IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0648

MONTANA ENVIRONMENTAL INFORMATION CENTER and EARTHWORKS,

Appellants/Plaintiffs,

vs.

OFFICE OF THE GOVERNOR,

Appellee/Defendant.

APPELLEE OFFICE OF THE GOVERNOR'S ANSWER BRIEF

On Appeal from the Montana First Judicial District, Lewis and Clark County, Cause No. DDV-25-2022-209, Honorable Christopher D. Abbott.

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STATEMENT OF ISSUES

1. This Court has held that district courts may consider any factor they deem appropriate when exercising their wide discretion whether to award attorney fees in a public records lawsuit. Did the District Court abuse its discretion in considering several relevant factors and denying MEIC's motion for attorney fees based on these factors?
2. Should this Court depart from a long line of cases holding that district courts have wide discretion to determine whether attorney fees are appropriate in a public records lawsuit and instead adopt a rule that presumptively favors attorney fees?
3. Section 27-26-402(1) provides that a prevailing mandamus applicant "may recover" its costs. Did this statutory language require the District Court to award MEIC attorney fees in this case involving a constitutional issue of first impression?

STATEMENT OF FACTS

Montana Environmental Information Center and Earthworks ("MEIC") appeal the District Court's order denying their motion for attorney fees.

A. MEIC submits a broad records request to advance its lawsuit against DEQ.

In November of 2021, MEIC filed an action against the Montana Department of Environmental Quality (DEQ) challenging DEQ's decision to dismiss a "bad actor" enforcement action against Hecla Mining under the Montana Mining and Metal Reclamation Act (MMRA). *See Ksanka Elders Adv. Comm.*, DDV-2021-1126 (1st Jud. Dist. Ct.).

While that lawsuit was pending, MEIC requested records from the Governor's Office related to the *Ksanka Elders* litigation. *See* Gov. App. at 014–20. MEIC's request was very broad. In a letter to the Governor's Office, MEIC described it as follows:

> As you are aware, the Montana Department of Environmental Quality (DEQ) recently filed a motion to dismiss litigation concerning the enforcement of Montana's Bad Actor provision against Hecla and Phillips S. Baker. Accordingly, MEIC & Earthworks request all documents relating to the proposed Montanore and Rock Creek mines and Montana's Bad Actor Provision from January 4th, 2021 to the present. This request includes, but is not limited to:
>
> > All documents, records, information, and materials regarding the Montanore and Rock Creek mines.
> >
> > All documents, records, information, and materials, regarding Montana's Bad Actor provision in the Metal Mine Reclamation Act.
> >
> > All communications which were generated, received, kept, referenced, and/or considered by the Office of the Governor and representatives, employees, shareholders, contractors, and/or other entities

> representing the interests of Hecla Mining and/or Phillips S. Baker. These communications may include (but this request is not limited to) the email domains @hecla-mining.com. This correspondence may also include, but is not limited to, employees of the consulting firm Environomics, Inc.
>
> All communications which were generated, kept, referenced, and/or considered by the Office of the Governor and the Montana Department of Environmental Quality concerning the permitting activities at the Montanore and Rock Creek Mines, and/or enforcement of the Bad Actor Provision."

Gov. App. at 018–19.

For each of these categories, MEIC sought all "memoranda, facsimiles, e-mails, letters, reports, modeling documents, meeting notes, phone conversation notes, text messages, field notes, internal communications, analyses, assessments, computer files, video tapes, and audio tapes." Gov. App. at 019.

MEIC submitted its request during the 2021 holiday season and asked that all documents be provided within 20 days—by December 24, 2021. Gov. App. at 020. And at the time MEIC submitted its request, the Governor's Office was processing an unusually large number of requests. Gov. App. at 014–15 (1st Milanovich Aff., ¶ 8.)

After reviewing the request, the Governor's Office declined to produce the requested documents. Gov. App. at 028–029. Relying on this Court's statement that "the right to know is not a tool for private litigation interests," *Nelson v. City of*

Billings, 2018 MT 36, ¶ 31, 390 Mont. 290, 412 P.3d 1058 (citation omitted), the Governor's Office contended that MEIC could not use a public records request to circumvent discovery in *Ksanka Elders*. *Id.* The Governor's Office came to understand that previous governors had denied documents on this basis. Gov. App. at 031. (2nd Milanovich Aff., ¶ 4). Several of the documents were also privileged. Gov. App. at 028–029.

B. The parties litigate whether there is a pending litigation exception to the right to know. The District Court denies MEIC attorney fees.

MEIC filed a complaint under § 2-6-1001, et seq. and Article II, § 9 of the Montana Constitution, along with a petition for a writ of mandamus, seeking to compel production of the requested records. Doc. 1, 8.[1] The Governor moved for summary judgment. Doc. 25, 27. The Governor argued that *Nelson* precluded MEIC from using a records request to circumvent discovery in *Ksanka Elders*. *See Nelson*, ¶ 31 ("[T]he right to know is not a tool for private litigation interests")(citing *Friedel, LLC v. Lindeen*, 2017 MT 65, 387 Mont. 102, 392 P.2d 141). Doc. 27 at 3–6. The Governor also argued that mandamus was not

[1] MEIC named the Department of Administration (DOA) as a defendant, but the District Court dismissed DOA from the case because DOA was not responsible for the records MEIC sought. *See* Doc. 72 at 7–11.

appropriate and MEIC had a speedy and adequate alternative remedy through discovery in *Ksanka Elders*. *Id.* at 6–9.

The District Court disagreed with how the Governor's Office interpreted *Nelson* and held that there is no pending litigation exception to the right to know. *See* Doc. 72 at 13–16. Thus, the District Court denied the Governor's motion for summary judgment and issued a writ of mandamus in favor of MEIC. *Id.* The mandamus order allowed the Governor's Office to withhold documents protected by other recognized privileges. *Id.* at 21.

The 2023 Montana Legislature amended the public records statute to provide that a "public agency may not refuse to disclose public information because the requested public information is part of litigation or may be part of litigation unless the information is protected from disclosure under another applicable law." 2023 Mont. L. ch. 775, § 1 (H.B. 693) (codified at § 2-6-1003(4), MCA). H.B. 693 became effective a few months after the District Court entered its mandamus order.

MEIC then moved for attorney fees under § 27-26-402(1), § 2-6-1009(3), and § 2-3-221, MCA. The District Court denied MEIC's motion. *See generally* Doc. 85. The District Court reasoned that fees were not warranted for several reasons. First, the Governor's Office had not responded to MEIC's request in bad

faith. *Id.* at 3. Second, MEIC did not pursue the "less resource- and time-intensive" path of seeking the same records through discovery in *Ksanka Elders*. And third, the case involved a constitutional issue of first impression. Doc. 85 at 4–6.

