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<tr><td>COURT OF APPEALS<br>STATE OF COLORADO<br><br>2 East 14th Avenue<br>Denver, CO 80203<br>(720) 625-5150</td><td rowspan="2">DATE FILED: June 23, 2022 5:25 PM<br>FILING ID: D96586E69310A<br>CASE NUMBER: 2022CA761<br><br>▲ COURT USE ONLY ▲</td></tr>
<tr><td>Larimer County District Court<br>Honorable Judge Gregory Lammons, Division 5B<br>Case Number 22CV30214<br><br>MAGGIE JANSMA,<br>Plaintiff-Appellant,<br><br>vs.<br><br>COLORADO DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION,<br>Defendant-Appellee.</td></tr>
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<tr><td colspan="2">OPENING BRIEF ON APPEAL</td></tr>
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Plaintiff-Appellant Maggie Jansma (hereinafter "Appellant"), by and through her counsel, Sarah Schielke, of The Life & Liberty Law Office, hereby submits the following

**Opening Brief on Appeal:**

## CERTIFICATE OF COMPLIANCE

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

This brief complies with C.A.R. 28(g). Excluding the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains 4,745 words.

This brief complies with C.A.R. 28(k). For the party raising the issue, it contains under a 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 (R._, p. __), not to an entire document, where the issue was raised and ruled on.

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

*s/ Sarah Schielke*
Counsel for Appellant

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## STATEMENT OF ISSUE PRESENTED

Can a police officer's mere act of checking the box "refused" on an Express Consent Affidavit and Notice of Revocation form *alone* supply all of the "substantial evidence" needed for the Department to find that a driver refused to cooperate with a chemical test request?

## STATEMENT OF THE CASE

During a winter storm on January 6, 2022, Ms. Jansma attempted to brake for an upcoming stop sign and her car began sliding and spinning on ice. This caused her to hit the vehicle up ahead of her, causing moderate damage to its rear. When Loveland Police officer Jerimiah Wood arrived and contacted Ms. Jansma, he ultimately came to believe she was impaired by alcohol. Officer Wood arrested Ms. Jansma for Driving Under the Influence and put her in his patrol car. R. *Exhibit A*, p. 14. Officer Contino subsequently arrived. Officer Contino then transported Ms. Jansma to the hospital for medical clearance and then to the Loveland Police Department to be booked and processed. Id. Both officers completed report narratives describing their contact with Ms. Jansma, which were included in Exhibit A.[1]

Exhibit A was the sole evidence presented at Ms. Jansma's revocation hearing. See CF, *Exhibit A*, p. 131 (Wood narrative); p. 132 (Contino narrative); p. 134-35 (Contino Affidavit in Support of Warrantless Arrest). The officers' arrest report narratives contain lots of detail regarding their encounters with Ms. Jansma. However nowhere in these narratives do the officers state that they gave Ms. Jansma an express consent advisement or otherwise requested she complete a chemical test. Nowhere in these narratives do the officers state that Ms. Jansma stated or indicated she was refusing to complete a chemical test. On both of these items, their reports are devoid of comment

[1] Exhibit A is also included in the record in the "COURT FILE" document, pages 118-138. For ease of reference in the rest of this Brief, Exhibit A cites will be cited to their corresponding page in the "EXHIBIT" document (Ex. A, p. ___).

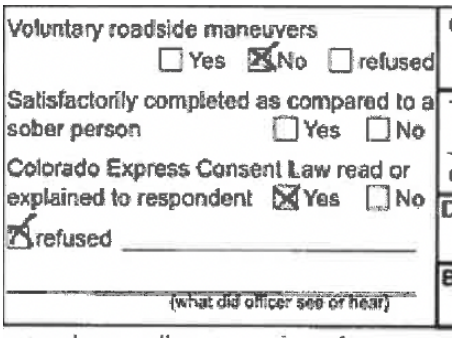
or claim. Neither officer testified at the Department Express Consent hearing. See CF, *Transcript of Hearing*, p. 44-50.

