

CITY COUNCIL  
CITY OF NEW YORK

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TRANSCRIPT OF THE MINUTES

of the

COMMITTEE ON CONSUMER AFFAIRS

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November 18, 2009

Start: 10:23 am

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HELD AT: Council Chambers  
City Hall

B E F O R E:  
LEROY G. COMRIE, JR.  
Chairperson

COUNCIL MEMBERS:  
Council Member Charles Barron  
Council Member James F. Gennaro  
Council Member G. Oliver Koppell  
Council Member John C. Liu

## A P P E A R A N C E S (CONTINUED)

Andrew Eiler  
Director of Legislative Affairs  
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SERGEANT-AT-ARMS: Quiet, please,  
make sure your cell phones are silent. Thank you.

CHAIRPERSON COMRIE: Good morning,  
my name is Leroy Comrie, I'm the Chair of the  
Committee on Consumer Affairs. Today we'll be  
holding our first hearing on Intro 913, a local  
law to amend the Administrative Code of the City  
of New York, in relation to licensing doorbuster  
sales. I'd like to begin by thanking my colleague  
and fellow Committee member, Council Member  
Gennaro, who is still on his way, stuck in  
traffic, for introducing this important piece of  
legislation. For many Americans, the day after  
Thanksgiving marks the official start of the  
holiday season. Also known as Black Friday, it is  
one of the busiest shopping days of the year.  
Many stores capitalize on the enthusiasm generated  
by the beginning of the holiday season, by opening  
stores very early on Black Friday, and by offering  
steep discounts on select merchandise.  
Oftentimes, these types of sales, known as  
doorbuster sales, generated large crowds and long  
lines outside stores. Last year, Black Friday

1  
2 took a tragic turn when Jimmy Damour, a temporary  
3 worker at a Wal-Mart in Nassau County, was knocked  
4 down and trampled to death, after 2,000 overeager  
5 shoppers entered the store in a frenzy. Wal-Mart  
6 was later faulted by the Nassau County Police  
7 Department, the Nassau County District Attorney's  
8 Office, the Occupational Health and Safety  
9 Administration, and various other organizations  
10 for inadequate preparation and poor crowd  
11 management. Sadly, Mr. Damour's death was no the  
12 first such episode to occur on Black Friday. In  
13 2005, a 72 year old woman was trampled at  
14 Brandsmart in Sunrise, Florida; and in 2006 a  
15 woman in Torrance, California was injured in a  
16 stampede when 500 gift certificates in balloons  
17 from the ceiling of a Del Amo Fashion Center.  
18 Retail violence is nota phenomenon limited to  
19 Black Friday. Even a release of a hotly  
20 anticipated product with poor planning can also  
21 result in frenzied behavior, as in 2006 when the  
22 release of a Sony Playstation 3 provoked a beating  
23 in Indiana, a shooting in Massachusetts, and  
24 vehicular violence in Wisconsin. The New York  
25 State Assembly introduced a bill this past

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2 February that would require all stores planning  
3 doorbuster type sales to obtain a license at least  
4 15 days prior to the date of the sale. As part of  
5 the license application, a store would required to  
6 create an submit a security plan and procedures  
7 for crowd control. Intro 913 seeks to address  
8 this issue at a local level. Prior to holding a  
9 doorbusters sale, businesses would need to obtain  
10 a license from the Department of Consumer Affairs.  
11 Applications for a license would be submitted at  
12 least 60 days prior to the sale date, and would  
13 need to include pertinent information such as a  
14 valid and accurate floor plan of the store, and a  
15 detailed plan for crowd control, including store  
16 capacity, numbers of shoppers expected, number of  
17 personnel assigned to the entrances, number of  
18 personnel assigned to work during the sale, and  
19 the time the shoppers are permitted to begin  
20 standing in line prior to the store's opening. At  
21 this point, I'd like to introduce the Council  
22 Members that are here: Council Member Oliver  
23 Koppell from The Bronx; Council Member and  
24 Comptroller Elect John Liu from Queens. At this  
25 time, we are going to hear from DCA, who is here

1  
2 this morning. Are you bringing testimony, Mr.  
3 Eiler? I look forward to hearing your testimony  
4 this morning?

