Court of Appeals, State of Colorado 2 East 14th Ave. Denver, CO 80203 District Court, Arapahoe County 7325 S. Potomac Street Centennial, CO 80112-4030 Honorable Bonnie Heather McLean, District Court Judge Case Number: 2023JV30006 THE PEOPLE OF THE STATE OF COLORADO In the Interest of: C.G. & N.G. Children and Concerning: R.G. Respondent-Appellant.	DATE FILED October 8, 2024 10:31 PM FILING ID: 79C27B903FF91 CASE NUMBER: 2024SC337 ▲ ▲ COURT USE ONLY
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OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 3.4, C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Opening Brief complies with C.A.R. 28(g) and 3.4(f) because it contains 4338 words and, under separate heading, (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on, (3) a statement of all Indian Child Welfare Act findings, (4) a summary of arguments, (5), a concise statement of the case, and (5) Appellant's full legal argument.

The Opening Brief complies with C.A.R. 32 because it is prepared using Roman style font 14-point size including footnotes.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 3.4, 28 and 32.

Dated this 4th day of January 2024

/s/ John F. Poor, #40395
Attorney for Respondent-Appellant

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STATEMENT OF COMPLIANCE WITH ICWA

Respondent-Appellant R.G. ("Mother") provides the following statement concerning compliance with the Indian Child Welfare Act ("ICWA")

1. Dates the court made an inquiry to determine whether the Children are or could be Indian children, and a statement of any identified tribe(s) or potential tribe(s): January 12, 2023 (CF p 225) (ICWA possibly applicable); TR 2/10/23 pp 4-5, 8-9 (possible Wampanoag heritage for Father).

2. Copies of ICWA notices: CF pp 62-68.

3. The postal return receipts for Indian child welfare notices: CF pp 69-72.

4. Responses from the parent(s) or Indian custodian(s) of the children, the BIA,and children's tribe(s) or potential tribe(s) may be found: Not applicable.

5. Additional notices (including for a termination hearing) were

sent to non-responding tribe(s), or the BIA: Not applicable.

6. Date(s) of any ruling as to whether the child is or is not an Indian child: Not applicable.

Based on the foregoing, it appears that DHS and the court are in the process of complying with the ICWA, but have yet to fully determine the Children's status.

ISSUES PRESENTED FOR REVIEW

The trial court misapplied C.R.C.P. 39(a), and erred in holding that Mother waived her right to an adjudicatory jury trial, when Mother appeared at the adjudication trial through counsel and when circumstances suggested that Mother was not present in-person because of a significant mental health condition that prevented Mother from effecting a voluntary waiver of her right to a trial by jury.

STATEMENT OF THE CASE

This is an appeal from an adjudication in dependency and neglect concerning R.G. ("Mother"), T.G. ("Father") (collectively, the "Parents"),

and their children, C.G. (born 01/16/2011) and N.G. (born 05/20/2015) (collectively, the "Children"). The Children were adjudicated dependent and neglected as to Mother following a trial that was converted from a jury trial to a court trial, and which occurred on July 19 and 20, 2023. Mother appeals the trial court's order of adjudication.

The Arapahoe County Department of Human Services ("DHS" or the "Department") became involved with this family after receiving referrals regarding the Children's school attendance and the Parents' mental health. (CF pp 1-9.) Following investigation, the Department filed a petition in dependency and neglect on January 6, 2023. (CF pp 11-18.) Mother denied the allegations in the petition,[1] and the matter was set for a two-day jury trial.

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[1] Father admitted the allegations in the petition, and the Children were adjudicated dependent and neglected to him by stipulation. (CF pp 119-20.)

On May 9, 2023 – more than two months prior to the trial – Mother filed a notice with the Court noting that she suffered from multiple significant mental health conditions, including schizophrenia, schizoaffective disorder, and post-traumatic stress disorder ("PTSD"). (CF p 94.) She therefore averred that the protections of the Americans with Disabilities Act and/or Rehabilitation Act (collectively, the "ADA") applied in this case. (CF pp 94-96.) She specifically requested that the Department provide transportation assistance to and from court appearances, as she had already expressed concerns to the Department about her ability to appear in court in person. (CF p 96.)

