UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WAL-MART STORES, INC., Respondent.	OSHRC Docket No. 09-1013

OPENING BRIEF FOR RESPONDENT

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INTRODUCTION

In this enforcement proceeding, the Secretary has—for the first time, and in the absence of any prior regulatory, informational, or industry guidance—asserted the ability to regulate crowds of customers at retail stores. The hazard, as affirmed by Judge Rooney in the decision under review, is "the congregation of a large crowd of customers who were highly motivated to enter [a] store at a specific time to compete with one [another] to obtain one or more of a limited supply of deeply discounted popular items." Decision and Order at 50 (Apr. 5, 2011) ("Order"). The Secretary has never sought to regulate or even inform the retail industry of crowd-related hazards before this case, and the newly minted obligation of retail stores to identify and control "large crowds" meeting the Secretary's and Judge Rooney's criteria would require a complex set of rules that is completely divorced from how the industry interacts with crowds on a daily basis. This sort of regulation is perhaps suited for notice-and-comment rulemaking, but the Secretary has instead elected to pursue it by redefining and expanding the "general duty" of employers under the Occupational Safety and Health Act ("OSH Act" or "Act").

The novel view that crowds of shoppers could, by definition, constitute a "hazard" under the OSH Act—let alone that Wal-Mart should have recognized and abated this supposed hazard in 2008, when the alleged violation of the General Duty Clause occurred—is remarkable on its face and finds no support in the record. The only witness who was even conceivably competent to define the nature of the hazard or opine on the feasibility of recommended abatement measures—the Secretary's expert on "crowd management," Paul Wertheimer—was deemed so unreliable by Judge Rooney that his testimony was retroactively excluded following the hearing. *See* Order 13–14. Yet Mr. Wertheimer's unreliable and inadmissible testimony was—before it was excluded—the sole support for the Secretary's theory that Wal-Mart had feasible and effective means of abatement.

General Duty Clause cases are typically dependent upon expert testimony precisely because the pertinent standard asks whether "experts familiar with the pertinent industry" would prescribe the recommended abatement measures. *Donovan v. Royal Logging Co.*, 645 F.2d 822, 830 (9th Cir. 1981). Without Mr. Wertheimer's testimony, the Secretary has *no* evidence, let alone expert testimony, to justify her position. Instead, all the relevant evidence points in the opposite direction: When the Secretary cited Wal-Mart, the National Fire Protection Association had expressly *excluded* retail establishments from its provisions on "crowd management," and the Workplace Safety Committee of the Retail Industry Leaders Association ("RILA") had never even *discussed* safety hazards relating to crowds.

Judge Rooney attempted to overcome the complete absence of evidence supporting the Secretary's position by relying almost exclusively on the unique events that gave rise to the citation, which she believed made the cited hazard "obvious and glaring," Order 46, and demonstrated that the hazard could be abated when those events were not repeated the following year, *id.* at 51. The tragic events that gave rise to the citation were literally unprecedented in the history of retail sales: A crowd of shoppers for the post-Thanksgiving sale at Wal-Mart's Valley Stream Store on Long Island acted in a frenzied, out-of-control manner; they jumped a barricade separating them from the Store entrance, pushed and shoved each other in line, and attempted to destroy the Store's security systems. And the only people who could have stopped this unruly and sociopathic behavior—the police—pronounced the crowd uncontrollable and left the scene. That this crowd charged into the store with such abandon hardly suggests that crowds of shoppers generally pose a danger to retail employees, that Wal-Mart should have recognized this supposed hazard in 2008, and that extensive (but as of yet undefined) crowd-management methods are necessary for abatement. The General Duty Clause does not impose liability for

"freakish and unforeseeable" events, *Tuscan/Lehigh Dairies, Inc.*, 22 BNA OSHC 1870, 2009 WL 3030764, at *14 (No. 08-0637) (ALJ), and that—if anything—is what this case involves. The Commission should reverse Judge Rooney's decision and vacate the Secretary's citation.

STATEMENT OF THE CASE

This case arises from an investigation by the Occupational Safety and Health Administration ("OSHA") into a November 2008 fatality during the annual "Blitz Day" sale at Wal-Mart's Valley Stream Store (the "Store"). Although this death prompted the investigation, the record does not establish the cause of death, and Judge Rooney concluded, as the Secretary had acknowledged, that the death is irrelevant to any further proceedings. *See* Order 50 n.29.

On May 26, 2009, the Secretary of Labor issued a citation alleging that Wal-Mart violated the General Duty Clause by not maintaining the Store free from the "recognized" hazard of "asphyxiation by crowd crush," and seeking a $7,000 penalty. The Secretary amended her allegations in a complaint filed on August 14, 2009. Following a trial from July 7 through 14, 2010, Administrative Law Judge Covette Rooney issued an order on March 25, 2011 affirming the citation and assessing a $7,000 penalty. On April 6, 2011, the Commission directed review.

STATEMENT OF FACTS

Wal-Mart's day-after-Thanksgiving Blitz Day sale was comparable in nature to Black Friday sales at retail stores across America. *See* Order 5. Popular items were placed on sale on a first-come, first-served basis for a limited amount of time. *See id.* at 36, 44. Customers traditionally arrived before the Store's opening and lined up outside the entrance. *See id.* at 18.

A. Respondent's Blitz Day Events From 2005 Through 2007 Occurred Without Serious Incident

Prior to 2008, the Store's Blitz Day sales occurred without serious incident. The Store continually adjusted its preparations to prevent the recurrence of minor property damage and

non-serious injuries to customers, and to ensure the comfort of customers and employees. Employees viewed the sale as a "fun" and "excit[ing]" event, *see* Gov't Ex. 144, at 149, and the Store traditionally began each year's sale with a countdown, *see* Order 24.

On Blitz Day 2005, two customers reported injuries from running and falling as they entered the Store. *See* Order 47. In addition, a door popped off its hinges due to the large number of people entering the Store. *See id.* For safety reasons, the doors had been designed to pop off their hinges when subjected to relatively small amounts of pressure. *See* Tr. 259, 1038.

To address these minor problems, the Store tailored its precautions for Blitz Day 2006. Store Manager Steve Sooknanan directed employees to distribute a map that specified the location of popular items and included a message instructing customers not to run. *See* Order 37. Mr. Sooknanan also instructed employees to use cones, balustrades, and a line of shopping carts to demarcate a waiting area before the Store opened, to clear the floor of debris, to assist any customers who fell down, and to stay out of the crowd's way as it entered the Store. *See* Tr. 199, 989–93. As an added measure of precaution, then-Assistant Manager Salvatore D'Amico obtained the assistance of the Nassau County Police Department by calling the local precinct before the event. *See* Order 5; Tr. 990.

When the Store opened on Blitz Day 2006, police officers were parked near the entrance using their lights and bullhorns to keep the crowd orderly. *See* Order 5; Tr. 237–38. Customers once again knocked the doors from their hinges, but no customers or employees were injured. *See* Order 47. During the opening, Mr. Sooknanan observed that some customers discarded their maps on the floor of the vestibule, which posed a slip-and-fall hazard. *See id.* at 37. He also observed that the row of shopping carts presented a restriction to entry because some customers were exiting the Store to retrieve carts as other customers were entering. *See id.* at 36–37.

In preparing for Blitz Day 2007, the Store again sought to address the minor problems from prior years. Mr. Sooknanan discontinued the use of maps to eliminate slip-and-fall hazards, and he stopped using shopping-cart lines to remove any impediments to customers' safe entry. *See* Order 37. He also instructed employees to keep carts out of the line, to keep the line straight and orderly, to clear the floor of debris, and to encourage walking. *See* Tr. 911, 991–92. As he had before Blitz Day 2006, he instructed employees to assist any customers who fell and to stand out of the crowd's way as it entered the Store. *See* Order 38. Finally, he directed employees to contact the Nassau County Police Department to ensure there would be additional patrols in the area. *See id.* at 37–38; Tr. 1036–37.

On Blitz Day 2007, the police were not present at the opening, and the crowd was less orderly than it had been in 2006. *See* Order 47. Several customers pressed against the doors before the opening, which made it difficult to open them, *see id.* at 15, and a group of employees had to place themselves in front of the entrance and ask customers to move back, *see id.* at 5–6; Tr. 129–30, 166–67. As the Store opened, customers ran inside and knocked the doors off their hinges. *See* Order 6. Some customers fell in the waiting area outside the Store, and one customer threw a boot through the vestibule door. *See id.* at 23; Tr. 170, 919, 996. Nonetheless, this behavior did not result in any serious injuries to customers or employees; Associate Justin Rice received a "paper cut" from the falling glass, but he was able to address this non-recordable first-aid injury with a Band-Aid before returning to work. *See* Tr. 167, 996–97.

B. Respondent Tailored Its Preparations For Blitz Day 2008 To Address The Minor Problems From Previous Years

In response to the crowd's behavior during Blitz Day 2007, the Store engaged in even more careful planning in preparation for Blitz Day 2008. Consistent with Wal-Mart's experience

in previous years, the uniform concern addressed by all precautions was customer, not employee, safety.

First, Store Manager Sooknanan "decided to use barricades to control the line of customers outside due to concerns expressed to him by [Mr.] Rice . . . that the crowd for the 2007 event was unruly and cones were not adequate to keep customers in line." Order 39. Mr. Sooknanan's intent was to use these barricades to demarcate a waiting area forty feet in front of the entrance, thus leaving a "buffer zone" in front of the doors, and to allow customers past the barricades only after the doors were opened. *Id.*; *see also* Tr. 1004–05. Mr. Sooknanan "believed that keeping the customers away from the front doors for the 2008 event would solve the problem of customers rushing into the vestibule." Order 48. He "also believed this would keep the crowd from pushing the doors down." *Id.*

Second, Mr. Sooknanan secured the availability of additional workers to help prepare for Blitz Day and to improve the shopping experience. He hired 100 temporary associates, which was more than the Store had hired in any previous year. *See* Order 19; Tr. 234. And Mr. D'Amico, who had by then assumed the role of Market Asset Protection Manager for Market 45, which included the Store, hired two security guards for the Store's opening. *See* Order 6; Tr. 270, 1075–76.

Third, Mr. D'Amico developed a "Market 45 Action Plan" and forwarded it to managers and Asset Protection personnel at the Store. *See* Order 18; Gov't Ex. 11. The Plan was meant to guide Asset Protection employees' preparations for Blitz Day and to complement Mr. Sooknanan's general Blitz Day planning. *See* Order 18; Tr. 1003–04. A variation of this Plan had worked without incident at Wal-Mart's Farmingdale Store during Blitz Day 2007. *See* Tr. 268.

Fourth, the Store held regular meetings "several weeks" in advance of Blitz Day 2008. *See* Tr. 998–1000. In these meetings, and on other occasions before Blitz Day, Mr. Sooknanan instructed employees to monitor the line, encourage customers to walk, answer customers' questions, reassure customers that the Store had enough products, inform customers where products were located, keep the floor free of potential slip, trip, and fall hazards, and stand out of the crowd's way. *See* Order 39; Tr. 999–1000, 1111–13. Mr. D'Amico held similar weekly meetings with Asset Protection employees. *See* Tr. 275–76. And the Store's Safety Committee met to implement safety strategies from the Company's intranet. *See id.* at 982.

Fifth, employees made repeated efforts to ensure that police would be present for the Store's opening. Several weeks before Blitz Day, Officer Malley of the Nassau County Police Department told Mr. D'Amico that he could call the local precinct to obtain a police presence for the opening. Tr. 238. Consistent with this instruction, Mr. D'Amico and Mr. Sooknanan both asked Asset Protection Coordinator Julius Blair to contact the police, which he did on two occasions prior to Blitz Day. *See* Order 26; Tr. 239, 999. Both times, the police stated that, although they could not be present *throughout* the night, they would be there for the Store's *opening*. *See* Order 26; Resp. Ex. 145(a), at 188–89, 193–94.

C. Prior To The Opening, The Store Took Reasonable Steps To Address An Increasingly Unruly Crowd

On Thanksgiving night, Store employees began setting up for the Blitz Day sale. Julius Blair, Andrew Gilroy, and Steve Sooknanan positioned the barricades forty feet in front of the Store's entrance to create an "L"-shaped buffer zone. *See* Order 39; Tr. 1053, 1061–63; Gov't Ex. 145, at 180. Additionally, Mr. Gilroy hung a sign on the exterior of the Store to indicate where customers should line up. Gov't Rebuttal Ex. 1, at 14. As customers began arriving, the Safety Committee ensured that fire exits remained unblocked. *See* Tr. 1002.

In the early hours of the morning, a crowd gathered outside the Store that was unexpectedly and incomparably larger than those in prior years: The Store had expected 900 customers based upon annual trends, but approximately 2,000 people gathered in line. *See* Order 6. Messrs. Sooknanan and D'Amico both testified that they had never seen a crowd so large. *See id.* at 21, 41. A group of employees monitored the line to provide assistance, keep carts out of the line, encourage walking, discourage pushing, and "keep attitudes in check." Tr. 87, 103, 925, 1007. Associate Dennis Fitch joked with customers to "keep them happy." *Id.* at 103.