The Governor's Office appealed the District Court's mandamus order. MEIC cross-appealed the District Court's attorney fees order. The Governor's Office ultimately determined that the Legislature's enactment of H.B. 693 (now codified at § 2-6-1003(4), MCA) likely mooted its appeal, so it dismissed its appeal. Thus, the only issue before the Court is whether the District Court abused its discretion in denying MEIC's request for attorney fees.

STANDARD OF REVIEW

This Court reviews a district court's decision on attorney fees for an abuse of discretion. *Yellowstone Cnty. v. Billings Gazette*, 2006 MT 218, ¶ 30, 333 Mont. 390, 143 P.3d 135; *Davis v. Jefferson Cnty. Election Office*, 2018 MT 32, ¶ 15, 390 Mont. 280, 412 P.3d 1048; *Kadillak v. Mont. Dep't of State Lands*, 198 Mont. 70, 74, 643 P.2d 1178, 1181 (1982) ("*Kadillak II*").[2] "An abuse of discretion occurs when the trial court acts arbitrarily without employment of conscientious judgment or

[2] This is true even if a party seeks attorney fees under § 27-26-402(1), MCA. *See infra*, § II.

exceeds the bounds of reasoning resulting in substantial injustice." *Petition of Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 218, ¶ 23, 335 Mont. 94, 149 P.3d 565. (quoting *Gaustad v. City of Columbus*, 272 Mont. 486, 488, 901 P.2d 565, 567 (1995)).

SUMMARY OF ARGUMENT

The District Court appropriately denied MEIC's motion for attorney fees in this case of first impression. The District Court reached this conclusion because the Governor's Office did not respond in bad faith to MEIC's request, MEIC could have accessed the same documents (more quickly and cheaply) through discovery in *Ksanka Elders*, and the case involved a constitutional issue of first impression. In claiming that the District Court abused its discretion, MEIC makes three arguments.

I. MEIC first quibbles with the factors the District Court considered and how the District Court applied them. But "district courts may consider any factor which the parties offer or the court deems appropriate to consider." *Petition of Billings High Sch. Dist. No. 2 v. Billings Gazette*, 2006 MT 218, ¶ 27, 335 Mont. 94, 149 P.3d 565. Each factor the District Court considered was rooted in this Court's precedents. And the evidence amply supported the District Court's application of these factors. This was not an abuse of discretion.

II. MEIC and its amici also ask this Court to adopt a new standard for evaluating attorney fees requests in public records litigation. Adopting this test would overrule well-settled precedent. It would also upend this Court's longstanding and well-grounded deference to district courts' judgments about the propriety of attorney fees in public records lawsuits. District courts must have the flexibility to analyze attorney fees requests within the unique circumstances of each case. The Court should not overrule these cases in favor of a rule that presumptively requires fees in public records lawsuits.

III. Finally, MEIC argues that section 27-26-402(1)—which provides that a successful applicant "may recover" its fees—required the District Court to award attorney fees. In effect, MEIC contends that "may" means "must." That construction makes little sense. First, "may" is a permissive word that usually connotes a discretionary decision. Second, the Legislature used the words "may" and "must" in § 27-26-402(1). It did not mean the same thing when it used these contrasting words. Third, other attorney fee statutes show that the Legislature uses permissive language—like "may recover"—when it wants to create a *discretionary* fee award and mandatory language—like "shall" and "must"—when it wants to create a *mandatory* award. Nowhere in the Montana Code does the Legislature use the permissive phrase "may recover" when it wants to *require* attorney fees. That

should not be surprising: "The word 'may' is commonly understood to be permissive or discretionary. In contrast, 'shall' is understood to be compelling or mandatory." *Matter of Investigative Records*, 265 Mont. 379, 381–82, 877 P.2d 470, 471 (1994) (citations omitted). Finally, accepting MEIC's flawed construction of § 27-26-402(1) would override the Legislature's clear intent that attorney fee awards are discretionary in public records cases.

MEIC does not seriously grapple with § 27-26-402(1)'s text. It instead claims that some of this Court's early decisions held attorney fees to be mandatory in successful mandamus actions. But the early case law paints a picture far murkier than MEIC suggests. Many of these early decisions suggest that fees may (or may not) be allowed. And more recent decisions from this Court have uniformly suggested that district courts have discretion to award fees under § 27-26-402(1). MEIC's venture into the first edition of the Pacific Reporter should not trump the statute's plain language.

MEIC also points to cases from other jurisdictions holding that the phrase "may recover" in various attorney fee statutes imposes a mandatory award of fees to prevailing plaintiffs. But these cases conflict with how *this* Court has interpreted the phrase "may recover" in *Montana* attorney fee statutes. These cases did not deal with public records requests—an area of Montana law where discretionary fee

awards are the well-settled rule. And their reasoning is not compelling. They should not override the plain language of section 27-26-402(1).

While fees may be appropriate where the government blatantly disregards a clear legal duty, taxpayers should not pay attorney fees simply because a plaintiff prevails on a constitutional theory of first impression.

ARGUMENT

I. The District Court did not abuse its discretion by declining to award MEIC attorney fees under the public records statutes.

Montana's public records laws give courts discretion to determine whether to award fees to a prevailing party in a right to know action. §§ 2-3-221, 2-6-1009(4), MCA; *Billings High Sch.*, ¶ 23; *Yellowstone Cnty.*, ¶ 30. Consistent with these statutes, this Court affords "considerable deference to the trial courts deciding whether an award of fees is warranted in a given [public records] case." *Unidentified Police Officers v. City of Billings*, 2019 MT 299, ¶ 9, 12, 398 Mont. 226, 454 P.3d 1205.

This Court has repeatedly refused to establish a definitive multi-factor test to guide district courts in exercising their discretion. *Unidentified Police Officers*, ¶ 9; *Shockley v. Cascade Cnty.*, 2016 MT 34, ¶ 1, 382 Mont. 209, 367 P.3d 336 ("*Shockley II*"); *Billings High Sch.*, ¶ 32. Instead, it has recognized that the appropriate inquiry is flexible and case-specific: courts may "consider **any factor** which the parties

offer or the court deems appropriate to consider." *Billings High Sch.*, ¶ 32 (emphasis added).

Here, the District Court issued a thoughtful order that "weighed the parties' respective positions on the issue of attorney fees and reached a measured determination on whether such an award was appropriate and necessary under the circumstances." *Billings High Sch.*, ¶ 38. MEIC now asks this Court to "substitute [its] judgment for that of the district court." *Billings High Sch.*, ¶¶ 23, 32.

