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I. INTRODUCTION

With unparalleled elegance, Justice Brandeis said the following about the significance of the First Amendment:

Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.\(^1\)

Courts have applied these principles regarding the First Amendment to extend its protection to newsgathering.\(^2\) As a practical matter, newsgathering is worthy

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* J.D. Candidate, University of Wyoming College of Law, Class of 2018. Creation of this note would not have been possible without the hard work and dependable comments from the editors of the Wyoming Law Review. I also want to thank Professor Alan Romero for his irreplaceable insight. Finally, thanks to my family, especially my father Blair, for hours of unswerving patience.


2 See, e.g., Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011) ("This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment."); Bartnicki v. Vopper, 532 U.S. 514, 527 (2001) ("if the acts of 'disclosing' and
of First Amendment protection because curtailing the discovery of information limits the possibility of a "public discussion" of that information.\(^3\) One area of newsgathering that deserves particular attention is the collection of resource data. In 2015 (amended in 2016), the Wyoming legislature adopted data trespass laws that target the collection of resource data under the guise of protecting property rights.\(^4\)

In *Western Watersheds Project v. Michael*, the Wyoming Federal District Court analyzed the constitutionality of Wyoming's data trespass laws to determine whether or not these statutes violated the First Amendment.\(^5\) Even though it was not expressly stated, the court applied the newsgathering doctrine because data collection constituted creation of speech.\(^6\) While newsgathering has some protections, like other kinds of speech, newsgathering is not unequivocally protected by the shield of the First Amendment.\(^7\) The general rule is that speech—in this case newsgathering—cannot be suppressed without satisfying strict scrutiny (i.e. a law must be narrowly tailored to meet a compelling government interest) unless that suppression is through a generally applicable law that has only incidental effects on the speech in question.\(^8\)

The District Court held that Wyoming's data trespass statutes are constitutional.\(^9\) The court truncated the issue and stated, "[i]n short, there is no First Amendment right to trespass upon private property for the purpose of collecting resource data."\(^10\) The court framed the constitutionality of the data trespass statutes as whether there was a right to engage in speech on another's property; that framework abbreviated meaningful First Amendment issues.\(^11\)

This case note will argue that Wyoming's data trespass statutes should have been subject to strict scrutiny for the following two reasons: (1) Wyoming's

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\(^1\) 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." (quoting Bartnicki v. Vopper, 200 F.3d 109, 120 (3d Cir. 1999)).

\(^2\) *Sorrell*, 564 U.S. at 570 (2011).


\(^5\) See *W. Watersheds Project*, 196 F. Supp. 3d 1231 at 1240-41.


\(^8\) W. Watersheds Project, 196 F. Supp. 3d, at 1245, 48.

\(^9\) *Id.* at 1242.

\(^10\) *Id.* at 1241.
data trespass laws are not laws of general applicability and have more than an incidental effect on speech; and (2) Wyoming's data trespass laws are content-based restrictions on speech. Statutes that impact speech but are not generally applicable or contain content-based restrictions require strict scrutiny. First, this note will discuss Wyoming's data trespass statutes and their legislative history. Second, this note will discuss the relevant case law. Third, this note will look at the genesis of Western Watershed's lawsuit. Fourth, this note will discuss the holding and analysis of the court. Fifth and finally, this note will argue that the court erred by not applying strict scrutiny to Wyoming's data trespass statutes—a test that they would fail.

II. BACKGROUND

A. Statutes

In 2015, the Wyoming legislature passed the first of two versions of the criminal data trespass law, Wyoming Statute section 6-3-414. The maximum penalty for a first time violation under the 2015 version of the statute included a possible one-year prison sentence and a fine of $1,000. This penalty is harsh, considering the existing criminal trespass statute has a maximum six-month jail sentence and fine of $750. The 2016 version of section 6-3-414 carries the same penalties as the 2015 version.

The 2015 version did not just prohibit an individual from trespassing onto private property to collect resource data, it also prohibited an individual from "[e]nter[ing] onto open land for the purpose of collecting resource data."

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12 See infra notes 116–165 and accompanying text.
14 See infra notes 19–32 and accompanying text.
15 See infra notes 33–82 and accompanying text.
16 See infra notes 83–115 and accompanying text.
17 See infra notes 116–165 and accompanying text.
18 See infra notes 166–172 and accompanying text.
20 Id. § 6-3-414(d)(i). A second conviction would result in a mandatory ten-day sentence, with a potential maximum sentence of a one year, and a fine of not more than $5,000. Id. § 6-3-414(d)(ii).
The statute defined “open land” as “land outside the exterior boundaries of any incorporated city, town, subdivision . . . or development . . . .” Additionally, there was another subsection that clearly applied to private land, showing that the Wyoming legislature knew how to differentiate public land and private land. Thus, since the 2015 version did not only apply to private land, it also made it illegal to go onto public land to collect resource data. The 2016 amendments made two major changes: adding language stating that the statutes only apply to private land and changing the definition of “collect.” The definition of “collect” was changed to mean “to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form and the recording of a legal description or geographical coordinates of the location of the collection.”