The crowd was initially calm and responsive to employees' instructions. Tr. 925. Around 3 a.m., however, it started to become unruly. *See* Order 6. A group of customers jumped over the barricades and congregated in front of the entrance. *See id.* at 39; Tr. 1014, 1084. Mr. Blair responded by calling the police to request assistance; they arrived in short order and restored a sense of calm by, among other things, breaking up a fight among customers. *See* Order 27 n.17; Tr. 1014–15. The individuals who had jumped the barricades were asked to leave. Tr. 1109.

The crowd continued to grow, and at around 4:30 a.m., it again became disorderly. *See* Order 27. Customers jumped over the barricades and accumulated in front of the doors. *See id.*; Tr. 241, 1016–17. Store employees once again asked the police for assistance, but this time the police stated that it was "not in their job description." Tr. 105; *see also* Order 27. The situation rapidly deteriorated. Customers chanted "push," yelled profanities, and spoke openly about breaking the doors. *See* Order 15; Tr. 105. Some customers fought each other in line. Tr. 278. Employee Dante Wedderburn assisted a family member to the front of the crowd, which further enraged customers. Gov't Ex. 145, at 231. Officer Pierre told Store employees that the situation was "hopeless," Order 21; Tr. 278–80, and he and the other officers left the Store entirely with

less than thirty minutes remaining before the scheduled opening, *see* Order 21. Following the unexpected departure of the police, employees repeatedly (but unsuccessfully) called the local precinct to request that they return. *See id.* at 44.

With the police gone, Mr. D'Amico devised a plan to move the crowd back from the doors. At Mr. D'Amico's request, six or seven employees went outside and addressed the crowd, asking them to move back. *See* Order 27–28; Tr. 242, 249. They removed the front barricade—which was now in the middle of the disorderly crowd—to increase freedom of movement. Tr. 87–88. And when customers did not move back, these six or seven employees "wedged" themselves between the crowd and the doors, attempting to create space. *See* Order 27–28; Tr. 242, 249. These efforts proved unsuccessful, and the crowd remained pressed against the glass, so Mr. D'Amico instructed all employees to go back inside and "be cautious." *See* Tr. 86–87, 242; *see also* Order 27–28.

At about 4:45 a.m., Store Manager Sooknanan held a final meeting with all Store employees. *See* Order 35, 40; Tr. 82. He reminded them to be safe, to have fun, to assist customers, to keep the floor clean, and to stay out of the crowd's way as it entered the Store. *See* Order 35, 40; Tr. 102, 879, 883, 915, 1020, 1100. Mr. Sooknanan met separately with Mr. D'Amico, who suggested that the Store should remain closed until employees were able to secure a police presence. *See* Order 20; Tr. 1018–19. Additionally, he noted, although the Store had contracted for two security guards to be present for the opening, only one had arrived on time. Order 6. Mr. Sooknanan decided that he could not leave the Store closed, despite the absence of any police, because the crowd was causing the doors, the glass walls of the vestibule, and the large glass "Always" sign above the vestibule to shake. *See* Order 45; Tr. 1018–19. He

was afraid that these items were about to fall and break, and that customers would be injured. *See* Order 45; Tr. 1018–19.

Just before 5 a.m., a mass of customers rushed from their cars in the parking lot to the front of the Store, cutting in front of the customers who had been waiting in line. *See* Order 6; Tr. 926. This "exacerbated" the situation, and some members of the crowd became even more enraged and violent. Order 50. In the seconds before the opening, approximately ten employees gathered in the vestibule to hold the doors in an attempt to keep them from re-closing (after they opened) or from breaking due to the pressure of the crowd. *See id.* at 16; Tr. 141–42, 889.

D. When The Store Opened, The Crowd Remained Unruly And Uncontrollable

As employees opened the doors, customers ran inside and pushed the doors off their hinges. *See* Order 6; Tr. 153. Individuals slipped and fell in the vestibule, and employees assisted the people who had fallen. *See* Order 6. While providing assistance in the vestibule, Associate Dennis Fitch was knocked down and stepped on without being injured. *See id.* at 14–15. Within a few minutes, employees observed that temporary employee Jdimytai Damour was on the floor of the vestibule, that customers were stepping on him, and that he was not moving. *See id.* at 6, 49 n.29. Without apparent difficulty, a group of employees surrounded Mr. Damour to keep the crowd away and to clear a path for medical assistance. *See id.* at 6.

The crowd remained unruly as it entered the Store. Some customers turned back toward the vestibule and vandalized the Store's security devices, causing them to become unbolted from the floor and to fall down. *See* Order 7; Tr. 1021. Others hoarded TVs and attempted to re-sell them on the sales floor. *See* Order 7; Tr. 106.

The police returned to the Store shortly after it opened, and they were able to restore order in a matter of seconds. *See* Order 17; Tr. 107, 174, 1021–22. The Store temporarily

closed, and Mr. Damour was taken to the hospital, where he was pronounced dead. *See* Order 3, 25.

E. The 2009 Day-After-Thanksgiving Sale Was Unlike Previous Years' Events

Following Mr. Damour's death, the Nassau County District Attorney's office investigated the Store, as did OSHA. In connection with the District Attorney's investigation, the Store entered a non-prosecution agreement that governed preparations for its 2009 day-after-Thanksgiving sale. *See* Order 51; Gov't Ex. 148, at 226. The Store was required to hire crowd managers, to implement these managers' recommendations, and to provide "crowd management" training to associates. *See* Order 32. Rather than a "hard" opening at a pre-assigned time, the Store was opened for 24 hours during its 2009 sale; no customers congregated in a static queue at the entrance. *See id.* at 51; Tr. 162, 404. In addition, a "massive" police presence provided additional security for the event, Tr. 567–68, and members of the local media were present in large numbers, *see id.* at 816. No customers or employees were injured.

F. The Secretary's Citation And Judge Rooney's Decision

Based on OSHA's investigation, the Secretary issued a citation against Wal-Mart. The Secretary's complaint, filed several months later, alleged that Wal-Mart had violated the General Duty Clause of the OSH Act by failing to abate the "hazards of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling." Order 2. According to the Secretary, Wal-Mart had ignored "feasible and acceptable methods to correct this hazard" in that "managers and employees were not provided effective crowd management training," its "[s]pecial events anticipated to attract the public" were not "preplanned by a person(s) qualified in crowd management," and it had not used "crowd control procedures and techniques." Compl. ¶ 8.

At the hearing, the Secretary presented employee testimony regarding the Store's Blitz Day events from 2005 to 2009. *See* Order 14–41. The Secretary also introduced injury claims from purportedly similar incidents at Wal-Mart's other stores. And to demonstrate the feasibility and effectiveness of her recommended abatement measures, the Secretary introduced the testimony of Paul Wertheimer, President of Crowd Management Strategies. *See id.* at 7.

Wal-Mart countered the Secretary's case by presenting Store Manager Sooknanan's testimony about the Store's precautions for Blitz Day 2008 and the dissimilarity of previous years' sales. *See* Order 36–41. Wal-Mart also presented the testimony of Casey Chroust, Executive Vice President of RILA, who explained that the retail industry had not recognized or discussed crowd-related hazards prior to Blitz Day 2008. *See id.* at 41–42. Finally, Wal-Mart elicited testimony from the Secretary's employee witnesses that the 2008 crowd was uniquely unruly, that they had not experienced crowd-related injuries at previous years' events, and that they did not anticipate any serious injuries on Blitz Day 2008. *See id.* at 28; Tr. 106, 174, 896.

Judge Rooney found that the Secretary had satisfied each element of her *prima facie* case. *First*, Judge Rooney found that Wal-Mart, "through advertising," had "caused a large congregation of shoppers to appear at the Store for the annual blitz event," and that this advertising had "created a strong sense of competition." Order 43–44. Judge Rooney cited the particular events of 2008 as evidence of the hazard, including that "[t]he police were called on several occasions" and "either could not or would not control the crowd," that customers were engaged in "[a]ltercations," and that "customers waiting in cars . . . attempted to cut into the front of the line." *Id.* at 44. She concluded that Wal-Mart's employees were exposed to the hazard "of being struck by an out-of-control stampede of people" and, for those employees who went outside before the opening, to the hazard of "being struck by customers who were pressing

against the doors." *Id.* at 45. By Judge Rooney's estimation, "the hazard in this case was the congregation of a large crowd of customers who were highly motivated to enter the Store at a specific time to compete with one [another] to obtain one or more of a limited supply of deeply discounted popular items." *Id.* at 50.

Second, Judge Rooney found that the Store had actual recognition of the cited hazard from "crowd-related incidents" that had occurred between 2005 and 2007. *See* Order 46–47. In this respect, Judge Rooney specifically referred to the two customer injuries from 2005, Mr. Rice's "minor laceration" from 2007, the fact that the doors had come off their hinges in previous years, and Mr. Sooknanan's instructions that employees should "stand to the side" and "help customers who fell." *Id.* at 47–49. Judge Rooney concluded that the lack of industry recognition was irrelevant because of the "obvious and glaring" nature of the hazard at the Store. *Id.* at 46.

Third, Judge Rooney found that employees were "exposed to being pushed to the floor and trampled." Order 49. Although she acknowledged that the record contained "no evidence that [Mr. Damour's] death was caused by being struck by the door or being stepped on or trampled on," Judge Rooney found it "reasonable to infer that falling and being trampled on . . . would likely result in serious injury or death." *Id.* at 50 n.29. And she found that "being struck by falling doors and broken glass . . . could also result in serious injury or death." *Id.* at 49.

Fourth, Judge Rooney found that the Secretary's abatement measures were feasible and effective because Wal-Mart had "virtually eliminated the situation that had occurred in 2008" through measures "adopted pursuant to its settlement agreement with Nassau County." Order 51. Judge Rooney specifically rejected the testimony of the Secretary's expert, Paul Wertheimer, as insufficiently reliable to satisfy Federal Rule of Evidence 702, *see id.* at 13–14,

but she nonetheless believed that feasibility had been demonstrated because no employees were injured at the Store's 2009 sale, *see id.* at 51. According to Judge Rooney, the Store's "own actions" showed that "feasible means existed to eliminate or materially reduce the cited hazard at the Store." *Id.*

STANDARD OF REVIEW

The Commission's direction for review "establishes jurisdiction in the Commission to review the entire case," Commission Rule 2200.92(a), and, based on its independent analysis of the record, the Commission reviews Judge Rooney's decision *de novo*, *see Superior Rigging & Erecting Co.*, 18 BNA OSHC 2089, 2000 WL 365285, at *5 (No. 96-0126). The Commission's *de novo* review means that it corrects "erroneous application[s] of the law" with "no more [or] less" authority than Judge Rooney, *Stevens Equip. Co.*, 1 BNA OSHC 1227, 1973 WL 4009, at *3 (No. 1060), and that the Commission also "has the ultimate authority to make findings of fact," *Franklin R. Lacy*, 9 BNA OSHC 1253, 1981 WL 18845, at *1 (No. 3701).

ARGUMENT

I. The Secretary Failed To Prove That Wal-Mart's Safety Precautions Were Inadequate.

"Congress quite clearly did not intend the general duty clause to impose strict liability." *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265–66 (D.C. Cir. 1973). For this reason, the Secretary is required, "as a threshold matter," to "submit evidence proving . . . that the methods undertaken by the employer to address the alleged hazard were inadequate." *Postal Serv.*, No. 04-0316, 2006 WL 6463045, at *8 (OSHRC Nov. 20, 2006); *see also*, *e.g.*, *Ala. Power Co.*, 13 BNA OSHC 1240, 1987 WL 89119, at *4–5 (No. 84-357).

The mere fact of an injury or accident does not establish the inadequacy of an employer's precautions. *See* Field Operations Manual § 4-16; *see also Titanium Metals Corp. of Am. v.*

Usery, 579 F.2d 536, 542 (9th Cir. 1978) (per curiam). Thus, in *National Realty*, the Secretary failed to prove the need for signs and other written measures discouraging employees from riding heavy machinery because she had not shown that the employer's existing, oral policy against equipment-riding was insufficient. *See* 489 F.2d at 1262, 1267. And in *Postal Service*, the Secretary failed to prove the necessity of ANSI-compliant reflective vests because she did not "sho[w] that the reflective garments or vests already provided by the postal service were inadequate such that they had to be modified or even replaced." 2006 WL 6463045, at *9.

Here, Wal-Mart was cited because it purportedly "didn't plan" and "didn't train [its] employees." Tr. 680. Judge Rooney indicated that "the Store had not developed any plans in advance of what should have been anticipated" and that "it cannot be found that Wal-Mart's instructions were in any way intended to eliminate the hazardous condition existing in the Store." Order 48, 54. The record proves the contrary. Wal-Mart *extensively* prepared for Blitz Day 2008 based on its experience with previous Blitz Days; its preparations cannot be viewed as "inadequate," particularly since the crowd at Blitz Day 2008 differed so fundamentally—and violently—from what anyone could reasonably have anticipated.

Given the available information, Wal-Mart's preparations for Blitz Day 2008 were well-calculated and should have been more than ample to provide for employee safety. The Secretary cannot cite Wal-Mart for the unprecedented events of Blitz Day 2008 without giving rise to precisely the sort of strict liability that the OSH Act squarely prohibits.