A. The District Court's well-reasoned ruling appropriately weighed relevant factors.

MEIC first takes issue with the factors the District Court considered and how it applied them. But a district court may consider factor it deems appropriate when assessing a motion for attorney fees in a records lawsuit. And the record amply supports the District Court's application of these factors.

1. The District Court appropriately found that the Governor's Office did not act in bad faith.

MEIC argues that the District Court should not have considered whether the Governor's Office acted in bad faith. MEIC Br., 15–21. This overlooks *Billings High*'s admonition that district courts "may consider **any factor** which the parties offer or the court deems appropriate." *Billings High Sch.*, ¶ 32 (emphasis added).

True, the government's good faith does not "preclude a discretionary award of fees." MEIC Br., 16 (quoting *Bozeman Daily Chronicle*, 260 Mont. at 232, 859 P.2d at 443–44). But this Court has never held that the government's motives are *irrelevant* to the attorney fees calculus. In *Billings High School*, this Court found it salient that the school district "took a reasonable approach" in handling a records request. *Billings High Sch.*, ¶ 28. In *Disability Rights Montana v. State*, this Court affirmed a denial of attorney fees based on the district court's determination that the parties had taken a "reasonable approach" in resolving a records request. 2009 MT 100, ¶ 32–33, 350 Mont. 101, 207 P.3d 1092; *accord Friedel, LLC v. Lindeen*, 2017 MT 65, ¶¶ 8–9, 387 Mont. 102, 392 P.3d 141. Even Justice Nelson's proposed seven-factor test—on which MEIC relies—would consider the government's good faith effort to respond to a request. *Yellowstone Cnty.*, ¶ 35 (Nelson, J., specially concurring) (proposed factor 7). Nothing supports MEIC's position that a District Court must ignore a party's good or bad faith when determining whether to award attorney fees.

Nor, as MEIC suggests, did the District Court misunderstand the law to hold that an absence of bad faith *precludes* an award of attorney fees. *Cf.* MEIC Br., 16–18. The District Court correctly understood that good or bad faith is a relevant, but not dispositive, factor:

> "[A]n award of attorney fees, when warranted, can deter and disincentivize dilatory conduct by public bodies that would deny the right to know…. Thus, although an award of attorney fees does not turn on a public body's good faith, *see Bozeman Daily Chronic*[*le*] *v. City of Bozeman Police Dept.*, 260 Mont. 218, 232, 859 P.2d 435, 443–44 (1993), good (or bad) faith still matters."

Doc. 85 at 3.

As a fallback, MEIC contends that *if* the District Court was going to consider the government's subjective motives, it should have found that Governor's Office acted in bad faith. MEIC Br., 18–20. MEIC's basic contention is that the nonexistence of the pending litigation exception should have been obvious from the beginning of this case. MEIC Br., 19–20.

The facts tell a different story. In asserting the pending litigation exception, the Governor's Office relied on this Court's statement in *Nelson v. City of Billings* that "the right to know is not a tool for private litigation interests." 2018 MT 26, ¶ 31, 390 Mont. 290, 412 P.3d 1058 (citing *Friedel*). On its face, this statement seems to say precisely what the Governor's Office thought it did: that a plaintiff may not use a right to know request as a litigation tool. While the District Court found this statement from *Nelson* to be non-binding dicta, it acknowledged that this statement could plausibly be interpreted in several ways, including the Governor's. Doc. 72 at 14–15. It was not unreasonable for the Governor's Office to rely on a facially

straightforward statement from *Nelson*, this Court's seminal decision interpreting the right to know.

Moreover, *Nelson* made clear that Montana courts must interpret the right to know in light of the "circumstances under which the Framers drafted the Constitution," and "the objective they sought to achieve." *Nelson*, ¶ 14. The Framers intended Article II, Section 9 to promote government transparency. *See, e.g.*, Mont. Constitutional Convention, Verbatim Tr., p. 2496 (Delegate Berg). They wanted to protect "the right of the people, the little guy, to find out what's going on" *Id.*, p. 2493, and "broaden the protection of the average citizen." *Id.* 2491–92 (Del. Furlong). No delegate mentioned an intent to give plaintiffs a new discovery tool to use in litigation against state agencies, especially when, as here, a party could get the documents through discovery in a pending case.

On top of this, it is not disputed in this case that previous administrations have withheld requested documents based on the pending litigation exception. Gov. App. 031 (Second Milanovich Aff. ¶¶ 4–6); Doc. 85 at 3 (noting that MEIC did not refute this fact). Nor was the nonexistence of the exception obvious to the 2023 Montana Legislature, which felt it necessary to enact H.B. 693 and clarify that the exception does not exist.

The Governor's Office did not act in bad faith by asserting the pending litigation exception. Instead, it reasonably relied on precedent and the practice of previous Montana administrations. And it was certainly not an abuse of discretion for the District Court to find no bad faith in these circumstances. Losing a public records lawsuit involving a constitutional issue of first impression does not equate to bad faith.[3]

2. The District Court did not abuse its discretion in finding that the Governor's Office was not dilatory in responding to MEIC's request.

MEIC next argues that the District Court abused its discretion in finding that the Governor's Office's was not dilatory in responding to MEIC's request. MEIC Br., 21–23. The record amply supports the District Court's finding.

MEIC submitted an exceedingly broad "all documents" request during the 2021 holiday season. *See* Gov. App. at 018–020; Doc. 85 at 4. At that time, the Governor's Office was already processing an unusually high number of requests. Gov. App. at 014–015. A little more than a month after receiving the request, the Governor's Office notified MEIC that it had received and was processing MEIC's

[3] The Governor's Office has continued to act reasonably by dismissing its appeal of the District Court's mandamus order given the Legislature's enactment of H.B. 693.

request. Gov. App. at 023–024. MEIC asked the Governor's Office for an update a little over one month later, and the Governor's Office promptly responded on February 25, 2022, that it "anticipate[d] completing your request soon." Gov. App. at 021. On March 15, 2022, MEIC filed this lawsuit before the Governor's Office could fully process its broad request. *See* Doc. 85.

Against this backdrop, the District Court reasonably concluded that "a broad request made during the holiday season for all documents related to the Montanan Ore and Rock Creek Mines and the 'bad actor' provision of the Metal Mine Reclamation Act—is not one where a three-month delay in fulfilling the request is self-evidently suggestive of bad faith or intentional delay." Doc. 85 at 4. This conclusion was not an abuse of discretion.

3. The District Court did not abuse its discretion in concluding that MEIC could have obtained its requested records through discovery in *Ksanka Elders*.

