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

REPLY BRIEF FOR RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Regulations

Other Authorities

INTRODUCTION

Without any testimony from witnesses who were "competent" to explain OSHA's first ever crowd-hazard citation, the Secretary revisits—and relies primarily upon—evidence that Judge Rooney excluded. From incomplete, hearsay accounts of previous "crowd-related incidents" that were not admitted as evidence, the Secretary concludes that "unmanaged crowds" are inherently dangerous and that Wal-Mart had "actual knowledge" of this "obvious" hazard. She attempts to support the likelihood of serious injury by pointing to Jdimytai Damour's death, even though she previously acknowledged—in an attempt to avoid litigating cause of death—that the death is "irrelevant." And she tries to show that her preferred abatement measures are effective by relying on the testimony of Paul Wertheimer—a witness who suggested racial profiling as an appropriate crowd management technique, and whose recommendations were so unreliable that Judge Rooney was forced to reverse her decision to allow his testimony.

The Secretary goes to such great lengths to rewrite the record because the *actual* record—the one this Commission must review—contains no support for her novel theories. There is no support for viewing retail crowds as inherently dangerous, particularly given the unprecedented nature of the events at issue here. There is no support for finding that Wal-Mart recognized the supposed hazards of retail crowds, particularly given the complete absence of any industry recognition. There is no support for concluding that any injuries caused by retail crowds would be serious, particularly given the Secretary's inability to identify *any* serious crowd-related injuries to employees in the history of retail shopping. And there is no support for believing that the Secretary's abatement methods would be effective and feasible, particularly since the only testimony on this issue (by Mr. Wertheimer) has now been excluded from the record.

The Secretary also fails even to *mention* the most relevant case law. Together, *Megawest Financial, Inc.*, 17 BNA OSHC 1337 No. 93-2874, 1995 WL 383233, and *Ramsey Winch, Inc. v.*

Henry, 555 F.3d 1199 (10th Cir. 2009), establish that unpredictable, anti-social behavior is a matter for police, not employers, to control. Ignoring this principle, the Secretary blames Wal-Mart for the consequences of a crowd's violent behavior—even though the Nassau County Police indisputably broke their commitment to be present when the Store was open.

The Secretary has failed to provide anything more than conjecture to support the imposition of novel and sweeping "crowd management" requirements, which would have "a significant impact upon the retail industry throughout the country." Order 13. The OSH Act requires more—it requires evidence, and there is none. The citation should be vacated.

ARGUMENT

I. The Secretary Failed To Prove That Wal-Mart's Safety Precautions Were Not Reasonably Effective.

The Secretary has failed to demonstrate that Wal-Mart's existing safety precautions were not reasonably effective, which is an essential prerequisite for establishing a violation of the General Duty Clause. *See Postal Serv.*, No. 04-0316, 2006 WL 6463045, at *8 (OSHRC Nov. 20, 2006); *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1266 (D.C. Cir. 1973) ("A hazard consisting of conduct by employees . . . cannot, however, be totally eliminated . . . . Congress intended to require elimination only of preventable hazards."). The Secretary alleges that "*most*" of the precautions that the Store used on Blitz Day 2008 "had proven to be ineffective." Secretary Br. 47 (emphasis added). But this allegation concedes that *some* of Wal-Mart's precautions *had* proved effective. Most importantly, the police had effectively controlled crowds in previous years, *see* Order 5, 37–38; *see also* Tr. 237–38, 271–73, and it is uncontested that they inexplicably broke their commitment to "be there when the store [was] open" on Blitz Day 2008, *see* Gov't Ex. 145, at 188–89, 193–94.

The Store also used a number of precautions that are "effective" by reference to OSHA's current crowd-control guidelines, such as developing a safety plan weeks in advance, using barricades for crowd control, asking customers not to run, and informing customers where specific sales items were located. *Compare* Tr. 1111–13 (outlining the Store's use of these and other reasonable measures in 2008) *with* OSHA Fact Sheet, Crowd Management Safety Guidelines for Retailers, http://www.osha.gov/OshDoc/data_General_Facts/Crowd_Control.html (recommending that retailers use these measures at contemporary Black Friday sales). Indeed, the Secretary does not dispute that Wal-Mart used a *majority* of the abatement measures listed in OSHA's citation. *See* Wal-Mart Br. Part II.D. Since no crowd-hazard citations, OSHA guidelines, industry customs, or consensus standards pre-date the Secretary's citation in this case, there was no way the Store could have intuited the specific additional measures that OSHA now believes were necessary.

The Secretary's assertions that Store managers "had no training" in "how to implement crowd management measures" and should have "consult[ed] someone with crowd-management expertise" are equally misplaced. Secretary Br. 48. The Secretary has provided no testimony or evidence on the kinds or methods of "crowd management training" she alleges to be effective, and in any event Store managers testified that they *did* have training on crowd-management issues. *See* Tr. 86–87, 101, 165, 180, 189, 210, 261–62, 318-19, 883, 895, 901, 923, 982. Moreover, the Secretary can hardly point to a purported lack of training as showing that the Store's abatement measures were inadequate since Paul Wertheimer *admitted* that "crowd management" training was "almost non-existent" in 2008. Tr. 573, 580. And even under OSHA's current crowd-control guidelines, the Store could have "consulted" with *police*—which

it did—instead of "crowd managers." *See* OSHA Fact Sheet (instructing retailers to "have trained security *or* crowd management personnel *or* police officers on site" (emphasis added)).

The extent of the Store's reasonable safety precautions is more fully evident in the significant preparations that the Secretary *fails* to mention. As Wal-Mart outlined in its opening brief, Store managers held meetings "several weeks" in advance of Blitz Day 2008, and they developed an Action Plan based on a detailed review of past experiences and sales trends. Wal-Mart Br. 16–19. Managers also received a commitment from the Nassau County Police Department that the police would "be there when the store's open," Gov't Ex. 145, at 188–89, 193–94, which was significant since the police had effectively controlled crowds on previous Blitz Days, *see* Order 5, 37–38; *see also* Tr. 237–38, 271–73.[1]

The Secretary claims that Store Manager Sooknanan's response to Associate Justin Rice's concerns about the "dangerous scene" in 2007 was "half-hearted." Secretary Br. 36. As an initial matter, Mr. Rice was not concerned that employees might be injured, as the Secretary suggests. The "dangerous scene" he described was that of "a *child* in front of a whole lot of people that are just running into a store." Tr. 125 (emphasis added). In any event, Mr. Sooknanan went above and beyond Mr. Rice's suggested response: Whereas Mr. Rice suggested using "movie ropes" to keep the crowd away from the vestibule doors, *id.* at 135, Mr. Sooknanan secured solid highway barricades, *see* Order 39; Gov't Ex. 34(a).[2]

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[1] The Secretary acknowledges that police performed crowd control in previous years but draws the unfounded and irrelevant distinction that they helped "to maintain order outside the store (but not to ensure orderly crowd entry into the store)." Secretary Br. 4. Of course, it was the failure to "maintain order outside the store" that led to the crowd's failure to enter the store in an "orderly" manner.

[2] The Secretary repeatedly faults Store Manager Sooknanan for using "plastic" barricades. Secretary Br. 47, 52. But there is no evidence that the physical composition of the barricades had any relation to their effectiveness. While Mr. Wertheimer testified that the barricades

The Secretary claims these measures were ineffective because members of the crowd inexplicably jumped the barricade, fought each other in line, and attempted to destroy the Store's property—all while the police were unable or unwilling to intervene. The General Duty Clause does not "impose strict liability," however. *Nat'l Realty*, 489 F.2d at 1265–66. The only conclusion from the record evidence is that Wal-Mart took reasonable steps in anticipation of Blitz Day 2008; those steps do not become unreasonable simply because unruly customers "thwart[ed] an otherwise safe working environment." *Megawest Fin., Inc.*, 17 BNA OSHC 1337, 1995 WL 383233, at *8–9 (No. 93-2879) (ALJ) (noting that human beings are not always "amenable" to employers' control and "[t]he employer has even less control over the behavior of third parties").

