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

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT WAL-MART STORES, INC.

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Pursuant to the Commission's April 19, 2011 briefing notice, the Chamber of Commerce of the United States of America ("Chamber") respectfully submits this brief in support of respondent Wal-Mart Stores, Inc.("Wal-Mart"). The Chamber's brief addresses Issues 1-4 identified in the Commission's briefing notice as well as those portions of Issue 5 dealing with the adequacy of Wal-Mart's existing safety precautions and Wal-Mart's good faith efforts to comply with the OSHA Act. The Chamber's brief does not address the remaining portions of Issue 5 or Issue 6.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber is the world's largest business federation. It represents three hundred thousand direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. More than 96% of Chamber members are small businesses with one hundred employees or fewer. Many Chamber members, moreover, are retail businesses. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

This action is of great importance to the Chamber because nearly all of the Chamber's members are subject to the Occupational Safety and Health Act ("Act"). As potential respondents to citations issued by the Secretary of Labor, these members have a vital interest in ensuring that the Secretary and the Commission correctly interpret and

fairly enforce the Act. This interest is particularly important where, as here, the Secretary seeks to effectively announce—in the absence of notice-and-comment rulemaking—that any crowd of motivated retail consumers between three and three million is a recognized hazard that employers have a concomitant general duty to "abate" under the Act. Indeed, while purporting to predicate her order on Wal-Mart's specific knowledge of an alleged hazard, the ALJ nevertheless acknowledges that her decision has the "potential to have a significant impact upon the retail industry throughout the country." Order at 13. Because large crowds of retail shoppers are an inseparable aspect of retail sales—and, indeed, one of the principal goals of retailer sellers—the Chamber has a significant interest in assisting the Commission in reaching a fair and accurate result in this case.

II. INTRODUCTION

The Secretary's citation in this case seeks to radically expand the traditional scope of Section 5(a)(1) of the Act, the general duty clause, while at the same time, eviscerating the deliberative approach that OSHA has historically applied to the announcement of new rules of general applicability. In the absence of any prior regulatory, informational, or industry guidance, and against a tradition of express restraint in policing social behavior via the general duty clause, the Secretary seeks to hold Wal-Mart liable for failing to abate, not the materials or conditions of its workplace, but the deliberative, reasoned, and, to be sure in this case, uncharacteristic, and entirely unpredictable actions of an isolated minority of customers—third parties whose actions were both unpredictable and beyond Wal-Mart's control.

The citation here would be startling and erroneous even as disingenuously framed by the Secretary: an alleged failure of Wal-Mart to recognize the purported glaring and obvious hazard of large crowds unique to its Valley Stream Store ("Store"). But, as the ALJ recognized, the allegedly unique circumstances at the Store are anything but and thus the Secretary's citation, and the ALJ's opinion, will "have a significant impact upon the retail industry throughout the country." Order at 13.

The problems that the ALJ's opinion poses for the retail industry as a whole flow from the deficiencies in the Secretary's citation as applied to Wal-Mart. In an attempt to regulate the social phenomenon of "crowd crush," both the Secretary and the ALJ define the alleged hazard broadly as a necessary but hardly sufficient cause of the problem that the Store experienced on Blitz Day 2008: large crowds of customers. In doing so, the Secretary and the ALJ seek to impermissibly characterize as a hazard a normal and inseparable activity of the retail industry and effectively concede that no casual link exists between most instances of the "hazard" and the likelihood of death or serious bodily injury. By focusing broadly on crowds, the Secretary also creates a situation where Wal-Mart either did not recognize the purported hazard or every retailer in the country that has had a blitz-day or similarly advertised sale did. Either way, the Secretary's application of the general duty clause is improper, as a matter of proof or a matter of policy. Finally, in failing to carry her burden of describing feasible and effective means of abatement, the Secretary both failed to prove her case as to Wal-Mart and—if the ALJ's decision stands—effectively announced that consumer crowds are a

recognized hazard, even though the Secretary's own expert concedes he has never seen a crowd-management plan for what Wal-Mart and the retail industry are purportedly legally obligated to do to abate such hazard.

III. ARGUMENT

To establish a violation of the general duty clause, 29 U.S.C. § 654(a)(1), 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. *Empire-Detroit Steel Div. v. OSHRC*, 579 F.2d 378, 383-84 (6th Cir. 1978). The Secretary failed to prove any of these elements here and, as a consequence, the citation must be vacated.

A. BOTH THE SECRETARY AND THE ALJ FAIL TO DEFINE A CITABLE HAZARD.

The Secretary and the ALJ's sweeping and amorphous definition of the purported hazard in this case is contrary to Commission precedent and Congressional intent. Hazards under the general duty clause must be "defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Sec'y of Labor v. Pelron Corp.*, No. 82-388, 1986 WL 53616, at *3 (Rev. Comm. June 2, 1986); *Sec'y of Labor v. Otis Elevator Co.*, No. 03-1344, 2007 WL 3088263, at *3 (Rev. Comm. Sept. 27, 2007) (same). In other words, the Secretary must identify "a preventable consequence of the

work operation." *Sec'y of Labor v. Morrison-Knudsen Co.*, No. 88–572, 1993 WL 127946, at *19 (Rev. Comm. April 20, 1993). Precise and limited definitions of "hazards" under the general duty clause are necessary because "Congress intended to require elimination only of preventable hazards." *Nat'l Realty & Const. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973). Because the general duty clause focuses only on preventable hazards, the Secretary and the Commission have traditionally limited its application to conditions and materials of the workplace as opposed to the social behavior of third parties. *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009).

1. "Large" And "Peaceful" Crowds Of Shoppers Are Not A Hazard Within The Meaning Of The General Duty Clause.

In an attempt to prevent the purported phenomenon they call crowd crush, both the Secretary and the ALJ define the alleged hazard in this case as any crowd of three to three million people that is motivated to shop for items of limited supply. Order at 43-44, 50; Tr. 767. This sweeping definition of "hazard"—which effectively encompasses every retail sale in the country—cannot stand for three independent reasons: (1) crowds of peaceful shoppers are a normal activity of the retail industry; (2) the general duty clause does not apply to the actions of third parties that are outside the employer's control and whose potentially hazardous conduct is not readily recognizable by the employer (3) the Secretary's definition makes no attempt to inform Wal-Mart or other retailers when crowds of consumers cross the line from benign to hazardous.

(a) The General Duty Clause Does Not Apply To The Normal Activities Of Business.

The Commission has held that the normal activities of a business do not represent the types of "hazards" that the general duty clause was intended to regulate. This is because "an employer cannot reasonably be expected to free its workplace of inherent risks that are incident to its normal operation." *See Sec'y of Labor v. Inland Steel Co.*, No. 79-3286, 1986 WL 53521, at *3 (Rev. Comm. July 30, 1986). Indeed, "[t]o permit the normal activities [ ] [ ] [of] industry to be defined as a 'recognized hazard' within the meaning of section 5(a)(1) is to eliminate an element of the Secretary's burden of proof and, in fact, almost to prove the Secretary's case by definition, since under such a formula the employer can never free the workplace of inherent risks incident to the business." *Pelron*, 1986 WL 53616, at *3 (emphasis in original).