Ms. Jansma, subsequent to her arrest, having never received any Notice of Revocation, but unsure what the DUI charge did to the status of her license, requested a hearing from the Department in an abundance of caution on January 11. R., CF, p. 111. The Department told Ms. Jansma there was no revocation action pending, and then the Department notified Loveland that they did not have an Express Consent Affidavit on file despite Ms. Jansma's apparent DUI arrest. This led Officer Contino, over a week later, on January 19, to fill out a late one and send it in to the Department. R. CF, p. 118. On the form, Officer Contino admitted he never completed the form with Ms. Jansma or served it on her:

| License Surrendered? ☐ Yes ☒ No | Temporary Permit Issued? For interlock restricted drivers, see also DR 2057- Do not issue permit. ☐ Yes ☒ No **Restrictions/Endorsements:** |
|---|---|
| Personally Served? (If blood do not serve) ☐ Yes ☒ No | Respondent's Signature (Officer, please explain a missing signature) Form not completed at time of arrest. Completed at later date. |

R. CF, p. 118.

On the form, Officer Contino checked a box that stated Ms. Jansma "refused" but he left blank the lines where the officer is specifically directed to describe what they saw or heard that they believed constituted a refusal to submit to testing:


Voluntary roadside maneuvers
☐ Yes ☒ No ☐ refused
Satisfactorily completed as compared to a sober person ☐ Yes ☐ No
Colorado Express Consent Law read or explained to respondent ☒ Yes ☐ No
☑ refused _____
_____
(what did officer see or hear)

Id. The Affidavit document contained no information about the timing of any chemical test request or any alleged refusal to complete the same. Id. The Department of Revenue received the late Notice of Revocation and subsequently contacted Ms. Jansma to tell her that there now was a pending revocation action upon which a hearing could be requested. R. CF, p. 109. She did so.

The hearing was held on March 18, 2022. No testimony was presented. The sole evidence comprising the record were the documents in Exhibit A. The sole issues at the hearing were whether a law enforcement officer had timely asked Ms. Jansma to complete a chemical test and whether Ms. Jansma had in response to that request refused to complete a chemical test. Ms. Jansma's argument at the hearing was straightforward: There were no "driver's words" or "other manifestations of willingness or unwillingness" for the trier of fact (hearing officer) to consider with respect to any chemical test request. *See Dolan v. Rust*, 576 P.2d 560, 562 (Colo. 1978) ("In deciding whether there was a refusal to submit to a chemical test, the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness to take the test."). The record contained no evidence of a timely advisement/chemical test request occurring and no evidence of any words or conduct supporting a legal determination of refusal to complete

such a chemical test. Solely checking a box on a form weeks after the fact that says "refused" could not possibly be sufficient, Ms. Jansma argued, because that would render EC hearings on refusals pointless. The "refused" box is checked by the police officer *on every single Express Consent form alleging refusal in Colorado*. If that is sufficient evidence of advisement and refusal, why even hold a hearing? Allowing the mere checking of the "refused" box by the police officer on this form to suffice as "substantial evidence" of a chemical test refusal would impermissibly put the police officer in the shoes of the trier of fact by permitting that officer, rather than the Department, to make the legal determination of a chemical test refusal.

The hearing officer took the matter under advisement and then three days later issued a written ruling upholding the revocation, R. CF, *Final Decision and Order*, p. 35-39, and suspending Ms. Jansma's driver license for one year. The basis of the Department's ruling was that Officer Contino had later completed an Express Consent Affidavit "under penalty of perjury" and in that document Contino indicated "that he read or explained Colorado Express Consent to Respondent and that she refused." Id. at 36. The Department's ruling amounts to a legal conclusion that any police officer completing any Express Consent Notice of Revocation form – no matter how vague, late, or incomplete – will automatically supply adequate factual evidence of a driver's refusal by merely checking the box "refused." The ruling is arbitrary and capricious, an abuse of discretion, and unsupported by the evidence in the record.

