

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint Nos. 18-22 and 18-29

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF: JOHN HICKENLOOPER

This matter comes before the Independent Ethics Commission (“Commission”) on a complaint filed by Public Trust Institute (“Complainant”) against John Hickenlooper (“Gov. Hickenlooper”), former governor of Colorado. Complainant alleged that Gov. Hickenlooper committed various ethical violations during his term as governor. The Commission dismissed certain allegations prior to hearing because they occurred more than one year prior to the filing of the complaint. Others were dismissed by the IEC following discussion with the parties. The IEC proceeded to hearing on six remaining allegations, which the Commission has jurisdiction over pursuant to section 5(1) of Article XXIX of the Colorado Constitution.

On June 4-5, 2020, the Commission held an evidentiary hearing and deliberated on the merits of the case in public. The Commission completed its deliberations at a meeting held June 12, 2020. For the reasons set forth below, the Commission determined that Gov. Hickenlooper violated section 3(2) of article XXIX of the Colorado Constitution when he accepted gifts in relation to his travel for two events: (1) the commissioning of the U.S.S. Colorado in Groton, Connecticut; and (2) the Bilderberg Meetings in Turin, Italy. The Commission determined that travel on four other occasions did not violate Article XXIX. Complainant did not demonstrate that the alleged gifts fell within the category of gifts required to be reported by state statute, and therefore the Commission did not consider whether there was a violation of any statutory reporting requirements.

I. Findings of Fact

a. Background

1. Gov. Hickenlooper was governor of the State of Colorado from 2011 to 2019.
2. Under the state fiscal rules, the State of Colorado will either pay for or reimburse an employee or public official for round-trip travel to an official state function.

3. An official state function is one which both (1) relates to one's position as a state employee; and (2) is in the interest of the state of Colorado.

b. Travel from New Jersey to Colorado

4. On January 10, 2018, Gov. Hickenlooper traveled from New Jersey to Colorado following the unexpected hospitalization of his wife in New York.

5. Gov. Hickenlooper was in New York for both his wife's medical procedure and to participate in a panel to attract more donations to fund the state's apprenticeship program at the Bloomberg Conference.

6. While at the conference, Gov. Hickenlooper ran into Kenneth Tuchman, a personal friend.

7. Upon hearing about his wife's medical procedure, Mr. Tuchman offered Gov. Hickenlooper a ride back to Colorado on his private plane to enable Gov. Hickenlooper to spend more time with his wife prior to giving the State of the State speech in Colorado the following morning.

8. The private plane was owned by Avian I LLC, a limited liability company that is 99% owned by Mr. Tuchman.

9. Gov. Hickenlooper accepted Mr. Tuchman's offer and flew back to Colorado with Mr. Tuchman.

10. Mr. Tuchman's publicly traded company, TTEC, had no business pending before Gov. Hickenlooper at the time Gov. Hickenlooper accepted Mr. Tuchman's offer.

c. Commissioning of U.S.S. Colorado

11. On March 15, 2018, Gov. Hickenlooper traveled from Colorado to Groton, Connecticut, to attend the commissioning of a submarine named the U.S.S. Colorado.

12. While some members of the Colorado delegation—other Colorado representatives involved in the commissioning that included Rep. Bob Gardner, Rep. Larry Liston, Sen. Larry Crowder, and then-Rep. Jeff Bridges—traveled via commercial airline, Gov. Hickenlooper and his chief of staff were offered, and accepted, travel on a private airplane owned or leased by MDC Holdings, Inc., a development corporation.

13. The average cost of a private flight from Colorado to Connecticut is between \$1,800 and \$2,600 per person.

14. MDC Holdings is a publicly traded company headquartered in Colorado engaged in several for-profit businesses.

15. MDC Holdings has an associated 501(c)(3) non-profit entity, the MDC Foundation, which has charitable interests in supporting veteran and military causes generally.

16. Larry Mizel is the CEO of MDC Holdings and the Chairman of the MDC Foundation.

17. The MDC Foundation was a sponsor of the commissioning of the U.S.S. Colorado.

18. MDC Holdings also provided financial support for the commissioning, including providing the plane, private meals, and meals at the commissioning events.

19. While in Connecticut, the State of Colorado paid for Gov. Hickenlooper's hotel accommodations.

20. At the U.S.S. Colorado commissioning, MDC Holdings sponsored two invite-only meals for small groups of 16-18 people, including Gov. Hickenlooper: (1) a March 15, 2018 MDC dinner; and (2) a March 16, 2018 MDC dinner.

21. Invitees on both the private airplane and to the MDC dinners included MDC representatives, Gov. Hickenlooper and his chief of staff, Major General Michael Loh, and Dianne Loh (collectively, the "MDC delegation").

22. The agenda description for the March 16 MDC dinner provided that it was held at the Oyster Club, a "fine dining restaurant and raw bar."

