

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

Supreme Court Cause No. DA 24-0328

BRYAN LATKANICH,

Appellant,

v.

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

Appellees/Appellant.

**ANSWER BRIEF OF APPELLEE
ENVIRONMENTAL HEALTH SCIENCES**

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

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Appellee, Environmental Health Sciences (“EHS”), by and through its counsel of record, respectfully submits the following answer brief in response to the principal brief of Appellant EQT CHAP LLC (“EQT”).

STATEMENT OF THE ISSUES

Did the district court correctly conclude that an out-of-state subpoena seeking the newsgathering records of a Montana news organization should be quashed under the Montana Media Confidentiality Act, which provides absolute protection for a journalist’s materials gathered in connection with a news report?

If not, should this Court affirm on the alternate ground that the subpoena should be quashed under the other state’s qualified First Amendment privilege?

STATEMENT OF THE CASE

In this appeal, EQT challenges an order (the “Order”) issued by the Eighteenth Judicial District Court on February 28, 2024, quashing a subpoena that EQT domesticated in Montana and served on EHS, a news organization based in Montana. The district court correctly ruled that Montana law controls whether the subpoenaed records are shielded from discovery and rightly concluded that the subpoena should be quashed under the Montana Media Confidentiality Act, § 26-1-902, MCA. In making that decision, the district court followed this Court’s precedent in *Buckles v. BH Flowtest, Inc.*, 2020 MT 291, ¶ 8, 402 Mont. 145, 476 P.3d 422, and analyzed the factors set forth in Sections 6(2) and 139 of the

Restatement (Second) of Conflict of Laws (the “Restatement”). Order at 3-9. The district court recognized “Montana’s strong public policy in favor of media confidentiality,” and determined that the Section 6(2) factors “favor[] applying Montana law,” and that, under Section 139, allowing discovery of EHS’s newsgathering material “would be contrary to the strong public policy” of Montana, which “favor[ed] applying Montana law.” *Id.* at 7-9. Subsequently, EQT moved for reconsideration after this Court decided *Goguen v. NYP Holdings, Inc.*, 2024 MT 47, 415 Mont. 356, 544 P.3d 868. The district court denied that motion on April 26, 2024, explaining that “[t]he *Goguen* decision . . . does not reflect a change in the law,” as “[t]he Supreme Court’s approach and analysis supports the approach” taken by the district court. Reconsideration Order at 2 (April 26, 2024). EQT filed a notice of appeal from the Order on May 23, 2024, and filed its principal brief on July 1, 2024. EHS now files this answer brief.

STATEMENT OF THE FACTS

Headquartered in Bozeman, Montana, EHS is a 501(c)(3) non-profit corporation dedicated to driving current science into public policy. *See* Decl. of Douglas Fischer (“Fischer Decl.”) ¶ 1. Since 2003, EHS has reported on environmental topics through its journalism arm *Environmental Health News*. *Id.* ¶ 2. EHS has ten full and part-time employees who conduct *Environmental Health*

News' reporting work, including three editors, two reporters, and a three-person news curation team. *Id.* ¶ 4.

Through *Environmental Health News*, EHS publishes several news websites, more than a dozen weekly and daily newsletters, and several social media sites, as well as operates a YouTube channel. *Id.* ¶ 3. *Environmental Health News* reaches nearly 700,000 users annually and serves up more than 10 million page views a year. *Id.* It has approximately 100,000 followers across social media and 15,000 direct subscribers of its newsletters. *Id.*

Over the past five years, *Environmental Health News* has produced between 150 to 300 news reports and opinion pieces annually covering a wide range of environmental topics. *Id.* ¶ 5. *Environmental Health News* journalists have won several prestigious awards from groups such as the Society of Environmental Journalists, the Association of Health Care Journalists, and the James Aronson Awards for Social Justice Reporting, among many others. *Id.* ¶ 6.

On March 1, 2021, EHS published a report through *Environmental Health News* that was titled “Fractured: The body burden of living near fracking,” and subtitled “EHN.org scientific investigation finds western Pennsylvania families near fracking are exposed to harmful chemicals, and regulations fail to protect communities’ mental, physical, and social health.” *See* <https://www.ehn.org/fractured-series-on-fracking-pollution-2650624600.html>. This report was a multi-

part series on the investigation of fracking chemicals and their impact on air, water, and public health. *Id.* Part Three of this series covered Bryan Latkanich’s experience with fracking activity on his land in Pennsylvania. *See* <https://www.ehn.org/fractured-fracking-regulation-neglect-2650594611.html>. The series was written by Kristina Marusic, who is a reporter for *Environmental Health News* and an employee of EHS. *See* 2d Decl. of Douglas Fischer (“2d Fischer Decl.”) ¶ 8.

