UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. UNITED PARCEL SERVICE, INC., Respondent, and SAMUEL J. BUCALO, Affected Employee.	OSHRC Docket No. 05-1115

BRIEF AS *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TRUCKING ASSOCIATIONS, INC., IN SUPPORT OF RESPONDENT

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INTERESTS OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN TRUCKING ASSOCIATIONS, INC.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations, from large Fortune 500 companies to home-based, one-person operations. The Chamber's members operate in every sector of the economy and in every geographic region of the country. Simply put, the Chamber serves as the voice of American businesses. One of the Chamber's primary missions is to represent its members' interests by filing *amicus* briefs in cases involving issues of national concern to American business.

The American Trucking Associations, Inc. ("ATA") joins the U.S. Chamber in this brief. ATA is a nonprofit corporation incorporated under the laws of the District of Columbia for the purpose of serving as the national trade association of the trucking industry. The ATA has about two thousand direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, the ATA represents tens of thousands of motor carriers. The ATA was created to promote and protect the interests of the trucking industry, an industry that represents every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies, and others.

The Chamber and the ATA have a strong interest in this case because the decision of the Occupational Safety and Health Review Commission is inconsistent with the plain language of OSHA's egress regulations. If left undisturbed, the Review Commission's erroneous decision would lead to severe adverse consequences for American business.

INTRODUCTION

In this case, Judge Welsch made several critical holdings. First, he held that, under OSHA' egress standard, the exit access includes the immediate area in which an employee works. Judge Welsch also held that an exit access and exit route must be maintained at all times as a 28-inch wide pathway where nothing may be placed, either permanently or temporarily. These conclusions are unsupported by the plain language of the egress standard, which requires only that the exit route be maintained capable of passage by employees not as a sacrosanct 28-inch pathway in which nothing may ever come to momentary rest. These conclusions are also inconsistent with other OSHA standards and sections of the Life Safety Code, which explicitly exempt work areas from the definition of an exit route.

The immediate effect of the decision under review is that UPS is in violation of OSHA's egress standard every time an employee places a package or other item, however small or however temporarily, within the 28-inch exit route. The larger impact of the holding, however, is that every employer in every

American industry will be harmed in its ability to comply with the standard as OSHA now interprets it. For example, an office worker may no longer set down a book or stack of papers within a 28-inch pathway from his or her desk to the corridor. Indeed, the mere act of sitting at a desk in a chair is now a violation of the standard. Nor could a server at a restaurant set a large serving tray down to collect or serve food. Similarly, customers and workers at home improvement stores, big-box retailers, and grocery stores may no longer set their carts at rest in the aisles while workers are working. The same applies to manufacturing, auto repair, health care, financial services, small retail stores, transportation, distribution, and many other worksites. OSHA could not have intended such a fundamental alteration of the landscape of American business when it promulgated its egress standard. If left undisturbed, the economic consequences of this decision will be severe for American enterprise and compliance will challenge other safety priorities. The Chamber of Commerce of the United States of America and the American Trucking Associations, Inc., advocate for an interpretation of the egress standard that comports with the standard's plain meaning as well as with the realities of the American workplace.

FACTUAL AND PROCEDURAL BACKGROUND

The alleged violations at issue in this case occurred at the UPS hub located in Sharonville, Ohio ("Sharonville Facility").

The Sharonville Facility handles almost 150,000 packages each day. R. at 420. All packages arriving during a particular shift leave before the end of that same shift – they are not stored at the facility. *Id.* at 451. Employees at the Sharonville Facility unload packages from arriving UPS vehicles, sort them by destination, and load them onto departing UPS vehicles. *Id.* at 303-12; 334-35.

The vast majority of the packages arriving at the Sharonville Facility are unloaded from a delivery truck and immediately placed onto a conveyor belt. Heavy and irregularly-shaped packages ("irregular packages") bypass the conveyer belt system and are handled by an "irregular train." Irregular packages are placed on the floor momentarily, as part of the operational process, awaiting imminent pickup by an irregular train. An irregular train is typically a 36-foot long and 36-inch wide battery-powered car that pulls four to six flatbed carts loaded with irregular packages. *Id.* at 310. Irregular trains travel around the perimeter of the Sharonville Facility, frequently stopping—again, momentarily, as part of the operational process—to pick up irregular packages off the floor. *Id.* at 308-10; 337-38. The irregular train continues around the perimeter of the hub and drops off each irregular package to be loaded onto the appropriate departing UPS vehicle.