At the corporate level, Wal-Mart trained new employees in safe practices, including the prevention of slip-and-fall accidents. *See* Gov't Ex. 148, at 220–22. Further, Wal-Mart's Emergency Procedures Manual, which was readily accessible to managers and hourly employees at "multiple locations" in individual stores (including the Valley Stream Store), *see* Tr. 986–87,

provided detailed instructions on addressing a myriad of potential emergencies, *see* Resp. Ex. 30, at 11. And the Company intranet contained a wide variety of additional safety materials. *See generally* Resp. Exs. 136–138. Vice President of Asset Protection Monica Mullins testified that the home office began distributing Blitz Day-specific guidance materials several weeks before the event. *See* Gov't Ex. 148, at 154–66.

At the store level, Valley Stream Store Manager Steve Sooknanan drew upon the home office's guidance materials and his own sixteen years of retail experience to prepare for the event. He began planning "several weeks" in advance and held weekly meetings with his management team. Tr. 998–1000. Among other things, he directed employees to take the following precautions:

- Walk the line on Blitz Day and speak with customers;
- Tell customers to walk and enter the store in an orderly manner;
- Answer questions, assure customers that the Store had enough products, and provide information on the location of products;
- Stand out of the crowd's way as it entered;
- Monitor the vestibule and the store generally to prevent and clean up slip, trip, and fall hazards;
- Contact the police before Blitz Day and confirm their presence for the opening;
- Order barricades and place them forty feet in front of the entrance to create a buffer zone.

See id. at 1111–13.

Mr. Sooknanan's efforts bore a close, logical relationship to his past experiences. For example, he made staffing and equipment decisions on an assumption that the crowd would grow at 12% to 13% "based on [the Store's] sales trend for the year"—an assumption that was, if anything, overly cautious because the nationwide recession had made it reasonable to expect that retail crowds might actually *shrink*. Tr. 997–98. He directed the placement of barricades to establish a forty-foot buffer in front of the entrance so that employees could "completely ope[n]" the doors, and customers would not "fe[el] as though" they had to rush, which was perceived to

have contributed to the problem of customers "bumping against" the door in 2007. *Id.* at 1004–05, 1047. As Judge Rooney acknowledged, Mr. Sooknanan "believed that keeping the customers away from the front doors . . . would solve the problem of customers rushing into the vestibule when the doors were opened," and also that it "would keep the crowd from pushing the doors down." Order 48.

Importantly, Mr. Sooknanan eschewed techniques that had not worked in the past. He refrained from using carts to demarcate the line, for example, because this had caused a "tumultuous environment" in previous years. Tr. 992–93. He refrained from using maps or informational pamphlets because they had "posed" a "slip, trip and fall hazard" during a previous event. *Id.* at 993–94. And he rented barricades, as opposed to using ropes and cones (as the Store had done in the past), as an extra measure of protection against the "minor incidents" of 2007 that had resulted in Mr. Rice's "paper cut"-like injury. *See id.* at 167, 999.

In addition, the Safety Committee, composed of managers and hourly employees, took strategies from the Company's intranet and implemented them within the Store. *See* Tr. 982. Market Asset Protection Manager Sal D'Amico held weekly calls with Asset Protection personnel to prepare them for the event. *See id.* at 274–75. He developed market-level safety goals by identifying "actionable" items from company-level guidance documents and by drawing upon his own four years of Blitz Day experience. *See id.* at 179, 230–32. He also contracted for security guards to be present for the opening. *See* Gov't Ex. 154. And he developed a "Market 45 Action Plan" based upon practices that had worked without "any issues" at Wal-Mart's Farmingdale store in 2007. *See* Gov't Ex. 2; Tr. 268.

Wal-Mart also made reasonable efforts to secure a police presence for Blitz Day 2008. Messrs. Sooknanan and D'Amico both testified that they asked Asset Protection Coordinator

Julius Blair to contact the Nassau County Police Department and "[e]nsure that [the Store was] going to have police presence" for the opening. Tr. 239, 999. Further, Mr. Blair testified that he called the police on two occasions before Blitz Day and that officers assured him they would "be there when the store's open." Gov't Ex. 145, at 188–89, 193–94. And even after the police abruptly left prior to the opening, Wal-Mart's employees made several additional calls to notify them of the potentially dangerous situation and request—unsuccessfully—that they return. *See* Tr. 1017, 1094.

Indeed, despite the absence of evidence that the Secretary's measures are reproducible or effective, *see infra* Part II.D, Wal-Mart *actually complied* with a majority of them on Blitz Day 2008. Area Director Ciuffo initially suggested that Wal-Mart needed a plan with a clear "who, what, where, when, how, [and] why," but then acknowledged that Mr. D'Amico's plan included *all* of these elements. *See* Tr. 682–86. Further, Messrs. Wertheimer and Ciuffo faulted Wal-Mart for not having between two and ten walkie-talkies, *see id.* at 601–02, 837, but the record demonstrated that Wal-Mart had *at least* this many; Messrs. Rice, Thompson, and Calhoun each specifically testified that they had walkie-talkies, *see id.* at 173, 895, 924, and all people greeters, managerial employees, hourly supervisors, cart pushers, Electronics and Lawn and Garden employees, back room supervisors, and Asset Protection employees also had walkie-talkies, *see id.* at 223, 1106, 1077, 1107. And Messrs. Wertheimer and Ciuffo faulted Wal-Mart for not having between eight and eighteen crowd managers monitoring the line, *see id.* at 588-90, 826, but the record demonstrated that it had fifteen employees performing this task, *see id.* at 103.

In light of Wal-Mart's extensive preparations for Blitz Day 2008, the Secretary's contention that it "didn't plan" is simply incredible. To impose liability on Wal-Mart because it

was unable, despite its extensive preparations, to control the unruly behavior of a massive, violent crowd is nothing short of strict liability. The Secretary's citation should be vacated.

II. The Secretary Failed To Establish A Violation Of The General Duty Clause.

To establish a violation of the General Duty Clause, the Secretary must prove that "(1) an activity or condition in the employer's workplace presented a hazard to employees; (2) the cited employer or its industry recognized that the condition or activity was hazardous; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) there were feasible means to eliminate or materially reduce the hazard." *Tuscan/Lehigh Dairies, Inc.*, 22 BNA OSHC 1870, 2009 WL 3030764, at *6 (No. 08-0637) (ALJ). The Secretary failed to prove *any* of these required elements.

A. Wal-Mart Did Not Expose Its Employees To Any Hazard.

In this case, the Secretary attempts to establish a never-before-cited hazard: "large" and "highly motivated" crowds. Order 43–44, 50. Treating crowds as a "hazard" subject to the OSH Act would "have a significant impact upon the retail industry throughout the country," *id.* at 13, which routinely—and without serious incident—deals with "large" groups of "highly motivated" shoppers. Given the General Duty Clause's traditional role of "fill[ing] those interstices necessarily remaining after the promulgation of specific safety standards," *Bristol Steel & Iron Works Inc. v. OSAHRC*, 601 F.2d 717, 721 (4th Cir. 1979), one might have expected the Secretary to regulate crowds of shoppers, if at all, through notice-and-comment rulemaking, *see infra* Part IV.C (arguing that she was required to do so). Having chosen to pursue such regulation instead through an enforcement proceeding, however, the Secretary was required—at a minimum—to adduce evidence that crowds are a "hazard," and that Wal-Mart exposed its employees to that hazard in an ascertainable "zone of danger" within the Store. She failed to do so.

There is no support for the Secretary's counterintuitive claim that large crowds constitute a workplace hazard in the retail industry; rather, the unprecedented behavior of the crowd in *this* case is precisely the sort of "[f]reakish and unforeseeable" event that, as a matter of law, cannot establish the existence of a hazard. *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14. In addition, neither the citation nor Judge Rooney's decision has identified any ascertainable "zone of danger" in which Wal-Mart's employees were exposed to this purported hazard. For these reasons, the Secretary's citation is flawed.

1. The Secretary Did Not Adduce Any Evidence That Crowds Are A Workplace Hazard Either For Wal-Mart Or For The Retail Industry As A Whole.

Judge Rooney concluded that Wal-Mart's employees "were exposed" to "crowd crush, crowd surge and trampling hazards" because a "large congregation of shoppers . . . appear[ed] at the Store" for Blitz Day 2008. Order 43, 51. No record evidence supports treating shoppers—even a large group of shoppers—as a hazard. The *only* relevant testimony regarding the supposed dangers presented by crowds, including the only attempt to define the supposed concepts of "crowd crush" and "crowd surge," was provided by the Secretary's expert, Paul Wertheimer. *See*, *e.g.*, Tr. 318–19. But Judge Rooney *excluded* Mr. Wertheimer's testimony after concluding that it was insufficiently reliable to satisfy Federal Rule of Evidence 702. *See* Order 13–14. And the remaining evidence points squarely in the opposite direction: The day-to-day experience of Wal-Mart's 4,200 stores—reinforced by the uniform experience of the retail industry as a whole—demonstrates beyond serious debate that large crowds of shoppers are not hazardous.

The only previous Blitz Day injury to an employee at the Store was "akin to a paper cut," and the employee treated it with a Band-Aid before continuing to work. *See* Tr. 167, 996–97.[1] This single, non-recordable first-aid injury is not remotely comparable to "being struck by an out-of-control stampede." Order 45. Thus, the Secretary's only Store-specific testimony about relevant employee experiences concerned Blitz Day 2008. But aside from Mr. Damour's death, which both Judge Rooney and the Secretary have acknowledged is irrelevant, *see* Order 50 n.29; Tr. 21, 813, none of these experiences resulted in injury: Dennis Fitch testified that he emerged "unscathed" from the vestibule, *see* Tr. 106; likewise, Dennis Smokes testified that he promptly caught his breath and continued working after customers pinned him in the vestibule, *see* Gov't Ex. 151, at 109–10.[2]

The record shows that two customers were injured at the Store on Blitz Day 2005. *See* Order 47. But the OSH Act is concerned only with *employee* safety. While employee injuries can sometimes suffice to prove employee exposure, *see*, *e.g.*, *Townsend Tree Servs. Corp.*, 21 BNA OSHC 1356, 2005 WL 2329316, at *6 (No. 04-1157) (ALJ), the Commission has never allowed *non*-employee injuries to show employee exposure. Customers and employees have different motives (for customers, to shop and obtain sale items with dispatch; for employees, to service customers courteously and expeditiously), as well as different fields of movement (for

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[1] By using the word "laceration" to describe this injury, Order 6, Judge Rooney treats Mr. Rice's "paper cut" with a greater degree of seriousness than it deserves. To "lacerate" is to "wound jaggedly" or "to cause sharp mental or emotional pain." *Webster's Third New International Dictionary* 1261 (1961).

[2] Before Judge Rooney, the Secretary attempted to rely on the experience of other Wal-Mart stores. Prior to 2008, however, only one recorded injury to an employee had occurred under even arguably similar circumstances at any of Wal-Mart's thousands of stores. *See* Gov't Ex. 127, at 9 (describing an alleged Blitz Day injury to an employee in Bedford, Indiana). But the Secretary did not provide any evidence regarding the alleged facts of this incident, *see* Tr. 947–48, 1144–88, and Judge Rooney thus properly declined to rely on the incident in her decision.

customers, the sales floor; for employees, who do not need to access the store as part of any crowd, only those parts of the store that are necessary to perform their jobs). Most importantly, Wal-Mart affirmatively told its employees to "get out of the way" of oncoming crowds of customers. *See* Tr. 883, 1088. Area Director Ciuffo conceded that this instruction put employees at a lower risk of exposure than customers. *Id.* 839–40 ("employees standing to the side [faced] less of a risk than members of the public who were in the midst of the crowd").

2. The Unruly And Unexpected Behavior Of The Blitz Day 2008 Crowd Cannot Constitute A Workplace Hazard.

Further, the Secretary failed to show that Wal-Mart exposed its employees to a cognizable hazard during Blitz Day 2008. The Secretary and Judge Rooney both appear to have relied *entirely* upon the events of Blitz Day 2008 in determining that a hazard existed at the Store. Area Director Ciuffo indicated that he was not aware of "any other instance in the history of the world" when there had been "a fatality or a serious injury to an employee" under circumstances that resembled Blitz Day 2008. Tr. 709–10. But he nevertheless cited Wal-Mart because "[a] crowd knocked people down" on Blitz Day 2008. *See id.* at 692. Similarly, Judge Rooney limited her discussion about "whether a 'hazard' existed" to the events of Blitz Day 2008. Order 43–46.

The tragic events of Blitz Day 2008 were caused by "[f]reakish and unforeseeable" circumstances that cannot "trigger statutory liability under the general duty clause." *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14. The extreme and antisocial behavior of the crowd was completely unprecedented—not just for Wal-Mart, but for the entire retail industry. Store Manager Sooknanan and Market Asset Protection Manager D'Amico—who had a combined twenty years of experience at retail day-after-Thanksgiving sales events, *see* Tr. 179, 976—both testified that they had *never* seen a crowd so large or unruly. *See* Order 21, 41.

Customers—enraged at repeated attempts to break in line and one associate's decision to help his family members bypass the line—fought each other and attempted to break down the doors and cause other damage to the Store. *See id.* at 7, 15, 27–28. And even though Wal-Mart had arranged for the Nassau County Police Department to be present as a precautionary measure, they unexpectedly "either could not or would not control the crowd." *Id.* at 44. None of these events had occurred in previous years. And since the General Duty Clause is not a strict-liability statute, the one-time confluence of these negative occurrences cannot "trigger statutory liability" against Wal-Mart. *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14.