5                   ANDREW EILER: Oh, it's on. Okay.  
6 Wait a minute. Good morning, Chairman Comrie, and  
7 Members of the Consumer Affairs Committee. I'm  
8 Andrew Eiler and I'm the Director of Legislative  
9 Affairs for the Department of Consumer Affairs.  
10 Commissioner Mintz asked me to thank you for this  
11 opportunity to comment on Intro 913. We  
12 appreciate the purpose of this bill, which is to  
13 promote the safety of large crowds that often  
14 gather to take advantage of deep discounts made  
15 available in sales like those on Black Friday, the  
16 day after Thanksgiving. According to the National  
17 Retail Federation, the numbers of shoppers swelled  
18 to over 127 million on Black Friday in 2008. In  
19 recent years, Black Friday deals have inspired  
20 consumers to start lining up as early as midnight,  
21 sometimes even pitching tents to be there, in time  
22 to get in on the action. The rush to beat other  
23 shoppers to those few irresistible deals has also  
24 brought in its wake rudeness, jumping lines,  
25 fights, injuries and even occasional deaths as

1 shoppers become frenzied in their efforts to reach  
2 the sale merchandise. To protect shoppers drawn  
3 to such sales, Intro 913 would require that they  
4 be licensed by the Department, that a retailer  
5 apply for such license at least 60 days before a  
6 qualifying sales event, and that that the  
7 Department issue licenses for such sales only on  
8 the approval of a detailed crowd control plan  
9 submitted by the applicant. The bill also  
10 provides for both civil and criminal penalties for  
11 violations. While we share the Council's concern  
12 about protecting the safety of shoppers, we are  
13 concerned that the proposal does not address those  
14 concerns, or worse actually decreases consumer  
15 protection for the following reasons. First, this  
16 proposal contains significant impracticalities,  
17 including vague triggering language such as  
18 "limited quantities," and it does not accommodate  
19 the reality that many stores, particularly small  
20 businesses, do not plan such sales as far in  
21 advance as 60 days. Second, protections offered  
22 by the submitted crowd control plan proposed here,  
23 would be illusory. Even assuming for the moment  
24 the Department had the expertise and additional  
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1  
2 staff to effectively evaluate whether any proposed  
3 plan would be adequate to ensure the safety of  
4 shoppers, the required information a store must  
5 provide about the number of shoppers anticipated  
6 and the resources assigned to the plan may be  
7 inaccurate, rendering a plan inoperative, and thus  
8 provide only illusory and misleading protection to  
9 the public. And third, we would caution the  
10 Council that there may be unintended legal  
11 disadvantages to consumers should they in fact be  
12 injured in such sale. Store owners who fully  
13 comply with an approved plan may argue in court  
14 that an injured plaintiff could not recover or  
15 should not recover as a result. Their theory  
16 would be that in the presence of a license, that  
17 the presence of a license absolves the store owner  
18 from legal responsibility for any injuries in the  
19 civil actions against retailers who followed an  
20 approved plan that proved to be inadequate for the  
21 actual sale. While the safety of shopper is of  
22 paramount concern, we do not see that the bill  
23 before you as a solution. And in fact worry that  
24 it might impede the current system of civil and  
25 criminal regulation designed to press merchants to



1  
2 safeguard shoppers on their premises under  
3 existing law. The Commissioner again thanks you  
4 for the opportunity to comment on Intro 913; I  
5 would be pleased to answer your questions.

6 CHAIRPERSON COMRIE: Thank you,  
7 Andy. What role does DCA have in overseeing  
8 retail sales currently?

9 ANDREW EILER: Well, basically  
10 right now, is with respect to obviously the  
11 advertising has to be accurate and complete. It's  
12 basically the content of the advertising, and  
13 avoiding misleading and deceptive practices in the  
14 promotion of goods and services.

15 CHAIRPERSON COMRIE: So, do you  
16 have an opportunity to hear from stores at the  
17 present time, about their sales practices, or if  
18 they're doing any event type sales, or grand  
19 opening sales, or going out of business sales?

