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LEGISLATIVE COUNCIL
OF THE
COLORADO GENERAL ASSEMBLY

AN ANALYSIS OF
1994 BALLOT PROPOSALS

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limits will be by choosing to make independent expenditures rather than direct campaign contributions. In this case, the PAC would only be required to report the expenditure to the appropriate official and give notice of the expenditure to the affected candidate. Also, when PACs make independent expenditures rather than giving directly to a candidate committee, the candidate who is affected by the independent expenditure loses control over the advertised message that results. This situation will cause candidates to be less accountable for the campaign advertising and unable to influence its content.

5) The limitations placed on donations are among the lowest in the country. Some states with low limits have ultimately supplemented candidate campaigns through public financing. If public financing occurs, taxpayers will pay for the campaigns of those candidates that they do not support.

6) The proposal will strengthen the power of the incumbent, the wealthy, and special interests. Low income and minority candidates will be hurt the most by this proposal. Because there is no limit on how much money a person can give to his or her own campaign and spend for advertising, the advantage for the wealthy will increase if this measure becomes law. In those states which have enacted very low spending limits, the average rate of success for incumbents staying in office has actually increased. The influence of special interests through the independent expenditures and through the "loans" made possible under this amendment could actually increase.

AMENDMENT 16 – OBSCENITY – FIRST AMENDMENT

Ballot Title: AN AMENDMENT TO THE COLORADO CONSTITUTION STATING THAT THE STATE AND ANY CITY, TOWN, CITY AND COUNTY, OR COUNTY MAY CONTROL THE PROMOTION OF OBSCENITY TO THE FULL EXTENT PERMITTED BY THE FIRST AMENDMENT TO THE U.S. CONSTITUTION, AND THEREBY PREVENTING THE COLORADO COURTS FROM INTERPRETING THE RIGHT OF FREE EXPRESSION MORE BROADLY UNDER THE COLORADO CONSTITUTION THAN UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION IN THE AREA OF OBSCENITY.

The proposed amendment to the Colorado Constitution would:

- amend Article II, Section 10, of the Colorado Constitution to allow the control of the promotion of obscenity by the state and any city, town, city and county, or county within the unincorporated area of a county to the full extent permitted by the First Amendment to the United States Constitution.

Background

This ballot proposal is presented to voters because the Colorado Supreme Court has interpreted the Colorado Constitution as providing broader protection for freedom of expression, including sexually explicit materials*, than required under the First Amendment of the U.S. Constitution.

The Colorado obscenity statute incorporates the following three-part test for obscenity that was developed by the United States Supreme Court. "Obscene" means material or performance that:

1) the average person, applying contemporary community standards, would find that, taken as a whole, appeals to the prurient interest in sex;

2) depicts or describes patently offensive representations or descriptions of [sexual or physical conduct]; and

3) taken as a whole, lacks serious literary, artistic, political, or scientific value.

* "Materials" or "expression" in this discussion include printed material, performances, speech, videos, film, radio and television broadcasts, electronic productions, etc.

The term "patent offensiveness" is further defined in the statute as "so offensive on its face as to affront current community standards of tolerance."

The constitutionality of state statutes may be tested under the Colorado Constitution or the U.S. Constitution. In considering the state's obscenity statute, the Colorado Supreme Court interpreted the Colorado Constitution as offering broader protection for freedom of expression than offered by the U.S. Constitution. Because of that interpretation, Colorado statutory and case law requires a standard for the determination of what is "obscene" that protects sexually explicit materials more than is required by the U.S. Constitution, as interpreted by the U.S. Supreme Court. Under the proposed amendment, the people of Colorado will decide whether they prefer the Colorado Constitutional standard for obscenity law or the U.S. Constitutional interpretations of obscenity law.

Both the U.S. and Colorado Supreme Court decisions have settled the issue that "obscene expression" is not protected by the First Amendment of the U.S. Constitution. However, pornography can be expression that is protected by the First Amendment. Although the words "pornography" and "obscenity" are often used interchangeably, "obscenity" has a special judicial meaning derived from U.S. Supreme Court case law. Since the proposed amendment refers to a First Amendment standard, it is important to understand how the U.S. Supreme Court has interpreted the First Amendment in the area of obscenity. It is also important to understand how the Colorado Supreme Court has concluded that the Colorado Constitution provides broader free speech protection than the First Amendment. Following is a summary of these interpretations.

U.S. Supreme Court Case Law

1973 – Miller v. California, 413 U.S. 15. In this landmark case, the defendant was convicted of mailing unsolicited sexually explicit materials in violation of the California obscenity statute. In this decision, the court limited the scope of a state's power to regulate obscenity to works that depict or describe "hard core" sexual conduct that is specifically defined by state law. The court also established the following three-part test for determining whether material is obscene:

1) **Appeals to prurient interest.** Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to a prurient interest in sex.

2) **Patently offensive.** Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law.

3) **Lacks serious value.** Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller also stated that requiring obscenity proceedings to establish national "community standards" would be futile: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." Subsequent U.S. Supreme Court cases have elaborated on the standards set forth in *Miller*.

1974 – Jenkins v. Georgia, 418 U.S. 153. The court held that under the First Amendment, a state is permitted to define the relevant community as the state or as a smaller geographical area within the state.

