No. 18-1455

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICA LIFE INSURANCE COMPANY,
Plaintiff-Appellee,

vs.

MICHAEL P. WERTZ,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, HONORABLE WILLIAM J. MARTINEZ, PRESIDING, NO. 15-CV-1161-WJM-SKC

BRIEF OF AMICI CURIAE (1) NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AND (2) INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION, IN SUPPORT OF AMICA LIFE INSURANCE COMPANY AND AFFIRMANCE

Marcy G. Glenn
Melissa Y. Lou
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
Tel.: 303-295-8000 / Fax: 303-295-8261
mglenn@hollandhart.com
mylou@hollandhart.com

Attorneys for Amici (1) National Association of Insurance Commissioners and (2) Interstate Insurance Product Regulation Commission

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the National Association of Insurance Commissioners and the Interstate Insurance Product Regulation Commission state that they are non-stock entities; they have no parent corporations; and no publicly held corporation has an ownership interest in either of them.

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GLOSSARY

Commission	Interstate Insurance Product Regulation Commission
Colorado Compact	Colorado Insurance Product Regulation Compact, C.R.S. § 24-60-3001
Compact	Interstate Insurance Product Regulation Compact
ITLIP Standards	Individual Term Life Insurance Product Standards
NAAG	National Association of Attorneys General
NAIC	National Association of Insurance Commissioners
NCSL	National Conference of State Legislatures
NCOIL	National Conference of Insurance Legislators

Pursuant to Fed. R. App. P. 29(a)(2) and the consent of the parties, the National Association of Insurance Commissioners (NAIC) and the Interstate Insurance Product Regulation Commission (Commission) (jointly, Amici) respectfully submit this joint brief as amici curiae in support of plaintiff-appellee Amica Insurance Company (Amica) and affirmance of the judgment entered by the district court.

IDENTITY, INTEREST, AUTHORITY, AND INDEPENDENCE OF AMICI CURIAE

Founded in 1871, the NAIC is the United States standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia, and five United States territories. *See generally* https://www.naic.org/. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, coordinate regulatory oversight, and represent their collective views domestically and internationally. The NAIC's purpose is to provide its members with a forum that allows them to work cooperatively on regulatory matters that transcend the boundaries of their own jurisdictions. Collectively, the state insurance commissioners work to develop model legislation, rules, regulations, white papers, and actuarial guidelines that promote and establish uniform regulatory policy.

The NAIC, working closely with the National Conference of State Legislatures (NCSL), the National Conference of Insurance Legislators (NCOIL),

the National Association of Attorneys General (NAAG), and other state officials, developed the Interstate Insurance Product Regulation Compact (Interstate Insurance Compact), *available at* https://www.insurancecompact.org/ (*see* link to "Compact Statute"). App.161, ¶4. The Interstate Insurance Compact was adopted through the model law process to be an interstate agreement for adoption by the states. Its purposes include to develop uniform standards for covered insurance product lines, receive and provide prompt review of filed products, and approve those product filings that satisfy the applicable uniform standards. App.161, ¶5.

In 2004, Colorado, as one of the Interstate Insurance Compact's founding members, enacted the Compact as C.R.S. § 24-60-3001 (Colorado Compact). App.162, ¶7. The Colorado Compact shares and was enacted to accomplish the Interstate Insurance Compact's purposes. Colorado Compact, art. I. The district court applied the Colorado Compact in granting summary judgment for Amica. App.656-658.

The Commission is the joint public agency created by the Interstate Insurance Compact. App.162, ¶7. *See generally* https://www.insurancecompact.org/. The Commission acts pursuant to the Interstate Insurance Compact as it has now been adopted in 44 states and Puerto Rico, with the District of Columbia joining in March 2019 (collectively, Compacting States). *See* https://www.insurancecompact.org/about.htm. As of December 31, 2018, the Compacting

States, acting through their respective state insurance regulators serving as Commission members, had collectively adopted more than 100 uniform standards for insurance products subject to the Interstate Insurance Compact, and had approved more than 7,600 insurance products submitted by more than 250 insurance companies. App.162, 9; *see also* https://www.insurancecompact.org/compact_rlmkng_record.htm and https://www.insurancecompact.org/documents/member_resources_prod_stats.pdf. The Insurance Commissioner of Colorado has served as a member of the Commission since its inception. App.162, ¶8.

Amici have a strong interest in appearing as amici curiae because defendant Michael P. Wertz is challenging the enforceability of the two-year suicide exclusion in the Amica policy (Policy), a provision the Commission approved in 2011 pursuant to the Individual Term Life Insurance Product Standards (ITLIP Standards) initially adopted as uniform standards in 2007. App.165-166, ¶18; 209. The two-year suicide exclusion appears in thousands of life insurance products that the Commission has approved, including inevitably many that insure Colorado residents or under which Colorado residents are beneficiaries.