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

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

The Secretary has not demonstrated employee exposure to the cited hazard for the simple reason that retail crowds are not—and have never been—a workplace hazard. The Secretary attempts to narrow the scope of the citation to crowds "comparable" to Wal-Mart's Blitz Day crowds, but even if it were clear what sort of crowds are "comparable," there is no evidence that crowds of *any* size are hazardous absent the unprecedented events of Blitz Day 2008. The Secretary also attempts to overcome her lack of evidence by relying on exhibits that, she claims, establish a long history of injuries on prior Blitz Days, but these exhibits are either not part of the record or insufficiently detailed to permit conclusions about the nature of the injuries at issue.

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should have met any number of arbitrary specifications, *see* Tr. 379–80, Judge Rooney excluded his patently unreliable testimony, *see* Order 13–14.

1. The Secretary Did Not Adduce Evidence That Crowds Are A Workplace Hazard.

Judge Rooney believed that the hazard in this case was a "large congregation of shoppers." Order 43. As Wal-Mart explained in its opening brief, there is no support for treating shoppers—even large groups of shoppers—as a hazard. *See* Wal-Mart Br. 20. This is precisely why the Life Safety Code excludes crowds at mercantile establishments from any of the crowd management requirements applicable to entertainment venues. *See* Tr. 722–25; *see also* Gov't Exs. 22–23. Simply put, according to the only consensus body that has examined the issue, not all types of crowds are the same. The Secretary appears to recognize as much, which is why she recasts the hazard as focused on "Blitz Day crowds" that are not "comparable to the day-to-day business operations" of Wal-Mart or other retailers. Secretary Br. 31 & n.14.

The Secretary never explains how large a crowd must be before it is transformed from an inevitable feature of retail stores into a potentially actionable workplace hazard. She acknowledges, in a footnote, Area Director Ciuffo's testimony that "a crowd as small as three people could be hazardous." Secretary Br. 32 n.14. Yet rather than disavow this testimony on grounds of astounding non-credulity, she instead says the testimony "does not suggest OSHA would ever issue a citation for such a small crowd." *Id.*

In other words, instead of clarifying as a matter of law and policy that a three-person "crowd" cannot possibly be subject to the General Duty Clause, the Secretary asserts only that she will exercise restraint in issuing citations. This is cold comfort to retail stores, like Wal-Mart, who need to understand the precise scope of their extraordinary obligations under this citation. A citation must explain how exposure is or was "reasonably predictable" in a specific "zone of danger." *See RGM Constr. Co.*, 17 BNA OSHC 1229, 1995 WL 242609, at *5–6 (No. 91-2107). And it must inform employers, in plain terms, of the means they must take to identify

and abate the hazard—not at some future time, but at the time of its issuance. *See* Wal-Mart Br. 49–55 (collecting cases). The Secretary's resort to prosecutorial discretion in the hands of ten Regional Administrators and more than ninety Area Directors does none of this.[3]

But even assuming that the Secretary was indeed focused on crowds "comparable" to those at Wal-Mart's Blitz Day events—whatever that means—there would still be no basis for viewing those crowds as a hazard. On previous Blitz Days at the Store, there had been only two customer slip-and-fall injuries and a single non-recordable employee injury "akin to a paper cut." Tr. 167, 996–97. No one had come close to being "struck" or "asphyxiated" by an "out-of-control stampede." Order 45. Although, as the Secretary notes, "[t]he relevant inquiry is the risk of injury, not the actual occurrence of prior injuries," Secretary Br. 32, the fact that there is no evidence of serious employee injuries—not only in the Store, but across all of Wal-Mart's 4,200 stores—is compelling evidence that the risk of injury was so minuscule as to preclude any finding of a hazard. *See Tuscan/Lehigh Dairies, Inc.*, 22 BNA OSHC 1870, 2009 WL 3030764, at *14 (No. 08-0637) (ALJ) (rejecting a General Duty Clause citation where the alleged hazardous action had been performed "millions of times . . . without any injury"). The "freakish" events of Blitz Day 2008 cannot "trigger statutory liability" as a matter of law. *Id.*

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[3] The Secretary similarly fails to rehabilitate Judge Rooney's finding that Wal-Mart "generated" the crowd's hazardous behavior through "advertising." Secretary Br. 29. Area Director Ciuffo opined that the Store's advertisement of "Friday only" and "November 28th only" sales was "possibly" hazardous, Tr. 707–08, and that "low prices" could have been "one of the elements" of the hazard, *id.* at 699–701. But the record contains no evidence of a link between advertising and crowd control—and Judge Rooney excluded the testimony of a world-renowned psychiatrist who would have testified that there is no discernible link. *See* Wal-Mart Br. 55–56. To defend Judge Rooney's conclusions, the Secretary suggests that Wal-Mart may use advertising "to generate enthusiasm for its sales" so long as it "appropriately manage[s] the crowds such advertising creates." Secretary Br. 29 n.13. But the Secretary's offhand pabulum not only fails to articulate how advertising exposes employees to danger but also does not identify *when* permissible advertising crosses the line into a workplace hazard. The OSH Act does not permit retailers to be placed at risk of statutory penalties based on this sort of guesswork.

2. The Secretary Impermissibly Attempts To Overcome Her Lack Of Evidence By Invoking Unadmitted And Irrelevant Exhibits.

The Secretary insists, however, that serious incidents were routine on Blitz Days, arguing that Wal-Mart has "admitted notice of over 100 . . . incidents" involving injuries to employees and customers. Secretary Br. 8. Yet the Secretary's purported evidence of exposure consists primarily of files from Wal-Mart's Claims Management Inc. ("CMI") system that Judge Rooney *excluded from the record*. The Secretary cannot properly rely on these excluded exhibits, and the remaining evidence is plainly insufficient to support the Secretary's arguments.

During the hearing, Judge Rooney excluded several CMI exhibits because the Secretary failed to "have a witness come in and testify about [them]" and had, in effect, told the Court to "figure it out." Tr. 947–48. With respect to several other CMI-based exhibits, the Court instructed the Secretary to "go through each document" and tell the Court "what page [and] line" it should review. *Id.* at 1156. The Secretary then created a smaller, highlighted exhibit. The Court stated an "understanding" that this "substituted" for the previous exhibits, and the Secretary responded that she was "prepared to do that." *Id.* at 1165. The chart attached as Exhibit A, which the Secretary distributed at trial, provides a full account of admitted CMI exhibits. All other CMI exhibits—including, for example, Exhibits 124 to 126 and the unlisted portions of Exhibit 127—were rejected by Judge Rooney. *See id.* at 1165, 1193.

Despite this, the Secretary's brief openly cites the CMI claims that Judge Rooney excluded. And it does so extensively. The extent of the Secretary's reliance on excluded material is extraordinary: Eight of the fourteen incidents cited in footnote 4 are from excluded exhibits, *see* Secretary Br. 8 n.4; thirty-nine of the forty-three incidents cited in footnote 8 are from excluded exhibits, *see id.* at 11–12 n.8; and thirteen of the fifteen citations to Exhibit 127 on page 9 refer to excluded pages, *see id.* at 9. Against this backdrop, the Secretary's attempts to

tally prior significant incidents—her contention that Wal-Mart's records document "109 customers' claims" and "thirteen or fourteen" employees' claims, Secretary Br. 8–9—are complete distortions of the record. And her contention that Wal-Mart "admitted notice" of "over 100 such incidents," Secretary Br. 8—simply by producing records that were responsive to the Secretary's broadly worded discovery requests—is risible. The Secretary's failure to build a compelling record could not be more aptly demonstrated than by such desperate reliance on untested speculation about the significance of raw discovery.

