A Watershed Moment Revealing
What’s at Stake: How Ag-Gag Statutes
Could Impair Data Collection and Citizen
Participation in Agency Rulemaking

Carrie A. Scrufari

ABSTRACT

What may state legislators do to prevent actions that they believe endanger private
property interests and undermine the economic interests of industries important to their
constituents? What laws can they enact to restrict the speech of those who disagree
with those interests? What limits can they place on free speech in a contest pitting one
constitutional set of rights against another? The Tenth Circuit Court of Appeals, and
likely the Supreme Court of the United States, will need to answer these questions when
it decides the case of Western Watersheds v. Michael to determine the constitutionality of
Wyoming’s ag-gag statues, passed just last year.

Sections 6-3-414(c) and 40-27-101(c)(i) of the Wyoming Annotated Code impose
criminal and civil liability, respectively, on persons who cross “private land to access
adjacent or proximate land where [they] collect[] resource data” and do not have an
ownership interest in the private land or permission from the private landowner. This
article explores the unintended consequences that Wyoming’s new ag-gag statutes could
have on the regulation of natural resources in the West. To avoid these consequences,
this article asserts that the Court of Appeals should reverse the District Court’s decision
by narrowly holding that data collected on public lands is constitutionally protected
speech under the First Amendment.

This article unfolds as follows: Part I provides a brief history of the circumstances
culminating in the passage of ag-gag legislation throughout the United States. Part
II details Wyoming’s efforts to pass its own ag-gag statutes, §§ 6-3-414 and 40-27-10
(hereinafter the Data Censorship Statutes). Part II also examines advocacy efforts to
challenge the constitutionality of the Wyoming Data Censorship Statutes in Western
Watersheds v. Michael. Part III assesses the impact Wyoming’s Data Censorship statutes
would have in a variety of other environmental regulatory contexts if the appeals court
dismisses plaintiffs’ constitutional challenges and upholds the district court’s decision.
Specifically, this article argues that Wyoming’s Data Censorship statutes would impair
the public’s opportunity to collect and submit data that is crucial to effective citizen
participation in federal agency decision-making under the Administrative Procedure Act,
the Taylor Grazing Act, Federal Land Policy and Management Act, and the National
Environmental Policy Act. Finally, this article argues that the unique history of land use
and regulation in the West supports the conclusion that data collection on public lands
is free speech, entitled to First Amendment constitutional protection.
Carrie Scrufari, Esq. joined the Vermont Law School Faculty as an Assistant Professor and Senior Fellow at the Center for Agriculture and Food Systems after completing her LL.M. in Food and Agricultural Law and Policy in December 2016. She earned her J.D. from the University of Maryland in 2011, where she graduated as a member of the Order of the Coif and the Order of Barristers. She is a member of the N.Y. Bar and has clerked at the N.Y. State Supreme Court Appellate Division Fourth Department and at the Court of Appeals in Albany, New York. She thanks Dave Muraskin, John Echeverria, and Pat Parenteau for all their thoughtful feedback and the staff of the UCLA Law Review for their comments and editing assistance.

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In a time of deceit, telling the truth is a revolutionary act.

—George Orwell

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

—United Nations, Universal Declaration of Human Rights

**INTRODUCTION**

What may state legislators do to prevent actions that they believe endanger private property interests and undermine the economic interests of industries important to their constituents? What laws can they enact to restrict the speech of those who disagree with those interests? What limits can they place on free speech in a contest pitting different constitutional rights against each other? These are precisely the sorts of questions the Tenth Circuit Court of Appeals will need to answer when it decides the case of *Western Watersheds Project v. Michael*—and the sorts of questions the U.S. Supreme Court may eventually encounter as well if it is called upon to determine the constitutionality of Wyoming’s ag-gag statutes, passed just last year.

The phrase ag-gag refers to the collective set of laws different states have passed to criminalize the act of taking pictures or videos inside farms or animal processing facilities. Section 6-3-414(c) of the Wyoming Statutes criminalizes the acts of persons “cross[ing] private land to access adjacent or proximate land where [they] collect[] resource data” and do not have an ownership interest in the

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1. This citation has been largely attributed to Orwell, although the actual origin is unknown. The earliest known attribution of this quotation to Orwell appears in V.G. VENTURINI, PARTNERS IN ECOCIDE: AUSTRALIA’S COMPLICITY IN THE URANIUM CARTEL, at ii (1982).
private land or permission from the private landowner.\textsuperscript{5} Similarly, section 40-27-101(c) of the Wyoming Statutes states that persons commit civil trespass if they “cross[] private land to access adjacent or proximate land where [they] collect[] resource data” without having an ownership interest in the property or legal permission to cross the private land.\textsuperscript{6} Environmental advocacy and animal welfare organizations, including the Western Watersheds Project, National Press Photographers Association, Natural Resources Defense Council, People for the Ethical Treatment of Animals, and the Center for Food Safety, collectively joined as plaintiffs to sue Wyoming Attorney General Peter K. Michael, the Director of Wyoming Department of Environmental Quality, and other county attorneys in Wyoming by alleging, among other things, that the statutes unconstitutionally censored free speech in violation of the First Amendment. Defendants moved to dismiss and the U.S. District Court of Wyoming granted the motion, holding insofar as relevant here that the statutes did not regulate protected First Amendment speech.\textsuperscript{7} Plaintiffs’ appeal is now before the Tenth Circuit Court of Appeals. The question before the court during oral arguments can best be framed as whether sections 6-3-414(c) and 40-27-101(c) prohibit data collection on public lands in violation of the free speech clause of the First Amendment.\textsuperscript{8}

This Article explores the unintended consequences that Wyoming’s new ag-gag statutes could have on the regulation of natural resources in the West. To avoid these consequences, this Article asserts that the Tenth Circuit Court of Appeals should reverse the district court’s decision with the narrow holding that data collected on public lands is constitutionally protected speech under the First Amendment. Accordingly, this Article unfolds as follows: Part I provides a brief history of the circumstances culminating in the passage of ag-gag legislation in the United States. Part II details Wyoming’s efforts to pass its own ag-gag statutes, Wyoming Annotated Code sections 6-3-414 and 40-27-10 (Data Censorship Statutes), to impose criminal and civil liability, respectively, on persons who trespass to collect resource data. Part II also examines advocacy efforts to challenge the constitutionality of the Wyoming Data Censorship Statutes in \textit{Western Watersheds Project v. Michael}.\textsuperscript{9} Part III assesses the impact Wyoming’s Data Censorship Statutes would have in a variety of other environmental regulatory con-