The current version of the statute bars any resource data captured from being used “in any civil, criminal or administrative proceeding, other than a prosecution for violation of this section or a civil action against the violator.” Under the current version, “resource data” is defined as “data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil, conservation, habitat, vegetation or animal species.” Moreover, the statute requires a governmental entity to expunge resource data unlawfully collected from its records.

There is another data trespass statute, Wyoming Statute section 40-27-101, which went through the same legislative evolutionary cycle as Wyoming Statute section 6-3-414. The only significant difference is that the latter applies to criminal charges, and the former exposes an individual to civil liability. Since both data trespass statutes curtail the ability to collect data (gather news), thereby restricting speech, they both must be analyzed to determine whether they are constitutional.

B. Relevant Case Law

1. The Rules Regarding General Applicability

In Cohen v. Cowles, Dan Cohen gave the Pioneer Press and the Minneapolis Star Tribune records relating to two criminal charges against Marlene Johnson, a

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24 Id. § 6-3-414(d)(ii).
25 Id. § 6-3-414(b).
26 See id.
28 Id. § 6-3-414(e)(i).
29 Id. § 6-3-414(f).
30 Id § 6-3-414(e)(iv).
31 Id. §6-3-414(g).
candidate for Lieutenant Governor. Cohen made the reporters promise that they would maintain his confidentiality. Nevertheless, the reporters identified Cohen as the source of the records. Cohen sued the reporters based on a theory of promissory estoppel, and the issue became whether the First Amendment barred a claim of promissory estoppel against the press. The Minnesota Supreme Court held that the First Amendment barred Cohen's promissory estoppel claim.

The United States Supreme Court reversed. The Court stated, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news." Just as the "press may not with impunity break and enter an office . . . to gather news," the press does not have immunity from promissory estoppel, a law of general applicability. Since the doctrine of promissory estoppel "does not target or single out the press," it was a generally applicable law, and the restriction on the press was not subject to strict scrutiny. While a precise definition of a law that is generally applicable can be difficult, one could derive a definition from Cohen as follows: a law is generally applicable if it does not target the expression of First Amendment principles; and, if it does affect the expression of those principles, it does so incidentally.

In Animal Legal Defense Fund v. Otter, Mercy for Animals, an animal rights group, recorded and released a video showing a cow being beaten and abused as part of an undercover investigation. Similar to Wyoming's data trespass statutes, the Idaho legislature created a new crime, "interference with agricultural production." The statute criminalized trespassing or misrepresenting oneself to make audio or video recordings of an agricultural production facility's operations.

After a review of the statute's legislative history, the Idaho District Court concluded that the statute "seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important

34 Id.
35 Id. at 666.
36 Id. at 666-67.
37 Id. at 667.
38 Id. at 672.
39 Id. at 669.
40 Id. 669–71.
41 Id. at 670.
42 See id.
44 IDAHO CODE § 18-7042 (2014); id. at 1200.
45 IDAHO CODE § 18-7042 (2014); Animal Legal Def. Fund, 118 F. Supp. 3d at 1200.
First Amendment values. The effect of the statute will be to suppress speech
by undercover investigators and whistleblowers . . . ."\textsuperscript{46} The comments in the
legislative history demonstrated clear animus: "one senator compared animal
rights investigators to 'marauding invaders centuries ago who swarmed into
foreign territory and destroyed crops to starve foes into submission,'" while
another representative described undercover investigators as "extreme activists
who want to contrive issues simply to bring in the donations."\textsuperscript{47}

The State of Idaho tried to defend the statute on the basis that it protected
against misrepresentation.\textsuperscript{48} The court held that a misrepresentation statute
that actually prohibited causing a "legally cognizable harm" would not violate the
First Amendment.\textsuperscript{49} However, because this newly created misrepresentation statute
was not really targeted at preventing any legally cognizable harm, but instead
sought to prevent publication of condemning reports about agricultural facilities,
the law was not generally applicable.\textsuperscript{50} The court stated that misrepresenting
oneself to gain access to the agricultural facility could even "advance core First
Amendment values by exposing misconduct to the public eye..."\textsuperscript{51}