Upon inspection for an alleged mercury spill, Complainant issued an amended citation for failure to maintain an exit route under 29 C.F.R.

§ 1910.37(a)(3). Opinion at 6. This section states that "exit routes must be free and unobstructed." *Id.*

Complainant's amended citation set out thirteen instances of alleged violations of Section 1910.37(a)(3). The nine alleged violations Complainant pursued at trial were:

> (a) On the east end of the sort aisle, the exit access was blocked by irregular packages on the walkway platform and [sic] reduced the width down to 16 inches.
>
> (b) At load doors #25 through #29, the exit access was blocked by a parked "irregular" train #500 for approximately 10 minutes; right after that "irregular" train moved on, another "irregular" train #300 blocked load doors #27 through #30 for about 10 minutes. There were a total of 5 "irregular" trains that circled the building in a clockwise manner throughout the shift alternately blocking various exit access routes.
>
> (c) There was [sic] blocked exit access in the Primary Unload area as an "irregular" train was left parked at break time and employees were observed squeezing around the train which left a gap 12 inches wide on one side and a gap 16 inches wide on the opposite side.
>
> (f) In Primary Unload, an "irregular" train blocked dock Doors #3 and #4 for approximately 5 minutes and restricted the main exit access aisle as there was only 22 inches on one side of the train by door #3 and only 19 inches on the far side.
>
> (g) At Door #25, there were irregular packages at the bottom of the stairs and on the platform blocking exit access for the employees in the trailer.
>
> (j) Exit Door B was blocked by two stands on the platform which left only 18 1/2 inches clearance.

> (k) At Door #12 through #14, there were employees observed squeezing by both sides of an irregular train and its packages and there was approximately only 16 inches on one side and 12.5-13 inches on the other.
>
> (l) At Door #45, there were packages on the platform that block [sic] exit access for employees from the trailer.
>
> (m) At Doors #37 and 38, there [sic] packages on the platform and irregular packages at the bottom of the stairs blocking exit access for employees from the trailers.

At trial, Administrative Law Judge Ken S. Welsch separated these nine alleged violations into three broad categories: (1) Instances (a), (g), (l), and (m) related to packages allegedly obstructing what Complainant deemed an exit access; (2) Instances (b), (c), (f), and (k) related to momentarily motionless irregular trains allegedly obstructing what Complainant deemed an exit access; and (3) Instance (j) related to two T-stands allegedly obstructing what Complainant deemed an exit access. Opinion at 5.

After a four-day trial, Judge Welsch issued an order finding UPS liable for eight of the nine instances[1] and imposing a penalty of $4,400.00. Judge Welsch found UPS liable for violating Section 1910.37(a)(3) because these alleged violations—packages temporarily set down on the floor, T-stands near an exit door, and irregular trains temporarily parked in an aisleway—reduced the

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[1] Judge Welsch determined the Secretary failed to establish that UPS violated § 1910.37(a)(3) with respect to alleged violation (b).

available space in the exit route to less than 28 inches. Judge Welsch concluded that "*any* material or equipment placed within the exit access is violative" of Section 1910.37(a)(3) if it reduces the available space in the exit access to less than 28 inches. Opinion at 12.

ARGUMENT

I. AN EXIT ROUTE MUST BE MAINTAINED SUFFICIENT TO PERMIT PASSAGE, NOT, AS JUDGE WELSCH HELD, AT A CLEAR WIDTH OF A CONSTANT 28 INCHES

Section 1910.36 of OSHA's egress standard addresses design and construction requirements for exit routes and provides that "[a]n exit access must be at least 28 inches wide at all points." 29 C.F.R. § 1910.36(g)(2).

Section 1910.37(a)(3), which addresses maintenance, safeguards, and operational features for exit routes, requires that "exit routes must be free and unobstructed. No materials or equipment may be placed, either permanently or temporarily, within the exit route. The exit access must not go through a room that can be locked, such as a bathroom, to reach an exit or exit discharge, nor may it lead into a dead-end corridor." Judge Welsch held that "*any* material or equipment placed within the exit access is violative" of Section 1910.37(a)(3) even if the route is "free and unobstructed." Opinion at 12. This interpretation is inconsistent with the plain language of OSHA's egress standard, inconsistent with other OSHA standards, and creates an impossible burden for American businesses.

