DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO** 1437 Bannock Street, Room 256 Denver, CO 80202 Phone: (303) 606-2300	DATE FILED: October 25, 2023 8:58 PM
NORMA ANDERSON, MICHELLE PRIOLA, CLAUDINE CMARADA, KRISTA KAFER, KATHI WRIGHT, and **CHRISTOPHER CASTILIAN**, **Petitioners**, v. **JENA GRISWOLD,** in her official capacity as Colorado Secretary of State, and **DONALD J. TRUMP** **Respondents**.	▲ COURT USE ONLY ▲
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DONALD J. TRUMP'S BRIEF REGARDING STANDARD OF PROOF IN THIS PROCEEDING

Respondent and Intervenor Donald J. Trump hereby files this brief regarding the appropriate standard of proof for the hearing commencing on October 30, 2023. Under case law of both the United States Supreme Court and the Colorado Supreme Court, Petitioners must satisfy the "clear and convincing evidence" standard of proof to receive the relief they desire, because they seek the absolute deprivation of the First and Fourteenth Amendment rights of President Trump and Colorado voters.

I. The "clear and convincing evidence" standard is the minimum standard of proof required when constitutional rights are at stake.

The standard of proof used in any proceeding is fundamentally a due process issue. While Section 1-4-1204(4) specifies that "[t]he party filing the challenge has the burden to sustain the challenge by a preponderance of the evidence," this statutory standard of proof is not dispositive because courts must always apply the appropriate standard of proof as a matter of federal law: "The 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.'"[1] Furthermore, "the degree of proof required in a particular type of proceeding 'is the kind of question has traditionally been left to the judiciary to resolve.'"[2]

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[3] "In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be

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[1] *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

[2] *Id.* at 755-56 (quoting *Woodby v. INS*, 385 U.S. 276 (1966)).

[3] *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring).

distributed between the litigants."[4] On this basis, the Supreme Court in *Addington v. Texas* explained which circumstances are appropriate for each of the three standards of proof.

"Preponderance of the evidence" is appropriate for "the typical civil case involving a monetary dispute between private parties" because "society has a minimal concern with the outcome of such private suites" and the litigants should "thus share the risk of error in roughly equal fashion."[5]

"Clear and convincing evidence" is appropriate when "[t]he interests at stake . . . are deemed to be more substantial than mere loss of money" and a higher standard of proof would be necessary "to protect particularly important individual interests in various civil cases."[6] To that end, "the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'"[7]

The "beyond a reasonable doubt" standard is appropriate in criminal cases, where "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirements they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment," because in those circumstances "our society imposes almost the entire risk of error upon itself."[8]

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[4] *Santosky*, 455 U.S. at 754-755.

[5] *Addington*, 441 U.S. at 423.

[6] *Id.* at 424.

[7] *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 425, 426).

[8] *Addington*, 441 U.S. at 423-24.

To determine which standard of proof is appropriate, the Court in *Santosky* applied a "straight-forward consideration of the factors identified in *Eldrige* to determine whether a particular standard of proof in a particular proceeding satisfies due process."[9] The factors are "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."[10] Importantly, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'"[11] "Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss."[12]

The Supreme Court has consistently applied this analysis when defendants' important or fundamental constitutional rights are at-stake, finding that the clear and convincing evidence standard is necessary to provide due process in proceedings concerning termination of parental rights[13] and involuntary psychiatric commitment.[14]

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[9] *Santosky*, 455 U.S. at 754.

[10] *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[11] *Id.* at 758 (*Goldberg v. Kelly*, 397 U.S. 254, 262–263 (1970)).

[12] *Id.*

[13] *See Santosky*, 455 U.S. 745.

[14] *See M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

In the First Amendment context, such as this case which implicates President Trump's First Amendment rights to free speech and petition, this analysis has lead the Supreme Court to require that a public official prove by clear and convincing proof that a speaker's defamatory statements were made with knowledge or the reckless disregard of their falsity.[15] The point of this higher standard is to give freedom of speech the necessary "'breathing space' essential to their fruitful exercise."[16]

The Colorado Supreme Court also uses this framework to determine the appropriate standard of proof in various cases:[17]

> Previously, we held that the three-factor analysis in *Eldridge* was an appropriate tool to assess the question of "what process is due" parties facing termination of parental rights. In *A.M.D.,* we employed the *Eldridge* balancing test to determine whether the Due Process Clause mandated a stricter standard of proof at the adjudicatory and termination hearings. There, we determined that the private interests of the parents in preserving their rights were "commanding."
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> We discussed that the risk of error at stake was the "risk of erroneous fact finding." The government's interests, we held, included the *parens patriae* interest in preserving and promoting the well-being of the child and the interest in reducing the fiscal and administrative burdens that come with a higher burden of proof. We also discussed, however, that a higher burden of proof at the adjudicatory stage could highlight the adversarial nature of the process, replacing the State's role as a "helping intervenor" with that of an "adversary of

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[15] *BE&K Constr. Co. v. NLRB*, 536 US 516, 531 (2002).