Even those portions of CMI files that *were* admitted are insufficient to demonstrate employee exposure. The Secretary is charged with defending a citation that lists the specifically worded hazard of "asphyxiation" or "being struck due to crowd crush, crowd surge, or crowd trampling." Order 2. But since "asphyxiation" is a medical term, the Secretary took that hazard off the table by failing to present any evidence that spoke to its likelihood.[4] Judge Rooney was careful to limit any such evidence in light of her decision to *exclude* the expert testimony of one of the world's foremost forensic pathologists, Dr. Michael Baden, *see* Tr. 813–14, as well as the Secretary's repeated acknowledgement that the cause of Mr. Damour's death was "irrelevant" to her case, *see id.* at 21, 158, 813. Moreover, while Paul Wertheimer offered definitions for the purported phenomena of "crowd crush, crowd surge, and crowd trampling," *see* Tr. 318–19, Judge Rooney excluded his testimony, *see* Order 13–14. No other witness used these terms;

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[4] Lay persons cannot testify (and unexplained videos and claims files cannot show) that employees were exposed to the danger of "asphyxia," which is defined as "impaired or absent exchange of oxygen and carbon dioxide on a ventilary basis" or "combined hypercapnia and hypoxia or anoxia." *See* Marjory Spraycar, *Stedman's Medical Dictionary*, 156 (16th ed. 1995). Dr. Michael M. Baden, whom Judge Rooney excluded, would have testified that "mechanical asphyxia requires many minutes of the continuous uninterrupted prevention of breathing during which time the individual can struggle and call out." Expert Report of Michael Baden (attached as Exhibit B) at 2. The Secretary's only evidence of an asphyxiation hazard was Mr. Damour's originally alleged—but withdrawn—cause of death.

Area Director Ciuffo at first claimed he was "competent" to explain what was necessary to "avoid being cited," *see* Tr. 666, 673, but he later admitted this was untrue, *see id.* at 837.

Without the benefit of any explanatory testimony regarding the hazards at issue, the Secretary purports to bridge the gap by offering *her own summaries* of CMI files and video footage to establish employee exposure. *See*, *e.g.*, Secretary Br. 33–34 (summarizing files with parenthetical notations like "everyone outside was pushing and shoving"). These summaries reflect the Secretary's own legal conclusions, not the views of a competent witness who was available for cross-examination. *See Needham v. White Labs.*, 639 F.2d 394, 403 (7th Cir. 1981); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300–01 (3d Cir. 1961). Although Wal-Mart admitted that the managers' statements in these CMI files were not *known* to be inaccurate, that does not relieve the Secretary of her burden of proof. Unexplained compilations of alleged "crowd-related incidents" cannot demonstrate exposure to the cited hazards, much less show that an "unmanaged crowd" is inherently dangerous.

Moreover, the admitted CMI files consist of incomplete double- and triple-hearsay accounts, often written in shorthand and by unnamed authors. *See* Tr. 1157 (Judge Rooney indicating that CMI files require supportive testimony to explain "the facts surrounding the claim"); *id.* at 943 (Judge Rooney acknowledging that these files contain hearsay accounts). And except for Mr. Wertheimer's videos of the Store's 2009 day-after-Thanksgiving sale (which are encompassed in Gov't Ex. 95) and the videos associated with CMI claims (which are encompassed in Gov't Ex. 128), the video exhibits all show *the same thing*: the Store's opening on Blitz Day 2008. Although the Secretary knew about Wal-Mart's CMI files and videos during the discovery period, she made no effort to procure live witnesses to testify about the underlying incidents at trial. Tr. 943. Thus, the Secretary can hardly claim surprise that Judge Rooney

chose not to rely on these exhibits—nor can the Secretary now rely on them to salvage Judge Rooney's decision. Simply put, Judge Rooney's decision relies exclusively on the Valley Stream experience and not on the rejected, speculative incidents at other Wal-Mart stores.

B. The Secretary Has Not Demonstrated That Wal-Mart Had Actual Recognition Of The Cited Hazard.

The Secretary does not dispute the uncontradicted testimony that the retail industry in 2008 had not recognized any hazards associated with large crowds. Tr. 722–25 (Area Director Ciuffo, acknowledging that the Life Safety Code did not require retail stores to engage in "crowd management"); *id.* at 1131–32 (Retail Industry Leaders Association ("RILA") Executive Vice President Casey Chroust, stating that RILA had never discussed workplace crowd hazards). She attempts to avoid the implications of this testimony by arguing that Wal-Mart—as opposed to every other retailer in the country—had "actual recognition" of the alleged hazard. As demonstrated above, this argument depends completely on unreliable—and, in some cases, unadmitted—evidence. The Store lacked any notice of the crowd's freakish behavior from prior "crowd related incidents," none of which were remotely comparable to the unprecedented events of Blitz Day 2008; its attempts to address those incidents by adopting safety measures similarly provide no support for the Secretary's "actual recognition" theory. Nor did Wal-Mart generally have actual recognition of the hazard: Judge Rooney excluded the vast majority of the evidence now cited by the Secretary regarding prior injuries to customers at other stores, and she recognized that the remaining evidence had little probative value because it lacked any meaningful discussion of the relevant facts.

1. The Secretary Has Failed To Establish Actual Recognition At The Store Level.

The Secretary's claim that the Store had "actual recognition" rests primarily on the breezy assertion that, "in prior years, customers fell as they entered the vestibule, and employees

pushed their way into the rushing crowd to render assistance." Secretary Br. 36. Yet crowds—even *rushing* crowds—are not cognizable "hazards" but a harmless, ubiquitous feature of daily life. The people who compete for space every day on packed subway cars disprove the Secretary's theory of inherent danger. And the few minor injuries from previous Blitz Day sales—*i.e.*, the two customer slip-and-fall injuries and Mr. Rice's "paper cut"[5]—did not put the Store on notice of a serious hazard "likely to cause death or serious physical harm." *See* OSH Act § 5(a)(1). The Secretary's employee-witnesses all testified that they "were not concerned for [their] own safety" and "did [not] expect that any employee [would] be injured"—even when the size and nature of the crowd were fully apparent in the minutes before the opening. *See* Tr. 106, 174, 896. Without a single prior incident of serious injury—to anyone, let alone employees—the rushing crowds from previous years showed only that excited *customers* might continue to trip and fall. *See id.* at 709–10 (Area Director Ciuffo indicating that he was not aware of "any other instance in the history of the world" when there had been "a fatality or a serious injury to an employee" under circumstances that resembled Blitz Day 2008). OSHA rarely describes slip-and-fall hazards as "serious."[6] A hazard assessment in this case must begin with a review of prior OSHA incidents and OSHA's Directives, both of which belied the existence of any hazard. *See infra* Part V. The virtual absence of serious employee or even customer injuries on prior Blitz Days disproves the Secretary's allegation of actual knowledge.

The Secretary attempts to bridge this evidentiary gap by proclaiming that Store Manager Sooknanan demonstrated "actual knowledge" by taking "measures each year (albeit ineffective

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[5] Mr. Rice's "paper cut" arose not from any of the cited hazards, but from the actions of a lone customer who *threw a boot* through the Store's window. *See* Tr. 924, 996.

[6] A Westlaw search for citations based upon the slip-and-fall provisions of OSHA's housekeeping standards showed that only 30 of 154 citations to Section 1910.22 were "serious," and only 12 of 104 citations to Section 1926.25 were "serious." Most of these "serious" citations involved distinguishable circumstances like falls from heights.

ones) to try to alleviate crowd-related hazards." Secretary Br. 35. But her list of purportedly "ineffective" measures destroys this theory of recognition. The Secretary claims, for example, that telling employees to "be safe" and "stand to the side as the customers entered" had "proven ineffective," as had a variety of other common-sense methods like "inform[ing] customers about the quantities and locations of merchandise and ask[ing] customers not to run." *See id.* at 15, 36. But these measures make sense regardless of whether Mr. Sooknanan believed that the Blitz Day crowd might pose a danger to employees; they are perfectly appropriate ways to provide customers with a comfortable and pleasant shopping experience and to avoid the types of slip-and-fall accidents that the Store had previously observed. Such actions hardly satisfy the Secretary's burden to prove actual knowledge of a hazard to life and limb.[7]

The Secretary's attempt to find "actual recognition" in the Store's use of safety precautions is further undermined by her admission that the Store was reasonable in addressing the crowd-related issues from previous years. She admits, for example, that the Store discontinued the use of shopping cart lines when those lines obstructed customers' entry in 2005. *See* Secretary Br. 6. And she acknowledges that the Store discontinued the use of maps when they posed a slip-and-fall hazard in 2006. *See id.* The Secretary claims that the "purportedly good faith implementation of safety measures serves to confirm, rather than negate," recognition of a hazard. *See id.* at 37–38. Yet, the Secretary's inspection file forecloses this argument.[8]

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[7] By faulting Wal-Mart for taking these common sense precautions, the Secretary perversely indicates that it would have been better—in terms of avoiding citations—for Wal-Mart to have done *nothing*. The Commission should reject the Secretary's logic, lest employers be chilled from taking proactive precautions in the absence of a recognized hazard.