Beyond Mother's ADA notice, the record is replete with references to Mother exhibiting symptoms of confusion and paranoia. (*See, e.g.*, CF pp 27 (Mother confused about presence of police at her home even though she called them), 83 (Mother confused about the role of various actors in the case), 76 (Mother displayed behaviors of severe paranoia, including unfounded claims that her wifi, food delivery service accounts,

bills, emails, social media, and other online accounts were hacked, that DHS workers had abused her when she was a child, and that police arriving at her home were not true police officers); TR 4/20/23 p 6:4-17 (Mother inquired whether caseworker had killed her son).)

The adjudication trial was scheduled to begin at 9:00 a.m. on July 19, 2023, with the parties and their attorneys appearing at 8:30 to address final pre-trial matters. When the court called the case, Mother was not present, but her counsel was, and a discussion ensued as to whether to convert the trial from a trial by jury to a court trial. Mother's counsel noted that, pursuant to this Court's opinion in *People in Interest of C.C.*, 2022 COA 81, the court was not permitted to simply convert the jury trial to a court trial, but was required to give Mother time to arrive and to inquire into the circumstances of her absence or tardiness before deciding upon a sanction. (TR 7/19/23 (J. Toussaint) pp

5-6.)[2] Mother's counsel informed the court that he had been in touch with Mother the previous evening and that Mother had indicated that she planned to attend the trial. (TR 7/19/23 (J. Toussaint) pp 6-7.) Counsel also noted that transportation had previously been an issue for Mother, and counsel acknowledged that the Department had arranged for an Uber ride to transport Mother to court for her trial. (TR 7/19/23 (Toussaint) pp 6-7.)

Counsel contended that, because a dependency and neglect case is a criminal rather than a civil proceeding, Mother's appearance through counsel was sufficient to preserve her right to a jury trial, even if Mother herself was not present in person. (TR 7/19/23 (J. Toussaint) p 7:12-24.) He also noted that Mother had been personally present on

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[2] Proceedings on July 19 were divided into two phases, the first of which was conducted before Judge Toussaint, the second of which occurred before Judge McLean.

nearly all prior court dates and had been heavily involved in the case to that point, meaning that her absence on the date of trial was aberrational rather than part of a larger pattern. (TR 7/19/23 (J. Toussaint) p 8:1-20.)

The court recessed from approximately 8:53 a.m. until 9:37 a.m. When proceedings resumed, Mother's counsel informed the court that counsel had missed a call from Mother at approximately 8:00 a.m., before the case was called. (TR 7/19/23 (J. Toussaint) pp 12-13.) Counsel indicated the following:

> I missed a phone call from [Mother] this morning a little before 8:00 a.m. A few things about that, one, in the message, she did indicate because she was -- she's trying to get in touch with me, but also she sounded different than I'd ever heard her before. I -- I can't say what it is. She sounded either very tired or sick and I -- and I truly don't know what it is, or -- or it could be something else. I truly don't know. I'm just trying to fill the Court in as best I can with the information I have. I tried calling her back about 30 minutes ago when the Court let us on a break, and so I've not heard back from her yet though. That's the -- the best record I can make. I -- I think I just said in addition to what I said before, that I was in contact with her last night.

> I know that there was other -- others from the team in contact with her earlier this week. So she has certainly been responsive in the past. I just don't know exactly what the situation is this morning other than the message I got saying she's trying to get in touch with me.

(TR 7/19/23 (J. Toussaint) pp 12-13.) Mother's guardian ad litem ("GAL") added:

> Your Honor, I've not heard from her while we were on the break. I did, however, listen to the voicemail. It -- it was a very concerning sounding voicemail from [Mother]. And I will just tell the Court that I'm frankly concerned about her well-being at this time.

(TR 7/19/23 (J. Toussaint) pp 13-14.)