Ms. Jansma timely appealed the Department's ruling to the Larimer County District Court. R. CF, p. 143. On May 10, 2022, the Larimer County District Court affirmed the Department's ruling. R. CF, p. 176-78. The Larimer County District Court declared, like the Department, that the fact of the officer checking the box "refused" on the Express Consent Notice of Revocation form "under oath" was per se sufficient evidence to find that Ms. Jansma (and apparently any other driver in Colorado) was offered and refused a chemical test. R. CF, p. 177. Ms. Jansma appeals.

## SUMMARY OF THE ARGUMENT

Colorado statute and refusal case law direct that a refusal is determined by the factfinder by looking at the driver's behavior and statements ***at the time the chemical test was requested***. *See, e.g.*, *Gallion v. Colorado Dept. of Revenue*, 171 P.3d 217, 220 (Colo. 2007) ("A finding of cooperation or non-cooperation requires that the court look to a driver's statements and behavior indicating willingness or unwillingness to submit to testing.") (emphasis added). In Ms. Jansma's case, there is no evidence whatsoever in the record regarding when a chemical test was requested or what Ms. Jansma said or did in response to a request for a chemical test. If a request for a chemical test was made, we do not know when the request occurred. Without knowing when that occurred, there is no way to know what behavior or statements to look at in deciding whether there was a refusal to complete testing. The Department proposes that the officer just checking the

"refused" box on the express consent affidavit – and leaving blank the part of the form where they are supposed to describe the chemical test refusal actions/statements they observed – is adequate. It is not. Every single refusal revocation action begins with an officer checking that box. A hearing is still required in which the hearing officer is to apply the law to the facts in the record. A hearing is still required where the hearing officer must examine the facts of evidence in the record (i.e., not just note that the "refused" box was checked) to determine whether a refusal occurred *as a matter of law*.

And with respect to that law, it is clear: "In deciding whether there was a refusal to submit to a chemical test, the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness to take the test." *Dolan v. Rust*, 576 P.2d 560, 562 (Colo. 1978) (emphasis added). The statements and behavior to be examined are those made in response to the request for the chemical test. The objective test for determining chemical test refusal does not look at what the driver says at the beginning of the stop. The objective test for determining chemical test refusal does not look at the driver's rudeness later at the jail when being booked. The objective test for determining chemical test refusal does not look at whether the driver declined to complete voluntary roadside maneuvers. The only facts relevant to making a legal determination of chemical test refusal are **what the driver says and does in response to being asked to complete a chemical test**.

The record in this case is devoid of any facts regarding when a chemical test was requested. We do not have evidence of a prompting event. We do not have evidence of a reactive event. The officers provided no description of a chemical test request and no description of any behavior or statements by Ms. Jansma in response to a chemical test request. Without this information, there is not any evidence (let alone "substantial evidence") upon which a refusal determination could be upheld. The Department's decision to revoke Ms. Jansma's driving privileges was arbitrary and capricious. It must be reversed.

**Standard of Review**

Section 42-2-126(9)(b), C.R.S. governs the standard of review in appeals of Department of Revenue license revocations. It states as follows:

> "Judicial review of the department's determination shall be on the record without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination that is unsupported by the evidence in the record, the court may reverse the department's determination."

"A hearing officer's finding of fact is arbitrary and capricious if the record as a whole shows there is no substantial evidence to support the decision." *Fallon v. Colo. Dep't of Revenue*, 250 P.3d 691, 693 (Colo. App. 2010).

## ARGUMENT

### 1. The record is devoid of the only facts relevant to a chemical test refusal determination: What Ms. Jansma said or did in response to a request for a chemical test.

