CASE NUMBER: 23-35014

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Montana Medical Association, et al.,
Plaintiffs-Appellees,
and
Montana Nurses Association,
Intervenor-Plaintiff-Appellee

v.

Austin Knudsen, Montana Attorney General, et al.,
Defendants-Appellants.

ON APPEAL FROM THE DISTRICT OF MONTANA, Missoula Division, Honorable Donald W. Molloy,
Case No. 9:21-cv-00108-DWM

Brief *Amicus Curiae* of The Buckeye Institute, in Support of Defendants-Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, The Buckeye Institute states that it is not a subsidiary or affiliate of a publicly owned corporation, and there is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome.

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IDENTITY AND INTERESTS OF *AMICI*

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

Consistent with its mission, The Buckeye Institute seeks to promote the constitutional design of limited powers in the federal government, which preserves states' ability to develop and enact such policies. The Buckeye

[1] Pursuant to Federal Rules of Appellate Procedure, Rule 29, The Buckeye Institute states that it has obtained written consent to file this amicus brief from all parties in the case. Further, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission.

Institute is concerned by the district court's analysis and decision regarding preemption under the Americans with Disabilities Act (ADA) and Occupational Safety and Health Act (OSH Act). In holding that those two statutes preempted the Montana law at issue here (Mont. Code Ann. § 49-2-312, the "Montana Statute"), the district court extended settled analysis far beyond its normal bounds to eliminate state statutory protections for a large group of employees. If the district court's reasoning were adopted by this Court, it would not just impact the rights of Montana employees to make their own vaccination decisions, but it would expand the scope of the ADA and OSH Act mandates beyond what employers can control to the choices of individual non-parties. Not only that, but it would also expand preemption far beyond Congress's expressed intent, by preventing states from prohibiting discrimination on grounds different from or in addition to federal anti-discrimination policy. The Buckeye Institute submits this brief to urge the Court to reject the invitation to expand the reach of federal law in this way.

SUMMARY OF THE ARGUMENT

The district court erred when it held that the Montana Statute is preempted by the ADA and the OSH Act in "healthcare settings." Its

analysis ignores the "presumption against preemption" established by the Supreme Court. It also dangerously expands the scope of the ADA and the OSH Act to impact, not just the actions of employers and public accommodations, but the personal decisions of third parties with no practical means of asserting their rights.

The Montana Statute is not preempted under the ADA, either Title I or Title III, because (1) no actual request for a reasonable accommodation has been made in this case, and (2) the law does not require employers to make a "reasonable accommodation" by forcing their employees to make permanent medical decisions. An actual, rather than a hypothetical, request is necessary in order to evaluate whether an accommodation exists that would not run afoul of the Montana Statute. But even if there were not, no cited case supports the proposition that the ADA requires employers, in blanket fashion, to mandate personal decisions for their employees.

The Montana Statute does not conflict with the OSH Act's general duty clause, either. That clause applies to workplace hazards that can be abated and that OSHA has neither regulated nor considered regulating but has the power to regulate. Viruses and communicable diseases do not pose a risk unique to the workplace, they are not always meaningfully abated by

vaccines, and the Supreme Court has held that OSHA does not have the power to regulate them. Litigants cannot impose by the general duty clause what the Supreme Court has held OSHA cannot directly enforce. The Montana Statute is not preempted.

FACTUAL BACKGROUND

The Buckeye Institute has nothing to add to the factual background set forth in Montana's brief and incorporates it here to the extent relevant to the arguments presented below.

ARGUMENT

I. Introduction

This case pits the overextension of two federal statutes designed for other, narrower purposes—the ADA and the OSH Act—against a state's policy decision to protect individual freedom to make private healthcare decisions without threat of losing employment. The ADA protects equal access to public accommodations and requires *employers* to provide reasonable accommodations. But the district court's decision would let employers require *other employees* to provide the "accommodation" and would allow patients (or the employers' perception of patients' preferences) to dictate employees' personal choices in the name of "equal access."

