BEFORE THE INDEPENDENT ETHICS COMMISSION
STATE OF COLORADO

CASE NO. 18-22

In the Matter of

JOHN HICKENLOOPER, Governor of the State of Colorado.

RESPONSE TO COMPLAINT FILED BY FRANK McNULTY

COMES NOW John Hickenlooper, by and through counsel, Mark G. Grueskin of Recht Kornfeld, P.C., to respond to the complaint filed with the Independent Ethics Commission ("IEC") by Frank McNulty ("McNulty") of the Public Trust Institute, pursuant to IEC Rule 7.K.3.

INTRODUCTION

McNulty filed a complaint on October 12, 2018, which the IEC determined to be non-frivolous at its October 22 meeting. At such time, the Commission had no facts or legal references before it to provide context for McNulty's allegations which contain factual misstatements, triple hearsay, and what even he admits to be a lack of evidence.

While the IEC did its best to fulfill its mission in evaluating the complaint to be non-frivolous when this matter was preliminarily considered, it erred in coming to that decision. This Response seeks the IEC's determination that, with a more complete record, this is not a matter that raises the ethical concerns implicated by Article XXIX of the Colorado Constitution ("Article XXIX").

McNulty bases his complaint largely on what unknown parties have indirectly related publicly in some fashion (via websites or social media sources such as Twitter), as well as redacted public documents produced by Hickenlooper. These "factual" underpinnings make clear that the complaint is founded on a lack of personal knowledge and is, in large part, factually or legally incorrect, or both. Given the undisputed potential for errant allegations to affect a public officer's credibility and reputation, allowing such complaints to go forward is inconsistent with the wide discretion granted to the IEC by Article XXIX.

Accordingly, it is incumbent upon the IEC to hold this complaint up to the light of day – represented by the facts and the law that are not addressed in the Complaint itself – and grant the requested dismissal of these proceedings.

BASIS FOR DISMISSAL OF COMPLAINT

A. Standards for dismissal of a complaint

When considering a C.R.C.P. 12(b)(5) motion to dismiss for failure to state a claim upon which relief may be granted, "only a complaint that states **a plausible claim for relief** survives a motion to dismiss." *Warne v. Hall*, 2016 CO 50, ¶ 9, 373 P.3d 588 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)) (emphasis added). "Dismissal under C.R.C.P. 12(b)(5) is proper only when the facts alleged in the complaint cannot, **as a matter of law**, support the claim for relief." *N.M. v. Trujillo*, 2017 CO 79, ¶ 18, 397 P.3d 370 (emphasis added).

A C.R.C.P. 12(b)(5) motion to dismiss serves to test "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In addressing a C.R.C.P. 12(b)(5) motion, it is typical for an adjudicative body to accept all factual allegations in the complaint as true and view them in the light most favorable to the complainant. *Id.* (citations omitted). Where legal conclusions are couched as factual allegations, however, they need not be accepted as true. *Warne, supra*, ¶ 9.

B. Grounds for Dismissal

1. All claims in the complaint are frivolous for failure to satisfy the specific requirement that they allege and identify an attempt to influence a public official's "official act."

The Commission incorrectly found the McNulty complaint to be non-frivolous. McNulty fails to allege that a gift was given by a person who sought to influence an official act of a public officer. In other words, he fails to meet the only specified standard for what comprises frivolousness in this context.

> (a) ...[T]he **commission shall dismiss as frivolous any complaint** filed under article XXIX **that fails to allege that a public officer**, member of the general assembly, local government official, or government employee **has accepted or received any gift or other thing of value for private gain or personal financial gain**.
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> (b) For purposes of this subsection (5):
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> > (I) "Official act" shall have the same meaning as set forth in section 24-18-102 (7).
> > (II) **"Private gain" or "personal financial gain" means** any money, forbearance, forgiveness of indebtedness, **gift, or other thing of value given** or offered **by a person seeking to influence an official act** that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official, or government employee.

C.R.S. § 24-18.5-101(5) (emphasis added); *see* Colo. Const., art. XXIX, §§ 1(d), 6 (efforts "to realize personal financial gain through public office" violate the public trust; penalties may be imposed only if covered official "breaches the public trust for private gain"). An "official act" is "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority." C.R.S. § 24-18-102(7).