[8] The OSHA-170 form in the Secretary's inspection file characterizes the Store's alleged error as a "misjudgment of a hazardous situation." Importantly, OSHA did not check the boxes for "insufficient or lack of engineering controls" or "insufficient or lack of written work practices programs." Tr. 719–20.

Since the General Duty Clause does not impose strict liability, the Store's good faith can only demonstrate its *lack* of recognition of the more serious hazards now alleged by the Secretary.

Ultimately, the Secretary can maintain that the Store's prior "crowd-related incidents" and precautions show "actual recognition" only by disregarding the truly unique and unpredictable events leading to the crowd's unruly behavior on Blitz Day 2008. The Secretary plays down the dissimilarity between Blitz Day 2008 and previous events by noting that "prior Blitz Day crowds had repeatedly rushed into and through the Valley Stream store vestibule." Secretary Br. 33. This superficial similarity glosses over the profound differences in the crowds.

The size of the 2008 crowd was more than 100% larger than the crowd in any previous year, and Messrs. Sooknanan and D'Amico testified that they had never seen a crowd so large or unruly in their combined twenty years of retail experience. Order 21, 42; *see also* Tr. 179, 976. Unlike in previous years, customers fought each other in line, intentionally pushed the doors before they opened, and deliberately kicked down security devices. Order 7, 15, 27–28. Although the police had promised to "be there when the store's open," Gov't Ex. 145, at 188–89, 193–94, and although they had provided assistance at prior years' sales, *see* Order at 5, 37–38, they unexpectedly "could not or would not control the crowd," *id.* at 44, and left before the opening, claiming it was "not in their job description" to provide assistance, Tr. 105.

There is a fundamental difference—in *kind*, not *degree*—between the incidental jostling threatened by an ordinary crowd of running shoppers and the serious danger threatened by antisocial behavior. The Secretary can establish a serious violation of the Act only by showing "that the employer knew or with the exercise of reasonable diligence, could have known of the presence of the violative condition." *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1993 WL 132965, at *2 (No. 90-1307) (citing cases), *aff'd*, 19 F.3d 643 (3d Cir. 1994). And "[f]reakish

and unforeseeable" injuries do not "trigger statutory liability." *Tuscan/Lehigh Dairies*, 2009 WL 3030764, at *14. Wal-Mart could not have recognized the possibility of *any* serious injury to employees—let alone a serious injury of "being struck" or "asphyxiated"—from the minor incidents of previous years.[9]

2. The Secretary Has Failed To Establish Actual Recognition At The Company Level.

The Secretary's claim that Wal-Mart had "actual recognition" of the hazard at the corporate level strains credulity to an even greater degree. Contrary to the Secretary's claim, Judge Rooney *did* "address" Wal-Mart's "corporate knowledge of the hazard." Secretary Br. 39 n.18. She rejected this theory of liability by excluding most of the CMI exhibits that the Secretary now summarily presents as evidence that "more than a dozen Wal-Mart employees" and "over one hundred customers" had suffered "crowd-related injuries." *Id.* at 39. With respect to those CMI exhibits that were admitted, Judge Rooney expressed reservations about their "appropriate weight" given that the Secretary failed to have a witness testify to the accuracy or reliability of their often-incomprehensible contents. Tr. 1172–88; *see also supra* Part II.A.

The Secretary also seizes upon scattered references to "crowd control" and "crowd management" in Wal-Mart documents as "evidence" of corporate recognition. Secretary Br. 39–40. But there is no record evidence to support this view; indeed, the evidence is to the contrary. The Secretary places particular emphasis on an e-mail by which Wal-Mart headquarters advised its stores that "36% of 'total [injury] claims [were] directly related to crowd control.'" Secretary

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[9] The Secretary cannot salvage her argument by claiming that Mr. Sooknanan exposed employees to the hazard by stationing employees outside and in the vestibule *immediately before* the Store's opening on Blitz Day 2008. *See* Secretary Br. 38. The "recognition" prong of a General Duty Clause citation cannot be satisfied at the time of the accident. *See* Wal-Mart Br. 30. Contrary to the Secretary's arguments, Mr. Sooknanan's actions were a reasonable effort to correct the problems caused by unforeseen customer violence and the unprecedented inaction of the Nassau County Police Department. *See id.* at 8–10.

Br. 39. Wal-Mart's Vice President of Asset Protection Monica Mullins testified, however, that this number included altercations, slip-and-falls, and a variety of other injury-claim categories that bear no resemblance to the cited hazard. *See* Gov't Ex. 148, at 178. Wal-Mart had no "crowd hazard" initiatives, and Ms. Mullins was unaware of any serious crowd-related injuries to employees on prior Blitz Days. *See* Gov't Ex. 91 ¶ 5. Instead, Wal-Mart viewed "crowd control" as a way to provide an "additional level of customer service" and to "create excitement." *See* Gov't Ex. 148, at 189, 193–94. It had never "assert[ed]" the ability "to control a crowd." *Id.* at 269–70.

The Secretary's attempts to show "actual" corporate knowledge are especially hollow in light of the substantial, unrebutted evidence that the broader retail industry *did not* recognize the cited hazard in 2008. The Commission specifically directed the parties to brief the significance of industry custom in this case. Yet the Secretary has cited only a single case—*Nelson Tree Servs. v. OSHRC*, 60 F.3d 1207 (6th Cir. 1995)—for the unremarkable proposition that actual knowledge may obviate the need to show industry recognition in appropriate cases. *See* Secretary Br. 35. Neither *Nelson* nor any other case indicates that an inquiry about actual recognition makes industry custom *irrelevant*. Rather, industry practice will inevitably affect an employer's *actual* knowledge. *See* Wal-Mart Br. 26–28.

In 2008, the only national consensus standard to have discussed crowd management, the National Fire Protection Association's Life Safety Code, had expressly excused retail establishments from its sections necessitating the use of crowd managers and detailed "crowd management" plans. *See* Tr. 711, 722–25; *see also* Gov't Exs. 22–23, at § 13.7.6.4. The Retail Industry Leaders Association had never even *discussed* crowd hazards. Tr. 1131–32. This lack of industry recognition compels a powerful inference: that Wal-Mart, like all other retailers, did

not recognize the counterintuitive workplace hazard of an "unmanaged crowd." *See* Wal-Mart Br. 28. The Secretary's claim of "actual knowledge," supported by nothing more than freakish accidents and coincidental references to "crowd control," cannot overcome that inference.

C. The Secretary Has Failed To Demonstrate That The Cited Hazard Posed A Likelihood Of Serious Injury Or Death.

The Secretary faces a major hurdle in arguing that crowd-related incidents are likely to cause serious injury or death: She cannot identify any instance, in the history of retail stores, in which such an injury has occurred. She attempts to leap this hurdle by focusing almost entirely on the death of Jdimytai Damour during Blitz Day 2008—indeed, she opens her argument section with the assertion that Mr. Damour "tragically died after a crowd of customers stampeded into Wal-Mart's Valley Stream store," thus linking his death to the alleged hazard of "crowd trampling." Secretary Br. 26. After repeatedly referencing Mr. Damour's death, *see*, *e.g.*, *id.* at 19 & n.10, 41, she argues that "the application of common sense" supports the "conclusion" that Mr. Damour was "put at risk of serious injury and death as a result of being knocked to the ground and trampled." *Id.* at 42. The Secretary's argument is impermissible.

Mr. Damour's death was tragic. But Wal-Mart was prepared to present expert medical testimony that it was not caused by crowd trampling. To avoid litigation on this issue, however, the Secretary simply *conceded* that Mr. Damour's cause of death was not relevant to her case. *See*, *e.g.*, Tr. 21 ("the actual cause of death of Mr. Damour is not at issue in this case"), *id.* at 158 ("whether Mr. Damour actually died from . . . being trampled on is irrelevant"), *id.* at 813 ("the cause of death to Mr. Damour is not a relevant inquiry in this case"). Consistent with the Secretary's position, Judge Rooney limited any testimony that would have addressed the subject; when Area Director Ciuffo testified about his reliance on Mr. Damour's cause of death, for example, Judge Rooney struck his answer so that the "record [would] be clear as to what the

issue is in this case." *Id.* at 813–14. And in her opinion, Judge Rooney reiterated that the record contains "no evidence" of the cause of Mr. Damour's death. Order 50 n.29.