Large and peaceful crowds of consumers are an inherent aspect of the retail industry. So too are limited supply of product, advertising, and the occasional sale. Indeed, the central goal of retail establishments (assuming they wish to be profitable) is to motivate consumers—generally through advertising—to frequent their establishments and purchase their products. The more successful the retailer and the better its advertising, the greater the number of customers that will frequent its establishment. Of course, none of these activities is unique to the Store or even Wal-Mart as a whole. Indeed, unless the retail industry fundamentally changes the way it does business, say, by converting exclusively to internet sales, or the government decides to dissipate consumer competition through industry-wide price controls, large crowds of consumers can neither

be prevented nor eliminated. *See Inland Steel*, 1986 WL 53521, at *3 ("As we have held, defining recognized hazards too broadly would undermine the congressional purpose behind the "recognition" element—to limit the general duty imposed by section 5(a)(1) to preventable hazards."). To the extent ordinary shoppers present any risk, those risks are "inherent risks incident to the [retail] business," and, as a consequence, are not appropriately defined as hazards under the general duty clause. *Pelron*, 1986 WL 53616, at *3; *see also Inland Steel*, 1986 WL 53521, at *3 ("Since movement of railcars is inherent and unavoidable in Inland's operation, Inland is not required under section 5(a)(1) to free its worksite or all railcar movement that might present a potential risk to its employees.").

(b) Purported Hazards Attributable To Third-Party Conduct Are Not Covered By The General Duty Clause.

Hazards under the general duty clause have traditionally been limited to those conditions or practices "over which the employer can reasonably be expected to exercise control." *Sec'y of Labor v. Megawest Fin., Inc.*, No. 93-2879, 1995 WL 383233, at *8 (Rev. Comm. June 19, 1995). "The element of an employer's control is a crucial one when determining the employer's duty under the Act." *Id.* Indeed, the Commission has "consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent." *Sec'y of Labor v. Green Constr. Co.*, No. 5356, 1976 WL 6135, at *2 (Rev. Comm. Oct. 21, 1976).

The alleged hazard in this case—a large crowd of motivated shoppers with all the unpredictable variables that human behavior entails—is fundamentally different from the hazards that the Act has traditionally addressed. The Act usually targets hazards that arise from some condition inherent in the environment or the processes of the employer's workplace not dependent upon unpredictable human behavior, such as overexposure to lead or noise or the risk of electrocution. The general duty clause has served a modest purpose by filling "those interstices necessarily remaining after the promulgation of specific safety standards" under the Act. *Bristol Steel & Iron Works, Inc. v. OSHRC*, 601 F.2d 717, 721 (4th Cir. 1979). The hazards traditionally covered by the Act—whether addressed by specific safety standards or the gap-filling function of the general duty clause—have one thing in common: they are aspects of the work environment that employers, through control of their workplaces, can both anticipate and reduce or eliminate.

Not so with large crowds of consumers that act completely outside the employer's control. There is nothing inherently hazardous about large crowds of shoppers. Such crowds frequent retail establishments—and a variety of other events including professional sports events and concerts—across the country every day without incident. Where consumer crowds act as they should, they present no hazard whatsoever. Whereas exposure to lead or noise will, at some level and at some point, necessarily lead to significant harm, crowds do not become dangerous merely because they grow too big or become too motivated. Rather, the danger from crowds "arises not from the processes or

materials of the workplace, but from the anger and frustration of people." *Megawest Fin.*, 1995 WL 383233, at *9. It is this "human factor," *id.*,—will, intention, intellect, and deliberation—that separates crowds from the traditional hazards regulated by the Act and places crowds—and the distinct individuals that comprise them—beyond the scope of an employer's general duties of hazard correction and control.

It has long been the law that hazards under the general duty clause do not include conduct that "is so idiosyncratic and implausible in motive or means that conscientious experts, familiar with the industry, would not take it into account in prescribing a safety program." *Nat'l Realty*, 489 F.2d at 1266.[1] Thus, that "[a] demented, suicidal, or willfully reckless employee may on occasion circumvent the best conceived and most vigorously enforced safety regime" does not give rise to a "preventable" hazard. *Id.* This rule incurs, in part, because "[e]mployers have less control over employees than they do over conditions[,] [as] employees have a will, an intention, and an intellect that drives their behavior, and they are not always amenable to control." *Megawest Fin.*, 1995 WL 383233, at *9. And, of course, employers have "even less control over the behavior of third parties [that are] not in [their] employ[,]" such as their customers. *Id.*

Because the sole element of danger from large crowds of customers arises, not from conditions of the workplace, but from the "wild card" of human behavior, crowds are "completely different from any other hazards addressed by the Act." *Id.* Indeed,

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[1] In this respect, it is significant that the Secretary's excluded expert witness concedes that he has never seen a crowd control plan for a retail event. Order at 12.

while the threats associated with third-parties such as crowds may be "omnipresent, an employer may legitimately fail to recognize that the potential for a specific" violent act by the crowd exists. *Id.*

Applying these principles, the Tenth Circuit has found any definition of "recognized hazard" that includes the purported hazard of firearms in company parking lots "too speculative and unsupported to [constitute] [ ] the clear and manifest purpose of Congress." *Ramsey Winch*, 555 F.3d at 1205, 1207 (internal quotation omitted); *see also Oil, Chem. & Atomic Workers v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir .1984) (refusing to apply a broad meaning of "hazard" under the general duty clause and instead "confin[ing] the term 'hazards' under the general duty clause to the types of hazards [the Court] kn[e]w Congress had in mind"). In reaching this conclusion, the Tenth Circuit observed that OSHA has historically exhibited an "express restraint in policing social behavior via the general duty clause." *Ramsey Winch*, 555 F.3d at 1206; *see also Pa. Power & Light Co. v. OHSRC*, 737 F.2d 350, 354 (3d Cir. 1984) (recognizing that an employer's "duty does not extend to the abatement of dangers created by unforeseeable or unpreventable employee misconduct"); *Pratt & Whitney Aircraft v. Sec'y of Labor*, 649 F.2d 96, 104 (2nd Cir. 1981) (indicating the Act only requires employers to "guard against significant risks, not ephemeral possibilities").

These principles regarding the difficulties with recognizing and controlling third-party conduct apply with particular force here. Indeed, the principal distinctions between the Store's Blitz Day 2007 event and Blitz Day 2008 event—late arriving customers

rushing from their cars to the front of an already tired and frustrated line; a particularly unruly crowd; vandalism; the police department's inability or refusal to control the crowd, and the actions of customers in hoarding and attempting to resell electronics on the Store floor—consist of precisely the sort of "human element" that courts have found unrecognizable and uncontrollable for general duty purposes. Order at 7, 15, 21, 27-28, 41, 44. Because Wal-Mart could not anticipate and had no control over the actions of these third-party customers (or the police), the general duty clause cannot be stretched to cover the purported potential for harm in the 2008 Blitz-Day sale.