"In deciding whether there was a refusal to submit to a chemical test, the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness **to take the test**." *Dolan v. Rust*, 576 P.2d at 562 (emphasis added) (Colo. 1978). "Thus, an objective test became the standard to determine whether an individual's statements or behavior constituted either an outright refusal to submit to testing or a refusal by noncooperation." *Gallion v. Colorado Dept. of Revenue*, 171 P.3d 217, 220 (Colo. 2007). The Colorado Supreme Court in *Gallion* continued, laying out the law applicable to making "refusal" determinations under Colorado law:

> "In addition to our decision in *Dolan*, the court of appeals has addressed the issue of refusal and failure to cooperate on multiple occasions. Generally, these cases presented two factual scenarios. **In one set of cases, the court of appeals reviewed the behavior and statements of the driver to determine whether they evidenced an agreement to take the test or a refusal to cooperate**. For example, in *Halter v. Department of Revenue*, the court of appeals considered whether a driver had refused testing when he agreed to provide a urine sample but then claimed he was unable to urinate for the next two hours and fifteen minutes despite having been given several glasses of water to drink. 857 P.2d 535, 536-37 (Colo. App. 1993). The court of appeals upheld the hearing officer's factual determination that the driver's uncooperative conduct in failing to provide a urine sample within a reasonable time was a refusal to submit to testing. *Id.* at 537. In this case as well as others, the court of appeals **applied the test from *Dolan* and reviewed the objective statements and behavior of the driver to determine whether there was an ultimate refusal to submit to testing as a matter of law**.

> **In the second set of cases, the court of appeals dealt with the factual scenario where the driver initially refused, but subsequently agreed to submit to testing**. Thus, the court of appeals considered whether it could find sufficient cooperation or an agreement to take the test in spite of an initial refusal. Beginning with *Zahtila v. Department of Revenue*, the court of appeals held that a driver's initial refusal to consent to a test is not irrevocable and in certain circumstances may be rectified by later consent. 560 P.2d 847, 849 (Colo. App. 1977). In *Zahtila*, only twenty-five minutes elapsed between the driver's initial refusal to submit to testing and his subsequent consent. *Id.* at 849. The court reasoned that on these facts, the primary purpose of the statute, which was to obtain evidence of BAC levels to curb drunk driving through prosecution of the offense, was fulfilled. *Id.* at 849. Thus, the court read the statute to allow a recantation of an initial refusal that reasonably furthered this evidence-gathering goal."

*Gallion*, 171 P.3d at 220-21 (emphasis added). This extended passage and analysis from *Gallion* is provided here because the Colorado Supreme Court in *Gallion* went out of its way to make something very clear in refusal cases: It is not the driver's behavior and statements generally over the course of the entire interaction that are reviewed in making a refusal determination, it is the driver's behavior and statements *at the time the chemical test is requested* that are to be considered. All of the refusal cases reviewed in *Gallion* share one thing in common: they are each evaluating the record facts as they exist in the context of the response to a request for a chemical test.

"A finding of cooperation or non-cooperation requires that the court look to a driver's statements and behavior indicating willingness or unwillingness to submit to testing." *Gallion*, 171 P.3d at 222 (emphasis added). And, with respect to the *timing* of

that cooperation, the *Gallion* Court held "that the driver must cooperate with the officer while the officer remains engaged in requesting or directing the completion of the test." *Gallion*, 171 P.3d at 222. "This requirement is rooted in the language of the statute. Specifically, the statute requires that the driver 'cooperate in the taking and completing of' the test '*when so requested and directed* by a law enforcement officer having probable cause' that the individual was driving under the influence." *Id.* (citing § 42-4-1301.1(2)(a)(I), C.R.S.) (emphasis in original). This seems straightforward because it is straightforward. In determining whether there was a chemical test refusal, the analysis can only begin at the moment a chemical test is requested.

In Ms. Jansma's case, the record has no evidence regarding when an express consent advisement or chemical test request might have been provided. We do not know where to even look.[2] We don't know what part of the encounter to assess. We do not know what behavior or statements to be assessing for cooperation or non-cooperation with any such phantom chemical test request. This is a problem.