\textsuperscript{5}\textsc{Wyo. Stat. Ann.} § 6-3-414(c) (Supp. 2016).
\textsuperscript{6} \textsc{Id.} § 40-27-101(c).
\textsuperscript{7} \textit{See} \textit{W. Watersheds Project}, 196 F. Supp. 3d at 1242–43.
\textsuperscript{8} \textit{See U.S. Const. amend. I; see also W. Watersheds Project}, 196 F. Supp. 3d 1231.
\textsuperscript{9} \textit{See} 196 F. Supp. 3d at 1240.
texts if the Tenth Circuit dismisses plaintiffs’ constitutional challenges and upholds the district court’s decision. Specifically, this Article argues that Wyoming’s Data Censorship Statutes would impair the public’s opportunity to collect and submit data that is crucial to effective citizen participation in federal agency decisionmaking under the Administrative Procedure Act, the Taylor Grazing Act, Federal Land Policy and Management Act, and the National Environmental Policy Act. Finally, this Article argues that the unique history of land use and regulation in the West supports the conclusion that data collection on public lands is free speech, entitled to First Amendment constitutional protection.

I. AG-GAG AT A GLANCE

State and federal laws have failed to adequately regulate the humane treatment of agricultural animals raised for food in the United States. Federal laws, such as the Humane Methods of Slaughter Act, originally enacted in 1958, apply only to conduct at slaughterhouses, and such laws only regulate how animals must be killed for processing. Federal laws do not reach conduct at animal production facilities, where animals spend most of their lives before slaughter. Moreover, many states’ anticruelty laws exempt the treatment of agricultural animals. The absence of federal and state laws aimed at regulating the humane handling and raising of animals during their lifespans motivated animal welfare advocates to begin investigating the treatment of agricultural animals and to raise consumer awareness regarding the conditions under which the meat for many Americans’ three squares a day were produced.

One of these kinds of investigations occurred when the advocacy organization Mercy for Animals sent an undercover operative to E6 Cattle Co. in Hart, Texas for two weeks in March 2011. The undercover advocate filmed the inner workings of E6’s cattle operation, which raised about 10,000 calves for dairy

10. 7 U.S.C. §§ 1901–1907 (2012). The Act provides that it is the policy of the United States that “the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods.” Id. § 1901. Poultry are exempt from the Humane Methods of Slaughter Act, see id. § 1902(a), but the Poultry Products Inspection Act, 21 U.S.C. §§ 451–472, regulates the slaughter of poultry. However, just like the Humane Methods of Slaughter Act, the Poultry Products Inspection Act does not regulate humane handling and welfare of poultry during their lives. See 21 U.S.C. §§ 451–472.
farms. The video he recorded captures the actions of employees, which include “bludgeoning calves’ skulls with pickaxes and hammers,” throwing beaten calves “still alive and conscious” onto piles of dead animals, “kicking downed calves in the head, and standing on their necks and ribs.” The video also shows the conditions in which the calves were kept: “squalid hutchs, thick with manure and urine buildups, and barely large enough for the calves to turn around or fully extend their legs” as well as the physical state of the calves, who suffered “open sores, swollen joints and severed hooves.” Following the release of this video on the Internet, Castro County Sheriff Salvador Rivera investigated the farm and the farm’s owner, Kirt Espenson. As a result of the investigation, Espenson was sentenced to serve one year probation for a Class A misdemeanor of abuse and to pay $4,000 in fines.

Numerous similar videos were released that subsequently resulted in food recalls, the closing of slaughter houses, criminal convictions of owners and employees, and public backlash. As a result, states attempted to block advocacy organizations from investigating farm facilities by drafting legislation that would criminalize those efforts. Advocates responded to these legislative attempts with vehement opposition, contending that the recordings were a form of whistleblowing that were entitled to First Amendment constitutional protection. Undercover advocates defended their actions, stating that they completed the work asked of them while recording. One advocate stated, “My purpose there isn’t to interfere or do anything, my purpose there is to work and record. . . . [It is] to be the eyes and ears of the public.” Members of the agricultural industry responded with claims that some of the videos were misleading, maintaining that no crimes were being committed.

14. Id.
15. Id.
16. Id.
17. Id.
20. See Carlson, supra note 19.
21. See id.
22. See Sulzberg, supra note 19.
23. Id.
24. Id.
Before long, the industry and their lobbyists were pushing their draft bills through state legislatures. Such ag-gag laws aim to punish those who record or photograph activity within animal production facilities, as well as those organizations that seek to aid in disseminating the recordings, such as the Humane Society of the United States and Mercy for Animals.

Ag-gag bills have been proposed and defeated in over twenty states, thanks to the advocacy efforts of organizations like the American Society for the Prevention of Cruelty to Animals (ASPCA). Nevertheless, eight states currently have ag-gag laws that criminalize whistleblowing on farms. In 1990, Kansas became the first state to criminalize unauthorized recordings and photography in animal production facilities by passing the Farm Animal and Field Crop and Research Facilities Protection Act. Montana followed suit a year later with its Farm Animal and Research Facilities Protection Act. Iowa, Missouri, North Carolina, North Dakota, and Utah have all enacted similar statutes. Moreover, several states have enacted legislation that regulates other activities beyond recording in agricultural operations, including any other actions that could allegedly interfere with such operations.

II. Watershed Moment: Upholding Ag-Gag Legislation in Wyoming

In 2015, the Wyoming legislature joined the ranks of states that had already passed ag-gag legislation by enacting sections 6-3-414 and 40-27-101 of the

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25. See Kingery, supra note 4, at 647.
28. See id.
29. See KAN. STAT. ANN. § 47-1827(c) (2000).
Wyoming Statutes, imposing criminal and civil liability, respectively, on those who trespass to collect resource data. Among other things, the statutes forbid unauthorized persons from traversing open land to collect information related to the land for submission to a governmental agency. One subsection of section 40-27-101 included open lands while another applied only to private open lands.