Colorado law thus mandates that the IEC dismiss a complaint where, as in the case of McNulty's, it fails to allege that a gift or other thing of value, was "accepted or received" with the result that the affected public officer obtains "private gain or personal financial gain." C.R.S. § 24-18.5-101(5). Even assuming the McNulty complaint is factually accurate (and, in many places, it is incomplete or incorrect), it neither alleges: (1) there were any "official acts" of interest to alleged donors to be performed by Governor Hickenlooper; nor (2) any goods or services were provided in order "to influence" the Governor's performance such act. It thus fails to meet this statutory mandate.

"'Frivolous' means a complaint filed without a rational argument for the IEC's involvement **based on** the facts or **law**." IEC Rule 3.A.5. Such "law" includes the statutory provisions set forth above, and McNulty made no rational argument – in fact, no argument at all – that his complaint meets this basic standard, established as a matter of law. Thus, the complaint is facially deficient and frivolous as a matter of law. Its dismissal is mandatory.

2. All claims pre-dating the complaint by more than 12 months must be dismissed.

The complaint was filed on October 12, 2018. In part, the complainant ruminates about events and circumstances said to have occurred in 2012, 2013, 2015, 2016, and January, 2017. Article XXIX allows complaints that pertain to events that actually transpired "within the preceding twelve months." Colo. Const., art. XXIX, § 5(3)(a).

Because these allegations are inconsistent with the 12-month period provided by Article XXIX, they must be dismissed. *SMLL, LLC v. Peak Nat'l Bank*, 111 P.3d 563, 564-565 (Colo. App. 2005) ("statute of limitations defense may be considered on a motion to dismiss where the bare allegations of the complaint reveal that the action was not brought within the required statutory period"). Even McNulty knows these matters are non-justiciable. He admits that the "violations set forth below no longer fall within the Commission's jurisdiction because the illegal act occurred over one year ago." Complaint at 11. The fact that he raises them here underscores that ethics-related allegations, as the IEC has observed, are sometimes filed to "impact reputations."[1] Where they are, they must be dismissed.

3. All claims relating to statutory reporting of gifts must be dismissed.

McNulty alleges that Hickenlooper also violated a statutorily dictated reporting of "gifts." Complaint at 15. *See generally* C.R.S. § 24-6-203.

McNulty does not cite or even acknowledge to the Commission that the statute specifically excludes from reporting any payments borne by the State as well as any payments that are

[1] IEC FAQ: Filing a Complaint (https://www.colorado.gov/pacific/iec/faq-complaints).

exempted from Article XXIX's gift ban. Beyond that, McNulty falsely represents the requirements of state law by stating, for example, "Even if Governor Hickenlooper claims any one of these gifts were given to the state, C.R.S. §24-6-203 requires such gifts be reported." The statute specifies just the opposite and states:

> The **reports required by subsection (2) of this section need not include** the following:
>
> (d) Payment of or reimbursement for actual and necessary expenditures for travel and lodging for attendance at a convention, fact-finding mission or trip, or other meeting that the incumbent or elected candidate is permitted to accept or receive in accordance with the provisions of section 3 of article XXIX of the state constitution, **if the payment of or reimbursement for such expenditures is made from public funds of a state or local government** in the case of an incumbent or elected candidate subject to the provisions of said article or from the funds of any association of public officials or public entities whose membership includes the incumbent's or elected candidate's office or the governmental entity in which such office is held;
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> * * *
>
> (f) Except as otherwise described in this subsection (4), **any other gift or thing of value an incumbent** or elected candidate who has been sworn into public office **is permitted to solicit, accept, or receive in accordance with the provisions of section 3 of article XXIX of the state constitution.**

C.R.S. § 24-6-203(4)(d), (f); *see also* IEC Advisory Opinion 13-01 at 10 (Article XXIX's exemptions "preempt[] the provisions of section 203(3.5)(a) of the Colorado Sunshine Act" which otherwise prohibit receipt of any "in-kind gift").

The Complaint's only citation to supposedly required reporting is Article XXIX, § 3(3)(f) which allows for certain nonprofits' reimbursements for public officials attendance at a convention, fact-finding mission or trip or other meeting. Complaint at 1, 4, and 14.[2] Yet, none of the expenses at issue in the Complaint were authorized by this non-profit exemption in Article XXIX. They were authorized because they were: personally paid by Hickenlooper; paid by the State; or acceptable (and thus not "gifts") because they were exempt under the "special occasion" provision of Article XXIX.

Thus, because the statute in question specifies that the mandated reports "need not include" any "gift or thing of value" that Hickenlooper was "permitted to... receive" under "the provisions of section 3 of article XXIX," C.R.S. § 24-6-203(4)(f), and because Hickenlooper was permitted by that section of the Constitution to act as he did, there is no violation made out by the facts in the Complaint.