Similarly, the OSH Act requires *employers* to protect their employees against recognized workplace hazards—not normal societal perils. But the district court's decision would allow employers to brandish the OSH Act's general duty clause as a club against employees to force them to undergo medical procedures to satisfy other employees' fears of contagion—risks not unique to the work environment.

The Supreme Court has instructed that implied preemption of state law based on federal regulation is not to be imposed lightly. The district court ignored this directive and led with ADA and OSH Act preemption. It then found the Montana statute preempted despite the absence of any precedent for applying either federal statute to allow employers to overrule their employees' personal medical decisions. The court's analysis under both statutes is flawed and sets dangerous precedent for limited government and individual freedom. The Buckeye Institute therefore respectfully requests that the Court reject the district court's preemption analysis and hold that neither the ADA nor the OSH Act preempts the Montana Statute.

II. In the Absence of Express Preemption, Courts Presume That Congress Did Not Intend To Preempt State Laws in a Sphere Where States Have Traditionally Regulated.

Preemption of state law by a federal law is an exertion of federal power over the state. It is therefore a limited doctrine that should not be imposed lightly. *E.g.*, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) ("Pre-emption of employment standards within the traditional police power of the State should not be lightly inferred." (internal quotation marks omitted)). As the district court recognized, under the Constitution's Supremacy Clause, preemption is the appropriate result when "it is *impossible* for a private party to comply with both state and federal law." (Decision at 13, 1-ER-20 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)) (emphasis added).) Preemption may also be warranted where, "*under the circumstances of a particular case*, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Id.* (quoting *Crosby*, 530 U.S. at 372) (emphasis added).) Most significant is the emphasis in these descriptions on "impossible" compliance and "the circumstances of a particular case." Outside of the category of "field preemption"—where Congress has authority and exercises it to preclude states from enacting *any* law on a particular topic—preemption requires an

"actual[] conflict[]." *See Knox v. Brnovich*, 907 F.3d 1167, 1175 (9th Cir. 2018) (distinguishing field and conflict preemption).

Recognizing the value of these limits in our federal system, federal courts apply a "presumption against preemption" when preemption is only implied and not explicit. *See id.* at 1178. "[T]he assumption [is] that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). "[A] high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 110 (1992)). This Court has since explained that *Wyeth* "recognized public health and safety as a realm in which the presumption applies." *City of Los Angeles v. AECOM Servs., Inc.*, 854 F.3d 1149, 1155 (9th Cir. 2017) (applying the presumption in the ADA context).

Although the OSH Act has an express preemption provision, the district court correctly held that it does not apply here. (Decision at 23–24, 1-ER-30–31.) This means that the OSH Act analysis is subject to the Supreme Court's presumption against preemption. *See, e.g.*, *Ramsay Winch Inc. v.*

Henry, 555 F.3d 1199, 1204 (10th Cir. 2009) (applying the presumption against preemption to the OSH Act general duty clause).

III. The ADA Cannot Facially Preempt a State Anti-Discrimination Statute.

The ADA was enacted with the purpose of "provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Its five titles each address a different type of actor who might discriminate or a different type of location where discrimination might occur. *See generally* Americans with Disabilities Act of 1990, Pub.L. No. 101–336, 104 Stat. 327 (1990). Three are relevant here. Title I addresses discrimination by private employers. *E.g.*, *Willis v. Pacific Maritime Ass'n*, 244 F.3d 675, 680 (9th Cir. 2001) (en banc) (citing 42 U.S.C. § 12112(b)(5)(A)). Title II addresses discrimination by public entities. *See City of Los Angeles v. AECOM Servs., Inc.*, 854 F.3d 1149, 1153 (9th Cir. 2017) (quoting 42 U.S.C. § 12132). And Title III addresses discrimination in public accommodations. *E.g.*, *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1049 (9th Cir. 2008) (citing 42 U.S.C. § 12182(a)).