1977 – Smith v. United States, 431 U.S. 291. The U.S. Supreme Court held that "contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community..." The district court in this case had instructed the jury that contemporary community standards

were set by what is in fact accepted in the community as a whole. The *Smith* court did not specifically address the meaning of the terms "tolerance" or "acceptance," nor which term was preferable. Regardless, a number of federal courts have adopted the proposition that *Miller's* "community standards" portion of the test for obscenity should be based on what the community as a whole accepts, rather than tolerates.

*1987 – **Pope v. Illinois**, 481 U.S. 497.* The U.S. Supreme Court held that the first two parts of the *Miller* test — "prurient interest" and "patent offensiveness" — are to be judged by "contemporary community standards" but that the third part (whether a work lacks serious literary, artistic, political or scientific value) was to be evaluated by an "objective" or "reasonable person" standard. Moreover, the court said the ideas that a work represents can merit protection without the approval of the majority in a community. The value of that work does not vary from community to community based on the degree of local acceptance it has won.

Colorado Supreme Court Case Law

*1976 – **People v. Tabron**, 544 P. 2d 380. Tabron* determined that, under the state obscenity statute, a statewide standard for the determination of obscenity was required. The court held that the state statute could not be construed differently in various local jurisdictions of the state.

*1985 – **People v. Seven Thirty-Five East Colfax**, Inc., 697 P. 2d 348.* This case considered the constitutionality of Colorado's obscenity statute, which defined "patently offensive" as "so offensive . . . as to affront current community standards of decency." Colorado's "decency" standard was declared unconstitutional. The court concluded that the Colorado Constitution provides broader free speech protection than the First Amendment and that a tolerance standard was required, at a minimum, to determine whether material is "patently offensive" in Colorado.

*1989 – **People v. Ford**, 773 P. 2d 1059.* The Colorado Supreme Court again considered the constitutionality of the "tolerance" standard. The court acknowledged that both federal and state courts had approved definitions of "patently offensive" which incorporate community standards of "decency," "acceptance," or "tolerance." Nonetheless, the court again concluded that a tolerance standard better protects freedom of expression and was the only standard of the three which would satisfy the Colorado Constitution. The decision stated, "When a tolerance standard is employed, material is not offensive unless the community cannot **endure** it". [Emphasis added].

State Law – Local Authority

State statutes also authorize counties and municipalities to enact ordinances to regulate the promotion of obscene material and performances, as defined in state law. Thus, any local ordinance would be subject to the same limitations as the state statute under the Colorado Constitution as interpreted by the Colorado Supreme Court.

Arguments For

1) The Colorado Supreme Court has interpreted the Colorado Constitution as providing greater protection to expressive activity, including obscenity, than under the First Amendment. Furthermore, the Colorado court has interpreted the *Miller* standard (for judging obscenity by community standards) to require that material cannot be "endured." In criminal cases involving obscenity, the prosecutor must establish the "endurance" standard beyond a reasonable doubt. Given that requirement, the standard is almost impossible to prove. The proposed amendment seeks to eliminate the "endurance" standard.

2) Colorado is one of a small number of states in which the state supreme court has protected expression that in another state might be found obscene. As contemplated by *Miller*, only "hard core" pornography is prosecuted in other states. Thus, the experience with obscenity laws in other states is useful in predicting the effect of the proposed amendment.

3) Allowing a community to define "patent offensiveness" according to its own standards is not a limitation on freedom of speech. Freedom of speech is protected by the First Amendment to the U. S. Constitution, yet certain forms of speech — such as libel, slander, criminal conspiracy, and false advertising — are not protected by the First Amendment. The Supreme Court has repeatedly held that obscenity is not protected speech. Furthermore, citizens of one community are not required to consider the attitudes of the citizens of another community in the determination of obscenity because the U. S. Constitution does not require a statewide obscenity standard.

4) Allowing a community to define "patent offensiveness" according to its standards is not censorship. The law defines censorship in terms of "prior restraint," which limits expression before it is disseminated. Moreover, a local standard for judging what is obscene can only regulate to the extent provided by federal case law. Under the proposed amendment, sellers of sexually explicit material would not be subject to any prior restraint; they would remain free to offer their materials, including pornography, for sale at any time. However, once pornography is offered for sale in a community, that community has the right to apply the *Miller* test and determine whether the material meets the narrow legal definition of obscenity.

5) Local control would not lead to types of censorship such as "book banning" that sometimes occurs in a local school. Colorado law grants school boards the power to exclude publications that, in the judgment of the board, are of "immoral or pernicious nature." This is by no means the same as a prosecution under an obscenity statute, which, as contemplated by *Miller*, deals only with "hard-core" pornography. Materials distributed by libraries, booksellers, theaters, and educational organizations would be protected from censorship by the third part of the *Miller* test, which requires that materials in question must "lack serious literary, artistic, political or scientific value" to be found obscene. Prosecutors will know that they have to present an obscenity case to a jury consisting of a cross section of the community which will apply the *Miller* test.

6) Some research supports the argument that "hard core" pornography contributes to violence against women and children and to the treatment of women as objects and as second class citizens in our society. The final report of the 1986 U.S. Attorney General Edwin Meese's Commission on Pornography concluded that pornography harms both the individual and society. The Meese Commission report linked pornography and violence against women and children and concluded that sexually violent material increases the likelihood of aggression towards women. According to the Meese Commission report, sexually violent material fosters and perpetuates the "rape myth" (the notion that every woman actually enjoys being raped); degrades the class and status of women; encourages a modeling effect (once a viewer sees specific activities portrayed, he tends to act them out); and causes aggression toward women. The report also concluded that hard core pornography is not the only cause of sexual violence against women and children, but it is a significant factor.