20 ANDREW EILER: Oh, going out of  
21 business sales, they have to get a license for  
22 that.

23 CHAIRPERSON COMRIE: How about  
24 grand opening sales?

25 ANDREW EILER: No, nothing like

1  
2 that. In other words, the only time the, for the  
3 going out of business sales, it's mainly to ensure  
4 the protection of the public against a false  
5 impression that may be created in such situations,  
6 that, you know, the going out of business sale is  
7 occurring when in fact it's not, leading people to  
8 imagine or believe that there are deep discounts,  
9 when in fact that's not true. But that's the  
10 whole point about the going out of business sale,  
11 that you can't--and the other thing is that the,  
12 such licenses are limited in the number of times  
13 you can apply for a renewal, so that the sale  
14 doesn't go on forever.

15 CHAIRPERSON COMRIE: And do you  
16 have any regulation about grand opening events?  
17 Like I have a flyer here from AJ Wright, which is  
18 just opening in Flatbush tomorrow, the 19<sup>th</sup> is  
19 Thursday, right? They're offering 100 gift cards  
20 for the first 100 people when their doors open at  
21 8:00 o'clock. And that can also create a frenzy  
22 and a lot of people rushing each other to try to  
23 get to, try to get to the event early. Do you  
24 have any--

25 ANDREW EILER: Stores are not

1  
2 required to, under anything that we administer  
3 right now, to tell us in advance whatever sales  
4 promotions they have or proposals or so forth and  
5 so on. What we would be concerned about in a  
6 situation like that is whether or not the  
7 information is accurate. If they're going to say  
8 they're going to have 100 free whatever, that they  
9 have 100.

10 CHAIRPERSON COMRIE: Right, 'cause-

11 -

12 ANDREW EILER: That's the issue.

13 CHAIRPERSON COMRIE: If you  
14 remember last year, there was a, was it MTV, or  
15 somebody was promoting giveaways in midtown for--  
16 and they promised Jet players to be there, and  
17 there was a major melee in midtown, as well,  
18 because number one that they didn't have what was  
19 promised--there was only one Jet player that  
20 showed up, and former Jet player that showed up--  
21 and there was a major problem and some violence  
22 occurred in midtown as well, because they did not  
23 have the tickets that they promised to the game,  
24 and they did not have any of the things that they  
25 had originally put out in their ad. Don't you

1  
2 think that the City should have some  
3 responsibility in making sure that the consumer  
4 does not get ripped off when someone promises a,  
5 an event, or they--grand opening event or a  
6 special product or a doorbusters type, doorbuster  
7 type sales day, or event day?

8                   ANDREW EILER: Oh, absolutely, I  
9 mean, that's, that would be the issue with  
10 respect, that's what the Consumer Protection Law  
11 covers: deceptive practices in the sale of goods  
12 and services. And failure to, I mean, promise,  
13 making promises that are not fulfilled is the  
14 basic issue with that law. And of course, those  
15 kind of things, the Department is constantly  
16 looking at.

17                   CHAIRPERSON COMRIE: So, have you  
18 received complaints about inadequate crowd  
19 management at retail stores, or different venues,  
20 when it happens?

21                   ANDREW EILER: I'm not, no, we have  
22 not received any consumer complaints on, in that  
23 kind of situation, for those kind of issues.

24                   CHAIRPERSON COMRIE: Well, do you  
25 believe that the Police Department, which actually

1  
2 we should've had here also, I kind of believe that  
3 this should've been a joint hearing with the PD,  
4 to talk about the public safety aspect of it. I  
5 don't, you know, I think that we'll probably have  
6 to do that again, after we do some redrafting of  
7 the bill, because I do agree with you with some  
8 aspects of the inadequacies of the bill. But I  
9 think that there has, just be complaints at the  
10 police level about crowd management and the issues  
11 of these grand openings, or special events that  
12 try to attract people to a venue and then they  
13 wind up crushing the venue, on their way in. So,  
14 you know, I think the government should have a  
15 role in overseeing doorbuster sales. I believe  
16 that we should do whatever we can to ensure that  
17 incidents that happen, like that, like what  
18 happened at Wal-Mart last year, does not happen in  
19 the City. And I hope that we can, you know, sit  
20 down and work together to try to make that a  
21 reality. Now, you talked about the--the three  
22 concerns about the bill, the language such as  
23 limited quantities. Right now, does DCA deal with  
24 checking whatever a retailer says in a particular  
25 ad? Do you check store ads or sales ads to make