Here, Plaintiffs asserted ADA preemption of the Montana Statute for the protection of (1) employees under Title I and (2) patients under Title III's

directives for public accommodations. They did not claim a violation of Title II. Yet they cited below a case arising under Title II, *Crowder v. Kitigawa*, 81 F.3d 1480, 1484 (9th Cir. 1996), which has a different analysis. In *Crowder*, this Court applied Title II to preempt a state pet quarantine law that had the effect of depriving visually-impaired persons who use a guide dog of "a variety of public services, such as public transportation, public parks, government buildings and facilities, and tourist attractions," because the law prohibited them from bringing a guide dog in these public places during the quarantine period. *Id.* at 1485. Since Title II prohibits discrimination by state entities, a hypothetical state statute that discriminates against individuals with disabilities would be preempted. But that is irrelevant; Plaintiffs have not alleged that the Montana Statute deprives any disabled individuals of state benefits in violation of Title II.

A. Title I Requires Employers to Provide a Reasonable Accommodation When Requested, So It Cannot Preempt a Statute Before a Request Is Made.

The ADA's Title I prohibits employers from discriminating against individuals with a disability, including by requiring employers to provide a "reasonable accommodation" when requested. 42 U.S.C. § 12112(b). The district court cited testimony that sometimes an employee might have a

disability due to being immunocompromised and concluded that employers must have the option to impose a vaccine mandate as one possible "reasonable accommodation." (Decision at 15–16, 1-ER-22–23.)

The district court cited no relevant precedent for its application of the ADA to hypothetical disabled employees. Nor did it cite any cases that required *other employees* to provide the "reasonable accommodation." Indeed, The Buckeye Institute could find no case, in this circuit or any other, to support such an application of Title I. Even if the hypothetical were true, it is not proper to enjoin a generally applicable state non-discrimination statute as to an entire category of employers just because it might be preempted as to one or two of them. The Buckeye Institute therefore asks the Court to reverse the district court's ADA preemption analysis and decision.

1. Facial Preemption Based on Hypotheticals Is Improper Because It Fails to Account for the Possibility of Lawful Options.

Jumping immediately to the "preemption" remedy is improper where there is another reasonable accommodation option that is consistent with the state statute. That was the fact pattern in *Barber ex rel. Barber v. Colo. Dep't of*

Revenue, 562 F.3d 1222, 1232 (10th Cir. 2009), a Rehabilitation Act case.[2] In *Barber*, the plaintiff sought to obtain a driver's license without meeting the statutory requirement that her legal guardian ride in the vehicle, because her mother had a vision disability and could not serve that function. She requested the "reasonable accommodation" of having a non-parent delegate drive with her, a solution that conflicted with the applicable statute. *Id.* at 1227. The state rejected that proposed accommodation and instead offered the option of creating a "limited guardianship" that would not require the plaintiff's mother to surrender parental rights but would allow her grandparent to supervise her driving. *Id.* at 1230–31. Plaintiff's mother considered the creation of a limited guardianship rather than simply allowing a non-parent delegate to be an "unreasonable" option. But the court held that because the state statute provided an option which would be an accommodation, the state statute did not conflict with the Rehabilitation Act, and therefore was not preempted. *Id.* at 1232–33.

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[2] Title I's "reasonable accommodation" requirement for private employers uses the same analysis as the Rehabilitation Act's similar standard for public employers, so cases applying the latter are instructive for the Title I analysis. *See Zimmerman v. Ore. Dep't of Justice*, 170 F.3d 1169, 1178 (9th Cir. 1999) (discussing the Rehabilitation Act's incorporation of employment related standards from Title I of the ADA).

Barber's analysis is instructive here, because it recognizes that the reasonable accommodation analysis requires an actual conflict between the state statute and the ADA—not a hypothetical one—to preempt a state statute. If there is a reasonable accommodation, even if not totally satisfactory to the one demanding it, there cannot be a preemption. Yet here, the district court issued a blanket injunction applicable to all "health care settings," extending preemption far beyond the parties and making clear that preemption was based on a hypothetical rather than an actual conflict. (1-ER-6.) For any employer that never has an employee request a vaccine mandate as an "accommodation" for a disability, no "actual conflict" exists to preempt Montana's express policy of anti-discrimination.