7) The proposed constitutional amendment would not affect the right of adults to read or watch sexually explicit materials in the privacy of their own homes. The amendment allows communities to control the "promotion of obscenity," simply meaning the distribution of obscenity by any means. In the 1968 case of *Stanley v. Georgia*, the U.S. Supreme Court ruled that the states could control the commercial distribution of

obscenity but that the state could not control the private possession of sexually explicit materials. Although obscenity laws do not affect what people do in the privacy of their own homes, privacy rights do not extend into the marketplace. The U.S. Supreme Court has decided in numerous cases that the distribution of obscenity is not protected by the U.S. Constitution.

Arguments Against

1) The intent of the proposed amendment is to narrow and restrict the protection currently afforded free expression in Colorado. State courts will be prohibited from interpreting rights of free expression in the area of obscenity more liberally than they may be interpreted under the First Amendment to the U. S. Constitution. Regardless of the intent to restrict state court interpretations in this area of law, the proposed amendment may create false expectations in the minds of voters because it may not change the prosecution of obscenity in Colorado.

How cases will be interpreted under a "First Amendment standard" is speculative. While the *Miller* test, as clarified by later cases such as *Smith, Jenkins,* and *Pope*, provides the basic framework for analyzing obscenity cases under the First Amendment, lower federal courts have reached a number of different conclusions regarding key decisions, particularly regarding "community standards." Should juries be instructed to consider "community standards of decency," "community standards of tolerance," or "community standards of acceptance"? Do "acceptance" and "tolerance" mean the same thing? Alternatively, is the emphasis on these terms misleading (as one federal circuit court opinion has suggested) and should juries simply judge the impact of material on their community based upon the individual juror's background? The U.S. Supreme Court has yet to answer these questions directly, and there is no guarantee that Colorado's current statutory "tolerance standard" would be found unconstitutional under this proposal.

2) States have certain powers reserved to them under the U.S. Constitution. According to the Tenth Amendment of the U.S. Constitution, states may exercise those powers as long as they do not conflict with rights guaranteed under the U.S. Constitution. The adoption of this proposal is inconsistent with the current trend of state challenges to federal authority over what have traditionally been state and local issues.

3) The proposed constitutional amendment is unnecessary. Under state law, local school boards have the right to determine what materials are used in schools and placed in school libraries. State statutes already authorize counties and municipalities to enact ordinances to regulate the promotion of obscenity. Child pornography is illegal under state and federal law, communities often pressure pornography shops to close, and special interest groups sometimes get books taken off public library shelves. Businesses have already made decisions about whether to sell certain publications, based on prevailing community standards. Colorado citizens can utilize zoning laws in efforts to restrict or encourage certain kinds of businesses. Further, as individuals they can do what most Colorado citizens do: simply choose not to purchase obscene material. The amendment encourages more government interference in the private lives of Colorado citizens in order to "protect" them from materials no one is forcing them to use in the first place.

4) The proposed amendment may have a "chilling" effect on free expression in the state. Local option for the prosecution of obscenity will be legal, and statewide distributors of materials may not know whether they are risking prosecution for promoting "obscenity" in any particular community. The prosecution of obscenity will be based on a local standards, rather than a statewide standard. The result of this amendment may be prior censorship of certain materials due to the fear of prosecution. For example, a local library district may serve several towns, and the librarians must consider the strictest of standards in each community. Will the library be breaking the law if it moves books from

one town to another to satisfy a patron request? Book dealers, video store owners, film distributors and movie theater owners must, on a daily basis, try to determine what material appeals to potential customers without breaking the laws of obscenity. Since a criminal defense can cost tens of thousands of dollars, businesses and libraries will be forced to conform to the most restrictive standard enacted by a local government.

In addition, health organizations which distribute information about AIDS, birth control, abortion, or human sexuality will become more vulnerable to legal challenges regarding sexually explicit educational and instructional materials. Although such challenges may eventually be defeated in court, the court challenges would cost time and money and could be used by opponents of health organizations as harassment.

5) The proposed amendment will allow political subdivisions to assess whether material is obscene, based on local community standards rather than a statewide standard. These aspects of the proposed amendment raise critical issues. First, the result will be a patchwork of local ordinances in the state, and determining the constitutionality of the local ordinances could require years of court action. Second, the strictest local standard could, in effect, become the statewide standard because libraries and other distributors of materials may not be willing to risk criminal prosecution by testing variations in obscenity standards from place to place.

6) The proposed amendment may result in censorship. The dictionary defines a censor as "an official who examines books, plays, news reports, motion pictures, radio and television programs, letters, cablegrams, etc, for the purpose of suppressing parts deemed objectionable on moral, political, military, or other grounds." In other words, censorship is the limitation by government of what people can read, see, and hear: it is a substitution of judgement by the government. A second definition of censor is "any person who supervises the manners or morality of others." The proposed amendment is both kinds of censorship.

7) No link between pornography and violence against women and children has been proven. The final report of the 1986 U.S. Attorney General Edwin Meese's Commission on Pornography has been criticized for its predetermined bias in favor of censorship, which many observers believe led to a predetermined conclusion. A Meese Commission member who wrote the draft report stated in a separate commentary that he did not make the claim, nor did the Meese Commission report, that a causal relationship exists between sexually explicit materials and acts of sexual violence. The commission member also wrote that he considered the deregulation of sexually explicit materials "only quite sensible." Furthermore, some experts believe that pornography provides a release for sexual urges that otherwise could take the form of inappropriate sexual conduct. A constitutional amendment to limit free speech, to deny adults access to certain materials, and to create a "chilling" effect for book dealers and video store owners would be inappropriate, given the lack of consensus concerning the effect of viewing pornography.