The court went a step further and determined that not only was the statute
not generally applicable, but that it was also a content-based restriction on
speech.\textsuperscript{52} A statute is considered content-based if "the underlying purpose of the
law is to suppress particular ideas."\textsuperscript{53} Both the legislative history, and the fact that
there was a restitution provision that forced repayment to the agricultural facility's
owner for publication damages within the statute, led the Idaho District Court
to conclude that the law was content-based.\textsuperscript{54} Content-based laws are subject to
the strict scrutiny standard.\textsuperscript{55} The court found that the law did not satisfy that
standard because there was no compelling governmental purpose; and it was not
narrowly tailored.\textsuperscript{56}

\textsuperscript{46} Animal Legal Def. Fund, 118 F. Supp. 3d at 1201.
\textsuperscript{47} Id. at 1200.
\textsuperscript{48} Id. at 1203.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 1203–04.
\textsuperscript{51} Id. at 1204.
\textsuperscript{52} Id. at 1206.
\textsuperscript{53} Id.; see also Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("the principle inquiry
in determining content neutrality ... is whether the government has adopted a regulation of speech
because of disagreement with the message it conveys.").
\textsuperscript{54} Animal Legal Def. Fund, 118 F. Supp. 3d at 1206.
\textsuperscript{55} Reed v. Town of Gilbert, 135 S. Ct 2218, 2227 (2015).
\textsuperscript{56} Animal Legal Def. Fund, 118 F. Supp. 3d at 1208–09.
In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the grocery chain Food Lion unknowingly hired undercover ABC reporters.\(^5\) The reporters took videos showing Food Lion employees engaging in unsafe food preparation practices: changing the dates on expired fish to show that the fish had not expired, mixing expired beef with fresh beef, and dousing expired chicken with barbeque sauce to mask its smell and displaying it as “gourmet.”\(^5\) After ABC broadcast the videos, Food Lion sued ABC for fraud, breach of the duty of loyalty, trespass, and unfair trade practices.\(^5\) At trial, the jury found all of the defendants liable for fraud, and two of them liable for trespass and breach of duty of loyalty.\(^6\)

On appeal, the Fourth Circuit Court of Appeals considered whether the First Amendment protected ABC.\(^6\) The Fourth Circuit cited the rule of general applicability from *Cohen v. Cowles*: there is no violation of the First Amendment by a generally applicable law that has merely incidental effects on the press’s ability to gather and report news.\(^6\) The court concluded that the torts of breach of the duty of loyalty and trespass were generally applicable because “[n]either tort targets or singles out the press.”\(^6\) Therefore, heightened scrutiny was not applicable because the plaintiffs had offended generally applicable torts that had no more than incidental effects on speech.\(^6\)

Free exercise of religion cases offer a comparable and informative area of First Amendment jurisprudence relating to generally applicable laws.\(^6\) In perhaps the most well-known case regarding the issue of general applicability, the United States Supreme Court struck down city ordinances that addressed the issue of religious animal sacrifice in *Church of the Lukumi Babalu v. City of Hialeah*.\(^6\) The Hialeah City Council passed the ordinances in response to the Santeria church, who, as part of their religious beliefs, engaged in animal sacrifice.\(^6\) The Court reaffirmed the rule that “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.”\(^6\) The Court determined that facial

\(^6\) Id. at 511.
\(^5\) Id.
\(^6\) Id. at 520.
\(^6\) Id. (quoting Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991)).
\(^5\) Id. at 521.
\(^6\) Id. at 522.
\(^6\) Id. at 524.
\(^6\) Id. at 531.
content-neutrality of the ordinance was immaterial because the record showed that the City Council adopted the ordinances to crush the Santeria religion.\textsuperscript{69} Thus, the Court applied strict scrutiny because the ordinances were not generally applicable, and held that the ordinances did not satisfy strict scrutiny.\textsuperscript{70}

Church of the Lukumi Babalu, in the context of freedom of religion, supports the finding that a generally applicable law that only has a mere incidental effect on religion is not subject to strict scrutiny; a law that is targeted and has more than an incidental effect on religion should be subject to strict scrutiny.\textsuperscript{71} The holding from Church of the Lukumi Babalu is consistent with Cohen, Animal Legal Defense Fund, and Food Lion, and demonstrates that when speech or religion is restricted by a law, that law must typically be generally applicable.\textsuperscript{72} While Animal Legal Defense Fund and Food Lion are not Supreme Court cases like Cohen or Church of the Lukumi Babalu, and thus not binding on the Tenth Circuit Court of Appeals,\textsuperscript{73} Animal Legal Defense Fund and Food Lion are helpful because they demonstrate where the courts did, and did not, find the torts at issue generally applicable. Assuming data collection is protected under the newsgathering doctrine, application of these cases to Wyoming’s data trespass laws would demonstrate that the data trespass laws are not generally applicable. The Wyoming data trespass statutes also raise the closely related issue of content discrimination.