23. According to Rep. Gardner, the other members of the Colorado delegation were not invited to the MDC dinners.

24. MDC Holdings also sponsored two "receptions," which were larger meals where commissioning-focused events took place.

25. Finally, MDC Holdings sponsored a "VIP Reception and Clambake" for "major donors and special guests."

26. Approximately 400 people were expected to be in attendance at the VIP Reception and Clambake.

27. Gov. Hickenlooper attended the VIP Reception and Clambake and give a speech there.

28. Gov. Hickenlooper attended the March 16 MDC dinner.

29. The parties stipulated that the purpose of Gov. Hickenlooper's travel to Connecticut was for an official state function, i.e., the commissioning of the U.S.S. Colorado.

d. Travel from Texas to Colorado

30. On April 5-8, 2018, Gov. Hickenlooper traveled from Denver, Colorado to Dallas, Texas, to officiate the wedding of Kimbal Musk.

31. Gov. Hickenlooper testified that he officiates two to three weddings a year, usually because he is friends with the couple.

32. Gov. Hickenlooper became friends with Mr. Musk through Mr. Musk's philanthropic work with Big Green, a non-profit entity that installs learning gardens in schools.

33. The purpose of Gov. Hickenlooper's travel to Dallas was not an official state function.

34. Gov. Hickenlooper traveled from Colorado to Dallas on a commercial flight.

35. Mr. Musk offered Gov. Hickenlooper transportation back to Colorado from Dallas on a private plane owned by Mr. Musk's corporation, Kimbal Logistics LLC, and Gov. Hickenlooper accepted that offer.

36. Kimbal Logistics LLC is wholly owned by Mr. Musk.

e. Bilderberg Meetings

37. On June 7-10, 2018, Gov. Hickenlooper traveled to Turin, Italy for the Bilderberg Meetings, an invite-only annual conference for industry and political leaders in Europe and North America.

38. The parties stipulated that Gov. Hickenlooper's attendance at the Bilderberg Meetings was not for an official state function.

39. Gov. Hickenlooper utilized vacation time to attend the Bilderberg Meetings.

40. Gov. Hickenlooper paid for his flights to and from Turin.

41. Gov. Hickenlooper paid for his hotel accommodations in Turin, a total of €1,275.00 (or \$1,502.97), with his spouse's personal American Express card.

42. The hotel rate was negotiated for Gov. Hickenlooper and other conference attendees by the Bilderberg steering committee.

43. The American Express statement reflecting the charge reads "NH Lingotto – Ingotto Hotels SRL Lodging."

44. In 2018, FCA N.V. (“Fiat Chrysler”), an automobile manufacturer, was the sponsor of the Bilderberg Meetings.

45. Fiat Chrysler paid for all conference costs of the 2018 Bilderberg Meetings, including hosting costs such as logistics and security, as well as hospitality costs such as meals and ground transportation.

46. There is no charge to conference attendees for attendance at the Bilderberg Meetings, and none of the Bilderberg Meeting attendees, including Gov. Hickenlooper, reimbursed Fiat Chrysler for any costs of the conference.

47. Gov. Hickenlooper received ground transportation and meals free of charge at the Bilderberg Meetings.

48. Gov. Hickenlooper testified that, generally, he does not eat breakfast but mostly took part in the other meals provided.

49. Gov. Hickenlooper utilized ground transportation provided by Fiat Chrysler, using its own vehicles and personnel, to the hotel.

50. The cost of a luxury rental car from Talixo, a European rental car service, is €232.56 per day, or about \$275.00.

f. Travel from Washington, D.C. to Jackson Hole, Wyoming

51. On August 13, 2018, Gov. Hickenlooper traveled from Washington, D.C. to Jackson Hole, Wyoming, to attend and speak at the American Enterprise Institute (“AEI”) symposium.

52. Patrick Meyers, Gov. Hickenlooper’s chief of staff, offered Gov. Hickenlooper a ride to Jackson Hole on his LLC’s private plane, as Mr. Meyers was traveling to Colorado at the same time.

53. Mr. Meyers’ private plane is owned by PEM LLC, a limited liability company that is 99% owned by Mr. Meyers.

54. Gov. Hickenlooper accepted Mr. Meyers’ offer of transportation in order to work on adjustments to the state budget for the incoming administration with Mr. Meyers.

55. Traveling on Mr. Meyers’ airplane afforded Gov. Hickenlooper and Mr. Meyers three to four uninterrupted hours to work on state business.

56. Gov. Hickenlooper and Mr. Meyers are close, longtime personal friends.

57. The parties stipulated that Gov. Hickenlooper was in Washington, D.C., at an official state function.

58. The parties stipulated that Gov. Hickenlooper's speech to the AEI Symposium was an official state function.

g. Travel from Washington, D.C. to Centennial, Colorado

59. On October 12, 2018, Gov. Hickenlooper traveled from Washington, D.C. to Centennial, Colorado.

60. Mr. Meyers offered Gov. Hickenlooper a ride back to Colorado on the private plane owned by PEM LLC, Mr. Meyers' limited liability company.