The unanticipated nature of the 2008 Blitz Day crowd's behavior is also significant because the Secretary can establish a serious violation—including any violation of the General Duty Clause—only by demonstrating "that the employer knew or with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1993 WL 132965, at *2 (No. 90-1307) (citing cases), *aff'd*, 19 F.3d 643 (3d Cir. 1994). In this case, there is no disputing that the extent of sociopathic conduct, the unresponsiveness of the police, and the size of the crowd were unprecedented; indeed, Wal-Mart's reasonable estimate of the crowd's size—based upon annual sales trends—was off the mark by more than 100%. *See* Order 6. The Secretary simply has not shown that Wal-Mart knew or should have known that the hazard of a "large crowd" behaving in such an unruly manner without police intervention would become manifest, particularly given its measured efforts to address the minor deficiencies of previous years' sales. *See supra* Part I.

3. The Secretary Did Not Show That Employees Were In An Ascertainable "Zone of Danger."

As explained above, the Secretary failed to show employee exposure in general—either in the Valley Stream store, or in any other Wal-Mart store. The Secretary also did not establish

that employees were in an ascertainable "zone of danger." To prove her *prima facie* case, the Secretary must demonstrate that employees were exposed to the hazard—or that exposure was "reasonably predictable"—in a precise "zone of danger." *RGM Constr. Co.*, 17 BNA OSHC 1229, 1995 WL 242609, at *5–6 (No. 91-2107) (finding that the Secretary had not shown exposure where employees "had ample room" to avoid the alleged zone of danger); *see also Douglas E. Barnhart, Inc.*, 20 BNA OSHC 1710, 2004 WL 235331, at *3 (No. 03-0352) (ALJ) (overturning a fall-hazard citation because the "zone" of exposure was a "short run of guardrail" that rational employees were likely to avoid).

The citation asserts generically that the hazard existed "[a]t the work site," without any hint regarding the precise boundaries of the "zone of danger," or the means by which employees were exposed within that zone. Order 2; *see also* Tr. 779 (conceding that the citation "could be read to cover the entire interior of the store"). The Commission has clearly instructed that such whole-facility zones of danger are inappropriate. *See*, *e.g.*, *Union Camp Corp.*, 1 BNA OSHC 3248, 1973 WL 4281, at *3 (No. 2367) (ALJ) (finding that "the citation and complaint" were inadequate because they "merely advise[d] the respondent that somewhere in its immense plant . . . there [was] some violation of the standard"). Moreover, since the alleged "hazard in this case was the congregation of a large crowd," Order 50, the zone of danger is limited, if at all, only by human behavior, which Commission ALJ Spies has persuasively indicated is "not always amenable to control" like traditional subjects of OSHA regulation, *Megawest Fin., Inc.*, 17 BNA OSHC 1337, 1995 WL 383233, at *9 (No. 93-2879) (ALJ); *see also Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1205–06 (10th Cir. 2009); *cf. Kone, Inc.*, 22 BNA OSHC 1441, 2008 WL 5507122, at *10 (No. 07-1664) (ALJ) (finding no exposure where "an employee would need to make a conscious decision to place himself in the zone of danger").

Neither the Secretary's all-encompassing "zone of danger," nor any attempt to limit the zone to a highly mobile crowd that could likewise be present throughout the entire store, is legally sufficient. For this reason, too, the citation should be vacated.

B. The Secretary Failed To Prove That Wal-Mart Recognized The Hazard.

The record is clear and unrebutted that the retail industry did not recognize any hazard posed by crowds of shoppers; at the time of Blitz Day 2008, no relevant OSHA standards or even guidelines discussed what the Secretary terms "crowd management" in the retail context or in any other context.[3] Thus, the Secretary can prevail only by establishing that the Store *itself* recognized the hazard. But the unique circumstances of Blitz Day 2008 foreclose the Secretary's assertion that Wal-Mart somehow had "actual knowledge" of a hazard wholly unrecognized by tens of thousands of retail stores and literally millions of employees who have worked on Blitz Day and countless other sales events.

According to Judge Rooney, several minor "crowd-related incidents" that occurred during previous Blitz Days gave the Store "obvious and glaring" notice of the hazard. Order 46–49. This conclusion is blatantly inconsistent with the evidence. There had never been a serious injury to *anyone* during a Blitz Day, let alone a serious injury to an *employee*, and customers in previous Blitz Days had never deliberately pushed the doors, let alone intentionally *kicked down* the Store's security devices. That undoubtedly explains Store Manager Sooknanan's sincere belief that his planning for Blitz Day 2008 was adequate based on his experience in prior years. *See id.* at 48. While the Secretary need not wait for the first injury before issuing a citation for a

[3] It was nearly six months after the issuance of the instant citation that OSHA posted a Fact Sheet recommending crowd-management measures patently based on the views of the Secretary's excluded expert, Paul Wertheimer. *See* OSHA Fact Sheet, "Crowd Management Safety Guidelines for Retailers," http://www.osha.gov/OshDoc/data_General_Facts/Crowd_Control.html.

hazardous working condition, the absence of injuries in this case is extremely powerful—indeed, incontrovertible—evidence of the lack of recognition given the overwhelming number of sales events that occurred without any employee incidents.

1. The Absence Of Retail Industry Recognition Undermines The Finding That The Store Had Actual Knowledge Of The Supposed Hazard Posed By Crowds Of Retail Shoppers.

The retail industry had not recognized the cited hazard in November 2008. *See* Tr. 711. The only national consensus standard to have discussed crowd management, the National Fire Protection Association's Life Safety Code, had excused retail establishments from its sections necessitating the use of crowd managers; as Area Director Ciuffo conceded, the Life Safety Code requires crowd managers only for "assembly occupancies," and the Store was not an "assembly occupancy" but a "mercantile occupancy." *Id.* at 722–25; *see also* Gov't Exs. 22–23, at § 13.7.6.[4] The Workplace Safety Committee of RILA, designed to develop industry safety benchmarks and to anticipate legal compliance issues, had never even *discussed* safety hazards relating to crowds. Tr. 1131–32. Its membership, comprised of "top Safety Executives" from member companies, had not identified this issue despite frequently discussing "employee safety" on weekly calls. *See id.* at 1130–31.

The Secretary's excluded expert, Mr. Wertheimer, acknowledged that he had never seen a crowd-management plan for a retail event. *See* Order 12. And even his own supposedly "landmark" crowd-management study, *Report of the Task Force on Crowd Control and Crowd*

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[4] The Life Safety Code defines "assembly occupancy" as "an occupancy (1) used for a gathering of 50 or more persons for deliberation, worship, entertainment, eating, drinking, amusement, awaiting transportation, or similar uses; or (2) used as a special amusement building, regardless of occupant load." *See* Gov't Ex. 23, at § 3.3.168.2. The National Fire Protection Association has retained this definition (and the exemption of retail establishments from its ambit) in the most recent edition of the Life Safety Code, which post-dates Blitz Day 2008.

Safety, states that crowd-management precautions are *not necessary at all* for events with fewer than 2,000 attendees. *See* Tr. 530–31. Yet the Store expected only 900 customers. *See* Order 6. And even by Mr. Wertheimer's estimation, it should have expected only 1,200 to 1,400. *See* Tr. 531.

The absence of industry recognition is significant here because most "actual knowledge" cases involve a hazard that is particular to a certain workplace, machine, or relationship—and thus *could not* be the subject of outside or expert knowledge. *See*, *e.g.*, *Valley Interior Sys., Inc.*, 21 BNA OSHC 2224, 2007 WL 2127305, at *6 (No. 06-1395) (ALJ) (finding "actual knowledge" where the hazard stemmed from the construction-employer's use of an "aerial lift" that had malfunctioned on previous occasions), *aff'd*, 288 F. App'x 238 (6th Cir. 2008); *Scarff's Nursery, Inc.*, 18 BNA OSHC 1542, 1998 WL 542627, at *4–5 (No. 96-1753) (ALJ) (finding "actual knowledge" of a cave-in hazard where employees of the excavator-employer openly joked about the possibility of death from a cave-in). But in this case, the Secretary's theory of "actual knowledge" sounds in work situations that are common to all retail stores and have a "significant impact upon the retail industry throughout the country." Order 13. The cited hazard is a "large" and "highly motivated" crowd that may consist of anywhere between "three and three million" people and is purportedly caused by advertising. *Id.* at 43–44, 50; Tr. 767. And the underlying mechanics of this pedestrian "hazard"—advertising, crowd behavior, and so forth—are the subjects of retailers' everyday experience. If the hazard of a "large crowd" were truly "obvious and glaring," as Judge Rooney asserted, Order 46, then the retail industry surely would have recognized it and taken remedial measures. By allowing the Secretary's case to stand *without* such industry recognition—in effect, concluding that the Store had actual knowledge of what was unknown to every other retail establishment at every other sales event—

Judge Rooney failed to draw the only inference permitted by the evidence: that Wal-Mart, like other retailers, did not recognize any hazard—to the crowd itself, much less to employees—from retail crowds. The mere assertion of "actual knowledge" cannot relieve the Secretary of her burden of proof or change the quantum of evidence that is necessary to support the sweeping propositions at issue.

2. The Minor Incidents From Previous Years Did Not Put The Store On Notice Of The Supposed Hazard.

By contrast to the unprecedented events of Blitz Day 2008, the "crowd-related incidents" of previous years were overwhelmingly minor and did not put the Store on notice of the cited hazard. Judge Rooney finds it significant that the crowd had "bu[m] rush[ed]" into the Store in previous years, that customers had fallen on the ground, and that doors "had been knocked off their hinges." Order 47–48. Yet, as discussed above, none of these incidents had even threatened the *possibility* of serious injury. *See supra* Part II.A.1. Justin Rice, who sustained a "paper cut," was the only employee to testify about an injury from these previous "crowd-related incidents," Tr. 167—and he sustained this insignificant injury not from a crowd, but from glass that fell from the vestibule window after one rogue customer threw a boot through it, *see id.* at 924, 996.

Judge Rooney claims that Store Manager Sooknanan acknowledged the hazard by telling employees to "be safe" and to "stand to the side as the customers entered." Order 47–48. But this common-sense acknowledgement that customers might slip or bump into employees does not remotely amount to recognition that employees faced *serious injury or death* from "crowd crush" or "asphyxiation." *See Constructural Dynamics, Inc.*, 22 BNA OSHC, 1942, 2008 WL 7243696, at *5 (No. 07-0976) (ALJ) ("Recognition that 'anything can happen' is not sufficient to

establish actual recognition of a hazard under section 5(a)(1)."), *aff'd*, 22 BNA OSHC 1941, 2009 WL 4648761 (No. 07-0976).

Indeed, Mr. Sooknanan told employees to "be safe" in the context of an event that employees perceived as fun and non-threatening. *See* Gov't Ex. 144, at 64, 149 (describing Blitz Day as "fun" and explaining that employees went to the front of the Store out of "excitement, the hype of Blitz"). The Secretary's employee-witnesses *all* testified that they were not afraid, "were [not] concerned for [their] own safety," and "did [not] expect that any employee was going to be injured," even when the size and nature of the crowd were fully apparent in the minutes before the opening on Blitz Day 2008. *See* Tr. 106, 174, 896. Al Calhoun testified that he brought his family to the event and "would not have let [them] wait in line if [he] thought that anyone would be injured . . . when the store was opened." *Id.* at 926. Judge Rooney found all of these employee-witnesses to be credible. Order 14, 15, 21, 22.

At the corporate level, there is similarly no evidence of recognition. Wal-Mart had conducted a thorough and professional risk analysis by identifying common accident types and making them the focus of ongoing safety initiatives. *See* Gov't Ex. 148, at 74–75, 148. Yet the Company had no "crowd hazard" initiatives, and Vice President of Asset Protection Monica Mullins testified that she was unaware of any crowd-related injuries to employees on prior Blitz Days. *See* Gov't Ex. 91. The Company's Emergency Procedures Manual also contained no reference to unruly crowds despite accounting for emergencies as diverse as landslides and lost children. *See* Resp. Ex. 30, at 11–12.

Judge Rooney's conclusion that Wal-Mart recognized the cited hazard prior to Blitz Day 2008 is based on little more than conjecture, in hindsight, that it should have done so. The record evidence does not support this conclusion.

3. The Events Of Blitz Day 2008 Cannot Themselves Provide "Actual Notice" Of The Supposed Hazard.

In addition to invoking the insignificant "crowd-related incidents" of previous years, Judge Rooney suggests that Wal-Mart might have gained "actual knowledge" of the cited hazard *during Blitz Day 2008*, when the hazard (if one existed at all) was already extant and the Store could not have taken any effective precautions. Judge Rooney focuses on a 3 a.m. phone call in which Mr. D'Amico told Mr. Sooknanan that the crowd was "out of control." *See* Order 48. She claims that, "*at this point*, based on his experience with prior Blitz Days, Mr. Sooknanan was on notice that employees stationed in the vestibule . . . would be exposed to injury if the doors were opened." *Id.* at 48 (emphasis added). Judge Rooney also claims that, at 5 a.m., "[b]ased upon previous blitz events *and the unsuccessful attempts earlier that morning* to move the customers away from the front doors, Mr. Sooknanan knew and recognized that allowing an uncontrolled entry of customers into the small space of the vestibule would endanger employees." *Id.* at 49 (emphasis added).