Beyond the specific provision at issue in this case, the resolution of the appeal will have a direct impact on the legitimacy of both the Colorado and Interstate Insurance Compacts. The validity of both Compacts, in turn, could affect the enforceability of other uniform standards the Commission has adopted,

which have been incorporated into thousands of insurance products approved for sale in Colorado and across the United States. Ultimately, the Interstate Insurance Compact's success relies on its uniform standards having the force and effect of law in accordance with a Compacting State's lawful delegation of authority, with the result that the insurance products the Commission has approved are enforceable as written.

Amici submitted separate briefs in the district court. App.446-475, 476-496. When the court ordered further briefing, it invited the NAIC and the Commission to participate, App.599, and both organizations filed supplemental briefs, App.613-620, 621-631. The district court's order granting summary judgment included frequent references to Amici's briefs, which were identified as among the materials that the district court "thoroughly studied" in granting summary judgment to Amica. App.654-655.

Both Amica and Mr. Wertz have consented to the filing of this brief.

No party's counsel authored this brief in whole or in part, and no party or person other than Amici contributed money toward its preparation and filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court properly enforced the two-year suicide exclusion in the Amica Policy. The ITLIP Standards permit a two-year suicide exclusion and the Commission approved the Policy. Under the Colorado Compact and the law

governing delegation of authority to interstate compacts, the one-year limit on suicide exclusions stated in C.R.S. § 10-7-109 is not applicable to a Commission-approved policy.

It is undisputed that the ITLIP Standards permit a two-year suicide exclusion, the Policy's exclusion satisfies those standards, and the Commission approved the Policy. The question is whether the Colorado Compact resulted in binding Colorado law that governs the permissible content of the Policy. The district court answered "yes" because, under Colorado legal standards for the legislative delegation of authority to *administrative agencies*, the Colorado Compact permissibly delegates authority to the Commission to adopt uniform standards that control over inconsistent state statutes. That holding was correct for the reasons stated below and in Amica's brief.

Amici take this opportunity to expand on why, additionally, the Court should affirm under the legal standards for state delegation of authority to *interstate compacts*[1]:

[1] This issue, addressed in Appellee's Brief at 43-49, is relevant to the Colorado Compact and approximately fifteen interstate compacts into which Colorado has entered that involve the exercise of collective administrative policy or regulatory authority. *See, e.g.*, Interstate Compact on Juveniles, Colo. Rev. Stat. §§ 24-60-701 to -708; Nonresident Violator Compact of 1977, Colo. Rev. Stat. §§ 24-60-2101 to -2104; Interstate Medical Licensure Compact, Colo. Rev. Stat. § 24-60-3602; Interstate Physical Therapy Licensure Compact, Colo. Rev. Stat. § 24-60-3702.

1. In the exercise of its sovereignty and as part of the conventional grant of legislative power, a state may enter an interstate compact to address an interstate issue. As with all state legislative delegations of authority, a delegation to an interstate compact must be reasonable and limited. Assuming those requirements are met, the compact is a valid and enforceable contract among the compacting states and must be enforced as written.

2. Applying these principles here, the General Assembly enacted the Colorado Compact for valid reasons in the exercise of its legislative power and the state's sovereignty. The Colorado Compact reasonably defines and limits the authority it delegates; it and the Interstate Insurance Compact include ample standards and safeguards to protect against the Commission's abuse of its authority; and the delegated authority is limited in scope. Therefore, the Colorado Compact is lawful and its provisions apply to Commission-approved policies even if Section 10-7-109 applies to other policies not submitted for Commission approval.

ARGUMENT

I. The Compact Law Question Is Ripe for Decision

As noted above, the district court granted summary judgment based on Colorado administrative law principles. Mr. Wertz and the Colorado Trial Lawyers Association have argued for reversal of the judgment under those

authorities. Yet, the district court considered compact law at some length in the summary judgment decision. App.668-686.

At first glance, the district court appears to have rejected a compact law basis for validating the Colorado Compact. *See* App.669-684. However, on closer examination, the court answered a narrower question: "does the power to enter into interstate compacts nonetheless give the Colorado Legislature authority to delegate administrative rulemaking power to an interstate agency *that it could not delegate to a Colorado agency*?" App.667-68 (emphasis added). In other words, the court's negative ruling under compact law assumed a negative conclusion on the administrative law issue, too. However, the court *accepted* Amica's administrative law argument, concluding that "if the agency receiving the delegated authority was a Colorado administrative agency[,]…the Insurance Compact [would] not violate Colorado's nondelegation doctrine." App.694. Therefore, Amici do not believe that the court actually rejected the compact law arguments advanced below.