Having elected not to litigate Mr. Damour's cause of death, and thus to preclude any disputes about whether "Mr. Damour had died from mechanical asphyxia," Secretary Br. 19 n.10, the Secretary is ill-positioned to argue that his death suggests that serious injury is likely to occur from crowd-related incidents. The Commission should reject the Secretary's attempt to change its position in this case to support Judge Rooney's decision.

The Secretary also claims that "professional literature" supports her inference that crowd-related hazards are likely to cause serious injury or death. Secretary Br. 42 n.19. This "literature" comes from two sources, neither of which the Secretary may properly rely upon.

First, the Secretary cites "literature" authored by Wal-Mart's withdrawn rebuttal expert, Gil Fried. *See* Secretary Br. 42 n.19 (citing Exs. 39 and 44). Yet Judge Rooney prevented the Secretary from introducing Mr. Fried's deposition transcript. *See* Tr. 1115 (instructing that "[Mr. Fried's] prior testimony may not be used in this matter as hearsay"). And Judge Rooney admitted Mr. Fried's "literature" only after the Secretary's counsel protested that he had relied upon these materials when he conducted his direct examination of Paul Wertheimer. *See* Tr. 1115–18 (admitting Fried's exhibits while expressing reservations about their "appropriate weight"). Since Judge Rooney has now *excluded* Paul Wertheimer's testimony, the Fried exhibits have *no* "appropriate weight." The Secretary is relying on hearsay evidence about the nature of "crowd-management," which is supported by no admitted testimony, through back-door means and against Judge Rooney's clear instructions. *See id.* at 1115.

Second, the Secretary cites "literature" authored by the National Fire Protection Association. *See* Secretary Br. 42 n.19 (citing Ex. 24). But the NFPA's general writings about

crowds must be read against the full context of its instruction, in the Life Safety Code, that such crowd-related hazards are *non-existent* in the retail industry. *See supra* Part II.B. This literature refutes, rather than supports, the Secretary's argument.

Finally, aside from her references to Mr. Damour's death and "professional literature," the Secretary relies upon the same "testimonial and video evidence" that is discussed and discredited above. *See* Secretary Br. 41–43; *see also supra* Part II.A. For the same reasons that these materials are insufficient to show exposure to any hazard, they are also insufficient to show exposure to a hazard that is *likely to cause serious injury*. Judge Rooney's decision to the contrary should be reversed.

D. The Secretary Has Failed To Establish That Feasible Or Effective Means Existed To Abate The Cited Hazard.

The Secretary has failed to establish that Wal-Mart had feasible and effective means to abate the cited hazard; indeed, the record is completely silent on this point. Although the Secretary now attempts to fix this evidentiary defect by questioning Judge Rooney's decision to exclude Paul Wertheimer's testimony and by claiming that the abatement measures are "obviously" effective, neither approach is sufficient to satisfy her burden of *proving*—using only the record evidence—feasibility and effectiveness.

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

As Wal-Mart explained in its opening brief, the record is completely devoid of evidence that the Secretary's recommended abatement measures are either feasible or effective: The only witness who testified on the issue, Paul Wertheimer, was deemed unreliable by Judge Rooney, and his testimony was excluded. *See* Wal-Mart Br. 34–38. Although purportedly defending Judge Rooney's decision, the Secretary is therefore forced to "not[e]" that "the ALJ erroneously excluded Mr. Wertheimer's testimony." Secretary Br. 45. The Secretary's self-serving "not[e]"

does not change the evidence that was *actually* admitted by Judge Rooney and is now *actually* before the Commission. *See* Order 13–14 (excluding Mr. Wertheimer's testimony). Regardless of whether the Secretary disagrees with Judge Rooney's ruling, the fact remains that the evidentiary record contains "no testimony about crowd management techniques Wal-Mart should have used and their effectiveness." Secretary Br. 45.

The Commission need go no further in rejecting the Secretary's arguments. Because she nonetheless relies on Mr. Wertheimer's excluded testimony, however, it is worth noting how far that testimony diverged from any semblance of reliability—or even rationality. Without citing any relevant personal experience—let alone consensus standards or credible research—Mr. Wertheimer repeatedly purported to dictate counterintuitive, micro-level "crowd management" measures that, he claimed, Wal-Mart should have used during Blitz Day 2008:

- He suggested that Wal-Mart should have hired clowns or entertainers, but cautioned that a crowd management expert would have to screen their jokes for "possibly off color or racial" content. *See* Tr. 635.
- He suggested that Wal-Mart should have distributed coffee to customers, but cautioned that different flavors "might" have different impacts on the safety of an event, and further that three-ounce cups could present a slip-and-fall hazard whereas two-and-a-half-ounce cups would "probably" not. *See* Tr. 479–80.
- He suggested that Wal-Mart should have acquired portable toilets to prevent customers from urinating on the ground as they waited for the store to open, which would create a slip-and-fall hazard. *See* Tr. 486–87.

Moreover, Mr. Wertheimer could not apply his suggestions in concrete scenarios. When discussing the number of crowd managers the Store should have used, for instance, he ranged from eight to eighteen. *See* Tr. 588–90. When discussing the number of customers the Store should have expected, he ranged from 1,200 to 1,400 but could not "say it was unreasonable" for

the Store to "assume that only a thousand customers would show up." *Id.* at 513, 517.[10] When discussing the number of customers the Store should have let in at one time, he ranged from 20 to 50. *See id.* at 616. When discussing the number of walkie-talkies the Store should have distributed, he admitted that "experts" could range from two to ten. *Id.* at 602. And when discussing the necessary height of the sign outside the Store, he ranged between twelve and fourteen feet while indicating that it should be visible "maybe 40 feet" away. *Id.* at 562–64.

It was hardly surprising, therefore, when Mr. Wertheimer "conceded that he was unaware of the effectiveness of his recommendations" and that he "was also unaware of anyone having tested his recommendations in a retail setting." Order 13. Those concessions would be sufficient by themselves to warrant exclusion of his testimony, as Judge Rooney correctly concluded. *See* Wal-Mart Br. 34–36. But even more problematically, Mr. Wertheimer included racial profiling as a critical means of abating crowd-related hazards.[11] Mr. Wertheimer claimed that, by considering the "age, race, gender," and other "demographic" characteristics of the crowd, retailers could intuit both the crowd's likely behavior and the necessary abatement measures: He warned that "some people" could "pose a danger," and that "extra care and attention" would be required to manage these "people." Tr. 508–12. (Incredibly, Mr. Wertheimer explained that, "[f]rom experience," Canadian crowd members are particularly

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[10] Mr. Wertheimer's own "landmark" crowd management study, Crowd Management: Report of the Task Force on Crowd Control and Crowd Safety, states that crowd management precautions are *not necessary at all* for events with fewer than 2,000 attendees. *See* Tr. 530–31. When confronted with the contradiction between this recommendation and his statement at the hearing that the Store should only have expected 1,200 to 1,400 customers, Mr. Wertheimer claimed that the Report's recommendation was out of date. *See id.* at 531. He was not able to suggest an alternative standard, however, and the most recent version of the *Life Safety Code* uses a similar 2,000-person threshold. *See* Resp. Ex. 12.

[11] Area Director Ciuffo "possibly" endorsed this absurd recommendation. *See* Tr. 828–29.

docile. *Id.* at 512.) The Secretary's endorsement of the "expert" who so testified speaks volumes about the lack of any *credible* evidence to support her case.