It is a familiar interpretive principle that "in all statutory construction cases, we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). By its own terms, Section 1910.37(a)(3) does not prescribe a minimum width for maintenance of exit accesses. Rather, the section requires only that an exit access must be maintained "free and unobstructed." As UPS showed in its post-hearing memorandum, "*Webster's* definition of 'unobstructed' is, not surprisingly, 'not obstructed.' 'Obstruct' is defined as 'to block up: stop or close up: place an obstacle in or fill with obstacles or impediments to passing.'" Respondent's Post-Trial Memorandum at 23. Applying the plain meaning of the regulation leads to the inescapable conclusion that, so long as an exit access is passable, or not obstructed, an employer is in compliance with Section 1910.37(a)(3). Judge Welsch in essence agreed with this definition. He held that "unobstructed" means "capable of easy passage by employees, without harmful delay caused by material or equipment placed within the exit route." Opinion at 12.

A. Judge Welsch Improperly Imported the 28-Inch Design And Construction Standard for Exit Routes Into the Standard for Maintenance of Exit Routes

Notwithstanding his agreement, however, Judge Welsch nonetheless held that "*any* material or equipment placed within the exit access is violative" of Section 1910.37(a)(3). Opinion at 12. To reach this conclusion, he imported the 28-inch standard for construction and applied it to the standard for maintenance,

reasoning that "[i]t would be duplicative to insert the 28-inch requirement into § 1910.37(a)(3) after it had already appeared in § 1910.36(g)(2)," Opinion at 9, and that "[h]aving once given the required minimum dimensions for the height and width of the exit route, it is unnecessary for OSHA to repeat the dimensions with each succeeding reference to exit routes." Opinion at 8. Judge Welsch also relied on the sentence in Section 1910.37(a)(3) that "[n]o materials or equipment may be placed, either permanently or temporarily, within the exit route." This is a flawed line of reasoning for several reasons. First, Judge Welsch ignored the well-established canon of statutory construction that "where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). This maxim, which applies equally when regulatory agencies exercise legislative authority based on a grant of rulemaking power from Congress, is particularly strong here because Sections 1910.36 and 1910.37 address construction and maintenance—two entirely separate issues relating to safe egress.

B. The Standard for Maintenance of Exit Routes Is Clear and Unambiguous And Does Not Require Further Interpretation to Other Sections of the Egress Standard

This is not a case where § 1910.37(a)(3) is silent as to any standard for maintenance of exit accesses. Rather, Section 1910.37(a)(3) sets forth a clear

standard: exit accesses must be maintained "free and unobstructed." Judge Welsh's decision to ignore that standard and import the 28-inch requirement from Section 1910.36(g)(2) goes beyond his role as an interpreter of existing law.

Furthermore, Judge Welsch's statement that OSHA need not repeat the 28-inch standard after citing it once is inapposite in this case. Rather than merely not repeating the 28-inch standard in 1910.37(a)(3), OSHA affirmatively wrote a different standard for maintenance of exit accesses. In any case, however, as discussed above, it would not be appropriate to blindly borrow a standard for construction for use in a standard for maintenance.

When Judge Welsch interprets the intent of § 1910.37(a)(3), he may not read into it that OSHA must have meant to imply that the 28-inch construction standard from 1910.36 was intended to be an implicit part of 1910.37. A reviewing tribunal must determine whether 1910.37 expressed a clear and unambiguous intent concerning the precise question at issue. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If the intent is clear and unambiguous on the face of the standard, then the Review Commission must give effect to the plain meaning of the law. *Id.* The second step, as to what OSHA's belief is as to the meaning of the standard, must only apply when a standard is silent or ambiguous. *Id.* Even then, the agency's interpretation must be sincere; disingenuousness may be evidenced through the agency's own contradictory utterances. Here, the standard is clear and unambiguous: for

maintenance, an exit access must be kept "free and unobstructed;" Section 1910.37 says nothing about a constant width of 28 inches for *maintenance* purposes and there is thus no ambiguity here.

Third, Judge Welsch's holding necessarily gives a rigid and absolutist meaning to the word "temporarily." Under his definition, an item set down within the 28-inch strip of an exit route for the smallest measurable amount of time would constitute a violation of Section 1910.37(a)(3). This impractical definition ignores workplace realities where, as a matter of operating procedure, items are intentionally or incidentally placed within the 28-inch exit route on a continuous basis. "Temporarily" must exclude operational or fleeting placement of things within the 28-inch exit route.