Officer Contino likely could have resolved much of this problem by completing the EC Affidavit in the manner it directs - by describing what he "saw or heard" that he believed constituted a refusal:

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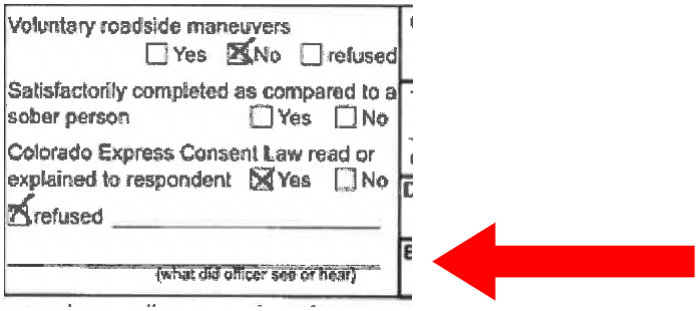
[2] Often, the fact that the driver was personally served with (and *signed*) the Express Consent Affidavit and Notice of Revocation form helps supply additional compelling evidence to support an officer's claim that a chemical test was requested and refused. That is almost certainly why the law requires personal service of the Notice on the driver, and a request for their signature on the same, at the time of refusal. § 42-2-126(5)(b)(I), C.R.S. Yet notably in this case, that service and signature event never occurred. See Argument (2), infra.




But he chose not to. This left the Department with no factual basis upon which to apply the objective test required for determining whether a refusal to submit to chemical testing occurred.

Indeed, while *Gallion* outlines the law applying to the two factual scenarios in which refusals occur and are analyzed, here we have no sense of what "factual scenario" is even presented. There are no facts related to either advisement, request, or refusal. The Department proposes that we find Ms. Jansma refused a chemical test from the fact that she was described in the officers' narratives as being at one point earlier in the traffic stop a bit rude or uncooperative. There are two problems with this: (1) Colorado statute and refusal case law directs that a refusal be determined from the driver's behavior and statements *at the time the chemical test was requested*, and (2) The officers both described in detail the moments in when Ms. Jansma seemed a bit rude or uncooperative, but they made no indication of uncooperativeness at the time a chemical test most likely would have been requested: **at the time of arrest**. In fact by their own narratives they indicate that Ms. Jansma was entirely cooperative once out of her car and immediately following being placed under arrest. Ex. A, p. 14, 15, 18.

With respect to problem (1), Colorado statute and case law expressly define the timeframe of where the factfinder is to look for evidence of refusal. Section 42-4-1301.1(2)(a)(I) states that a driver "shall be required to take and complete, and to cooperate in the taking and completing of, any tests of the persons breath or blood … **when so requested and directed by a law enforcement officer having probable cause**" (emphasis added). Every appellate case to consider a determination of refusal properly states and applies this reality. For example, in *Dikeman v. Charnes*:

> "On appeal, Dikeman initially argues that his statements to the arresting officer were not tantamount to a refusal. We do not agree. It is the driver's external manifestations of unwillingness to take the test which are relevant here. The evidence before the hearing officer, including the officer's testimony and notes, provides support for the finding that Dikeman refused the test." *Dikeman v. Charnes*, 739 P.2d 870, 871-72 (Colo. App. 1987) (emphasis added).

From *Dolan v. Rust:*

> "In deciding whether there was a refusal to submit to a chemical test, the trier of fact should consider the driver's words and other manifestations of willingness or unwillingness to take the test." 576 P.2d 560, 562 (Colo. 1978) (emphasis added).

From *Gallion v. Colorado Dept. of Revenue*:

> "We hold that the driver must cooperate with the officer **while the officer remains engaged in requesting or directing the completion of the test**. This requirement is rooted in the language of the statute." 171 P.3d 217, 222 (Colo. 2007) (emphasis added).