The Commission should proceed with tremendous caution to the extent that it would extend the general duty clause to hold employers liable for the social behavior of third parties. While employers may have theoretical knowledge that third parties are capable of posing a hazard to their employees, human beings do not act with the same level of predictability as the processes and materials traditionally covered by the Act. Thus, even if the Secretary had introduced relevant evidence that certain customers had previously committed acts of violence or that certain crowds had become unruly and injured employees in the past—and she decidedly did not—that would say little about what other customers or other crowds might do in the future. The ALJ's opinion makes no allowance for the overriding element of human decision making on this record and, in doing so, imposes the type of strict liability forbidden by the Act. *Nat'l Realty*, 489 F.2d at 1265–66 ("Congress quite clearly did not intend the general duty clause to impose

strict liability."). For this reason, the ALJ's decision should be reversed and the Secretary's novel citation vacated.

(c) The Secretary And The ALJ's Open-Ended Definition Of The Alleged Hazard Fails To Give Wal-Mart And Other Retailers Notice Of The Conditions Or Practices They Must Prevent.

The purported purpose of the Secretary's citation in this case is to protect the Store's employees from so-called crowd crush. Order at 2. Because "crowd crush" is a social phenomenon rather than a "condition or practice" of the workplace over which employers exercise control, *Pelron*, 1986 WL 53616, at *3, however, the Secretary and the ALJ are forced to characterize the hazard at issue as the phenomenon's cause: large crowds of consumers. Order at 50 ("the hazard in this case was the congregation of a large crowd of customers who were highly motivated"). Thus, according to the ALJ, the hazard that Wal-Mart was supposed to identify and abate involved (1) a congregation of a large crowd of customers (2) motivated to enter the store and shop (3) for one or more limited items (4) that were on sale. Order at 50. As explained, on its face, this definition of the alleged hazard encompasses the vast majority of retail sales in the United States. Yet, it is clear that neither the Secretary nor the ALJ intended to characterize all retail crowds as preventable hazards under the general duty clause, because most crowds of shoppers do not pose a "tangible and appreciable risk" to employees. *See Sec'y of Labor v. Beverly Enters., Inc.*, Nos. 91-3144 et. al, 2000 WL 34012177, at *13 (Rev. Comm. Oct. 27, 2000). It is therefore unclear from the ALJ's opinion precisely what preventable hazard the Act required Wal-Mart to abate.

The ALJ's failure to clearly delineate the precise contours of the alleged hazard is problematic because general-duty hazards must be "defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control." *Pelron Corp.*, 1986 WL 53616, at *3.[2] Further, an employer is entitled to fair notice that he may be charged with a violation of the general duty clause: "Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents." *R.L. Sanders Roofing Co. v. OSHRC*, 620 F.2d 97, 100 (5th Cir. 1980). Importantly, these due process concerns apply, not just to the Secretary's promulgation of specific standards, but also to her enforcement of the broadly-worded general duty clause. *Id.*

The notice concerns raised by the ALJ's amorphous definition of the alleged hazard are compounded by the sweeping nature of the citation at issue. While couched as a Wal-Mart-specific issue, the ALJ is forced to concede that her decision has "the

[2] The ALJ correctly notes that some courts have declined to focus on fair notice issues where an employer has actual knowledge. While the Secretary alleges actual knowledge in this case, there is no evidence to support that claim. *See infra* Section B. 2. On a more fundamental level, the issue of fair notice is also relevant because, unlike the typical actual notice case, the ALJ recognizes that her decision and the Secretary's citation "have a significant impact upon the retail industry throughout the country." Order at 13. Thus, the Secretary's citation and the ALJ's decision sweep far broader than the typical employer-specific circumstances that are the subject of the vast majority of actual notice cases. *See Ramsey Winch*, 555 F.3d at 1205 (holding that the general duty clause "was not meant to 'be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under *special circumstances* for which no standard has yet been adopted.'") (quoting S. Rep. No. 91-1282, at 5186 (1970) (emphasis added)). Under these circumstances, the Commission should review the ALJ's decision with a particular sensitivity to these notice issues.

potential to have a significant impact upon the retail industry throughout the country." Order 13. The ALJ's apprehensions about the potentially broad impact of her decision are well founded. Many, if not most, retailers have blitz-day or similarly advertised sales events and thus, under the logic of the ALJ's decision, most retailers have "actual notice" that consumer crowds have the capacity to congregate in a "motivated", thus—under the ALJ's view, potentially hazardous manner.

But while arguably notifying the retail industry in broad strokes of the newly minted hazards associated with consumer crowds, the ALJ's sweeping and generic definition of the alleged hazard leaves fundamental questions unanswered. With little help from the decision or the Secretary, Wal-Mart and other retail employers that wish to fulfill their general duty obligations will now have to decide:

- How many customers must congregate for a sale before a retailer has a general duty to implement crowd control measures?
- When does a crowd become too large to allow through the front door of a retail establishment?
- How many customers must a business expect before it has an obligation to remain open to avoid crowd congregation?
- How limited do supplies of a product have to be to create a hazard?
- How low do prices have to be compared to similarly situated stores before a retailer can expect a "hazardous" crowd?
- What if a discount retailer consistently offers lower prices than its competitors? Must the discount retailer implement crowd control measures on an ongoing basis for fear that customers will become competitive?
- Is it sufficient for a retailer that expects a large crowd to secure a police presence, or must the retailer do more, such as hire private security personnel?

- What characteristics should an employer look for in a crowd to determine whether it has the capacity for "crowd crush"?

And the list of unanswerable questions raised by the ALJ could go on virtually endlessly. In short, those above are merely a small sampling of the questions that remain unanswered under the ALJ's novel and overly inclusive definition of the alleged hazard. Indeed, both the Secretary and the ALJ fail to separate in any meaningful way the alleged hazards and, in particular, the 2008 Blitz-Day events, from the normal activities of retail establishments and, as a consequence, fail to give Wal-Mart and similarly situated retailers notice regarding the conditions they must abate. Because Wal-Mart "could not have been sufficiently apprised of [its] potential liability under the general duty clause" for failing to prevent large crowds from competing for a limited number of sale priced items, the citation must be vacated. *Sanders*, 620 F.2d at 100.