2. Content Discrimination

A law is subject to strict scrutiny when it contains a content-based restriction, either on its face or by a discriminatory governmental motive.\textsuperscript{74} In Ward v. Rock Against Racism, the United States Supreme Court applied strict scrutiny to a facially content-neutral law to determine whether the governmental motive for the law was “because of disagreement” with the message of the speech it regulated.\textsuperscript{75} Reed v. Town of Gilbert extended the analysis in Ward, as a result, the current

\begin{itemize}
  \item \textsuperscript{69} Id. at 534.
  \item \textsuperscript{70} Id. at 547.
  \item \textsuperscript{71} Id. at 531.
  \item \textsuperscript{72} Compare id. (finding the city ordinances were not generally applicable because they were targeted), with Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991) (declaring that the tort of promissory estoppel was generally applicable), and Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F. 3d 505, 520–21 (4th Cir. 1999) (holding that the ABC reporters had violated generally applicable torts whose purposes were not to target speech), and Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1203 (2015) (striking down Idaho’s “interference with agricultural production” statute after finding the statute was not generally applicable).
  \item \textsuperscript{73} E.g., Fed. Deposit Ins. Corp. v. Daily, 973 F.2d 1525, 1532 (10th Cir. 1992) (stating that Ninth Circuit decisions are not binding on the Tenth Circuit and noting the Defendant’s failure to cite any Tenth Circuit decisions).
  \item \textsuperscript{74} Reed v. Town of Gilbert, 135 S. Ct. 2218, 2228 (2015).
  \item \textsuperscript{75} Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
\end{itemize}
law requires that both a facially content-based law adopted because of innocent motives and a facially content-neutral law adopted because of discriminatory motives comply with strict scrutiny.\textsuperscript{76}

In \textit{Rules of General Applicability}, Professor Shaman states that "[l]aws of general applicability usually are characterized by neutrality toward speech or religion."\textsuperscript{77} Professor Shaman makes a compelling argument that equal protection jurisprudence has a similar analytical framework as the principle of general applicability.\textsuperscript{78} In a typical equal protection analysis, strict scrutiny is required if a law makes classifications that target a suspect class.\textsuperscript{79} Evidence of animus towards a suspect class can be essential to determine if a law targets a suspect class.\textsuperscript{80}

Thus, comparing equal protection jurisprudence with the rules for general applicability, a court should look at disagreement with the speech involved to see if a law is, or is not, generally applicable—similar to how courts turn to animus towards a suspect class to find a violation of equal protection.\textsuperscript{81} If there is animus towards the speech, then it probably is not a generally applicable law; further, it is also probably a content-based law adopted due to disagreement with the message the speech communicates.\textsuperscript{82}

In sum, general applicability, content discrimination, and principles from equal protection jurisprudence as they relate to free speech should have been at the forefront of the court's decision in the principal case to determine the constitutionality of the data trespass statutes. Consideration of these principles would have shown that the data trespass statutes are not constitutional. As discussed in the next section, the court, unfortunately, did not consider these principles.

III. PRINCIPAL CASE

Western Watersheds Project, National Press Photographers Association, National Resource Defense Council, People for the Ethical Treatment of Animals, and the Center for Food Safety filed a lawsuit in the fall of 2015 against Wyoming Attorney General Peter Michael, the Director of the Wyoming Department of

\textsuperscript{76} See Reed, 135 S. Ct. at 2228–29 (2015).
\textsuperscript{78} Id. at 420.
\textsuperscript{80} Id. at 632.
\textsuperscript{81} See supra notes 33–80 and accompanying text.
\textsuperscript{82} See supra notes 33–80 and accompanying text.
Environment Quality, and Wyoming Governor Matt Mead. The plaintiffs' original lawsuit turned on the public lands aspect of the 2015 statutes. However, the Wyoming legislature amended the statutes, causing the plaintiffs to amend their complaint. The subsequent issue became whether Wyoming Statutes sections 6-3-414 and 40-27-101 violated the First Amendment and the Equal Protection Clause. The defendants moved to dismiss on the basis that the plaintiffs failed to state a claim that data collection was a protected activity, and even if the court found that data collection was protected, the plaintiffs had no right to expressive activity on private land. Additionally, the defendants argued that there was no equal protection claim because "the revised statutes did not target a suspect class or burden a fundamental right," and that the current version of the 2016 statutes cured any animus that may have been present in the 2015 versions.

The court first determined whether the data trespass statutes violated the First Amendment. The court found collecting data (newsgathering) was not protected speech if it occurred while trespassing. The court reasoned that if the government regulates activity that is not protected by the First Amendment, then the court "need go no further." The court acknowledged that "creation and dissemination of speech" can be protected; however, the court considered case law and correctly acknowledged that not all creation of speech is protected.