After hearing these reports, the court attempted to call Mother, without success. (TR 7/19/23 (J. Toussaint) pp 15-16). The court then set a deadline of 10:00 a.m. for Mother to arrive. When Mother did not arrive by the deadline, and over the objections of Mother's counsel, the court converted the jury trial to a court trial. The court also denied two separate requests from Mother's counsel to continue the trial – one in which counsel asked the court to reschedule the trial so that the matter

could be heard by a jury with Mother present, and another to allow Mother to be present for a trial to the court. (TR 7/19/23 (J. Toussaint) pp 8:1-4, 17-22.) The court also denied a request by Mother's counsel to exercise its discretion under § 19-3-202, C.R.S. to order a jury trial despite Mother's absence. (TR 7/19/23 (J. Toussaint) pp 20-21.)

After Judge Toussaint converted the jury trial to a bench trial and denied Mother's motion to continue, he handed the matter off to Judge McClean for docket management reasons. The bench trial then took place across parts of July 19 and 20, 2023. Following the bench trial, the court entered an order adjudicating the Children dependent and neglected with respect to Mother. (CF pp 156-57.)

Mother appeals the order of adjudication.

SUMMARY OF ARGUMENT

The trial court erred in finding that Mother had waived her right to a jury trial, and it erred by converting Mother's jury trial to a court trial as a result. Although Mother was not present in-person on the

morning of trial, a fair reading of C.R.C.P. 39(a) suggests that, in a dependency and neglect case, a respondent parent who is not personally present but who appears through counsel at her adjudication trial has not failed to appear under the meaning of the rule. Because Mother's counsel was present and prepared to represent Mother at trial, the court should have allowed the jury trial to proceed.

Even assuming *arguendo* that the waiver provision of C.R.C.P. 39(a) was implicated when Mother was not present on the morning of trial, this Court has made clear that a trial court must inquire into the particular circumstances of a parent's absence or tardiness before finding that a parent has expressly or impliedly waived her right to a jury trial. Here, the circumstances suggested that Mother was experiencing a mental health episode and had not voluntarily waived her right to a jury trial. Accordingly, the court erred in finding a waiver in this case.

The right to a trial by jury, once properly exercised, is a substantial right, and the wrongful infringement of that right is not harmless. Reversal of the order of adjudication is therefore required.

ARGUMENT

I. The trial court misapplied C.R.C.P. 39(a), and erred in holding that Mother waived her right to an adjudicatory jury trial, when Mother appeared at the adjudication trial through counsel and when circumstances suggested that Mother was not present in-person because of a significant mental health condition that prevented Mother from effecting a voluntary waiver of her right to a trial by jury.

A. Standard of review & preservation for appeal

The right to a trial by jury is an issue of law that is subject to de novo review. *See People v. Pitts*, 13 P.3d 1218, 1222 (Colo. 2000) ("[T]he trial court's legal conclusions are subject to de novo review."). Likewise, where, as here, the trial court's ruling rests on its interpretation of a governing rule or statute, this Court's review is de novo. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011).

Mother objected repeatedly and at length to the conversion of the jury trial to a court trial, as described in detail above.

B. Respondent parents in dependency and neglect cases have a right to a trial by jury concerning the allegations in the petition. Once asserted, a parent may only forfeit her jury trial right for the reasons enumerated in C.R.C.P. 39.

The right to a jury trial in civil cases has been an essential part of Colorado's justice system almost from its inception. *See* Colo.Sess.Laws 1887 § 173 at 252. As a result, Colorado appellate courts have long emphasized the vital importance of the right to trial by jury, stressing the crucial role it plays in ensuring that the rights of citizens are not left solely to the discretion of governmental authorities.

"The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community . . . in preference to the professional or perhaps over-conditioned or biased response of a judge." *Fields v. People*, 732 P.2d 1145, 1151 (Colo. 1987) (en banc) (quoting *Duncan v. Louisiana*, 419

U.S. 522, 531 (1975)). See also *People in Interest of Clinton*, 762 P.2d 1381, 1390 (Colo. 1988) ("[F]ailure to honor the statutory right to a jury trial . . . is a deviation that seriously alters the nature of the hearing to which the respondent is entitled"); *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017) ("The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power.").