This Court may affirm a judgment on an alternative or additional ground. *e.g., Allen v. Minnstar, Inc.*, 97 F.3d 1365, 1369 (10th Cir. 1996). Based on the importance of the issue, Amici urge the Court to hold that the Colorado Statutory Compact is also authorized under compact law principles.

II. The Interstate Insurance Compact Addresses an Important Interstate Problem.

"The authority of states to enter into compacts is, in the words of James Madison, so clearly evident that no further discussion is needed." Michael L. Buenger, et al., THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS, at 17 (ABA 2d ed. 2016) (citing THE FEDERALIST No. 44) (Buenger). "The compact…adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938).

"A compact is, after all, a contract." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Therefore, "[i]nterstate compacts are construed as contracts under the principles of contract law." *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 628 (2013). Member states contractually agree on certain principles and rules concerning the exercise of joint governing authority for the subject matter of the compact, which "may limit the agreeing States in the exercise of their respective powers." *United States v. Bekins*, 304 U.S. 27, 52 (1938). Compacts "create a third tier of governing authority that occupies the space between the federal government and individual states through the collective action of member states." Buenger, at 14. They are an effective means of marshalling state cooperation in resolving interstate issues, including to establish "uniformity of legislation among

the several States." Felix Frankfurter, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 YALE L.J. 685, 698 (1925).

In *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), the seminal case on legislative delegation to interstate compacts, the Supreme Court confirmed that a state may "solve a problem…by compact and by the delegation, if such it be, necessary to effectuate such solution by compact." *Id.* at 31. As the Court has observed, "[t]he Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships[,]" and it "is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *New York v. O'Neill*, 359 U.S. 1, 6 (1959) (approving the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, which provides for interstate rendition of witnesses as a "cooperative arrangement[ ] for the effective administration of justice"). *See also, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (compacts address "interests that may be badly served or not served at all by the ordinary channels of National or State political action") (internal quotation marks and citation omitted).

It is beyond question that the Interstate Insurance Compact exists to address a real and important interstate problem: the need, recognized since the early-1990s

by Congress and state insurance regulators acting through the NAIC, to identify and make improvements in certain areas of state insurance regulation. Unlike other financial services industries that are regulated at the federal level, insurance is regulated primarily by the states. In the McCarran-Ferguson Act, Congress explicitly declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011. To give meaning to that policy statement, Congress made clear that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). *See, e.g.*, *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946) ("Congress' purpose [in enacting the McCarran-Ferguson Act] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance.").[2]

[2] The Compact Clause requires congressional approval only for interstate compacts that interfere with federal supremacy. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). In a ruling that Mr. Wertz has not challenged, the district court correctly held that the Interstate Insurance Compact did not require such consent because the McCarran-Ferguson Act delegates to states broad responsibility to regulate the business of insurance and the purposes and powers of the Interstate Insurance Compact fall squarely within that authority. App.422, 669-70. *See, e.g.*, *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991).

Because the business of insurance is subject to state regulation, insurance companies doing business in multiple states are frequently subject to compliance with varying or even conflicting state requirements. The burden of monitoring and complying with those disparate insurance product requirements affects the efficiencies, time, and cost at which insurance companies can bring new products to market, referred to as "speed-to-market."

In the early-2000s, state insurance regulators identified the process for filing, review, and approval of insurance products as an area in need of modernization, to increase speed-to-market for the benefit of consumers, insurers, and regulators alike. The ever-increasing mobility of the population exacerbated the need for uniformity of some product lines, especially ones competing with federally regulated securities and banking products. *See generally* 2002 NAIC Proceedings, 2d Qtr. (June 8, 2002), *available at* 2002 WL 32700633, at *44-45; 2002 NAIC Proceedings, 4th Qtr. (Dec. 7, 2002), *available at* 2002 WL 32842723, at *9-12; 2003 NAIC Proceedings, 3d Qtr. (Sept. 13, 2003), *available at* 2003 WL 24100891, at *34-35.

A federal report that anticipated the Interstate Insurance Compact acknowledged the need to promote uniformity and efficiency in obtaining regulatory approval of new insurance products: "[T]he states and NAIC have the opportunity to 'raise the bar' for insurance regulation across the states generally by

incorporating…best regulatory practices into more streamlined, uniform processes for all states." U.S. Gov't Accountability Office, *Regulatory Initiatives of the National Association of Insurance Commissioners*, at 11 (July 6, 2001), *available at* https://www.gao.gov/products/GAO-01-885R. "Success in implementing these initiatives depends largely on the extent to which states 'buy in' to the concepts of uniformity and reciprocity as these concepts apply to state insurance regulation…. The more uniform regulatory processes and functions are across states, the easier it will be to gain such acceptance." *Id.* at 1-2.