MEIC also thinks it was an abuse of discretion for the District Court to conclude that MEIC could have obtained the information it sought through discovery in *Ksanka Elders*. Doc. 85 at 4. Not so.

The District Court judge in this case is the same judge presiding in *Ksanka Elders*. Doc. 72 at 3–4. From this firsthand position, the District Court observed that "much—if not all—of the information MEIC sought could have been

requested in discovery in *Ksanka Elders*." *Id.* at 4–5. The District Court reasoned that discovery would have allowed MEIC to receive responses in thirty days. *Id.* The District Court also noted that "the cost of discovery is generally borne by the producing party, whereas the cost of fulfilling a public records request may be placed on the requester." *Id.* (citing § 2-6-1006(3), MCA (2021)). Thus, this factor also weighed against awarding MEIC attorney fees. *Id.*

In reaching this conclusion, the District Court relied on *Friedel*, where this Court upheld a denial of attorney fees to a requestor who declined to obtain information through discovery and instead "resort[ed] to a right-to-know action." Doc. 85 at 5 (citing *Friedel*, ¶¶ 8–9). The situation here was analogous to *Friedel*. And this Court has declined to find an abuse of discretion where a district court "carefully analyzed … controlling cases" in assessing the propriety of attorney fees. *Matter of Investigative Records*, 272 Mont. at 489, 901 P.2d at 567.

MEIC now contends its "information requests were not intended to influence the *Ksanka Elders* case." MEIC Br., 25. Nonsense. MEIC's own description of its request to the Governor's Office made clear that it sought records to advance the *Ksanka Elders* litigation. *See* Gov. App. at 018 ("As you are aware, the Montana Department of Environmental Quality (DEQ) recently filed a motion to dismiss litigation concerning the enforcement of Montana's Bad Actor provision

against Hecla and Phillips S. Baker. *Accordingly*, MEIC & Earthworks request all documents…") (emphasis added); *see also* Gov. App. at 005–006 (First Amended Complaint ¶¶ 7–13.)

MEIC also argues that it could not obtain the records it sought here through discovery in *Ksanka Elders* because the Governor's Office is not a party to that case. MEIC Br., 24. And it proffers some speculative civil procedure hypotheticals in an attempt to show why the discovery requests it never tried would have been denied. *See* MEIC Br., 24.

MEIC omits, however, that *Ksanka Elders* is before the same District Court that heard this case. *See* Doc. 72 at 3–4. This Court should defer to the District Court's firsthand view about MEIC's ability to obtain its requested records through discovery in *Ksanka Elders*. *Billings High Sch.*, ¶ 23. Moreover, many of MEIC's requests sought documents that would likely fall within the purview of DEQ, which is a party to *Ksanka Elders*. *See* Gov. App. at 018–020 (outlining request). And while MEIC complains that the District Court did not outline how MEIC's requested records would be discoverable in *Ksanka Elders*, it is hard to fault the District Court for failing to analyze discovery requests that MEIC never submitted.

As the judge overseeing both this case and *Ksanka Elders*, the District Court was uniquely well-positioned to assess whether MEIC could have obtained its requested records through discovery in *Ksanka Elders*. This Court should not second-guess its on-the-ground assessment. *Matter of Investigative Records*, 272 Mont. at 488, 901 P.2d at 567 ("We will not substitute our judgment for the district court's judgment unless it clearly abused its discretion.").

4. The District Court appropriately considered the burden on taxpayers.

Fourth, MEIC contends it was an abuse of discretion for the District Court to factor in the cost of MEIC's lawsuit to the taxpayer. MEIC Br., 27. MEIC asserts that "burden to the taxpayers is not something the Court considers on a motion for attorney fees." *Id.* Yet MEIC once again overlooks that "district courts may consider **any factor** which the parties offer or the court deems appropriate to consider … in determining whether to award attorney fees in" public records act cases. *Billings High Sch.*, ¶ 32 (emphasis added). None of this Court's decisions forbids a District Court from considering taxpayer burden under the facts of a particular case.

B. MEIC and its Amici propose a standard for evaluating attorney fees awards in public records lawsuits that contradicts *Billings High School* and its progeny.

MEIC's true quarrel lies less with the District Court's analysis and more with this Court's precedents. MEIC contends that the controlling test for attorney fees in a records case *should be* whether the plaintiff has "vindicate[d] an important public interest." MEIC Br. 12, Under this novel test, a district court would be required to analyze only "the 'public benefits gained,' and based on those benefits, determine the extent to which "the 'costs of litigation should be spread among beneficiaries." MEIC Br., 27 (quoting *Yellowstone Cnty.*, ¶ 30). Amici likewise suggest that the importance of the Constitution's right to know requires a rule that would presumptively require taxpayers to fund their litigation efforts. Br. of Amici Curiae, 5, 14.

These proposed tests are at odds with *Billings High School* and related cases. *Billings High School* adopted a posture of appellate deference to district court attorney fees determinations in public records actions. *See Billing High Sch.*, ¶¶ 23, 38. And it made clear that no precise set of factors binds district courts' attorney fees determinations. *Billings High Sch.*, ¶ 32 ("[D]istrict courts may consider *any factor* which the parties offer or the court deems appropriate to consider") (emphasis added). After all, "mandat[ing] factors trial courts must consider in

exercising their discretion would be a serious intrusion into the province of those Courts." *Id.* ¶ 32. This Court has reaffirmed that conclusion and reasoning several times. *See Unidentified Police Officers*, ¶ 9 ("We have declined to articulate firm guidelines for a district court's consideration in ruling on a fee request" and "we afford considerable deference to the trial courts deciding whether an award of fees is warranted in a given [public records] case.") (citations and quotation marks omitted); *Shockley II*, ¶ 1; *Disability Rights*, ¶¶ 31–33; *Friedel,* ¶¶ 7–9.

Stare decisis counsels against accepting MEIC's invitation to overrule *Billings High School* and its progeny. Recognizing that the law "should be definitively settled if that is possible," *State v. Wolf*, 2020 MT 24, ¶ 22, 398 Mont. 403, 457 P.3d 218, the doctrine promotes "stability, predictability and equal treatment." *McDonald v. Jacobsen*, 2022 MT 160, ¶ 30, 409 Mont. 405, 515 P.3d 777. To "justify a departure from" the *Billings High School* line of cases, MEIC must show that those cases are "'manifestly wrong,' rather than merely one of several 'viable alternatives.'" *McDonald*, ¶ 30 (quoting *Wolf*, ¶ 22). It has not even attempted that showing. Nor could it. Given the diversity of public records requests, district courts should have the flexibility to assess attorney fees motions on a case-by-case basis.