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

Implicitly acknowledging that no *actual* evidence supports the feasibility or effectiveness of the Secretary's recommended abatement measures, the Secretary instead insists that "no explanatory testimony is required" because it is "undeniably obvious" that the measures implemented by Wal-Mart during its 2009 day-after-Thanksgiving sale were "effective" in "manag[ing] the crowd." Secretary Br. 44, 46. Relying solely upon the fact that there were no crowd disasters in 2009, the Secretary proclaims as settled "fact" that "Wal-Mart was able to materially reduce crowd-related hazards through the use of such techniques as metering and a soft opening." *Id.* at 45. Yet, since the Secretary admits "the fact that no hazardous crowd gathered in 2009," *id.* at 46, the Store's abatement measures could not have *managed* such a crowd, *see* Wal-Mart Br. 39.

The Secretary is apparently unfamiliar with the logical fallacy *post hoc ergo propter hoc*. Assuming the effectiveness and necessity of each measure in the Secretary's abatement arsenal from a single unrepresentative event is equivalent to assuming that the weather, or the names of the employees on duty, or some other random factor is what caused the crowd to behave more peaceably in 2009. The Secretary's assertions about the "obvious" effectiveness of her abatement regime are completely undermined by her failure to address highly plausible explanations for the comparatively peaceful behavior of the 2009 crowd—explanations that have nothing at all to do with the proposed abatement measures listed in the citation. The Secretary dismisses as "speculation" that "factors other than implementation of crowd control measures could have had a calming effect on the 2009 crowd," Secretary Br. 47 n.22, but Area Director

Ciuffo and Paul Wertheimer both conceded that the crowd's calm behavior may have been *entirely* due to the "massive" presence of police at the Store's opening, the increased presence of the media, or just the memory of Blitz Day 2008, *see* Tr. 569, 815–17.

Nor does it save the Secretary's argument to suggest that Wal-Mart "effectively" used specific items from OSHA's abatement regime at "certain [other] prior sales events." Secretary Br. 44. The Secretary cites only a single prior event: the release of a Harry Potter book in 2007. *See id.* at 44, 48. But as Wal-Mart Vice President of Asset Protection and Safety Monica Mullins testified—and the Secretary did not refute—the "crowd control" provisions in the Harry Potter Playbook were meant to provide an "additional level of customer service" and to "create excitement," not to address struck-by or asphyxiation hazards. *See* Gov't Ex. 148, at 189, 193–94. And even though there were, in fact, no crowd problems at this event, that hardly establishes the effectiveness of the measures employed: Just as the 2009 day-after-Thanksgiving sale does not demonstrate the effectiveness of OSHA's abatement regime, a single sales event cannot prove the effectiveness of any individual techniques, especially given the thousands of Wal-Mart and other retail stores that have incident-free sales events *without* using any such techniques. *See* Tr. 637, 818.[12] The Secretary strives mightily to convince the Commission to assume that abatement measures must be effective if they are employed at events where there are no crowd problems, but no *evidence* supports this assumption.

Yet even if the Secretary's proposed measures might be effective, Wal-Mart's experience at the Valley Stream Store provides no support for the Secretary's conclusion that they are feasible for controlling freakish circumstances like those that occurred on Blitz Day 2008. As the Secretary notes, "Wal-Mart, not the Valley Stream Store, [is] the cited employer." Secretary

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[12] Store Manager Sooknanan could not recall if the Store followed the Playbook because there was little interest in Valley Stream for the Harry Potter book. Gov't Ex. 152, at 304–05.

Br. 39. This citation has "significant" implications for all of Wal-Mart's stores, as well as for "the retail industry throughout the country," Order 13, and the use of abatement measures at a single store for a single incident does not establish that Wal-Mart was able to implement those measures at *all stores* for *all incidents* covered by the citation. Quite the contrary, Area Director Ciuffo and Paul Wertheimer could name only five crowd management "experts" between them. *See* Secretary Br. 46 n.22. The Secretary touts Exhibit 45, which purportedly gives a "directory of firms providing crowd management services." *Id.* at 46 n.22. But even assuming the accuracy of this document—and that each of the listed entities could provide OSHA-sanctioned services—there are only a few dozen firms in limited geographic areas. *See* Gov't Ex. 45. Wal-Mart could not have hired enough crowd managers from this pool to advise each of its 4,200 stores on Blitz Day 2008, nor is it likely that Wal-Mart could do so today.[13]

3. The Secretary Has Failed To Rebut Evidence That Her Abatement Measures Expose Employees to Greater Hazards.

The Secretary's showing is further defective because she fails to rebut clear evidence that OSHA's abatement measures expose retail employees to greater hazards. Like Judge Rooney, the Secretary has incorrectly assigned *Wal-Mart* the burden of establishing a "greater hazard defense." Secretary Br. 49. And in attempting to wriggle free of the caselaw, she has implicitly acknowledged her error: She concedes that, when "the means of abatement specified by the Secretary create [greater] hazards," they are "infeasible," yet at the same time insists that it falls to the employer to "demonstrat[e]" this "infeasibility." *Id.* It is, however, "not the employer's

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[13] Abandoning all pretense of demonstrating the feasibility of its listed abatement measures, the Secretary suggests that Wal-Mart could have abated the hazard on Blitz Day 2008 "by not placing its employees directly in the zone of danger." Secretary Br. 47. This tautological observation is the equivalent of Area Director Ciuffo's equally unhelpful and impractical instruction that Wal-Mart could have abated the hazard by locking all employees in a back room when the doors were opened. Tr. 781.

burden to establish an affirmative defense of greater hazard" for the simple reason that the *Secretary* bears the burden of proof on feasibility. *Kokosing Constr. Co.*, 17 BNA OSHC 1869, 1996 WL 749961, at *6 n.19 (No. 92-2596). Judge Rooney's decision deserves to be reversed on this ground alone. *See* Wal-Mart Br. 40–41.

The Secretary does not dispute that it would have been far more dangerous for Store employees to "confron[t] the crowd . . . on Blitz Day 2008." Secretary Br. 49. She insists, instead, that the "whole purpose" of OSHA's abatement measures is "to prevent these types of crowd-related hazards" by "eliminating a waiting crowd." *Id.* at 49–50. But this argument diverges wildly from both the text of the citation and the Secretary's prior representations. The Secretary's abatement measures call for Wal-Mart to "safely manage," not *eliminate*, crowds. Amended Complaint ¶ 5; *see also* OSHA's Crowd Control Fact Sheet (explaining how the abatement measures listed in the citation require employees to "update" and "manage" waiting crowds). The Secretary has not presented any evidence that it is feasible (or even necessary) for retailers to "eliminate a waiting crowd" altogether. Rather, the Secretary has repeatedly suggested that Wal-Mart should place *more* employees in *closer* proximity to crowds that could allegedly hurt them, thus raising the indelible specter of a greater hazard. *See* Wal-Mart Br. 41.

Indeed, the Secretary has not even claimed that *fully-managed* crowds will always remain orderly: She has faulted Wal-Mart for failing to "train" its employees on "how to reinstate order should [a] crowd become unruly" and "how to protect employees and customers from a crowd that has become unruly." Tr. 856–57, 900. Even Area Director Ciuffo admitted these new duties could "possibly" expose Wal-Mart's employees to a greater hazard. Tr. 847.

The abatement measures at issue here would require store employees to attempt to "restore order" and "protect employees" even in the face of a crowd that has become unruly.

That is a dangerous job even for armed and experienced police officers, as at least one officer demonstrated on Blitz Day 2008 when he declared the situation "hopeless," *see* Tr. 271–75, 278–79; it is completely untenable to place Wal-Mart's employees in that position.

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

The Commission should overturn Judge Rooney's decision because the Secretary has failed to carry her burden on each of the elements of a General Duty Clause violation. But even if the Commission disagrees with Wal-Mart on that point, it should vacate the citation because the Secretary has not offered any meaningful rebuttal to Wal-Mart's affirmative defenses.

A. The Complaint Is Time-Barred.

The Secretary concedes, as she must, that the Amended Complaint sweeps more broadly than the original citation in describing both the allegedly "recognized hazards," Secretary Br. 53, and the "geographic and temporal scope" of those hazards, *id.* at 55. She insists, however, that the newly alleged hazards were not "materially different" from the hazards alleged in the original citation, and that any changes to the geographic and temporal scope of the citation are "moot" in light of Judge Rooney's decision. *Id.* at 55–56. The Secretary is mistaken on both points.