The "recognition" prong of the General Duty Clause inquiry cannot be satisfied at the time of an accident. The appropriate inquiry is whether the employer recognized the potential for a hazard *before* an accident occurred, such that the employer could have taken feasible and effective measures—here, measures in addition to the extensive ones already taken—to *prevent* the accident's occurrence. *See Pelron Corp.*, 12 BNA OSHC 1833, 1986 WL 53616, at *3 (No. 82-388) (noting that employers are accountable only for "conditions . . . over which [they] can reasonably be expected to exercise control").

By 3 a.m. on Blitz Day 2008, the cited hazard was already extant and irremediable but for the presence of police trained and equipped to deal with sociopathic conduct. As Judge Rooney acknowledged, the Store had "no reliable methods available to [it] to prevent what happened

when the doors were opened." Order 49. And even if the Store *did* have the kinds of measures that Judge Rooney finds feasible and effective, it would not have had time to implement them beginning at 3 a.m. The methods at issue—Wal-Mart's "own measures" from the 2009 day-after-Thanksgiving sale—take *months* to develop and implement. *See id.* at 32–33 (outlining Wal-Mart's "comprehensive" training and "crowd management" techniques); *see generally* Gov't Ex. 71. Judge Rooney's suggestion that Wal-Mart should have implemented these measures in the middle of Blitz Day 2008 is unpersuasive on its face.[5]

C. The Supposed Hazard Was Not Likely To Cause Serious Injury Or Death.

The General Duty Clause reaches only "hazards that are causing or are likely to cause death or serious physical harm to . . . employees." 29 U.S.C. § 654(a)(1). To satisfy this standard, the Secretary must prove that, "if an accident were to occur, death or serious physical harm would be the *likely* result." *Beverly Enters., Inc.*, 19 BNA OSHC 1161, 2000 WL 34012177, at *31 (No. 91-3144 *et al.*) (emphasis added). Judge Rooney concluded that the Secretary had carried her burden because "falling and being trampled on by a large and frenzied crowd . . . would likely result in serious injury or death," and because "being struck by falling doors and broken glass . . . could also result in serious injury or death." Order 49. The latter of these conclusions is insufficient as a matter of law: that an accident "could" result in serious injury does not establish that serious injury is the "likely" result of the accident, as the General Duty Clause requires. And the former conclusion is flatly contradicted by the record evidence,

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[5] In any event, Store Manager Sooknanan testified, without any evidence or testimony to the contrary, that he had no choice but to open the doors because the crowd was about to break them down or be crushed against them. *See* Order 15, 40. Thus, to the extent Wal-Mart gained actual knowledge of the hazard only at 3 a.m. or 5 a.m. on the day after Thanksgiving, any attempt to abate the hazard would have posed far greater dangers than opening the doors. *See* Order 45; Tr. 1018–19.

which overwhelmingly demonstrates that any likely consequences of employee injuries caused by crowds are *not* serious.

If there were ever a laboratory to test the likelihood of serious employee injuries resulting from crowds, it is Wal-Mart's 4,200 stores. But having examined this experience, the Secretary did not prove a single serious employee injury. As Judge Rooney acknowledged, the cause of Mr. Damour's death is both unknown and irrelevant to the citation. *See* Order 50 n.29; *see also* Tr. 21, 813 (conceding as much). Aside from Mr. Damour's death, any remaining injuries were not recordable, let alone sufficiently serious to implicate the General Duty Clause. Justin Rice testified that he received a "paper cut" in 2007. Tr. 167. Dennis Fitch testified that he emerged "unscathed" after customers stepped on him in 2008—a subjective experience that, of course, resulted in no recordable injury or even first aid. *Id.* at 106. And Dennis Smokes testified that he promptly caught his breath and continued working after customers pinned him in the vestibule in 2008. *See* Gov't Ex. 151, at 109–10.

Rather than identifying any relevant evidence, Judge Rooney claimed it was "reasonable to infer" that serious injury was likely. But this simply excuses the Secretary's burden in the guise of indulging an inference. *Cf. Avirgan v. Hull*, 932 F.2d 1572, 1579 (11th Cir. 1991) (noting, in the summary-judgment context, that the "absence of evidence does not result in a favorable inference"). The Secretary was required to adduce *evidence* showing a "substantial probability that death or serious physical harm could result." *Manganas Painting Co.*, 21 BNA OSHC 1964, 2007 WL 6113032, at *18 (No. 94-0588) (internal quotation marks omitted). Yet despite thousands of annual Blitz Day events across the country, the record contains not a single incident of serious injury or death. Indeed, Area Director Ciuffo conceded that he was unaware of "any other instance in the history of the world" where there had been a "fatality or a serious

injury to an employee" under similar circumstances. Tr. 709–12. The only reasonable inference is that serious injuries are *unlikely* to occur.

Judge Phillips's decision in *Tucsan/Lehigh Dairies* is instructive. The compliance officer in that case cited an employer for allowing its employees to remove the "load bars" on delivery trucks in a manner that raised "struck by" hazards and had allegedly resulted in one employee's death. *See* 2009 WL 3030764, at *6. Yet, Judge Phillips noted, load bars were "removed tens of millions of times . . . without any injury," and "[t]he most serious injury which could reasonably be expected to result from a[n employee] being struck by a load bar released under pressure is a small, minor bruise." *Id.* at *14.

Under these circumstances, Judge Phillips concluded that the single employee death on record was a "[f]reakish accident," and that the Secretary therefore had not carried her burden of proof. 2009 WL 3030764, at *14; *see also Super Excavators, Inc.*, 15 BNA OSHC 1313, 1991 WL 218314, at *5 (No. 89-2253) (finding that the physical harm caused by employees' exposure to hazardous substances erroneously excluded from the cited employer's data sheets was "not likely" to be serious). Similarly here, the consistent experience of Wal-Mart and countless other retailers demonstrates that any injuries from employees' interactions with crowds of shoppers are decidedly *un*likely to be serious. The citation should therefore be vacated.

D. The Secretary Has Not Shown Feasible Or Effective Means Of Abating The Supposed Hazard.

The OSH Act was intended to hold employers accountable only for "conditions . . . over which [they] can reasonably be expected to exercise control." *Pelron Corp.*, 1986 WL 53616, at *3. Accordingly, the Secretary must show that Wal-Mart had available means of "eliminat[ing]" or "materially reduc[ing]" the alleged hazard, *Nat'l Realty*, 489 F.2d at 1266-67, and in particular that "a reasonably prudent employer familiar with the circumstances of the industry would have

protected against the hazard in the manner specified by the Secretary's citation," *L.R. Willson & Sons, Inc. v. OSHRC*, 698 F.2d 507, 513 (D.C. Cir. 1983). The Secretary's evidence on this issue falls woefully short. There is *no* evidence regarding the feasibility of the "crowd management" techniques addressed in Judge Rooney's decision, and the only evidence that Judge Rooney cited—Wal-Mart's own measures applied during the 2009 day-after-Thanksgiving sale—is irrelevant because of the overwhelming differences between that sale and Blitz Day 2009. If anything, the relevant evidence suggests that the Secretary's abatement measures would expose employees to *greater* hazards, and this possibility further makes clear that the Secretary has not carried her burden of proof.

1. The Record Contains No Evidence Regarding The Feasibility Or Effectiveness Of "Crowd Management."

Not one scintilla of record evidence supports the feasibility or effectiveness of the Secretary's recommended abatement measures. As outlined in the citation, the Secretary's only recommended abatement measure is the use of "effective crowd management." *See* Order 2. She faults Wal-Mart for failing to provide employees with "crowd management training" or to use "appropriate crowd management techniques," some of which are listed in the citation. *Id.* But aside from Paul Wertheimer, *none* of the Secretary's witnesses professed that they were "competent" to inform Wal-Mart what was necessary to "avoid being cited," *see* Tr. 673; Area Director Ciuffo at first claimed that he had gained competency in the field of crowd management, *see id.* at 666, but he later admitted that this was untrue, *see id.* at 837. And Mr. Wertheimer's testimony was excluded as unreliable *precisely because* Judge Rooney concluded that "objective crowd safety standards do not exist for the retail industry," that "the discipline known as 'crowd management and control' is not based on science," and that "there was no evidence that other experts agreed with Mr. Wertheimer's recommendations and

conclusions." Order 12–13. The Secretary has failed to carry her burden of proving that "appropriate crowd management techniques" would abate the cited hazard for the simple reason that there is no evidence regarding what those "techniques" might be, let alone that any particular set of crowd-management "techniques" would be effective.

Mr. Wertheimer's testimony was excluded for good reason. Not only did he fail to provide the requisite reliability for any of his "crowd management techniques," the techniques that he proposed were hopelessly flawed. For instance, with Area Director Ciuffo's apparent approval, *see* Tr. 828–29, Mr. Wertheimer included racial profiling as a critical component of "crowd management," *see id.* at 449, 508–12. By considering the "age, race, gender," and other "demographic" characteristics of the crowd, Mr. Wertheimer believed that retailers could intuit both the crowd's likely behavior (*i.e.*, whether "some people" could "pose a danger") and the necessary abatement measures (*i.e.*, whether "extra care and attention" is required). *Id.* at 508–12. The suggestion that Wal-Mart was required to engage in racial profiling to comply with its responsibilities under the OSH Act is both appalling and risible. Equally ridiculous were Mr. Wertheimer's suggestions that retailers should hire "entertainers like clowns," *id.* at 632, and that retailers should distribute coffee with flavoring to calm the crowd but that they should be cautious because three-ounce cups could present a slip-and-fall hazard whereas two-and-a-half-ounce cups would "probably not," *id.* at 479–80.

By contrast, common sense dictates that "crowd management" would be *ineffective* in abating the hazard as cited and magnified by the Secretary's rejected expert to include conditions inherent in the nature of retail sales. It is impossible to define "crowd management" given the absence of admitted evidence about its precise contours or elements. But the only *available* evidence—Mr. Wertheimer's excluded testimony—suggests that the "goal" of crowd

management is to "protect people who gather in crowds or who assemble in crowds." Tr. 318–19. The Secretary's citation endorses this principle by instructing that Wal-Mart must use "crowd management techniques to safely manage a large crowd." Order 2. And yet, as defined by the Secretary and Judge Rooney, the cited hazard clearly exceeds the reach of such techniques.

The Secretary and Judge Rooney both point to the hazard on Blitz Day 2008, not as the lack of crowd management techniques, but as *the crowd itself*. Area Director Ciuffo claimed that Blitz Day was "inherently unsafe" because it involved "low prices, limited quantities, and . . . and popular items," Tr. 699, and that a hazard could arise from retail events that involved anywhere between "three and three million" people, *id.* at 699, 767. He also conceded that Wal-Mart could have avoided citation by shutting its employees in a back room. *See id.* at 781. Similarly, Judge Rooney thought that the best abatement measure was to cancel the sale altogether. *See* Order 48. She concluded that "the hazard in this case was the congregation of a large crowd of customers" and that "abatement" should entail "eliminating a waiting crowd outside the Store." *Id.* at 50–52. But "managing a large crowd" is different from "eliminating" the crowd altogether—if crowds are inherently dangerous, then they cannot be managed. The Secretary has not provided any evidence that eliminating crowds would be feasible or effective, and Judge Rooney does not believe it is necessary. *See id.* at 32 (noting that Wal-Mart's stores could use a "hard" or a "soft" opening).

Similarly, the Secretary and Judge Rooney have both linked the hazard to Wal-Mart's advertising. Area Director Ciuffo was concerned that the Store's advertisement of "Friday only" and "November 28th only" sales was "possibly" hazardous. Tr. 707-08. Judge Rooney went even further, finding that Respondent "caused" the hazardous "congregation" on Blitz Day 2008

"through advertising." Order 43. Yet no evidence suggests that eliminating or modulating advertising is a means of "managing a large crowd," and no one in this case has treated it as such. If the hazard is wholly or partially caused by advertising, then it cannot be addressed through the recommended measures, which focus exclusively upon "crowd management."

Moreover, to suggest that OSHA will regulate the content of advertising is to open a Pandora's Box and invite a level of micro-management not anticipated by the OSH Act and beyond the agency's authority and expertise. For example, Area Director Ciuffo built upon his objections to Wal-Mart's advertising by speculating that the Store should have stocked "more than five" plasma-screen televisions but stating that he "d[id not] know" whether the Store could have eliminated the hazard by stocking ten. *See* Tr. 704–05. Mr. Ciuffo also offered (and later retracted) his opinion that the Store should have allowed only one to five customers to enter at a single time. *See id.* at 616, 821–22. And he speculated that Wal-Mart's "low prices" could have been "one of the elements of the hazards," but he was unable to say what specific prices or discounts were hazardous. *See id.* at 699–701.