As part of its reporting for the “Fractured” series, EHS tested air and water at the homes of several families living near oil and gas drilling operations in Western Pennsylvania, including the Latkanich family. *See* Fischer Decl. ¶¶ 8-9. EHS also tested the urine of those family members. *Id.* ¶ 8. As reported in the series, in connection with their newsgathering, EHS journalists communicated with many people, including members of the Latkanich family, university professors and researchers, scientists, educators, and government officials. *Id.* ¶ 9.

In April of 2022, more than a year after *Environmental Health News* published the “Fracking” series, Mr. Latkanich filed a complaint with the Commonwealth of Pennsylvania’s Department of Environmental Protection requesting an investigation of his water supply. He was concerned that his water well and soil were contaminated by the oil extraction process. On April 20, 2023, Pennsylvania’s Department of Environmental Protection issued a determination

letter to Mr. Latkanich advising him that it could not conclude that his water supply had been adversely affected by the nearby oil and gas operation. Order at 2. Mr. Latkanich appealed the Department's determination to the Pennsylvania Environmental Hearing Board. *Id.* EQT, which is a successor in interest to the lease permitting fracking on Mr. Latkanich's land, is a party to the administrative proceeding. *Id.*

In connection with that proceeding, EQT obtained a subpoena for documents directed to *Environmental Health News*. *Id.* The subpoena was issued and lodged with the Clerk of Court of the Montana Eighteenth Judicial District Court. Fischer Decl. Ex. A (copy of subpoena) at 1. The subpoena includes 15 broad requests for documents that seek all of the records relating to and underlying the "Fractured" series and *Environmental Health News*' 2021 report covering Mr. Latkanich's experience with the fracking operation on and under his land. *Id.* at 12-13. For example, the subpoena seeks, among other things:

- "all documents related to the study" that "was the subject of the four part series 'Fractured'";
- "all documents related to any news report, article, documentary, or broadcast involving the Latkanich Property or its residents";
- "all documents related to the Property" and members of the Latkanich family, including communications with the family; and

- “all documents referenced in part three of the four-part Fractured series.”

Id. The subpoena also seeks all documents related to the “collection” and “analysis” of information and data gathered and obtained for, and reported in, the “Fractured” series. *Id.*

EHS, the corporate entity that publishes *Environmental Health News*, subsequently moved the district court to quash that subpoena. Order at 1. The district court (McElyea, J.) granted EHS’s motion to quash pursuant to the Montana Media Confidentiality Act and denied EQT’s subsequent motion to reconsider that ruling.

STANDARD OF REVIEW

The district court’s conclusion that Montana law governs the subpoena is reviewed de novo. *Buckles*, ¶ 8. The factual findings underlying that conclusion are reviewed for clear error. *Id.*

SUMMARY OF ARGUMENT

The district court correctly concluded that an out-of-state subpoena served on a Montana-based news organization seeking its records in Montana that were obtained in the course of newsgathering by its employee should be quashed under the Montana Media Confidentiality Act. That Act provides absolute protection for a journalist’s materials gathered in connection with a news report. The district court reached that conclusion by correctly recognizing that under Montana’s

choice-of-law principles, as articulated by this Court in *Buckles* and prior decisions, Montana law governs the question of whether the requested records are privileged. Moreover, even if this Court were to conclude that the district court erred and that Pennsylvania law applies, this Court should still affirm on the alternate grounds that Pennsylvania's qualified First Amendment privilege shields the requested records and EQT has not carried its heavy burden to overcome those protections. The ruling below should therefore be affirmed.

ARGUMENT

I. EQT's Subpoena to EHS Seeks Newsgathering Material Protected By A Reporter's Privilege.

EQT acknowledges that the subpoena served on EHS exclusively seeks documents relating to its newsgathering and reporting. *See, e.g.*, EQT Br. at 3-4. The sole issue is which state's law governing the reporter's privilege applies to EQT's subpoena, the law of Montana or Pennsylvania.

In Montana, the Media Confidentiality Act codifies an absolute evidentiary privilege for any person "connected with" the news media. Specifically, the Act provides at § 26-1-902(1), MCA:

Without a person's consent, a person, including any newspaper, magazine, press association, news agency, news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these for the purpose of gathering, writing, editing, or disseminating news, may not be examined as to or may not be required to disclose any information obtained or prepared or the source of that information in any legal

proceeding if the information was gathered, received, or processed in the course of the person's employment or business.

This Court has explained that the Act “protects media representatives from being required to disclose information in a legal proceeding if the information was gathered, received, or processed in the course of the media representative's employment.” *State v. Kolb*, 2009 MT 9, ¶ 12, 349 Mont. 10, 200 P.3d 504 (affirming decision to quash subpoena to the Missoulian newspaper); *see also Sible v. Lee Enters.*, 224 Mont. 163, 169, 729 P.2d 1271, 1274 (1986) (stating that this reporter's “shield” statute protects both a “reporter's sources” and “notes”).