First, the Secretary's argument that "the violative conduct alleged in both the original citation and amended citation is the same" (Secretary Br. 54) is impossible to reconcile with her repeated efforts before Judge Rooney to define and distinguish the *separate* hazards of "crowd crush," "crowd surge," and "crowd trampling." The Secretary specifically adduced testimony from her (now-excluded) expert Paul Wertheimer that a "surging" crowd is different from a "crushing" or "trampling" crowd. *See* Tr. 318 (defining each hazard); *see also*, *e.g.*, *id.* at 327 (describing a purported "surge effect"). Far from simply "provid[ing] a more complete description" of the hazard alleged in the original citation, Amended Complaint at ¶ 5, the Amended Complaint injected new and expanded hazards into this proceeding—and thus changed

the nature of the "conduct, transaction or occurrence" at issue. Fed. R. Civ. P. 15(c)(1)(B); *cf. B.C. Crocker*, No. 4387, 1975 WL 22024 (OSHRC ALJ Jan. 17, 1975), *aff'd in part*, 4 BNA OSHC 1775, 1976 WL 6125 (No. 4387) (denying an amendment that would have added a new hazard).

As a fall-back option, the Secretary insists that "[a]bating the originally cited asphyxiation hazard from crowd crush would necessarily have abated the struck-by hazard from crowd surge and crowd trampling." Secretary Br. 55. The Secretary nowhere explains how this could be relevant—whether or not the same abatement methods would apply to the hazards, they remain *different* hazards. And the Secretary's assertion that the hazards alleged in the Amended Complaint are "encompassed" by those in the original citation is foreclosed by Area Director Ciuffo's testimony that a hazard of "crowd crush, crowd surge, or crowd trampling" is "more encompassing" than a hazard of "crowd crush." Tr. 766–67. But even assuming that a "struck-by hazard" is a "lesser" hazard than the "original asphyxiation charge," Secretary Br. 55, the struck-by hazard should be *harder*—not *easier*—to abate: It is easier to prevent someone from being killed by a crowd than to prevent him from being hurt at all. That these hazards are purportedly "different potential consequences of the same hazardous condition" hardly means, as the Secretary assumes, that the possible abatement methods are identical for each.

Second, the Secretary attempts to dismiss her undisputed broadening of the "geographic and temporal scope of the crowd-related hazards" in the Amended Complaint (Secretary Br. 55) by ignoring that document altogether. According to the Secretary, "the ALJ [has] expressly limited the violation" to "areas [that] are plainly covered by the factual allegations in the original citation." *Id.* at 55–56. The issue, however, is not the scope of Judge Rooney's decision but the scope of the *citation* that she sustained. Indeed, even the Secretary does not believe that Wal-

Mart can respond to the decision by ignoring all areas of its stores except the "front of the entrance" and the "vestibule surrounding the entryway doors." *Id.* Instead, the Secretary insists that Judge Rooney's decision should give Wal-Mart "heightened awareness of the need to protect its employees from *any* future crowd-related hazards." *Id.* at 56 n.24 (emphasis added). That is so because the Amended Complaint, unlike the original citation, covers the *entire* store—and that change to the citation's breadth means that it does not relate back to the original citation. Accordingly, the Amended Complaint should be dismissed as time-barred.[14]

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

Whether OSHA can or should regulate sociopathic behavior—particularly through the General Duty Clause rather than notice-and-comment rulemaking—is necessarily a core issue in the agency's attempt to regulate crowds of retail customers. Dating back at least to *National Realty*, courts have recognized that "demented, suicidal, or willfully reckless" conduct falls outside the scope of the General Duty Clause. 489 F.2d at 1259. And that is so for good reason: The OSH Act is meant to protect workers from unsafe workplace conditions that employers can control; matters of general public safety, by contrast, are left to the states rather than individual employers. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992).

Human behavior is a "wild card" not directly "amenable to control" by employers. *Megawest*, 1995 WL 383233, at *8–9. Thus, "an employee's general fear that he or she may be subject to violent attacks is not enough to require abatement of a hazard under the general duty clause." *Ramsey Winch, Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009). Instead,

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[14] The Secretary asserts—without any supporting authority—that the allegations in the original citation may survive "[e]ven if the amendments to the citation were time barred." Secretary Br. 56. This argument is foreclosed by the "well established" rule that the Amended Complaint "supersedes the original and renders it of no legal effect." *Int'l Controls Corp. v. Vesco*, 556 F.2d 665, 668 (2d Cir. 1977).

employers "may reasonably believe that the institution to which society has traditionally relegated control of violent criminal conduct, i.e., the police, can appropriately handle the conduct." *Megawest*, 1995 WL 383233, at *9.

The Secretary has no meaningful response to these decisions. She attempts to address them only by making the uncontroversial and irrelevant point that a General Duty Clause citation is not impermissible "simply because members of the public will also benefit." Secretary Br. 51. The issue is not whether "members of the public" will benefit, but instead whether the particular hazard at issue is appropriately addressed by individual employers or instead by the traditional police power of the states.

To frame the relevant inquiry is to answer it: A crowd is not directly "amenable to [employers'] control," *see Megawest*, 1995 WL 383233, at *9, and a crowd of people engaged in "willfully reckless" behavior like fighting and attempting to damage property is even *less* amenable to control, *see Nat'l Realty*, 489 F.2d at 1266. Especially under the circumstances of this case, where the police had repeatedly committed to "be there when the store's open," Gov't Ex. 145, at 188–89, 193–94, Wal-Mart reasonably relied on the police to "appropriately handle" the crowd's violent conduct, *Megawest*, 1995 WL 383233, at *9. The Secretary's attempt to transform this issue of public safety into a violation of the OSH Act is impermissible.[15]

[15] The Secretary does not help her case by echoing Judge Rooney's counterfactual ruling that the Store abated any crowd-related hazards at its 2009 day-after-Thanksgiving sale "without the assistance of police." Secretary Br. 51. The "massive" amount of police assistance during that event—acknowledged by Paul Wertheimer and Area Director Ciuffo, *see* Tr. 567–69, 815–17, and demonstrated in Mr. Wertheimer's videos of the event, *see* Gov't Ex. 95—simply underscores how "managing" crowds is a police function.

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

The Secretary dismisses the clear due process implications of her vague citation by stating that "Wal-Mart's actual knowledge of the crowd-related hazards defeats [this] claim." Secretary Br. 58. As discussed in Part II.B, however, Wal-Mart did *not* have "actual knowledge" of the cited hazard. And regardless, the Secretary cannot cure a constitutional deficiency by retreating to the regulatory standard of "actual knowledge." "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). In this case, the Secretary has violated this principle by leaving Wal-Mart and other employers to "guess" critical elements of the cited hazard. Without any industry custom or OSHA standard, it is impossible for retailers to discern whether any given crowd of between "three and three million" customers is potentially dangerous, *see* Tr. 699, 767; whether any given sale is a "special sales event," *see* Complaint ¶ 5; or whether their chosen mix of precautions is reasonable under the principles of "crowd management."

The Secretary also relies exclusively on Wal-Mart's purported "actual knowledge" to defend her failure to use rulemaking in announcing the first ever "crowd-related hazards." Secretary Br. 58. But Wal-Mart's purported "actual knowledge" is not relevant to the requirements of the Administrative Procedure Act ("APA"). Agencies must proceed by rulemaking if they seek "to change the law and establish rules of widespread application." *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981). The Secretary has done just that: She does not dispute that the citation marks a sharp break from prevailing practice. The Secretary's

cursory dismissal of these regulatory requirements demonstrates a tendency toward the very dangers—of expediency, secrecy, and arbitrariness—that the APA aims to prevent.

Finally, the Secretary claims that the "particularity" requirement of the OSH Act is satisfied because Wal-Mart was able "to vigorously and exhaustively defend itself." Secretary Br. 58. But this "vigorous" and "exhaustive" defense demonstrates nothing more than Wal-Mart's conviction that the Secretary's citation is unfounded and unlawful. Employers are entitled to make *informed* defenses, not just "vigorous" or "exhaustive" ones. *See Hercules, Inc.*, 20 BNA OSHC 2097, 2005 WL 5518545, at *2 (No. 95-1483) (instructing that a citation must "fairly characterize" the hazard and "inform the employer of what must be changed" (internal quotation marks omitted)). But here, the Secretary has not told Wal-Mart *where* or *when* it should anticipate and abate the cited hazardous condition. Her broad references to "special sales events" with anywhere between "three and three million" people show an impermissible attempt to outline "OSHA's own idealized minimum safety program." *Keith Rasmussen & Sons Constr.*, 17 BNA OSHC 1565, 1995 WL 17049980, at *5 (No. 94-1954) (ALJ).