Finally, the 28-inch standard itself was never considered to be absolute—certainly not for maintenance purposes—as Judge Welsch's opinion would suggest. There are a number of instances where the Life Safety Code permits access in widths that are varied and significantly less than 28 inches. The Life Safety Code, for example, requires that the aisle accessway between rows of seating shall have a clear width of not less than 12 inches but in most cases shall not be required to exceed 22 in. *See* NFPA 101-2000 ("Life Safety Code"), §§ 12.2.5.5.2, 12.2.5.5.3, 12.2.5.7.1, 12.2.5.7.3, 12.4.2.4, 12.4.2.5, 13.4.2.4, 13.4.2.5, 13.2.5.5.2, 13.2.5.5.3. The Life Safety Code further provides that the minimum clear width of aisles shall be sufficient to provide egress capacity in accordance

with Section 12.2.3.2 but shall be not less than (3) 23 in. (58 cm) between a handrail and seating, or between a guardrail and seating where the aisle is subdivided by a handrail and (6) 23 in. (58 cm) between a handrail or guardrail and seating where the aisle does not serve more than five rows on one side. *Id.* at §§ 12.2.5.5.4, 12.2.5.6.3 and 13.2.5.6.3

Additionally, the Life Safety Code states that the minimum clear width shall not be required to exceed 22 inches, *id.* at §§ 12.4.2.4 and 12.4.2.5, and that the clear width of lighting and access catwalks and the means of egress from galleries and gridirons shall be not less than 22 in. *Id.* at §§ 12.4.5.9, 13.4.2.9.

According to the Life Safety Code, Replacement Fire Escape Stairs are only required to have a minimum width of 22 inches clearance between the rails. Access to escape doors or casement windows may be as little as 24 inches. *Id.* at Table 7.2.8.4.1(a) and Table 7.2.8.4.1(b). Further, the Life Safety Code states that a secondary means of escape may go through bathroom doors of not less than 24 inches wide. *Id* at §§ 24.2.2.3.

II. WORK AREAS ARE DISTINCT FROM, AND NOT PART OF, AN EXIT ACCESS OR EXIT ROUTE

The egress standard provides the minimum requirements for design and maintenance of "exit routes." 29 C.F.R. § 1910.34(b). An exit route is "a continuous and unobstructed path of exit travel from any point within a workplace to a place of safety. . . . An exit route consists of three parts: The exit access; the

exit; and, the exit discharge." *Id.* at 1910.34(c). The exit access is "that portion of an exit route that leads to an exit. An example of an exit access is a corridor on the fifth floor of an office building that leads to a two-hour fire resistance-rated enclosed stairway." *Id.* The exit is "that portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge." *Id.* An example of an exit is the two-hour fire resistance-rated enclosed stairway to which the exit access leads. Finally, the exit discharge is "the part of an exit route that leads directly outside or to a street, walkway, refuge area, public way, or open space with access to the outside." *Id.* An example of an exit discharge is a door at the bottom of a fire-resistant stairwell that leads outside. Taken together, an exit route begins with a corridor that leads to an enclosed, fire-resistant stairwell that leads finally to a door that exits the building.

The Secretary, however, considers the "exit access" to include the immediate area in which an employee works. Opinion at 7. Judge Welsch never explicitly held whether he too shares this interpretation. However, such a holding is necessary to his conclusion that the area at the Sharonville UPS hub where UPS workers perform their job functions was obstructed (a fact that is only a violation of Section 1910.37(a)(3) if the UPS employees' work area is part of the exit access). Judge Welsch's reasoning requires employers to accept his premise that an exit access begins at the tip of an employee's shoe—wherever that employee may be at any point in time—and extends to the exit. Ironically, in his attempt to

eliminate subjectivity from OSHA's egress standard,[2] Judge Welsch created an inherently subjective moving-target definition of an exit access that has no practical boundaries and finds no support in the egress standard or in other OSHA regulations.

Here again, Judge Welsch's interpretation clarifies that which is unambiguous, thanks to the example provided in the standard. A clear and unambiguous standard is not in need of judicial interpretation. *See Chevron,* 467 U.S. 837 (1984).

Judge Welsch's definition of an exit access as including the space where an employee works means, by definition, that there are as many exit accesses as there are employees in any given work facility. However, Section 1910.36(g)(2) prescribes rules for instances "[w]here there is only one exit access leading to an exit or exit discharge." Under Judge Welsch's holding, this provision would only make sense if there were one person at a facility, an unlikely occurrence for which OSHA would draft a rule.

