

**IN THE SUPREME COURT OF  
THE STATE OF MONTANA**

**Supreme Court Cause No. DA 24-0328**

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BRYAN LATKANICH,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
Appellee, and EQT CHAP LLC,

Appellees/Appellant.

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**BRIEF OF THE APPELLANT, EQT CHAP LLC**

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On Appeal from the Montana Eighteenth Judicial Court,  
Gallatin County, The Honorable Rienne H. McElyea Presiding

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Appellant EQT CHAP LLC (“EQT CHAP”) submits the following Brief in its appeal of the district court’s order granting Environmental Health Sciences’ Motion to Quash Subpoena.

### **STATEMENT OF ISSUES**

Did the district court err when it determined that Montana, not Pennsylvania, law applies to a subpoena originating in a Pennsylvania action that requests documents obtained by a Pennsylvania reporter for news articles related to Pennsylvania?

### **STATEMENT OF THE CASE**

On September 15, 2023, EQT CHAP filed a praecipe in the Eighteenth Judicial District Court to domesticate a subpoena (the “Subpoena”) from the Commonwealth of Pennsylvania Environmental Hearing Board (“Pennsylvania EHB”) directed to Environmental Health News.<sup>1</sup> The Subpoena requests documents in an appeal pending before the Pennsylvania EHB, in which Bryan Latkanich is challenging an April 20, 2023 determination by the Commonwealth of Pennsylvania Department of Environmental Protection that Mr. Latkanich’s water supply had not been adversely affected by oil and gas operations. (Feb. 28, 2024 Order re Mot. to Quash Subpoena (“Order”) at 2.)

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<sup>1</sup> Environmental Health News is a “reporting arm of EHS.” (EHS’ Reply Memo in Support of its Mot. to Quash Subpoena, Ex. A (Second Declaration of Douglas Fischer), ¶ 2.)

Environmental Health Sciences (“EHS”) moved to quash the Subpoena. It argued that Montana’s Media Confidentiality Act § 26-1-902 (“”) would make privileged those documents EQT CHAP sought. EQT CHAP opposed the Motion to Quash arguing that Pennsylvania law applies. Pennsylvania’s Shield Law protects a reporter from compelled disclosure of a confidential source but allows for discovery of information that does not reveal the identity of a confidential media-informant. (Order at 3.) *Com. v. Bowden*, 838 A.2d 740, 752 (Pa. 2003). On February 28, 2024, the court issued its Order in which the court granted EHS’s Motion to Quash and held that Montana law—not Pennsylvania’s Shield Law—applied. (Order at 10.)

This Court issued its opinion in *Goguen v. NYP Holdings, Inc.*, on March 12, 2024. There, it decided whether New York’s or Montana’s law governs the fair report privilege. *Goguen v. NYP Holdings, Inc.*, 2024 MT 47, 415 Mont. 356, 544 P.3d 868. *Goguen* is the first case in which this Court decided a choice of law issue related to a privilege. Following that decision, on March 27, 2024, EQT CHAP filed a Motion for Relief from the February 28, 2024 Order pursuant to Rule 60(b)(6) of the Montana Rules of Civil Procedure. On April 26, 2024, the district court denied EQT CHAP’s Motion for Relief pursuant to Rule 60(b)(6). (April 26, 2024 Order on Mot. for Relief from Order Pursuant to R. 60(b)(6) (“April Order”).)