Section 6-3-414 originally defined collect as “to take a sample of material, acquire, gather, photograph or otherwise preserve information in any form from open land which is submitted or intended to be submitted to any agency of the state or federal government.” Resource data was 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.” Therefore, a violation of the 2015 statutes necessarily required: (1) a person without permission; (2) enter “open land” to collect such data; (3) record the data; and (4) submit or intend to submit the data to a governmental agency. Finally, the statutes prevented the use of any such collected data in a civil, criminal, or administrative proceeding and required that any information submitted to a governmental entity be expunged. Thus, anyone photographing outdoor agricultural operations who later submits the photographs to the state prosecutor’s office seeking legal action for alleged animal abuses would be prevented from doing so under these laws. However, the Wyoming statutes placed a new twist on ag-gag statutes by reaching a broader range of data collection activities than other state ag-gag statutes had previously done.

Western Watersheds Project (Western Watersheds), National Press Photographers Association (National Press), National Resource Defense Council (NRDC), People for the Ethical Treatment of Animals (PETA), and the Center

33. *Cf. Complaint for Declaratory and Injunctive Relief at 4, 48, W. Watersheds Project v. Michael, 196 F. Supp. 3d 1231 (D. Wyo. 2016) (No. 15-cv-169), 2015 WL 5731927 (discussing the legislature’s purpose in passing the laws and its animus towards people that legislators referred to as “activists, extremists, nefarious, and evil” (original alterations omitted)).*

34. *WYO. STAT. ANN. §§ 6-3-414, 40-27-101 (2015).*

35. *Id. § 40-27-101(a)(i).*

36. *Id. § 40-27-101(b).*

37. *Id. § 6-3-414(d)(i).*

38. *Id. § 6-3-414(d)(iv).*

39. *See id. §§ 6-3-414(a)–(d), 40-27-101(a)–(b). The use of such data is only allowed as evidence in a civil action or criminal prosecution under the statutes to prove a violation had occurred. Id. §§ 6-3-414(e), 40-27-101(d)–(e).*

40. *Id. §§ 6-3-414(e)–(f), 40-27-101(d)–(f).*
for Food Safety (CFS) are public interest environmental advocacy groups. They joined as plaintiffs to challenge the pair of Wyoming statutes prohibiting the collection of resource data on public lands as unconstitutional under certain circumstances. Defendants Attorney General Peter K. Michael and Governor Matt Mead moved for dismissal, claiming, among other things, that the complaint failed to properly state a claim for relief. The district court granted in part and denied in part defendants’ motion to dismiss, holding that plaintiffs had submitted plausible “First Amendment Free Speech and Petition” and equal protection claims.

A. Free Speech Analysis as Applied to Wyoming Statutes

In holding that plaintiffs had submitted plausible free speech claims, the district court expressed concern regarding the statutes’ ability to restrict activities on public lands and the statutes’ targeted application towards submitting data to government agencies. Accordingly, the Wyoming legislature amended the two challenged statutes in 2016. The new 2016 statutes are largely identical versions of their 2015 counterparts; however, the 2016 statutes omit references to open lands. This omission illustrates that the statutes apply to only private lands and eliminates the requirement that the data be submitted to a governmental agency. In addition, the 2016 statutes modify the definition of collect, now to mean “to take a sample of material, acquire, gather, photograph or otherwise preserve

42. See W. Watersheds Project, 196 F. Supp. 3d at 1235.
43. Id.
44. See id. at 1235–38.
45. Id. at 1247.
46. See WYO. STAT. ANN. §§ 6-3-414(a)–(c), 40-27-101(a)–(c) (Supp. 2016).
information in any form and the recording of a legal description or geographical coordinates of the location of the collection.\textsuperscript{47}

The revised statutes contain three types of prohibited behavior, as illustrated by the following subsections:

(a) A person [is guilty of trespassing/commits a civil trespass] to unlawfully collect resource data from private land if he:

(i) Enters onto private land for the purpose of collecting resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(B) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(b) A person [is guilty/commits a civil trespass] of unlawfully collecting resource data if he enters onto private land and collects resource data from private land without:

(i) An ownership interest in the real property or, statutory, contractual or other legal authorization to enter the private land to collect the specified resource data; or

(ii) Written or verbal permission of the owner, lessee or agent of the owner to enter the private land to collect the specified resource data.

(c) A person [is guilty of trespassing/commits a civil trespass] to access adjacent or proximate land if he:

(i) Crosses private land to access adjacent or proximate land where he collects resource data; and

(ii) Does not have:

(A) An ownership interest in the real property or, statutory, contractual or other legal authorization to cross the private land; or

\textsuperscript{47} Id. §§ 6-3-414(c)(i), 40-27-101(h)(i). The definitions in the 2015 version of 40-27-101 were inadvertently omitted in the final approved version. Id. § 40-27-101 cmt. at 570.
(B) Written or verbal permission of the owner, lessee or agent of the owner to cross the private land.\textsuperscript{48}

Plaintiffs amended their complaint to bring the same suit against the enactment of the 2016 statutes once the state legislature repealed and replaced the 2015 versions.\textsuperscript{49} The amended complaint argued that even the revised statutes still violated the First Amendment on its face and as applied to plaintiffs’ data collection activities (and several other activities as well).\textsuperscript{50} Defendants Michael and Todd Parfitt (Director of the Wyoming Department of Environmental Quality) moved to dismiss the amended complaint.\textsuperscript{51} For the reasons that follow, the court granted defendants’ motion to dismiss.\textsuperscript{52}

The court first analyzed whether the amended statutes regulated protected First Amendment activity.\textsuperscript{53} While the court recognized that the “creation and dissemination of speech”\textsuperscript{54} may constitute speech under the First Amendment, it also noted that the creation of all speech is not necessarily protected expressive activity.\textsuperscript{55} Here the district court acknowledged that the “[p]laintiffs’ asserted inability to determine their location and land ownership during data collection creates somewhat of a conundrum.”\textsuperscript{56} Despite this concern, the district court held that there was no First Amendment right to trespass on private property to collect resource data.\textsuperscript{57} With respect to public lands, the court held that, despite plaintiffs’ entitlement to engage in data collection on public lands, “the public does not have the right to cross private lands (trespass) to engage in such activi-

