laws cannot stand.[6]

Finally, even if forum analysis applied, and even if the laws were not subject to strict scrutiny, Defendants are incorrect that this Court's review would be premature. Defendants try to use the agreed upon fact that GPS devices can be imprecise to insinuate there is no way to know if Plaintiffs collection sites are on public land. Defs.' Opp. 5-6. But Plaintiffs have identified their collection sites, including, in certain instances, by latitude and longitude. *See, e.g.*, Dkt. No. 96-9 ¶ 47. These public lands are open for Plaintiffs' speech. *See, e.g.*, MTD Decision I, at 5 n.3; 36 C.F.R. § 251.51; 43 C.F.R. § 2920.1–1(d). If Defendants wished to dispute these facts, they should have done so with evidence. They have not. Thus, Plaintiffs' claims are ripe, and they can be resolved in Plaintiffs' favor because subsections (c) fail the requisite scrutiny. *See Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1145 (10th Cir. 2001).

V. Conclusion.

Defendants' Opposition fails on every level. Subsections (c) are unconstitutional.

[6] Defendants assert in a footnote this Court cannot consider a "facial challenge" because they contend there are some circumstances where the statutes do not implicate the First Amendment. Defs.' Opp. 19 n.4. Plaintiffs' Opposition, at 2, 12-15, explains this is wrong.

Submitted this 8th day of August, 2018.

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CERTIFICATE OF SERVICE

I, David Muraskin, HEREBY CERTIFY that on the 8th day of August, 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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