Reed Zars
910 Kearney Street
Laramie, WY 82070
(307) 760-6268
reed@zarslaw.com
Counsel for Plaintiffs

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' OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Subsections (c) of Wyoming's "Data Censorship Statutes" create criminal and civil liability for "cross[ing] private land" without "authorization" if, and only if, the person goes on to "access adjacent or proximate" land *and* "collects resources data" on that adjacent land. *See* Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). The Tenth Circuit held that the "collection of resource data constitutes the protected creation of speech." *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017).

The facts Defendants admit in their cross-motion establish it should be denied and judgment should be entered for Plaintiffs that subsections (c) violate the First Amendment. Defendants admit subsections (c) cause Plaintiffs to forgo speech. Thus, Plaintiffs have standing. Further, the undisputed facts, particularly subsections (c)'s plain text, establish the provisions are content-based. Content-based restrictions on speech are subject to strict scrutiny and presumptively invalid. Defendants do not begin to overcome that presumption. Thus, the laws cannot stand. Every one of Defendants' claims to the contrary is wholly inconsistent with controlling precedent.

Specifically, Defendants claim that Plaintiffs lack standing because Plaintiffs have not been injured, but a statute produces an Article III injury-in-fact if it decreases a plaintiff's willingness to speak, which Defendants admit is the case here. The Tenth Circuit held that plaintiffs suffer "concrete and particularized" injuries if a "statute discourages" them from engaging in speech. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). Defendants explain "a perfect example of why the Legislature enacted" subsections (c) is that they "stopped" Plaintiffs from engaging in resource-data collection (speech). Dkt. No 99 ("Defs.' Br.") 13-14. Defendants also state that to avoid the statutes' penalties Plaintiffs must exercise "caution" in engaging in their desired speech, refraining from

accessing certain areas to collect resource data. *See id.* at 12. Subsections (c) are meant to, and have chilled Plaintiffs' speech. That establishes Plaintiffs' standing.

On the merits, Defendants' suggestion that this Court cannot entertain Plaintiffs' facial challenge because subsections (c) do not implicate "constitutional right[s]" in "some circumstances" is wrong on at least two levels. *See* Defs.' Br. 20. First, the Tenth Circuit has held that a facial First Amendment challenge is not defeated by "musings about potentially valid applications of the statute." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 (10th Cir. 2012) (emphasis removed). Once it is established that the First Amendment applies to the challenged statute, the question is whether the statute can survive "the relevant constitutional test [] such as strict scrutiny." *Id.* at 1127. If not, the statute "can no longer be constitutionally applied to anyone." *Id.* It is facially invalid. Second, the Tenth Circuit has also held that First Amendment rights are implicated by every application of subsections (c). Defendants claim subsections (c) do not implicate First Amendment rights if the resource-data collection (speech) occurs on private property. Defs.' Br. 20. But, the Tenth Circuit explained that what brings subsections (c) "within the ambit of the First Amendment" is that subsections (c) regulate the "collection of resource data." *W. Watersheds Project*, 869 F.3d at 1195-97. Subsections (c) equally restrict the collection of resource data on public and private land. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). The First Amendment is implicated every time the provisions apply. Nothing stands in the way of Plaintiffs' facial challenge.

Subsections (c) cannot survive such review because their text proves they are presumptively-invalid content-based laws, and Defendants provide no evidence to counteract that presumption. "[A] speech regulation targeted *at specific subject matter*" is "a paradigmatic example of content-based discrimination." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015)

(emphasis added). Defendants admit (as they must) that the Data Censorship Statutes only prohibit speech regarding "land or land use," speech on a specific subject matter. Wyo. Stat. §§ 6-3-414(e)(iv), 40-27-101(h)(iii); Defs.' Br. 2, 22 (describing subsections (c) as targeting information about land). Therefore, subsections (c) are content-based. Defendants do not attempt to argue that they satisfy the resulting strict scrutiny. Thus, the statutes cannot stand.

Further, the statutes fall even if, as Defendants claim, they are content-neutral, because Defendants also fail to show that the statutes satisfy intermediate scrutiny. A law only survives intermediate scrutiny if it does not "burden substantially more speech than necessary to achieve the [] asserted interests," *McCullen v. Coakley*, 134 S. Ct. 2518, 2537 (2014). "To meet th[is] requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests[.]" *Id.* at 2540. Defendants produce *no* evidence the state considered, let alone tested alternatives to targeting speech to show those laws would fail to achieve the state's ends. This is fatal. *Id.* ("Given the vital First Amendment interests at stake, it is not enough [] simply to say that other approaches have not worked.").

Defendants' final claim, that the Court must delay reaching the conclusions above so it can analyze the fora where the speech takes place is, once again, manifold error. *See* Defs.' Br. 18-19. As the Supreme Court reiterated just last month, a law "implicates our forum based approach" when the statute "applies *only* in a specific location," "government-controlled spaces." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (emphasis added). Subsections (c) restrict collecting resource data (speech) on *all* "adjacent" property—not only state land, but federal and private property as well. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c).

Forum analysis has no role here. And, even if it did, Defendants admit that Plaintiffs identify the relevant fora, meaning no delay would be warranted. Defs.' Br. 12.

Defendants' motion should be denied and Plaintiffs' cross-motion granted.

I. Argument.[1]

a. Defendants' standing arguments misstate the law.

To establish standing, Plaintiffs only need to show that subsections (c) target their speech and have discouraged Plaintiffs from speaking. All parties agree that has occurred here.