B. THE SECRETARY FAILED TO PROVE THAT WAL-MART RECOGNIZED THE HAZARD.

To constitute a recognized hazard, "the dangerous potential of a condition or activity must be actually known either to the particular employer or generally in the industry." *Usery v. Marquette Cement Mgf. Co.*, 568 F.2d 902, 910 (2nd Cir. 1977). Here, the Secretary concedes that the retail industry does not recognize any hazards posed by crowds of shoppers, Order at 46, and the ALJ's finding that Wal-Mart had "obvious and glaring" notice of the hazard based on prior Blitz-Day events is implausible on this record. The ALJ, moreover, failed to reconcile her finding of actual knowledge with the traditional scope of the general duty clause, which does not extend an employer's safety obligations to the unpredictable social behavior of third parties. And, in all events, even

if Wal-Mart recognized the alleged hazard posed by its customers—which it did not—the Secretary failed to prove that the Store's existing safety precautions were inadequate under the standards of any relevant industry.

1. The Secretary's Concession Regarding The Lack Of Industry Recognition Is Significant.

The Secretary concedes that the retail industry does not recognize crowds of shoppers as a hazard. Indeed, 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. The Secretary's own expert, moreover, concedes that he has never seen a crowd control plan for a retail business. Order at 12. And 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 provisions requiring the use of crowd managers. Tr. 722–25; *see also* Gov't Exs. 22–23, at § 13.7.6. As Wal-Mart notes in its opening brief, Opening Br. at 26-28, the Secretary's concession is significant because, while framed as an actual knowledge case, the alleged hazard here—large crowds of shoppers—exists in virtually every retail establishment across the country. Thus, unlike the typical actual knowledge case, *see* Opening Br. at 27 (collecting cases), the Secretary is not alleging that Wal-Mart had insider knowledge of a hazard peculiar to its workplace. *See Ramsey Winch*, 555 F.3d at 1205 (holding that the general duty clause "was not meant to 'be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working *under special circumstances* for which no standard has yet been adopted.'")

(quoting S. Rep. No. 91-1282, at 5186 (1970) (emphasis added)). Rather, the Secretary contends that Wal-Mart—unlike thousands of other retail establishments across the country—was somehow uniquely positioned to recognize the previously unknown "fact" that the peaceful crowds of shoppers that routinely frequent retail establishments are likely to kill or seriously injure employees. That is a remarkable proposition in and of itself, but in all events one that certainly finds no support in this record.

2. Wal-Mart Lacked Actual Knowledge Of The Alleged Hazard.

(a) Past Blitz-Day Events Did Not Give Wal-Mart Actual Knowledge Of The Alleged Hazard.

Having conceded—as she must—that the retail industry does not recognize consumers crowds as a hazard, the Secretary is forced to retreat to the indefensible position that the Store's previous Blitz-Day events provided the Store with actual knowledge of the hazards purportedly posed by crowds. To carry her burden on this allegation, the Secretary must prove that "the dangerous potential" of retail crowds was "actually [ ] known" by Wal-Mart. *Usery*, 568 F.2d at 910. The Secretary does not come close to satisfying this evidentiary burden.

As an initial matter, in an attempt to factually support the Secretary's allegations of actual notice regarding the purported hazard in 2008, the ALJ counterintuitively focuses the vast majority of her analysis on the 2008 events themselves. Thus, the ALJ notes that the 2008 crowd "was out of control," that employees were "afraid to open the doors," and that police "assistance" was requested. Order 48-49. According to the ALJ, these events put Wal-Mart on "notice that employees stationed in the vestibule to open

the doors and assist customers would be exposed to injury if the doors were opened." Order at 48-49. That is perhaps true, but irrelevant. Everyone has notice of an event once they witness it. But the question for general duty clause purposes is whether Wal-Mart had actual notice of a hazard "over which [ ] [it] [could] reasonably be expected to exercise control." *Pelron*, 1986 WL 53616, at *3. Nothing in the record suggests that Wal-Mart could have formulated and implemented "better" crowd control measures instantaneously during the course of Blitz Day 2008, and the ALJ's implicit suggestion that Store manager Steve Sooknanan should have just left the doors closed is untenable: Wal-Mart had no obligation "to free its workplace of inherent risks that are incident to its normal operation," *Inland Steel Co.*, 1986 WL 53521, at *3, and crowds of customers are an inseparable component of retail transactions. Nor is it clear on this record that leaving the doors shut would have thwarted the alleged danger as the crowd appeared poised to enter the Store one way or the other—either by Wal-Mart opening the doors or the crowd "opening" them for Wal-Mart . And the events that took place after Wal-Mart opened the doors—vandalism, hoarding of products, and a relentless push of customers forward—suggest that the crowd would have done just that. Indeed, the pressure on the doors from the crowd was so great that Store manager Steve Sooknanan testified that "if I didn't open the building . . . the glass was going to come down and cause serious damage to people." Order at 40.

The Secretary fares no better on those events that are actually relevant. The ALJ notes that prior Blitz-Day events involved "large crowds," pushing, and unhinged doors,

Order at 47-48, but none of this conveys actual notice of the risk of crowd crush leading to asphyxiation or being trampled. *See* Order at 2 (Secretary's citation). Unhinged doors are undesirable but dangerous only in the rarest of circumstances, pushing is impolite but generally harmless, and large crowds congregate in retail establishments (and elsewhere) on a daily basis without incident. The ALJ also notes that several customers fell, but it is undisputed that none of these incidents threatened the type of serious injury or death that would have alerted Wal-Mart to the purported hazard. *See infra* Section C. I. Finally, the ALJ notes that Blitz Day 2007 involved shattered glass panels. But the glass led to no more than a paper cut. Tr. 924, 926. Further, the record demonstrates that the glass shattered not as a result of crowd crush, but due to a rogue customer that decided to throw his boot through the window. *Id.*

Nor are Wal-Mart's preexisting safety measures evidence that it recognized the Secretary's alleged hazard. The mere fact that Wal-Mart enacted safety measures does not demonstrate that it was aware of a hazard within the meaning of the general duty clause—that is, one capable of causing serious injury or death—and, regardless, knowledge of a hazard "may not be implied from voluntary safety efforts standing alone." *Owens-Corning Fiberglass Corp. v. Donovan*, 659 F.2d 1285, 1288 (5th Cir. 1981).

The ALJ's conclusion that Wal-Mart should have recognized the alleged hazard finds no support in the record, is grounded in hindsight (and most likely a death that the

ALJ herself admits is irrelevant to this case and nonetheless occurred after the fact for recognition purposes), and should be rejected by the Commission.

(b) The Secretary Failed To Carry The Heightened Burden Necessary To Prove That Wal-Mart Recognized The Allegedly Hazardous Actions Of Third Parties.

The Secretary and the ALJ's attempts to impose actual knowledge on Wal-Mart regarding "the dangerous potential" of crowds of shoppers also fails because any duty Wal-Mart had to anticipate or prevent the deliberate actions of third parties was extremely limited and required the Secretary to carry a heightened burden. To be sure, the great weight of authority holds that third-party conduct is simply beyond the purview of the Act and the general duty clause. *See* Section A.1.B. But even where courts have entertained the possibility of extending the general duty clause to third-party conduct—and such cases are indeed few—they have recognized that the distinctions between social behavior and the traditional subjects of the Act mandate a heightened standard to find that an employer "recognized" the hazardous potential of third parties.