## STATEMENT OF FACTS

The Eighteenth Judicial District Court of Gallatin County domesticated a Pennsylvania Subpoena that was served upon EHS. (Dec. of Douglas Fischer, Ex. A (Subpoena).) The Subpoena originates in Pennsylvania. It was issued in an appeal pending before the Pennsylvania EHB in which Bryan Latkanich, a resident of Pennsylvania, is challenging the Commonwealth of Pennsylvania Department of Environmental Protection’s determination that his water supply had not been adversely affected by oil and gas operations. (*Id.*; EQT CHAP Br. in Opp. to Mot. to Quash Subpoena at 1–2.) In his appeal, Mr. Latkanich extensively refers to and quotes from the results of sampling conducted in July and August 2019 by Pennsylvania reporter, Kristina Marusic, as part of a pilot study titled “Human exposure to chemicals associated with unconventional oil and gas operations in Pennsylvania.” (EQT CHAP Br. in Opp. to Mot. to Quash Subpoena, Ex. 1 (Amended Notice of Appeal), ¶¶ 72–84; Ex. 2 (September 1, 2020 letter from Kristina Marusic to Bryan Latkanich) at 1.) For this study, Ms. Marusic, a Pennsylvania reporter, “collected air, water, and urine samples from five Southwestern Pennsylvania households, including from Latkanich.” (*Id.*)

The Subpoena requests documents related to Ms. Marusic’s reporting on oil and gas operations in western Pennsylvania, including a multi-part series called “Fractured: The body burden of living near fracking” (hereafter “*Fractured*”),

which reported on oil and gas drilling operations in western Pennsylvania. (Dec. of Douglas Fischer, ¶¶ 7-8.) *Fractured* featured, in part, Bryan Latkanich, a resident of Pennsylvania and his home in Pennsylvania.<sup>2</sup> (EHS Mem. in Supp. of Mot. to Quash Subpoena at 3.)

Ms. Marusic subsequently published several articles related to purported health effects of oil and gas operations on residents in Pennsylvania including the Latkaniches: *Pennsylvanians living near fracking wells face higher risk for childhood cancer, low birth weights and asthma attacks* (August 17, 2023); *See where toxic PFAS have been used in Pennsylvania fracking wells* (October 14, 2022); *PFAS: The latest toxic concern for those near fracking* (August 4, 2022); *One year after our “Fractured” investigation on fracking: Lots of talk, no action* (May 31, 2022).<sup>3</sup> (EQT CHAP Br. in Opp. to Mot. to Quash Subpoena at 2.)

EHS is headquartered in Bozeman, Montana and is the publisher of Environmental Health News. (Order at 3.) At the time that “*Fractured*” was researched and published, EHS operated as an unincorporated organization through a joint plan of work under Virginia Organizing, a non-profit organization based in Charlottesville, Virginia, that provides administrative support for organizations.

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<sup>2</sup> A copy of *Fractured: How EHN tested the air, water, and urine of families in Pennsylvania fracking country for harmful chemicals* is available at <https://www.ehn.org/fractured-series-fracking-data-2650699245.html> (last visited Nov. 11, 2023).

<sup>3</sup> Copies of these articles are included as Exhibits 3A through 3D, respectively, to EQT CHAP’s Br. in Opp. to Mot. to Quash Subpoena.

(EHS Reply Memo in Supp. of Mot. to Quash Subpoena, Ex. A (Second Declaration of Douglas Fischer), ¶ 4.) EHS’s activities in Montana consist of a small office where its Executive Director, Douglas Fischer, and EHS’s office manager work.<sup>4</sup> (*Id.* ¶ 7.) EHS’s other employees do not appear to be located in Montana. (*See Id.* ¶¶ 7, 8.) Furthermore, none of EHS’s five-member board of directors appear to be based in Montana. (EQT CHAP Br. in Opp. to Mot. to Quash Subpoena at 3.) Peter Myers, EHS’s founder, board chair, and chief scientist serves as adjunct faculty to Carnegie Mellon University in Pittsburgh, Pennsylvania and previously worked in Charlottesville, Virginia.<sup>5</sup> Julie Jones resides in Charlottesville, Virginia.<sup>6</sup> Martin Kearns works and resides in Washington, D.C.<sup>7</sup> Derrick Jackson does not appear to have any ties to Montana.<sup>8</sup> Brian Johns is the Executive Director of Virginia Organizing in Charlottesville, Virginia.<sup>9</sup> Based on available information, aside from Douglas Fischer, none of

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<sup>4</sup> The office building located at 614 W. Lamme St, Bozeman, MT 597115 is pictured and described in [614 W Lamme St, Bozeman, MT 59715 - KESTREL AERIAL | LoopNet](#).