In this case, it is undisputed that, as the publisher of *Environmental Health News*, EHS is a news agency and news service covered by the Act. It also is undisputed that each of the subpoena's requests seeks information and documents that are protected by the Act. Thus, if the Act applies, as the district court concluded, the subpoena must be quashed in its entirety.

In Pennsylvania, journalists are protected by two distinct privileges. *See Commw. v. Bowden*, 576 Pa. 151, 160-183, 838 A.2d 740, 746-60 (2003) (discussing both privileges). The first privilege, codified in the Pennsylvania Shield Law, absolutely protects the identity of a reporter's confidential sources. *See* 42 Pa. C.S. § 5942. EQT discusses only this privilege on appeal, EQT Br. at 11-12, and the district court addressed only it below, Order at 5. That privilege,

however, is irrelevant to this case because EHS did not rely on any confidential sources in reporting the “Fracking” series.

The second privilege recognized in Pennsylvania, which EQT ignores, is the “qualified First Amendment privilege,” *Davis v. Glanton*, 705 A.2d 879, 885 (Pa. Super. Ct. 1997), which follows precedent of the United States Court of Appeals for the Third Circuit, *see, e.g., Bowden*, 838 A.2d at 753 n.10. This privilege protects non-confidential sources, “a reporter’s resource materials,” *United States v. Cuthbertson* (“*Cuthbertson I*”), 630 F.2d 139, 147 (3d Cir. 1980), and all other “unpublished information,” *Davis*, 705 A.2d at 885. Under Pennsylvania law, a litigant can compel the production of that material only if the litigant satisfies a rigorous three-part test:

First, the party “must demonstrate that [it] has made an effort to obtain the information from other sources.”
Second, the party “must demonstrate that the only access to the information sought is through the journalist and [his or] her sources.” Third and finally, the party “must persuade the court that the information sought is crucial to [its] claim.”

Bowden, 838 A.2d at 755 (citations omitted). Any assessment of whether a litigant can overcome the privilege must be made “on a question-by-question basis.”

United States v. Criden, 633 F.2d 346, 359 (3d Cir. 1980); *accord Davis*, 705 A.2d at 884-86 (reviewing document subpoena on a request-by-request basis).

The question presented by EQT’s appeal is whether EHS is protected by Montana’s absolute privilege or Pennsylvania’s qualified privilege. As explained below, the district court correctly ruled that the subpoena should be quashed in accordance with Montana’s Media Confidentiality Act.¹

II. Under Montana Choice-Of-Law Rules, Montana’s Privilege Applies Here And Shields All Of The Subpoenaed Records From Disclosure.

In *Buckles*, this Court reiterated the well-established analysis that courts must undertake when confronted with a question of which state’s law to apply: When the state has not issued a statutory directive, “the Court considers the principles outlined in [Restatement] § 6(2) with the specific section of the Restatement that is applicable to the case.” *Buckles*, ¶ 11 (citing *Talbot*, ¶ 23; *Phillips*, ¶¶ 28-30). Applying this directive, the district court correctly concluded that Section 139 is the specific section of the Restatement that addresses which state’s law governs whether the subpoenaed records are privileged, and that under the principles outlined in Sections 6 and 139, Montana law applies and shields the subpoenaed records from disclosure.

¹ As explained in Section III, Pennsylvania law also would require that the subpoena be quashed in its entirety. *See infra* at 24-29. Thus, to the extent that the outcome under Pennsylvania and Montana law would be the same, the conflict between the two states’ laws could be deemed a false conflict. *See Goguen*, ¶ 21 (“A false conflict exists where application of either state’s laws ‘are substantially the same and would produce the same result.’”) (citation omitted).

A. The district court correctly looked to Section 139, not Section 145.

As an initial matter, “the specific section of the Restatement that is applicable to the case” is Section 139. That section provides the choice-of-law principles for determining which state’s law governs whether information is privileged. It is directly on point because the subpoena seeks newsgathering information that EHS claims is privileged.

EQT nevertheless argues – as it did unsuccessfully below – that this Court should instead look to Section 145, which provides the choice-of-law principles for determining which state’s law governs tort claims. *See* EQT Br. at 15-17. This argument suffers from four principal flaws.

First, by its own terms, Section 145 governs which state’s law applies only to the “rights and liabilities of the parties with respect to an *issue in tort*.” Restatement § 145(1) (emphasis added). The question presented here is not an issue in tort. Rather, it is an issue of privilege. Section 139 is titled “Privileged Communications.” It appears in a sub-chapter of the Restatement that covers “Witnesses and Evidence.” Restatement Chap. 6, Title B. That is precisely what is at issue here.