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[2] The Complaint does not invoke or even indirectly reference any of the other statutory provisions that could conceivably apply to incumbent elected officials but are inapplicable to the facts here. *See* C.R.S. § 24-6-203(3)(d)-(h). As such, they are not addressed in this Response either.

4. All claims based on the Complainant's speculation must be dismissed.

In order to meet his pleading requirements, McNulty cannot base his complaint solely on conclusory statements or innuendo. He admits that, in large part, his complaint is supposition given the redaction of personal or other details on the Governor's calendar. The failure to plead any essential element of an alleged offense is sufficient to support a motion to dismiss. A complainant's factual allegations necessarily fail if they cannot "raise a right to relief 'above the speculative level.'" *N.M., supra,* 2017 CO 79 *at* ¶ 18 (citing *Twombly, supra*).

Given the central role played by speculation in the Complaint, all of its allegations must be dismissed. That said, this Response will also set forth the substantive facts that McNulty did not cite or otherwise make inquiry into.

RESPONSE TO ALLEGATIONS IN COMPLAINT

A. Allegations regarding Bilderberg Meetings – 2018

1. Ground transportation

Like all Bilberberg participants, Governor Hickenlooper paid for his own travel expenses and lodging (including meals). The car service referenced was provided as part of the all-inclusive conference package; no separate charge was assigned to the use of this transportation service by the meeting host. *See* Exhibit 1, attached ("Transportation between the airport or train station and the hotel will be provided."). Given that Governor Hickenlooper both used United Airline mails and personally paid for the conference expenses (a cost of $6,770.79) and thus paid for the transportation service provided, there was no gift made by any third party and no violation of Article XXIX of the Constitution or any other law. *See* Exhibit 3 (payment for tax assessed on miles used to travel to Turin); Exhibit 4 (plane reservation made for return trip, resulting in charges of $5,144.51); Exhibit 5 (Hickenlooper's personal payment of $5,144.51 in travel expense); Exhibit 6 (Hickenlooper's personal payment of $1,502.97 in hotel expense in Turin); *see* IEC Advisory Opinion 13-09 at 2 (no gift received where government official "is paying his own expenses" including those relating to travel).

2. Hotel accommodations

Governor Hickenlooper personally paid for the hotel room he used personally and without reimbursement, either by the State of Colorado or by any third person. *See* Exhibit 6, attached. As such, there was no gift made by any third party and no violation of Article XXIX of the Constitution or any other law. *See* Advisory Opinion 13-09, *supra*, at 2.

3. Flight to conference

Governor Hickenlooper personally paid for the flights to and from Bilderberg and without reimbursement, either by the State of Colorado or by any third person. *See* Exhibits 3-5, attached.

As such, there was no gift made by any third party and no violation of Article XXIX of the Constitution or any other law. *See* Advisory Opinion 13-09, *supra*, at 2.

4. Meals and activities

Because Governor Hickenlooper personally paid to attend this conference, all aspects of that conference (including meals and activities) were paid for by him. As such, there was no gift made by any third party and no violation of Article XXIX of the Constitution or any other law. Advisory Opinion 13-09, *supra*, at 2-3 (where official pays his or her own way in trip to build relationships that "may benefit" a state agency, there is no violation of Article XXIX).

Additionally, McNulty does not identify a value to be ascribed to any meal, activity, or even the so-called gift bag from Chrysler Fiat. Indeed, it is not clear from the "evidence" McNulty provides that any of the allegations surrounding these activities actually took place. In this portion of his complaint, McNulty uses hearsay upon hearsay upon hearsay (a third party's allegedly undoctored photo, placed on a public website, viewed and downloaded by McNulty or his agents, and then transmitted to this Commission). Even in administrative hearings where an agency may rely on certain hearsay evidence, it must still be trustworthy. Like other state agencies, the IEC must find a basis for doing so after considering the totality of the circumstances:

- whether the statement was written and signed;
- whether the statement was sworn to by the declarant;
- whether the declarant was a disinterested witness or had a potential bias;
- whether the hearsay statement is denied or contradicted by other evidence;
- whether the declarant is credible; whether there is corroboration for the hearsay statement;
- whether the case turns on the credibility of witnesses;
- whether the party relying on the hearsay offers an adequate explanation for the failure to call the declarant to testify; and
- whether the party against whom the hearsay is used had access to the statements prior to the hearing or the opportunity to subpoena the declarant.