\textsuperscript{48}. Id. §§ 6-3-414(a)–(c); 40-27-101(a)–(c).
\textsuperscript{50}. Id.
\textsuperscript{51}. Id. at 1238.
\textsuperscript{52}. Id. at 1248. While the scope of this Article is limited to plaintiffs’ free speech claims, it is worth noting that the district court also rejected plaintiffs’ equal protection arguments, holding that the statutes “rationally relate to the interest of protecting private property rights” and therefore pass the rational basis test. Id. at 1247. The plaintiffs also asserted:

[T]he revised statutes violate[d] their Equal Protection rights by distinguishing between the purposes and intent of entrants on private property, punishing only those seeking to collect resource data. They also . . . burden[ed] the fundamental right of freedom of speech without serving any legitimate government interest. [And] because they were promulgated out of animus . . . [T]he statutes . . . aimed at chilling the efforts of those persons who disapprove of various land-uses and gather and communicate information to governmental agencies to further the implementation of environmental laws.

\textit{W. Watersheds Project}, 196 F. Supp. 3d at 1240–41 (citations omitted).
\textsuperscript{53}. Id. at 1240.
\textsuperscript{54}. Id. (citing Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)).
\textsuperscript{55}. Id. (citing Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978)).
\textsuperscript{56}. Id. at 1241.
\textsuperscript{57}. Id.
ties.” The court rejected plaintiffs’ arguments that such a holding creates a chilling effect such that there would be “a realistic danger of a substantial suppression of speech.” In sum, the court concluded that plaintiffs could not maintain a First Amendment challenge because “[t]here is no constitutionally protected First Amendment right to enter upon the private lands of another for the purposes of collecting data.” Plaintiffs timely appealed.

III. THE LANDSCAPE AT STAKE

The district court’s holding that crossing private land for the purposes of collecting resource data on public lands cannot be constitutionally protected under the First Amendment has far-reaching implications. The district court viewed the issue as whether a constitutional right existed to trespass upon private property to collect resource data. Thus, the court reasoned: “The ends, no matter how critical or important [the] public concern, do not justify the means [of] violating private property rights.” What the district court failed to see is how its reasoning, when construed as a battle of free speech versus private property rights, impacts citizen participation in other areas of the law.

Collection of data—the foundation of sound science—is central to the responsible management of federal public lands in the West, including informed and effective citizen participation in government decisionmaking related to these lands. Environmental advocates who wish to participate in agency rulemaking must collect data before drafting comments to submit for consideration. The procedural and substantive requirements of several federal regulatory regimes demonstrate that the government intends for citizens to be able to submit reasoned, scientifically supported comments to assist agencies in fulfilling their rulemaking duties. Federal statutes mandate that agencies analyze data, refer to it, and rely upon it in promulgating regulations and making decisions. When citizens petition courts to review agency action, courts rely upon this data as a basis for their legal determinations about whether the agency acted in an arbitrary and capricious manner or took action that was not supported by substantial evidence in the record. Moreover, the unique history of land use regulation in the West...
supports the conclusion that data collected on public lands is speech. To con-
clude otherwise would allow the Data Censorship Statutes to have a chilling ef-
fect on the data collection efforts on public lands that are necessary for the 
continued responsible management of natural resources.

A. The Importance of Data Collection for Effective Citizen Participation in 
Federal Agency Decisionmaking

From safeguarding air quality\(^6\) to prevention of water pollution,\(^7\) protec-
tion of endangered species,\(^8\) food safety\(^9\) and animal welfare,\(^10\) data collection on 
public lands implicates the political discourse surrounding some of the most 
compelling issues confronting civil society. As such, it is imperative that the 
precise type of data collection on public lands targeted here be entitled to free 
speech protection so that this data may be used for citizen advocacy and for 
challenging agency decisions.

\(^{6}\) See, e.g., John R. Jacus, Air Quality Constraints Upon Energy Project 
Development on Public Lands 1 (2010), http://www.dgslaw.com/images/materials/JJAC- 
LSI-paper_AirQualityConstraints_EnergyDevelopment.pdf [https://perma.cc/Q2H6-4TUF] 
(examining how energy facilities erected on public lands—such as petroleum and natural gas—will 
need to begin collecting data to track their greenhouse gas emissions to comply with the Clean Air 
Act’s requirements; also evaluating the projects’ effects on air quality under the National 
Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act).

\(^{7}\) See, e.g., Morris v. U.S. Nuclear Regulatory Comm’n, 598 F.3d 677, 695 (10th Cir. 2010) 
(evaluating data collected from multiple project sites that the Nuclear Regulatory Commission used 
to assess whether municipal groundwater quality was successfully restored following licensed 
mining operations).

\(^{8}\) See, e.g., WildEarth Guardians v. U.S. Fish & Wildlife Serv., 784 F.3d 677, 697 (10th Cir. 2015) 
(discussing a land acquisition resulting in the federal government controlling over one hundred 
acres of land inhabited by an endangered mouse species and whether data collected concerning 
nitrogen dioxide emissions and its effect on air quality should prevent the construction of a 
parkway near the affected habitat area).

\(^{9}\) See, e.g., Undercover Exposé: Inhumane Treatment of Animals, Food Safety Concerns at Costco Egg 
supplier-060915.html (airing data collected in the medium of an undercover video showing ill birds 
in cramped confinement laying eggs on top of dead cage mates and piles of broken, fly-covered 
eggs amidst dead birds on the plant’s floors).