Ultimately, even if crowd-management measures could theoretically be effective in abating the cited hazard, they would nonetheless be completely infeasible because those measures were not sufficiently available to Wal-Mart on Blitz Day 2008—nor are they sufficiently available today—to permit a "material reduction" in the cited condition. *Cardinal Operating Co.*, 11 BNA OSHC 1675, 1983 WL 23900, at *2–3 (No. 80-1500). The complaint suggests that "special events" should be "preplanned by a perso[n] qualified in crowd management." Compl. ¶ 8. But, together, Messrs. Wertheimer and Ciuffo could name only five crowd management experts *in the world*. *See* Tr. 471–72, 768–69. Even the author of the citation, Area Director Ciuffo, would not be of any help in a retail store's inquiry as to the

elements of "crowd management" necessary to prevent a General Duty Clause citation. *See id.* at 768–69 (demonstrating that Mr. Ciuffo could not say "with any degree of specificity" what elements were required, but would have to depend on Mr. Wertheimer). Wal-Mart has 4,200 stores, with "special sales events" occurring regularly and often at the same time in multiple locations. *See* Gov't Ex. 148, at 216–18. Even if one unquestionably accepts the list of crowd-management providers that the Secretary offered at trial, *see* Gov't Ex. 45, there are too few to go around. Nor is there any quick fix for the lack of experts. According to a 2010 National Fire Protection Association publication, crowd-management training has been "almost non-existent," Tr. 573, and Mr. Wertheimer conceded that this was "a reasonable statement," *id.* at 580. Wal-Mart simply had more stores than there were crowd-management experts in 2008, and it seems unlikely that the ratio has since evened out appreciably.

The Secretary cannot carry her burden of proof by articulating a safety regime that is theoretically desirable but impossible to execute. "Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and [it] therefore insisted that health and safety goals be capable of economic and technological accomplishment." *Am. Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 514 n.31 (1981). But here, given limited "crowd management" resources, the Secretary's recommendations are purely aspirational.

2. Wal-Mart's "Own Measures" Do Not Establish The Feasibility Or Effectiveness Of Abatement.

It does not cure the Secretary's flawed citation to conclude, as Judge Rooney did, that the Store's "own methods" at the 2009 day-after-Thanksgiving sale "virtually eliminated the situation that had occurred in 2008." Order 51. Since almost every Blitz Day sale at Wal-Mart's 4,200 stores has *not* involved any "crowd-related incidents," and since Wal-Mart's expert Arthur

Barsky would have testified that such "incidents" are extremely rare (*see infra* Part V), it is likely that the crowd's calm behavior was a simple reflection of reality—that crowds typically are not violent. By Judge Rooney's loose standard of association, one could just as easily link the presence of shopping carts or cash registers (or just the passage of one year's time) to the absence of crowd-related disasters at Wal-Mart's stores. In any event, the 2009 sale was categorically different from Blitz Day 2008 and provides no guidance about what measures might have been effective in 2008.

Because there was no "hard opening" in 2009, there was no occasion when crowds accumulated outside the door in the manner the Secretary alleges was hazardous in 2008. *See* Tr. 162–63, 403. As Mr. Wertheimer noted, customers could enter "whenever they wanted . . . without the large, you know, crowd buildup in front of the Store." *Id.* at 403. Judge Rooney did not make any findings regarding whether there nonetheless was a "crowd" in 2009, so the hazard was not present and Wal-Mart's "crowd management" measures could not materially have affected it for the purpose of showing feasibility and effectiveness. Judge Rooney also ignored other likely reasons for the crowd's relative calm. Area Director Ciuffo and Paul Wertheimer conceded that the crowd's calm behavior may have been *entirely* due to the "massive" presence of police at the Store's opening, the increased presence of the media, or just the memory of Blitz Day 2008. *See id.* at 569, 815–17.

Even ignoring the absence of any cause-and-effect evidence regarding the link between Wal-Mart's "own measures" and crowd behavior, Judge Rooney's reliance upon these measures is still inherently flawed. In cases involving the General Duty Clause, the Secretary must "specify the *particular steps*" that the "cited employer should have taken," as well as demonstrating the "likely utility of those measures." *Nat'l Realty*, 489 F.2d at 1268 (emphasis

added). Here, far from identifying "particular steps," the Secretary has asked only whether Wal-Mart adopted "*any* of the [recommended] measures" in 2009, *see* Tr. 396, and Judge Rooney has generically referenced Wal-Mart's "own methods" while providing an incomplete list of the "methods" at issue, *see* Order 50. This scattershot approach does not suffice to show that each recommended measure "eliminate[s] or materially reduce[s] the hazard," as the Secretary was required to prove. *See Cardinal Operating Co.*, 1983 WL 23900, at *2; *see also Arcadian Corp.*, 20 BNA OSHC 2001, 2004 WL 2218388, at *8 (No. 93-0628).

3. The Secretary Failed To Rebut Evidence That Her Recommended Measures Expose Employees To Greater Hazards.

In a General Duty Clause case, the Secretary must rebut any evidence that her abatement measures would create a greater hazard; without a convincing rebuttal, the Secretary has not established her *prima facie* case. *See Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1996 WL 749961, at *6 n.19 (No. 92-2596) ("Under the general duty clause, if a proposed abatement method creates additional hazards . . . the citation must be vacated for failure to prove feasibility; it is not the employer's burden to establish an affirmative defense of greater hazard."). For example, in *Royal Logging Co.*, the Commission found that the Secretary's recommended use of seatbelts to avoid rollover hazards involving logging equipment was not feasible because she had failed to rebut evidence that seatbelts would leave employees exposed to the "greater" hazard of stray debris and branches (which are sometimes loosened during the logging process). *See* 7 BNA OSHC, 1979 WL 8506, at *8 (No. 15169), *aff'd*, 645 F.2d 822 (9th Cir. 1981).

In this case, however, Judge Rooney relieved the Secretary of her burden by *erroneously shifting it to Wal-Mart*. Judge Rooney devoted only a single sentence to the issue of "greater hazard," finding—in the discussion of affirmative defenses—that "[Respondent] ha[d] not provide[d] any evidence to show that eliminating a waiting crowd outside the Store will result in

a greater hazard to employees." Order 52. This is obvious legal error: The Secretary, not Wal-Mart bears the burden on this issue, and she has not carried it.

First, Area Director Ciuffo conceded that "confronting an unruly crowd," as required under the citation, could "possibly" expose employees to a "greater hazard." Tr. 847. More generally, the Secretary admits that increased proximity to an unruly crowd will increase the risk of harm. *See id.* at 839–40 ("employees standing to the side [faced] less of a risk than members of the public who were in the midst of the crowd"). The caselaw similarly explains that the "severity" of a hazard is dependent upon the number of employees exposed and the proximity of employees to the hazard. *See*, *e.g.*, *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 2003 WL 22232017, at *9 (No. 97-0755). Yet the Secretary's suggestion that employees should be trained on "how to reinstate order should the crowd become unruly" (Tr. 856–57, 900) would require *more* employees to be in *closer* proximity to crowds. "How to reinstate order" is unquestionably a police function, and Wal-Mart reasonably trained its employees to deal with "unruly" crowds or customers by calling the police. *See* Order 15, 22.

Second, the Secretary and Judge Rooney both fault Store Manager Sooknanan for deciding to open the doors at 5 a.m. But the evidence demonstrates that he faced a greater hazard by leaving the doors closed—the crowd was about to break the doors down or be crushed against them. *See* Order 45; Tr. 1018–19. By failing to rebut this evidence of a greater hazard, the Secretary has failed to carry her burden of proof.

III. The Secretary's Citation Is Foreclosed By Wal-Mart's Affirmative Defenses.

Not only has the Secretary failed to establish a *prima facie* case, but Wal-Mart's affirmative defenses would defeat the citation even if the Secretary *had* carried her burden. In its post-hearing briefing, Wal-Mart offered over twenty pages of caselaw and analysis to support its affirmative defenses, *see* Wal-Mart Post-Hearing Br. 52–73, but Judge Rooney summarily

rejected these defenses in just over three pages, *see* Order 51–54. Judge Rooney's analysis is insufficient—and incorrect—with respect to all of Wal-Mart's affirmative defenses. At the Commission's instruction, however, Wal-Mart has focused its discussion on the following defenses, each of which is sufficient to defeat the Secretary's citation: the complaint is time-barred under the OSH Act's statute of limitations, and the citation improperly targets issues of public safety outside of OSHA's jurisdiction.

A. The Complaint Is Time-Barred.

The OSH Act provides that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation." 29 U.S.C. § 658(c). Blitz Day 2008 occurred on November 28, so the statute of limitations expired on May 28, 2009. The Secretary filed her original citation on May 26, 2009 and then waited nearly three months—until August 14, 2009—to file her complaint. Because "[i]t is well established that an amended complaint ordinarily supersedes the original and renders it of no legal effect," *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977), this case must be dismissed unless the complaint is deemed to "relate back" to the citation under the OSH Act's statute of limitations.

Under Commission precedent, the difference between an amendment (which can "relate back" to the original citation after the statutory period has passed) and a new issuance (which cannot "relate back") is a matter of scope. Amendments are minor or technical changes concerning the conduct alleged in the original citation. *See Duane Smelser Roofing Co.*, 4 BNA OSHC 1948, 1976 WL 22798, at *3 (No. 4773) (allowing an amendment to correct a "technical deficienc[y]"), *aff'd in part & rev'd in part*, 617 F.2d 448 (6th Cir. 1980); *CMH Co.*, 9 BNA OSHC 1048, 1980 WL 10699, at *5 (No. 78-5954) (allowing an amendment to substitute a "closely related" company as the respondent). A new issuance, by contrast, "place[s] new facts in issue," *Worldwide Mfg., Inc.*, 19 BNA OSHC 1023, 2000 WL 1086717, at *3 n.2 (No. 97-

1381), or enlarges the original citation, *see B.C. Crocker*, No. 4387, 1975 WL 22024 (OSHRC ALJ Jan. 17, 1975) (denying an amendment that would have added a new hazard), *aff'd in part*, 4 BNA OSHC 1775, 1976 WL 6125 (No. 4387); *see also*, *e.g.*, *Roanoke Iron & Bridge Works, Inc.*, 5 BNA OSHC 1391, 1977 WL 7489, at *3 (No. 10411) (upholding an ALJ's decision not to amend a complaint where the amendments would "add new factual allegations"). Here, the complaint is a new issuance for three independent reasons.[6]

First, it adds new hazards to the original citation. While the original citation alleged a hazard of "asphyxiation by crowd crush," the complaint adds the hazard of "being struck." Compl. ¶ 8. "Being struck" is an entirely different hazard than "asphyxiation." OSHA's IMIS database has a unique category for "struck by" hazards, and multiple cases support this separate categorization. *See Ed Cheff Logging*, 9 BNA OSHC 1883, 1981 WL 18906, at *7 (No. 77-2778) (distinguishing "rollover" hazards from "struck by" hazards); *Darby Creek Excavating, Inc.*, 21 BNA OSHC 1137, 2004 WL 2857354, at *3 (No. 03-1541) (ALJ) (distinguishing "pinch point" hazards from "struck-by" hazards). Indeed, the Secretary explained that she sought to amend the citation "to reflect that employees were exposed to the hazards of asphyxiation *and* being struck." Complainant's Opp'n 3 (emphasis added).

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[6] Judge Rooney never addressed whether the complaint was a permissible amendment or a time-barred new issuance. Although she believed that the statute-of-limitations issue had previously been resolved by the late Judge Sommer, *see* Order 54, neither order she cites directly confronted this issue. In an order dated September 1, 2009, Judge Sommer rejected Wal-Mart's argument that the Secretary should proceed through Federal Rules of Civil Procedure 12(e) or 15 in seeking to file an amended complaint. In a subsequent motion to strike, Wal-Mart raised the *different* argument that the complaint was time-barred. Judge Sommer, however, denied this motion in an October 15, 2009 order based on the inaccurate assumption that Wal-Mart had raised "the same arguments" that had previously been rejected.

Similarly, while the original citation alleged that employees faced injury from "crowd crush," the complaint adds the possibility of injury from "crowd surge, or crowd trampling." Compl. ¶ 8. Area Director Ciuffo testified that "crowd crush, crowd surge, or crowd trampling" is "more encompassing" than "crowd crush." Tr. 766–67. And although his testimony was ultimately excluded by Judge Rooney, Paul Wertheimer explained in detail how "crowd crush," "crowd surge," and "crowd trampling" are separate (purported) phenomena. *See id.* at 318. The Secretary thus alleges a different hazard in her complaint than she did in her citation.

Second, the complaint broadens the geographic scope of the violation. The original citation placed the hazard at the "East entrance of 77 Green Acres Mall," but the complaint encompasses the entire premises at "East 77 Green Acres Mall." Compl. ¶ 8. Area Director Ciuffo thus acknowledged that the citation could be read to allege the presence of a hazard throughout "the entire interior of the store." Tr. 779; *see also supra* Part II.A.3 (discussing the "zone of danger"). This expansion of the cited area makes clear that the complaint is a new issuance. *See Willamette Iron & Steel Co.*, 1978 CCH OSHD ¶ 22,587, 1978 WL 22368, at *7 (No. 76-1201) (denying amendment where it "would enlarge the space where the violation allegedly existed to include new, additional areas"), *aff'd*, 9 BNA OSHC 1900, 1981 WL 18908 (No. 76-1201). The implications of such a far-reaching expansion of the citation for potential failure-to-abate, repeat, and willful citations are self-evident.