The court referenced 
Houchins v. KQED, Inc. to determine the breadth of the First Amendment's protection. In that case, KQED was denied access to portions of the Santa Rita jail to take pictures of the facility after the suicide of a prisoner. After a lawsuit alleging First Amendment violations, the United States Supreme Court stated: "[t]his Court has never intimated a First Amendment

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84 Id. See generally Complaint for Declaratory and Injunctive Relief at 7, W. Watersheds Project v. Michael, 196 F. Supp. 3d (D. Wyo. 2016) (ECF No. 1) (stating that the 2015 statutes “apply to all Wyoming land beyond town and city boundaries; to public as well as private property . . . ”).
85 W. Watersheds Project, 196 F. Supp. 3d at 1237–38.
86 See id. at 1238–40.
87 Id. at 1240.
88 Id.
89 Id. at 1240–45.
90 Id. at 1242.
91 Id. at 1240 (quoting Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985)).
92 Id. (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)).
93 Id.
guarantee of a right of access to all sources of information . . . ”

The Wyoming District Court agreed with this analysis, stating, “no matter how important or sacrosanct they believe the information to be, [the First Amendment] does not compel a private landowner to yield his property rights and right to privacy.”

The court also considered whether the data trespass statutes were facially overbroad. To assert a facial overbreadth claim, a plaintiff must demonstrate (1) that the challenged law does not just regulate permissible areas of speech, but that it spills over and regulates protected areas of speech; or (2) it can be shown that while the law may apply permissibly to the party challenging the law, it could apply impermissibly to others. The claimant must also demonstrate substantial overbreadth.

The plaintiffs in the present case relied on the second prong. The plaintiffs argued three examples: (1) “a child taking a picture with her cellphone on her neighbor’s property, which she has permission to be upon;” (2) “a traveler, who enters private land in response to a cry for help, discovers a fire, and records the location using GPS on her phone;” and (3) “the hiker who records and reports illegal activities occurring on private property.”

The court rejected the overbreadth arguments. “[P]roperty rights are like a bundle of sticks, and can be divided in terms of dimension, duration, and scope.” Therefore, an individual has the right to limit the dimension of property access and can restrict third persons from taking pictures. The court held that the second and third examples would not be a First Amendment violation because there was no “collection” under the statutory definition. The court said that the definition of “collect” under the statutes required more than calling in an emergency or telling the police what happened.

See id.
The third section of the court’s analysis was equal protection.\textsuperscript{107} Unless a classification burdens a fundamental right or targets a suspect class it is presumptively valid, subject only to rational basis scrutiny and not the stringent test of strict scrutiny.\textsuperscript{108} Under the rational basis test, a legislative classification will be upheld if it advances a legitimate government interest, which is much easier to pass than strict scrutiny.\textsuperscript{109} When the court referred to a “fundamental right,” it was referring to the idea that if a law burdens a fundamental right and the government draws distinctions on who can exercise that right, then that law should require a strict scrutiny analysis. Since the court did not discuss whether a suspect class was involved, presumably the court was looking to see if the data trespass statutes drew classifications on who can exercise the fundamental right of free speech in a discriminatory manner.\textsuperscript{110}

As previously discussed, the court held that the fundamental right of free speech was not burdened by the data trespass statutes, and thus, these statutes were not subject to strict scrutiny.\textsuperscript{111} Also, despite comments made during the legislative session for the 2015 versions of the statutes, and despite the fact that the statutes applied first to public land and then private land, the court held that there was no animus.\textsuperscript{112} Apparently, the animus was “cured” by simply passing another set of statutes that were slightly different.\textsuperscript{113}

The court concluded that data collection was speech, otherwise the discussion of the First Amendment would have been improper.\textsuperscript{114} Since data trespass statutes prohibit data collection, they burden speech, and since they prohibit data collection—and no other activity—the court should have also analyzed general applicability and content discrimination.\textsuperscript{115} The following will demonstrate the unconstitutionality of the data trespass statutes.


\textsuperscript{107} \textit{W. Watersheds Project}, 196 F. Supp. 3d at 1245-47.


\textsuperscript{110} See \textit{W. Watersheds Project}, 196 F. Supp. 3d at 1246.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.} at 1246-47. The court thought that amending the data trespass statutes and not saying anything derogatory during the amending process cured the statutes. That would mean pure unresponsiveness was all a legislature had to do to cure past animus. Case law shows that the process of curing requires affirmative action. Hayden v. Paterson, 594 F. 3d 150, 167 (2d Cir. 2010); Johnson v. Governor of Florida, 405 F. 3d 1214, 1225 (11th Cir. 2005) (en banc), cert. denied, 546 U.S. 1015 (2005).