But even for those employers where such an "accommodation" may be requested, the Court still does not know whether and how many employees would refuse to provide their vaccination status or records on a voluntary basis. The employer could easily request a voluntary disclosure as a reasonable accommodation. If relevant employees voluntarily indicate that they have the vaccinations necessary to address the concerns of a particular disabled employee who will interact with them in the workplace, the statute becomes irrelevant but is not preempted.

2. *Reasonable Accommodation Does Not Mean Forcing Other Employees to Make Permanent Healthcare Decisions.*

The district court's Title I analysis creates a second—and more significant—legal muddle: it expands "reasonable accommodation" to force other employees, rather than the employer, to take action, and forces those other employees to adopt the particular personal healthcare decisions preferred by the disabled employee. The district court did not cite any relevant authority to expand Title I of the ADA in this way.

When a proposed accommodation could have negative impacts on other employees in the workplace, such accommodations are typically not considered "reasonable," or they pose an "undue hardship" to the employer that absolves the employer of any obligation under the ADA. One common fact pattern, that most federal circuit courts have addressed, is a proposed accommodation that would impact other employees' seniority rights under a collective bargaining agreement, such as an accommodation that would give the disabled individual a position or shift that would otherwise be the right of a more senior employee. The circuits have uniformly held that, in that scenario, it is per se not a reasonable accommodation to impair those

other employees' collective bargaining rights. *See, e.g.*, *Willis v. Pacific Maritime Ass'n*, 244 F.3d 675, 680 (9th Cir. 2001) (en banc) (collecting cases).

Outside of the collective bargaining rights context, where a proposed reasonable accommodation would have even slight impacts on other employees, courts have not imposed a per se rule, but neither have they preempted the statute in blanket fashion. The third-party impacts are instead factored into the fact-specific statutory "reasonableness" or "hardship" analyses.

For example, in *Milton v. Scrivner, Inc.*, 53 F.3d 1118 (10th Cir. 1995), the court reasoned that an accommodation's impact on other employees' ability to perform their job functions is a relevant factor in the reasonableness analysis. In *Doll v. Brown*, 75 F.3d 1200, 1205 (7th Cir. 1996), the court ordered consideration of the effect of the proposed reasonable accommodation on others within the workplace in fashioning a remedy for workplace discrimination. And in a third case, in which an employer switched insurance plans to a cheaper provider even though the cheaper provider would not cover a disabled employee due to his disability, the court held that there was an issue of fact regarding whether requiring the more expensive coverage—impacting all the other employees—would pose an

undue hardship. *Anderson v. Gus Mayer Boston Store of Del.*, 924 F. Supp. 763 (E.D. Tex. 1996).

What makes this case stand out is that here it is employers (who would normally be the party to assert undue hardship) rather than disabled employees who are preemptively demanding the discretion to impose a particular "reasonable accommodation." A hardship analysis cannot even begin without facts about the specific disability and the extent of the accommodation needed. But since the ADA does not require employers to provide a reasonable accommodation that poses an undue hardship, it could not preempt the Montana Statute in any situation where imposing a vaccine mandate had that effect—there would be no "actual conflict." The district court's preemption analysis has Title I of the ADA backwards and undoubtedly reflects the exact mindset that prompted Montana to pass this law in the first place.

The employers' legal stance here is unfortunate because they are passing off any accommodation request, whether reasonable or not, on third parties not present here—namely the other employees who will have to comply with an accommodation request. The employers care not if those

"accommodating" employees might object to any medical treatment demands a hypothetical employee asserts.

Further, the district court's analysis has no logical limit to the healthcare context. Why could not all immunocompromised office employees in every industry demand a vaccine mandate on their fellow employees? And why stop with communicable diseases and vaccinations? Could an individual with a severe peanut allergy demand a peanut free workplace? Or an individual with severe, poorly controlled asthma triggered by allergens on others' clothing demand that no smokers or pet owners work there? The obvious answer is that these impositions on other employees' personal lifestyle choices would be unreasonable. It does not appear that a court has ever considered such an intrusive request.