[16] *Id., citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

[17] *See People in Interest of A. M. D.*, 648 P.2d 625 (Colo. 1982); *A.M. v. A.C.*, 2013 CO 16, ¶ 32, 296 P.3d 1026, 1035–36, *as modified on denial of reh'g* (Mar. 18, 2013); *E.R.S. v. O.D.A.*, 779 P.2d 844, 847-48 (Colo. 1989); *In re D.I.S.*, 249 P.3d 775, 785 (Colo. 2011); *L.L. v. People*, 10 P.3d 1271, 1276 (Colo. 2000); *People in Int. of O.E.P.*, 654 P.2d 312, 315 (Colo. 1982).

> the parents, bent on the permanent destruction of their relationship with the child."
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> For these reasons, we concluded that the government's "substantial" interests went beyond its pecuniary stake. Balancing those interests against one another in the context of each hearing, we concluded that fairness required a clear and convincing standard at the termination hearing but only a preponderance of the evidence standard at the adjudicatory hearing.[18]

Both the United States Supreme Court and the Colorado Supreme Court have consistently found that whenever constitutional rights are at stake, the appropriate standard of proof is either clear and convincing evidence or higher.[19]

An evaluation of the *Eldridge* factors under *Santosky* shows that the appropriate standard of proof is clear and convincing evidence, so that President Trump and those who seek to vote for him may be afforded due process.

II. The appropriate standard of proof is "clear and convincing evidence" because important constitutional rights would be permanently damaged by an error.

The appropriate standard of proof in this proceeding is "clear and convincing

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[18] *A.M. v. A.C.*, 2013 CO 16, ¶ 32, *as modified on denial of reh'g* (Mar. 18, 2013) (paragraph breaks added) (relying on *People in Interest of A. M. D.*, 648 P.2d 625 (Colo. 1982)) (internal citations omitted).

[19] *See Santosky*, 455 U.S. 745 (clear and convincing evidence needed before terminating parental rights); *M.L.B.*, 519 U.S. 102 (same); *Addington v. Texas*, 441 U.S. 418 (clear and convincing evidence needed before involuntarily committing defendant to psychiatric hospital); *In re Winship*, 397 U.S. 358 (1970) (beyond a reasonable doubt standard necessary for juvenile delinquency proceeding); *People in Interest of A. M. D.*, 648 P.2d 625 (Colo. 1982) (applying *Santosky* to hold that clear and convincing evidence is needed before termination parental rights); *A.M. v. A.C.*, 2013 CO 16 (same); *People in Int. of O.E.P.*, 654 P.2d 312 (Colo. 1982) (preponderance of the evidence standard was acceptable in parental neglect determination because no constitutional rights were threatened, unlike in an action to terminate parental rights).

evidence" because Petitioners' requested relief would permanently deprive President Trump and Colorado voters of their important constitutional rights regarding freedom of association and voting. All three factors of the *Santosky* analysis indicate that due process requires the "clear and convincing evidence standard."

First, the private interests at stake are significant. Petitioners here seek to have President Trump declared permanently ineligible for access to the ballot in Colorado for any federal or state office. Unlike a purely monetary interest that merits only a preponderance of the evidence standard of proof,[20] the interests threatened in this case are important First and Fourteenth Amendment constitutional rights related to freedom of association.[21] The Colorado Supreme Court has directly recognized that "restrictions on a political organization's access to an election ballot burden two fundamental rights: 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'"[22] And "ballot access restrictions imposed on candidates necessarily implicate voters' freedom of association by limiting the field of candidates from which the voters might choose.[23]

Second, the Government's interest in regulating its elections is not harmed by using

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[20] *See Addington*, 441 U.S. at 423.

[21] *Colorado Libertarian Party v. Sec'y of State of Colo.*, 817 P.2d 998, 1002 (Colo. 1991).