Thus, for example, Judge Spies has held that an apartment complex did not recognize the threat of violent attacks on staff by residents, even though "[s]taff members testified that they were often subjected to threats or belligerent conduct and, on a few occasions, to physical attack." *Megawest Fin.*, 1995 WL 383233, at *2, 9. According to the court, "a high standard of proof must be met to show that [an] employer itself recognized the hazard of workplace violence." *Id.* at *9. While the court did not elaborate on the precise contours of this heightened standard, it did note that "[i]t is not

enough that an employee may fear that he or she is subject to violent attacks, even if that fear is communicated to the employer, and even if the employee is one whose knowledge can be imputed to the employer." *Id.* Nor, according to the court, "is it sufficient that there has been a previous injury from a violent incident." *Id.*

The principles espoused by Judge Spies apply equally here, where the Secretary attempts to hold Wal-Mart liable for failing to recognize the alleged hazards that its customers created for employees. Because the Secretary failed to establish that Wal-Mart recognized this alleged hazard under the traditional "recognition" standard—let alone the applicable heightened standard of *Megawest*—the Commission should vacate the citation.

3. In All Events, The Secretary Failed To Prove That Wal-Mart's Existing Safety Measures Were Inadequate.

Even if Wal-Mart recognized the purported hazard, the citation must still be vacated because the Secretary failed to establish that Wal-Mart's existing safety measures were inadequate to address the potential for crowd crush. Where, as here, "evidence of the employer's [purported] actual knowledge is relied on as proof that a hazard is 'recognized,' under the general duty provision of the Act, the Secretary has the burden of demonstrating by substantial evidence that the employer's safety precautions were unacceptable in his industry, or a relevant industry." *Magma Copper Co. v. Marshall*, 608 F.2d 373, 377 (9th Cir. 1979); *Sec'y of Labor v. Copperweld Steel Co.*, No. 80-7330, 1981 WL 19147 (Rev. Comm. Sept. 21, 1981) (same). The record is devoid of proof that Wal-Mart's existing safety measures were unacceptable in the retail industry or any other relevant industry.

Based on its experiences with prior Blitz-Day sales, Wal-Mart implemented significant safety measures calculated to address the very matters raised by the Secretary in her citation. At the corporate level, for example, Wal-Mart trained new employees in safe practices, including prevention of slip-and-fall accidents, Gov't Ex. 148 at 220-22; placed the Wal-Mart Emergency Procedures Manual in multiple locations in individual stores, Tr. 986-87; provided detailed instructions on addressing emergencies, Resp. Ex. 30 at 11; populated the company intranet with additional safety materials, Resp. Exs. 136-138; and began distributing Blitz-Day-specific instructional materials several weeks before the event, Gov't Ex. 148 at 154-66.

At the Store, employees were directed to walk the line on Blitz-Day and speak to customers; instruct customers to enter the store in an orderly fashion; answer customer questions, ensure customers that the Store had sufficient products, and provide customers with the location of products; stand away from the crowd as it entered the Store; monitor the Store and its entrance to prevent and clean up slip, trip, and fall hazards; contact the police before Blitz Day to confirm their presence; and order barricades and place them forty feet in front of the entrance to create a buffer zone. Tr. 998-1000.

The Secretary failed to prove that these safety measures were inadequate under any standard. Indeed, not only did the Secretary fail to prove that Wal-Mart's existing safety measures were unacceptable under retail or other relevant industry standards, the Secretary did not even establish the content of those standards. Although the Secretary's expert witness, Paul Wertheimer, was supposed to testify regarding the alleged

ineffectiveness of Wal-Mart's Blitz-Day safety measures, and the purported additional measures that Wal-Mart could have taken to reduce the alleged hazard, the ALJ correctly struck his testimony on *Daubert* grounds, finding his somewhat bizarre opinions[3] unsupported by either peer-reviewed publications, the knowledge of other experts, or scientific testing. Order at 7, 13. The ALJ's ruling is well supported on this record. And even Mr. Wertheimer would have testified that "objective crowd safety standards do not exist for the retail industry." Order at 12. He also would have testified that no crowd management precautions are necessary for events with fewer than 2,000 attendees. Tr. 530-31. Yet, Wal-Mart expected only 900 customers for Blitz Day 2008, and even Mr. Wertheimer opined that Wal-Mart should have expected no more than 1400. Tr. 531. On this record, then, the Secretary simply cannot carry her burden to establish that Wal-Mart's "safety precautions were unacceptable in [its] industry, or a relevant industry." *Magma Copper*, 608 F.2d at 377.[4]

Only in *response* to the events of Blitz Day 2008 did the Secretary, for the first time in OSHA's history, issue a fact sheet containing "Crowd Management Safety Guidelines for Retailers."[5] While those guidelines are entirely irrelevant to Wal-Mart's obligations in this case—indeed, they were issued after the fact—a close examination of

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[3] *See* Opening Brief at 35, recounting the expert's suggestions that Wal-Mart control Blitz-Day crowds through a combination of racial profiling, flavored coffee, and clown costumes.

[4] Of course, the Secretary also had the option of proving that the retail industry standards regarding crowd control (or lack thereof) were impermissibly low. *Magma Copper*, 608 F.2d at 376 n.2. But the Secretary offered no admissible expert testimony on this issue either.

[5] http://www.osha.gov/OshDoc/data_General_Facts/Crowd_Control.htmlm, last visited 6/29/2011.

the suggested guidelines reveals that Wal-Mart's 2008 safety measures actually satisfy most of OSHA's suggestions. OSHA suggests that where large crowds are expected, retailers should have police officers on site; Wal-Mart did everything in its power to secure a police presence. Tr. 998-1000. OSHA suggests that the retailer create a detailed staffing plan; Wal-Mart specifically assigned employees to the vestibule to assist customers. Order at 38. OSHA suggests that retailers ensure that workers are properly trained; Wal-Mart trained new employees in safe practices, Gov't Ex. 148 at 220-22, and began distributing Blitz-Day-specific instructional materials several weeks before the event, Gov't Ex. 148 at 154-66. OSHA suggests that retailers designate a worker to contact local emergency responders; the Store manager did so. Order at 39. OSHA suggests that retailers use signage to inform customers where major items are; Wal-Mart's employees were instructed to convey the location of products to customers. Tr. 998-1000. OSHA suggests the use of barricades; Wal-Mart used barricades. *Id.* OSHA suggests that the crowd not be allowed to line up right at the door; Wal-Mart placed the barricade forty feet away from the Store entrance. Order at 39. OSHA suggests that workers should be designated to explain to customers the retailer's entrance procedures; Wal-Mart employees instructed customers on how to properly enter the Store. Tr. 998-1000. OSHA suggests that outside personnel have a way to communicate with those in the store; Wal-Mart used walkie-talkies. Order at 28. OSHA suggests that retailers make sure that employees are aware of the door entrance opening; Wal-Mart used a countdown before the door was opened. Order at 35. OSHA suggests that retailers use security guards; Wal-Mart employed two. Order at 6.