First Amendment standing doctrine rests on the principle that "a plaintiff need not expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Initiative & Referendum Inst.*, 450 F.3d at 1087-88 (quotation marks omitted). The First Amendment is meant to protect against the suppression of speech; thus the "chilling effect" a law has on the plaintiff's willingness to speak is itself an "injury in fact, caused by the challenged action and redressable in court," even if the statute has never been applied and the plaintiff has "no specific plans[] to engage in" the covered speech. *Id*. at 1088-89.

Put another way, it is well-established that "self-censorship" in response to a statute that targets the plaintiff's desired speech is "a harm" unto itself "that can be realized even without an actual prosecution." *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Where a statute "regulate[s], constrain[s], or compel[s] an[] action on the[] part" of the plaintiff, leading the plaintiff to limit or alter its speech in response, there is no potential for conjecture or speculation, the plaintiff has shown an ongoing First Amendment injury. *See Clapper v. Amnesty*

[1] Defendants do not provide a separate "short statement of evidence" on which they rely. *See* Local Rule 7.1(b)(2)(A). Instead, they incorporate those facts into their legal argument. Accordingly, Plaintiffs' Opposition proceeds similarly.

Int'l USA, 568 U.S. 398, 420 (2013). The state cannot "intimidate[] parties into censoring their own speech" through creating the risk of penalties for speaking without the law being subject to challenge, as the "pervasive threat inherent in [the law's] very existence [] constitutes the danger to freedom of discussion" the First Amendment exists to stop. *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 757 (1988) (quotation marks omitted) (emphasis removed).

Actionable "intimidation" of speech can take the form of either an absolute bar on speaking or imposing "significant and costly compliance measures" before a person can engage in speech. *Am. Booksellers Ass'n*, 484 U.S. at 392. If the state "discourages" the plaintiff's desired speech in either way that constitutes cognizable constitutional injury. *Initiative & Referendum Inst.*, 450 F.3d at 1089.

There is no dispute that Plaintiffs have established such an injury-in-fact. Defendants do not contest that the Data Censorship Statutes penalize "mistaken[] trespass" if, and only if, that "mistaken trespass" occurs en route to engage in resource-data collection (speech) elsewhere. Defs.' Br. 10. Indeed, subsections (c) contain no scienter requirement, so any unauthorized entry onto private property on the way to engage in speech, no matter how unintentional, can result in criminal and civil liability. Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). Further, Defendants do not contest that Plaintiffs desire to collect resource data (engage in speech) in areas where they have the potential to mistakenly trespass as part of their resource-data collection, causing Plaintiffs to forgo certain data collection (speech) in an effort to avoid the statutes' sanctions.[2]

[2] The record Plaintiffs provide with their cross-motion for summary judgment fully substantiates that Plaintiffs desire to collect resource data in areas where they risk mistakenly trespassing. Dkt. No. 96-1 ("Buccino Decl.") ¶¶ 8-14; Dkt. No. 96-3 ("Molvar Decl.") ¶¶ 13-16, 20-21; Dkt. No. 96-9 ("Ratner Decl.") ¶¶ 42-46; Dkt. No. 96-10 ("Thuermer Decl.") ¶¶ 12-15; Dkt. No. 96-11 ("Umekubo Decl.") ¶¶ 4-5. While Defendants admit as much, including for Plaintiff Western Watershed Project ("WWP"), Defs.' Br. 12-17, it is worth noting that Defendants misstate why WWP has been unable to access the "Coal Creek site," claiming the

In fact, Defendants explain that Angus Thuermer, a member of Plaintiff National Press Photographers Association ("NPPA") and a photojournalist, acted the way Wyoming intended in passing subsections (c) when he "stopped" taking a photo of land while on public property because he did not have "the time to conduct the due diligence" subsections (c) require of him to ensure he did not touch private property on the way to the site. Defs.' Br. 14; *see also* Thuermer Decl. ¶¶ 12-13 (substantiating same). Defendants similarly explain that subsections (c) require Plaintiffs to leave "buffer[s]" around private property "to avoid trespass" and the statutes' penalties for contact with private property while on the way to engage in speech. Defs.' Br. 12. Such "buffers" prevent Plaintiffs from collecting resource data in public areas near private property, or even using public pathways to reach other collection sites if those paths cross too close to private property. *Id.* at 12; *see also* Buccino Decl. ¶¶ 8-14; Molvar Decl. ¶¶ 13-16, 20-21; Ratner Decl. ¶¶ 28-31, 33-35, 37, 43-46; Umekubo Decl. ¶¶ 4-5 (describing that these restrictions have stopped Plaintiffs' desired speech).

In short, subsections (c) constrain and burden Plaintiffs' ability to engage in their desired speech, and those constraints and burdens have caused Plaintiffs to "self-censor." No more has ever been required for standing to bring a First Amendment challenge.

i. There is nothing conjectural about Plaintiffs' injury.