*When* did one of the officers here request or direct Ms. Jansma to take a chemical test? The record is devoid of evidence on this subject.

Problem (2) compounds problem (1). Namely, the officers went out of their way to describe in detail other times that Ms. Jansma was at least momentarily rude or uncooperative. But not a single one of those detailed instances was in the context of her being asked to take a chemical test. The reports reveal that the officers knew very well how to describe any uncooperative behavior they observed. But with respect to Ms. Jansma and her response to any allegedly requested chemical test, they detailed none. Zero.

Further, we know from experience and Colorado statute that express consent advisements are typically given at the time of arrest. And Officer Wood, who arrested Ms. Jansma, described her uneventful arrest as follows:

> JANSMA eventually exited the vehicle. When JANSMA exited the vehicle, she was unsteady and had trouble maintaining balance. I placed JANSMA into custody and walked her to my patrol vehicle. I searched JANSMA incident to arrest and placed her into my patrol vehicle.
>
> Due to knowing JANSMA well for several years, Officer Contino took custody of JANSMA and transported her to the Loveland Police Department.

Ex. A, p. 14. This is the part of the encounter most likely to contain factual allegations regarding any chemical tests requested and any statements or behavior by the driver in response to the same. Instead, we have not just a narrative omitting any facts as to both, but also a narrative describing a driver who was, at this likely express consent test request juncture of the encounter, being cooperative.

Officer Contino, who took over transport of Ms. Jansma after Wood had already placed her under arrest and into his patrol car, offers no further record assistance on this

front. Officer Contino described Ms. Jansma's uncooperative behavior, whenever it did occur, in detail with respect to time, place, and context. None of it related to or occurred in the context of response to a request for a chemical test. Further, Ms. Jansma was not even consistently uncooperative while being transported or processed; according to Officer Contino, she was sometimes "rude" and sometimes "friendly." Ex. A, p. 15 ("While in contact with Maggie, I noticed that her moods and behaviors varied numerous times from rude to friendly."). If Officer Contino was even present at the time a chemical test was requested, which one of these two equally alternating dispositions was she at the time a test was requested? There is no indication. And there is certainly not "substantial evidence" supporting any indication. It seems unlikely that Contino is even the officer who would have the answer to this question (perhaps this is why he left blank the space for describing the acts/statements observed as amounting to refusal on the EC Affidavit form), but in any event, the record is the record. Judicial review is conducted on this record. *See* § 42-2-126(9)(b), C.R.S. ("Judicial review of the department's determination shall be on the record without taking additional testimony."). And this record does not supply any evidence, let alone "substantial evidence" of any information or facts needed under Colorado law to make a finding that Ms. Jansma was offered and refused a chemical test.

**2. On a record devoid of reference to a chemical test request, the fact that Ms. Jansma was not contemporaneously served with the Notice of Revocation as required by law is evidence that further enjoins a finding of refusal.**

Colorado's express consent statute provides that all drivers are required to take, and to cooperate in the taking and completing of, a BAC test when requested to do so by an officer with probable cause that the individual was driving under the influence. *Gallion v. Colorado Dept. of Revenue*, 171 P.3d 217, 219 (Colo. 2007). A person "must cooperate" with the request, "such that the sample of blood or breath can be obtained within two hours of the person's driving." § 42-4-1301.1(2)(a)(III), C.R.S. Additionally, the statute outlines obligations for any officer alleging that a driver has refused to cooperate. *Id.* Specifically:

> "A law enforcement officer, on behalf of the department, **shall personally serve a notice of revocation on a person who is still available to the law enforcement officer if the law enforcement officer determines that, based on a refusal** or on test results available to the law enforcement officer, **the person's license is subject to revocation for** excess BAC or **refusal**."