At a minimum, imposing as a "reasonable accommodation" a requirement on other employees is a fact-intensive analysis. It cannot be answered in blanket fashion with respect to an entire category of employers. And that is especially true here, where the hypothetical "accommodation" would force employees to undergo a permanent medical procedure. This is not how the ADA was intended to be used or how it has ever been used in any reported case under Title I across the country. This Court should not be

the first. The district court's Title I analysis should be rejected as an improper basis for preemption.

B. Title III Imposes on Public Accommodations a Duty to Provide Equal Access, Not to Infringe the Freedoms of Third Parties.

The district court's Title III analysis fails for similar, but even stronger, reasons. In Title III, the ADA prohibits businesses that meet the definition of "public accommodations" from discriminating against individuals with a disability. In the context of Title III, discrimination includes denial of participation, unequal or separate benefits, failure to make reasonable modifications, and failure to remove architectural barriers. 42 U.S.C. § 12182. In short, Title III is about making a business "accessible." *See, e.g.*, *Langer v. Kiser*, 57 F.4th 1085, 1092 (9th Cir. 2023) ("[T]o bring an ADA claim against a place of public accommodation, it is enough for a plaintiff to have actual knowledge of accessibility barriers there."). For Title III to preempt the Montana Statute, that would mean that businesses *must* mandate vaccines if they have—or potentially could have—an immunocompromised patient.

That is not the law. Nothing in Title III allows a single patient to dictate the personal medical decisions of individual employees who work in "health care settings." Unsurprisingly, Title III does not appear to ever have been

used to preempt any state law, much less a state law that protects individual freedom in making medical decisions from discrimination by employers.

Just as with the Title I analysis, the district court's Title III conclusion could be expanded to all sorts of situations where contact with an allergen could trigger a disability: nuts, pets, cigarette smoke, and the like. Do all public accommodations need to maintain facilities free of these dangers just in case a person with allergies, COPD (chronic obstructive pulmonary disease), lung cancer, or another disability walks through their doors? That is surely not what Congress had in mind when it enacted the ADA, and it is indisputably not in the text of the ADA.

IV. OSH Act's General Duty Clause Does Not Preempt State Statutes.

The district court's OSH Act analysis under the general duty clause suffers from much the same flaws as its ADA analysis—it improperly applies preemption doctrine, and it presents an unprecedented expanded application of the OSH Act's general duty clause. Congress enacted the OSH Act "to assure safe and healthful working conditions for the nation's work force and to preserve the nation's human resources." *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 417 (5th Cir. 1984) (citing 29 U.S.C. § 651). The OSH Act empowers the Secretary of Labor to

promulgate rules governing occupational health and safety through a notice and comment process. 29 U.S.C. § 655(b). Where there is no properly promulgated regulatory standard, the OSH Act imposes a "general duty" on employers to protect their employees from "recognized hazards." *Id.* § 655(a). But OSHA lacks authority to regulate employees' vaccination choices, and therefore the OSH Act cannot be used to preempt state law concerning the same.

A. The District Court Correctly Held that the OSH Act Express Preemption Does Not Apply Because OSHA Has Not Mandated a Vaccination Standard.

Before addressing where the district court's OSH Act analysis went wrong, it is worth emphasizing what it got right. The OSH Act preempts "all state 'occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992) (quoting 29 U.S.C. § 667(b)). Typically, preemption is triggered when an OSHA standard exists on the same subject, and the state statute or regulation is outside of the state's OSHA-approved plan. *See Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1310 (9th Cir. 1997) (explaining that state regulations omitted from the approved plan, "even if complementary to the

Occupational Safety and Health Act's scheme, are subject to the 'background pre-emption' of the federal standard'").