<sup>5</sup> *See* EQT CHAP Br. in Opp. to Motion to Quash Subpoena at 3–4 (citing <https://www.cmu.edu/chemistry/people/faculty/affiliated/index.html> (last visited Nov. 14, 2023) and <https://omega.ngo/presenter/presenter/pete-myers-ph-d/> (last visited Nov. 14, 2023)).

<sup>6</sup> *See* EQT CHAP Br. in Opp. to Motion to Quash Subpoena at 3–4 (citing <https://www.linkedin.com/in/julie-jones-a5633312/> (last visited Nov. 14, 2023)).

<sup>7</sup> *See* EQT CHAP Br. in Opp. to Motion to Quash Subpoena at 3–4 (citing <https://www.linkedin.com/in/martykearns/> (last visited Nov. 14, 2023)).

<sup>8</sup> *See* EQT CHAP Br. in Opp. to Motion to Quash Subpoena at 3–4 (citing <https://www.ucsusa.org/about/people/derrick-z-jackson> (last visited Nov. 14, 2023)).

<sup>9</sup> *See* EQT CHAP Br. in Opp. to Motion to Quash Subpoena at 3–4 (citing <https://virginia-organizing.org/brian-johns/> (last visited Nov. 14, 2023)).

the other members of EHS’s Editorial Board reside or work in Montana.<sup>10</sup> Bryan Latkanich and his property—the subjects of the reporting done by a Pennsylvania-based reporter—are located in Pennsylvania. (EQT CHAP Br. in Opp. to Mot. to Quash Subpoena, Ex. 1 (Amended Notice of Appeal), ¶¶ 3, 72–84; EHS Reply Memo in Supp. of Mot. to Quash Subpoena, Ex. A (Second Declaration of Douglas Fischer), ¶ 8.) Accordingly, the district court’s factual findings are correctly summarized as follows: (i) “Ms. Marusic [the reporter] is based out of Pennsylvania”; (ii) “[h]er work at issue in this matter involved communications she had in Pennsylvania”; (iii) “Ms. Marusic’s research and work product occurred in Pennsylvania”; and (iv) “[t]he communications being subpoenaed occurred in Pennsylvania.” (Order at 9.) Accordingly, “Montana is far removed from the underlying substantive contest” (Order at 5) and the “most significant relationship to the communication supports a conclusion that Pennsylvania law must apply.” (Order at 9.)

### **STATEMENT OF THE STANDARD OF REVIEW**

The district court’s determination as to which state’s substantive law governs the subpoena is a question of law that is subject to a de novo review.

*Buckles v. BH Flowtest, Inc.*, 2020 MT 291, ¶ 8, 402 Mont. 145, 476 P.3d 422. “A

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<sup>10</sup> See EQT CHAP Br. in Opp. to Motion to Quash Subpoena at 3–4 (citing <http://www.iamangelamarie.com/> (Angela Marie Hutchinson); <https://www.cmu.edu/chemistry/people/faculty/affiliated/index.html> (Pete Myers); <https://www.kayhoe.com/mission-driven-and-nonprofit-organizations/> (Matt Kayhoe)).

district court's factual findings underlying its choice of law determination are reviewed for clear error." *Id.*

### SUMMARY OF ARGUMENT

Under Montana's choice of laws rules, Pennsylvania law governs the Subpoena. The Restatement (Second) Conflicts of Laws § 6(2) factors support applying Pennsylvania law. The district court erred in its analysis of the § 6(2) factors by (i) failing to give weight to the place where the conduct occurred (factors 2, 3, and 6), (ii) deciding a factor in favor of applying Montana law that *Goguen* held to be inapplicable (factor 5), and (iii) deciding a factor in favor of applying Montana law that, under *Goguen*, was to be applied equally (factor 7).