1  
2 sure that what's being promoted in the ad is  
3 actually realized? I know you do it in the  
4 vehicle industry, but--

5           ANDREW EILER: We do it vehicle, we  
6 focus on certain kinds of adverti--we do have  
7 someone who's reviewing advertising in the major  
8 newspapers and things. And when stuff pops out, I  
9 mean, that's what we look at, and some claims are  
10 being made that look, you know, on its face. And  
11 then of course, we get complaints about bait-and-  
12 switch and these kind of things that promises not  
13 kept and so forth. So, that, yes, we follow up on  
14 those things. And we do have a proactive program  
15 for reviewing advertising, and, you know, address  
16 them when it appears that there's some issue.

17           CHAIRPERSON COMRIE: And do you  
18 work with--do you have someone that's monitoring  
19 the, I guess the, like this type of flyer or the  
20 different stores when they're putting in their,  
21 when they're opening up their business, to make  
22 sure that they are doing it in a manner that won't  
23 generate a doorbuster type crowd, or are you doing  
24 anything like that?

25           ANDREW EILER: I don't think, I

1  
2 mean, again, our issues have been in the area of  
3 the accuracy of the advertising, when those kind  
4 of issues come up, rather than the crowd control  
5 that they should be dealing with, 'cause that's  
6 kind of beyond what our role is in terms of  
7 saying, "Well, you should do this, you should do  
8 that." With regard to you have to impose, you  
9 have to set up this kind of crowd control, that  
10 kind of crowd control, I mean, we have no basis  
11 for ordering such things.

12 CHAIRPERSON COMRIE: Mhm. Okay.  
13 And--but you would agree that there should be some  
14 type of joint role between DCA and the PD,  
15 regarding situations that you feel may be  
16 hazardous to consumer safety.

17 ANDREW EILER: Well--

18 CHAIRPERSON COMRIE: Has the  
19 opportunity ever come before DCA as a question  
20 mark or an event that you may need to make sure  
21 that the PD is represented for a crowd control  
22 safety type in this--

23 ANDREW EILER: I'm not aware that  
24 that thing has ever come before the Department in  
25 that kind of form. I mean, I--In the course of

1 looking into this, of course the Police  
2 Departments have been involved when crowd control  
3 has become an issue, or when too many people were  
4 showing up in other locations, in other venues,  
5 you ended up with Police Department having to do  
6 crowd control, even arresting people, for, you  
7 know, assault and various kinds of issues like  
8 that. So the Police Department, if crowd issues  
9 become, arise out of the, as a result of it, they  
10 do become involved. I mean, that's something that  
11 happens, though after the event rather than I  
12 think before.

14 CHAIRPERSON COMRIE: Mhm, okay.

15 And I agree with your third point that we should  
16 be careful about over-legitimizing a crowd control  
17 plan, because you don't want the company to say  
18 that they have, they can absolve themselves for  
19 responsibility. I think that they should do an  
20 information type of notification type to the City,  
21 about what their plan is, not looking for a City  
22 sign off on it. So, I would agree with that. I  
23 think we need to work on changing that in the  
24 bill, as well. We have been joined by Council  
25 Member Gennaro now, and Council Member Koppell. I



1  
2 know Councilman Gennaro had a--did you have, you  
3 had a statement that you wanted to make first?

4 COUNCIL MEMBER GENNARO: Thank you,  
5 Mr. Chairman. I guess rather than go into my  
6 statement, something that, you know, should have  
7 done right at the outset of the hearing, and I do  
8 apologize Mr. Chairman, and everyone here for not  
9 being here at the outset of the hearing, I'll just  
10 go into questions for the witnesses, if it's my  
11 turn to do so. But if not, I can, you know, defer  
12 to Oliver if he's already signed up for questions.

13 CHAIRPERSON COMRIE: It's up to  
14 Council Member Koppell.

15 COUNCIL MEMBER GENNARO: Oh, Oliver  
16 go ahead, sure, sure.

17 COUNCIL MEMBER KOPPELL: Well, if  
18 you want--alright, fine. Do you have any  
19 jurisdiction right now, does the Commissioner have  
20 any jurisdiction to regulate the way sales are  
21 handled at stores?