61. Gov. Hickenlooper accepted Mr. Meyers' offer of transportation in order to work on transition issues for the incoming administration.

62. Again, traveling on Mr. Meyers' airplane afforded Gov. Hickenlooper and Mr. Meyers several uninterrupted hours to work on state business.

63. The parties stipulated that Gov. Hickenlooper was in Washington, D.C. at an official state function.

II. Conclusions of Law

a. Colo. Const. art. XXIX, § 3(2)

Section 3 of Article XXIX of the Colorado Constitution provides:

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than [\$59] in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

* * *

(3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:

* * *

(g) Given by an individual who is a relative or personal friend of the recipient on a special occasion.

b. Travel from New Jersey to Colorado

64. The Commission finds that Gov. Hickenlooper's January 10, 2018 travel from New Jersey to Colorado falls within the "special occasion" exception set forth in Section 3(3)(g) of Article XXIX and thus is not a violation of Article XXIX.

65. The Commission has previously determined that even somber occasions, including medical crises, can constitute a "special occasion."

66. The special occasion exception applies if: (1) it is a familial or personal relationship rather than the recipient's governmental position that is the controlling factor; and (2) the recipient's receipt of the gift or other thing of value would not result in (a) use of his or her office for personal benefit, (b) giving preferential treatment to any person or entity; (c) loss of independence or impartiality, or (d) acceptance of gifts or favors for performing official duties. *See* Advisory Opinion 11-08; Position Statement 08-01.

67. Gov. Hickenlooper and Mr. Tuchman are personal friends.

68. Gov. Hickenlooper's wife was undergoing a medical procedure in New York, an occasion serious enough that Mr. Tuchman, upon hearing of it, offered Gov. Hickenlooper a ride back to Colorado on his plane so that Gov. Hickenlooper could spend a couple extra hours with his wife.

69. It was Gov. Hickenlooper's personal relationship with Mr. Tuchman that prompted Mr. Tuchman's offer. Complainant offered no evidence to contradict Gov. Hickenlooper's description of his relationship with Mr. Tuchman.

70. There was no indication that Gov. Hickenlooper's receipt of a ride back to Colorado on Mr. Tuchman's plane would result in any improper influence or loss of impartiality on Gov. Hickenlooper's part. TTEC had no business pending before the governor at the time of the flight. There was no subsequent preferential treatment of Mr. Tuchman or his companies, and no official duties were performed by Gov. Hickenlooper to Mr. Tuchman's benefit.

71. Accordingly, the "special occasion" exception set forth in Section 3(3)(g) of Article XXIX applies, and Gov. Hickenlooper's acceptance of travel on Mr. Tuchman's private plane was not a violation of the Colorado Constitution.

c. Commissioning of the U.S.S. Colorado

72. The Commission finds that Gov. Hickenlooper's March 15, 2018 travel on a private airplane owned by MDC Holdings, and acceptance of at least one MDC delegation dinner provided by MDC Holdings, violates Section 3(2) of Article XXIX.

73. Gov. Hickenlooper's presence at the U.S.S. Colorado commissioning was undisputedly official state business.

74. However, the Commission finds that it is the State of Colorado that should have paid for Gov. Hickenlooper's travel to the commissioning of the U.S.S. Colorado, and no exception applies that would allow Gov. Hickenlooper to accept private air travel instead. *See* Colo. Const. art. XXIX, § 1(2) ("The people of the state of Colorado also find and declare that there are certain costs associated with holding public office and that to ensure the integrity of the office, such costs of a reasonable and necessary nature should be born[e] by the state or local government.").

75. In Position Statement 12-01, the Commission set forth the factors it considers in determining whether a gift is subject to the analysis set forth in Article XXIX, Section 3(2) because it is a gift that personally benefits the covered individual. Those factors are: (1) whether the offer is to a specific individual or to a designee of the state agency; (2) whether the offer is *ex officio*; (3) whether the event or travel is related to the official duties of the covered individual; (4) whether there is an existing or potential conflict of interest or appearance of impropriety; and (5) whether the primary purpose of the travel is primarily educational or business-related.

76. MDC's offer of travel was to Gov. Hickenlooper as a specific individual. Generally, the fact that an invitation is to an individual rather than a designee weighs in favor of the gift being to the individual. But the Commission has previously determined that even where an invitation is to a specific individual, that factor is not determinative. *See* Advisory Opinion 15-08; Advisory Opinion 19-03.

77. The parties stipulated that the commissioning of the U.S.S. Colorado was an official state function. However, the Commission finds that the offers of private airfare and the March 16 MDC dinner were not *ex officio* because they were offered to Gov. Hickenlooper personally, unrelated to the governor's attendance as part of his official state duties, and those gifts were not offered to others.