Industrial Claims Appeal Office v. Flower Stop Marketing Corp., 782 P.2d 13 (Colo. 1989). The social media postings and other third-party internet sources used as the basis for this claim do not meet any of the Flower Stop tests. To the extent that a person's reputation is placed at issue, he or she should be able to expect that a majority of these standards be met before further proceedings are authorized.

McNulty admits to a lack of factual basis for these allegations but instead is counting on "[t]he Commission investigation... to define the full scope of expenses Governor Hickenlooper accepted as part of the Bilderberg Meetings." Complaint at 5-6. A complaint that makes "bare, conclusory assertions" has not stated a plausible claim for relief because such allegations are "not entitled to be assumed true." *Warne, supra*, ¶ 27. As such, it may be dismissed.

As a licensed attorney, McNulty knows that he may not launch a complaint alleging wrong-doing without a substantial factual basis. *See* C.R.C.P. 11 (based on a required pre-filing inquiry, an attorney or a litigant may only sign pleading if, based on investigation, the signer reasonably

believes the pleading is "well-grounded in fact"); *see also Switzer v. Giron*, 852 P.2d 1320, 1321 (Colo, App. 1993) (authorizing the award of attorney fees under C.R.C.P 11 where this standard was not met). He cannot use the prospect of a Commission investigation or discovery tools to relieve himself of the responsibility to plead legally sufficient allegations. The fact that "discovery might uncover facts that would allow (plaintiff) to plead" a legally sufficient claim is no response to the facial inadequacy of a complaint; the IEC "may consider only the allegations contained in the complaint." *N.M., supra*, at ¶ 48, citing *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) ("[I]n passing upon a motion to dismiss a complaint, the court can consider only matters stated therein and must not go beyond the confines of the pleading.").

B. Allegations regarding M.D.C. Holdings, Inc.

1. Airplane – Colorado to Connecticut

The trip in question was admitted by McNulty to be a one-way trip "to attend and speak at a federal event honoring the Commissioning (sic) of the USS Colorado Navy submarine in Connecticut." Complaint at 7; Exhibit K.[3]

In 2013, Hickenlooper officially supported "establishing a committee for the commissioning of the USS Colorado," which marked the first time since 1947 that there was "a ship bearing our state's name in the critical work of protecting our Nation's maritime interests."[4] Hickenlooper sought to have Colorado's Adjutant General involved in the progress of this effort.[5] *Id.* Mizel supported this commissioning that honored Colorado and participated in the event in Connecticut. The questioned trip to Groton reflected the culmination of this undertaking that gave the State valuable national and international prominence as well as affirming its place in the military defense of the United States.

This trip does not qualify as a prohibited gift under Article XXIX. It was not a trip provided to Hickenlooper for any purpose other than to facilitate his role as Governor, including (as McNulty notes in the Complaint) providing remarks at this event. This travel meets the tests of IEC Advisory Opinion 14-10 (secretary of state inquired about travel expenses for attending a national event to which he had been invited), namely:

> a. Is the gift to a specific individual or to the designee of an agency?
> b. Is the offer made *ex officio*?
> c. Is the travel related to the public duties of the traveler?
> d. Is there a potential conflict of interest or appearance of impropriety in acceptance of this gift?
> e. Is the purpose of the trip primarily educational or a networking opportunity for the covered individual or the donor?

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[3] Although it is not raised in the Complaint, the Governor personally paid for his return trip to Colorado, travelling from New York City. Exhibits 7 (flight reservation details) and 8 (credit card payment of $279.30).

[4] *See* https://usscoloradocommittee.org/governor-hickenlooper-letter/; Exhibit 2.

[5] *Id.*

Id. at 4-6; *see generally* IEC Position Statement 12-01 at 5-8 (establishing this five-factor inquiry). The questioned travel to Connecticut necessarily meets these tests.

- This trip necessarily involved the Governor as the State's designee, conferring an "institutional benefit" to the state. *See* Advisory Opinion 15-02 at 4-5 ("there is no other individual within state government comparably suited to the Director, and therefore no viable alternative to attend the Annual Forum if he is unable to do so").
- For that reason, it was an *ex officio* offer to Hickenlooper.
- It was clearly related to his public duties as "the governor is the personification of the state" of Colorado. *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008); *see also Colorado Taxpayers Union, Inc. v. Romer*, 750 F. Supp. 1041, 1045 (D. Colo. 1990) ("The official position (of the state's governor) is a part of the person of the incumbent at all times. Governors have no duty shifts or time off."), *aff'd on other grds*, 963 F.2d 1394 (10th Cir. 1992).
- As addressed above, there was no interest alleged in any State policy that was before the Governor to benefit anyone associated with the company, precluding the finding of a conflict of interest or appearance of impropriety.
- The Connecticut trip was primarily educational to advance the State's connection to the country's national defense – by commemorating a major military facility, named for Colorado – at a federally sponsored event.