The district court correctly recognized that OSHA has not enacted any regulations that preempt the Montana Statute. (Decision at 19, 23–24, 1-ER-26, 1-ER-30–31.) OSHA's only regulation concerning vaccines relates to the transmission of bloodborne pathogens in the workplace context. *See* 29 C.F.R. 1910.1030. Congress did not authorize, and OSHA did not impose, a vaccination requirement. *See id.*; *see also* Needlestick Safety and Prevention Act, Pub. L. 106-430, 114 Stat. 1901 (2000). In describing that rule, Sixth Circuit Judge Jeffrey Sutton explained how the rule differed from a vaccine mandate, including that it "narrowly targeted health care workers for protection from viruses, particularly those causing Hepatitis B and AIDS, that can be transmitted in the blood of patients," and "it appreciated the personal nature of the decision whether to get a vaccine—that a truly voluntary program, in OSHA's words, would 'foster greater employee cooperation and trust in the system.'" *In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination and Testing*, 20 F.4th 264, 281 (6th Cir. 2021) (Sutton, J., dissenting from denial of initial hearing en banc) (cleaned up). In sum, "[i]t did not pressure or coerce

unvaccinated employees by imposing significant costs and burdens on them alone." *Id.* The district court correctly concluded that the bloodborne pathogen regulation did not preempt the Montana Statute because these distinguishing features meant that no actual conflict was present.

For that reason, the only applicable analysis for Plaintiffs' preemption claim under the OSH Act is the same implied analysis that applies to the ADA, with the Supreme Court's instruction that state law is presumptively not disturbed.

B. The OSH Act's General Duty Clause Does Not Apply to Risks Existing Outside the Workplace.

The OSH Act's "general duty" clause requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1). This duty applies only to workplace hazards that can be abated; it is not a strict liability obligation to make the workplace "safe." *See, e.g.*, *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 543–44 (9th Cir. 1978) (emphasizing that "the employer's duty under the general duty clause[] must be one which is [a]chievable" (cleaned up)); *Baroid Div. of NL Indus., Inc. v. Occupational Safety*

& Health Review Comm'n, 660 F.2d 439, 446–47 (10th Cir. 1981) ("OSHA does not impose on employers an absolute duty to make safe the working environment of its employees."). Its purpose is to ensure that employers remain responsible for "unanticipated hazards"—that is, unanticipated by OSHA—when the employer is in the best position to address them. *See, e.g.*, *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804 (6th Cir. 1984).

At the same time, the general duty clause is not an independent grant of authority to OSHA to regulate conduct that it is otherwise not authorized to address by the rest of the OSH Act; it simply applies when there are no specific standards. *Flower World, Inc. v. Sacks*, 43 F.4th 1224, 1227 (9th Cir. 2022). The OSH Act "empowers the Secretary to set *workplace* safety standards, not broad public health measures." *Nat'l Fed. of Independent Bus. v. Dep't of Labor* ("*NFIB*"), 142 S. Ct. 661, 665 (2022) (invalidating OSHA's emergency regulation mandating proof of covid vaccination or weekly testing for all employers with more than 100 employees).[3] "Permitting

[3] By contrast, the Court simultaneously held that the Centers for Medicare and Medicaid Services did have the authority to impose a vaccination mandate applicable only to staff of healthcare facilities participating in Medicare and Medicaid. *See Biden v. Missouri*, 142 S. Ct. 647 (2022). The juxtaposition of these two cases reveals the significance of statutory authority to take a particular action, and the limits of that authority.

OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization." *Id.*

The OSH Act does not authorize OSHA to mandate vaccines, and it therefore cannot preempt a state statute that prohibits a vaccine mandate. Beyond the absence of any express authority with respect to vaccines (other than the transmission of bloodborne pathogens, discussed above), the structure of the OSH Act confirms that OSHA's authority does not extend to vaccine-preventable diseases generally. *See, e.g.*, 29 U.S.C. § 675 (listing toxic substances as those "in industrial usage"); 29 U.S.C. § 671a(c)(1)(A) (focusing on "issues related to the contamination of workers' homes with hazardous chemicals and substances, including infectious agents, transported from the workplaces of such workers"). And Congress's findings justifying the enactment of the OSH Act refer to "personal injuries and illnesses arising out of work situations." 29 U.S.C. § 651(a). The OSH Act never refers to viruses or communicable diseases generally.