Amendment 17 – Term Limits

Ballot Title: AN AMENDMENT TO THE COLORADO CONSTITUTION TO LIMIT THE NUMBER OF CONSECUTIVE TERMS THAT MAY BE SERVED BY A NONJUDICIAL ELECTED OFFICIAL OF ANY POLITICAL SUBDIVISION OF THE STATE, BY A MEMBER OF THE STATE BOARD OF EDUCATION, AND BY AN ELECTED MEMBER OF THE GOVERNING BOARD OF A STATE INSTITUTION OF HIGHER EDUCATION AND TO ALLOW VOTERS TO LENGTHEN, SHORTEN, OR ELIMINATE SUCH LIMITATIONS OF TERMS OF OFFICE; AND TO REDUCE THE NUMBER OF CONSECUTIVE TERMS THAT MAY BE SERVED BY THE UNITED STATES REPRESENTATIVES ELECTED FROM COLORADO.

The proposed amendment to the Colorado Constitution would:

- amend the term limitation provisions adopted by the voters of Colorado as a constitutional amendment in 1990 specifying the maximum consecutive terms of office, beginning January 1, 1995, as follows:

  United States House of Representatives – reduce the number of consecutive terms from six to three consecutive terms, or from 12 to six years.

  Local elected officials – establish a new limit of two consecutive terms of office, unless this limitation is changed by the voters of that political subdivision. (Includes elected officials of counties, municipalities, school districts, service authorities, and other political subdivisions.)

  Other state elective offices – establish a new limit of two consecutive terms for members of the State Board of Education and the University of Colorado Board of Regents, a total of 12 years.

- allow the voters of a political subdivision to lengthen, shorten, or eliminate the limitations on terms of office imposed by this amendment;
- allow the voters of the state to lengthen, shorten, or eliminate the terms of office for the two state education boards included in this proposal;
- state that the people of Colorado, in adopting this amendment, are in support of a nationwide limitation of terms of not more than two consecutive terms for members of the U.S. Senate and three consecutive terms for members of the U.S. House of Representatives and that public officials of Colorado are instructed to use their best efforts to work for such limits; and
- state that the intent of this measure is that federal officials elected from Colorado will continue to voluntarily observe the wishes of the people as presented in this proposal in the event that any provision of this proposal is held invalid.

Background

As defined in existing law, "consecutive terms" means that terms are considered consecutive unless they are four years apart. Also, any person appointed or elected to fill a vacancy in the U.S. Congress and who serves at least one half of a term of office shall be considered to have served one full term in that office.

The term limits now in place in Colorado would not be changed by this proposal:

U.S. Senators – two consecutive terms or 12 years

State elected officials (Governor, Lieutenant Governor, Attorney General, State Treasurer, Secretary of State) – two consecutive terms or eight years

Colorado General Assembly –

Senators – two consecutive terms or eight years
Representatives – four consecutive terms or eight years

Term limits in other states. Colorado was one of the first states to adopt term limitations for elected officials when it approved an initiated proposal in 1990. Fifteen states have adopted term limits for their members of the U.S. House of Representatives: Arizona, Arkansas, California, Michigan, Montana, Oregon, Washington, and Wyoming allow members to serve three terms; Florida, Missouri, Nebraska, and Ohio limit members to four terms; and Colorado, North Dakota, and South Dakota allow their members a total of six terms.

Term limits for local governments. At the present time, no states have constitutional limits on the number of consecutive terms local officials may serve. This issue will be on the ballot in five states in 1994 with each state providing a two consecutive term limitation. The states voting on this issue in 1994 are Colorado, Idaho, Nevada, Nebraska, and Utah. In Colorado, home rule cities may establish their own term limits, either through a referred or initiated amendment to the city charter. Colorado Springs, Lakewood, Greeley, and Wheat Ridge are among the cities that have adopted term limits.

Terms of members of the U.S. House of Representatives. Fourteen persons from Colorado have served in the U.S. House of Representatives since 1970. Of these 14 members, the number of terms served ranged from a high of three members serving 12, 11, and 10 terms down to two members serving one term each. Including the terms served by these members before 1970, there were a total of 59 terms served by these 14 members, an average of 4.2 terms per member.

Term limits began for Colorado members of the U.S. House of Representatives beginning on January 3, 1991. With six consecutive terms permitted, present members of the U.S. House of Representatives could serve until January, 2003. This proposal provides that the new term limitations are to begin on January 1, 1995. With three consecutive two-year terms, a member elected to the U.S. House of Representatives this November could serve consecutive terms until January, 1999.

The ability of a state to impose term limitations on elected federal offices such as members of Congress is subject to challenge. Limitations on terms of members of Congress have been challenged in at least two other states, Arkansas and Washington. The courts ruled against the term limits for members of Congress in both states. There is no pending litigation involving the Colorado provisions on term limitations. The U.S. Supreme Court has agreed to hear the Arkansas case in its 1994-95 term, with a decision expected in 1995.