Some requests seek information that is plainly subject to disclosure. Others seek information that is privileged or otherwise designated confidential by law. *See,*

e.g., *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 47 n.9, 405 Mont. 1, 493 P.3d 980; *Nelson*, ¶¶ 17–37; § 2-6-1002(1) (defining confidential information that is legally prohibited from disclosure). Still others involve a complex mixture of public information—which must be disclosed—and private information—which must not. *See Unidentified Police Officers 1 v. City of Billings*, 2019 MT 299, ¶ 12, 398 Mont. 226, 231, 454 P.3d 1205, 1209; *Krakauer v. State*, 2019 MT 153, ¶ 11, 396 Mont. 247, 445 P.3d 201. Determining whether information is public or private requires delicate, case-by-case balancing. *Krakauer II*, ¶ 12; *Pengra v. State*, 2000 MT 281, ¶ 15, 302 Mont. 276, 14 P.3d 499.

The bottom line is that no two records requests are alike. District Courts have a firsthand view of the proceedings and are better positioned to judge the reasonableness of the parties' conduct. They should therefore have the flexibility to assess the propriety of attorney fees in the circumstances of each case. That flexibility is exactly what the Legislature has given them. §§ 2-6-1009(4), 2-3-221, MCA; *accord Unidentified Police Officers*, ¶ 9.

This Court should decline amici's and MEIC's invitation to upend the established practice in Montana and presumptively require taxpayers to fund every public records lawsuit.

II. District courts have discretion to determine whether to award attorney fees in a mandamus action.

As noted, the Legislature left it to district courts to make case-by-case decisions about the propriety of attorney fees in public records cases. §§ 2-6-1009(3), 2-3-221, MCA. Following the Legislature's clear intent, this Court has given district courts "considerable discretion" to evaluate the propriety of fees within the circumstances of each case. *Unidentified Police Officers*, ¶ 9

Seeking an end-run around this settled law, MEIC claims that Montana's mandamus statute provides for a mandatory award of attorney fees—even in a public records case. *See* § 27-26-402(1), MCA. But § 27-26-402(1)'s plain language provides that a successful mandamus applicant "*may* recover" its attorney fees—not "must." It is black-letter law that "may" connotes discretion. This Court has understood the phrase "may recover" in other attorney fee statutes to create a *discretionary* award of fees. And, conversely, statutes mandating attorney fees use mandatory language like "must" or "shall."

MEIC's view of § 27-26-402(1) violates basic statutory interpretation principles, ignores the Legislature's clear intent that fees be discretionary in public records cases, and is unwise as a matter of policy. This Court should reject MEIC's interpretation.

A. Section 27-26-402(1) provides that mandamus petitioner "may" recover their attorney fees. And "may" implies discretion.

Section 27-26-402 provides:

"If judgment is given for the applicant [in a mandamus action]:

> (1) the applicant **may recover** the damages that the applicant has sustained, as found by the jury or as determined by the court or referees, if a reference was ordered, together with costs;
>
> (2) an execution may issue for the damages and costs; and
>
> (3) a peremptory mandate must be awarded without delay."

(emphasis added).

The District Court correctly interpreted this provision as giving it discretion to award or deny fees. Doc. 85 at 2. MEIC argues that the District Court had no discretion to deny it fees because "may recover" really means "shall recover." MEIC Br., 27–34. MEIC is wrong.

1. "May recover" gives the district court discretion.

Statutory interpretation begins with the statute's plain language. *State Dep't of Rev. v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 12, 385 Mont. 282, 384 P.3d 1035. The plain language here states that a successful mandamus applicant "**may** recover" costs—not shall. § 27-26-402(1) (emphasis added). "The word 'may' does not have a mandatory connotation in its usual meaning." *Kageco Orchards, LLC v. Mont. Dep't of Trans.*, 2023 MT 71, ¶ 23, 412 Mont. 45, 528 P.3d 1097.

(citation omitted); *see Choteau Cnty. v. City of Fort Benton*, 181 Mont. 123, 128 592 P.2d 504, 507 (1979); *Lewis v. Petroleum Cnty.*, 92 Mont. 563, 567, 17 P.2d 60 (1932). Rather, "the use of the word 'may'" in a statute "means that the decision to be made is discretionary." *Kageco Orchards*, ¶ 23; *see also Matter of Investigative Records*, 272 Mont. at 488, 901 P.2d at 567 ("the word 'may' is permissive and therefore gives the district court the discretion to award attorney fees").

2. The other subsections in 27-26-402(1) provide additional textual evidence that "may" means "may."

The Legislature's contrasting use of the terms "may" and "must" in § 27-26-402 provides another textual clue that "may" retains its ordinary, permissive meaning here. Subsection (1) provides that an applicant "**may** recover" his costs. Subsection (2) provides that "an execution **may** issue for the damages and costs." § 27-26-402(1) & (2) (emphasis added). Yet subsection (3) provides that "a peremptory mandate **must** be awarded without delay." §27-26-402(3).

The words "may" and "must" should be construed differently, especially when they are used in the same provision. When "the Legislature does not use identical language in different provisions of a statute," this Court presumes it intended "a different statutory meaning." *Mont. Env't'l Info. Ctr. v. Mont. Dep't of Pub. Serv. Reg.*, 2024 MT 66, ¶ 24, 415 Mont. 499, 545 P.3d 69 (citation and quotation marks omitted) ("*MEIC*"); *accord Comm'r of Pol. Practices for Mont. v.*

Mont. Republican Party, 2021 MT 99, ¶ 10, 404 Mont. 80, 485 P.3d 741; *In re Kesl's Estate*, 117 Mont. 377, 386, 161 P.2d 641, 645–46 (1945) ("It is a settled rule of statutory construction that, where different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect.").

Here, the Legislature provided that costs "**may**" be recovered, and that "an execution **may** issue" for these costs, but that a peremptory mandate "**must** be awarded without delay." *Compare* § 27-26-402(1) & (2) *with* (3). Each of these subsections deals with the same topic: the remedies available to a successful mandamus applicant. Thus, the contrasting words "may" and "must" have different meanings. *MEIC*, ¶ 24; *Comm'r of Pol. Practices*, ¶ 10. The Legislature did not mean the same thing when it used "may" and "must" in the same statutory provision.

3. This Court has interpreted "may recover" in other attorney fee statutes to confer discretion on district courts.

This Court's interpretation of other attorney fee statutes further confirms that the phrase "may recover" vests the district court with discretion to award or deny attorney fees.