Pennsylvania also has the superior connection with the occurrence. The district court correctly recited the following facts: (i) "Ms. Marusic [the reporter] is based out of Pennsylvania"; (ii) "[h]er work at issue in this matter involved communications she had in Pennsylvania" with Bryan Latkanich, a resident of Pennsylvania; (iii) "Ms. Marusic's research and work product occurred in Pennsylvania"; and (iv) "[t]he communications being subpoenaed occurred in Pennsylvania". (Order at 2, 9.) Because Pennsylvania has the superior connection with the communications at issue, Pennsylvania law must apply.

The district court erred by applying § 139(1), which has not been adopted by this Court. Section 139 is inapplicable because it concerns the admission of

evidence, not a discovery dispute, and Pennsylvania is both the forum (i.e. where the evidence will be admitted) and the state with the most significant relationship. Furthermore, § 139's "unless" clause is inconsistent with Montana's choice of laws rules under which the law of the state with the most significant relationship is determinative. Section 139(1)'s "unless" clause introduces a public policy exception that contradicts well-established jurisprudence of this Court. Accordingly, it was an error for the district court to rely upon § 139(1) and its "unless" clause.

Under Montana's choice of laws rules, Pennsylvania law must apply to the Subpoena.

## ARGUMENT

- I. **The district court erred in determining that Montana law applied to a subpoena originating in a Pennsylvania action that requests documents obtained by a Pennsylvania reporter who was reporting on Pennsylvania issues and communicating with residents of Pennsylvania.**

Montana's choice of laws rules require the court first to determine if an actual conflict exists. *Goguen*, ¶ 21. Here, there is no dispute that an actual conflict exists. The MMCA would allow EHS to withhold documents as privileged that would otherwise be produced pursuant to the Subpoena under Pennsylvania law.

Where a conflict arises regarding which state’s substantive law applies to a particular issue, Montana courts apply the analytical approach from the Restatement (Second) of Conflict of Laws. *Buckles*, ¶ 10. Where there is no statutory directive, the court considers the factors outlined in the Restatement (Second) of Conflicts of Law §6(2) along with the applicable section of the Restatements to determine the state with the most significant relationship or a superior connection with the occurrence. *Buckles*, ¶¶ 11–13; *Goguen*, ¶ 23.

Montana has repeatedly relied upon the most significant relationship test to decide conflicts of law. *See, e.g., Goguen*, ¶¶ 20–39 (applying New York law that had the most significant relationship to the issue); *Buckles*, ¶ 34 (applying Montana law and holding Montana had the most significant relationship to the litigation); *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 23, 298 Mont. 438, 995 P.2d 1002 (applying most significant relationship test for conflict of law issue in tort); *Polzin v. Appleway Equip. Leasing, Inc.*, 2008 MT 300, ¶ 16, 345 Mont. 508, 191 P.3d 476 (applying most significant relationship test for conflict of law issue in contract).

**A. The district court erred in applying the § 6(2) factors.**

The Restatements (Second) of Conflicts of Laws § 6(2) lists the following seven factors to consider:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,

- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971); *Gougen*, ¶ 23.

The first factor (a) “supports the application of a state’s law with the most significant relationship to the issue.” *Id.* ¶ 24. As to this factor, the district court correctly concluded that this factor weighs in favor of applying Pennsylvania law where “Montana is far removed from the underlying substantive contest.” (Order at 5.) EQT CHAP does not dispute the district court’s finding that the fourth factor, (d), regarding justified expectations, weighs equally, especially where that factor is less important when the parties “act without giving thought to the legal consequences of their conduct or to the law that may be applied.” *Gougen*, ¶ 28. There is no indication here that the parties considered what privilege law would apply in a subsequent discovery dispute.<sup>11</sup>