In recognition of the procedural and substantive protections provided by the right to a jury trial, Colorado law is clear that respondent parents are entitled to a jury trial on the issue of whether their children are dependent or neglected. § 19-3-202, C.R.S. states, in pertinent part, that "[t]he petitioner, any respondent, or the guardian ad litem may demand a jury trial at the adjudicatory hearing . . . ." Likewise, Colorado Rule of Juvenile Procedure 4.3 prescribes that every respondent parent has a right to demand a jury trial for the adjudication at the time they deny the allegations in a petition in

dependency and neglect. Colo. R. Juv. P. 4.3. Notably, Colo. R. Juv. P. 4.3 enumerates only one mechanism by which a party can waive a jury trial—by failing to demand one in the first instance.

The Rules of Juvenile Procedure make clear that the Rules of Civil Procedure also apply to the proceedings in areas where the Rules of Juvenile Procedure or the Children's Code are silent. See Colo. R. Juv. P. 1. C.R.C.P. 38 and 39 provide three ways in which a party can forfeit a properly invoked right to a jury trial: by failing to pay the fee, see C.R.C.P. 38(e); by withdrawing the demand and waiving the right in writing, *see id.*; *see also* C.R.C.P. 39(a)(1) and when "all parties demanding trial by jury fail to appear at trial." C.R.C.P. 39(a)(3) (emphasis added); *see also People in Interest of J.R.M.*, 2023 COA 81, ¶ 9.

In a variety of contexts, and in light of the foregoing principles, Colorado appellate courts have repeatedly held that trial courts may not revoke or infringe upon litigants' jury trial rights except when doing so

is specifically authorized by statute or an applicable procedural rule. See, e.g., *Watkins v. People*, 344 P.2d 682 (Colo. 1959) (noting that, in mental health proceedings, failure to honor the statutory right to a jury trial is an essential deviation that seriously alters the nature of the hearing to which the respondent is entitled by statute); *Wright v. Woller*, 976 P.2d 902, 903 (Colo. App. 1999) (holding that trial court improperly revoked jury trial for parties' failure to tender jury instructions timely) ("[A] right to a jury trial may only be lost for the reasons cited in C.R.C.P. 39(a)."); *Whaley v. Keystone Life Insurance Co.*, 811 P.2d 404 (Colo. App. 1989) (trial court improperly converted jury trial to court trial for plaintiff's failure to timely file jury instructions) ("In light of . . . [the jury trial's] fundamental importance, we conclude that, once a proper demand has been made and the fee paid, the right to a jury trial may be lost only for the reasons enumerated in C.R.C.P. 39(a).") (emphasis in original).

C. The trial court erred in holding that Mother failed to appear under the meaning of C.R.C.P. 39(a) when Mother's counsel was present and prepared to proceed.

As noted above, Mother's trial counsel was present at the time that the adjudicatory trial was scheduled to begin, though Mother herself was not. Because a dependency and neglect case is a civil rather than a criminal case, and due process requires only that respondent parents appear through counsel, the trial court erred in finding that Mother failed to appear under the meaning of C.R.C.P. 39. Accordingly, the court erred in finding that conversion of the jury trial to a bench trial was authorized by C.R.C.P. 39(a).

Colorado courts have long held that, because a dependency and neglect case is a civil rather than a criminal matter, a respondent parent's appearance through counsel, rather than in-person, is sufficient to protect the parent's right to due process during the termination stage. *See People in Interest of C.G.*, 885 P.2d 355, 357 (Colo. App. 1994) ("An action for termination of the parent-child legal

relationship is a civil action; therefore, neither due process nor other constitutional guarantees confer a right of confrontation on a respondent or require his presence at a termination hearing. Thus, if a respondent has an opportunity *to appear through counsel* and is given an opportunity to present evidence and cross-examine witnesses through deposition or otherwise, his due process rights are not violated.") (emphasis added); *People in Interest of V.M.R.,* 768 P.2d 1268, 1270 (Colo. App. 1989) (Because respondent had the opportunity to *appear through court-appointed counsel*, his absence was not prejudicial error.") (emphasis added). Case law in Colorado concerning the waiver of a jury trial right for failing to appear also supports the principle that a failure to appear sufficient to effect a waiver of a duly exercised jury trial right means a failure to appear at all, whether in-person or through counsel. *See, e.g.*, *Frank v. Bauer*, 75 P. 930 (Colo.