These challenges led the NAIC to seek a speed-to-market solution that would both address the uniformity of content requirements applicable to new products, and streamline the review and approval process for products offered on a multi-state platform. A single point of filing would protect consumers across the country regardless of where insurance was issued or where an insured resided at the time of a claim. Over the course of three years of study, an interstate compact emerged as the best way to facilitate interstate cooperation and foster efficiency. 2002 NAIC Proceedings, 4th Qtr., at 10. The Interstate Insurance Compact created a legal mechanism for (1) the adoption of uniform standards to apply in multiple states, and (2) a single point of filing products for review and approval. 2002 NAIC Proceedings, 2d Qtr., at 44; Compact, art. IV, §§ 2-3. At the same time, the Interstate Insurance Compact and the enacting legislation of the Compacting

States, including the Colorado Compact, were carefully crafted to clearly define and limit the Commission's authority and to preserve other specific authority in the states. *See infra* at 19-23, 24-25.

The NAIC adopted the initial model compact legislation in December 2002. Recognizing that the delegation of limited regulatory authority to the Commission must work seamlessly with other facets of regulation and consumer protection delegated by state legislatures to insurance regulators and attorneys general, NAIC members collaborated with NCSL, NCOIL, NAAG, and other state officials. Pursuant to this collaboration, the NAIC adopted eight amendments in July 2003, resulting in the current version of the Interstate Insurance Compact adopted by each Compacting State, including Colorado.

NCSL and NCOIL endorsed the Interstate Insurance Compact and both organizations continue to actively promote it, as well as to fulfill their obligations under the Interstate Insurance Compact to appoint members to the Commission's standing Legislative Committee. Interstate Insurance Compact Bylaws, art. VIII, §1(A), *available at* https://www.insurancecompact.org/ (*see* link to "Bylaws"). As explained in NCOIL's resolution of endorsement, "critics of state regulation single out the product approval process as the most glaring shortcoming of state insurance regulation"; "a delay in bringing products to market is disadvantageous for consumers"; and "the Compact would offer insurers flexibility by allowing them to

seek product approval either through the Compact or on an individual state basis." NCOIL, "Resolution in Support of the NAIC Interstate Insurance Product Regulation Compact Model Legislation" (July 11, 2003), *available at* http://www.ncoil.org/wp-content/uploads/2016/04/CompactResolution.doc.

NCSL unanimously endorsed the Interstate Insurance Compact for similar reasons:

> The Compact promises to preserve the state system of insurance regulation against federal encroachment while raising insurance standards, improving the quality of product review, and giving companies the regulatory efficiency that they need to compete in the modern marketplace…. At the same time, it would benefit consumers by promoting higher product standards and facilitating the development of new products that meet consumer needs. The Compact also would allow states to pool their collective expertise to better review products and to make more valuable use of resources.

NCSL, "FAQs on the Interstate Insurance Product Regulation Compact", *available at* http://www.ncsl.org/documents/insur/compactfaq.pdf. *See also* http://www.ncsl.org/research/financial-services-and-commerce/iiprc-statutes.aspx (NCSL website, providing current information on the Interstate Insurance Compact).

The Interstate Insurance Compact was established in March 2004 with legislative adoption by Colorado and Utah. In May 2006, the Commission passed its operational threshold of adoption by 26 states, or 40% of the national premium volume in the subject product lines. *See* https://www.insurancecompact.org/

history.htm. With this, an important initiative—to achieve greater speed-to-market—evolved into creation of a separate body with statutory authority to exercise a limited regulatory function as "an instrumentality of the Compacting States." Colorado Compact, art. III § 2.

Just as the compact in *Dyer* was appropriate to "solve a problem" of "pollution in the Ohio River system" in *Dyer*, 341 U.S. at 24, 31, and the uniform law in *O'Neill* was "a free-willed collaboration of independent States" with a salutary purpose of "preserving harmony between States, and order and law within their respective borders," 359 U.S. at 5, 8, here the Interstate Insurance Compact permissibly facilitates the regulation of covered insurance products in the Compacting States. Mr. Wertz has not argued otherwise.

III. The Colorado Compact Lawfully Delegates Authority to the Commission.

A. Compact Law Permits Reasonable and Carefully Limited Delegations of Legislative Authority.

"An interstate compact, by its very nature, shifts a part of a state's authority to another state or states, or to the agency the several states jointly create to run the compact.'" *Hess*, 513 U.S. at 42 (internal citation omitted). In *Dyer*, the Supreme Court held that the West Virginia legislature engaged in "the conventional grant of legislative power" when it entered into the Ohio River Valley Water Sanitation Compact, because the West Virginia statute was "a reasonable and carefully

limited delegation of power to an interstate agency." 341 U.S. at 31. As Amica and Amici argued below, App.462-466, 479-480, 487-495, 499-502, 616-617, and Amica argues on appeal, Appellee's Brief at 45-48, under *Dyer*, a state legislature's delegation of authority to an interstate compact is lawful so long as it is "reasonable and carefully limited." *See, e.g.*, *Nebraska v. Cent. Interstate Low-Level Radioactive Waste Compact Comm'n*, 187 F.3d 982, 985 (8th Cir. 1999) (upholding compact under the *Dyer* standard).