The principal reason for holding congressional term limits unconstitutional is the "qualifications clause" of the U.S. Constitution. The courts in the Arkansas and Washington decisions held that the U.S. Constitution requires only three things as qualifications for members of Congress: 1) to be 25 years of age; 2) to be a U.S. citizen; and 3) to be a resident of the state from which the member is elected. Any other limitations on eligibility of service, including the number of terms served, would represent an unconstitutional imposition of an additional qualification on candidates for federal office. Thus, the constitution of the United States, not a state constitution, would need to be amended to accomplish term limitations for federal offices.

Proponents of term limits at the congressional level argue that restrictions on ballot access are permissible as matters of state consideration under the concept of federalism. States, under the Ninth and Tenth Amendments of the U.S. Constitution, have powers reserved to them that include the ability to regulate elections for federal offices.

Term limits for education board members. This amendment adds term limits for two elected state boards, the State Board of Education, a seven-member board, and the University of Colorado Board of Regents, a nine-member board. These officers may not serve more than two consecutive terms, a total of 12 years.

Arguments For

1) Voters in Colorado adopted the concept of term limits in 1990 as a method of keeping elected officials from viewing their positions as lifetime or career jobs. By forcing turnover, new people will be able to enter the political scene and bring fresh ideas into the legislative branch of the government and to local governments.

Extending term limits to local officials, reducing the consecutive terms permitted for members of the U.S. House of Representatives, and limiting terms of the two elected state boards represents the completion of the term limit concept in Colorado.

2) A reduction in the number of consecutive terms from six to three terms for the U.S. House of Representatives will provide more competitive races for these seats in almost every election. Stronger candidates will emerge if a real possibility of winning an election is seen. Political parties will work harder at finding serious candidates when an election race is competitive and not looked at as a "throwaway" campaign. With a three-term limit, each of the elections can be vigorously contested. The problem with the six-term limit is that the first and last elections may be competitive but, in many instances, the elections in between will not be as competitive because of the advantages of incumbency. Re-election of members of Congress is almost automatic, challengers rarely defeat incumbents.

3) By implementing term limits, service in the U.S. Congress will be regarded as public service, not as a career. The three-term limit will provide the opportunity for the House of Representatives to become a citizen legislature. Many qualified individuals will be interested in serving four or six years in Washington and then returning to their home state to resume their previous careers. The turnover in representation resulting from term limitations, especially a three-term limit, will bring more "real world" private sector experience to the decisions made by Congress.

4) Primary goals of the term limitation movement are to begin to restructure the U.S. Congress and restore the idea that the U.S. House of Representatives is a legislative body of the people that acts as a barometer of public concern. A six-term House limit does nothing to change congressional incumbency because the average number of years served in the U.S. House of Representatives is 10.1 years. For Colorado members who have served since 1970, as shown on page 54, the average is 8.4 years. Thus, a six-term limit (12 years) is longer than the average stay of House members.

This proposal is a means of changing the methods by which Congress operates and of elevating the public perception of Congress as an institution. As more states adopt term limits, there will be a reduction in the importance of the seniority system. Legislators will no longer need to serve multiple terms in order to be influential.

Arguments Against

1) An additional reduction in the terms that members of the Colorado delegation to the U.S. House of Representatives may serve from six to three consecutive terms would mean that Colorado's already limited influence in that chamber would be further weakened. This would occur until other states, particularly the largest states, adopt a similar limitation. The prospect of other states doing this may be some years away. While 15 states have adopted term limits for their members of the U.S. House of Representatives, 35 have not yet acted. By adopting a three-term limit, the Colorado delegation will be subject to more severe limitations than are found in 41 states. It may be appropriate to have a limit on consecutive terms that is equivalent to two terms (12 years) of U.S. Senators, but not to have a limit that would equate to only one term of a Senator.

2) The proposal unnecessarily imposes term limitations on all local government offices rather than simply authorizing local citizens to impose local limits where needed or desired. The statewide mandate imposes uniform term limits on thousands of elected offices throughout the state. Taxpayers who wish to repeal or modify the state mandated limits must go to the trouble, time, and expense of conducting a separate

election to repeal the limits or substitute appropriate limits tailored to local conditions and desires. While the proposal allows local governmental units to exempt themselves from the term limits, a better course of action would be to simply allow local communities to act on their own if they determine that a problem of incumbency needs to be addressed.

3) The local government officials and members of the two state boards that would be affected by this proposal are not part of the entrenched, privileged groups that have created the term limit issue. For many local governments, the problem is not the long tenure of officials, rather it is a problem of securing interested and qualified individuals to serve. In smaller communities, the pool of talent available for public office is not large and turnover in office is high, not low. Local government positions are not career positions and most local government elected officials receive only a small stipend or none at all. Salaries are paid to the Denver City Council members and to county officers because these positions are considered to have either full-time or substantial part-time commitments. Members of the State Board of Education and the Board of Regents receive no salaries, and only one person on one of the two boards has served more than two consecutive terms since 1970.

4) The beneficial results claimed for term limitations are not yet known and cannot be evaluated at this time. Colorado is still four years away from the first restrictions on elected officials running for re-election. An analysis of the results of term limits should be completed before any further reductions are made, particularly when the state stands to lose influence in the U.S. Congress.

5) In a democracy, people should be able to vote for the candidates they want to have in office without arbitrary limits. Term limitations make our political system less democratic because citizens may be denied equal protection since their right to vote for their preferred candidate is limited. Further, there will be a shift in power from elected officials to lobbyists and nonelected officers, including bureaucrats and congressional staff, because term limits result in a loss of institutional memory and continuity in elected positions.