Second, EQT nevertheless asserts that Section 145 applies because this Court looked to Section 145 in *Goguen* when it “applied Montana’s choice of law rules to an issue of privilege.” EQT Br. at 16. That is technically accurate but

greatly misleading: the “privilege” at issue in *Goguen* was a category of speech that is *privileged from tort liability* (such as statements made in court filings, which are protected from defamation or related claims by the judicial privilege), not an *evidentiary privilege* that renders certain statements undiscoverable and/or inadmissible (such as attorney-client communications). In looking to Section 145, *Goguen* followed the same approach that this Court has instructed courts to follow since adopting the Restatement, that this Court employed in *Buckles*, and that the district court adhered to in ruling on EHS’s Motion to Quash below: this Court considered the factors under Section 6 and the specific section applicable to the issue in that case, Section 145, which is the section on conflicts in tort law. *See Goguen*, ¶¶ 23-39 (citing *Buckles* and *Phillips*).

The Court in *Goguen* looked to Section 145 because it was addressing the first category of privilege – *i.e.*, whether the news report at issue was privileged from tort liability. *Goguen*, ¶ 41 (after analyzing choice-of-law issue, considering “whether the complaint can be dismissed pursuant to New York law because the challenged statements are protected as a matter of law”). This case, however, concerns the second category of privilege – *i.e.*, whether the material sought by EQT’s subpoena was subject to an evidentiary privilege. These are distinct concepts that just happen to share a name.

The word “privilege” can mean, on the one hand, (1) “[a] special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty,” or it can mean, on the other hand, (2) “[a]n evidentiary rule that gives a witness the option to not disclose the fact asked for, even though it might be relevant; the right to prevent disclosure of certain information in court, esp. when the information was originally communicated in a professional or confidential relationship.” *Privilege*, Black’s Law Dictionary (11th ed. 2019). That second definition of “privilege” is the only meaning of the term relevant here.

Because the reporter’s privilege is an evidentiary privilege, it can be invoked in any civil or criminal litigation and far outside the realm of tort law. Indeed, the underlying proceeding in this case is not a tort action between two parties, but an administrative appeal arising from a claim that a state agency failed to conduct an environmental investigation. Choice-of-law questions about an evidentiary privilege could just as easily arise in a dispute over real property, a contract, or an estate. Yet EQT urges this Court to conduct a choice-of-law analysis on the evidentiary reporter’s privilege by relying on a section of the Restatement – Section 145 – that applies *only* to tort law. That simply makes no sense, and EQT does not explain why courts seeking to answer those choice-of-law questions should look to Section 145, which would be inapposite in any of those disputes, as opposed to Section 139, which applies across all of those areas of law and others.

Third, EQT relies on word games in arguing that the district court erred in looking to Section 139 because that section only “concerns *the admission* of evidence.” EQT Br. at 11 (EQT’s emphasis). That argument is simply wrong. Courts often must determine whether communications are privileged in deciding whether they are discoverable in the first instance. Yet by EQT’s telling, courts cannot look to Section 139 to decide whether, for example, an attorney who is subpoenaed must produce potentially privileged client communications in discovery, merely because the court would not be adjudicating whether those communications are *admissible*. EQT cites no authority, and EHS is aware of none, adopting this bizarrely constricted view of Section 139. Quite the contrary, courts can and do look to Section 139 in deciding whether records are discoverable, not just admissible. *See, e.g., Kraft v. Essentia Health*, 602 F. Supp. 3d 1130, 1149 (D.N.D. 2022) (citing Section 139 to decide whether documents must be disclosed in discovery). In fact, the comments to Section 139 make clear that it applies in discovery, as it includes a separate comment on determining which state’s law applies in connection with privileges asserted in depositions. *See* Restatement § 139 cmt. f.

Fourth, EQT plays even more word games in asserting that the use of the word “forum” in Section 139 means that it cannot apply in this case, because EHS is asserting a privilege in a separate forum than the one in which the underlying

action is being litigated. EQT Br. at 17. Again the comments to Section 139 make clear that its principles apply in a situation where, as here, a party to litigation seeks information from a nonparty in discovery “outside the state of trial,” and that the nonparty can successfully assert privilege in a court of that “deposition state.” *See* Restatement § 139 cmt. f & illustration 4.

In sum, the district court correctly looked to the choice-of-law principles set out in Restatement Sections 6 and 139 to determine which state’s law governs whether EHS’s newsgathering records are protected by the reporter’s privilege.