22 ANDREW EILER: Not--aside from the  
23 Consumer Protection Law, no.

24 COUNCIL MEMBER KOPPELL: And the  
25 Consumer Protection Law doesn't give you any

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2 power, you couldn't say "You have to have a  
3 certain number of guards, or you have to have  
4 barriers, or you have to have a certain kind of  
5 door."

6 ANDREW EILER: No, basically the  
7 Consumer Protection Law deals with the issue of  
8 accuracy, truthfulness, in the representation of  
9 claims.

10 COUNCIL MEMBER KOPPELL: Right,  
11 right.

12 ANDREW EILER: Rather than the kind  
13 of issue that this would raise. So, under the  
14 CPL, I don't believe so. I mean--

15 COUNCIL MEMBER KOPPELL: Right.  
16 So, now are you familiar, I notice in the  
17 materials prepared for the Committee, and I, I am  
18 not familiar with this myself, but it's made  
19 reference to, that there's certain recommendations  
20 to stores in this regard, by the National Retail  
21 Alliance. Are you familiar with those  
22 recommendations?

23 ANDREW EILER: No, I'm not  
24 personally, but I'm sure that the, they, Retail  
25 Alliance is aware of these kind of issues, and

1  
2 that they would be recommending to their members  
3 what they should be doing to avoid liability that  
4 they would have under the liability laws. I mean-  
5 -

6 COUNCIL MEMBER KOPPELL: Right,  
7 now, would, do you think there'd be any purpose in  
8 codifying some of those recommendations and making  
9 them requirements for stores in New York City?

10 ANDREW EILER: That becomes a more  
11 problematic questions 'cause as you know,  
12 liability law basically imposes an obligation upon  
13 everybody, you know, whoever they do, and that  
14 they're required to exercise a certain degree of  
15 care. And the failure to exercise the appropriate  
16 care, then triggers a responsibility. And that is  
17 of course fiscal or financial, or to pay for the  
18 harm that results. And that applies to everybody.  
19 And I think that puts in place a kind of structure  
20 that forces people to be careful. And that's what  
21 applies in these kind of situations. And as a  
22 matter of fact, there's one retailer who's been  
23 paid out over \$2 million for injury claims. OSHA  
24 was involved in the case with regard to, in Long  
25 Island, they ended up with the maximum fine of

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2 \$7,000, for failing to have the appropriate, you  
3 know, safety measures or crowd control measures in  
4 place. So there, there is currently, under the  
5 current liability structure, and OSHA and so  
6 forth, there are requirements that they're  
7 supposed to follow that are meant to protect. Now  
8 there's nothing that we can do, no law that we can  
9 pass, that will prevent it. The only thing that  
10 we can do is put in place a structure to hold  
11 people accountable if they don't take the  
12 appropriate care. And that's what the liability  
13 system does.

14 COUNCIL MEMBER KOPPELL: Right, but  
15 let me say, and I value your opinion on whether  
16 this should be under the Department of Consumer  
17 Affairs, maybe it should be under the Building  
18 Department, or maybe under the Police Department.  
19 So, I mean, the--if I look at the recommendations  
20 of the National Retail Federation, there are  
21 certain specific recommendations made that, so for  
22 instance, talking about some of the physical  
23 things, they say, you know, signage, placed in  
24 strategic locations identifying where the event or  
25 merchandise is located, stanchions and barriers,

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2 outside or inside, to manage traffic flow.  
3 Tickets or wristbands can be used to maintain  
4 orderly lines; a designated chain of command, a  
5 site map, creating a site map noting entrances,  
6 exits, traffic flow. I mean, and there are other  
7 things here, I won't read the whole thing. If--  
8 that is the idea of the bill, which requires that  
9 a plan be presented to you, to your Department,  
10 outlining what the store is going to do. Now, is  
11 it a good idea to have such a plan?

12                   ANDREW EILER: Well, clearly it is  
13 a good idea for the store, to avoid liability, for  
14 failing to have it and creating a disaster. It is  
15 the incentive of the store to have such a plan.  
16 And - -

17                   COUNCIL MEMBER KOPPELL: You don't  
18 think such a plan should be mandated by law, in  
19 whole or in part?