Similarly, in OSHA's *Principal Emergency Response and Preparedness Requirements and Guidance*, which provides guidance in implementing the egress regulations, OSHA states that employers should "[s]eparate an exit route from

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[2] Judge Welsch criticized UPS's interpretation of the egress standard as "too subjective." Opinion at 8.

other workplace areas with materials that have the proper fire resistance-rating for the number of stories the route connects." OSHA Publication 3122-06R at 4 (2004). This guidance is meaningless under Judge Welsch's ruling because his holding presumes workplace areas are inherent parts of an exit route that cannot be "separated." *Id.*

Furthermore, OSHA is well aware of the legal significance of a "work area" and would have included it in the egress standard if work areas were meant to be part of an exit route. *See Keene Corp., supra.* In 29 C.F.R. § 1910.1200(c), for instance, which addresses Hazard Communication, OSHA defines "work area" as "a room or defined space in a workplace where hazardous chemicals are produced or used, and *where employees are present*." (Emphasis added.)

Similarly, in 29 C.F.R. § 1910.268(b)(1)(iii), which addresses telecommunications, OSHA defines "working spaces" as "maintenance aisles, or wiring aisles, between equipment frame lineups." Section 1910.268(b)(1)(iii) specifically provides that "working spaces" "are not an exit route for purposes of 29 C.F.R. § 1910.34." This is perhaps the most telling statement that working spaces are distinct from Section 1910.34 exit routes.

In the instant case, the areas where UPS employees perform their job duties and work—sorting packages while the trains pass by to pick up irregular packages—are work areas and are not part of an exit route. Judge Welsch's holding to the contrary must be reversed.

III. JUDGE WELSCH'S RULING WOULD HAVE THE PRACTICAL EFFECT OF HALTING AMERICAN BUSINESS

Judge Welsch made two critical holdings in this case. First, he held the employer to an interpretation that the exit access includes the immediate area in which an employee works. Second, he held that an exit access must be maintained at all times as a 28-inch-wide pathway where nothing may be placed, either permanently or temporarily. In practical terms, Judge Welsch requires that every employee must have, at all times, a completely free and clear 28-inch pathway from his or her person to an exit. According to Judge Welsch, "*any* material or equipment placed within the exit access is violative" of Section 1910.37(a)(3). Opinion at 12. This is an interpretation that, when taken to its logical extension, would render compliance infeasible at the very least.

The real-world impacts of this decision affect not only UPS, nor only the package delivery industry; this decision affects every industry, and every type of employer and workplace.

In the foodservice industry, restaurants with servers setting a large serving stand down beside a table to serve food would be in violation of the standard if the width of the walkway were reduced to less than 28 inches. A crowded restaurant or one crowded with tables would be in violation if all waitstaff and every patron did not have 28 inches from any place in the restaurant to an exit at every given moment. Kitchen operations in food service establishments, as well as other food preparation sites, like stand-alone or grocery-store-located bakeries

and butchers, routinely involve movable shelving, movable food preparation counters, trash and recycling containers, and wall and ceiling mounted racks for tools of the trade.

The retail industries would also be in constant violation. A bookstore or clothing retailer receiving shipments that must be unloaded from boxes and placed on shelves would have to ensure that at least 28-inches of space remains in the aisle where a particular employee is working to unload the boxes. But even provided that the boxes could ultimately be aligned to keep 28 inches clear, the stores would be in violation of the standard the moment a hand trolley is set down the center of an aisle to unload boxes or when a single small box is set down in the middle of an aisle to permit access to larger boxes.

In grocery stores, where vendors often deliver products on palettes to load onto retail shelves, the store would be in violation by the mere presence of a palette in an aisle or in a stockroom. Cashiers in grocery stores and other retail stores often work in tiny stations that almost always contain less than 28 inches of room. Home improvement retailers would be affected on an almost continuous basis. In these establishments, the layout of the stores and nature of the products sold requires that employee-operated forklifts routinely retrieve products for customers. The presence of such a forklift in an aisle would be a violation of Section 1910.37(a)(3). Additionally, customers and employees often use flat-bed

dollies to store their items while they shop. Even in wide aisles, these dollies leave less than 28 inches of free space. Their presence alone is a violation.