B. The district court correctly concluded that under Sections 6 and 139, Montana law applies and protects EHS’s records.

Consistent with the principles set forth in Section 6 of the Restatement, Section 139 provides that a court faced with a choice-of-privilege analysis should apply the privilege of the state that has the “most significant relationship” with the requested material, “unless the admission of such evidence would be contrary to the strong public policy” of the court’s own jurisdiction. *See* Restatement § 139(1).²

² EQT claims this provision of Section 139 “is contrary” to Montana law, but the only basis for this view is that, in other cases, this Court applied other Restatement sections that do not include the same provision. *See* EQT Br. at 18 (citing *Goguen* (which addressed Sections 6 and 145), *Buckles* (same), and *Phillips v. Gen. Motors Corp.*, 2000 MT 55, ¶ 28, 298 Mont. 438, 446, 995 P.2d 1002, 1008 (same)).

With respect to discovery, Section 139 provides that a court in the forum in which discovery is sought should apply its privilege law if it would “serve a substantial local interest.” *Id.* cmt. f. As the Restatement explains, “this would be the case when” the state in which the subpoena was served “has the most significant relationship with the” material protected by the privilege or “has a substantial relationship with the parties and the” material. *Id.* In addition, when “the privilege belongs to a person who is not a party to the action,” the court should “be more inclined to recognize the privilege and to exclude the evidence than it would be in a situation where the privilege is claimed by a person who is a party to the action.” *Id.* cmt. d.

Here, the factors set out in Restatement Sections 6 and 139 weigh heavily in favor of applying Montana law. Montana has the most significant relationship with the issue – a request for the protection of a Montana-based news agency’s newsgathering material – and requiring disclosure under another state’s law would be contrary to the strong interest in protecting journalists expressed by Montana law.

First, Montana’s Media Confidentiality Act (the “Act”) evinces its strong policy interest in protecting dissemination of news by assuring that a reporter need not respond to or be held in contempt for withholding information in response to a subpoena. It provides an ironclad privilege to those who qualify for the Act’s

protection, giving them absolute immunity from requests to disclose their newsgathering material. The legislative history of the Act makes clear the Legislature’s intent that Montana news entities receive broad protection: the Act was enacted in 1943 (as the “Reporter’s Confidence Act”), and over the ensuing years, each amendment to the Act has only strengthened and expanded the privilege of non-disclosure. *See* En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951; amd. Sec. 1, Ch. 225, L. 1977; R.C.M. 1947, 93-601-2(1), (2); amd. Sec. 2, Ch. 285, L. 1979; amd. Sec. 538, Ch. 56, L. 2009; § 1, Ch. 215, L. 2015.

This statutory provision, which encourages the free flow of information to the public and ensures accurate news reporting, is constitutionally bolstered by “the freedom of speech” guaranteed in Article II, Section 7, of the Montana Constitution. Montana is “committed to the notion that freedom of expression should be as broad and unfettered as possible.” *Sible v. Lee Enters.*, 224 Mont. 163, 170, 729 P.2d 1271, 1275 (1986) (Hunt, J., concurring). As Justice Hunt noted in *Sible*, the Act “was written to encourage a free and dynamic press by protecting journalists and related media personnel from compelled disclosure of sources and confidential information,” and it is the judiciary’s “duty to uphold legislative intent whenever possible.” *Id.* at 171-72. Montana thus, without question, “has a strong interest” in the application of its robust reporter’s privilege. *Buckles*, ¶ 23 (discussing Section 6 factor (a)).

Second, Montana’s policies and interests would be most well served by applying Montana’s law, as it has the most significant relationship with the subpoenaed party and subpoenaed records. Contrary to EQT’s claims, EQT Br. at 5-6, EHS is firmly rooted in Montana. For 10 years, EHS has been headquartered in Bozeman. 2d Fischer Decl. ¶ 5. And, throughout that time, *Environmental Health News* has been published and distributed from Montana. *Id.* ¶ 5.

EQT seeks to downplay those connections to Montana by pointing to EHS’s previous connection to Virginia Organizing, Inc. *See* EQT Br. at 4-5. But the historical connection to Virginia Organizing is irrelevant to this matter. EHS is a Montana-based non-profit organization. Fischer Decl. ¶ 1. Before its formal incorporation, “EHS operated as an unincorporated organization via a joint plan of work under Virginia Organizing,” a non-profit “that handles audit, insurance, bookkeeping, payroll, and other administrative support for more than three dozen organizations around the country.” 2d Fischer Decl. ¶ 4. At the time the newsgathering and reporting for the “Fractured” series was conducted, EHS had no office in Virginia. *Id.* ¶ 5. It was based in Montana, and its publications were disseminated from Montana. *Id.* ¶ 5-6.

Moreover, the “Fractured” series was edited, published, and distributed from Bozeman. *Id.* ¶ 10. All of the records gathered in connection with the “Fractured”

series – that is, all of the subpoenaed records – are held by EHS on its digital storage devices. *Id.* ¶ 9.