AMENDMENT 18 – STATE MEDICAL ASSISTANCE – REPAYMENT

Ballot Title: AN AMENDMENT TO THE COLORADO CONSTITUTION TO PROVIDE, EFFECTIVE JULY 1, 1995, THAT ANY PAYMENT OF MEDICAL ASSISTANCE BY ANY AGENCY OF THE STATE OR ANY OF ITS POLITICAL SUBDIVISIONS TO A BIOLOGICAL PARENT OR THIRD PARTY ON BEHALF OF OR FOR THE BENEFIT OF THAT BIOLOGICAL PARENT'S CHILD BORN ON OR AFTER JULY 1, 1995, FOR ANY MEDICAL ASSISTANCE RENDERED TO THE CHILD SHALL CONSTITUTE A DEBT OWED TO THE AGENCY JOINTLY AND SEVERALLY BY: A) THE BIOLOGICAL PARENT WHO IS NOT THE APPLICANT FOR OR RECIPIENT OF THE MEDICAL ASSISTANCE PAYMENT, UNTIL THE CHILD REACHES FULL AGE, AND B) EACH BIOLOGICAL OR ADOPTIVE PARENT OF A MINOR BIOLOGICAL PARENT OF THE CHILD, UNTIL THE INCOME, PROPERTY AND RESOURCES OF THE PARENT BECOME INSUFFICIENT OR UNTIL THE MINOR BIOLOGICAL PARENT REACHES FULL AGE; TO REQUIRE THAT THE APPLICANT FOR OR RECIPIENT OF ASSISTANCE SHALL ASSIST THE APPROPRIATE AGENCY IN ESTABLISHING THE PATERNITY OF THE CHILD; AND TO EXEMPT FROM THE INCURRED DEBT MEDICAL ASSISTANCE RENDERED TO THE BIOLOGICAL PARENT OR CHILD WHEN SUCH ASSISTANCE IS AVAILABLE TO THE PUBLIC WITHOUT REGARD TO ECONOMIC STATUS.

The proposed amendment to the Colorado Constitution would:

- require that any costs for medical assistance provided by the state, or any of its political subdivisions, to parents receiving medical assistance on behalf of their children born on or after July 1, 1995, shall constitute a debt owed to the state;
- state that medical assistance would include, but not be limited to, prenatal care, birth delivery, and post-partum care;

- require the debt to be repaid:
  - by the parent not receiving the medical assistance (typically an absent parent); and
  - in the event that either the mother or the father of the child is a minor, by the parents of the minor mother and the minor father (the grandparents);
- make the parents of the minor mother and the minor father (the grandparents) liable for the debt until:
  - their income, property, and resources become insufficient to meet the costs of covering medical assistance provided to the recipient; or
  - the minor parent(s) reach full age, whichever occurs first;
- supersede all provisions of Colorado law and the Colorado Constitution which conflict with the intent or the provisions of this initiative, and require the state to seek waivers from federal statutory provisions which conflict with this amendment;
- require the applicant or recipient of such assistance to aid the appropriate agency in establishing paternity of the child when necessary;
- exempt from the debt provisions medical assistance provided that is free or subsidized, and is otherwise made available without regard to economic status;
- require the General Assembly, by May 1, 1995, to enact legislation to implement the provisions of the amendment; and
- require the appropriate agency to promulgate all necessary rules.

Background

This amendment requires the biological parent of a child for whose benefit medical assistance was paid, and who did not actually apply for or receive the assistance, typically the absent father, to repay the debt to the state. Also, in the event that a parent is a minor, the minor's parents (the grandparents) have an obligation to repay the debt until their income, property, and resources become insufficient, or until the minor parent reaches full age, whichever occurs first. This debt applies to any state medical assistance received by children born on or after July 1, 1995, until they reach full age. This amendment excludes from the debt provision, free or subsidized care which is made available without regard to economic status. State administered programs that may be affected by the debt provision of this amendment include, but may not necessarily be limited to: the Colorado Medical Assistance Program (Medicaid); Colorado Indigent Care (Medically Indigent); programs funded through the federal Maternal and Child Services Block Grant; and Migrant Health.

State Administered Programs Impacted

Colorado Medical Assistance Program. The Colorado Medical Assistance Program, also referred to as "Medicaid," is a federal/state funded program. Medicaid funds serve as the primary source for providing medical assistance to the low income population of the state. The population potentially impacted by this amendment includes: 1) welfare recipients, or persons who receive Aid to Families with Dependent Children (AFDC); 2) pregnant women and children who are below a certain income threshold; 3) disabled children receiving supplemental security income; and 4) children in foster care. Medicaid reimburses health care providers for physician services, hospital care, prescriptions, and a variety of other health care services rendered eligible recipients.

Originally, only a limited segment of the population was eligible for Medicaid, but eligibility has expanded since its inception in 1965. During fiscal years 1990 and 1991,

federal mandates resulted in the further expansion of existing Medicaid eligible populations. Eligibility requirements expanded to include additional elderly, disabled, long term care recipients, and pregnant women and children with incomes in excess of the federal poverty level. Additionally, reimbursement rates for Medicaid providers were increased, and national and state economic downturns resulted in an increase in the low income and medically needy populations. During that two year period, there was an average 12 percent Medicaid enrollment increase and an average 28 percent Medicaid expenditure increase. The FY 1994-95 projected Medicaid enrollment has stabilized at a 4.7 percent growth rate, and Medicaid expenditures are anticipated to increase 10 percent. Last year, Colorado's Medicaid program provided health care coverage for approximately 300,000 Coloradans, about 8 percent of the state's citizens. The anticipated total Colorado Medicaid budget for FY 1994-95 was approximately $1.3 billion, with over $700 million of that budget federally funded.