Defendants' claim that Plaintiffs' injury is "conjectural" because Plaintiffs are not certain when "they **will** mistakenly trespass" and be liable under subsections (c) misconstrues standing based on chill. Defs.' Br. 10 (emphasis in original). The First Amendment injury of self-

---

chill there is for another reason, *id.* at 17. As the declaration of WWP Wyoming Office Director, Jonathan Ratner, explains, there are two reasons that WWP has not been able to access the "Coal Creek site" (1) accessing it from one direction takes WWP over a road for which the easement has been revoked; and (2) accessing it from the other direction leads WWP through an area of public lands interspersed with unmarked private land where WWP fears it may mistakenly trespass. Ratner Decl. ¶ 46.

censorship is present as soon as statutes intimidate plaintiffs into altering their activities so they will not face the risk of the statutes' penalties. *City of Lakewood*, 486 U.S. at 757. Of course Plaintiffs do not know exactly when they will violate the laws because the threat inherent in subsections (c)'s penalties has led them to stop attempting to speak. That squelching of Plaintiffs' speech is an injury. To establish this injury-in-fact, Plaintiffs need not have "plans" to speak, let alone evidence specific speech would result in liability. *Initiative & Referendum Inst.*, 450 F.3d at 1088-89. Subsections (c) were designed to, and have caused Plaintiffs to suppress their speech to "avoid" the statutes' sanctions. Defs.' Br. 12. That suppression is an active, concrete First Amendment harm. *Am. Booksellers Ass'n*, 484 U.S. at 392.

ii. There is nothing unreasonable about Plaintiffs' chill.

Defendants attempt to distract the Court from Plaintiffs' clear injuries by portraying Plaintiffs' chill as "unreasonable" given the "modern marvels" of GPS technology and GIS maps, but this discussion only affirms that the statutes have reasonably brought about Plaintiffs' chill. Defs.' Br. 10-12. Defendants concede that these technologies are imperfect. *Id.* Indeed, Defendants provide no evidence to contradict Plaintiffs' expert report, *id.*, which explains GPS devices and maps cannot prevent unintentional contact with private property because those tools are imprecise and can be highly inaccurate, Dkt. No. 96-12 ("Woods Decl.) ¶¶ 7-11 & Ex. 1. In Wyoming, the resulting "caution" Defendants admit is required to avoid mistaken trespass and liability, Defs.' Br. 12, is extreme because the state can be a "jumble of federal, state, and private land," *Wyoming v. Livingston*, 443 F.3d 1211, 1229 (10th Cir. 2006).

Moreover, Defendants agree that because of the lack of "perfection" inherent in modern technology, subsections (c) place Plaintiffs at risk for criminal and civil penalties for engaging in their desired speech. Defs.' Br. 12. As noted above, Defendants admit the statutes punish even

the most accidental contact with private property that occurs (and only if it occurs) on the way to engage in collecting resource data elsewhere. Defs.' Br. 12; *see also* Wyo. Stat. §§ 6-3-414(c), 40-27-101(c). They further concede that Plaintiffs' resource-data collections create the potential for Plaintiffs to misstep onto private property on the way to engage in speech, demanding Plaintiffs forgo collecting certain resource data to avoid the risk of the statutes' penalties. *Id.* at 12, 14; *see also* Buccino Decl. ¶¶ 8-14; Molvar Decl. ¶¶ 13-16, 20-21; Ratner Decl. ¶¶ 28-31, 33-35, 37, 43-46; Thuermer Decl. ¶¶ 12-15; Umekubo Decl. ¶¶ 4-5 (substantiating same). Plaintiffs' self-censorship in response to the statutes' restrictions is plainly reasonable. It directly follows from the risks the statutes create for Plaintiffs engaging in their desired speech. *See, e.g.*, *Initiative & Referendum Inst.*, 450 F.3d at 1090-92.

The list of time-intensive, costly procedures Defendants suggest Plaintiffs should undertake to reduce, though not eliminate, the chill subsections (c) produce underscores this conclusion. For instance, Defendants state that Plaintiffs should secure "horse[s], "mountain bike[s]," and even "helicopter[s]" to carve paths around private property and reach certain public data collection locations without risking the laws' penalties. Defs.' Br. 16. Of course, none of these tools alter the fact that subsections (c) stop Plaintiffs from collecting data (engaging in speech) anywhere near enough to private property that GPS devices and maps could lead them to run afoul of the laws. *See, e.g.*, Molvar ¶ 15. And, the notion that subsections (c) require Plaintiffs to absorb such "significant and costly compliance measures," which has led Plaintiffs to forgo speech rather than undertake those burdens, is evidence the Supreme Court has explained establishes the statutes logically caused self-censorship and an Article III injury. *Am. Booksellers Ass'n*, 484 U.S. at 392.

Defendants' claim that the compliance measures subsections (c) require are no different than the state mandating someone obtain a permit to protest further proves Plaintiffs' point. Defs.' Br. 14. A statute that burdens speech by requiring a permit is subject to First Amendment challenge by those who have to apply for that permit and thus been chilled rather than undertake those burdens. *See, e.g.*, *City of Lakewood*, 486 U.S. at 754-56 (standing to challenge licensing scheme); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1228-30 (10th Cir. 2005) (plaintiffs had standing to challenge licensing scheme "without first applying for a license"). Similarly, Plaintiffs can challenge subsections (c)'s burdens on their speech.[3]

iii. Defendants' other attacks on NRDC's and WWP's standing are irrelevant and incorrect.