Instead of addressing these connections between EHS, the records at issue, and Montana, EQT focuses on journalist Marusic’s connections with Pennsylvania. EQT Br. at 5-6. But what may be an obvious point bears emphasis: EQT served the subpoena on EHS. Marusic is an employee of EHS, and all of her work for the “Fractured” series was performed on behalf of EHS. *See* 2d Fischer Decl. ¶ 8. All of the material and information that Marusic gathered for the “Fractured” series is the property of EHS. *See id.* ¶ 9. And, as EHS’s CEO has explained, “[a]lthough Ms. Marusic lives in the Pittsburgh metropolitan area, her journalism for EHS covers many topics, and her articles appear on all relevant pages of the *Environmental Health News* website.” *Id.* ¶ 8.

By focusing on Marusic for purposes of the choice-of-law analysis, EQT adopts “an approach that can only be characterized as of the ‘have its cake and eat it too’ variety” – it asks the Court to focus on Marusic’s location in Pennsylvania, but seeks EHS’s documents in Montana. *State v. Webb*, 252 Mont. 248, 257, 828 P.2d 1351, 1357 (1992). The Court should reject that approach and instead treat this subpoena as what it actually is: an out-of-state demand made on a Montana news organization for unpublished newsgathering material stored in Montana.

Montana plainly has the most significant relationship to the subpoenaed party and records, and “Montana law evinces a strong policy interest” in mandating absolute protection to newsgathering materials held by Montana publishers. *Buckles*, ¶¶ 25-27. In contrast, Pennsylvania’s constitutionally-derived privilege, while robust, is qualified and thus “not nearly as strong.” *Id.* ¶ 27; *see supra* at 8-9. Accordingly, the “relevant policies . . . and interests” of the states “weigh[] in favor of Montana.” *Buckles*, ¶¶ 24-27 (applying Section 6 factors (b) and (c)). Moreover, providing less stringent protection for EHS – and risking the disclosure of any of its records – would be “contrary to the strong public policy” of Montana. *See* Restatement § 139(1). As in *Buckles*, “[t]he harmonious relationship between Montana and [Pennsylvania] is hardly advanced by denying applicability of Montana law in such cases.” 2020 MT 291, ¶ 23 (discussing Section 6(2)(a)); *see Holmes v. Winter*, 22 N.Y.3d 300, 307, 3 N.E.3d 694, 698 (2013) (New York court applies New York reporter’s privilege to shield records from Colorado subpoena because of New York’s “long tradition . . . of providing the utmost protection of freedom of the press”).

Third, in *Buckles* this Court explained that “there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved.” *Buckles*, ¶ 29 (quoting Section 6(2) cmt. h). As recognized in both Montana and Pennsylvania, the basic

policy underlying the reporter's privilege is the principle that compelled production of a reporter's newsgathering materials is a significant intrusion into their reporting and can harm the free flow of information to the public. *See, e.g., Davis v. Glanton*, 705 A.2d 879, 886 (Pa. Super. Ct. 1997) (discussing "the chilling effect on First Amendment freedoms that . . . broad disclosure has the potential to cause"). Montana's shield law, which provides *absolute* protection for newsgathering materials, achieves that policy more effectively than Pennsylvania's *qualified* privilege.

Fourth, this Court explained in *Buckles* that "[p]redictability and uniformity of result are of particular importance in areas where the parties are likely to give advance thought to the legal consequences of their transactions." *Buckles*, ¶ 30 (discussing Section 6(2)(f) & (g)). Here, EHS operates and publishes *Environmental Health News* from its headquarters in Montana. Fischer Decl. ¶¶ 1-3; 2d Fischer Decl. ¶¶ 1, 5, 6. Its journalists "work remotely from more than ten different states, plus two other countries." *Id.* ¶ 7. Ensuring that one state's law uniformly applies to all of EHS's newsgathering would provide it and its journalists with certainty and predictability as they undertake their reporting. In contrast, subjecting them to a dozen or more potential states' laws would undermine the principles set forth in the Restatement, as every subpoena to an EHS journalist would involve a complex analysis of state interests and contacts, leaving

EHS and its employees unable to assess what state’s law governs the information they collect in their work. *See* Order at 8. Just as in *Buckles*, therefore, applying the absolute privilege afforded by the Act would “promote[] the important values of legal certainty, predictability, uniformity of result, and ease in determining the applicable law.” *Buckles*, ¶ 30 (recognizing the importance of this principle for “Montana companies who have contracted with Montana individuals to perform work that is supervised from Montana”). In addition, a Montana-based news organization like EHS has a “justified expectation” that Montana law would apply to, and protect it from, requests for its newsgathering materials, tipping that factor in favor of applying Montana law, too. *See* Restatement § 6(2)(d).