In an election "contest, the prevailing party **may recover** the party's costs, disbursements, and reasonable attorney fees." § 13-36-205, MCA (emphasis

added). This Court has interpreted this language to give district courts discretion to determine whether to award attorney fees. *See Paulsen v. Huestis*, 2000 MT 280, ¶ 35, 302 Mont. 157, 13 P.3d 931; *Marsh v. Overland*, 274 Mont. 21, 30, 905 P.2d 1088, 1093 (1995). The Residential Landlord and Tenant Act similarly provides that "an aggrieved party **may recover** appropriate damages." § 70-24-401(1), MCA (emphasis added). Unsurprisingly, this Court has construed the Act's "may recover" language as providing for a "**discretionary** award of attorney fees to the prevailing party." *Summers v. Crestview Apartments*, 2010 MT 164, ¶ 32, 357 Mont. 123, 236 P.3d 586 (emphasis added).

Identical terms in statutes addressing the same subject matter should be construed consistently with one another. *Mountain W. Farm Bureau Mut. Ins. Co. v. Hall*, 2001 MT 314, ¶ 23, 308 Mont. 29, 38 P.3d 825; *In re Clark's Estate*, 105 Mont. 401, 409, 74 P.2d 401, 405 (1937). In each of these attorney fees statutes, this Court has construed the phrase "may recover" as giving the district court discretion to decide whether to award attorney fees. The same construction should be given to § 27-26-402(1), a statute on the same subject (attorney fees) that uses the same language ("may recover").

4. When the Legislature wants to mandate attorney fees, it uses mandatory language.

In contrast, when the Legislature wants to mandate attorney fees, it uses clear, imperative language like "must" or "shall." For example, a plaintiff who wins a suit to recover wrongfully withheld wages is always entitled to attorney fees. *Dias v. Healthy Mothers, Healthy Babies, Inc.*, 2002 MT 323, ¶¶ 24–25, 313 Mont. 172, 60 P.3d 986. That is because the Legislature provided that the "resulting judgment **must** include a reasonable attorney fee in favor of the successful party." § 39-3-214(1), MCA (emphasis added); *see also* § 39-3-214(2) ("A judgment for the plaintiff in a proceeding pursuant to this part **must** include all costs reasonably incurred in connection with the proceeding, including attorney fees.") (emphasis added).

A district court must award attorney fees to a party with an established lien, *Vintage Constr., Inc. v. Feighner*, 2017 MT 109, ¶ 24, 387 Mont. 354, 394 P.3d 179, because the Legislature made clear that "the court **shall allow** as costs the money paid and attorney fees incurred for filing and recording the lien and reasonable attorney fees in the district and supreme courts." § 71-3-124, MCA (emphasis added).

The same is true for property owners who win an eminent domain lawsuit. They are always entitled to reasonable attorney fees, *State ex rel. Dep't of Highways.*

v. McGuckin, 242 Mont. 81, 86, 788 P.2d 926, 929 (1990), because the Legislature has provided that "when the condemnee prevails … the court **shall award** necessary expenses of litigation to the condemnee." § 70-30-205(2), MCA (emphasis added); *see also* § 27-28-205, MCA (quo warranto proceedings) ("judgment **must be rendered** that … the relator recover costs."); § 30-5-131(5) (letters of credit under the Uniform Commercial Code) ("Reasonable attorney fees and other expenses of litigation **must be awarded** to the prevailing party in an action in which a remedy is sought under this chapter") (emphasis added).

While these mandatory attorney fee provisions use imperative language like "shall" and "must," § 27-26-402(1) uses the permissive word "may." "The word 'may' is commonly understood to be permissive or discretionary. In contrast, 'shall' is understood to be compelling or mandatory." *Matter of Investigative Records*, 265 Mont. at 381–82, 877 P.2d at 471 (citations omitted). When the Legislature uses different words on the topic of attorney fees, it intends different meanings. *Bullock v. Fox*, 2019 MT 50, ¶ 59, 395 Mont. 35, 435 P.3d 1187 *Zinvest, LLC v. Gunnersfield Enters.*, 2017 MT 284, ¶ 26, 389 Mont. 334, 405 P.3d 1270 ("Different language is to be given different construction."). No other statute in the Montana Code uses *permissive* language like "may recover" to impose a

mandatory award of attorney fees. This Court should not construe § 27-26-402(1) to be the first.

MEIC points to § 27-1-202 as potential guide for interpreting § 27-26-402(1). *See* MEIC Br., 31–32. That statute, however, is a red herring. Section 27-1-202 deals with a party's entitlement to damages in a successful *tort action*, not attorney fees. In contrast, this Court has interpreted the phrase "may recover" in attorney fee statutes to create a discretionary award of fees. *Crestview Apartments*, ¶ 32; *Paulsen*, ¶ 35. And statutes "consistent with one another that refer[] to the same subject matter" should be construed consistently. *Mountain W. Farm Bureau*, ¶ 23 (describing the *in pari materia* canon).

5. Accepting MEIC's interpretation of § 27-26-402(1) would override the Legislature's intent that fees should be discretionary in public records cases.

Along with the statutory interpretation principles outlined above, this Court should also interpret § 27-26-402(1) together with § 2-3-221, and § 2-6-1009(4), MCA. In these statutes, the Montana Legislature provided that a prevailing right to know plaintiff "*may* be awarded costs and reasonable attorney fees." § 2-3-221, MCA (emphasis added); *see* § 2-6-1009(4) (same). By using the permissive "may," the Legislature unequivocally provided "that an award of attorney fees is

discretionary" in public records litigation. *Matter of Investigative Records*, 265 Mont. at 381–82, 877 P.2d at 471–72.

If this Court were to accept MEIC's flawed interpretation of the mandamus statute, Plaintiffs would tack mandamus claims on to every public records lawsuit to guarantee attorney fees. That would flout the Legislature's clear intent that fee awards in public records lawsuits should be discretionary. *See Matter of Investigative Records*, 265 Mont. at 381–82, 877 P.2d at 471–72 (discussing legislative history of § 2-3-221, MCA and concluding that the Legislature intended an attorney fee award to be "discretionary rather than mandatory"). Accepting MEIC's contra-textual interpretation of § 27-26-402(1) would override the Legislature's specific intent that district courts have discretion to assess attorney fees in public records cases. *See Gibson v. State Compensation Mut. Ins. Fund*, 255 Mont. 393, 396, 842 P.2d 338, 340 (1992) ("[W]hen a general statute and a specific statute are inconsistent, the specific statute governs, so that a specific legislative directive will control over an inconsistent general provision."); *see also* § 1-2-101, MCA.

B. This Court has not squarely addressed whether section 27-26-402(1) requires district courts to award attorney fees to a successful mandamus plaintiff.