Third, the complaint expands the temporal scope of the hazard. While the original citation required abatement measures for "large sales events," the complaint requires abatement measures for "[s]pecial events anticipated to attract the public." Compl. ¶ 8. Not all "special events" are "large sales events," and vice versa—Wal-Mart sells computer games, books, and a number of other items that have "special" release dates but whose release does not constitute a

"large sales event." *See* Resp.'s Mot. to Strike 7. Indeed, Judge Rooney demonstrates the broad temporal sweep of this citation by relying upon a Harry Potter book release to support her analysis. *See* Order 31. Depending on how arbitrarily the Secretary intends to pursue this nebulous allegation, "special events anticipated to attract the public" could encompass daily sales at every store. *See* Tr. 768 (testimony by Area Director Ciuffo that abatement measures might be necessary for any crowd having "three to three million" people). Such a broadening of the hazard's temporal scope clearly exceeds the parameters of the original citation and further underscores the enormous potential reach of expanded penalties. *See Willamette Iron & Steel Co.*, 1978 WL 22368, at *7.

For each of these reasons, the Secretary's complaint amounts to a new issuance that occurred only after the statute of limitations had expired. The Commission should therefore vacate the citation.

B. The Citation Is Directed To An Issue Of Public Safety Outside OSHA's Jurisdiction.

By calling for employees to protect customers and to perform functions traditionally reserved for public safety officials like the police or the National Guard, the Secretary improperly targets an area of public safety that is not within OSHA's jurisdiction. Judge Rooney erroneously affirmed the Secretary's overreaching in this regard by failing to account for the significant role of the Nassau County police in managing crowds at the Store.

The OSH Act is a limited-purpose statute, meant to "assure . . . safe and healthful *working* conditions" by preventing "personal injuries and illnesses arising out of *work* situations." 29 U.S.C. § 651(a)–(b) (emphases added). "Congress did not intend the Act to apply to every conceivable aspect of employer-employee relations," and not every "condition of employment" is a potential "hazard." *Am. Cynamid Co.*, 9 BNA OSHC 1596, 1981 WL 18872,

at *2 (No. 79-5762). Thus, in *Gade v. National Solid Wastes Management Ass'n*, the Supreme Court clarified that the OSH Act does not preempt "state laws of general applicability (such as laws regarding traffic safety or fire safety)" that "regulate workers simply as members of the general public." 505 U.S. 88, 107 (1992). And in *Ramsey Winch Inc. v. Henry*, the Tenth Circuit prevented the Secretary from using the General Duty Clause to prohibit guns from workplace parking lots. *See* 555 F.3d at 1205–06 (finding that workplace violence was not a recognized hazard within the scope of the General Duty Clause). Relying upon *Megawest*, the Court stressed that "an employee's general fear that he or she may be subject to violent attacks is *not* enough to require abatement of a hazard under the general duty clause." *See id.* at 1206. It also noted OSHA's "express restraint in policing social behavior via the general duty clause." *Id.*

Here, the Secretary improperly targets activities that do not "directly, substantially, and specifically" concern occupational safety and health. *Gade*, 505 U.S. at 107. Nassau County maintains a police force for the general protection of its citizens, and its duties include responding to the unpredictable, violent actions of unruly crowds. Wal-Mart, like any other employer, "may reasonably believe that the institution to which society has traditionally relegated control of violent criminal conduct, i.e., the police, can appropriately handle the conduct." *Megawest Fin., Inc.*, 1995 WL 383233, at *9.

That belief was particularly justified in this case: Before 2008, the police had taken active efforts to control crowds using their lights and bullhorns during Blitz Day sales at the Store. *See* Order 5, 37–38; *see also* Tr. 237–38. In 2008, moreover, the police initially came to the Store and assisted employees by breaking up fights and ushering customers behind the barricades. *See* Order 27 n.17; *see also* Tr. 1110; Resp. Ex. 145(a), at 188–89, 193–94. Each

time the crowd became unruly, employees turned to the police, consistent with their training. *See* Tr. 105, 1017, 1094. And after Mr. Damour's death, the police returned to the Store and quickly restored order. *See* Order 17, 29, 34; *see also* Tr. 105, 1017, 1094. The Secretary would have employees, rather than police, "reinstate orde[r] should a crowd become unruly." Tr. 72. She would have employees "protect [themselves] and customers from a crowd that [had] become unruly." *Id.* But in asserting these purported responsibilities, she misconstrues the OSH Act's purpose and neglects to recognize that human beings, unlike traditional OSHA subjects, are not "amenable to [the employer's] control," *Megawest Fin., Inc.*, 1995 WL 383233, at *8–9. The regulation of advertising, sales prices, and retail store hours of operation are well outside OSHA's mandate or authority.

Judge Rooney compounds the Secretary's error by grossly understating the level of police involvement at the Store's 2009 day-after-Thanksgiving event. Judge Rooney believed that "the settlement agreement between Respondent and Nassau County provided for a reasonable and effective means, *without the assistance of police*, of abating the hazards associated with an out-of-control crowd attempting to enter the store." Order 53 (emphasis added). But contrary to her conclusion, the settlement agreement anticipated that police would provide necessary assistance—as did Wal-Mart's Store-specific and nationwide "crowd management" plans—and the police *in fact* provided substantial assistance during the Store's 2009 sale.

First, Wal-Mart's 2009 planning materials anticipated that police would provide assistance in managing crowds. Wal-Mart's Event Management Plan (used at stores outside of New York State) provided that Asset Protection Associates would "coordinat[e] police, fire, and EMS responders." Gov't Ex. 74, at A1; *see also* Wal-Mart's Crowd Management Plan at A-1 (attached as Ex. A) (used at stores inside New York State pursuant to the settlement agreement;

containing the same language as the Event Management Plan); Wal-Mart's Settlement Agreement with Nassau County at 8 (attached as Ex. B) (anticipating the possibility of "crowd-related police response[s]"). *Second*, consistent with Wal-Mart's planning, there was a "massive" police presence at the Store's 2009 day-after-Thanksgiving sale. Tr. 568. Area Director Ciuffo conceded that the absence of any injuries or incidents in 2009 may have been *entirely* due to the presence of police, *see id.* at 781, 815, as did the Secretary's expert Mr. Wertheimer, *see id.* at 569.

In view of these considerations, Judge Rooney's contention that Wal-Mart acted "without the assistance of police" is clearly mistaken. There is no defensible basis for allowing the application of the OSH Act in an area reserved for police. The Commission should not permit the Secretary's thinly veiled efforts to transform the usual grist of police work—unpredictable, antisocial behavior—into a "workplace hazard."

IV. The Secretary's Citation Violates Due Process And The Particularity Requirement Of The OSH Act.

Although the Commission has not directly requested briefing on the due process implications of the Secretary's citation, the Commission cannot consider that citation without observing the serious constitutional and statutory difficulties it raises. The nebulous concepts of "crowd management" on which the Secretary would impose a retroactive penalty and insist on future abatement measures are hopelessly vague, and any attempt to enforce those ill-defined concepts—whether retroactively or prospectively—would therefore contravene the Due Process Clause of the Fifth Amendment. Moreover, by failing to describe the nature of the hazard with particularity, the Secretary has violated not only the Due Process Clause but also the particularity requirement of the OSH Act, *see* 29 U.S.C. § 658(a). If the Secretary wants to develop rules governing the never-before-recognized "hazard" of crowds in retail stores, she has an appropriate

mechanism available to her: notice-and-comment rulemaking. Her transparent attempt to bypass that method by issuing sweeping new rules in this adjudication should be rejected.

A. The General Duty Clause Is Unconstitutionally Vague As Applied And Deprives Wal-Mart Of Adequate Notice Regarding The Required Abatement Measures.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen Constr. Co.*, 269 U.S. 385, 391 (1926). For this reason, the OSH Act is unconstitutional as applied unless it provides "reasonably prudent employer[s]" in the relevant industry with "notice and warning" of the prohibited conditions. *Asamera Oil (U.S.), Inc.*, 9 BNA OSHC 1426, 1980 WL 81803, at *14 (Nos. 79-949 & 79-1756) (ALJ); *see also*, *e.g.*, *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007) ("Where, as here, a party first receives actual notice of a proscribed activity through a citation, it implicates the Due Process Clause of the Fifth Amendment."). Thus, in *Asamera Oil (U.S.), Inc.*, Commission ALJ Cronin rejected a citation under a standard that required employers to prevent fire hazards "normally prevented by positive mechanical ventilation." 1980 WL 81803, at *14–15. Without something more than the Secretary's "rules of thumb," Judge Cronin concluded, this instruction left employers without "an appropriate basis or standard capable of determining the existence and extent of classified areas." *Id.* at *16.

The prohibition against vague standards applies with particular force in context of the General Duty Clause, which provides only that employers "shall furnish . . . a place of employment . . . 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). "[A]ny statute . . . imposing general obligations," such as the General Duty Clause, "raises certain problems of fair notice." *Nat'l Realty*, 489 F.2d at 1268 n.41. "[T]hese problems dissipate," the Ninth Circuit has

explained, only "when we read the clause as applying when a *reasonably prudent employer in the industry* would have known that the proposed method of abatement was required under the job conditions where the citation was issued." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981) (emphasis added); *see also*, *e.g.*, *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1984 WL 34818, at *1 (No. 77-2350) (finding that the Secretary's "broad, generic definition" of a hazard did not "apprise [the employer] of its obligations and identify conditions or practices over which [it could] reasonably be expected to exercise control").

The Secretary's citation runs afoul of these bedrock principles. The Secretary claims that, under the General Duty Clause, Wal-Mart must apply "appropriate crowd management techniques" at "special sales events." Order 2. But the only *conceivable* definition of "appropriate crowd management techniques" was the testimony of Paul Wertheimer, which even Judge Rooney acknowledged was insufficiently reliable to be admitted as evidence. *See id.* at 13–14. Thus, this case is devoid of even "rules of thumb" to guide Wal-Mart—or other retailers—in attempting to comply with the vague direction to implement "appropriate" abatement measures, let alone sufficient guidance before Blitz Day 2008 that Wal-Mart should have understood which abatement measures were required. Indeed, given the utter lack of any recognition in the retail community that crowds could pose dangers to employees, *see supra* Part II.B.1, the Secretary cannot plausibly argue that "reasonably prudent employer[s]" understood in 2008 or understand today which "proposed method[s] of abatement [are] required," *Royal Logging Co.*, 645 F.2d at 831.

Yet even if it were possible to discern from the Secretary's vague citation an approved set of "appropriate crowd management techniques," Order 2, it is still not clear *when* these abatement measures are necessary. The Secretary and Judge Rooney were both concerned with

"large crowds" meeting various motivational criteria. *See id.* at 2, 50. But neither the citation nor Judge Rooney's decision provides any guidance regarding the *number* of shoppers that must be present—or, for that matter, how "highly motivated" those shoppers must be, *id.* at 50—before a crowd is deemed sufficiently "large" to warrant "crowd management." Indeed, Area Director Ciuffo conceded that abatement measures might be necessary for crowds between "three and three million" people. Tr. 768. The suggestion that Wal-Mart should have known at the time of Blitz Day 2008, without the guidance of *any* relevant consensus in the retail community, whether the crowd of shoppers at the Store was sufficiently large to implicate the "hazard" imagined by the Secretary is nonsense. And given the vague guidance provided in this proceeding, Wal-Mart is no better situated to make that determination today. The Secretary's citation is therefore inconsistent with fundamental principles of due process.

B. The Citation Does Not State The Nature Of The Hazard With Particularity.

Independent of any constitutional issues, the OSH Act *itself* requires the Secretary to describe any alleged violations with "particularity." 29 U.S.C. § 658(a). This statutory requirement "goes beyond due process" in requiring the employer to "have notice of *precisely* what he did wrong and what he must do to correct it." *Royal Logging Co.*, 645 F.2d at 828 (emphasis added).

While the Secretary's citations need not contain minute detail, they must "fairly characterize the violative condition" in a way that is adequate "to inform the employer of what must be changed." *Hercules, Inc.*, 20 BNA OSHC 2097, 2005 WL 5518545, at *2 (No. 95-1483) (internal quotation marks omitted). Thus, in *Keith Rasmussen & Sons Construction*, the Commission rejected a citation that blankly called for the employer to initiate a "safety program" because it did not specify how the employer's conduct implicated specific hazards, and its list of

requirements was "nothing more than OSHA's own idealized minimum safety program." 17 BNA OSHC 1565, 1995 WL 17049980, at *5 (No. 94-1954) (ALJ). Similarly, in *Whirlpool Corp.*, the Secretary's initial citation did not satisfy the particularity requirement because it did not clarify whether the problem with an employer's netting system was the netting itself or the bolts that held the netting in place. *See* 7 BNA OSHC 1356, 1979 WL 8443, at *5 (No. 9224).

Moreover, the Secretary must describe the *location* of the violation with particularity. In *Marshall v. B.W. Harrison Lumber Co.*, for example, the Fifth Circuit rejected a citation that called for a "hearing conservation program" without identifying the particular work stations where noise violations occurred. 569 F.2d 1303, 1309 (5th Cir. 1978); *see also Union Camp Corp.*, 1973 WL 4281, at *3 ("The citation and complaint merely advise the respondent that somewhere in its immense plant . . . there is some violation of the standard"). And in *Henry J. Kaiser Co.*, the Commission explained that a citation implicating split timbers in a scaffolding structure was not sufficiently particular until the Secretary amended the complaint to reference specific beams. 11 BNA OSHC 1597, 1983 WL 181692, at *1–2 (No. 82-476) (ALJ).