78. Both the U.S.S. Colorado commissioning and Gov. Hickenlooper's travel to the commissioning relate to the official duties of the governor in representing the state at that event. However, neither travel on MDC's private plane nor the MDC delegation dinners were related to Gov. Hickenlooper's duties at the commissioning.

79. In particular, the fact that MDC Holdings provided private air travel and invite-only meals to only Gov. Hickenlooper and his chief of staff, without extending the offer to other members of the Colorado delegation, weigh against those gifts being related to Gov. Hickenlooper's official duties. If those gifts were gift to the state, they would have been provided to other state officials who were attending the commissioning on the same state business.

80. Under the fourth factor, there was an existing or potential conflict of interest or appearance of impropriety. Again, MDC Holdings only included the governor and his chief of staff in its invitation on its private plane and to MDC delegation dinners. Those events were clearly opportunities for MDC representatives to interface with the governor and his chief of staff. Regardless of whether MDC had business pending before the state at the time of the flight and the MDC delegation dinners, the inclusion of Gov. Hickenlooper in the MDC delegation created a potential conflict of interest and an appearance of impropriety.

81. Under the fifth factor, both the travel on MDC's private plane and the MDC delegation dinners were unrelated to the commissioning events. In providing private air travel and hosting private dinners, MDC Holdings was providing gifts that went above and beyond the travel and meals provided to other state officials who attended the U.S.S. Colorado commissioning. *See, e.g.*, Advisory Opinion 13-03 (events outside the scope of the official state function may not be categorized as gifts to the state).

82. The Commission finds compelling that Gov. Hickenlooper could articulate no benefit to the state of flying on a private plane, rather than a commercial one, other than saving time. While the pressures on the governor's time are no doubt numerous and compelling, they do not, standing alone, justify allowing a private corporation to pay for private air travel for the governor.

83. On balance, the factors set forth in Position Statement 12-01 weigh in favor of finding the gift was to Gov. Hickenlooper as an individual. Because the benefit of flying on a private plane and attending a private dinner inured to Gov. Hickenlooper personally, rather than

to the state of Colorado, those gifts were to him rather than to the state. *See* Advisory Opinions 10-17, 16-02. That mode of transportation and the March 16 MDC delegation dinner was unrelated to the state purpose for which Gov. Hickenlooper attended the commissioning.

84. Unlike in the other cases of private air travel discussed herein, MDC Holdings is not a closely held corporation where a personal friend of the governor essentially owned the private plane. Accordingly, the Section 3(3)(g) “special occasion” exception does not apply, because MDC Holdings is not a “relative or personal friend” of the governor. *See* Colo. Const. art. XXIX, § 3(3)(g).

85. Gov. Hickenlooper both accepted and received a thing of value of over \$59.00¹ in accepting travel via private plane and the March 16 MDC delegation dinner from MDC Holdings during the commissioning of the U.S.S. Colorado. Gov. Hickenlooper thus violated Section 3(2) of Article XXIX.

d. Travel from Texas to Colorado

86. The Commission finds that Gov. Hickenlooper’s April 8, 2018 travel from Dallas, Texas to Colorado falls within the “special occasion” exception set forth in Section 3(3)(g) of Article XXIX and is thus not a violation of Article XXIX.

87. Gov. Hickenlooper traveled to Dallas to officiate the wedding of Kimbal Musk because they are personal friends.

88. Similarly, Mr. Musk offered Gov. Hickenlooper transportation back to Colorado on his private plane because of their personal friendship and in recognition of Gov. Hickenlooper’s officiation of his wedding.

89. The wedding of Mr. Musk was a “special occasion” within the meaning of Section 3(3)(g).

90. Under the first part of the 3(3)(g) test forth in Part II.C., above, it was Gov. Hickenlooper’s personal relationship with Mr. Musk that was the controlling factor in Mr. Musk’s offer of travel on his private plane back to Colorado.

91. Under the second part of the 3(3)(g) test, Gov. Hickenlooper’s receipt of private air travel back to Colorado did not result in any improper influence or loss of impartiality on Gov. Hickenlooper’s part. Complainant presented evidence that Gov. Hickenlooper signed an

¹ The gift ban limit has recently been increased, per Section 3(6) of Article XXIX, to \$65.00. However, the gift ban limit in effect at the time of the conduct at issue was \$59.00.

executive order regarding “Maintaining Progress on Clean Vehicles” and that Mr. Musk is the brother of Elon Musk, CEO of Tesla, but failed to connect the dots between the parallel policy positions of those two individuals and any alleged impropriety on the part of *Kimbal* Musk. There was no evidence in the record of any subsequent preferential treatment of Kimbal Musk or his companies, or that any official duties were performed by Gov. Hickenlooper to Kimbal Musk’s benefit.