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

The Secretary's citation cannot be sustained because Judge Rooney excluded evidence, and deprived Wal-Mart of critical discovery, on several issues that directly bear on the citation. Even if the Secretary had otherwise carried her burden of proof, which she has not, these erroneous rulings would be sufficient by themselves to warrant reversal.

First, Judge Rooney improperly excluded the testimony of world-renowned psychiatrist Arthur Barsky, who would have testified that "antisocial violence [in crowds] is rare" and that "the results of this crowd behavior could not have reasonably been anticipated or prevented." *See* Expert Report of Arthur Barsky (attached as Exhibit C) at 1. The Secretary insists that this

testimony would have been irrelevant because, in her view, "the relevant inquiry is the nature of the hazard and Wal-Mart's actions and inactions, rather than any purportedly unique or unforeseeable crowd behavioral dynamics." Secretary Br. 59. This is nonsense.

As a matter of law, employers are not responsible under the General Duty Clause for the consequences of "unique or unforeseeable" behavior. *See Nat'l Realty*, 489 F.2d at 1259. If the crowd behaved in a "unique or unforeseeable" manner on Blitz Day 2008, therefore, that would foreclose any argument that Wal-Mart violated the General Duty Clause. Dr. Barsky's testimony would have been dispositive on this issue. The Secretary's suggestion that Wal-Mart could be liable *even if* the "crowd behavior could not have reasonably been anticipated or prevented," *see* Expert Report of Arthur Barsky at 1, is an impermissible attempt to "impose strict liability" under the General Duty Clause. *See Nat'l Realty*, 489 F.2d at 1265–66.

Nor is the Secretary correct that Dr. Barsky's testimony should have been excluded because he is "not an expert in crowd behavior or crowd management techniques." Secretary Br. 59. The Secretary's invocation of purported "crowd management" experts is remarkable since, according to Messrs. Wertheimer and Ciuffo, there are only five such experts in the world. *See* Tr. 471–72, 768–69. In any event, there is no reason to believe that an expert "clinical and research psychiatrist" (Expert Report of Arthur Barsky at 5) lacks "sufficient facts or data" or "reliable principles and methods" to testify regarding the normal behavior of crowds. Fed. R. Evid. 702. Indeed, the testimony of an expert psychiatrist is, if anything, far *more* helpful for the trier of fact in predicting the behavior of crowds than that of a self-proclaimed expert in "crowd management" who Judge Rooney rejected as unreliable.

Second, Judge Rooney improperly excluded testimony bearing on the Secretary's prior investigations of crowd disasters, none of which resulted in citations, and unfairly limited Wal-

Mart's discovery into this prior inconsistent enforcement. The Secretary dismisses this argument on the theory that the inconsistent-enforcement defense invoked by Wal-Mart does not exist. Secretary Br. 57. In the Secretary's view, her failure to issue citations for other crowd-related incidents would be completely "irrelevant" to the soundness of the citation in this case. *Id.* Unfortunately for her, the Supreme Court has said otherwise.

The Secretary's interpretations of the OSH Act are entitled to deference only when they are "reasonable," and this reasonableness depends on "whether the Secretary has consistently applied the interpretation embodied in the citation." *Martin v. OSHRC*, 499 U.S. 144, 157 (1991). Judge Rooney foreclosed any meaningful inquiry into whether the "interpretation embodied in the citation" had consistently been applied by the Secretary. *See* Wal-Mart Br. 56. And while the Secretary accuses Wal-Mart of attempting to "infer" inconsistency, Wal-Mart sought access to previous investigative files and depositions of relevant OSHA decision-makers to provide *evidence*—not mere inference—that the Secretary had proceeded inconsistently compared to other similar cases. Indeed, Wal-Mart has recently submitted a request under the Freedom of Information Act for the investigative file in yet another case analogous to this one.[16]

In any event, the Secretary is wrong to claim that the inconsistent-enforcement argument is wholly dependent on her "failure to issue citations." Secretary Br. 57. The few specific contexts in which the Secretary had defined—and continues to define—the threat of workplace violence as a cognizable hazard sent a signal to employers that antisocial human behavior was

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[16] Although publicly available information shows that a crowd of customers ran into a Target store in North Buffalo, New York on Black Friday 2010, pushing and injuring people and "trampling" at least one person in much the same way as they are alleged to have done on Blitz Day 2008, Buffalo Area Director Art Dube indicated to Wal-Mart's counsel that OSHA investigated this incident without issuing a citation. Unless Target was implementing the precise crowd-management measures outlined in OSHA's Fact Sheet and in the instant citation, which seems unlikely, OSHA's decision in that case stands in direct conflict with its citation here—further demonstrating the unreasonableness of the Secretary's position.

not subject to regulation in other contexts, including day-after-Thanksgiving sales at retail stores. *See* OSHA Workplace Violence Page, http://www.osha.gov/SLTC/workplaceviolence/ (explaining the factors and work contexts that allegedly contribute to workplace violence while excluding any mention of crowds or crowd-management).[17] The Secretary's citation in this case cannot be squared with her prior and contemporaneous guidance, and Wal-Mart should have been permitted to explore that inconsistency at trial.[18]

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

The Secretary has no answer for OSHA's failure to demonstrate that an appropriate representative of the agency authorized the Amended Complaint. The Secretary insists that "the Solicitor's Office assists the Secretary" in "prosecuting contested citations." Secretary Br. 60. But the Secretary *never* claims that the amendments were actually authorized by the Solicitor. *See* Wal-Mart Br. 58–59. Who authorized the sweeping Amended Complaint remains a mystery; neither Area Director Ciuffo, nor the Secretary's counsel, nor any of the Secretary's witnesses had *any* knowledge regarding who, if anyone, authorized the amendments. *See id.* at 58. Yet even assuming (*dubitante*) the purported authorization was made by the Solicitor's office, the Secretary's brief does not identify any legal authority for such authorization: The fact that the Solicitor "assists the Secretary" in "prosecuting contested citations" hardly means that the Solicitor has been granted authority to *issue or amend* citations without the knowledge or

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[17] Although OSHA's guidance materials on workplace violence were not admitted into evidence, the Commission may take judicial notice of them as public records that are "not subject to reasonable dispute." Fed. R. Evid. 201.

[18] Wal-Mart proffered the testimony of James Stanley, a former Deputy Assistant Secretary, who would have testified that "the OSHA Act does not require employers to protect their employees against violent acts of the general public." Expert Report of James Stanley (attached as Exhibit D) at 3.

authority of the client—OSHA. *Cf.* 29 C.F.R. § 1903.14 (decision whether to authorize a citation is made by Area Director).

The Secretary's inability to explain who authorized the Amended Complaint matches her inability to issue or enforce the citation without impermissibly delegating government authority to Paul Wertheimer. As Wal-Mart has explained, Area Director Ciuffo acknowledged that he lacked "competenc[e]" in crowd management, Tr. 837, yet this "competence" is essential in selecting among the potential abatement measures or applying them in this or other cases, *see* Wal-Mart Br. 59. The *only* witness who was purportedly "competent" enough to do so was Mr. Wertheimer—a private individual. Thus, although the Secretary claims—without even a single citation to the record—that Wal-Mart's argument is "factually and legally unfounded," Secretary Br. 60, the record is clear that the Secretary has simply relied upon the recommendations of an outside expert without even the basic competence necessary to understand (let alone evaluate) those recommendations. The OSH Act requires more.

CONCLUSION

For the above reasons, as well as those contained in Wal-Mart's opening brief, the Secretary has failed to state a cognizable claim. The Commission should reverse Judge Rooney's decision and vacate the Secretary's citation.

Respectfully submitted,

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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

CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the foregoing Reply Brief for Respondent was electronically filed and served via overnight mail and electronic mail on the following parties on this 21st day of October, 2011:

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