Therefore, the terms agreed to by the respective states are to be given meaning provided they meet the "reasonable and carefully limited" standard articulated in *Dyer*. That test is consistent with Colorado law on the delegation of legislative authority to administrative agencies. Both bodies of law take a functional approach, focusing on the substance of the delegation involved.

Mr. Wertz acknowledges that "[t]he delegation of administrative authority is an accepted part of our legal system, and Colorado courts have upheld broad grants of administrative authority under the state's nondelegation doctrine." Opening Brief (OB) at 20 (citing *Cottrell v. City & Cnty. of Denver*, 636 P.2d 703, 709 (Colo. 1981)). Under Colorado law, as explained in *Cottrell*, the General Assembly may delegate power to an administrative agency if "there are sufficient statutory standards and safeguards and administrative standards and safeguards, in combination, to protect against unnecessary and uncontrolled exercise of

discretionary power." *Id.* at 709-10 (holding adequate a statute that required the agency to set water rates "as low as good service will permit" and to make them "uniform as far as practicable"); *see also, e.g.*, *People v. Lowrie*, 761 P.2d 778, 779 (Colo. 1988) (upholding delegation of regulation where the statutory standards mandated "reasonable and just" agency rules that were "necessary for the fair, impartial, stringent, and comprehensive administration" of the liquor laws). Thus, under Colorado law, a challenge under the nondelegation doctrine will be "seldom sustained." *Cottrell*, 636 P.2d at 708.

The Colorado Supreme Court has made clear that in delegating authority to state administrative agencies, the General Assembly discharges "its [lawmaking] function when it describes what job must be done, who must do it, and the scope of his authority." *Swisher v. Brown*, 402 P.2d 621, 626 (Colo. 1965). The same can be said for the lawful delegation of authority to interstate compacts under the *Dyer* standard: if the compact statute states the tasks to be accomplished, identifies those charged with a duty to act, and defines the extent of the designees' authority, the delegation is "reasonable and carefully limited" and, thus, permissible. The Colorado Compact fully meets those standards.

B. The Colorado Compact's Delegation of Authority Is Reasonable and Carefully Limited.

The district court undertook a careful analysis under *Cottrell*, separately considering the substantive "standards" and procedural "safeguards" applicable to

the promulgation of uniform standards, including the ITLIP Standards, under the Colorado Compact. App.691-694.[3] The court came to the correct conclusion that the statute's provisions delegating authority to promulgate uniform standards provides adequate standards and safeguards to survive scrutiny under Colorado administrative law, as stated in *Cottrell*. App.691. Whether the test is for "sufficient statutory standards and safeguards" (under *Cottrell*) or a "reasonable and carefully limited delegation" (under *Dyer*), the same provisions of the Colorado Compact comply equally with Colorado administrative law and general compact law.

At the outset, the Colorado Compact's stated purposes provide substantive standards that apply to the Commission's activities. Those purposes include "[t]o promote and protect the interests of consumers of [covered] insurance products"; "[t]o develop uniform standards for insurance products covered under the Compact"; "[t]o establish a central clearinghouse to receive and provide prompt review of [covered] insurance products…submitted by insurers"; and "[t]o give appropriate regulatory approval to those product filings…satisfying the applicable

[3] Because the court held that the statute's standards and safeguards are sufficient, it did not reach the second inquiry under *Cottrell*—"whether additional administrative standards and safeguards accomplish the necessary protection from arbitrary action," 636 P.2d at 710—which is relevant only if "those standards and safeguards [in the Colorado Compact] are inadequate."

uniform standard[.]" Colorado Compact, art. I, §§ 1-4. The Commission's uniform standards must be promulgated "in order to effectively and efficiently achieve the purposes of [the] Compact." *Id.*, art. VII, § 1.

The Colorado Compact includes additional substantive standards that apply specifically to the development of uniform standards, including the ITLIP Standards. "[E]ach uniform standard shall be construed…to prohibit the use of any inconsistent, misleading or ambiguous provisions in a Product and the form of the Product made available to the public shall not be unfair, inequitable or against public policy as determined by the Commission." *Id.*, art. II, §§ 15. And the uniform standards must be "reasonable." *Id.*, art. IV, § 2, art. VII, § 1.