92. Accordingly, the “special occasion” exception set forth in Section 3(3)(g) of Article XXIX applies, and Gov. Hickenlooper’s acceptance of travel on Mr. Musk’s private plane was not a violation of the Colorado Constitution. It is important to note that the Commission does not hold that attendance to preside at a wedding can never be an ethical violation. Complainant here failed to contradict Gov. Hickenlooper’s description of his relationship with Mr. Musk and failed to connect any business involving the state to the attendees at the wedding. On the record before the Commission, a majority of commissioners were unable to find sufficient evidence of a violation.

e. Bilderberg Meetings

93. The Commission finds that Gov. Hickenlooper’s June 7-10, 2018 acceptance of meals and ground transportation at the Bilderberg Meetings in Turin, Italy, violated Section 3(2) of Article XXIX.

94. Under Section 3(2), a public official may not “solicit, accept, or receive” a thing of value. Colo. Const. art. XXIX, § 3(2).

95. Gov. Hickenlooper argued that, because he did not know that his payment for the hotel was not inclusive of the other conference costs, he did not “accept” or “receive” a thing of value.

96. First, “accept” is a more active verb than “receive”, and the two are not synonyms. *See, e.g., Amer. Fam. Mut. Ins. Co. v. Barriga*, 418 P.3d 1181, 1183-84 (Colo. 2018) (Courts avoid constructions of statutes that would “render any words or phrases superfluous”); *Catholic Health Initiatives Colo. v. City of Pueblo, Dept. of Finance*, 207 P.3d 812, 821 (Colo. 2009) (Courts “assum[e] the drafters intended that meaning should be given to each word.” (internal quotation omitted)).

97. The Black’s Law Dictionary definition of “receive” is “To take ... to come into possession of or get from some outside source.” Black’s Law Dictionary (11th ed. 2019).

98. Gov. Hickenlooper got, “from some outside source,” meals and ground transportation at the Bilderberg Meetings. He thus “receive[d]” those gifts within the meaning of Section 3(2) of Article XXIX, regardless of whether or not he actively “accept[ed]” them.

99. Additionally, given that Gov. Hickenlooper’s credit card statement reflected only a direct charge from the hotel, he could not have reasonably believed that the hotel cost was inclusive of all meals and ground transportation related to the Bilderberg Meetings.

100. The Commission finds that Gov. Hickenlooper received meals and ground transportation at the conference, and therefore does not reach the question of whether other conference costs should be considered in finding a violation. The meals and ground transportation received exceed the gift ban limit of \$59.00.

101. Attendees at invitation-only events with no ticket price are not exempt from paying the readily ascertainable costs of benefits received in terms of meals and ground transportation. Gov. Hickenlooper was required to obtain a ballpark estimate of those costs from conference hosts and reimburse them for that amount where, as here, his attendance at the conference was undisputedly for personal purposes.

102. Gov. Hickenlooper received a thing of value of over \$59.00 in the form of meals and ground transportation at the Bilderberg Meetings. Gov. Hickenlooper thus violated Section 3(2) of Article XXIX.

f. Travel from Washington, D.C. to Jackson Hole, Wyoming

103. The Commission finds that Gov. Hickenlooper’s August 13, 2018 travel on a private airplane belonging to his chief of staff’s LLC from Washington, D.C. to Wyoming for the AEI Symposium does not fall within the prohibitions of Article XXIX.

104. The Commission has never before been faced with a similar situation where an employee of the state and close personal friend of an elected official chooses to use a valuable personal asset to facilitate the state’s business. Nor does the Commission believe that this will be a common occurrence. On its face, there does not seem to be any prohibition in Article XXIX of a state employee using a personal asset to facilitate state business. Nor do we believe that would normally be a violation. For example, use of private frequent flier miles for a state trip, or use of a personal vehicle to travel to a state function would normally seem to be a gift to the state by the employee and would not raise an ethical concern. Therefore, the use of the private plane by Mr. Meyers for a state purpose does not raise an ethical concern on the facts of this case.

Here, Mr. Meyers made the plane available to his superior and personal friend, Gov. Hickenlooper, for the same purpose. Under either the gift-to-the-state or the § 3(3)(g) exception, Mr. Meyers' generosity to the state does not constitute a violation. Again, we stress that our finding is limited to the special facts of this case.

105. As set forth above, the factors the Commission considers in determining whether a gift inures to the benefit of the state or to the benefit of the individual and is thus subject to the analysis set forth in Article XXIX are: (1) whether the offer is to a specific individual or to a designee of the state agency; (2) whether the offer is *ex officio*; (3) whether the event or travel is related to the official duties of the covered individual; (4) whether there is an existing or potential conflict of interest or appearance of impropriety; and (5) whether the primary purpose of the travel is primarily educational or business-related.

106. The offer was *ex officio*, or made by virtue of Gov. Hickenlooper's specific position. In particular, Mr. Meyers offered Gov. Hickenlooper travel on his private airplane so that Gov. Hickenlooper and Mr. Meyers, in their respective roles as governor and chief of staff, could work on adjustments to the state budget for the incoming administration.

107. The travel was related to Gov. Hickenlooper's official duties. He was traveling from one official state function to another and working on state business en route.