[22] *Id.* (quoting *Williams v. Rhodes,* 393 U.S. 23, 30 (1968)); *accord Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986); *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184 (1979); *National Prohibition Party v. State,* 752 P.2d 80, 83 (Colo.1988).

[23] *Id.* (citing *Anderson v. Celebrezze,* 460 U.S. 780, 787-88 (1983).

the "clear and convincing evidence" standard and are actually preserved. While the Government does have an interest in regulating its election to ensure they are "'fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes,'"[24] this interest must be balanced against the effect of those regulations on the rights of candidates, political organizations, and voters.[25]

Unlike election regulations which impose a surmountable hurdle to would-be candidates that can be overcome by patience, effort, or savvy, such as the one-year disaffiliation requirement for independent candidates, the government action Petitioners seek here would permanently bar President Trump from the ballot, including of course access to the ballot for the 2024 election. Whereas regulations like the disaffiliation requirement provide a clear benefit to the government by cutting down on chaos that would be caused by candidates continuing intra-party on the general election ballot,[26] President Trump's permanent disqualification does not present an unambiguous regulatory benefit to the Government's administration of elections. To the degree the Government has an interest in substantively evaluating the constitutional qualifications of presidential candidates under Section Three in order to keep disqualified candidates off the ballot (which President Trump has disputed in separate briefing), this interest is only in keeping off candidates who are actually disqualified.

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[24] *Colorado Libertarian Party*, 817 P.2d at 1002 (quoting *Storer v. Brown*, 41 U.S. 724, 730 (1974)).

[25] *Id.* at 1001-02.

[26] *Id.* at 1003.

The Government has no interest in keeping candidates off the ballot who are qualified—especially on a permanent basis. Accordingly, the "clear and convincing evidence" *serves* the Government's interest here by reducing the risk of an erroneous permanent bar on an otherwise qualified candidate. Given the limited procedures for resolving Petitioners' challenge and the insurmountable nature of the disability they seek to impose on President Trump, the governmental interest in only prohibiting truly disqualified candidates from the ballot is aided by the heightened standard of proof. And the Colorado General Assembly has explicitly stated that the Election Code "shall be liberally construed so that all eligible electors may be permitted to vote."[27] This interest is not served by erroneously barring a qualified and popular candidate from the ballot forever. Thus, requiring Petitioners to meet the "clear and convincing evidence" standard before permanently banning President Trump from the ballot is in the interests of both the Government and President Trump.

Third, the risk of erroneous deprivation of President Trump and Colorado voters' rights in this proceeding is heightened because of its abbreviated procedures. Petitioners have chosen to proceed under Section 113's expedited procedures, preventing President Trump's use of the discovery process, putting him under significant time-constraints while they have had over a year to prepare, and affording him severely limited procedures for appeal. Because of these procedural pressures, President Trump and Colorado voters face a real risk that their important First and Fourteenth Amendment rights will be erroneously deprived without adequate remedy. Furthermore, the hearing requires the Court to go into

[27] C.R.S. § 1-1-103(1).

deep and uncharted constitutional waters regarding how to apply Section Three of the Fourteenth Amendment to a former President.

This combination of limited procedures for establishing and adjudicating complex factual issues related to the events of January 6, 2021, the Court's need to decide novel constitutional issues, and an abridged appeals process presents a distinct risk of an erroneous judgment. This risk of error is all the more severe because Petitioners seek a *permanent* prohibition on President Trump's ballot access. A risk of an erroneous permanent deprivation of constitutional rights, particularly when that risk is magnified by procedures that remove traditional due process safeguards, necessitates a higher standard of proof.[28]

Conclusion

The Court has a duty to ensure that the First and Fourteenth Amendment rights of President Trump and Colorado voters are protected by sufficient process. Applying the "clear and convincing" standard of proof protects against an erroneous deprivation of these rights while serving the governmental interests. Accordingly, the Court must require Petitioners to meet this higher standard of proof for the relief they seek.

Respectfully submitted this 25th day of October 2023,

GESSLER BLUE LLC

s/ Geoffrey N. Blue
Geoffrey N. Blue

[28] *See Santosky*, 455 U.S. at 761-64 (finding a higher standard of proof was necessary when procedural limitations meant that parents' rights were subject to termination based on complex, subjective, or otherwise imprecise standards).

Certificate of Service

I certify that on this 25th day of October 2023, the foregoing was electronically served via email or CCES on all parties and their counsel of record.

s/ Joanna Bila
Joanna Bila, Paralegal