As a result, such travel is exactly "the sort of travel which should be permissible under Article XXIX..., is not a gift to a covered individual, and therefore permissible under Article XXIX." Advisory Opinion 14-10 at 6; *see* IEC Advisory Opinions 16-01, 16-03, and 16-04 at 3 ("gift ban does not apply" where travel "is a benefit to the agency and Colorado, and does not directly benefit the Executive Director in her individual capacity").

More to the point, this airfare was given by "a personal friend of the recipient on a special occasion." Colo. Const., art. XXIX, § 3(3)(g). The costs of this airfare were borne by Larry Mizel who offered the service to Hickenlooper. The two have known each other for well over a decade and are social and personal friends. Mizel has a deep interest in matters pertaining to our national security and defense; he is well-known as the President and Founder of The CELL – Counterterrorism Education Learning Lab.[6] His offer to the Governor of transportation to an event that is directly related to national security was consistent with the educational mission he undertakes in his philanthropic work.

2. Hotel room for one night

The hotel stay was paid by the State of Colorado, as this expense was not a gift, based on the above analysis. *See* Exhibit 9 (payment to Mystic Marriott on state credit card). It was not paid for by a private person or any corporation, contrary to the allegations in the complaint. It is therefore not subject to the strictures of Article XXIX. *See* Advisory Opinions 16-01, 16-03, and 16-04, *supra*, at 3.

[6] *See* www.thecell.org/about.

C. Allegations regarding transit from New Jersey to Colorado

1. Airport terminal usage

In what is likely a precedent-setting allegation, McNulty suggests that the ability to use a publicly accessible air terminal is a gift or thing of value. Without belaboring the obvious, it is functionally impossible to get onto a passenger airplane without using a terminal. Benefits provided in connection with travel are not gifts under Article XXIX. *See* IEC Advisory Opinion 14-23 (relating to free meals provided by airline when a flight is cancelled); *see also* Advisory Opinion 14-12 (relating to public official's receipt and use of travel reward benefits). Airport terminal usage, particularly when it is not alleged that Hickenlooper made any particular use of the facility out of the ordinary, is far from an ethical violation, covered by Article XXIX.

2. Airplane

The airplane usage in question was provided to Hickenlooper to allow him to travel back from New York City where his wife was recovering after a medical procedure. *See* Exhibit 10 and 11 (insurance company explanation of benefits). Governor Hickenlooper and his wife traveled to New York on January 6 at their own expense. *See* Exhibit 12 (flight arrangements for Mr. and Mrs. Hickenlooper) and 13 (payment of flights to and from New York City for Mr. and Mrs. Hickenlooper). The Governor spent four days in New York, alternating between time with his wife and preparing for the state of the state speech, which was delivered the morning of January 11. *See* Exhibit 14 (Governor's calendar for January 8-10, showing time spent on both medical procedure and state business).

The Governor's wife would need to remain in New York for ten days to recover, but because of pressing state business, the Governor did not have unlimited time to spend with her as to that ten-day recuperation. It is clear from his calendar that he spent most of the morning of January 10 with his wife, then travelling back to Denver, and immediately preparing for the state of the state speech. *Id.* The transportation back to Denver was provided by a long-time, close friend of Hickenlooper's (Kenneth Tuchman) who knew of this medical situation. Besides his need to spend time in New York with his wife, Hickenlooper also needed an expedited, reliable return to Colorado to deliver his State of the State address before the Colorado General Assembly on January, 11, 2018.

Article XXIX exempts from the gift ban anything given by "a personal friend of the recipient (Hickenlooper)" and when given "on a special occasion." Colo. Const., art. XXIX, § 3(3)(g). This exception is couched in "broad language" and has been applied over time in that light. Advisory Opinion 13-01, *supra*, at 6 (such an event may be a "happy occasion" or a solemn matter, one whose occurrence is "rare"; in either case, this exemption applies); Policy Statement 08-01, *supra*, at 10 (special occasions can also reoccur and are permissible, even if they take place "on a regular basis").

Furthermore, Tuchman did not have any matter before Hickenlooper at the time of the trip from the New York metropolitan area. Thus, there was no potential for an official governmental act to be affected by this provision of air transport.