When Congress intends for an agency to address vaccines or vaccine-preventable diseases, it knows how to do so, and it has done so separately

from occupational health standards. For example, the CDC has statutory authority to address "the introduction, transmission, or spread of communicable diseases" in limited circumstances. 42 U.S.C. § 264(a). The FDA has statutory authority over the approval of vaccines, including requiring individuals to be informed of the "option to accept or refuse administration of" an emergency approved vaccine. *See* 21 U.S.C. § 321(g) & § 360bbb-3; 42 U.S.C. § 262(i)(1). But the OSH Act is not only silent as to vaccines and communicable diseases, it also preserves the authority of other federal agencies such as HHS regarding their "exercise [of] statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C. § 653(b)(1).

Just as in *NFIB*, the risk of spreading communicable disease in the workplace is the same risk that those diseases will spread among the general public. It is not a risk committed to OSHA's authority and it is therefore not covered by the OSH Act. The OSH Act therefore cannot preempt the Montana Statute's prohibition on employer vaccine mandates.

C. The OSH Act's General Duty Clause Does Not Preempt Laws Regarding Risks that OSHA Has Deliberately Declined to Regulate.

The general duty clause also does not apply where OSHA deliberately chooses not to act. Two cases addressing state laws protecting employees' right to concealed-carry weapons on their employer's premises are directly analogous. *See, e.g.*, *Ramsay Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009) (holding that the OSH Act did not preempt a state statute that preserved the right of employees to conceal-carry weapons in the parking lot of their employers); *Fla. Retail Fed., Inc. v. Attorney General of Fla.*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008) (same). In *Ramsey Winch*, Oklahoma prohibited employers from banning their employees from storing firearms in locked vehicles on company property. 555 F.3d at 1202. A similar Florida statute was at issue in *Florida Retail*. *See* 576 F. Supp. 2d at 1284. In both cases, employers that had policies against guns on company property sued, arguing (among other things) that the general duty clause preempted the state laws because the threat of workplace violence was a "recognized hazard."

The *Ramsey Winch* court rejected those arguments. Beginning "with the assumption that the historic police powers of the States [are] not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress," the court looked at the purpose of the general duty clause and the history of OSHA's approach to firearms in the workplace. 555 F.3d at 1204 (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)). The general duty clause "was not meant to 'be a general substitute for reliance on standards, but would simply enable the Secretary to [e]nsure the protection of employees who are working under special circumstances for which no standard has yet been adopted.'" *Id.* at 1205 (quoting S.Rep. No. 91–1282, at 5186 (1970)). Although OSHA has "recognized workplace violence as a serious safety and health issue," it "has not[ ] promulgated any mandatory standards regarding workplace violence." *Id.* To the contrary, OSHA had "declined a request to promulgate a standard banning firearms from the workplace." *Id.* at 1206 (citing Standards Interpretations Letter, September 13, 2006, available at 2006 WL 4093048). Other cases applying the general duty clause had held that fear of violent attacks did not require "abatement of a hazard under the general duty clause." *Id.* (citing cases). In the end, the court firmly held that interpreting "recognized hazard" to encompass storage of legal weapons in locked vehicles "is simply too speculative and unsupported to construe as the 'clear and manifest purpose

of Congress.'" *Id.* at 1207 (quoting *Altria Grp.*, 555 U.S. at 77). Since "state laws of general applicability that do not conflict with OSHA standards and that regulate conduct of works and non-workers alike are generally not preempted," the Oklahoma law could not be said to have thwarted Congress's purpose in enacting the OSH Act. *Id.* (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992)).