MEIC devotes little attention to the text of the mandamus statute. Nor does it cite any other attorney fee statute that uses "may recover" to require an award of

attorney fees. Instead, it dusts off a stack of early-twentieth-century cases and announces a "long history of finding fees mandatory." MEIC Br., 30–31 (citing the cases discussed below). A close look at these cases shows MEIC's "long history" to be a revisionist one.

Start with *State ex rel. Golden Valley County. v. District Court*, which held that attorney fees "are allowable" in mandamus cases but "may not be recovered where the right thereto" has not been "proved." 75 Mont. 122, 242 P. 421, 423 (1925). That attorney fees are "*allowable*" does not mean they are *mandatory*. *State ex rel. Barry v. O'Leary* also recognized that courts have discretion to award or deny attorney fees to mandamus plaintiffs: "It is the province of the court to fix the amount of the attorney's fee **if one be allowed**." 83 Mont. 445, 272 P. 677, 679 (1928) (emphasis added).

MEIC claims *State ex rel. Lynch v. Batani*, 103 Mont. 353, 62 P.2d 565, 569 (1936), held that a "successful mandamus applicant 'is entitled to reimbursement' of attorney fees as damages." MEIC Br., 29 (purporting to quote *Lynch*). But this quotation never appears in the *Lynch* opinion. Likewise, MEIC claims that *State ex rel. Miller v. Dist. Ct.*, 130 Mont. 65, 73, 294 P.2d 903, 907 (1956) held that a "successful applicant for writ of prohibition [is] entitled to 'judgment for their

damages and costs." MEIC Br., 31. But this quote comes from the dissent in *Miller*. *See Miller*, 130 Mont. at 73, 294 P.3d at 907 (Adair, J., dissenting).

MEIC also relies on *State ex rel. Shea v. Cocking*, 66 Mont. 169, 213 P. 594 (1923). The *Shea* court held that, "Mandamus being a special proceeding under the provisions of 9858, costs are allowed of course to the plaintiff upon a judgment in his favor. Sections 9787 and 9858 when construed together, determine that the award of costs in a mandamus proceeding is not discretionary." *Shea*, 213 P. at 597. *Shea*'s analysis answers a different question than the one presented in this case. *Shea* read section 9858 of the 1921 Montana Code **together** with section 9787 to hold a prevailing mandamus applicant was entitled to attorney fees as a matter of course. Section 9787 is codified today at § 25-10-101, and section 9858 is codified today at § 27-26-402(1). MEIC has never claimed that it is entitled to attorney fees under § 25-10-101 and § 27-26-402(1) read together. *See generally* Doc. 74, MEIC Br. It argues that § 27-26-402(1), alone, entitles it to attorney fees. More importantly, *Shea* was not a public records case and did not address the Legislature's clear provision for discretionary attorney fee awards in public records cases. So *Shea* does not speak to the relevant questions in this case.

Even if *Shea* were on point (it is not) and went as far as MEIC claims (it does not), more recent decisions from this Court suggest that attorney fees are

discretionary under § 27-26-402(1). In *Christopherson v. State*, this Court reviewed a district court's partial grant of attorney fees to a prevailing mandamus petitioner for an abuse of discretion. 226 Mont. 350, 355, 735 P.2d 524 (1987). If attorney fees were mandatory under § 27-26-402(1), there would have been no discretionary decision for the *Christopherson* Court to review. In *Braach v. Graybeal*, this Court held that under "§ 27-26-402(1), MCA, a successful petitioner for a writ of mandamus **may recover** damages, and we have held that such damages **may** include attorney fees." 1999 MT 234, ¶ 15, 296 Mont. 138, 988 P.2d 761 (emphasis added). Just a few years ago, this Court said that *Braach v. Graybeal*, "clarified that attorney fees **may be available** for an elector seeking a writ of mandamus." *Davis v. Jefferson Cnty. Election Off.*, 2018 MT 32, ¶ 15, 390 Mont. 280, 412 P.3d 1048 (emphasis added).[4]

In short, MEIC is wrong to claim that this Court has long "found the phrase 'may recover'" in § 27-26-402(1) to be "mandatory." MEIC Br., 31. This Court

[4] *See also Braach v. Missoula Cnty. Clerk and Recorder*, 2013 MT 49N, ¶ 20, 369 Mont. 541, 2013 WL 696422 (Table) ("The District Court properly **exercised its discretion** to award attorney fees and costs to the Braachs [as successful mandamus applicants].") (emphasis added). While *Missoula County Clerk* is a non-precedential memorandum opinion, it provides further evidence that, under this Court's modern jurisprudence, district courts have discretion to award or deny attorney fees in a mandamus case.

has never squarely held that 27-26-402(1) mandates attorney fees. If anything, the weight of the case law strongly suggests that the statute provides discretion. And to the extent that precedent does not speak clearly to the issue, the plain language of section 27-26-402(1) should control the outcome of this appeal.

Finally, if *Shea* misinterpreted § 27-26-402(1)'s permissive language as requiring attorney fees, then it should be overruled. Such a construction has no basis in the statute's text, *see supra* § II.A. And it contradicts this Court's more recent case law.

C. MEIC's out-of-state "may recover" cases are at odds with this Court's precedents, unpersuasive, and distinguishable.

MEIC points out that other state courts have interpreted the phrase "may recover" to require an award of attorney fees. *See* MEIC Br., 34–35 (citing the out-of-state cases discussed below). But this Court has interpreted the phrase "may recover" as creating a discretionary award of fees, not a mandatory one. *Crestview Apartments*, ¶ 32; *Paulsen*, ¶ 35.

Moreover, this Court adopts other states' interpretation of their laws "only to the degree that the reasoning of the decision appears compelling." *Davis v. State*, 2008 MT 226, ¶ 16, 344 Mont. 300, 187 P.3d 654 (citation and quotation marks omitted). The reasoning of MEIC's out-of-state cases is not compelling.

These cases recognize that "may recover" implies discretion, but reason that the phrase gives a *plaintiff* discretion to pursue attorney fees rather than giving a *court* discretion to award them. *See James Twp. v. Rice*, 509 Mich. 363, 372–73, 984 N.W.2d 71, 75 (2022); *Pepitone v. Winn*, 272 Neb. 443, 448, 722 N.W.2d 710, 714 (2006); *Bisson v. Ward*, 160 Vt. 343, 347, 628 A.2d 1256, 1259 (1993). In other words, these state courts believed their legislatures intended to let plaintiffs choose between paying their own fees or sending the bill to the defendant. That is no choice at all—a plaintiff will always accept payment of her attorney fees by an opposing litigant. *See James Twp.*, 984 N.W. 2d at 380 (Welch, J., dissenting). It would be meaningless for the Legislature to provide successful mandamus petitioners with an option they will always take, and a "presumption exists that the Legislature does not pass meaningless legislation." *State v. Brown*, 2009 MT 452, ¶ 10, 354 Mont. 329, 223 P.3d 874. The reasoning of these other courts is not compelling, *Davis*, ¶ 16, and this Court's interpretation of "may recover" is the better one. *Crestview Apartments*, ¶ 32; *Paulsen*, ¶ 35.