20                   ANDREW EILER: Well, it mandated by  
21 liability law. Liability law--

22                   COUNCIL MEMBER KOPPELL: I know,  
23 but liability law is very vague in this regard, I  
24 would suspect. I mean, unless you can point to  
25 something specific, the liability law would say

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that the store has, can't be negligent.

ANDREW EILER: Right.

COUNCIL MEMBER KOPPELL: And then that's subject to interpretation through court decisions and such. But we tend to codify some aspects of liability law, many aspects of liability law, I mean, you know, it's--liability law would say that if you drive 100 miles an hour down a residential street, and you cause an accident, you're liable. But we put a speed limit of what, 30 miles an hour or 20 miles an hour, notwithstanding the fact that there's liability law. So, that's just sort of a crude example, but there are many examples where we've codified certain requirements, even though there may be legal liability. But we still codify requirements either in law or in regulation. We have countless regulations of human activity of various sorts, codified, even though in many instances the violation of such standards would be actionable under common law. So the question here is should we have substantive law in addition to the somewhat vague requirements of liability law, should we have substantive law, to put into place

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2 requirements of stores to avoid the problems that  
3 have arisen with respect to these sales.

4           ANDREW EILER: Well, the question  
5 that raises is how complete that kind of  
6 standardization of codification can be, and then  
7 what happens at the edges. And basically, what  
8 you, what you have if you codify something, does  
9 that then create protection for, if you follow the  
10 codified requirements, is that then absolve you of  
11 any responsibility for anything else?

12           COUNCIL MEMBER KOPPELL: Or maybe  
13 it should. I mean, maybe--

14           ANDREW EILER: Well--

15           COUNCIL MEMBER KOPPELL: --from the  
16 point of view of the business, maybe, maybe they  
17 should know, they maybe should have a safe harbor.  
18 I mean, people also are responsible in themselves  
19 for conducting themselves appropriately. I mean,  
20 if the store does everything possible, and 100  
21 people, notwithstanding the proper safeguards and  
22 everything else, you know, push, I don't know that  
23 the store should be liable in that instance. I  
24 mean, that's the individual's responsibility. So,  
25 I'm not, it's not our job to create a trap,

1  
2 either. So, if we create a, if we create a safe  
3 harbor, if you will, I mean, if we, presumably,  
4 under normal circumstances to use my crude  
5 example, if there's a 30 mile an hour speed limit,  
6 and someone's driving 27 miles an hour, and they  
7 have an accident, absent other factors, they  
8 couldn't be held responsible for speeding. Of  
9 course, if there's special circumstances, there's  
10 a big rainstorm or something, they might still be.  
11 But we've created a standard, and in violating,  
12 not violating that standard probably does provide  
13 at least somewhat of a safe harbor. So, I don't  
14 think that that's a good argument that you make.  
15 Let me ask you this, assu--forget for a moment  
16 whether you agree or disagree, if I believe, as a  
17 legislator, that there ought to be certain  
18 regulations of these sales, and that the stores  
19 ought to be required to do certain things to  
20 protect the consumer, should you be the ones to  
21 regulate this? Because you have indicated that  
22 the Department of Consumer Affairs basically  
23 regulates deceptive practices, they don't regulate  
24 the conduct of the enterprise in this sense.  
25 Should it be you that we put this responsibility,



1  
2 should it be the Police Department, should it be  
3 the Building Department? Who should--should, if  
4 we--my own view if licensing is probably an  
5 unnecessary step, but I think that creating  
6 requirements is a good idea. If we create  
7 requirements, and perhaps give some agency  
8 additional rulemaking power, 'cause I don't know  
9 if we can think of everything that ought to be  
10 done, I think we should create reason--we should  
11 legislate standards and then we should let perhaps  
12 an administrator put into place rules. That's  
13 generally the way we do things. We create overall  
14 standards and then we have rulemaking power.  
15 Should this be given to your Commissioner in your  
16 view? Or should it be given to the Police  
17 Department, or maybe the Building Department?  
18 What's your opinion on that?