Thus, not only did the Secretary fail to prove the inadequacy of Wal-Mart's safety measures, the record reveals that those safety measures prophetically encompassed many of the guidelines that OSHA issued in response to this very incident. Simply put, Wal-Mart should not be penalized for leading the industry—and the Secretary—on the very safety issues for which it was cited.

C. LARGE CROWDS OF SHOPPERS ARE NOT LIKELY TO CAUSE SERIOUS INJURY OR DEATH.

1. The Secretary Failed To Proffer Evidence That Accidents Arising From Large Crowds Are Likely To Cause Serious Injury Or Death.

Even if large crowds are "hazards" within the meaning of the general duty clause, and Wal-Mart actually recognized the existence of this hazard, the Secretary still failed to prove that death or serious physical harm are the likely results of accidents caused by crowds at the Store. The "death or serious physical harm," 29 U.S.C. § 654(a)(1), prong of the general duty clause focuses on the likely results of accidents arising from hazards, not on the likelihood that a hazard will lead to an accident in the first instance. The prong thus requires the Secretary to establish by a preponderance of the evidence that an employee is "likely" to die or suffer serious physical injury if the alleged hazard causes an accident. *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1164 (3rd Cir. 1980). Here, the Secretary offered no evidence, let alone substantial evidence, that the types of accidents caused by the Blitz-Day crowds at the Store were likely to kill or seriously injure Wall-Mart employees. *See Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30 (7th Cir. 1976) (concluding that the Commission's factual findings should be supported by substantial evidence). In fact, analyzed under the appropriate de novo standard of review,

see Sec'y of Labor v. Superior Rigging & Erecting Co., No. 96-0126, 2000 WL 365285, at *5 (Rev. Comm. April 5, 2000), the record evidence supports the opposite conclusion: although there were incidents during the Blitz Day sales at the Store between 2005 and 2008, few if any resulted in death or the serious injury of a Wal-Mart employee.

For example, employee Dennis Fitch testified that:

- he was pushed to the ground by the 2008 Blitz Day crowd, felt pain, and had trouble breathing;
- during this period, Fitch saw customers and other employees knocked to the ground;
- after recovering from his initial fall, Fitch helped "ten to 20 people who had fallen get back on their feet";
- at this time, Fitch also helped "one or two" employees who had fallen.

Order at 14-15. Yet, despite witnessing what likely amounted to twenty separate accidents, the record suggests that the vast majority of these accidents resulted in no injury or only negligible injuries.

Similarly, employee Justin Rice testified that:

- during the Store's 2007 Blitz-Day event, he was struck by glass and suffered a "paper cut";
- he also witnessed "many people" fall in the vestibule;
- during the 2008 event, Rice was pushed against the vending machines in the vestibule by the crowd;
- Rice also saw customers falling to the floor of the vestibule. Order at 15-17; Tr. 167.

Nonetheless, like employee Fitch, the record suggests that the vast majority of accidents identified by Rice resulted in no injury or only negligible injuries.

Additionally, during the 2008 event, employee Jaime Thompson saw several customers on the ground, Order at 22; during the 2007 and 2008 events, employee Alton Calhoun saw several customers fall to the floor of the vestibule, Order at 23; and during the 2008 event, employee Bibi Azeem "helped 20 to 30 people who had fallen." Order at 25. Yet, none of these employees identified a single serious injury or death attributable to these myriad accidents. Indeed, the only clear evidence of death or serious physical injury on this record is the death of employee Jdimytai Damour. While tragic, the ALJ acknowledged in her decision that "no evidence" links Damour's death to the alleged hazard, Order at 49-50 n.29, and the Secretary concedes that the death is irrelevant to her citation. Tr. 21, 813. And regardless, far from demonstrating that death or serious physical injury are the "likely" results of Blitz-Day accidents, the freakish and unforeseen nature of Damour's death operates only to confirm that the vast majority of Blitz-Day accidents threaten only the types of "minor injuries" that are exempt from the general duty clause's coverage. *Sec'y of Labor v. Tuscan/Lehigh Dairies, Inc.*, No. 08-0637, 2009 WL 3030764, at *14 (Rev. Comm. July 27, 2009).

While "[i]t is not necessary to show that an accident" resulting in death or serious physical injury actually occurred to establish a violation of the general duty clause, the Secretary nonetheless bore the burden of establishing a link between the accidents typically associated with the alleged hazard and the likelihood of death or serious bodily

injury. *Babcock*, 622 F.2d at 1164. Generally, that link is established through expert testimony, *see Taylor v. TECO Barge Line, Inc.*, 642 F. Supp. 2d 689, 693 (W.D. Ky. 2009), or, at the very minimum, from a fact witness familiar with the nature of the alleged hazard. But here the ALJ struck the Secretary's expert witness on *Daubert* grounds. Order at 13. And the Secretary's most knowledgeable fact witness—Area Director Ciuffo—conceded that he was not aware of "any other instance in the history of the world" where there had been "a fatality or a serious injury to an employee" under circumstances that resembled Blitz Day 2008. Tr. 709–10.

Because "the Secretary has failed to prove that there is a definite casual link between" the accidents caused by the Store's Blitz-Day crowds "and the fact or likelihood of death or serious injury" to a Wal-Mart employee, the citation must be vacated. *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14 (holding that "[t]he requirement of 'death or serious physical harm' exempts from the general duty clause's coverage hazards that threaten only minor injuries"). Indeed, the ALJ's conclusion that the "Secretary [ ] has shown the [death or serious physical harm] element of the analysis by a preponderance of the evidence," Order at 49, cannot stand on a record that is both devoid of expert testimony and contains evidence of literally dozens of accidents yet not a single death or clear-cut serious physical injury to a Wal-Mart employee. *Id.* (holding that alleged hazard was not causing or likely to cause death or serious bodily injury because "[t]he creditable evidence . . . shows that drivers struck by load bars when they

are under pressure sustained either no injuries or only small, minor bruises that did not require any medical treatment").

2. The ALJ Improperly Substituted Her Own Speculation For Evidence Of A Definite Casual Link Between The Hazard And The Likelihood Of Death Or Serious Bodily Injury.

In her zeal to protect Wal-Mart employees from a non-existent hazard, the ALJ—in the absence of supporting evidence—simply "inferred" that large crowds are likely to lead to accidents that cause serious injury or death. Indeed, the ALJ's half page "analysis" of the serious injury or death prong of the general duty clause is stunning in that it does not cite actual evidence regarding the likely results of accidents caused by crowds of shoppers. *See* Order at 49. As the D.C. Circuit has held, "[h]aving the burden of proof, the Secretary must be charged with [ ] evidentiary deficiencies." *Nat'l Realty*, 489 F.2d at 1267. By substituting her own uncommon sense for actual evidence, the ALJ improperly relieved the Secretary of her burden to prove each essential element of the purported violation by a preponderance of the evidence. *See Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 540 (9th Cir. 1978). This error was particularly egregious in the context of the general duty clause, because the boundless nature of that clause demands specific and detailed evidence to support a violation. *Brennan v. OSHRC*, 502 F.2d 946, 952-53 (3d Cir. 1974) ("Since the general duty clause is so broad, the evidence to support a charge of violation should be specific and detailed.").