Medicaid provides coverage for prenatal care, birth delivery, and neonatal care for one out of three Colorado births. Medicaid services for children include well-care, immunizations, early identification and treatment of disabilities, preventive care, and primary health and dental care. With respect to pregnant women and children, births covered by Medicaid increased from 11 percent of all Colorado births in 1989, to 21 percent in 1990, 31 percent in 1991, and to 34 percent in 1992.

In 1993, there were 18,600 births to women covered by Medicaid; an estimated 1,900 of which were to women under age 18. In that same year, children made up approximately 43 percent of Medicaid enrollment, consuming less than 16 percent of Medicaid expenditures. It is estimated that the Medicaid program will provide ongoing assistance to an average of 139,000 eligible children per month during FY 1994-95.

Colorado Indigent Care Program. Low income individuals who do not qualify for Medicaid are eligible to participate in the Colorado Indigent Care Program (Medically Indigent Program). Only one-third of Coloradans who have no health care insurance qualify for Medicaid. The Medically Indigent Program is a state funded program which provides health care services to Colorado's uninsured and underinsured residents. In FY 1992-93, the program served approximately 113,000 residents.

Maternal and Child Services Block Grant. The Maternal and Child Services Block Grant, which is a federal/state funded, provides program funding to ensure low income and underinsured mothers and their children access to quality maternal and child health services. The goal of the program is to reduce infant mortality and reduce the incidence of preventable diseases and handicapping conditions among children. Approximately 26,400 pregnant women and children benefit from services provided by the following state programs funded by the grant: the Prenatal Program, Child Health Services, and the Health Care Program for Special Needs Children.

Migrant Health. The Migrant Health Program was created to provide primary and preventive care to seasonal workers. This federal/state funded program provides health care to approximately 7,500 seasonal workers, of which approximately 4,100 are women and children.

Private Health Care Insurance

Currently, many Colorado minors are covered under their parents' employer-based or private health insurance. However, if a minor has children, these children are not necessarily eligible to be covered under the same insurance.

Federal Law and Federal Waivers

States must structure their Medicaid programs in accordance with federal law. When there is a conflict between federal and state law, federal law supersedes unless the state submits and receives approval for a waiver of federal law. Different kinds of waivers may be submitted. This amendment imposes state requirements that may conflict with debt repayment provisions of Title 19 of the Social Security Act (Medicaid), requiring the submission of a "Section 1115 waiver" of federal law. Twenty-one states and the District of Colombia have submitted 33 Section 1115 waivers, 5 of which have been implemented, 4 approved, 4 disapproved, and 20 pending.

Programs which are subject to Section 1115 waivers must be a demonstration or pilot project. The federal government can put additional conditions on a waiver such as limiting the duration of the program, or requiring that the state share the cost of a rigorous program evaluation by the federal government. The federal government has final authority to approve or to deny state requests for waivers. Waivers which are granted may still be challenged on the basis that the federal government lacks the authority to grant the waiver. If a state fails to obtain a waiver, and the conflicting program is implemented, the state could be deemed out of compliance with federal law. Such noncompliance may jeopardize the state's receipt of federal funds.

Federal and State Law

Some of the issues in this amendment have been addressed by federal legislation which has been adopted by the State of Colorado. Relevant legislation includes: the Omnibus Reconciliation Act of 1993 (OBRA-93); the Family Support Act; the Child Support Enforcement Act; and the Uniform Parentage Act. These laws encourage programs which establish paternity and enforce child support.

The Family Support Act requires that states meet and maintain a certain percentage of paternity establishment for unwed mothers. The Omnibus Reconciliation Act of 1993 requires hospitals to offer single mothers an opportunity to identify the father for hospital records. The establishment of paternity at birth in Colorado has increased from 94 in 1992, to 1,278 during the first four months of 1994. On June 1, 1994, Colorado's paternity establishment percentage was at 43.1 percent. Annual increases are required until a 75 percent paternity establishment rate is achieved. The number of court cases required to establish paternity has decreased 67 percent since Colorado implemented the hospital based paternity establishment program as required by OBRA-93.

The federal Child Support Enforcement Act requires states to operate a child support program in order to be eligible to receive AFDC funds. The Automated Child Support Enforcement System supports Colorado's 63 county child support enforcement units with paternity establishment, the location of absent parents, the establishment of medical and financial support, and enforcement of child support orders. Congress requires the enrollment of children in medical support programs which are available through the absent parent's employment. Additionally, Colorado's Uniform Parentage Act provides for a judgment or order directing the father of a child to pay the reasonable expenses of the mother's pregnancy and confinement.

Arguments For

1) This amendment places financial responsibility with families. Parents and families that can afford to pay for the medical costs associated with childbearing and rearing should not be able to pass that cost on to the state. Taxpayer dollars should be saved by requiring the absent parent and, in the event that a parent is a minor, the minor's

parents (the grandparents) to repay the state for medical assistance received on behalf of a child.

2) The proportion of the state budget devoted to Medicaid has steadily increased over the past several years. This increase has taken funding away from other necessary services. This trend may be partially reversed if some of the monies expended for low income pregnant mothers and children are reimbursed to the state. Further, program costs may be reduced since Medicaid recipients may be more cost conscious about their health care expenditures and may utilize health care services only when necessary.