\(^{10}\) See Wyoming v. U.S. Dep’t of Interior, 839 F.3d 938, 939 (10th Cir. 2016) (analyzing the Bureau 
of Land Management’s duties to manage the overpopulation of wild horses on public lands in 
Wyoming pursuant to the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 
(2012)); see also Justin Marceau & Alan K. Chen, Free Speech and Democracy in the Video Age, 116 
COLUM. L. REV. 991, 999 (2016) (asserting that video recording is speech protected by the First 
Amendment, or that, alternatively, video image capture is “covered by the First Amendment 
because it is conduct preparatory to speech”).
1. Environmental Advocacy Data Collection During Rulemaking

Government agencies are statutorily mandated to collect and consider data when formulating policy,\(^71\) drafting rules and regulations,\(^72\) and amending those rules and regulations.\(^73\) Data collection on public lands must be constitutionally protected speech under the First Amendment because without such data collection, government agencies would be unable to draft and promulgate the rules by which they operate. The information that the Data Censorship Statutes regulate must be speech because it is so integral to political discourse, as the following regulatory regimes demonstrate.

a. How the Administrative Procedure Act Necessitates the Use of Data Collection on Public Lands

The Administrative Procedure Act (APA) sets forth the procedural requirements federal agencies must follow when engaging in rulemaking. The APA requires agencies to both provide the public with (1) notice of the proposed rulemaking and (2) the opportunity to comment on any proposed rulemaking.\(^74\) Regarding the public’s opportunity to comment, the APA states that agencies “shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.”\(^75\) In particular, when the Bureau of Land Management (the Bureau) provides notice and comment opportunities to the public before preparing resource management plans, the notice must contain, among other things, a “[d]escription of the proposed planning action” and the

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71. See 5 U.S.C. § 553(c) (directing agencies to consider public comments when adopting a general statement of purpose for their proposed rules). Public comments often require the submission of data in order to be compelling. For example, a public comment could state that the Bureau of Land Management (the Bureau) is not adequately preserving the rangeland against overgrazing from cattle. In order to support that assertion, the public comment would need to contain data (collected soil samples, pictures/measurements of grass growth, etc. to support that claim). Similarly, if a public comment asserted that the Bureau was allowing overgrazing to the extent that water quality in streams on the rangeland was negatively affected, the comment would need to include collected water samples that perhaps show higher than acceptable levels of bacteria indicative of fecal matter in the water.

72. See id. § 553(b)–(c) (detailing the notice and comment procedures agencies must follow when engaging in rulemaking).


74. 5 U.S.C. § 553(b)–(c).

75. Id. § 553(c).
identification of the geographic area for which the plan is to be prepared.”

When soliciting comments from the public on these proposed actions, the Bureau directs citizens to submit substantive comments while cautioning against nonsubstantive comments, such as those “without justification or supporting data,” as they will not be considered in final reports. Thus, the APA requires agencies to seek out and rely upon precisely the sort of information that is regulated under the Data Censorship statutes.

Courts have struck down agency action as violative of the APA when that action drastically limits the public’s ability to participate in the rulemaking process. In *Western Watersheds Project v. Kraayenbrink*, the U.S. Court of Appeals for the Ninth Circuit found that the Bureau limited the ability for public comment insofar as the proposed regulations prohibited the Bureau from relying upon data that citizens, advocacy groups, and independent biologists, soil scientists, hydrologists, and other experts submitted via comments during rulemaking. In arriving at its conclusion, the court relied on the findings of a Bureau interdisciplinary team that had counseled against adopting the proposed regulations. The team reasoned that limiting the agency’s ability to consider precise, scientific data during rulemaking by restricting the public’s ability to participate would “ultimately lead to poorer land management decisions . . . [and] to greater environmental harm.” *Western Watersheds Project v. Kraayenbrink* therefore suggests that citizens’ ability to collect and submit data during agency rulemaking is re-

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76. 43 C.F.R. § 1610.2(c) (2016).
77. See, e.g., *Providing Comments During Public Scoping*, BLM ROYAL GORGE FIELD OFFICE, https://www.cmc.org/Portals/0/Documents/Conservation/ECRM%20Providing%20Effective%20Comments.pdf [https://perma.cc/P7YW-DUZF]. Interestingly, this document used to be available on the U.S. Department of Interior Bureau of Land Management’s website; however, as of May 2017, it has been removed.
78. See, e.g., *Kraayenbrink*, 632 F.3d at 496 (enjoining the Bureau’s 2006 amendments to its 1995 grazing regulations because the amendments prohibited reliance on data collection from various advocacy groups and citizens).
79. 632 F.3d 472.
80. See id. at 479–80 (citing 43 C.F.R. § 4180.2(c)(1) (1995)).
81. See id. at 479.
82. Id. at 479 (alteration in original) (quoting the record). Environmental advocacy groups were not the only ones expressing concern regarding the new regulations’ effect of decreasing the opportunity for public oversight. Due to the vast amount of public land the federal government and the state governments manage in the West, the New Mexico Department of Game and Fish, California Department of Fish and Game, and the Arizona Department of Game and Fish all submitted comments to the Bureau opposing the new regulations. See id. at 488. Other federal agencies were similarly concerned; the Fish and Wildlife Service noted that “[p]ublic input is an important component of ensuring [a] complete and accurate analysis” with respect to managing grazing permits. Id. at 497 (alterations in original) (quoting the record). The U.S. Court of Appeals for the Ninth Circuit agreed, reasoning that the amendments allowed for a “substantial reduction[] in the avenues for public input.” Id. at 494.
quired under the APA and that the government expects citizens to provide it with data for its rulemaking. Here, the Data Censorship Statutes interfere with agency rulemaking obligations under the APA because they threaten citizens with civil and criminal liability if citizens unknowingly cross private land to access public land to collect data for submission during a notice and comment period. The judiciary has previously been unwilling to allow agency action restricting citizens’ ability to participate in rulemaking. The judiciary should also be unwilling to allow state action that would similarly restrict citizens’ ability to participate in rulemaking.