The healthcare industry would also be significantly affected. Hospitals and health care facilities keep tools and equipment on mobile carts, including blood pressure machines, intravenous fluid dispensers, trays with surgical tubes, patient meals, wheelchairs, gurneys, and a variety of other portable materiel or equipment. A requirement that every employee working with these devices must maintain a constant 28 inches of space for egress is wholly impractical, especially in light of the emergency uses to which these devices are put. Even on a more considered basis, the rule proves impractical. For example, a doctor performing surgery who has a tray of instruments or medical devices on either side of him while operating on a patient would be in violation of the standard. Similarly, a dentist or dental assistant who moves a tray next to him or herself while examining a patient would be in violation.

In a traditional office setting, an employee who sits at his or her desk with a chair tucked in around him or herself is in violation. It would also be a violation to leave a stack of papers or a box anywhere in an office if the employee would have less than 28 completely-clear inches to walk out to the hallway. Cubicles present a constant potential for violation once a worker moves a chair, lamp, cupboard door, or other furniture. Additionally, Judge Welsch's interpretation

would deem a mail cart temporarily set at rest in a hallway while mail is being delivered to be violative of Section 1910.37(a)(3).

Many of the above examples involving portable shelving, carts, mobile equipment, movable furniture, are the result of generations of professional custom, tradition, and practice. In most cases, these practices are the evolutionary effort within trades to perform work in a manner that is most productive, reduces hazards known to their profession, and reduces wasted or injurious repetitive motions.

The Chamber and ATA are gravely concerned that such an overbroad and impractical interpretation of the egress standard, if left untouched, would render compliance infeasible and would greatly harm most, if not all, businesses. *Amici* instead urge a more considered and common-sense approach to the egress standard.

IV. THE CHAMBER AND THE ATA PROPOSE CLEAR AND WORKABLE STANDARDS THAT EMLOYERS CAN COMPLY WITH

The Review Commission should hold that Judge's Welsch's interpretation of the egress standard is inconsistent with the plain language of the egress standard and inconsistent with the best practices already in place in multiples of industries. Given that the language of the standard is clear and unambiguous in requiring that exit routes be maintained to permit passage, the Review Commission should reject Judge Welsch's holding that any item at rest within the

exit route renders it *per se* obstructed. If OSHA believes more clarity is required, rulemaking is the proper process for doing so and would avoid interpretations that would result in the chaos described above.

To be enforceable, regulations should be written in plain language that can be easily understood by the general public in accordance with Executive Order 12866, which states that "Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." Section 2(b)(12), Exec. Order No. 12866, (Sept. 30, 1993), as amended by Exec. Order No. 13258 (Feb. 26, 2002) and Exec. Order No. 13422, (Jan.18, 2007). This concept is embodied in the egress standard itself. OSHA states that it "proposed to revise Subpart E in plain language so that the requirements would be easier to understand by employers, employees, and others who use them." Exit Routes, Emergency Action Plans, and Fire Prevention Plans, 67 Fed. Reg. 67950, 67950 (Nov. 7, 2002). On this basis, the Chamber and the ATA offer the following definitions.

The maintenance standard requires that no materials may be placed, "either permanently or temporarily," within the exit route. 29 C.F.R. § 1910.37(a)(3). The term "temporarily" should not include momentary or operational placement of material or equipment. Material or equipment that is placed within an exit route as a matter of operations or work process should not be interpreted as constituting a temporary obstruction. As discussed above, Judge

Welsch's absolutist reading of "temporarily" would lead to infeasible compliance by many industries and is plainly an unmanageable standard.

Additionally, the Chamber and the ATA assert that a work area, where workers routinely conduct their regularly performed duties, is not a part of an exit access or an exit route as defined in 29 C.F.R. § 1910.34. This reading draws support from the egress standard itself and from other sections of the Code of Federal Regulations.

Finally, the Chamber proposes that for purposes of the egress standard, an obstruction be defined as an impediment rendering it impossible for a person to pass; this does not include partial impediments that one or few persons are unable to pass. Objects that are easily moved, inherently mobile, or easily overcome by repositioning oneself or by stepping over or under would not constitute an obstruction. This performance-based definition has the dual benefit of remaining faithful to the purpose behind the egress standard and providing necessary flexibility to the American businesses that must comply with the standard.

CONCLUSION

For the foregoing reasons, the opinion of the Occupational Safety and Health Review Commission should be vacated.

Respectfully submitted,

Dated: January 17, 2008

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CERTIFICATE OF SERVICE

I certify that on January 17, 2008, I served a copy of the foregoing Brief as *Amici Curiae* of the Chamber of Commerce of the United States of America and the American Trucking Associations, Inc., in Support of Respondent via FedEx to counsel for Complainant, counsel for Respondent, and to the Affected Employee as follows:

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