108. There was no existing or potential conflict of interest or appearance of impropriety. Mr. Meyers was Gov. Hickenlooper's chief of staff, and his offer of transportation to Gov. Hickenlooper was clearly made in the context of their longstanding personal relationship and completing state business.

109. The primary purpose of the travel was business-related. Gov. Hickenlooper testified that he and Mr. Meyers spent the entirety of the flight working on state business, and Gov. Hickenlooper was traveling from one official state function to another.

110. On balance, Gov. Hickenlooper's receipt of travel on Mr. Meyers' private plane was a gift to the state of Colorado and inured to the benefit of the state. Accordingly, no violation of Article XXIX occurred.

g. Travel from Washington, D.C. to Centennial, Colorado

111. The Commission finds that Gov. Hickenlooper's October 12, 2018 travel on a private airplane from Washington, D.C. to Colorado was a gift to the state and thus does not fall within the prohibitions of Article XXIX.

112. The travel at issue here is almost identical to that set forth above in Section II.F, except that Gov. Hickenlooper and Mr. Meyers utilized the time en route to work on state business regarding transition issues for the incoming administration. Gov. Hickenlooper was, again, in Washington, D.C. for an official state function.

113. Therefore, the gift-to-the-state analysis set forth above is also applicable here, and Gov. Hickenlooper's receipt of travel on Mr. Meyers' private plane was a gift to the state of Colorado and inured to the benefit of the state.

III. Penalties

114. Section 6 of Article XXIX provides, "Any public officer ... who breaches the public trust for private gain ... shall be liable to the state ... for double the amount of the financial equivalent of any benefits obtained by such actions." Colo. Const. art. XXIX, § 6.

115. Complainant did not prove actual costs of travel for the violations found above. In two instances, Complainant provided comparable estimates of such costs. The Commission utilizes those cost estimates to arrive at a penalty. *See, e.g., Tull v. Gundersons, Inc.*, 709 P.2d 940, 944-45 (Colo. 1985) (in a torts context, where the fact of damages is established but the amount cannot be established by a "mathematical certainty," the court will arrive at a reasonable estimate of damages).

a. Commissioning of the U.S.S. Colorado

116. There is not enough evidence in the record to assess a penalty for the March 16, 2018 MDC delegation dinner received by Gov. Hickenlooper in violation of Section 3(2) of Article XXIX.

117. However, there is evidence that the average cost of a private flight from Colorado to Connecticut is between \$1,800 and \$2,600 round trip.

118. The Commission finds that \$2,200, the midpoint of the range reflected in Complainant's evidence, is a reasonable estimate of a round-trip private flight from Colorado to Connecticut.

119. Gov. Hickenlooper only took a one-way flight to Connecticut, and should be assessed only half of the round-trip flight cost, or \$1,100.

120. Accordingly, the Commission finds that, pursuant to Section 6, Gov. Hickenlooper is liable for a penalty of \$2,200, or double the amount of the one-way private flight estimate, \$1,100.

b. Bilderberg Meetings

121. The Commission finds that there is not enough evidence in the record to assess a penalty for the value of meals received by Gov. Hickenlooper at the Bilderberg Meetings in violation of Section 3(2) of Article XXIX.

122. However, there is evidence in the record that the cost of a luxury rental car from Talixo, a European rental car service, is €232.56 per day, or about \$275.00.

123. Accordingly, the Commission finds that, pursuant to Section 6, Gov. Hickenlooper is liable for a penalty of \$550.00, or double the amount of a comparable rental car estimate for one day.

THEREFORE, the Commission finds by a preponderance of the evidence that Gov. Hickenlooper violated Section 3(2) of Article XXIX on two occasions, the commissioning of the U.S.S. Colorado and the Bilderberg Meetings. The Commission finds that a penalty of \$2,750.00 is warranted.

THE INDEPENDENT ETHICS COMMISSION

Elizabeth Espinosa Krupa, *Chair*, concurring in part and dissenting in part

William Leone, *Vice Chair*

Selina Baschiera, *Commissioner*

Debra Johnson, *Commissioner*

Yeulin Willett, *Commissioner*, concurring in part and dissenting in part

DATED: August 18, 2020

ELIZABETH ESPINOSA KRUPA, dissenting as to Part II.C. and Part III.

I dissent with the majority in two respects: (1) the finding of a violation related to Gov. Hickenlooper's travel to the commissioning of the U.S.S. Colorado; and (2) the assessment of penalties. In all other respects, I join the majority opinion.