Data collected on public lands must be speech not only because it is useful for carrying out agencies’ procedural obligations under the APA, but also because this data is expressly required for substantive federal rulemaking under a variety of other environmental statutes.

b. How the Taylor Grazing Act Requires Agencies to Consider Citizen Submissions of Data During Rulemaking

Congress’s federal permitting scheme to manage grazing on millions of acres of public land in the West under the Taylor Grazing Act of 1934 requires the Bureau to collect data, rely upon it, and review the data members of the public have collected and presented. To fulfill its obligation of assessing the livestock-carrying capacity of a given allotment in accordance with its mandate under the Taylor Act, the Bureau must have data that demonstrates “what kinds of animals grazed [in the area] and for how long . . . how much vegetation has been consumed,” and what is the “effect [or trend] of [that] specified grazing.” Nevertheless, due to insufficient funding and a lack of personnel for monitoring purposes, the Bureau lacks the necessary data to make permitting decisions for nearly half of all its allotments. Even when data has been collected on allotments and monitoring was performed, the Bureau is unable to analyze the majority of this information to assess whether existing permits require changes in livestock numbers. Thus, environmental organizations concerned with the health of the

83. See, e.g., 632 F.3d 472.
rangeland ecosystems must collect data independently and submit it for consideration when the agency engages in rulemaking under the Taylor Act.

c. How the Federal Land Policy and Management Act Contemplates the Submission of Citizen Comments that Rely on Data Collected From Public Lands

In addition to the Taylor Act, the Federal Land Policy and Management Act (the Federal Lands Act) creates the framework for the Bureau’s management of public lands “under principles of multiple use,” which include “recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.” In order to manage public lands according to the multiple use mandate, the Federal Lands Act requires the Bureau to create land use plans, which are subject to public notice and comment. These land use plans—called resource management plans—are required to advance the purpose of protecting:

- the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.

To comply with this purpose during rulemaking, the Bureau must demonstrate that it examined all relevant data in its decisionmaking process. The Data Censorship Statutes would frustrate the Bureau’s ability to examine all relevant data when creating resource management plans by limiting citizens’ ability to collect and submit data due to fear of prosecution. The Ninth Circuit recognized in Western Watersheds Project v. Kraayenbrink that the Federal Lands Act requires the Bureau to afford the opportunity for public participation insofar as it directs the Bureau to “establish procedures, including public hearings where appropriate, to give . . . the public adequate notice and an opportunity to comment upon the formulation of

89. 43 U.S.C. § 1732(a).
92. See 43 C.F.R. § 1610.2(a).
93. 43 U.S.C. § 1701(a)(8).
94. See Utah Shared Access All. v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006); Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994) (reasoning that agencies must examine “the relevant data and articulate[,] a rational connection between the facts found and the decision made” in order to be supported by “substantial evidence”) (citation omitted).
standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.95 For citizens to meaningfully participate in the Bureau’s decisionmaking process under this Act, they will need to collect data on public lands indicative of air, water, soil, and wildlife habitat quality.96 The Data Censorship Statutes obstruct this vital public participation by subjecting citizens to potential civil and criminal liability for collecting data on public lands.

d. How the National Environmental Policy Act Requires Federal Agencies to Disclose and Consider Comments Containing Responsible Scientific Data

Another environmental statute that mandates federal agency reliance on data is the National Environmental Policy Act (NEPA).97 NEPA requires federal agencies to “make decisions that are based on [an] understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.”98 Such decisions must be based on “[a]ccurate scientific analysis” subject to “public scrutiny.”99 The actions of federal agencies that will significantly affect the quality of the human environment must prepare an Environmental Impact Statement (EIS) evaluating the effects of such actions.100

For example, when fulfilling its substantive obligations under NEPA in its management of small-scale timber harvests, the Forest Service must employ various monitoring techniques to assess the environmental impacts of such projects, which include “personal observations, measurements, photo-point, etc. . . ., and the resulting data” for the purposes of ensuring that such projects meet forest plan standards and state water quality standards.101 The case of Colorado Wild v. U.S. Forest Service102 demonstrated that if the Forest Service concludes, based on its field monitoring data, that a timber project will not cause a significant environmental impact but advocacy groups disagree, then those groups will need to collect their own data to present their opposing viewpoints and conclusions to the agency.103

95. W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 499 (9th Cir. 2011) (alteration in original) (quoting 43 U.S.C. § 1739(e) (2012) (enjoining the Bureau’s proposed regulations because it disregarded this statutory mandate)).
97. See 40 C.F.R. § 1500.1(c) (2016).
98. Id.
99. Id. § 1500.1(b).
100. See 42 U.S.C. § 4342; id. § 4344(3); id. § 4332(2)(C); 40 C.F.R. §§ 1501–1508.
102. Id.
103. See id.
Colorado Wild is not unique in demonstrating the important role data collection on public lands plays in conservation advocacy efforts. Multiple cases illustrate that federal agencies, such as the Forest Service, are required to include, consider, and reply to any “responsible opposing view” in their Final EISs pursuant to 40 C.F.R section 1502.9(b) (2016). Although the terms “responsible opposing view” and “responsible scientific opposition” are not defined in the regulations, case law suggests that the disclosure requirement in 40 C.F.R section 1502.9(b) (2016) is intended to obligate the agency “to make available to the public high quality information, including accurate scientific analysis, expert agency comments and public scrutiny, before decisions are made and actions are taken.”

Thus, responsible opposing viewpoints would seem to be those that are supported by high quality data and accurate scientific analysis performed according to commonly accepted methods by experts independent of the agency’s experts.

Only such reasonable and responsible public comments relying on scientific evidence grounded in data are likely to inform agency rulemaking. If citizens are unable to collect data to substantiate their claims, due to the chilling effects of the Data Censorship Statutes, the consequences will be significant. Environmental advocacy efforts will be hamstrung. Independent experts will be unable to provide useful comments rooted in scientific fact and with geographic precision about specific public lands.

The procedural and substantive requirements contained in the APA, the Taylor Act, the Federal Lands Act, and NEPA regarding public participation in agency rulemaking all support the conclusion that data collection, especially on public lands, represents a component of speech protected by the First Amendment. Indeed, environmental advocacy groups must participate in the notice and comment period to alert the agency of their position and claims. Unless this participation is permitted, thereby allowing the agency an opportunity to meaningfully consider the issues raised, advocates will be barred from later challenging the agency action.

104. See, e.g., Ctr. for Biological Diversity v. U.S. Forest Serv., 349 F.3d 1157, 1160, 1167 (9th Cir. 2003) (holding that the Forest Service violated NEPA because its Final Environmental Impact Statement (EIS) concerning the habitat of a sensitive hawk species failed “to disclose responsible scientific opposition” submitted by environmental advocacy groups and other agencies); see also Seattle Audubon Soc’y v. Espy, 998 F.2d 699, 704 (9th Cir. 1993) (finding that the Forest Service must address scientific criticisms opposing the evidence upon which it relied in the management strategy detailed in the Final EIS).