The above establishes Plaintiffs can proceed. Beyond the arguments addressed above, Defendants do not dispute that NPPA's member's evidence and certain examples that WWP offers of how subsections (c) have interfered with their speech establish those Plaintiffs are suffering Article III injuries. Defs.' Br. 13-15, 17. "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

Nonetheless, for completeness, Plaintiffs address Defendants' other arguments: (1) that Plaintiff Natural Resources Defense Council ("NRDC") has not established standing because to substantiate its chill it referenced activities it called off in response to the earlier, 2015 versions

[3] Defendants standing arguments are remarkably free of citation to supporting case law. Even the cases they cite laying out general standing rules largely arise outside the First Amendment context. Defs.' Br. 9-10. Nonetheless, in connection with their argument that subsections (c)'s burdens on speech are equivalent to a permitting requirement, Defendants provide their single First Amendment citation that purportedly supports their arguments, *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979). That citation is entirely unhelpful to Defendants. *Babbitt* explains that where "the State has not disavowed any intention of invoking" the law and the risks the statute creates cause the plaintiffs to "forgo full exercise of what they insist are their First Amendment rights" the court is presented with "a case or controversy" even if the statute "may never be applied" to the plaintiffs. *Id.* at 301-02.

of the Data Censorship Statutes, and (2) that WWP's *other* examples of how its speech had been chilled are insufficient to establish its standing. Each fails.

Defendants' attacks on NRDC's standing are just a variation of their erroneous assertion that self-censorship in response to a genuine risk of sanction is insufficient to establish standing. Defendants claim that even though subsections (c) cover and thereby discourage NRDC's work, NRDC cannot be injured because certain examples of how subsections (c) have chilled its speech concern resource-data collection NRDC ceased planning in 2015, as soon as the original Data Censorship Statutes were passed. Defs.' Br. 12-13. That timeline is correct, but inconsequential. NRDC *still* wishes to engage in that and other resource-data collection (speech) and is not doing so because of the *current,* amended statutes. *See, e.g.,* Buccino Decl. ¶ 14 (explaining NRDC would presently like to engage in its air quality monitoring in Wyoming, but will not do so because it fears mistakenly stepping onto private land); Mordick Decl. ¶ 24 (stating the same regarding visit to an oil and gas wastewater facility); Umekubo Decl. ¶¶ 4-5 (stating the same regarding photographing eagles). Those facts, which Defendants offer nothing to dispute, is exactly what Article III chill looks like.[4]

NRDC did not need to provide any "evidence of past activities" to have standing. *Initiative & Referendum Inst.*, 450 F.3d at 1089. Its evidence of its past work that is now restricted by subsections (c) "lends concreteness and specificity to [its] claims" that the current provisions are keeping NRDC from engaging in activities it would undertake but for the statutes.

[4] Defendants suggest that because NRDC expressed it was uncertain about the significance of what *one* of these data collections might uncover that makes NRDC's injury "conjectural." Defs.' Br. 13. Defendants' argument fails to address the other examples of NRDC's chill. Moreover, chill (injury-in-fact) does not depend on the consequences of the speech Plaintiffs forewent because of the statutes. Chill and injury exist because the statutes reasonably caused Plaintiffs to stop speaking. *Initiative & Referendum Inst.*, 450 F.3d at 1087-89.

Id. NRDC could (and does) establish the same "concreteness and particularity" by describing "specific plans or intentions to engage in the type of speech affected by the challenged government action." *Id.* Defendants do not question that subsections (c) presently keep NRDC from engaging in First Amendment protected activities it would otherwise undertake. *See, e.g.*, Buccino Decl. ¶ 14; Mordick Decl. ¶¶ 18-24; Umekubo Decl. ¶¶4-5. No more is required.

Defendants' arguments regarding WWP's standing are more scattershot, but equally fail to find their mark. Defendants play a word game surrounding certain instances where WWP claims its speech is chilled. WWP explains it has stopped collecting resource data at some sites because it has looked for easements authorizing the federal roads it must take to those sites and been unable to find them. *See, e.g.*, Defs.' Br. 15; Ratner Decl. ¶ 47. This chill is distinct from the chill WWP explains it is experiencing because it wishes to collect resource data near private property boundaries. *See, e.g.*, Molvar Decl. ¶¶ 15-17. Defendants claim that because WWP says it does not plan to "knowingly trespass[]," subsections (c) cannot be chilling WWP from collecting data using roads for which WWP cannot find easements, as WWP "knows" it might now be able to engage in those collections without trespassing. Defs.' MSJ 15-16, 17.

However, Defendants' claim about WWP's mental state is irrelevant. Defendants do not dispute that subsections (c)'s penalties could apply to WWP's desired conduct. Moreover, WWP has stated it *would* use these roads and visit these sites to collect data were it not for subsections (c). Molvar Decl. ¶¶ 17, 19- 21; Ratner Decl. ¶¶ 42, 47. WWP explains that it will defend its right to traverse Wyoming land consistent with Wyoming law. Molvar Decl. ¶ 19. If the government is going to maintain roads that other citizens can and do use, WWP explains it will not be deterred from using those roads for fear of selective enforcement of generally applicable laws not applied to anyone else. *Id.* As a result, the only thing standing in the way of WWP

engaging in its speech are the Data Censorship Statutes. *Id.* WWP's statement that, but for the Data Censorship Statutes, it would engage in speech those statutes regulate, which is undisputed by Defendants, is the very definition of evidence establishing chill. That Defendants believe WWP should characterize its intended activities as "knowing trespasses" is of no moment.

Defendants gain no traction by pointing out that one WWP employee, Jonathan Ratner, has stated he wishes to avoid suit under Wyoming's generally applicable trespass laws. Defs.' Br. 16. WWP's Executive Director, Mr. Ratner's superior, has explained that given the organization's desire to carry out its work, if subsections (c) were struck down, the organization would send another employee to collect at any site Mr. Ratner did not wish to go to on his own. Molvar Decl. ¶¶ 19-20; Ratner Decl. ¶ 42. Again, Defendants introduce nothing to dispute this.[5]

While any single instance of chill suffices, each basis for Plaintiffs' standing is established by facts Defendants have not disputed. This Court has jurisdiction.