App. 1903) (jury trial waived when neither individual litigant nor counsel appeared for trial).[3]

The above interpretation is also consistent with the public policy objectives of, on the one hand, avoiding unnecessary inconvenience to jurors, *see C.C.*, ¶ 18, and on the other hand, affording a respondent parent her statutory right to a jury trial unless circumstances clearly evince a waiver of that right. In a scenario like *Frank*, when neither

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[3] The undersigned acknowledges that 1903 was a long time ago – before the Great Depression and the World Wars, before the creation of the Federal Bureau of Investigation and the Federal Reserve and, as relevant here, before the enactment of the Colorado Rules of Civil Procedure. Notwithstanding, *Frank* and the other authorities cited herein generally support the principle that failing to appear in a civil case means that neither the litigant nor the litigant's counsel is present, and the "defense table" is thus completely empty.

the litigant nor counsel is present, there is really, truly no reason for the court to empanel a jury to hear the evidence, as the Department's presentation will be effectively uncontested and judgment will almost certainly be appropriate if the Department meets its basic evidentiary burden.

By contrast, when a parent is represented by counsel who is present and prepared to defend, there is a legitimately contested civil trial, as this Court recognized in *C.G.*, 885 P.2d at 357, and *V.M.R.,* 768 P.2d at 1270. As such, empaneling a jury is not unnecessary or superfluous, as the Department's evidence will be subject to dispute, its witnesses will be subject to cross-examination, and the fact-finder will thus play an important role. Jurors will thus avoid the inconvenience of appearing for a meaningless proceeding, and the jury will determine the outcome of a full trial in which the parent's counsel has subjected the Department's case to adversarial testing.

Accordingly, because a dependency and neglect case is a civil proceeding, this Court should interpret C.R.C.P. 39(a) to permit the conversion of a jury trial to a court trial only when a parent *entirely* fails to appear, either in-person *or* through counsel. Such an interpretation is consistently with the language of C.R.C.P. 39(a), as applied in a civil context, and will preserve the respondent parent's statutory jury trial right while avoiding empaneling juries to hear uncontested, *pro forma* adjudication trials. This Court should further hold that the trial court erroneously converted Mother's adjudication trial from a jury trial to a court trial.

The improper denial of Mother's right to a trial by jury requires reversal of the order of adjudication. Under Colorado law, the filing of a petition in dependency and neglect and the subsequent adjudication of the subject child as dependent or neglected provides "the jurisdictional bases for State intervention to assist the parents and child in establishing a relationship and home environment that will preserve

the family unit." *People in Interest of S.X.M.*, 271 P.3d 1124 (Colo. App. 2011), 1128 (citing *People in Interest of A.M.D.,* 648 P.2d 625, 640 (Colo. 1982)). A determination that a minor child is dependent and neglected rapidly triggers a host of life-altering consequences for the respondent parents and the child, *K.D. v. People*, 139 P.3d 695, 698-99 (Colo. 2006), including the imposition of a court-ordered treatment plan and, most importantly, the terror-evoking possibility that Mother might lose her parental rights entirely if she fails to comply with the treatment plan to the satisfaction of the Department and the court. Mother was thus entitled to have this critical adjudication decision made by a jury of her peers. The trial court erred in revoking this right when Mother's counsel was present and prepared to start the trial on time.

The trial court's erroneous revocation of Mother's jury trial right was not harmless because, as this Court has previously held, "a parent's statutory right to a jury trial at the adjudicatory stage is a 'substantial right' under C.R.C.P. 61," and an infringement of such a right

necessitates reversal. *C.C.*, ¶ 21 (citing *People in Interest of M.H-K.*, 2018 COA 178, ¶ 15; *People in Interest of Hoylman*, 865 P.2d 918, 921 (Colo. App. 1993); *Watkins*, 344 P.2d at 684). This Court should therefore reverse the adjudication of the Children as dependent or neglected and should remand the case for a jury trial.