3) This amendment may decrease teenage pregnancy by making parents more accountable for the reproductive choices of their minor children. Increased communication between parents and their children about sex and birth control should enable parents to be more involved in influencing their children's reproductive choices. Minors may consider the financial consequences of having children if they know that under this law, their parents will be financially liable for any medical services debt incurred related to the birth, and medical care for their child. Teenage pregnancy often results in welfare dependence which, in turn, contributes to a cycle of poverty. Decreasing teenage pregnancy should result in lower welfare and Medicaid costs to the state and better outcomes for children.

4) Opponents argue that the implementation of this amendment could cause Colorado to lose up to $700 million in federal Medicaid funding. The proponents argue that the proposed amendment is to be implemented only if required federal waivers are granted, or to the extent that there is no conflict with federal law. This amendment provides for the waiver process, as allowed by the federal government, in an effort to reduce the number of Colorado's residents who may abuse the Medicaid system. Twenty-one states and the District of Colombia have already submitted Section 1115 waivers to the federal government to implement state level Medicaid reform. The federal government has shown its support of state level Medicaid reform through the number of waivers which have been approved.

5) This amendment does not bar indigent citizens from receiving Medicaid or other state funding. The state may not charge the parent who applies for or receives medical assistance for repayment, which typically includes mothers with custody of their children. The amendment clearly states that biological or adoptive parents of a minor biological parent will only be required to reimburse the state for funding until their income, property and resources become insufficient, or until the minor parent reaches full age (as to be defined by statute), whichever occurs first. Free medical programs, including immunization clinics offered to citizens regardless of financial need, are also not affected by this amendment. These programs will still be available.

Arguments Against

1) The amendment does not specifically provide for what occurs if the state is required to submit a Section 1115 waiver of federal law, the state in fact applies for such a waiver, and the waiver is then denied. It is not clear whether the state must implement the constitutional provision even if it conflicts with federal law. If so, the implementation of the proposed measure may jeopardize the state's receipt of federal funds for the Medicaid program. No federal waiver has ever been granted for the repayment of medical assistance from the parents of minor parents (the grandparents). Failure to obtain a waiver of the federal law may result in the state's loss of up to $700 million in federal Medicaid funding. Loss of this funding would place at risk federally funded medical services in Colorado, including those for individuals who have developmental disabilities, who are medically needy, elderly, physically or mentally disabled, institutionalized, long term care recipients, and low income pregnant women and children.

Federal law governing the Maternal and Child Services Block Grant and the Migrant Health Programs may also prohibit the recoupment of funds from family members other than a spouse or parent. The implementation of this amendment may jeopardize federal funding for those programs.

2) Medical costs, including those paid by state government, may increase if recipients delay seeking care until the illness or condition is more critical. Requiring typically the absent parent or, in the event that the parent is a minor, the minor's parents (the grandparents) to pay for services is expected to discourage low income women from seeking prenatal care and preventive medical care for their children. Studies have shown that these types of medical services significantly decrease long term medical care costs. In 1991, children born with no prenatal care experienced infant mortality rates of 41.9 per 1,000. By comparison, infant mortality rates for children born with prenatal care was 7.6 per 1,000.

3) The additional financial burden this amendment imposes, all medical costs on top of existing child support obligations, may impoverish those fathers who are already barely able to meet their children's financial needs, and may discourage fathers from coming forward to establish paternity because they will be required to repay full medical costs to the state without regard for their ability to pay. Also, the parents of minor parents may be required to exhaust their resources while repaying the debt, perpetuating the cycle of poverty. In addition, this amendment duplicates some of the family responsibility efforts currently in place, such as federal requirements to establish paternity and medical support.

4) It is likely that most of the debt created would not be collectible from either the absent parent or the parents of minor parents (the grandparents). Only a small percentage of the parents of minor parents (the grandparents) would reimburse the state for medical expenses. In 1985, Wisconsin adopted legislation which made the parents of unmarried minor parents (the grandparents), financially liable for the support of the minor's child. In 1988, Wisconsin's Department of Health and Social Services reported that 10 percent of the parents of minor parents (the grandparents) were actually held financially responsible for supporting their grandchildren. This figure was low because 56 percent of the mothers to these minor parents were on AFDC, two-thirds of the cases involved fathers who were not minors, or the parents of the minor lived out of state, were deceased, or incarcerated. Additionally, the report stated that only seven percent of teens were familiar with the law, that "changes in behavior arising from the law is quite small," and that "the law does not appear to have led to a decline in the number of teen pregnancies."

5) The amendment is based upon incorrect assumptions about human behavior. The amendment overestimates the ability of parents to control the actions of their minor children and assumes that parental control will be enhanced by the threat of financial consequences. In addition, the proposal assumes the ability of those without insurance coverage to pay for medical care.

6) This amendment would establish a new legal responsibility to the parents of minor parents (the grandparents) for medical assistance received on behalf of the child of the minor parent. Medical cost for some children born prematurely, with complications, or with severe disabilities, can be extremely high. The parents of minor parents (the grandparents) would be required to repay these medical costs from their income and/or resources. Some grandparents may have no choice but to repay this debt from money they have saved for their own retirement or the education of their children. Enforcement of this amendment could be financially disastrous to these individuals and their families. Some grandparents and their other children may become eligible for Medicaid themselves due to the loss of their personal resources.