Neither is there any support for the proposition that the ALJ or this Commission can carry the Secretary's evidentiary burden through sheer speculation about the probable

results of an alleged hazard. Indeed, the Commission is not permitted to "cure" the Secretary's evidentiary "deficiencies sua sponte by speculating" about the injuries that crowds might inflict. *Nat'l Realty*, 489 F.2d at 1267. Rather, the "Commission's expertise must operate upon, not seek to replace, record evidence." *Id*; *see also Brennan*, 502 F.2d at 952-53 (noting that speculation made without supporting testimony should result in a holding that the Secretary simply failed to carry her burden). To the extent "the Commission[ ] [or the ALJ] attempt[s] to serve as [an] expert witness[ ] for the Secretary . . . [t]his is not their role." *Nat'l Realty*, 489 F.2d at 1267 n.40.

Wholly apart from the Secretary's failure to proffer any evidence linking the alleged hazard to death or serious bodily injury, the ALJ's unauthorized exercise in do-it-yourself expert analysis fails on its own merits. According to the ALJ, "[i]t is reasonable to infer that falling and being trampled on by a large and frenzied crowd, especially in the small space of the vestibule, would likely result in serious injury or death." Order at 49. Whatever merit to this "inference," it in undisputed that "trampling" is not the sole or even the most common "accident" associated with Blitz-Day Crowds. Indeed, the record here reveals that most Blitz-Day accidents did not involve customers or employees being "trampled," and even those that did were not *likely* to lead to serious injury or death. The ALJ's decision to focus her speculation exclusively on Blitz-Day accidents that involve trampling is like analyzing the likely impact of car accidents by focusing solely on those that send passengers flying through the windshield. While the most extreme accidents associated with any alleged hazard can lead to death or serious bodily injury (of course,

on this record we do not know what physical harm, if any, even the most extreme instances of crowd crush can cause as the Secretary proved nothing), the general duty clause does not require employers to guard against "freakish and unforeseeable" injuries. *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14. Rather, the clause asks, if an accident were to occur, would it *likely* result in death or serious bodily injury? *Id.* Because the Secretary failed to offer evidence that the answer to this question is "yes," the citation must be vacated.

D. THE SECRETARY FAILED TO PROVE THAT WAL-MART'S 2009 BLITZ-DAY SAFETY MEASURES WERE A FEASIBLE AND EFFECTIVE MEANS OF ABATING THE PURPORTED 2008 BLITZ-DAY HAZARD.

Even if Wal-Mart recognized the alleged hazard, the Secretary had the burden to demonstrate and describe the feasibility, practicality, and economic viability of additional safety measures that Wal-Mart could have employed to "eliminate[ ]" or "materially reduce[ ]" the hazard. *Nat'l Realty*, 489 F.2d at 1266-67; *Donovan v. Royal Logging Co.*, 645 F.2d 822, 830 (9th Cir. 1981). While the Secretary does not have to propose safety standards that have gained wide-spread industry acceptance, prevailing industry standards must be considered and are relevant to determining feasibility, just as they are relevant to the deciding the central question of whether a reasonable person would have utilized the precautions if faced with the alleged hazard. *Voegele Co. v. OSHRC*, 625 F.2d 1075, 1080 (3d Cir. 1980).

The record contains no evidence regarding the feasibility, practicality, or economic viability of the crowd management techniques alluded to in the Secretary's

citation. Indeed, because the ALJ properly struck the Secretary's expert witness, the ALJ was forced to rely exclusively on Wal-Mart's 2009 safety precautions as purported proof of feasibility and utility. Yet, there is no evidence that a reasonable retailer in the industry would have applied Wal-Mart's newly formed 2009 techniques to the 2008 event; nor is there evidence that these techniques would have materially reduced or eliminated the alleged hazards associated with the 2008 event. Accordingly, the Secretary's citation must be vacated.

1. The Secretary Failed To Prove That Wal-Mart's 2009 Precautions Would Have Been Employed By A Safety Expert Familiar With The Retail Industry.

Despite bearing the affirmative burden, the Secretary offered no evidence "that a reasonably prudent employer familiar with the [ ] [ ] [retail] industry would have required its workers to" employ Wal-Mart's 2009 precautions during the 2008 event. *L.R. Willson and Sons, Inc. v. OSHRC*, 698 F.2d 507, 510 (D.C. Cir. 1983). Indeed, it appears that the ALJ simply credited Wal-Mart's implementation of new precautions following Blitz Day 2008 as evidence that a reasonably prudent retailer would have adopted those same techniques prior to 2008. This was error. The record refutes any notion that Wal-Mart was acting as a reasonably prudent employer with respect to potential safety issues when it adopted the 2009 precautions. Indeed, Wal-Mart enacted the 2009 safety measures, not as a reasonably prudent employer, but as part of an agreement with the Nassau County District Attorney's Office arising from the 2008 events. Order at 51 (noting that Wal-Mart adopted the abatement measures pursuant to its settlement agreement with Nassau County).

The Secretary's failure to carry her burden under the reasonably prudent employer standard should come as no surprise. Even the Secretary's expert witness would have testified that he had never seen a crowd-management plan for a retail event. Order 12. Under these circumstances, it is highly unlikely that any qualified witness would have been able to confirm the prudence of Wal-Mart's Blitz Day 2009 techniques as applied to the retail industry in 2008. *L.R. Willson*, 698 F.2d at 513. (noting that the Secretary must satisfy the reasonably prudent employer standard with "evidence *from persons qualified to express such opinions*.") (emphasis in original)).

Because the Secretary failed to prove that a "reasonably prudent employer familiar with the circumstances of the [retail] industry would have protected against the hazard" using Wal-Mart's 2009 precautions, the citation must be vacated. *Id*; *see Bristol Steel*, 601 F.2d at 723 ("It may well be that [the employer] failed to meet its general duty under the Act, but the Secretary neglected to present evidence demonstrating in what manner the company's conduct fell short of the statutory standard . . . . Thus the burden of proof was not carried, and substantial evidence of a violation is absent.").

2. The Secretary Failed To Prove That Wal-Mart's 2009 Precautions Would Have Materially Reduced The Alleged Hazard In 2008.