There are other reasons why MEIC's out-of-state cases are a poor fit here. First, none of them involved a public records lawsuit. And Montana's Legislature clearly intended that district courts have discretion to award or deny fees in such cases. *See supra*, § II.A.5. And, unlike the statutes involved in these cases, section

27-26-402 provides that a mandamus applicant "may recover" his costs, but then provides that the court "must issue" a peremptory writ.[5] The Legislature's use of the contrasting terms "may" and "must" in section 27-26-402 suggests that it intended different meanings. *MEIC*, ¶ 24; *Comm'r of Political Practices*, ¶ 10; *Kesl's Estate*, 117 Mont. at 386, 161 P.2d at 46. It is difficult to imagine the Legislature meant the same thing when it used the different words "may" and "must" in the same statute.

Finally, to the extent that out-of-state authority is relevant, MEIC overlooks more apposite authority from Kansas. Kansas's mandamus statute, like Montana's, provides that a successful mandamus plaintiff "may recover" her fees. *See* K.S.A. § 60-802(c) ("If judgment be given for the plaintiff, he or she **may also recover** such damages as he or she may have sustained by reason of the failure of the defendant to perform the specified duty, together with costs.") (emphasis added). Yet Kansas courts have not interpreted this language as requiring attorney fees to every successful mandamus applicant. Instead, the Kansas cases applying this

[5] The Nebraska statute at issue in *Pepitone* contained the word "shall," but it did so in the context of an entirely different subject: the statute of limitations for commencing an action to recover the damages a plaintiff had won in an action under the statute. *See* Neb. Rev. Stat. §76-2,120(12). In contrast, §27-26-402(1)'s "may" and (3)'s "must" deal with the same subject: the remedies available to a successful mandamus applicant.

statute hold that a successful mandamus plaintiff is entitled to attorney fees only when the public official *unreasonably* refuses to perform a clear legal duty. *See, e.g.*, *Link, Inc. v. City of Hays*, 268 Kan. 372, 381, 997 P.2d 697, 703 (2000); *Barten v. Turkey Creek Watershed Joint Dist. No. 32*, 200 Kan. 489, 438 P.2d 732 (1968).

MEIC's out-of-state cases are inapposite, unpersuasive, and at odds with this Court's precedents.

D. Montana taxpayers should not be required to pay a plaintiff's attorney fees in mandamus cases involving constitutional issues of first impression.

Not only does a discretionary standard better comport with the plain language of § 27-26-402(1)—it is also better public policy. Mandamus is an extraordinary remedy designed to compel the performance of an unequivocal legal duty. *Boehm v. Park Cnty.*, 2018 MT 165, ¶ 9, 392 Mont. 72, 421 P.3d 789 (citation omitted). Traditionally, it was available only in "rare cases" where the government refused to perform a preexisting duty that the law outlined with "precision and certainty." *Boehm*, ¶¶ 9–10 (quotations and citations omitted). But increasingly, mandamus is becoming a vehicle for resolving questions of first impression in which no "clear legal duty" exists until a district court finds one.[6] And like MEIC

[6] The Governor's Office respectfully disagrees with the District Court's conclusion that a writ of mandamus was appropriate here. Yet, given the enactment of § 1-6-

here, other plaintiffs have begun to seek substantial attorney fee awards in mandamus cases involving close constitutional issues.

Consider *Wild Montana v. Gianforte*, Cause No.: DV-25-2023-411, a case pending in the First Judicial District. *Wild Montana* required the district court to "clarify a narrow procedural ambiguity in Montana's constitutionally established veto procedures" in Article VI, § 10. *See Wild Montana v. Gianforte*, Cause No.: DV-25-2023-411 (1st Jud. Dist. Ct.) (Doc. 45 at 4) (district court's mandamus order). As in this case, no "clear legal" duty existed until the district court resolved this novel question. Even so, the District Court issued a writ of mandamus. *Wild Montana*, No. DV-25-2023-411, (Doc. 45 at 4–7). And the plaintiffs' attorneys now seek a fee award of **$132,917.** *See Wild Montana*, No. DV-25-2023-411 (Pet'rs & Pls.' Br. Supp. Mot. Award Att'y Fees & Costs).

Government employees are not fortune-tellers. *See State ex rel. W.V. Highlands Conservancy, Inc. v. W.V. Div. of Env't Prot.*, 193 W.Va. 650, 653, 458 S.E.2d 88, 91 (1995) ("Although some disingenuous hindsight rule would be easy to apply, accurate predictions of court decisions are not a requirement for public officers."). So while attorney fees may be appropriate when "a public official

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1003(4), the Governor's Office concluded that question is likely moot and therefore did not appeal it.

disregard[s] a clear, nondiscretionary duty," *Highlands Conservancy*, 193 W. Va. at 653, courts should not award fees in mandamus actions premised on "a duty to which" courts have "not heretofore spoken in detail." *Graf v. Frame*, 177 W.Va. 282, 290, 352 S.E.2d 31, 39 (1986); *see also State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St. 3d 518, 525, 844 N.E.2d 1181, 1188; *State ex rel. Pend-Air Citizen's Comm. v. City of Pendleton*, 145 Or.App.236, 249–51, 929 P.2d 1044, 1052 (1996).

As these other state courts recognize, district courts should have the flexibility to differentiate between mandamus cases where an official deliberately ignores a clear legal duty and cases presenting public officials with novel constitutional issues (such as this one and *Wild Montana*). Adopting MEIC's flawed interpretation of § 27-26-402(1) would strip courts of any discretion and require an award of attorney fees simply whenever a government agency fails to foretell how a court might resolve a question of first impression. But courts "should not be in the practice of punishing parties for taking a rational stance on an unsettled legal issue." *Cincinnati Enquirer*, 108 Ohio St. 3d at 525, 844 N.E.2d at 1188. Nor should the taxpayers be penalized whenever a public official fails to predict how a district court will resolve a novel constitutional issue.

CONCLUSION

For these reasons, this Court should affirm the District Court's order denying MEIC's motion for attorney fees.

/s/ Timothy Longfield

CERTIFICATE OF COMPLIANCE

I certify that this Brief is printed with a proportionately spaced Equity typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word is 8,954 words including footnotes. Mont. R. App. P. 11(4).

/s/ Timothy Longfield

CERTIFICATE OF SERVICE

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