B. Defendants' merits arguments misstate the law.

i. Subsections (c) are subject to facial constitutional challenge.

In contravention of the Tenth Circuit's directive—that the First Amendment applies to subsections (c) and this Court should now resolve "the level of [First Amendment] scrutiny to be

[5] Moreover, Mr. Ratner explains he does not fear liability under Wyoming's generally applicable trespass statutes, as he only accesses sites he has a good faith basis to believe he can go to without trespassing. Rather, he fears the burdens of defending himself from erroneous claims brought under Wyoming's generally applicable trespass laws. Ratner Decl. ¶ 32. As a result, he avers, the Data Censorship Statutes' deterrent effect is much more severe, because subsections (c) create not just the fear of litigation, but the fear of liability. *Id.* A plaintiff has standing to challenge government action that could be a "contributing factor" to the plaintiff's injury. *Nat. Res. Def. Council, Inc. v. U.S. FDA*, 710 F.3d 71, 85 (2d Cir. 2013) (citing *St. Pierre v. Dyer*, 208 F.3d 394, 402 (2d Cir. 2000)). Mr. Ratner will never be able to decide what risks he is willing to accept under Wyoming's generally applicable trespass laws unless the Data Censorship Statutes are removed, meaning they are, at the very least, contributing to his self-censorship. *See Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 945 & n.2 (1982) (standing to challenge law that makes plaintiff ineligible for permit even if he did not show would have received permit had he been eligible). Thus, his statements alone provide WWP standing.

applied and whether the statutes survive the appropriate review," *W. Watersheds Project*, 869 F.3d at 1197-98—Defendants' focus their merits arguments on claiming the First Amendment does not apply to certain applications of subsections (c) at all, and thus the provisions cannot be facially challenged. Defs.' Br. 18-20. Defendants claim subsections (c) only regulate First Amendment speech if a person crosses private land to engage in resource-data collection on adjacent public land, not adjacent private land. *See, e.g.*, *id.* at 20. Thus, Defendants argue, the provisions can only be subject to as-applied challenges addressing Plaintiffs' desire to collect data on public land. *Id.* Defendants are incorrect both as a matter of First Amendment doctrine and in light of the construction the Tenth Circuit provided of subsections (c).

Defendants' theory that facial First Amendment challenges may proceed only if "'no set of circumstances exists under which the Act would be valid.'" Defs.' Br. 20 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)), ignores Tenth Circuit precedent. The Tenth Circuit explains, "The idea that the Supreme Court applies the 'no set of circumstances' test to every facial challenge is simply a fiction, readily dispelled by a plethora of Supreme Court authority." *Doe*, 667 F.3d at 1124. Instead, once it is determined that a challenged statute implicates the First Amendment, a facial First Amendment challenge can proceed, with the court analyzing the statute under the "appropriate constitutional standard," *i.e.*, strict or intermediate scrutiny. *Id.* at 1127. "*Salerno's* language [] is accurately understood not as setting forth a test for facial challenges, but rather as describing the result of a facial challenge in which a statute fails to satisfy the appropriate constitutional standard. … [I]t can no longer be constitutionally applied to anyone—and thus there is 'no set of circumstances' in which the statute would be valid." *Id.* Hence, courts conduct facial First Amendment reviews even of laws they have held do *not*

implicate the First Amendment in all instances. *See, e.g.*, *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194-99 (9th Cir. 2018).

In any event, the Tenth Circuit has held *every* application of subsections (c) implicates the First Amendment. The Tenth Circuit held that subsections (c) regulate First Amendment protected speech because the statutes' "expansive definitions of 'resource data' and 'collect'" restrict the "creation of speech." *W. Watersheds Project*, 869 F.3d at 1195-96. The same definitions of "resource data" and "collect" apply whether the data collection occurs on state, federal, or private land. Wyo. Stat. §§ 6-3-414(c), (e); 40-27-101(c), (h). Moreover, the Tenth Circuit made clear the reason "collecting resource data" implicates the First Amendment is "the "activities covered by" those terms—such as "photograph[y]," "tak[ing] notes," and "sampl[ing]." *W. Watersheds Project*, 869 F.3d at 1196-97. Those activities do not change with the location of the collection. Subsections (c) prohibit First Amendment protected activities wherever the collection occurs.

Further, the Tenth Circuit rejected the premise on which Defendants' reading of subsections (c) relies, explaining the First Amendment reaches speech that occurs on private property. *See id.* at 1195 ("The fact that one aspect of the challenged statutes concerns private property does not defeat the need for First Amendment scrutiny."). While Wyoming can protect private land through "general trespass statute[s]," the Tenth Circuit explained the power to protect private property does not allow for "differential treatment of individuals who create speech" without implicating the First Amendment. *Id.* at 1197. This ruling follows Supreme Court precedent that First Amendment speech does not lose its constitutional protection if it occurs on private property. *See, e.g., Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536

U.S. 150, 154-55 (2002) (applying First Amendment to a law prohibiting "going in and upon private residential property" without permission (quotation marks omitted)).[6]