D. Assuming *arguendo* that Mother's failure to be present in-person at the scheduled time constituted a failure to appear, the trial court nevertheless erred in converting the jury trial to a bench trial under the circumstances presented here.

Even if this Court declines to hold that a parent's appearance through counsel constitutes a valid appearance for the purposes of applying C.R.C.P. 39(a), this Court should nevertheless hold that the trial court erred in converting Mother's jury trial to a court trial under the unique circumstances of this case.

In *C.C.*, a division of this Court recently held that a trial court must first make a detailed inquiry into the circumstances behind a

parent's absence or belated arrival at a jury trial before converting the proceeding to a bench trial. This Court wrote:

> [W]e conclude that the mother's failure to appear for trial on time did not constitute a waiver — either express or implied — of her statutory right to a jury trial. In reaching this conclusion, we do not suggest that a parent can never waive her right to a jury trial by being late. However, before a court determines whether a waiver has occurred, it should inquire further about the parent's whereabouts and the circumstances concerning her absence before converting a jury trial to a bench trial. Especially when the mother's counsel and GAL were there on time and ready to proceed, the court should have inquired about the mother's whereabouts and, if satisfied that she would appear promptly or that she had a good reason for her tardiness, should have given her additional time to arrive before releasing the jurors. The court failed to make such inquiries or accommodations, and while its concern about inconveniencing the jurors was understandable, it was an insufficient reason to overcome the mother's statutory right to a jury trial.

Id. ¶ 18.

The trial court erred in holding that Mother waived her right to a jury trial under the unique circumstances of this case. As detailed at length above, Mother suffers from an array of significant mental health

conditions that have resulted, over the life of the case, in significant symptoms of confusion and paranoia. The statements of Mother's counsel and guardian ad litem on the morning of trial suggest that Mother was likely suffering from these symptoms on the morning of her trial. She was thus likely confused about where she was supposed to be and how she was supposed to get there.

A respondent parent may waive a statutory right in a dependency and neglect case, but such a waiver must be voluntary, even though it need not be knowing or intelligent. *People in Interest of B.H.*, 2021 CO 39, ¶ 69. Thus, "the waiver of a statutory right is effective if it is the product of a free choice, regardless of whether the holder [of the right] has the 'information legally relevant to the making of an informed decision' and is 'fully aware of what [she] is doing.'" *Id.* at ¶ 69 (quoting *People v. Walker*, 2014 CO 6, ¶ 16). "[A] person impliedly waives a statutory right through freely chosen conduct that clearly manifests an

intent to relinquish the right or is consistent with its assertion." *Id.* at ¶ 70.

Here, the record suggests that Mother did not make a voluntary waiver of her statutory right to a trial by jury during the adjudicatory phase of her dependency and neglect case. The record provided by Mother's counsel and GAL, combined with ample evidence regarding Mother's mental health conditions, suggest that Mother (a) was confused about where she needed to be and how to get there, (b) was unaware of when her trial was scheduled to take place and/or (c) perhaps believed, erroneously, that the transportation that the Department had arranged for her was fraudulent or illegitimate, or potentially even dangerous. In other words, circumstances suggest that Mother may have had a good reason for failing to be present at her adjudication trial – or, at least, a reason rooted in her mental health rather than any intention to voluntarily waive her right to a trial by jury.

C.C. makes clear that a trial court must inquire into the particular circumstances of a parent's tardiness or absence from a scheduled jury trial before concluding that the parent has waived her right to a trial by jury, either expressly or impliedly. In this case, the trial court made the requisite inquiry, but it gave essentially no weight to Mother's mental condition. The details of Mother's mental health conditions, as documented in the record, strongly suggest that Mother did not voluntarily elect to waive her right to a trial by jury. This Court should therefore hold that the trial court erroneously converted the jury trial to a court trial, and should reverse the order of adjudication on that basis.

CONCLUSION

This Court should reverse the order adjudicating the Children dependent and neglected.

Respectfully submitted this 4th day of January 2023

/s/ John F. Poor
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by the Colorado E-filing system on all interested parties on the day of filing.

/s/ John F. Poor
John F. Poor