Beyond these substantive standards, the Colorado Compact incorporates a variety of important procedural safeguards against Commission overreach. *First*, a Compacting State's legislature may withdraw from the Interstate Insurance Compact by specifically repealing the statute by which the state joined, with withdrawal effective on the date of repeal. *Id.*, art. XIV, § 1(b).[4] *Second*, short of withdrawal, a Compacting State retains the unfettered sovereign authority to opt

[4] In contrast, other compacts postpone the effectiveness of withdrawal until the withdrawing state has taken further steps such as notifying other member states, *e.g.*, C.R.S. § 24-60-1201, art. VIII, § d (Interstate Compact for Education); or a specified period of time has elapsed, *e.g.*, C.R.S. § 24-60-2202, art. 8, § D (Rocky Mountain Low-Level Radioactive Waste Act).

out of any uniform standard, *id.*, art. VII, §§ 3–6—a "unique" feature that "[n]o other compact has[.]" Buenger, at 451, 452. A Compacting State has the corollary right to request a stay of the applicable uniform standard while the state perfects its opt-out under the Compact's terms. Colorado Compact, art. VII, § 6.[5] In this case, for example, either the General Assembly or the Insurance Commissioner could have exercised this statutory safeguard by opting out of the ITLIP Standards that included the two-year maximum suicide exclusion; in that event, the ITLIP Standards would have had "no further force and effect" in Colorado. *Id.*, art. VII, § 5.

In addition to these procedural protections:

- The insurance commissioners of all Compacting States, including Colorado, serve as Commission representatives and have an equal vote on all Commission matters, including the adoption of uniform standards. *Id.*, Preamble, art. V, § 1(b).

[5] The Commission has consistently assisted Compacting States in connection with opt-outs. For example, Indiana (by regulation) and Hawaii (by prospective legislation), among others, opted out of the individual long-term care insurance uniform standards. 760 Ind. Admin. Code §§ 2-21-1 to -2; Hawaii Rev. Stat. § 431:30-112(d)(3).

- The Commission must follow the Model State Administrative Procedure Act in adopting rules and operating procedures. *Id.*, art. VII, § 2.
- Promulgation of a uniform standard requires the support of a two-thirds supermajority of both the Commission and its Management Committee. *Id.*, art. V, §§ 1(b), 2(b)(ii).
- The Commission must provide written notice of its intent to adopt a uniform standard to each Compacting State's relevant legislative committees. *Id.*, art. VII, § 2.
- A uniform standard adopted in excess of the Commission's specific rulemaking authority, "shall be invalid and have no force and effect." *Id.*, § 1.
- If any Colorado Compact provision exceeds the General Assembly's constitutional authority to delegate, it "shall be ineffective" and those duties "shall remain" in the General Assembly and the Insurance Commission. *Id.*, art. XVI, § 2(d).[6]

[6] Mr. Wertz makes much of the Colorado Compact's severability provision. *See* OB at 12, 18-19. However, the rule of severability applies to *all* Colorado statutes, C.R.S. § 2-4-204, and the mere inclusion of a routine provision to that effect does not connote an expectation that the Colorado Compact will be held unlawful.

- Any person, including a Compacting State, may obtain judicial review of an adopted uniform standard. *Id.*, § 7.

Beyond these substantive standards and procedural safeguards, the Colorado Compact's delegation of authority is circumscribed in scope and, therefore, carefully limited under *Dyer*. The Commission is limited to developing uniform standards for covered insurance product lines and, on behalf of the Compacting States, reviewing and approving specific insurance products that insurance companies submit and that satisfy adopted uniform standards. All other aspects of insurance regulation are left untouched. "The Commissioner of any State in which an Insurer is authorized to do business or is conducting the business of insurance, shall continue to exercise his or her authority to oversee the market regulation of the activities of the Insurer in accordance with the provisions of the State's law[,]" *id*., art. VIII, § 4, including to regulate for consumer protection and market conduct related to Commission-approved products. "Nothing [in the Colorado Compact] prevents the enforcement of any other [Colorado] law." *Id*., art. XVI, § 1(a). And neither the Colorado Compact nor any action of the Commission can "abrogate or restrict"

> (i) the access of any person to state courts; (ii) remedies available under state law related to breach of contract, tort, or other laws not specifically directed to the content of the Product; (iii) state law relating to the construction of insurance contracts; or (iv) the authority of the attorney general of the state, including but not limited to

> maintaining any actions or proceedings, as authorized by law.

Id., § 1(b). Accordingly, while embracing uniform product standards and centralized product review, the Colorado Compact preserves the General Assembly's broad and direct oversight of insurers' qualifications to do business in Colorado, licensing of insurance agents, consumer education and assistance, and remedies available to consumers and enforcement of consumer protection laws.