In sum, the Section 6 factors – as this Court interpreted and explicated them in *Buckles* – and the principles set forth in Section 139 squarely support application of Montana’s privilege in this matter.³ Because it would offend Montana’s long-

³ EQT cites a decision from an intermediate appellate court in Colorado to support its argument that Pennsylvania law should apply here. *See* EQT Br. at 14 (citing *BlueMountain Credit Alternatives Master Fund L.P. v. Regal Entm’t Grp.*, 2020 COA 67, 465 P.3d 122). But, that case did not involve a privilege and has no bearing on the question presented here. In the case, the Colorado court considered whether to enforce a subpoena to the founder of a company that was the controlling stockholder of a Delaware corporation. The founder, who lived in Colorado, was subpoenaed in connection with an appraisal proceeding involving the Delaware corporation in Delaware. The founder objected because he claimed his testimony was not relevant or necessary to that proceeding. The court held that Delaware, not Colorado, had the most significant relationship with that question because the corporation was “incorporated in Delaware” and the testimony related to appraisal proceedings in Delaware. *BlueMountain Credit*, 465 P.3d at 126-127.

standing and strong public policy to force a Montana news organization to turn over its newsgathering material, the Court should apply Montana law and conclude that the subpoenaed records are privileged under the Act's absolute protections.

C. *Goguen* further supports quashing EQT's subpoena.

To the extent that this Court's opinion in *Goguen* is relevant to the question of which state's privilege law applies, it supports the district court's decision to quash EQT's subpoena. Indeed, the two decisions mirror each other, stressing the importance of applying a state's policy to protect media entities based in their states.

In the decision below, the district court recognized that (1) Montana's Media Confidentiality Act "evinces a strong policy interest in reporting and dissemination of news by Montana news organizations is done with the benefit of confidentiality"; (2) applying Montana's law on the reporter's privilege to a Montana news organization "would provide it and its journalists with certainty and predictability as they undertake their reporting"; and (3) applying Montana's more powerful reporter's privilege advances the policy interest that both Montana and Pennsylvania share, albeit to different degrees, in ensuring that news entities "receive broad protection" in the important work that they do to inform the public. *See generally* Order; *see also id.* at 9 ("Montana has strong public policy in favor of the privilege"). Likewise, in *Goguen*, this Court recognized that (1) "the fair

report privilege protects the speaker” and “the application of New York’s privilege would respect New York’s significant policy interests and substantive law”; (2) “[a]pplying New York law” on the fair report privilege “results in certainty and predictability for publishers” based in New York; and (3) applying New York’s more powerful fair report privilege advances the policy interest that both New York and Montana share, albeit to different degrees, in “protect[ing] the media while they gather information needed for the public to exercise effective oversight of the government.” *Goguen*, ¶¶ 24, 26-30. The principles that led the district court to apply Montana law and quash EQT’s subpoena are thus the same as those that led this Court to apply New York law and dismiss Goguen’s defamation claim.

At bottom, this is an action to enforce an out-of-state subpoena in Montana seeking a Montana news entity’s newsgathering materials. In such a situation, Montana has a strong interest in protecting documents and information gathered in connection with newsgathering for reporting by a media entity based here. For this reason as well, the district court correctly quashed the subpoena based on Montana’s strong public policy in favor of media confidentiality.

III. Even If Pennsylvania Law Applies, The Subpoena Should Be Quashed.

For all the reasons set forth above, the subpoena should be quashed under Montana law. But, even if Pennsylvania law were to apply, that state’s law also would require that the subpoena be quashed. The district court’s discussion of that

point was limited, given its ruling rested on Montana law, and thus if this Court were to conclude instead that Pennsylvania law applies, it can and should affirm on those alternate grounds. *See, e.g., Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 4, 392 Mont. 1, 3, 420 P.3d 528, 531 (this Court can affirm on alternate grounds).

As discussed above, under Pennsylvania law, EQT can compel the production of EHS's unpublished newsgathering material only if EQT has satisfied the three-part test required to overcome the First Amendment reporter's privilege. *See supra* at 9. Specifically, EQT must demonstrate that (1) it has sought the requested information from other sources, (2) the only access to the information is from EHS, and (3) the information requested from EHS is crucial to EQT's defense. *See id.* This test is applied separately to each of the requests in EQT's subpoena, *see id.*, and any compelled production must be subject to "strict limitations," *Criden*, 633 F.2d at 359. Moreover, as the Pennsylvania Supreme Court has explained, "the privilege assumes greater importance in civil than in criminal cases" and, when discovery is sought from a journalist, "it should be more difficult to compel production from a non-party witness who has no personal interest in the matter" than from a party. *Bowden*, 838 A.2d at 754-55.

If Pennsylvania law were to apply in this case, EQT would not be able to meet its heavy burden to overcome that state's privilege.