19 ANDREW EILER: Well, basically on  
20 this--

21 COUNCIL MEMBER KOPPELL: If we do  
22 it, if we do it--

23 ANDREW EILER: --basic--

24 COUNCIL MEMBER KOPPELL: --contrary  
25 to your advice.

1  
2                   ANDREW EILER: Well, it would  
3 basically depend on, I'm not the one at this  
4 point, without knowing what the proposal would be,  
5 who would be best able to effectuate the proposal.

6                   COUNCIL MEMBER KOPPELL: Well, I'm  
7 telling you what the proposal would be.

8                   ANDREW EILER: Well, even whatever  
9 the standards, you mean you have standards and  
10 what the standards would call for, and how it  
11 would be implemented and effectuated. Like what  
12 you have here is, yes you have situations that  
13 rarely, it doesn't very, happen very often, that  
14 someone engages, you end up with these doorbuster  
15 sales. That's where the licensing scheme comes  
16 into play where you put in play a review process  
17 that would require an enormous expenditure of  
18 resources to review all these things, when  
19 essentially it would not be nec--or it wouldn't  
20 be, wouldn't have much of an impact one way or the  
21 other, because people follow their response, and  
22 do what needs to be done.

23                   COUNCIL MEMBER KOPPELL: Well, I'm  
24 not suggesting licensing.

25                   ANDREW EILER: Okay.

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COUNCIL MEMBER KOPPELL: I'm suggesting that we set up a series of standards that stores will have to comply with--

ANDREW EILER: Well--

COUNCIL MEMBER KOPPELL: Such as, so that if, for instance, we could set up one standard that they'd have the responsibility of notifying the police. That could be a standard. If they're going to hold one of these sales, they have to notify the police. Another standard could be that if it's reasonably anticipated that more than X number of people will show up, that they have some sort of stanchions or gates so as to-- for crowd control. There are a whole series of things, the National Retail Federation rules probably provide a good starting place. If we set up those rules, should--I'm not saying to review them in advance, I'm saying should the rules be under your Department or should we give it to somebody else?

ANDREW EILER: Probably, with respect to if you're talking about crowd control, safety, and that kind of thing, it's definitely not within a normal activity of the Department of

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Consumer Affairs. Where it would be appropriately lodged would depend upon exactly what would be the proposal and what, what requirements are, and that would identify which agency would best be able to deal with the issue that you wanted to address. But since it's--

COUNCIL MEMBER KOPPELL: They're mostly crowd control issues, I would think. That's my impression, I may be wrong, but which agency would you recommend?

ANDREW EILER: I think you, I'm not going to recommend which agency, I'm not going to be the one to pick who should be doing what when I'm not sure what it is they're going to be doing.

COUNCIL MEMBER KOPPELL: Well, I, I sort of thought I told you, but I guess you're going to take the Fifth on that. So, I'll leave it at that. Thank you.

CHAIRPERSON COMRIE: Councilman Gennaro.

COUNCIL MEMBER GENNARO: Thank you, Mr. Chairman. I have to say, Mr. Eiler, I've been associated with this Council for almost 20 years, as a staff member, and as a Council Member. And

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2 this is perhaps, I think, one of the sorriest  
3 displays I've ever seen from any agency regarding  
4 what I think is a very constructive proposal. And  
5 we could stay here, we could stay here for four  
6 days, and you would just come up with more and  
7 more reasons why it doesn't make any sense to do  
8 anything, or why the City really shouldn't bother,  
9 or the City would expose itself to liability.  
10 Obviously, it's Department of--your agency, and  
11 perhaps this Administration, that there is just  
12 not a problem here, and I fail to see why your  
13 agency perhaps, in you know, consultation with  
14 other agencies, couldn't come here with a  
15 presentation that amounted to anything more than  
16 "Don't bother us with this," which is really what  
17 you're testimony and all your presentation has  
18 been, since the time that I've been in the room.  
19 I didn't hear what you said earlier. Let's just  
20 go over briefly what happens in other kinds of  
21 street assemblages. It is, there's no way you can  
22 get a couple of people in the city together, you  
23 know, without requiring some sort of permit, some  
24 sort of structure, some sort of oversight, some  
25 sort of action on the part of the government to