The Northern District of Florida reached a similar conclusion. The Florida statute it considered restricted the policies the employer could impose, and also protected employees with a concealed-carry permit from employment discrimination. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1293. The Florida court relied on two independent arguments in rejecting the plaintiffs' claim of OSH Act preemption. First, in § 667, the OSH Act "explicitly authorized the states to act on workers safety issues as they deem appropriate," *id.* at 1298: "Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. § 667(a). Second, the court explained that the argument "proves way too much. If the failure to ban

guns were indeed a violation of the general duty clause, then all businesses would have a duty to ban guns." *Fla. Retail Fed.*, 576 F. Supp. 2d at 1299.

The Montana Statute protecting employees from discrimination due to their vaccination choices is directly analogous to the Oklahoma and Florida statutes regarding firearms on workplace property. Both involve politically charged personal decisions on which OSHA has not imposed a federal standard. Both are state laws of general applicability. And in both contexts, OSH Act preemption would prove too much—it would mean all businesses would need to establish the harsh consequences on employees that the state laws sought to prevent.

D. Preempting the Montana Statute under the OSH Act's General Duty Clause Weaponizes Federal Law Against Personal Choices and Would Require Employers to Act.

As the court in *Florida Retail Federation* pointed out, using the general duty clause to preempt a state anti-discrimination statute proves too much. The general duty clause is not optional; it *requires* employers to maintain a workplace free of recognized hazards. If "unvaccinated employees" were deemed a "workplace hazard," that would mean *all* employers could face liability if they did *not* mandate vaccination. That is exactly the opposite of

what the Supreme Court held in *NFIB* when it struck down OSHA's vaccine mandate regulation.

Indeed, examining a case that properly applied the general duty clause illustrates why it does not apply here. In *Puffer's Hardware, Inc. v. Donovan*, OSHA found an employer liable under the general duty clause for allowing its employees to use an elevator that was open on one side, which resulted in serious injuries. 742 F.2d 12, 14 (1st Cir. 1984). The absence of any preexisting regulation regarding this hazard—because of its unusual nature, rather than uncertainty about whether it was a hazard—did not protect the employer from liability because the employer "had actual knowledge of the hazard," as evidenced by an existing safety program. *Id.* at 18. But the safety program was not sufficient to satisfy the general duty clause. *Id.* Rather, the employer was required—under the OSH Act's general duty clause—to install interlocked doors on its elevators, in light of (a) long-standing national standards requiring them, (b) Massachusetts law requiring them in other contexts, and (c) evidence that interlocked doors had been installed in other analogous contexts. *Id.* at 19.

The "risk" of unvaccinated employees is completely different from the risk posed by an open elevator. An employee's personal health decisions

regarding vaccination for the benefit of other employees are nothing like unsafe equipment fixable by the employer proactively spending some money on an upgrade. And the general duty clause is not a catch-all for litigants to impose their policy preferences when OSHA declines to regulate.

The potential impacts of such a far-reaching interpretation of the general duty clause extend far beyond a single statute in Montana protecting employees' choice not to get a vaccine. It threatens the divide between the workplace and people's personal lives, giving employers the authority to dictate their employees' personal choices even in the face of the legislature's express direction that employers should not have that right. How many other personal choices could be deemed a workplace "hazard"? Smokers carry third-hand smoke into the office on their clothing. The parents of young children are much more likely to catch and spread cold and flu germs. Indeed, the impacts of these types of "hazards" might be more keenly felt in healthcare settings—but they are not what Congress had in mind, much less put into the text of the law, when it enacted the OSH Act. Individuals' vaccination choices are no different, and the OSH Act's general duty clause should not be interpreted to preempt the Montana Statute.

The district court should have ended its OSH Act preemption analysis when it concluded that OSHA has not enacted any regulations that preempt the Montana Statute. This Court should reverse the rest of the district court's OSH Act analysis.

V. Conclusion.

For the foregoing reasons, The Buckeye Institute respectfully requests that the Court reject the district court's finding of preemption under the ADA and OSH Act.

Respectfully submitted,

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I hereby certify that on June 23, 2023, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will cause a copy of said document to be electronically transmitted to all counsel of record.

/s/ Elisé K. Yarnell
Counsel for The Buckeye Institute

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