First, EQT has not made *any* showing, much less the necessary “strong showing,” that “there is no other source for the information requested.” *Riley v. Chester*, 612 F.2d 708, 716 (3d Cir. 1979). EQT served a subpoena seeking “all documents related to” EHS’s newsgathering and reporting for the “Fractured” series, the Latkanich family and their property, and a wide range of other topics. Fischer Decl. Ex. A. Yet EQT has been silent on what effort it made to seek the requested information from other sources or show that the information is not available from any other source.

Before pursuing EHS, EQT is required to seek the information requested in the subpoena from the many known and readily available alternative sources – for example, the University of Missouri (which analyzed the samples collected by EHS); the statisticians, scientists, epidemiologists, and other sources referenced in the “Fractured” series, including the individuals identified by name in EHS’s supplement to the series, which explained the data collection and analysis, *see* “Fractured: About our data,” <https://www.ehn.org/fractured-series-fracking-data-2650699245.html>; and the members of the Latkanich family mentioned in the subpoena. *See United States v. Cuthbertson* (“*Cuthbertson II*”), 651 F.2d 189, 196 (3d Cir. 1981) (denying motion to compel production of recorded interviews because defendants had “not indicated . . . why [they] may not themselves interview these same interviewees”); *McMenamin v. Tartaglione*, 139 Pa. Commw.

269, 286, 590 A.2d 802, 811 (1991) (quashing subpoena to reporter because litigant had not sought information from numerous alternative sources).

Second, EQT cannot establish that any record it seeks from EHS is crucial to its defense in the administrative proceeding. To meet that standard, EQT must establish that the evidence it seeks goes to the “heart” of the claims in that proceeding. *Riley*, 612 F.2d at 717. Although EQT’s subpoena seeks extensive discovery from EHS, EQT attempted below to justify only its requests for “data and information related to the sampling gathered by the reporter” and “samples and information” that EHS gathered from “Mr. Latkanich and his son.” EQT Opp. to Mot. to Quash (“Opp.”) at 7, 9. If Pennsylvania law applied in this matter, therefore, EQT’s requests for all other categories of information would be quashed out of hand. *See Davis*, 705 A.2d at 886 (quashing subpoena requests to reporters where litigant had “not made a specific showing” that the requested information was crucial).

Even with respect to the subset of information that EQT has actually addressed, EQT still cannot meet its burden. EQT has contended that “Mr. Latkanich extensively refers to and quotes from the results of sampling [Marusic] conducted” in support of his administrative appeal, Opp. at 2, but that conclusory statement is insufficient to overcome the privilege. As EQT itself has acknowledged, the sole issue in the administrative appeal is the Pennsylvania

Department of Environmental Protection’s determination that the Latkanich family’s “water supply had not been adversely affected by oil and gas operations.”

Id. The presence of chemicals found in EHS’s study does not prove that the Latkanich family’s water supply was contaminated by the oil and gas activities on their property. Indeed, the letter from Marusic that EQT attached to its Opposition below explicitly states that “[t]here are several possible reasons for higher-than-average results, including activities that aren’t related to exposures from gas wells.” Opp. Ex. 2 at 2-3.

Similarly, EQT has offered no explanation for how any other “information from Mr. Latkanich and his son” that EHS gathered for its journalism bears on the administrative appeal. Opp. at 7. On that issue, EQT has stated only that a party’s “statements to media” are “unique bits of evidence that are frozen at a particular place and time.” *Id.* at 9 (quoting *Bowden*, 576 Pa. at 177). That truism does nothing to meet EQT’s burden of showing that the Latkanich family’s statements to EHS are crucial to its defense. In fact, they do not bear on the issue before the administrative board at all. *See, e.g., Davis*, 705 A.2d at 885 (quashing subpoena seeking “reporters’ notes in connection with any conversations with the defendants or their representatives” because the plaintiffs had “not made a specific showing that the broad disclosure requested by . . . the subpoena is material, relevant and necessary to their case”).

As Pennsylvania law would recognize, EQT’s sweeping subpoena to EHS is nothing more than an impermissible “fishing expedition.” *Cuthbertson I*, 630 F.2d at 144. Thus, even if Pennsylvania law were to apply (contrary to Montana choice-of-law principles), the subpoena would still need to be quashed in full.

CONCLUSION

For the foregoing reasons, EHS respectfully requests that the Court affirm the district court’s decision quashing EQT’s subpoena.

Respectfully submitted this 29th day of August, 2024.

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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 is 6,724 words, excluding tables and certificates of service and compliance.

/s/ Peter Michael Meloy

CERTIFICATE OF SERVICE

I, Peter Michael Meloy, hereby certify that on the 29th day of August I have served true and accurate copies of the foregoing Answer Brief via the Court's electronic filing system on the following:

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