The district court, however, erred in its analysis of the § 6(2) factors by (i) failing to give weight to the place where the conduct occurred (factors 2, 3, and 6), (ii) deciding a factor in favor of applying Montana law that *Gougen* held to be

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<sup>11</sup> One Restatement comment indicates that the justified expectation of the parties as to a privilege is to apply the law of the state with the most significant relationship: “if [the parties] relied on any law at all, they would have relied on the local law of the state of most significant relationship.” Restatement (Second) of Conflict of Laws § 139 cmt. c (emphasis added).

inapplicable (factor 5), and (iii) deciding a factor in favor of applying Montana law that, under *Goguen*, was to be applied equally (factor 7). *Goguen*, ¶¶ 23-32.

The second and third factors, (b) and (c), concern “which state has the most significant interest for the particular issue.” *Id.* ¶ 25. In *Goguen* this Court placed significant weight on where the conduct occurred in deciding the state with the most significant interest and reasoned that “[t]he conduct in question occurred in New York, and New York has a more significant interest in regulating the conduct of its citizens.” *Id.* ¶ 27. Further, “[w]hile conduct in New York may impact residents of other states, *the conduct nonetheless took place in New York.*” *Id.* (emphasis added).

The district court erred by not giving any weight to where the conduct occurred when deciding the second and third factors. Here, the privilege is asserted by a Montana non-profit organization to protect a Pennsylvania reporter whose “research and work product occurred in Pennsylvania.” (Order at 9.) While Montana’s law favors a broad privilege that protects the media, Pennsylvania law favors the “free flow of information to the media, *while preserving access to certain media materials.*” *Bowden*, 838 A.2d at 752 (citing and analyzing cases) (emphasis added). The Pennsylvania Shield Law, 42 Pa.C.S. § 5942(a), protects a

reporter from compelled disclosure of a confidential source.<sup>12</sup> *See Bowden*, 838 A.2d at 751.

Under Pennsylvania’s Shield Law, however, a party may discover unpublished documentary information gathered by the media to the extent that the documentary information does not reveal the identity of a confidential source. *See Bowden*, 838 A.2d at 752 (“In conclusion, we construe *Taylor*, as interpreted by *Hatchard* and *Sprague*, as standing for the proposition that documents may be considered sources for Shield Law purposes, but only where production of such documents, even if redacted, could breach the confidentiality of the identity of a human source and thereby threaten the free flow of information from confidential informants to the media”).

Pennsylvania, therefore, seeks to protect both the interests of the media and parties seeking discovery. *Id.* Because the reporting took place in Pennsylvania by a Pennsylvania reporter on topics concerning Pennsylvania (Order at 2, 9), Pennsylvania has a stronger interest in the determination of how the privilege applies to the Subpoena to protect *both* the “free flow of information to the media”

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<sup>12</sup> “**General rule** —No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.” 42 Pa.C.S. § 5942(a).

and “access to certain media materials.” *Bowden*, 838 A.2d at 752. The second and third factors, therefore, weigh in favor of applying Pennsylvania law.

The fifth factor, (e), concerns “situations where the policies of the interested states are largely the same but where there are nevertheless minor differences between their relevant local rules.” *Goguen*, ¶ 29 (quoting Restatement (Second) § 6(2) cmt. h). In *Goguen*, as here, the differences between the two laws are “not minor” where one law was “absolute” and the other “qualified.” *Id.* Under this Court’s holding in *Goguen*, when a major difference between the laws exists this factor is “inapplicable.” *Id.* It was an error, therefore, for the district court to weigh this factor in favor of applying Montana law. (Order at 8.)

The sixth factor, (f), addresses certainty, predictability, and uniformity of results. While applying less importance to this factor, this Court in *Goguen* looked to where the conduct occurred, stating, “the certainty and predictability factor weigh in favor of applying the privilege consistently to ***the conduct occurring in New York.***” *Gougen*, ¶ 30 (emphasis added).