These substantive standards and procedural safeguards substantially exceed those present in *Cottrell*, *Lowrie*, and other Colorado decisions upholding the General Assembly's delegation of authority to administrative agencies. Individually and certainly cumulatively, they also reasonably and appropriately limit the Commission in its exercise of delegated authority under compact law.

C. The ITLIP Standards Do Not Impermissibly Amend or Conflict With Colorado Law.

Throughout his brief, Mr. Wertz assumes that through the two-year maximum suicide exclusion in the ITLIP Standards, the Commission has effectively amended the one-year maximum suicide exclusion in Section 10-7-109 and that the ITLIP Standards impermissibly conflict with Section 10-7-109. He is mistaken for at least three reasons. *First*, the *General Assembly*, not the Commission, enacted the Colorado Compact, and so the Commission did not amend Colorado law.

Second, although the ITLIP Standards and Section 10-7-109 differ, they apply to distinct policies. The Colorado Compact makes clear that "it is not intended for the Commission to be the exclusive entity for receipt and review of insurance product filings." Colorado Compact, art. III, § 1. The statute unambiguously states that any uniform standards adopted by the Commission (as to which a Compacting State has not opted-out) "shall have the force and effect of law and shall be binding in the Compacting States…only for those Products filed with the Commission," *id.*, art. IV, § 2; "it is not intended for the Commission to be the exclusive entity for receipt and review of insurance product filings[,]" *id.*, art. III, § 1; and "[n]othing herein shall prohibit any Insurer" from instead obtaining direct state approval of its policies, *id.* If an insurance company makes that permissible choice, its policies "shall be subject to the laws of those States." *Id.*, art. XVI, § 1(c); *see also id.*, art. X, § 1.

As a result, the two-year maximum suicide exclusion authorized under the Colorado Compact did not amend Section 10-7-109, which indisputably applies to life insurance policies that have not been submitted for Commission approval; instead, the Colorado Compact merely authorizes the Commission to approve the two-year exclusion for those policies submitted for Commission review. The legislature did not subordinate Colorado law as much as it established an alternate path for product approval: insurers may file their policies with the Commission and

abide by its uniform standards, or they may comply with the Colorado laws and regulations, including Section 10-7-109, that otherwise apply to policies offered to Colorado consumers. The fact that the rules differ depending on that choice does not establish an implied amendment.

Third, because the Colorado Compact is a contract between the Compacting States, it must be enforced as written and the two-year maximum suicide exclusion in the ITLIP Standards must apply to policies submitted for Commission approval. As the Colorado Supreme Court recognized in *Frontier Ditch Co. v. Southeastern Colorado Water Conservancy District*, 761 P.2d 1117 (Colo. 1988), differences between the terms of interstate compacts and otherwise applicable state law are both inevitable and permitted—and the compact provisions are controlling. *Frontier* involved the Arkansas River Compact between Colorado and Kansas, which, in turn, concerned Arkansas River water that originated in Colorado and traveled to Kansas through a canal and headworks located in Colorado. The compact gave *Kansas* "'exclusive administrative control over the operation of the Frontier canal and its headworks…, to the same extent as though said works were located entirely within the state of Kansas'"—control that, but for the compact, *Colorado* would have exercised under Colorado water law and in Colorado water courts. *Id.* at 1119 (quoting compact). The Court held that "[e]ven though existing [Colorado] statutory schemes might well result in a different apportionment of

waters, the provisions of such a compact bind the states and their citizens." *Id*. at 1123 (citing *Hinderlider*, 304 U.S. at 106). The General Assembly could agree to subject the Colorado water, canal, and headworks to Kansas water law and jurisdiction because, "through the use of an interstate compact, a state may…agree that the sister state to which the water is equitably apportioned will have exclusive authority over the determination of an applicant's right to divert the water and the administration of any such decreed water right." *Id.*

Like *Frontier*, other decisions confirm the need to enforce compacts as written and the validity of state delegation of authority to compacts, even where the compact's provisions differ from state law. For example, *Doe v. Pennsylvania Board of Probation and Parole*, 513 F.3d 95 (3d Cir. 2008), considered whether the State of Pennsylvania denied the plaintiff, an out-of-state convicted sex offender serving probation in Pennsylvania, equal protection when it required community notification of his convicted sex-offender status—even though a sex-offender convicted in Pennsylvania would be treated more leniently. The Third Circuit acknowledged that a Pennsylvania "Megan's Law" called for the disparate treatment of in-state and out-of-state convicted sex offenders. *Id.* at 100-02. But it held that "[b]y signing the Interstate Compact [Concerning Parole and Probation], Pennsylvania has agreed that, when accepting out-of-state probationers who transfer their parole and their residence to the Commonwealth, it will approximate