105. Ctr. for Biological Diversity, 349 F.3d at 1167 (citing 40 C.F.R. § 1500.1(b)).

106. See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 553 (1978) (noting that it is “incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors’ position and contentions”).
2. Why Environmental Advocates Must Be Able to Collect Data to Challenge Agency Decisions

Data collection is necessary not just for public participation in agency decisionmaking but also for successfully accessing and using the judicial system to challenge agency decisions as arbitrary and capricious.\(^\text{107}\) Under the APA, federal agencies are required to consider data in order to make reasoned environmental decisions and substantiate their conclusions for judicial review.\(^\text{108}\) The APA allows “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute” to seek judicial review of that agency action.\(^\text{109}\) Thus, a plaintiff must (1) “identify some ‘agency action’ that affects him in the specified fashion” and (2) “show that he has ‘suffered legal wrong’ because of the challenged agency action, or is ‘adversely affected or aggrieved’ by that action ‘within the meaning of a relevant statute.’”\(^\text{110}\)

The first element—an agency action—is defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”\(^\text{111}\) The second element—a legal wrong—requires the plaintiff to establish that he has been aggrieved or suffered an adverse effect that “falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for [the] complaint.”\(^\text{112}\) Thus, plaintiffs must demonstrate that an agency rule or agency failure to act causes them to suffer harm that the agency’s enabling legislation is designed to protect against.

For example, the APA allows citizens to sue federal agencies acting in violation of the statutory procedures contained in NEPA or the Federal Lands Act in order to set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”\(^\text{113}\) Successful demonstration of harm suffered as a result of agency action (or inaction) under NEPA or the Federal Lands Act will often require collecting the type of information that the Data Censorship Statutes target: legal descriptions and geographic coordinates of where the harm occurred and precise scientific information regarding pollution

\(^{108}\) See id.
\(^{109}\) Id. § 702.
\(^{111}\) 5 U.S.C. § 551(13).
\(^{112}\) Lujan, 497 U.S. at 883 (quoting Clarke v. Sec. Indus. Ass’n, 479 U.S. 388, 393 (1987)).
levels, soil biomass, species population levels, etc. to prove the type and extent of the harm suffered.\(^{114}\)

Similarly, an environmental advocacy organization claiming the Bureau’s permitting rules are in violation of the Federal Lands Act will need to collect data to demonstrate to a court’s satisfaction that the Bureau has impermissibly allowed overgrazing and the continued deterioration of natural resources.\(^{115}\) The organization will further need to demonstrate where specifically the overgrazing is occurring and what harm is ensuing as a result of the agency’s failure to properly manage the public resources entrusted to it.

The ability to collect data on public lands is also crucial to advocacy efforts seeking to enjoin land management plans that violate federal and state water quality standards. Water scholar Richard H. Baun notes: “Application of the Clean Water Act to [Bureau] riparian zone management provides the agency with a legally enforceable duty to programmatically restore those areas.”\(^{116}\) Environmental advocacy groups must be able to collect data on public lands to compel the Bureau to fulfill its duty of mitigating the harm overgrazing has inflicted on water quality in the West. As one scholar has noted: “Citizens and interested groups are likely to develop hard data regarding grazing caused pollution if that data may lead to successful enforcement actions. Even if suits are never filed, citizen work in the field and the potential for judicial intervention may accelerate the [Bureau’s] efforts to rehabilitate riparian zones.”\(^{117}\) The Data Censorship Statutes target this sort of data collection by prohibiting the recording, in any form, of “a legal description or geographical coordinates of the location of the collection.”\(^{118}\) Courts routinely evaluate the inferences drawn from this precise type of data collection when reviewing whether there is a reasoned explanation for agency action.\(^{119}\)

\(^{114}\) See, e.g., Utah Shared Access All. v. Carpenter, 463 F.3d 1125, 1134 (10th Cir. 2006) (evaluating whether the Bureau examined the relevant data and articulated a rational basis for promulgating regulations under the Federal Lands Act).


\(^{117}\) Id. at 78.


\(^{119}\) See, e.g., Wyo. Lodging & Rest. Ass’n v. U.S. Dept’ of Interior, 398 F. Supp. 2d 1197, 1214, 1220 (D. Wyo. 2005) (upholding the National Park Service’s decision as supported by substantial evidence in part provided by the entry data collected at Yellowstone Park that permitting entry to over “720 snowmobiles [each day] would cause significant adverse effects on the environment”); see also, e.g., Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1241–1242 (10th Cir. 1979) (holding that the EPA did not act arbitrarily or capriciously in setting copper and cyanide effluent limitations for certain froth flotation mills based on the information contained in its database and
If advocacy organizations such as petitioners are unable to obtain their own data to present to a reviewing court, they will face an uphill battle in refuting an agency’s assertion on judicial review that its action was reasonable. Without the ability to collect data referencing the state of natural resources on specific sections of public lands, advocates will be unable to dispute an agency’s location and method of data collection, verify an agency’s results, or present a different interpretation of the data and the role it should play in policy decisions. Notably, parties seeking to challenge agency action and decisionmaking must rely on their own data collection if they are to meet their high burden of proof. Agency action is presumptively valid and appellants seeking to challenge that action bear the burden of proof.\footnote{See Colo. Health Care Ass’n v. Colo. Dep’t of Soc. Servs., 842 F.2d 1158, 1164 (10th Cir. 1988) (“A presumption of validity attaches to the agency action and the burden of proof rests with the appellants who challenge such action.”).}

First Amendment scholars have articulated the overarching principle that protecting the acts that are necessary precursors to creating speech is required to adequately safeguard that speech.\footnote{See, e.g., Jane Bambauer, Is Data Speech?, 66 STAN. L. REV. 57 (2014) (asserting that data should receive speech protection any time it is regulated as information); Ashutosh Bhagwat, Producing Speech, 56 WM. & MARY L. REV. 1029, 1035 (2015) (arguing that conduct associated with producing speech should be entitled to First Amendment protection).} Advocacy organizations’ comments submitted during agency rulemaking are speech. Their words in complaints later challenging agency action are speech. Their notes taken to reflect the location of where they collected their data are speech. So too must be the acts that they performed to collect the data necessary for developing evidence and substantiating their claims, without which they could not prove their case. Here, environmental advocacy organizations seeking to collect data on public lands for the purposes of participating in agency action, opposing agency action, or seeking judicial review of agency action should be entitled to the highest level of constitutional protection under the First Amendment.