The district court erred by holding the opposite by reasoning that it was EHS’s Montana headquarters that should control, rather than where the reporting occurred. (Order at 8.) Here, the Subpoena requests documents and information in connection with conduct that occurred in Pennsylvania where “Ms. Marusic is based” and where “[h]er work at issue in this matter involved communications she

had in Pennsylvania” where her “research and work product occurred.” (Order at 9.) Because the communications, sampling, and research occurred in Pennsylvania in connection with a resident of Pennsylvania and his property in Pennsylvania, the sixth factor favors Pennsylvania. *Gougen*, ¶ 30.

Regarding the final factor, (f), either Pennsylvania’s Shield Law or MMCA could be applied to the Subpoena without difficulty. Under *Gougen*, therefore, this factor applies equally. *Id.* ¶ 31. It does not favor Montana law as the district court concluded. (Order at 8.)

Accordingly, “every factor that is of consequence” points towards Pennsylvania and its law having the most significant relationship to the issue of privilege as applied to the Subpoena. *Gougen*. ¶ 32.

**B. The district court erred by not applying Pennsylvania law after determining that Pennsylvania had the superior connection with the occurrence.**

After analyzing the § 6 factors to determine which state has the most significant relationship, a “court must examine the contacts of the respective jurisdictions to ascertain which has a superior connection with the occurrence and thus would have a superior interest in having its policy or law applied.” *Gougen*, ¶ 33; *see also BlueMountain Credit Alternatives Master Fund L.P. v. Regal Entm’t. Grp.*, 465 P.3d 122, 126 (Colo. App. 2020) (holding that substantive legal issues related to a subpoena are decided by applying the law of the state with the most

significant relationship: “Once the state having the most significant relationship is identified, the law of that state is then applied to resolve the issue”).

Under Restatement (Second) of Conflict of Laws § 145, the significant contacts “to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) the place where the injury occurred,
- (b) the place where the conduct causing the injury occurred,
- (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
- (d) the place where the relationship, if any, between the parties is centered.”

Restatement (Second) of Conflict of Laws § 145 (2).

The district court correctly identified the facts that support Pennsylvania having the most significant relationship or superior connection with the occurrence:

Ms. Marusic [the reporter] is based out of Pennsylvania. Her work at issue in this matter involved communications she had in Pennsylvania. Ms. Marusic’s research and work product occurred in Pennsylvania. Ms. Marusic is an employee of EHS [that is] based in Bozeman, Montana. EHS is the owner and publisher of the material. The communications being subpoenaed occurred in Pennsylvania.

(Order at 9.) The district court correctly found that the “most significant relationship to the communication supports a conclusion that Pennsylvania law

must apply.” (*Id.*) Under Montana’s choice of laws rules, therefore, Pennsylvania law must apply to the Subpoena.

**C. The District Court erred by applying § 139 and its exception after concluding that the “most significant relationship to the communication supports a conclusion that Pennsylvania law must apply.”**

Notwithstanding its insightful comments<sup>13</sup> as to issues of privilege, § 139 is inapplicable and cannot be applied to the choice of law analysis at issue here. Notably, *Goguen*—that applied Montana’s choice of law rules to an issue of privilege—does not refer to § 139. Section 139 appears in the “Procedure” chapter of Restatement (Second) of Conflicts of Laws and concerns *the admission* of

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<sup>13</sup> Although § 139’s text is inapplicable to the facts of this dispute, its comments strongly support applying Pennsylvania law:

- Comment c: “There can be little reason why the forum should exclude evidence that is not privileged under the local law of the state which has the most significant relationship with the communication.”
- Comment c: “Admitting such [privileged] evidence cannot defeat the expectations of the parties since, *if they relied on any law at all, they would have relied on the local law of the state of most significant relationship*” (emphasis added).
- Comment e: “The *state which has the most significant relationship* with a communication will usually be the state where the communication took place, which, as used in the rule of this Section, is the state where an oral interchange between persons occurred, where a written statement was received or where an inspection was made of a person or thing” (emphasis added).
- Comment f to the 1988 Revision: “Where the matter is privileged under the local law of the deposition state, a court of that state should not, for this reason alone, apply its rule of privilege to bar the evidence. The court should not apply its rule unless doing so would serve a substantial local interest. *This would be the case when the deposition state is the one which has the most significant relationship with the communication, and also perhaps when this state, although not that of most significant relationship, nevertheless has a substantial relationship with the parties and the communication*” (emphasis added).

privileged communications into evidence. No party here is seeking to admit evidence into a Montana court proceeding.

Furthermore, § 139 states:

[e]vidence that is not privileged under the local law *of the state* which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law *of the forum*, unless the admission of such evidence would be contrary to the strong public policy of *the forum*.

Restatement (Second) Conflicts of Law § 139(1) (emphasis added). As the district court correctly concluded, Pennsylvania is the state “with the most significant relationship” and “Montana is far removed from the underlying substantive contest.” (Order at 5, 9.) Pennsylvania—specifically the Pennsylvania EHB—is also the forum as that term is used in § 139 (i.e., where the action is pending). (*See* Order at 1.) Section 139, therefore, can apply only in instances where the state with the most significant relationship with the communication is not the forum state. It is inapplicable here because Pennsylvania is both the forum—the location of the proceeding in which a party seeks to offer an allegedly privileged communication into evidence—and the state with the most significant relationship.

Accordingly, the District Court erred by relying on § 139.

**D. The district court erred by applying § 139 because its exception is contrary to Montana law.**

Under Montana’s choice of laws rules, the state's law with the most significant relationship is determinative. *Buckles*, ¶ 13 (“The law of the state of the injury will not control if, ‘with respect to a particular issue, [a different] state has a more significant relationship’” (quoting *Phillips*, ¶ 32)); see *Polzin*, ¶ 16 (holding that in the absence of a choice of law provision, Montana applies the law of the state with “the most significant relationship to the transaction and the parties under the principles stated in § 6” (quoting Restatement (Second) Conflict of Laws § 188)).

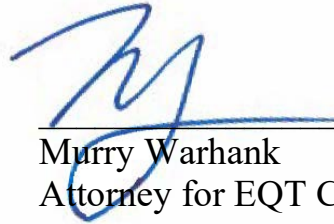
Montana has not adopted Restatement (Second) of Conflict of Laws § 139. Only the first part of § 139(1) is consistent with Montana law—“[e]vidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum . . . .” Restatement (Second) of Conflict of Laws § 139(1). Section 139’s “unless” clause--“unless the admission of such evidence would be contrary to the strong public policy of the forum”--is contrary to well-settled Montana law because it introduces a public policy exception to replace the most significant relationship test that has been repeatedly held to control Montana’s choice of laws rules. See, e.g., *Goguen*, ¶ 33; *Buckles* ¶ 13; *Phillips*, ¶ 32.

Accordingly, the district court erred by relying on § 139 and its “unless” clause.

### **CONCLUSION**

For the reasons stated above, EQT CHAP respectfully requests that this Court reverse the district court’s decision to grant EHS’s Motion to Quash for failure to apply Pennsylvania law to the Subpoena.

Dated this 1<sup>st</sup> day of July 2024.




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Murry Warhank  
Attorney for EQT CHAP LLC

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with proportionately spaced Times New Roman text typeface of 14 points, is double-spaced except for footnotes and for quoted and indented material, and the word count calculated by Microsoft Word for Windows is 3,774 words, excluding certificates of service and compliance.

By:  \_\_\_\_\_  
Murry Warhank

## **CERTIFICATE OF SERVICE**

I, Murry Warhank, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-01-2024:

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Dated: 07-01-2024