the same procedures and standards it applies to its own probationers." *Id.* at 108. In other words, the separately adopted compact controlled over the state's Megan Law. *See also Doe v. Ward*, 124 F. Supp. 2d 900, 914–15 (W.D. Pa. 2000) (same: "The law of interstate compacts as interpreted by the U.S. Supreme Court is clear that interstate compacts are the highest form of state statutory law, having precedence over conflicting state statutes….") (citation omitted). For additional cases recognizing this principle, *see, e.g.*, *Hinderlider*, 304 U.S. at 105 (enforcing the La Plata River Compact between Colorado and New Mexico: the compact's "apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights [to a Colorado ditch company] before it entered into the compact"); *Green v. Biddle*, 21 U.S. 1 (1823) (Kentucky statute could not impair Kentucky's obligations under a compact with Virginia); *McComb*, 934 F.2d at 479 ("Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states.")[7]; *Alcorn v. Wolfe*, 827 F. Supp. 47, 52 (D.D.C. 1993) ("[T]he terms of the [Metropolitan Washington Airports Authority] compact

[7] The district court distinguished *Green* because the Kentucky statute post-dated the compact. App.670. However, the General Assembly is presumed to be aware of its own enactments. *LaFond v. Sweeney*, 343 P.3d 939, 943 (Colo. 2015). Here, therefore, it understood that the Colorado Compact would allow the Commission to develop a uniform standard that might vary from Section 10-7-109.

cannot be modified unilaterally by state legislation and take precedence over conflicting state law."); *C.T. Hellmuth & Assocs., Inc. v. Wash. Metro. Area Transit Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976) (rejecting argument for disclosure of compact documents pursuant to Maryland Public Information Act, where compact itself included no comparable provision: "Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law.").

"[A]s with any contract, [the Court must] begin by examining the express terms of the Compact as the best indication of the intent of the parties[.]" *Tarrant*, 569 U.S. at 628. In this case, the plain language of the Colorado Compact makes clear that the General Assembly intended a uniform standard to control over an inconsistent provision of Colorado law: "For any Product approved or certified to the Commission, the Rules, Uniform Standards and any other requirements of the Commission shall constitute the exclusive provisions applicable to the content, approval and certification of such Products." Colorado Compact, art. XVI, § 1(b). If there were any question about the General Assembly's intent, the Colorado Compact's legislative history conclusively shows that the legislature understood and intended that the Colorado Compact "'replace[ ] conflicting state law for

products approved by the Commission[.]'" App.690 (Order Granting Summary Judgment, quoting legislative history); *see* Appellee's Brief at 17 & n.14.

Equally important, the Colorado Compact's opt-out procedures and the General Assembly's ability to repeal the Colorado Compact in its entirety, *see supra* at 20-21, ensure that the legislature controls Colorado law on the content of all life insurance policies issued within Colorado. In other words, far from improperly delegating authority to amend Colorado law, the General Assembly has explicitly and repeatedly provided for its own retention of that authority.

If this Court were to hold that Section 10-7-109 overrides the ITLIP Standards' maximum suicide exclusion, it would not merely second-guess the General Assembly's decision to enter the Colorado Compact and to not opt out of the ITLIP Standards or any of the 22 uniform standards with the same suicide exclusion provision, App.171, ¶45. It also would violate the general principle that "[a] state can impose state law on a compact organization only if the compact specifically reserves its right to do so.". *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir. 1986). As a contract between states, a compact is subject to the constitutional prohibition on the impairment of contracts. U.S. CONST. art. I, § 10, cl. 1; COLO. CONST. art. 2, § 11; *see, e.g.*, *Green*, 21 U.S. at 92. Application of Section 10-7-109 to products submitted to the Commission, including the Amica Policy, beyond

traipsing on the General Assembly's indisputable authority and intent, would unlawfully impair the Colorado Compact.

CONCLUSION

For the reasons stated above, Amici request the Court to affirm the judgment below.

Dated: April 10, 2019.

Respectfully submitted,

s/ Marcy G. Glenn
Marcy G. Glenn
Melissa Y. Lou
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
Tel. 303-295-8000/Fax: 303-295-8261
mglenn@hollandhart.com
mylou@hollandhart.com

Attorneys for Amici National Association of Insurance Commissioners and Interstate Insurance Product Regulation Commission

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019, a copy of this **AMICUS BRIEF OF (1) NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AND (2) INTERSTATE INSURANCE PRODUCT REGULATION COMMISSION** was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Marcy G. Glenn

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 29(a)(4)(G), 29(a)(5), and 32(g)(1), undersigned counsel states that this brief complies with the applicable type-volume limitations, because this brief, exclusive of the items listed in Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), contains 6,473 words.

s/ Marcy G. Glenn

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