B. Why the Unique History of Land Use and Regulation in the West Further Supports a Holding that Data Collection on Public Lands Is Speech

Although the story of land use management in the West may be a familiar plot “too well plowed to require extensive retelling,” a brief tour through the history of the rangelands demonstrates why data collection performed on public lands
should be entitled to First Amendment free speech protection.\footnote{122} The history of federal management of public lands in the Western states, involving the checkerboarding of private and public properties, provides unique support for protecting data collection on public lands as free speech. Data collection is both more necessary and more likely to be political speech where private and public lands intersect because there is a heightened public interest in close monitoring, given the shared types of natural resources involved.

1. The Danger Ahead: Difficulty in Distinguishing Public Lands From Private Lands in the West Could Create a Serious Risk the Data Censorship Statutes Will Chill Speech

Land use in the West is a complicated tale of various entangled federal, state, and private property interests. Because vast amounts of federal land dominate the western landscape, public participation during the notice and comment period of federal agency rulemaking is even more important when those rules directly bear on public land use. The federal government, via the Bureau of Land Management, oversees about 247 million acres of federally owned public land in the eleven Western states.\footnote{123} In addition, the eleven state governments oversee the use of seventy-two million acres of public land, which the federal government granted to them.\footnote{124} Both the federal and the state governments allow ranchers to graze on public lands. The resulting federal, state, and private ownership patterns are difficult to discern and it is common “to find a rancher holding a state lease, a federal permit, and deeded base lands.”\footnote{125}

Moreover, the federal government deeded over ninety million acres of public land to private railroad companies.\footnote{126} Congress granted alternating broad strips of land on either side of a 400-foot right of way, pursuant to the Union Pacific Act of 1862.\footnote{127} The land grants resulted in a massive checkerboarded landscape, with millions of acres of public lands wholly surrounding private lands and vice versa.\footnote{128} The ensuing combination of state, federal, and private ownership interests converged into a pattern that is not really a pattern at

125. Id. at 8.
126. Id. at 12.
127. See Union Pacific Act of 1862, 37 Cong. Ch. 120, 12 Stat. 489.
all, with “state and private lands . . . randomly interspersed among the federal tracts and checkerboarded with railroad sections.”\textsuperscript{129} As a result, numerous experts have recognized that the West is a patchwork of private and public lands without clear lines of demarcation with “land ownership maps . . . resemble[ing] general cartographic chaos.”\textsuperscript{130} As a practical matter, such a patchwork makes it difficult to discern boundary lines for the purposes of environmental advocates seeking to collect data to assess how well state and federal agencies are managing the public lands in accordance with statutory mandates. The Data Censorship Statutes will have an especially chilling effect here where boundary lines are difficult to discern and citizens may inadvertently cross private lands in seeking to access public lands for data collection purposes.

2. How Land Use History in the West Underscores the Need for Data Collection on Public Lands for Continued Management of Natural Resources

History has demonstrated that collecting data that is indicative of the health of the rangeland ecosystems is an essential piece of environmental advocacy. Before 1934, the public rangelands were unregulated and ranchers grazed their livestock without restrictions.\textsuperscript{131} This lack of regulation eventually resulted in the overgrazing of the western rangelands, deteriorating soil conditions, and a compromising of the entire prairie ecosystem. The catastrophic storms of the Dust Bowl galvanized Congress to pass the Taylor Grazing Act of 1934, which authorized the Secretary of the Interior to oversee the rangelands and vested management authority with the Bureau to halt the degradation of public lands.\textsuperscript{132} The lands that the Bureau oversees are divided into grazing districts, further divided into planning areas, and then finally divided into grazing allotments for which it issues grazing permits or licenses. Thus, the Taylor Act eliminated what was previously a public license to graze\textsuperscript{133} and replaced the public license with a grazing permitting scheme.\textsuperscript{134}

This permitting scheme was intended to prevent overgrazing and promote physical improvements on the range by allowing for the implementation of regulations that would ensure carrying capacity did not exceed forage

\textsuperscript{129} \textit{Id.} at 21.
\textsuperscript{130} George Cameron Coggins, Commentary, \textit{Overcoming the Unfortunate Legacies of Western Public Land Law}, 29 LAND & WATER L. REV. 381, 382 (1994).
\textsuperscript{133} See Buford v. Houtz, 133 U.S. 320, 326 (1890).
\textsuperscript{134} See 43 U.S.C. § 315(a) (2012).
allocations. However, the Taylor Act has not achieved its intended purpose because most districts issued permits for “more livestock than the range could [adequately] support.”

Despite the need for more data collection and better monitoring of public lands, the Data Censorship Statutes will operate to chill environmental advocates and independent experts seeking to safeguard the natural resources on public lands in the West if they can be prosecuted for unknowingly traversing the private-public checkerboard when collecting data on specific public land allotments. Such a chilling effect will impact efforts to monitor air, water, and soil quality as well as efforts to assess the wellbeing of various threatened and endangered species on the range.

The significance of data collection throughout the history of land use regulation in the West demonstrates that it should be afforded the highest level of constitutional protection under the First Amendment. The long history of substantial consensus about the need for land use regulation in the West provides further justification for holding that data collection on public lands is protected free speech.

CONCLUSION

The right to speak would be largely ineffective if it did not also include the right to engage in activity designed to collect facts necessary to support the veracity of that speech. Data collection is an activity with the capacity to uniquely shape public laws and policies. Interpreting the First Amendment as not protecting the ability of advocates to identify instances of public harm cannot be the rule of law. Accordingly, following oral arguments this May, the Tenth Circuit should reverse the district court by holding that data collected on public lands is constitutionally protected speech under the First Amendment. The future health of our natural resources and the very nature of our democratic process depend on it.

135. See id. § 315(c).