\textsuperscript{114} See \textit{W. Watersheds Project}, 196 F. Supp. 3d at 1240-45 (citation omitted).

IV. Analysis

A. The Requirement that a Law Be Generally Applicable

As acknowledged earlier, the right to speech is not absolute, nor is the right to trespass for the purpose of engaging in speech.116 This line of analysis is the backbone of the Wyoming District Court’s opinion: there is no right to trespass to collect data or to gather news and information.117 However, lack of immunity to trespass to collect data is not a complete analysis of the issues in the case. Since data collection has some protection under the newsgathering doctrine, and because these statutes directly curtail newsgathering, the general applicability of the data trespass statutes comes into question.118

First, creation of speech is a protected activity within the First Amendment.119 Therefore, a law must be generally applicable and merely have incidental effects on creation of speech to not violate that protection.120 As an example of the principle of generally applicability, in Cohen the United States Supreme Court found promissory estoppel to be generally applicable.121 The Court said that the press does not get some sort of special immunity from generally applicable laws such as promissory estoppel.122 This is different from Animal Legal Defense Fund, where the Idaho District Court held that Idaho’s “interference with agricultural production” statute did not represent the same interest that fraud or defamation protected.123 The Idaho District Court struck down the statute because the statute was not generally applicable and had direct effects on targeted speech.124 Additionally, Animal Legal Defense Fund is different from Food Lion, because the torts in Food Lion (breach of duty of loyalty and trespass) were generally applicable because they did not single out specific speech, but were neutral in their application.125

116 Zemel v. Rusk, 381 U.S. 1, 17 (1965); see supra notes 93–96 and accompanying text.
117 W. Watersheds Project, 196 F. Supp. 3d at 1242.
118 Id. at 1240–41.
119 Id. at 1240 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011)).
121 Id. at 671.
122 See id. at 669–71.
124 Id. at 1212.
125 Compare id. (striking down Idaho’s “interference with agricultural production” statute because it was targeted and did not protect the interests it purported to protect), with Food Lion, Inc. v. Capital Cities/ABC, Inc. 194 F. 3d 505, 520–22 (4th Cir. 1999) (explaining how newsgathering protection does not grant immunity from liability for the generally applicable torts of breach of duty of loyalty and trespass).
Wyoming Statutes sections 6-3-414 and 40-27-101 punish an individual for trespassing to collect data.\textsuperscript{126} These statutes would not apply if an individual trespassed and did not collect data.\textsuperscript{127} Further, if an individual trespassed and engaged in speech not associated with data collection, these statutes would not apply.\textsuperscript{128} Therefore, the data trespass statutes are not like promissory estoppel, breach of duty of loyalty, or trespass generally, they are more like “interference with agricultural production” because they are not limited to their supposed purpose (protecting property rights), and burden speech only if that speech relates to data collection. Consequently, the data trespass statutes violate strict scrutiny because they are not narrowly tailored towards the purpose of protecting against trespass.

In \textit{Western Watersheds}, the court distinguished \textit{Animal Legal Defense Fund} by saying that Wyoming’s revised statutes “preclude trespassing to collect any resource data, regardless of whether the data is favorable or unfavorable to the owner.”\textsuperscript{129} The court implied that the data trespass statutes are generally applicable because they prevent \textit{all} collection of data, rather than just negative data. However, that conclusion is not dispositive. By admitting that the statutes prevent collection of data, the court admits that the statutes suppress newsgathering speech, but case law does not require that the speech be negative.\textsuperscript{130} In fact, the general rule in \textit{Cohen} (generally applicable laws that have mere incidental effects on speech are constitutional), does not put a qualifier that the news must be \textit{bad} and cannot be \textit{good}, just that it must be news.\textsuperscript{131} The data trespass statutes limit both good and bad data collection.\textsuperscript{132} An individual might trespass onto private land to engage in a research experiment that would show that a rancher’s activities have produced mysterious water purity. Or, the scientist might find that a rancher has dumped toxins into a river. Either way, both are speech, and they are both more than incidentally affected.

A synthesis of these cases creates an analytical framework that this note urges future courts to apply to targeted laws like Wyoming’s data trespass statutes. First, the court should look at whether there is a First Amendment concern implicated. In this case, the concern is newsgathering.\textsuperscript{133} Second, the court should look at

\begin{itemize}
\item \textsuperscript{129} \textit{Watersheds Project v. Michael}, 196 F. Supp. 3d at 1247.
\item \textsuperscript{131} See \textit{Cohen}, 501 U.S. at 669.
\item \textsuperscript{133} See \textit{Watersheds Project}, 196 F. Supp. 3d at 1240–41.
\end{itemize}
whether the law that restricts the First Amendment concern is generally applicable. Here, Wyoming’s data trespass statutes are not. Third, the court must determine if the effects are direct or merely incidental. Here, the Wyoming data trespass statutes completely deter speech regarding data collection. Finally, as will be discussed next, the court should see if the law is a content-based discrimination.