Defendants' claim that Plaintiffs' appeal "conceded" data collection on private land is unprotected by the First Amendment is false. Defs.' Br. 18. Plaintiffs argued to the Tenth Circuit that the First Amendment applies to speech that occurs on private property, Muraskin Opp. Decl. Ex W (excerpts of Plfs.' Opening 10th Cir. Br.), and, as shown above, that court's decision spoke to that issue. True, Plaintiffs focused their appeal on subsections (c)—rather than appealing this Court's rulings on subsections (a) and (b), which *only* apply to data collected on private land—because subsections (c)'s penalties for unintended trespass on the way to collect resource data on public land are the central barriers to Plaintiffs' speech. Wyo. Stat. §§ 6-3-414(a)-(c), 40-27-101(a)-(c). But, in appealing this Court's entire ruling on subsections (c)—provisions Defendants admit penalize data collection on all "adjacent" land, *whether public or private*, Defs.' Br. 5—Plaintiffs plainly preserved their argument that the First Amendment applies to each of subsections (c)'s applications. Regardless, once the First Amendment applies, the question before the Court is solely what scrutiny is warranted. *Doe*, 667 F.3d at 1123-27. Plaintiffs' facial challenge can proceed.

ii. Subsections (c) are content-based laws subject to strict scrutiny.

Subsections (c) are content-based because they only restrict speech about land. Wyo. Stat. §§ 6-3-414(e)(iv); 40-27-101(h)(iii). Thus, they can only stand if they survive strict scrutiny. Defendants arguments otherwise are, at best, baffling attempts to rewrite what is now

[6] *See also, e.g.*, *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988) ("protected free speech interests" cannot be "subordinated" to enable non-speech-based regulation); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193, 1208-09 (D. Utah 2017) ("[T]he fact that speech occurs on a private agricultural facility does not render it outside First Amendment protection[.]" The argument that "the First Amendment does not apply on private property … finds no support in the case law.").

hornbook law that statutes whose speech regulations are aimed at "'specific subject matter[s],' [are] a form of speech suppression known as content based discrimination." *Matal v. Tam*, 137 S. Ct. 1744, 1765–66 (2017) (Kennedy, J., concurring) (quoting *Reed*, 135 S. Ct. at 2230).

Defendants claim the statutes are content-neutral because of why "the government has adopted [the] regulation." Defs.' Br. 21 (quotation marks omitted). But, the Supreme Court has explained, "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 135 S. Ct. at 2228 (quotation marks omitted).

Defendants also state subsections (c) are content-neutral because they do not distinguish between the "views expressed." Defs.' Br. 21 (quotation marks omitted). But, this "conflates two distinct but related limitations." *Reed*, 135 S. Ct. at 2229. To be sure, "[g]overnment discrimination among viewpoints" is a particularly "blatant" and "egregious form of content discrimination." *Id.* at 2229-30 (quotation marks omitted). Yet, it is only one form of content discrimination. "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints." *Id.* at 2230.

Relatedly, Defendants claim that the statutes are content neutral because they do not treat different types of people who engage in resource-data collection differently. Defs.' Br. 21-22. But, a law is content-based if it "describes" its restrictions "in terms of [] subject matter" even if it makes no distinctions between who can talk about that subject. *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972).

Subsections (c)'s definitions, which Defendants fail to address, make abundantly clear that the statutes regulate speech based on the subject matter of the speech. The statutes only apply to persons who collect "resource data," and that term is defined to mean speech about

"land or land use." Wyo. Stat. §§ 6-3-414(c), (e)(iv); 40-27-101(c), (h)(iii). To determine liability under the statutes one must "necessarily examine the content of" the data that was collected (the speech) to determine if it was about land or another matter; that is the very essence of a content-based law. *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984); *Herbert*, 263 F. Supp. 3d at 1210.

Defendants' own authority, *Turner Broadcasting Systems, Inc. v. F.C.C.*, 512 U.S. 622 (1994), confirms this conclusion. In *Turner* the Court held "the must-carry rules"—requirements that cable providers "offer carriage to a certain minimum number of broadcast stations"—were content neutral because the rules operated "without reference to the content of the speech." *Id.* at 643-44. The rules did not say which broadcast channels must be carried based on the "the views, programs or stations" of the channel. *Id.* In other words, the Supreme Court explained, what made the "must-carry rules" content-neutral is what makes them entirely distinct from the Data Censorship Statutes. For the "must carry" rules to have been like the Data Censorship Statutes, they would have had to require cable operators to carry not just broadcast stations generally, but the PBS show *Nature* specifically. This would have rendered the must-carry rules obviously content based, as is true of subsections (c).[7]

[7] The above is sufficient to reject Defendants' contentions and hold for Plaintiffs. Nonetheless, Plaintiffs' cross-motion for summary judgment details three other ways in which the statutes are also content-based or viewpoint discriminatory: (1) the statutes define "collect" so the statutes exclusively apply if one gathers the exact details federal and state environmental agencies demand be provided to them in connection with any data submitted to inform those agencies' decisions—meaning the statutes restrict a particular type of speech, speech to influence environmental agency decisions-making; (2) the provisions only penalize speech unauthorized by the aggrieved private landowner, so that the landowner's viewpoint controls what speech can occur; and (3) the legislative history demonstrates Wyoming enacted the provisions out of a desire to suppress particular types of speech and views. Plfs.' Br., Dkt. No. 96, at 15-19. Defendants fail to even acknowledge the statutory text supporting the first or second points. Their claim that it is "the law of this case that the Legislature did not enact these laws to suppress the Interest Groups' speech" is baseless. Defs.' Br. 22-23. Defendants cite this Court's motion to

iii. Subsections (c) cannot survive any constitutional scrutiny.