The Secretary also failed to prove that Wal-Mart's 2009 precautions would have materially reduced or eliminated the alleged hazard. The ALJ—relying on the logical fallacy of "after this, therefore because of this"—concluded that the absence of any major incidents at the Store during Blitz Day 2009 constituted conclusive proof that Wal-Mart's enhanced Blitz-Day safety measures were an effective means of materially reducing the

purported hazard. This flawed conclusion cannot stand where the ALJ made no effort to eliminate other potential differences between 2008 and 2009 that may have resulted in the 2009 crowds' relative calm. *See* Opening Br. at 38-40. Nor is there any evidence that the particularly unruly crowd faced by Wal-Mart in 2008 would have been subdued merely by leaving the Store's doors open or handing out tickets for products, as Wal-Mart did in 2009. Indeed, assuming the crowd is large enough, crowd crush can occur just as easily in a store as it can in the store's vestibule. Similarly, an unruly crowd can trample crowd members waiting in line for tickets to purchase televisions or computers just as easily as waiting in line for the real thing.

Unlike measures to fix a broken conveyor belt or reduce the risks of noise exposure, the effectiveness of precautions aimed at the deliberative actions of third parties cannot be evaluated on a general level. Human behavior is affected by countless variables. Here, for example, the record suggests that much of the crowds' relative calm in 2009 was due to the presence of the police and news media. Tr. 569, 815–17. Because the ALJ failed to account for these and other diverse variables, her conclusion that Wal-Mart's 2009 precautions materially reduced the alleged hazard is fatally flawed, and the Commission should reject it. *See Nat'l Realty*, 489 F.2d at 1268 ("Only by requiring the Secretary, at the hearing, to formulate and defend his theory of what a cited defendant should have done can the Commission and the courts assure evenhanded enforcement of the general duty clause.").

E. ADJUDICATION IS INAPPROPRIATE TO EFFECT THE SWEEPING POLICY CHANGE EMBODIED IN THE SECRETARY'S CITATION.

Courts have long admonished the Secretary that "specific standards are intended to be the primary method of achieving the policies of the Act" and that "they should be used instead of the general duty clause whenever possible." *Usery*, 568 F.2d at 905, n.5. Indeed, the limited purpose of the general duty clause is to address "those interstices necessarily remaining after the promulgation of specific safety standards." *Bristol Steel*, 601 F.2d at 721. Thus, the general duty clause—properly applied with judicious discretion—serves the limited purpose of insuring "the protection of employees who are working under *special circumstances*" that are inappropriate for specific standards. *Ramsey Winch*, 555 F.3d at 1205 (quoting S. Rep. No. 91-1282, at 5186 (1970) (emphasis added).

The Secretary's citation uproots these established principles in alarming fashion. Prior to the Secretary's citation, OSHA had no standards or even guidelines discussing what the Secretary now terms "crowd management" in the retail context or in any other context. To the contrary, OSHA had exhibited an "express restraint in policing social behavior via the general duty clause." *Ramsey Winch*, 555 F.3d at 1206. Yet, in this enforcement proceeding, the Secretary—for the first time, and in the absence of any prior regulatory, informational, or industry guidance—contends that Wal-Mart had a general duty to apply "crowd management" techniques to the social behavior of crowds of customers. This is so even though the Secretary's own expert knew of no such techniques specifically applied to the retail industry. Order 12. And while the Secretary

attempts to downplay the significance of the citation by focusing on Wal-Mart's "unique" past experiences with Blitz Day sales, the ALJ understood well the far-reaching implications of this matter. Thus, even as she affirmed the Secretary's citation, the ALJ recognized that treating crowds as a "hazard" subject to the Act would have an effect, not just on Wal-Mart, but on the entire retail industry. Order at 13.

The Commission should not permit the Secretary to effect this type of sweeping policy change through ad hoc litigation. Informing retailers through case-by-case adjudication that their principal goal—motivating consumers to frequent their establishments and purchase their products—actually presents a potentially life threatening hazard that must be abated under the general duty clause of the Act is a radical change that warrants notice-and-comment rule making. This is especially so where the Secretary has failed even in this case to "specify the particular steps" that the "cited employer should have taken" to abate the alleged hazard. *Nat'l Realty*, 489 F.2d at 1268. The Secretary's back-door approach to rule making is also problematic where she has failed to provide retailers with any clear guidance concerning what characteristics or circumstances transform a typical group of customers into a "hazardous" crowd. *See supra* Section A.1.B.

The Chamber's concerns with the breadth of the ALJ's decision are well founded. Based on the decision and OSHA's subsequent fact sheet, some law firms have already begun advising their retail clients that they have a general duty under the Act to control

their customers.[6] Yet, the Secretary has clearly defined neither the hazard nor the appropriate abatement measures, leaving retailers to guess at both whether they face a "hazardous" crowd and what they are legally required to do about it. The Commission should not permit the Secretary to hold retailers across the country, including the Chamber's members, in this sort of limbo, especially where that limbo could lead to significant fines and legal fees. Although the fine in this case was uncharacteristically low, the Secretary's restraint was likely due to the fact that this case was novel—indeed, the first of its kind. Of course, the fines for general duty violations can be and often are significantly higher. Under the Act, each serious violation carries a potential $7000 fine; willful violations, a $70,000 fine. *See* 29 U.S.C. § 666(a), (b). And it is not uncommon for OSHA to treat as separate violations each employee subjected to the alleged hazard.

For precisely these reasons—the risks associated with a general duty clause violation and the lack of guidance that comes from case-by-case adjudication—ad hoc litigation is not the appropriate method for the Secretary to "establish [new] rules of widespread application" dealing with crowd control. *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981). Because the Secretary's citation uproots the traditional application of the general duty clause and undermines the orderly process of notice-and-comment rule making, the Commission should vacate it.

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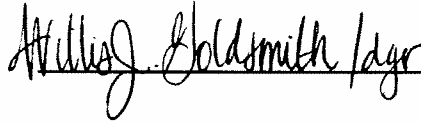
[6] *See* http://www.morganlewis.com/index.cfm/fuseaction/publication.detail/publicationID/5cde27ac-fc58-49c3-98a7-29b4adae7282, last visited July 1, 2011.

CONCLUSION

The Secretary's failure to carry her burden of proof on this record is not surprising. Vastly expanding the traditional scope of the general duty clause to reach an alleged hazard caused by the social behavior of third parties beyond the employer's control is no small task, especially where the Secretary embarks on this bold endeavor without the assistance of admissible expert testimony. If the Secretary still "seeks to encourage a higher standard of safety performance from the [retail] industry than customary industry practices exhibit," she might be able to promulgate "a regulation that specifically addresses [the] hazard [of crowd crush]." *Sanders*, 620 F.2d at 101. But, as this record demonstrates, "adventurous enforcement of the general duty clause" is not the answer. *Nat'l Realty*, 489 F.2d at 1267, n.37. The Commission should reverse the ALJ's decision and vacate the Secretary's citation.

Date: July 15, 2011

Respectfully submitted,



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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

This is to certify that on this 15th day of July 2011, a true and correct copy of the foregoing Brief was served electronically filed and served on the following:

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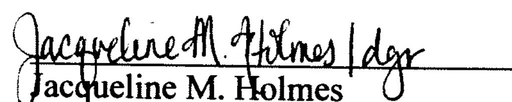

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