Thus, the "special occasion" exception applies here. The exception is not limited to joyful celebrations; it also applies to situations that reflect out-of-the-ordinary events when friends would typically reach out to minimize a person's personal stress or trauma. IEC Advisory Opinion 11-08 at 3 (donations to a fund to pay medical expenses for a covered official's spouse comprised a "special occasion"). This exception was intended to be broadly applied. *See* IEC Position Statement 08-01 at 10 ("The term 'special occasion' should not be restricted to birthdays, anniversaries and holidays; nor should it necessarily mean events that are rare or unusual.") The provision of transportation under these circumstances does not violate Article XXIX.

D. Rocky Mountain Regional Airport Travel

McNulty alleges that a trip on a private airplane was made to Dallas, Texas where, based on "press account," Hickenlooper was "officiating the wedding of Kimbal Musk." Complaint at 14. McNulty simply assumes that airplane must have belonged to someone other than Kimbal Musk, and then doubles down – without a scintilla of evidence – on that assumption by guessing that it belongs to Kimbal Musk's brother, Elon Musk.

McNulty is incorrect. The plane belongs to Kimbal Musk. *See* Exhibit 15 (showing McNulty's statement that "no public records show[] Kimbal Musk or his corporations own a private aircraft" is incorrect; Aircraft N278PC is registered to Kimbal Logistics LLC); Exhibit 16 (Aircraft N278PC transported Hickenlooper and Musk to Denver after the wedding). Further, Kimbal Musk is "a personal friend of the recipient (Hickenlooper)," and the trip to Dallas was given "on a special occasion" – namely, Musk's wedding at which Hickenlooper was the officiant. Colo. Const., art. XXIX, § 3(3)(g). This exception applies to life cycle events such as the birth of a child, Advisory Opinion 13-01, *supra*, at 7, and, logically, it must also apply to an event such as a wedding.

Kimbal Musk and Hickenlooper have been personal friends for years, and thus this relationship is one that Article XXIX was crafted to meet. But even if the wedding of a friend for whom Hickenlooper was the officiant was not "a special occasion," McNulty acknowledges that Hickenlooper provided services to Musk, and in return for those services, the questioned transportation was provided to Hickenlooper. He was the officiant at Kimbal Musk's wedding. Complaint at 14.

No "gift" exists where a person "receiv[es] lawful consideration of equal or greater value in return from the public officer." Colo. Const., art. XXIX, § 2. IEC Advisory Opinion 14-22 at 4 (because the delivery of a speech was "a valuable service (to donor, the preparation and delivery of the speech)... comprised lawful consideration... (and) the ban in Article XXIX does not apply"). Thus, Article XXIX's limitations do not apply to these facts.

In the alternative, the provision of transport services constituted an honorarium that meets the IEC's tests of permitted payment to a public official. As previously outlined by the IEC:

Honoraria of more than $50 are permissible, provided that:

a. Delivering the speech or writing the publication is not part of the public official's or employee's official duties;
b. Public resources are not used in the preparation of the speech or publication (including computers, telephones, staff, etc.);
c. Government time is not used for the preparation or delivery of the speech or publication;
d. The amount of the honorarium is reasonably related to the services the public employee or official is being asked to perform. (This can be deemed to be lawful consideration of equal or greater value); and
e. Neither the sponsor of the speech nor the source of the honorarium is a person or entity with whom the public official or employee has had, or reasonably expects to have, dealings in his or her official capacity.

Position Statement 08-01, *supra,* at 7-8. Hickenlooper meets these tests:

- Officiating at a wedding is not a part of the job of being governor of Colorado.
- No public resources were used in this undertaking.
- The wedding was held outside of the ordinary government work week and worktime.
- The amount of the honorarium was reasonable, given the commonly accepted practice where an engaged couple pays for the out-of-town to travel to another location so a third party – here, Hickenlooper – is able to perform the wedding service.
- Neither the bride nor the groom had any governmental dealings with Hickenlooper.

It is worth noting here that McNulty includes an entirely speculative, unsupported claim that the Governor's transport to the wedding was furnished by Elon Musk or one of his corporations. Complaint at 13. It was not. *See* Exhibits 15 and 16, *supra*. Where allegations are founded in speculation alone, they must – as a matter of law – be dismissed. *N.M., supra,* 2017 CO 79 *at* ¶ 18.