B. Content Discrimination

Violations of general applicability are not always content-based restrictions. General applicability is a lower bar and is more concerned with a law that singles out or burdens some speech (perhaps through targeting) and leaves other speech unburdened; content discrimination focuses more on overt targeting of the speech or religion. In Reed v. Town of Gilbert, the United States Supreme Court held that regulation of speech “is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.” The only speech the data trespass statutes regulate are speech related to data collection. Since the data trespass statutes treat speech related to data collection differently from all other kinds of speech, the data trespass statutes are facially content-based.

Furthermore, as noted earlier, similar to how animus towards a suspect class can demonstrate a violation of equal protection, animus towards certain speech is indicative of a law that is not generally applicable; and, by extension, evidence of a content-based discrimination. Examples from the legislative history for the 2015 version of the statutes show that the legislature expressed worry that “government agencies would use resource data” to “implement environmental laws in ways that were contrary to the interest of certain private property owners.” Additionally, the legislature expressed a concern that data collection might lead to protection for the sage grouse. Most concerning, the legislature indicated a concern that individuals engaging in data trespass were “activist[s],” “extremists,” “nefarious,” and “evil.” These comments reveal hostility towards messages that individuals

134 Cohen, 501 U.S. at 669.
137 Id. (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-40 (1993)).
139 See supra notes 79–83 and accompanying text.
142 Id.
143 Id. ¶ 140.
who engage in data trespass promote. Laws adopted based on disagreement with the message conveyed are subject to strict scrutiny.\textsuperscript{144} An honest reading of the data trespass statutes and their history demonstrate that the Wyoming legislature adopted these statutes due to disagreement with the messages of data trespassers.

The Wyoming District Court commented on some questionable statements in the legislative history.\textsuperscript{145} The court quoted \textit{United States v. O'Brien} for the general rule that an entire act is not tainted just because one legislator might have said something showing animus.\textsuperscript{146} The court then stated that even if it accepted that the 2015 versions were drafted with animosity, the court was now concerned with the 2016 versions of the statutes.\textsuperscript{147} The court then cited cases that state, “legislatures may ‘cure’ a law originally enacted with unconstitutional animus.”\textsuperscript{148}

There are two problems with this conclusion. First, the 2016 data trespass statutes are devoid of legislative history. The only significant changes were that the public lands aspect was removed by the Wyoming legislature, along with the requirement that the person who trespassed intend to submit the data to a governmental agency.\textsuperscript{149} These amendments came at the prompting of the court.\textsuperscript{150} Case law shows that an intervening event, such as the \textit{judicial} invalidation of “some of the more blatantly discriminatory selections” does not “cure” a tainted law.\textsuperscript{151} Moreover, the Second Circuit has stated, “[w]e do not take lightly the possibility that a legislative body might seek to insulate from challenge a law known to have been originally enacted with a discriminatory purpose by (quietly) reenacting it without significant change.”\textsuperscript{152} Applying precedent as it relates to curing animosity to the facts here, the data trespass statutes and their history were not adequately cured.

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\item \textsuperscript{144} \textit{Ward v. Rock Against Racism}, 491 U.S. 781, 787 (1989).
\item \textsuperscript{146} \textit{Id.} at 1246 (quoting \textit{United States v. O'Brien}, 391 U.S. 367, 383 (1968)).
\item \textsuperscript{147} \textit{Id.}
\item \textsuperscript{148} \textit{Id.} (citing \textit{Hayden v. Paterson}, 594 F. 3d 150, 162–69 (2d Cir. 2010); Johnson v. Governor of Fla., 405 F. 3d 1214, 1223 (11th Cir. 2005 (en banc), \textit{cert denied} (citation omitted))).
\item \textsuperscript{150} \textit{Watersheds Project}, 196 F. Supp. 3d at 1236–37. (After oral argument, the Wyoming District Court issued an order stating that the court was “primarily concerned” with the 2015 data trespass statutes and their application to public land. Subsequently, the Wyoming legislature amended the data trespass statutes).
\item \textsuperscript{151} \textit{Hunter v. Underwood}, 471 U.S. 222, 233 (1985).
\item \textsuperscript{152} \textit{Hayden v. Paterson}, 594 F. 3d 150, 167 (2d Cir. 2010).
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Further, the data trespass statutes champion the fact that they protect property interests; however, there was already a trespass statute that protected property interests.\textsuperscript{153} Under equal protection jurisprudence, newly created laws that attempt to protect interests already protected are subject to higher levels of scrutiny.\textsuperscript{154} In the present case, the court held that the existing trespass statute did not effectively deter trespassers.\textsuperscript{155} One of the problems that the court noted was that notice had to be provided to the trespasser.\textsuperscript{156} The court then likened this situation to where Wyoming altered trespass laws to protect landowners from trespassers who would hunt or fish on their land.\textsuperscript{157} However, the hunting trespass statute is distinguishable from data trespass statutes.\textsuperscript{158} The incidental effects of providing more severe sanctions for trespassing to hunt or fish does not implicate the First Amendment, while restrictions on data collection implicates newsgathering, which falls under the First Amendment.\textsuperscript{159}