Because subsections (c) are content-based they are "presumptively unconstitutional," *Reed*, 135 S. Ct. at 2226, and can be applied only if Defendants can establish the provisions are the "least restrictive means to further a compelling interest," MTD Decision I, Dkt. No. 40, at 27. Even if the Court were to hold subsections (c) are content-neutral, the government would still have to demonstrate the restrictions are "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534. Because Defendants do not attempt to carry these burdens, subsections (c) cannot stand in any circumstance.[8]

Defendants' entire argument for how subsections (c) survive constitutional scrutiny is that the provisions "address complaints" of trespass to collect resource data, but they cite *no* evidence whatsoever to support this claim. Defs.' Br. 24. This is Defendants' summary judgment motion. They cannot prevail without introducing undisputed evidence to support their factual assertions. *See* Fed. R. Civ. P. 56. Moreover, given that the parties have filed cross-motions to finally resolve this matter and Defendants bear the burden of proof to satisfy strict and

---

dismiss decision as their sole support for their "law of the case" argument. *Id.* Plaintiffs appealed that decision and raised the same arguments they do here. Muraskin Opp. Decl. Ex. W (excerpts of Plfs.' Opening 10th Cir. Br.). That decision was reversed based on a predicate issue. As a result, the motion to dismiss decision does not provide any law of the case. *See, e.g., Guidry v. Sheet Metal Workers Intern. Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir.1993) ("When further proceedings follow a general remand, the lower court is free to decide anything not foreclosed by the mandate issued by the higher court." (quotation marks omitted)), modified on other grounds, 39 F.3d 1078 (10th Cir.1994) (en banc);*Williams v. Apfel*, 65 F. Supp. 2d 1223, 1229-30 (N.D. Okla. 1999) ("[S]ince the previous decision was reversed and remanded, there was no law of the case to be considered from the first [] decision[.]").

[8] To the extent Defendants suggest that if the statutes are content-neutral they could be upheld because "data collectors can still create their speech" in certain circumstances, this is incorrect. Defs.' Br. 24. The Supreme Court has explained courts only examine whether a content-neutral statute "leaves open ample alternative channels of communication" *after* the government has carried its burden to show the statutes are "narrowly tailored" to achieve the government's legitimate end. *McCullen*, 134 S. Ct. at 2540 n.9.

intermediate scrutiny, that they have not even attempted to do so here means both their motion should be denied and the issue should be resolved in Plaintiffs' favor.[9]

The evidence Defendants cite elsewhere in their brief is also insufficient to carry their burden. Defendants point to a letter from a single grazing association submitted into the legislative record in support of the 2015 versions of statutes, and statements from a handful of Wyoming residents Defendants obtained after the statutes were passed as their sole facts suggesting Wyoming needed to pass special laws protecting private property from trespass by resource-data collectors. Defs.' Br. 2-3. Yet, the grazing-association letter does not describe any evidence that resource-data collectors are particularly frequent or harmful trespassers warranting restrictions different than other Wyomingites. Instead, the letter explains that ranchers wish to suppress resource-data collection because "special interest groups" and others "use this information for analysis and public comment to influence public agency land use decisions" in a way that harms their interests—that is, the ranchers wished to suppress political speech. *Id.* Ex. A 1. Likewise, Defendants' witnesses testified that data collectors are neither the primary trespassers on their land nor especially harmful to their property. Muraskin Decl., Dkt. No. 97, Ex. R 31:21-32:14, 43:3-13 (defense witness McConnell testifying "99 percent" of the people who "pass through the[] roads" on her property without permission are recreationalists); *see also id.* Ex. S 34:22-35:4, 36:25-37:2, 44:4-6 (excerpts of defense witness Hansen deposition); Ex. T

[9] Defendants assert without providing authority that "[i]t is the law of this case that the statutes in question advance important governmental interests," Defs.' Br. 23, but, as noted above, this is incorrect. Plaintiffs appealed the sole decision in this matter and won reversal on a preceding issue, so there is no law of the case on this point. And, since strict and intermediate scrutiny require fact-based analysis, whether Defendants had carried their burden to satisfy strict or intermediate scrutiny could not have been finally resolved at the motion to dismiss stage. *See Chandler v. City of Arvada*, 292 F.3d 1236, 1243 (10th Cir. 2002) (evidence must support that the law serves a government interest). Further, Defendants do not contend anything frees them from substantiating the statutes are properly tailored. Nonetheless they cite no evidence in support.

68:13-25 (excerpt of defense witness Woodland deposition); *id.* Ex. U 34:4-22, 37:3-7 (excerpt of defense witness Schramm deposition); *id.* Ex. V 32:18-33:7, 40:20-41:8 (excerpt of defense witness Zakotnik deposition). The witnesses explain that they support a law targeted at data collectors because, although most trespass is from other activities, they dislike the collectors' speech. *See, e.g.*, Muraskin Decl. Exs. R-T, V (providing experts from depositions of witnesses).

Such evidence does not satisfy any aspect of strict or intermediate scrutiny. Under strict and intermediate scrutiny it is the government's burden to establish *both* that (a) there was some real need for the government to pass this law; and (b) the restriction on speech is properly tailored to achieve that legitimate end. *McCullen*, 134 S. Ct. at 2534; *Chandler*, 292 F.3d at 1243; MTD Decision I, at 27. The record before this Court establishes no need to restrict speech for any purpose.