E. Miscellaneous other allegations regarding transportation

McNulty questions airplane usage for trips involving Jackson Hole, Wyoming, Aspen, Colorado, and Canada. In the first two instances, Hickenlooper was invited to and did give speeches as Governor of the State of Colorado. As addressed regarding the Connecticut travel and incorporated herein, Hickenlooper was acting in his role as Governor. In such a role, transportation expenses are not a gift to the public official and therefore are not addressed by Article XXIX.

1. Aspen

The Complaint alleged that travel to an Aspen Institute event "may have violated Amendment 41." Complaint at 9. This is another instance of McNulty's use of pure speculation in order to lodge ethical charges against the Governor.

In fact, the State of Colorado paid for Hickenlooper's travel to Aspen where he was scheduled to speak at the Aspen Institute. *See* Exhibit 17 (reservation information for Denver to Aspen trip); Exhibit 18 (reservation information for Aspen to Denver trip); and Exhibit 19 (state payment information for both trips). As such, there was no gift to Hickenlooper at all, much less any act that violated Article XXIX.

2. Jackson Hole

McNulty is factually incorrect in stating, "On August 13, 2018, Governor Hickenlooper took a flight from Dallas, Texas to Jackson Hole, Wyoming to attend the American Enterprise Institute's Jackson Hole Symposium. Complaint at 9. Hickenlooper did not travel from Dallas; he traveled from Washington, D.C.

Hickenlooper traveled to Jackson Hole with his chief of staff, Patrick Meyers. Meyers leases his own airplane and was scheduled to leave Washington, D.C. on the same date that Hickenlooper was to leave for the AEI Annual Retreat. Hickenlooper flew with Meyers, who was in Washington, D.C. at that time, and used an empty seat on that plane. This answers McNulty's question about "who paid for the flight and any other travel related expenses." Complaint at 9.

Meyers' provision of an open seat on this airplane was not a gift to Hickenlooper. Meyers is and has been a "personal friend" of Hickenlooper's for years, and he was entitled to provide transport to the Governor in this instance. Their shared need to return west from Washington, D.C. met the "special occasion" requirement in law. Colo. Const., art. XXIX, § 3(3)(g). Just as a covered official may "turn to friends and family" for a useful resource such as a legal defense fund, Advisory Opinion 13-01, *supra*, at 7, such official may turn to friends and family for a resource that broaches no concern whatsoever of impropriety or appearance of impropriety. *Id.* at 9. As noted above, this exception applies outside of celebrations and can even apply to opportunities to spend uninterrupted time together. Policy Statement 08-01, *supra*, at 10 ("occasion" need not be "unusual" and can even occur in the ordinary course of events, such as "a weekly meal with friends or family"). Thus, there was no violation of Article XXIX.

Hickenlooper attended the AEI annual retreat to deliver the keynote address, discussing regional economic development. This was clearly a public purpose related to the Governor's performance of his official duties. Any expenses paid by AEI (including Hickenlooper's return trip from Jackson Hole to Denver) represented a gift to the State of Colorado. "The benefits of participation include[d] an exchange of ideas and policy suggestions from others involved" in that sphere. Advisory Opinion 16-01, *supra*, at 2; *see also* Advisory Opinion 13-11.

As to the IEC's inquiry, this speech met the test for gifts to a public entity rather than a public official:

- This trip necessarily involved the Governor as the State's designee, conferring an "institutional benefit" to the state. *See* Advisory Opinion 15-02, *supra*, at 4-5 ("Attending and participating in the Seminar, which is attended largely by individuals from the communication sector, ensures that the message about Colorado's marijuana policy is understood and disseminated in an appropriate

fashion. Thus there is a beneficial purpose to the State, directly tied to the duties of the covered individual.").

- For that reason, it was an *ex officio* offer to Hickenlooper.
- It was clearly related to his public duties as "the governor is the personification of the state" of Colorado. *Developmental Pathways, supra*, 178 P.3d at 530; *see also Colorado Taxpayers Union, Inc., supra*, 750 F. Supp. at 1045 ("The official position (of the state's governor) is a part of the person of the incumbent at all times. Governors have no duty shifts or time off."), *aff'd on other grds*, 963 F.2d 1394 (10th Cir. 1992).
- There was no interest alleged in any State policy that was before the Governor to benefit anyone associated with the entity, precluding the finding of a conflict of interest or appearance of impropriety.
- This trip was primarily educational as a matter of learning about successful economic strategies for the existing economies in the West, including Colorado-specific strategies like balancing energy needs with environmentalism, diversifying our economy, and making government more efficient.

Therefore, nothing associated with the Jackson Hole trip presents an issue that would justifiably arise under Article XXIX.