I dissent with the majority's finding of a violation in relation to Gov. Hickenlooper's acceptance of private airfare and a meal at the commissioning of the U.S.S. Colorado. That finding is inconsistent with our past cases and advisory opinions analyzing both gifts to the state and conference attendance under the Section 3(3)(f) exception. Recently, the Commission held in Complaint 16-20, *In the Matter of Kim Ransom*, that the "gold" level of attendance at the

Western Conservative Conference was permissible because Rep. Ransom represented the state at a conference sponsored by a non-profit and the gift thus fell under the Section 3(3)(f) exception. The “gold pass” Rep. Ransom received included not only attendance at the conference, but a concert, reserved or preferred seating, book signings, photo opportunities with speakers, and a banquet. The “gold pass” was valued at \$400 more than the “silver pass,” which included only attendance at the conference and the concert. Yet, the Commission did not divvy up the individual perks included with the gold pass in determining that Rep. Ransom could accept the gold pass because she could accept the gift of attendance at the conference.

Similarly, in its applications of the gift-to-the-state analysis from Position Statement 12-01, the Commission does not parse whether certain components of travel such as a meal or a more upscale mode of transportation than the state would otherwise provide inures to the benefit of the state. The Commission simply asks whether, under its five-factor test, the trip inures to the benefit of the state or the individual. *See, e.g.*, Advisory Opinions 18-01, 18-02, 18-03, 19-04. Generally, inclusion of meals and transportation is permitted and extraneous entertainment is not. *See* Advisory Opinions 13-03, 18-01, 19-04, 19-07.

Here, the majority reverses course, and without record support for its assumptions. The majority adds to its gift-to-the-state analysis an element of whether the travel or meals provided *feel* extraneous to the undisputedly official event and Gov. Hickenlooper’s undisputedly public duties in representing the state at that event. The only rationale they could articulate during deliberations were that the travel and meals in question felt “above and beyond.”

Yet, Complainant presented no evidence demonstrating that either Gov. Hickenlooper’s travel to the event or the meals at that event were unrelated or extraneous to the commissioning. Gov. Hickenlooper was offered travel on MDC Holdings’ private plane to the event, and it seems apparent to me that offer was related to his public duties and role in representing the state. MDC Holdings’ offer to provide both the private flight and MDC delegation meals was *ex officio* and Gov. Hickenlooper was invited to join the MDC flight and meals because of his position as the head of state. Similarly, the only evidence regarding the March 16 MDC delegation dinner in the record is the agenda for the commissioning, which indicates that the MDC delegation dinners were just two of many commissioning events. Complainant presented no evidence that Gov. Hickenlooper was doing anything but representing the state in his official role as governor at those events. I do not believe those events need to be open to everyone—or that the meals provided must be McDonald’s—in order to constitute a gift to the state, and the majority cites no authority in support of that distinction.

Complainant attempted to argue at hearing that MDC Holdings had business pending before the state that could create an appearance of impropriety, but could point to none. Complainant asked the governor about pending legislation and there was none. Complainant asked the governor about building and water permits because MDC is a homebuilder, and Gov. Hickenlooper explained that those are issued on the local level, not by the state. In short, Gov. Hickenlooper rebutted each attempt to demonstrate that his travel to and participation in the commissioning of the U.S.S. Colorado was a gift that inured to him personally, and the majority *still* found a violation.

I also dissent from the majority's assessment of penalties for the Bilderberg Meeting violation.² No evidence regarding penalties was presented at hearing. At the close of evidence, it was apparent to me that Complainant had abandoned any claim that a penalty should be assessed. Complainant had attached website printouts to its complaint, apparently as an attempt to provide estimates of costs, but never substantiated those estimates or presented evidence regarding them at hearing. Then, Complainant attempted to resurrect its website printouts in a post-hearing submission, for which a foundation was never laid. It is unclear whether or how the rental car printout is related to the violation at issue. It is not known who printed it out, or when. The printout does not even convey that its rates are for Italy, much less for Turin; or for a car comparable to that utilized by Gov. Hickenlooper. No comparable quotes are provided for the estimate. No dates are included. The Complainant entirely fails to connect the dots.

While our rules allow us to consider evidence outside that presented at hearing, *see* Rule 3.A.19, it is my position that such evidence must at least have a modicum of reliability. Where a party fails to present evidence at hearing, that evidence is not subject to cross-examination, laying a foundation, or a credibility determination. Therefore, to give effect to our Rule 8.E, the Commission should decline to consider post-hearing evidentiary submissions without good cause given for the lateness of the evidence. At a minimum, they should give such submissions very little weight. And, contrary to the suggestion of my fellow commissioners, it was not Gov. Hickenlooper's job at hearing to counter evidence not presented at hearing, especially when that "evidence" took the form of unsubstantiated website printouts that were attached to the complaint and never mentioned again. The website printout relied on by the majority here falls far short of the preponderance of the evidence standard set forth in Section 5(3)(e) of Article XXIX. I would not assess a penalty for the Bilderberg Meetings violation.

YEULIN WILLETT, dissenting as to Part II.D.

My dissent turns upon both the specifics of the matter in question, particularly a failure of proof of the elements of the "affirmative defense", *see* Colo. Const. art. XXIX, § 3(3)(g), and upon the overall approach taken by the IEC in this and previous matters as to this defense, including a troubling expansion and loosening of the elements of that exception (derived from, in my view, a too liberal approach to Constitutional interpretation).