Here, as in the above cases, the Secretary has not described *either* the required conduct *or* the location of the hazard with particularity. *First*, the required conduct is "not limited to" the "procedures and techniques" listed in the citation. Compl. ¶ 8, *quoted in* Order 2. But if the Secretary must specify between one of two equally plausible abatement measures, as in *Whirlpool*, then she must specify the concrete "procedures and techniques" that she has in mind here. If the call to "initiate a safety program" in *Rasmussen* was not particular, then neither is the Secretary's call to employ "effective crowd management," whatever that might mean. The particularity requirement demands more than a vague direction that Wal-Mart should have hired one of the five purported "experts" in the "crowd management" field. *See* Tr. 471–72, 768–69.

Second, the Secretary generically implicates "East 77 Green Acres Mall" as the location of the hazard. *See* Compl. ¶ 8. But just as the Secretary's whole-plant locations were unacceptable in *BW Harrison* and *Henry J. Kaiser*, she cannot target the whole store in this case. The employers in those cases could not be required to ferret out particular planks or noise hazards, just as Wal-Mart should not have to determine (if it is even possible to do so) how to pair specific abatement measures with specific but unidentified work locations in its stores.

C. The Secretary Was Required To Use Rulemaking Rather Than Adjudication.

The Secretary's difficulties in complying with due process or the OSH Act's particularity requirement point to a further flaw in the citation at issue here: The lack of any relevant industry standards pertaining to crowd control dictates that the Secretary should have proceeded by rulemaking rather than adjudication to target the alleged hazards.

The Supreme Court has instructed that agencies should perform "[t]he function of filling in [statutory] interstices . . . as much as possible, through the quasi-legislative promulgation of rules." *SEC v. Chenery*, 332 U.S. 194, 202 (1947). Problems of notice and fairness arise when agencies use adjudication to develop policy on novel issues or change their existing policy. *See id.* at 203; *see also Martin v. OSHRC*, 499 U.S. 144, 158 (1991) (noting that "the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties").

Agencies must therefore use rulemaking if the problem of retroactively deeming conduct unfair, which is inherent in the use of adjudication, outweighs "the mischief of producing a result which is contrary to a statutory design." *Chenery*, 332 U.S. at 203. In *Ford Motor Co. v. FTC*, for example, the Ninth Circuit announced that agencies may proceed by adjudication "to enforce discrete violations of existing laws where the effective scope of the rule's impact will be

relatively small," but must proceed by rulemaking if they seek "to change the law and establish rules of widespread application." 673 F.2d 1008, 1009 (9th Cir. 1981).

The Secretary's use of adjudication in this case raises all of the above concerns. The retail industry had not even discussed crowd hazards, and the National Fire Protection Association had expressly excused retailers from having to comply with the Life Safety Code's crowd management provisions. The Secretary's own expert, Mr. Wertheimer, opined (before his testimony was excluded) that the targeted conduct should be "made safe by *creating* a standard that everybody can adhere to"—that is, "a formal standard that is adopted or applied that requires everyone to stay consistent." Tr. 637 (emphasis added). Yet nothing inherent in the OSH Act's "statutory design" compels the Secretary's immediate intervention *by way of adjudication*. This is an admittedly novel theory of liability, and nothing objectively new to the workplace triggered the Secretary's sudden interest.

At the time of the alleged violation, the Commission had not considered crowd-based hazards, but it had instructed that "[f]reakish and unforeseeable" injuries do not "trigger statutory liability under the general duty clause," *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14. At least one ALJ had instructed that human behavior was a "wild card" that was not directly "amenable to control" under the OSH Act. *Megawest Fin., Inc.*, 1995 WL 383233, at *9. Courts had rejected the Secretary's attempts to regulate human-behavior-based hazards in other similar contexts, including workplace violence and ergonomics. *See id.* (holding that employer did not recognize a "hazard" of workplace violence).[7] And the only relevant consensus-standard

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[7] *See also*, *e.g.*, *Ramsey Winch*, 555 F.3d at 1205–06 (applying *Megawest* and holding that, despite guidance materials on OSHA's website, workplace violence was not a "recognized hazard" under the General Duty Clause); *Nat'l Realty*, 489 F.2d at 1266 (holding that the

[Footnote continued on next page]

guidance expressly excluded retail establishments from any crowd management requirements. *See supra* Part II.B.1. These were the most relevant materials available to Wal-Mart, and the instant citation effectively second-guessed them. The Secretary is not seeking to "enforce discrete violations of existing laws," but to "establish [new] rules of widespread application," *Ford Motor Co.*, 673 F.2d at 1009—and this she may do, if at all, only through notice-and-comment rulemaking. The citation should therefore be vacated.

V. Judge Rooney Improperly Excluded Evidence That Undermines The Secretary's Citation.

The Secretary's citation should be vacated because she failed to carry her burden on each of the elements necessary to establish a violation of the General Duty Clause, and because Wal-Mart's affirmative defenses foreclose the citation in any event. But even if the Commission were somehow to conclude that the Secretary otherwise had carried her burden based on the evidence of record, it could reach that conclusion only because: (1) Judge Rooney erroneously excluded probative and admissible evidence that directly undermines the Secretary's citation and Judge Rooney's own decision, and (2) Judges Sommer and Rooney did not permit Wal-Mart to conduct discovery on critical issues. These rulings are themselves sufficient to warrant reversing Judge Rooney's decision.

First, Judge Rooney excluded expert testimony that would have undermined the central thesis of her opinion and the Secretary's citation: that a "large" and "highly motivated" crowd of shoppers could give rise to a hazard under the OSH Act. Order 50. Wal-Mart proffered, but Judge Rooney declined without explanation to consider, testimony from Harvard psychiatrist

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[Footnote continued from previous page]

Secretary had not identified a feasible means of preventing employee horseplay); *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 1997 WL 212599, at *51 (No. 89-265) (finding that the Secretary had not identified a feasible means of abating repetitive motion injuries).

Arthur Barsky that would directly have undermined this understanding of crowd behavior. *See* June 24, 2010 Order (excluding this testimony). Dr. Barsky would have testified that "the crowd behavior exhibited in this case resulted from a cascade of numerous unlikely and improbable events" and that "the results of this crowd behavior could not have reasonably been anticipated or prevented." *See* Expert Report of Arthur Barsky at 1 (attached as Ex. C). According to Dr. Barsky, "antisocial violence is rare" among "gatherings of individuals in competition for some desired resource," and this observation is "borne out by the overall experience of the retail industry . . . where serious physical violence or serious injury is rare, and death almost unheard of." *See id.* at 2. This testimony cannot be reconciled with the Secretary's citation, and yet Judge Rooney declined even to consider it.

Second, although Judge Rooney concluded that Wal-Mart had presented "no evidence" of the Secretary's prior inconsistent enforcement actions, *see* Order 54, she *excluded* the very testimony that would have provided this evidence. *See* June 21, 2010 Order (excluding the testimony of Vicky Heza); June 24, 2010 Order (excluding the testimony of James Stanley). Wal-Mart proffered the testimony of James Stanley, who worked in OSHA for over twenty-five years, including serving as Deputy Assistant Secretary, and would have testified that "the OSHA Act does not require employers to protect their employees against violent acts of the general public," and that "OSHA and the safety industry before [Blitz Day 2008] did not recognize [the] alleged hazards to employees of asphyxiation or being struck due to crowd crush, crowd surge or crowd trampling." *See* Expert Report of James Stanley at 3 (attached as Ex. D). Judge Rooney also prevented Wal-Mart from presenting similar testimony from Vicky Heza, a former deputy chief of California OSHA. *See* Deposition of Vicky Heza (attached as Ex. E). Additionally, Judge Rooney excluded evidence concerning the Secretary's pre-November 2008 position on

workplace violence, as well as evidence concerning the Secretary's prior investigations of previous high-profile crowd disasters, none of which resulted in any citations. *See* June 21, 2010 Order (excluding this evidence). Although the Secretary pretends that this case is consistent with previous enforcement efforts, the evidence offered by Wal-Mart, but excluded by Judge Rooney, proves that the opposite is true.

Third, Judges Sommer and Rooney prevented Wal-Mart from conducting discovery with respect to essential elements of the citation. Judge Sommer prevented Wal-Mart from deposing senior-level OSHA officials who, unlike Mr. Ciuffo, may have been "competent" to explain the terms and application of the citation. *See* February 17, 2010 Order (denying Wal-Mart's motion to take depositions). Other orders enabled the Secretary to withhold OSHA's known, non-secret communications with outside entities and other agencies under blanket assertions of the "investigative technique privilege" and the "deliberative process privilege." *See* February 17, 2010 Order (denying Wal-Mart's motion to compel); February 22, 2010 Order (same). Further, Judge Rooney prevented Wal-Mart from obtaining "all factual material" from the Secretary's privilege-log documents after the Court had already ordered Wal-Mart to provide "all factual material" material from *its* privilege-log documents. *Compare* June 10, 2010 Order (ruling that the Secretary need not provide factual material) *with* April 6, 2010 Order (ruling that Wal-Mart had to provide factual material).

All of these prejudicial procedural rulings prevented Wal-Mart from developing its own case. As explained above, the Secretary did not carry her burden of proof. *See supra* Part II. But even Judge Rooney's mistaken conclusion otherwise was possible *only* because the factual record was unduly limited to favor the Secretary.

VI. The Secretary's Complaint Is Further Flawed Because It Lacked Necessary Authorization And Because The Secretary Improperly Delegated Government Authority To An Outside Expert.

Judge Rooney also failed to fully consider other arguments that the Commission has not directed for review but which further undermine the Secretary's citation.

First and most importantly, the complaint lacks authorization from Area Director Ciuffo or any other identified representative of OSHA. At the hearing, Area Director Ciuffo admitted that the amendments[8] to the citation "were not made with [his] authorization" and that he was not "aware" of any other OSHA official that had authorized them. Tr. 759-60. Judge Rooney *assumes* that the Solicitor's office approved of this document. *See* Order 2 n.1. But while the Solicitor can decide whether or not to bring legal proceedings based upon a valid complaint, the decision whether or not to issue a citation in the first instance is *the Area Director's alone*. *See* 29 C.F.R. § 1903.14. And besides, there are important indications that the Solicitor did not give her approval as Judge Rooney assumes. In response to Area Director Ciuffo's admission, the Secretary's counsel at first claimed the amendments were "a decision of the Solicitor's office," but then denied having "personal" knowledge of their authorization. *See* Tr. 759, 774. The action of a government agency needs *governmental* authorization, and since the Secretary has not shown any authorization for her actions in this case, the citation is legally in jeopardy. Courts have long shown sensitivity to this basic principle. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (requiring "intelligible principles" to cabin the exercise of agency discretion under a delegation of Congressional authority); *Cont'l Cas. Co. v. United States*, 113 F.2d 284, 286 (1940) ("That the [government] agent in this case had no authority to perform the

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[8] These were not truly "amendments." Rather, the complaint was an impermissible new issuance. *See supra* Part III.A.

act relied upon . . . is evidenced by the fact that the decision of the Comptroller General, which he cited and which controls such disbursements, held the contrary.").

The Secretary's failure to show that someone under her aegis approved of the complaint is especially troubling since she appears to have improperly delegated government authority to a private individual: Paul Wertheimer. As the holder of congressionally delegated authority, the Secretary may not re-delegate her public duties to a private entity. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (finding that the "most obnoxious" form of abrogation is a delegation of authority "to private persons whose interests may be and often are adverse to the interests of others in the same business"); *see also Sierra Club v. Sigler*, 695 F.2d 957, 962 & n.3 (5th Cir. 1983); *Wallace v. Currin*, 95 F.2d 856, 865–66 (4th Cir. 1938). But here, the Secretary indiscriminately relied upon the recommendations of an outside expert. She used Mr. Wertheimer, rather than any OSHA official, to explain the citation and elaborate on the means for selecting abatement measures. Moreover, she repeatedly indicated that Wal-Mart would have to hire an expert "similar" to Mr. Wertheimer to determine the abatement measures for specific sales events. *See* Tr. 528. Without any "competence" in crowd management, the Secretary lacks discretion to choose among the recommended measures or to apply them in this or any future "crowd hazard" cases. *See id.* at 673, 683, 687, 770, 831, 835–37. The OSH Act requires more, especially to support an unabashedly ambitious and path-breaking citation like the one at issue.

CONCLUSION

For the above reasons, the Secretary has failed to state a cognizable claim. The Commission should reverse Judge Rooney's decision and vacate the Secretary's citation.

Respectfully submitted,

/s/ Baruch A. Fellner

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. WAL-MART STORES, INC., Respondent.	OSHRC Docket No. 09-1013

CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the Opening Brief for Respondent was electronically filed and served on the following parties on this 20th day of June, 2011:

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Subject: OSHRC Docket No. 09-1013: Filing by Respondent Wal-Mart Stores, Inc.

Attachments: 09-1013 Respondent's Opening Brief.pdf(379KB)

Attached please find the Opening Brief for Respondent in the above-captioned matter. The brief has five exhibits, which (due to size constraints) I will send under separate cover.

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