3. Canada

As to the trip using Canadian airports, those travel expenses were paid for by Hickenlooper. *See* Exhibit 20 (Hickenlooper's commercial travel plans to Edinburgh); Exhibit 21 (Hickenlooper's travel plans, via airline miles, from Edinburgh); Exhibit 23 (payment of $145.71 tax applicable to miles usage for trip from Edinburgh); and Exhibit 23 (payment of airfare to Edinburgh of $1,280.71 as well as hotel charge of $419.06 in Edinburgh).

The occasion was a personal one (the death of a family member, a brother-in-law living in Scotland), which led to the redactions that were highlighted in the Complaint. McNulty states that redacted details translate to the use of a private aircraft. This is yet another instance of an allegation of an ethical violation that is based on personal speculation. Not only is that practice unjustified, this assumption is wrong. This allegation, too, must be dismissed.

F. Reporting by public official, pursuant to C.R.S. § 24-6-203

As addressed under the reasons for dismissal of the complaint that were addressed above, the statute in question excludes reporting responsibilities for expenses paid by the State and for payments that are authorized under Article XXIX. C.R.S. §24-6-203(4)(d), (f). Further, this Commission has held that the exemptions of Article XXIX, where satisfied, "preempt" the statute on which McNulty singularly relies. Advisory Opinion 13-01, *supra,* at 10. Those arguments are incorporated by reference here.

The point is, if a good or service does not qualify as a "gift," it is not supposed to be reported under C.R.S. § 24-6-203. Thus, this claim regarding reporting is without merit.

CONCLUSION

There's no "on/off" switch to being governor. Once in that office, everywhere one goes – and everything one does and says – is a reflection of, and on, the State of Colorado. Indeed, as a matter of law, the Governor is the "personification" of Colorado.

Still, even the Governor is entitled to some personal (albeit not entirely private) life. The voters knew this when they adopted Article XXIX and set up a new ethics regime for government officials and employees at all levels. They allowed those who are in public service to tend to their families and attend events of special significance. As importantly, they allowed them to do so under the same terms that any other person might do so – as a function of friendship, family ties, and connections that have nothing to do with government service. Or politics.

Under the facts at issue here, the Governor payed for certain expenses about which ethical concerns have been raised. The State paid for certain others that pertained to State business. And, as is permitted by law, personal friends absorbed a limited universe of other such costs.

If the IEC treats complaints as non-frivolous because of non-specific social media postings or complainants' admissions that they lack proof of wrong-doing (but, with time and discovery tools, maybe something might be found), it lends its substantial prestige and weight to phantom complaints. The IEC fulfills, not evades, its duties under law when it weeds out complaints that raise no violations of the public trust. It is the mission of the IEC to focus instead on those that raise conflicts of interest, self-dealing, or use of public positions for private benefit. In short, the IEC must be willing to draw a line where political actors launch political crusades, seeking this Commission's legitimacy for their exercise.

This complaint does not meet that test of substance. It is factually wrong in certain places, and it is legally wrong elsewhere. As a matter of fairness, it should be dismissed now.

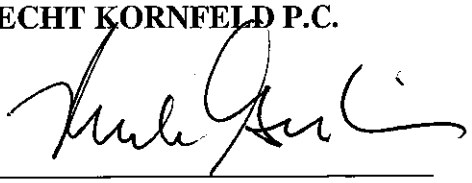
RELIEF SOUGHT

WHEREFORE, for the reasons stated herein, Respondent seeks:

(1) Dismissal of all claims in the Complaint;
(2) To the extent that the IEC may consider one or more of the allegations, any such determination be based on the legal arguments contained in, as well as the submitted exhibits to, the pleadings; and
(3) Such other relief as is warranted by law or equity.

Respectfully submitted this 21st day of November, 2018.

RECHT KORNFELD P.C.



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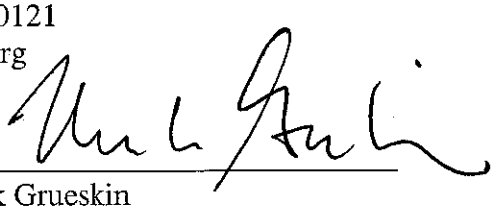
CERTIFICATE OF SERVICE

I, Erin Holweger, hereby certify that on ____ day of November, 2018, I submitted via email, the foregoing **RESPONSE TO COMPLAINT FILED BY FRANK McNULTY** to the following:

Frank McNulty
5190 S. University Blvd.
Greenwood Village, CO 80121
trust@publictrustinstitute.org



Mark Grueskin