The record amounts to a random and minor collection of idiosyncratic views that does not meaningfully speak to the effectiveness of Wyoming's pre-existing trespass laws and the need to pass additional protections. Indeed, all but one of Defendants' witnesses explained they did not understand the scope of Wyoming's pre-existing laws. Muraskin Opp. Decl. Ex. Y 9:23-10:19 (excerpts of McConnell deposition); *id.* Ex. Z 7:3-7 (excerpt of Hansen deposition); *id.* Ex. AA 11:4-16 (excerpt of Woodland deposition); *id.* Ex. BB 36:3-18 (excerpt of Zakotnik deposition).

To the extent statements by a handful of cherry-picked people, unfamiliar with their rights under the generally applicable trespass laws could be interpreted as substantiating those laws are ineffective, the evidence reflects that this is because those generally applicable trespass laws do not stop *non*-data collectors. This record does not remotely justify the government using its powers to single out trespass connected with resource-data collection, rather than working to target trespass generally. The only reason the record reveals for targeting resource-data collectors

is to suppress their First Amendment protected speech, particularly their speech to government agencies. That is plainly not a "need" the government should fulfill.

Even assuming there was undisputed evidence that the Data Censorship Statutes responded to a public need to deter trespass in light of the actions of resource-data collectors, the record would *still* not establish that the statutes' restrictions on speech are properly tailored to that end. For instance, the record is devoid of any suggestion that Wyoming examined the deterrent value of a non-speech based regulation, such as increasing the penalties for violating the state's generally applicable trespass laws. The Supreme Court recently struck down a statute under intermediate scrutiny as not properly tailored where the state first passed a generally applicable law and determined that it was ineffective, and then passed a law regulating speech to achieve the government's end. The Court concluded those were not sufficiently "serious[]" efforts to show it was necessary to regulate speech. *McCullen*, 134 S. Ct. at 2539-41. Wyoming's reflexive decision to restrict speech as its first step is inconsistent with the First Amendment's requirement that the state prove the restriction on speech is necessary.

iv. Forum analysis does not inform the conclusions above.

Finally, Defendants' claim that this Court must delay performing the analysis above because First Amendment scrutiny needs to be informed by the forum where the speech takes place is incorrect in multiple respects. Defs.' Br. 17-19, 21 n.6.

First, forum is irrelevant to this case. The forum where the speech takes place may be relevant "[w]hen the government restricts speech on property it owns" and thereby is acting as a property owner. John E. Nowak & Ronald D. Rotunda, *Constitutional Law* § 16.1(f) (8th ed. 2010); *see also Minn. Voters All.*, 138 S. Ct. at 1885 (same); *Int'l Soc'y For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (same). Forum analysis exists to lessen the

constitutional burdens on the government when it is acting "as a proprietor" to "manag[e]" its own "internal operations." *Int'l Soc. For Krishna Consciousness, Inc.*, 505 U.S. at 678. However, where, as here, the government acts as a public policy maker—passing a statute "to control speech" not only on its own property but elsewhere—the fora implicated by the law do not inform the scrutiny to be applied. Nowak & Rotunda, *supra*, § 16.1(f); *see also Minn. Voters All.*, 138 S. Ct. at 1885. Subsections (c) restrict activities on all land, not just Wyoming state land. *Compare* Wyo. Stat. §§ 6-3-414(c), (e); 40-27-101(c), (h), *with* 18 U.S.C. 1382 (statute prohibiting entry onto military facility). Therefore, the Court's review does not require forum analysis. Because the statutes fail strict or intermediate scrutiny they fall. No other information is required.

Second, even if the Court were to disagree, the analysis above still resolves this case without the need for additional information. The Tenth Circuit has held that content-based laws that are subject to forum analysis can stand only in "limited or nonpublic" fora and only then if the restrictions are needed to "preserve[] the purpose of the forum[s]" where they apply. *Summum v. Callaghan*, 130 F.3d 906, 917 (10th Cir. 1997). Defendants have admitted subsections (c) do not preserve the purpose of the fora to which they apply. Muraskin Decl. Ex. E 2 (State Defs.' supplemental interrogatory responses). Therefore, because the statutes are content-based, they cannot stand anywhere.

Third, even if the Court holds subsections (c) are content-neutral and concludes it must consider the fora where the speech will take place this suit is not "premature." Defs.' Br. 17-18. Plaintiffs provided that exact information. Indeed, Defendants acknowledge "[e]ach of the three [Plaintiffs] provided specific instances where they alleged to have been 'chilled.'" *Id.* 12. Plaintiffs have identified locations where they wish to collect resource data on open public

lands—in some instances even providing longitudes and latitudes of collection sites. *See, e.g.*, *Id.* Ex. K 7. Defendants have failed to show subsections (c)'s can be constitutionally applied to these collections. *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1145 (10th Cir. 2001) (explaining intermediate scrutiny applies to content-neutral statutes subject to forum analysis and applied to open fora); § I.B.iii, *supra*. Thus, even in these circumstances, subsections (c) still must be struck down as applied to Plaintiffs' desired data collections.

II. Conclusion.

Taking the facts as Defendants describe them, their motion must be denied and subsections (c) held facially unconstitutional.

Submitted this 11th day of July, 2018.

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

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

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

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

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

Reed Zars
Attorney at Law
910 Kearney Street
Laramie, WY 82070
(307) 760-6268
reed@zarslaw.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, David Muraskin, HEREBY CERTIFY that on the 11th day of July, 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.

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