Turning to the case at hand, as an initial matter, I believe Complainant satisfied its burden of proof and demonstrated that a gift was received. The burden then shifted to Gov. Hickenlooper to present an affirmative defense. Gov. Hickenlooper presented evidence that he wrote a \$1,000.00 check to Big Green, Mr. Musk's charity, following Mr. Musk's wedding, in purported consideration for the flight. The check was never cashed. I would note that Gov. Hickenlooper waffled as to what the defense would be: The airfare was payment or consideration for Gov. Hickenlooper's officiant services; or it was an honorarium in recognition of his services; or, ultimately chosen, it was a gift from a personal friend on a special occasion.

² I did not vote on assessment of a penalty for the U.S.S. Colorado commissioning violation because I disagreed with assessment of a violation for that travel.

All three options of defense fit to a certain degree but none were really satisfied legally, proven factually, and/or were internally inconsistent. Probably the most logical fit was with the honorarium, but the gift received was hardly nominal. In my view, the fact that three defenses are close, and are thrown out alternatively, should not necessarily bode in favor of the defense, especially given the totality of the circumstances--my supposition being that the intent of the voters in drafting Section 3 and the limited exceptions therein is that there ought to be a clear showing of a reasonably firm fit legally and satisfactory compliance factually. (Another consideration in this regard is that, in addition to no one good fit, the defenses here clash to a degree--why would one offer to pay for a 'gift' when one could be expected to receive a small token of appreciation as honorarium?)

Having fallen back on the last chosen defense, the problem for Respondent is both a lack of fit and lack of proof. What I found here was a significant high-end gift to the highest statewide elected official, from an acquaintance, on an occasion primarily special to the giver (as opposed to being special to the elected official or at least equally special to both of them), at a star-studded event fraught with political elbow-rubbing opportunities. In summation, I couldn't get over the appearances of impropriety, or what is formally stated as a "justifiable impression... that the [public] trust is being violated." *See* Colo. Const. art. XXIX, § 1(c), (e); and the gut feeling that the voters really intended the exception to be for gifts of a much more natural and ordinary nature. The application of the Section 3(3)(g) exception here felt forced to me, to an unacceptable level.

It is instructive to me that the Constitutional exception applies to two categories of persons: "relative" and "personal friend". Obviously far different than if the choice of language had been "friend or close acquaintance". Listing the term "relative" first, and adding "personal" as a further qualifier to the concept of 'friend', tells me the intent was that the giver be a true close friend of the elected (not a political, casual, convenient, or other type friend, of which there are of course many for any statewide politician). Here, the evidence was more in support of a finding that Mr. Musk was a close acquaintance and fellow civic leader vis-a-vis the Respondent, while possibly being a close friend to Respondent's wife. There was precious little factual presentation as to the alleged close relationship. To demonstrate the affirmative defense, I would expect testimony as to the following: Time (quality and quantity) spent with each other, prior gifts received or accepted from both parties, shared interests, prior special occasions to which the other person has been invited, etc. In this regard, the limited presentation of evidence puts the Commissioners in an unfair and awkward position of having to ask numerous personal, even unintentionally intimate or embarrassing questions at the public hearing to determine whether the exception applies. Gov. Hickenlooper presented evidence of such a relationship with Mr. Tuchman in this hearing, and could have done the same for Mr. Musk.

As far as the "special occasion" element of the defense goes, I again would lean on my interpretation, for what it's worth, of what the voters intended in the Constitutional amendment. I believe that the occasion should be truly special to the gift recipient or at a minimum equally special to the gift-giver and the recipient. Here, the event was the Musk wedding and was special to Mr. Musk and his spouse. No evidence was presented that the wedding party and family were close to Respondent or that the occasion could otherwise be reasonably deemed special to him.

Lastly, as far as the overall IEC treatment of this defense goes, I note this is the latest in a series of opinions expanding the defense and tweaking the elements thereof. *See, e.g.*, Advisory Opinion 13-01. If the Section 3(3)(g) exception is not limited and a corrective course of action is not taken, one can easily fashion a parade of future abusive, if not bizarre, situations whereby an elected could receive huge gifts, from people or groups, and in situations where the voters would clearly think they should not under their Constitutional amendment. While I don't have huge concerns about the prior opinions, and see manifested therein the old maxim of bad facts making bad law, I think this one goes too far and sets bad precedent, as noted above. Perhaps the IEC should consider how or if it can give further guidance. Should the IEC issue a new Position Statement or revision to Position Statement 08-01 to address these serious gaps in protection of the public's trust as to receipt of gifts? Without such further guidance, meeting Constitutional scrutiny, I am left with simply interpreting the plain language of the constitution on this fairly simple and limited exception and, respectfully, I do not believe Gov. Hickenlooper carried his burden of proof here.