§ 42-2-126(5)(b)(I), C.R.S. (emphasis added). As discussed above, there are "outright refusal" factual scenarios and "refusal by noncooperation" factual scenarios. *See also Schulte v. Colo. Dep't of Revenue*, 488 P.3d 419, 424 (Colo. App. 2018) (discussing the same). "If a licensee does not give a definitive answer about whether he would like to participate in a chemical test, it may be reasonable to assume that he did not know for certain that the officer had deemed some uncooperative statement or act to be a refusal." *Schulte*, 488 P.3d at 424. "In those potentially ambiguous circumstances, a licensee may

only realize that he had refused when the officer delivers the notice." *Id.* Contemporaneous service of the notice is thus critical for clarifying any ambiguous circumstances and serving the purpose of the revocation statute. *See Turbyne v. People*, 151 P.3d 563, 569 (Colo. 2007) ("The mutual obligations created by the statute … facilitate cooperation between citizens and police officers… and allow a driver to obtain a chemical test for exculpatory purposes and the police to obtain a test to inculpate the driver.").

Further, pursuant to the revocation statute, if a refusal to submit to a chemical test has occurred, then by definition the driver is "still available to the law enforcement officer" to personally serve them with notice of revocation. This is why there is a line on the form for the driver's signature. This is why there are also statutory obligations for the officer to confiscate the driver's physical license. These events occur close in time, in the driver's presence, by statutory design. But the record in this case indicates that Ms. Jansma was never personally served with the Notice of Revocation as required by law. The officers' narratives detail no extraordinary circumstances preventing them from following this requirement of the law. If Ms. Jansma were being deemed a refusal by noncooperation under ambiguous circumstances, she was denied the opportunity that the statute provides with personal service of the notice of the revocation to correct that ambiguity. The untimely execution of the Notice of Revocation form thus serves to further compound this case's timeline problems. There is no record support indicating

whether Ms. Jansma was asked to take a chemical test within two hours of driving (let alone the "substantial evidence" that is required to make this finding). There is no record support indicating what Ms. Jansma said or did in response to any request for a chemical test at all.

Finally, it ought to be emphasized that every single alleged refusal revocation case in the State of Colorado begins with an officer filling out the Express Consent Notice of Revocation form and checking the box for "refused." Every single one. If this alone were adequate, there would be no "objective test" for determining whether a driver's statements or behavior in response to a request for a chemical test constituted a refusal. There would be no need for even a hearing. The cases of *Gallion*, *Schulte*, and *Dolan* would not exist (or they would all be considerably shorter).

This is why the blank space after the "refused" checkmark box where the officer is directed to describe the statements and behavior observed in response to the request for chemical test **is legally critical**. If an officer elects to leave it blank, then the officer needs to provide that critical information in his report. If he elects to not say a word about what statements or behavior he observed in response to an alleged timely request for a chemical test in either document, then there is not "substantial evidence" in the record supporting a finding of refusal to submit to a chemical test. There is no chemical test refusal evidence to consider at all.

## CONCLUSION

"A hearing officer's finding of fact is arbitrary and capricious if the record as a whole shows there is no substantial evidence to support the decision." *Fallon v. Colo. Dep't of Revenue*, 250 P.3d 691, 693 (Colo. App. 2010). In the instant case, the record as a whole shows there is no substantial evidence to support a finding of refusal to submit to a chemical test. There is no indication as to when a chemical test was requested. There is no indication as to what was said or done by Ms. Jansma in response to an alleged request for a chemical test. The Department's finding of a refusal to complete a chemical test in the absence of any information as to these critical facts was arbitrary and capricious, requiring reversal.

**THE LIFE & LIBERTY LAW OFFICE**

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**CERTIFICATE OF SERVICE**

This certifies that on June 23, 2022, a true and accurate copy of the foregoing **Opening Brief** was provided to the following parties via ICCES e-service:

Colorado Attorney General's Office

Larimer County District Attorney's Office
*courtesy copy*

Larimer County District Court
*courtesy copy*

*/s/ Sarah Schielke*