Also, since the 2016 statutes do not have legislative history, it is impossible to know whether the amendments were intended to cure the statutes. In all the cases the court cites, the legislature took affirmative steps to cure the history.\textsuperscript{160} Admittedly, those cases did not involve free speech, but racial animus in felon disenfranchisement laws; however, the threshold of curing animus is still analogous.\textsuperscript{161} Splicing out sections the court had concern with as the sole remedy to cure animosity so that "the Court no longer [had] 'considerable doubt' as to the purposes of the revised statutes"\textsuperscript{162} is not the affirmative steps contemplated by these cases.\textsuperscript{163}

\textsuperscript{154} W. Watersheds Project, 196 F. Supp. 3d at 1246 (citing U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536–37 (1973)).
\textsuperscript{155} Id.
\textsuperscript{156} Id.; Wyo. Stat. Ann. § 23-3-305(b), (d).
\textsuperscript{157} W. Watersheds Project, 196 F. Supp. 3d at 1247.
\textsuperscript{160} W. Watersheds Project, 196 F. Supp. 3d at 1246. See also Hayden v. Paterson, 594 F. 3d 150, 167 (2d Cir. 2010) (holding that New York's disenfranchisement laws were amended to "substantively change how legislatures were permitted to consider, or no longer consider, whether felon disenfranchisement laws should be passed . . ."); Johnson v. Governor of Florida, 405 F. 3d 1214, 1225 (11th Cir. 2005) (en banc), cert. denied, 546 U.S. 1015 (2005) (holding that "Florida's felon disenfranchisement provision is constitutional because it was substantively altered and reenacted in 1968 in the absence of any evidence of racial bias.").
\textsuperscript{161} See Hayden, 594 F. 3d at 167; Governor of Florida, 405 F. 3d at 1225.
\textsuperscript{162} W. Watersheds Project, 196 F. Supp. 3d at 1246.
\textsuperscript{163} See Hayden, 594 F. 3d at 167; Governor of Florida, 405 F. 3d at 1225.
When taken together, these legal principles for restrictions based on content demonstrate that the data collection statutes should be subject to heightened scrutiny. No affirmative measures were taken to “cure” any animosity that the court was worried about with the 2015 version of the statutes. Moreover, precedent requires the court to examine a statute with more severe scrutiny when that statute purports to protect an interest that another statute already protects. Since data trespass implicates speech, if the Wyoming legislature is concerned about “nefarious” citizen scientists, the Wyoming legislature should amend the existing trespass law to better protect those specifically affected property interests. As a result, the statute would not directly implicate speech and landowners would still be protected from all kinds of trespass.

V. CONCLUSION

This case note argues that the Tenth Circuit Court of Appeals should hold that Wyoming’s data trespass statutes violate First Amendment protections for newsgathering because they are neither laws of general applicability nor content-neutral restrictions. The data trespass statutes do not solely intend to deter trespass. If the data trespass statutes were a genuine attempt at solely deterring trespass, then their scope should be limited to trespass and not tied to data collection. The data trespass statutes are concerned with only one particular kind of trespass: trespass to engage in newsgathering. Newsgathering is a protected area of speech under the First Amendment. When statutes implicate First Amendment rights, the laws that restrict them typically must be laws of general applicability. Wyoming’s data trespass statutes are not laws of general applicability because they target and completely deter speech arising from data collection. Additionally, the legislative history shows that the data trespass statutes are content-based. Like Animal Legal Defense Fund, Wyoming’s data trespass statutes certainly would not satisfy strict scrutiny. Through targeting one type of trespass that involves speech, the Wyoming data trespass statutes commit First

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164 W. Watersheds Project, 196 F. Supp. 3d at 1246 (citing U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 536-37 (1973)).
165 See id. at 1240–41.
Amendment violations without a compelling governmental interest because there is no compelling reason to protect interests already protected. Also, the data trespass statutes are not narrowly tailored because they do not just prevent trespass, they directly curtail speech. Accordingly, the Tenth Circuit Court of Appeals should strike down Wyoming’s data trespass statutes.