1  
2 make sure that public safety is going to be  
3 provided for. If somebody wants to do a block  
4 party or a street fair, or a parade, or some kind  
5 of activity, you know, within one of our public  
6 parks, I mean, all of that has to be--all of that  
7 requires the submission of plans to somebody. You  
8 know, you need a street activity permit, or you  
9 need this, or you need that, or you need a permit  
10 from the Parks Department. You know, you can't  
11 hit a tennis ball in this town without somebody,  
12 somebody from the government making sure that the  
13 public safety and wellbeing is going to be  
14 provided for. And I would posit that most of  
15 those kinds of, most of those kinds of things are  
16 not something where people are going to be  
17 gathering in the middle of the night, they're  
18 anxious about, you know, getting in there. People  
19 have nothing to do other than, you know, get on  
20 each other's nerves, like while they're waiting  
21 for the doors to be opened. I think this kind of  
22 situation where you have actors within the City,  
23 whether it's a, whether it's, you know, some of  
24 kind of retail establishment, or in other kinds of  
25 situations where they're having some sort of

1  
2 audition or something, where people have to line  
3 up and queue up, and that there've been problems  
4 with that kind of thing. It would seem that it's  
5 incumbent upon the government to make sure, when  
6 these, you know, impromptu kinds of, or actually  
7 they're not impromptu, they're planned,  
8 advertised, they're, you know, going to attract  
9 thousands of people, you know, with no public  
10 safety provided for, it is certainly incumbent  
11 upon the government to take steps to make sure  
12 that the entity that's doing this, has done their  
13 appropriate due diligence, and you know, made  
14 appropriate provisions for security. Like many  
15 retailers already do, because they don't want to  
16 be subject to liability. But we can't be  
17 dependent upon everybody to do that, and there are  
18 going to be bad actors, and there are going to  
19 people, are going to be people who don't care.  
20 And frankly these bad actors are not threatened by  
21 a \$7,000 fine that I think you just mentioned a  
22 few minutes ago. It would be, you know, merely a  
23 cost of doing business. So, what I had hoped for  
24 was when they, you know, Department of Consumer  
25 Affairs, you know, came here today, there would at

1  
2 least be a recognition that this is something  
3 that, you know, government needs to focus on. And  
4 perhaps at the, you know, Department of Consumer  
5 Affairs is not quite the right entity to do that,  
6 but there, you know, is a recognition of this and  
7 you could've come here today saying, "Well, I've  
8 had a consultation with the, you know, Department  
9 of, you know, Transportation; I've had  
10 consultation, you know, with the Police  
11 Department; I've had consultation with the  
12 Building Department" maybe "We've reached out to  
13 our neighbors in Nassau County where this, you  
14 know, terrible stampeded happened last year." And  
15 even though you could say, "I don't speak for  
16 these other departments, this is the direction  
17 that we believe we ought to be going," and you  
18 know, "Here is a, you know, framework that we  
19 think we can, you know, use as a basis to  
20 proceed." But that's not what we've heard.  
21 You've just, you're just completely blowing of  
22 this whole topic. And I think it's a sorry  
23 display on the part of the Department of Consumer  
24 Affairs, because you know, while we, you know,  
25 want to, you know, protect consumers from, you



1  
2 know, businesses that are going to cheat them, or  
3 you know, in some way deceive them, at the end of  
4 the day, whether it's through the, you know,  
5 Department of Consumer Affairs or some other organ  
6 of city government, our job first and foremost is,  
7 you know, before we protect their pocketbook from,  
8 you know, business practices, is to protect their  
9 basic, you know, health, wellbeing and safety.

10 And you've come here before us today with a very,  
11 you know, bureaucratic mindset that says, "This is  
12 not what we do." And you know, we have liability  
13 laws in place, but still we have stampedes, we--we  
14 have people getting injured and killed. And I  
15 don't know that it makes sense to even engage you  
16 in a detailed line of questioning on where we can  
17 go, because you haven't done the due diligence on  
18 this, and frankly I don't think you or your agency  
19 really care. If you want to respond to that, go  
20 ahead.

21 ANDREW EILER: Well, sir, I was  
22 asked to come her to comment on the content of  
23 Intro 913, and to the--and whether those proposals  
24 would address, and would in fact deal with the  
25 issue at hand. We don't, you know, we take

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seriously, the fact that consumers get injured.

COUNCIL MEMBER GENNARO: I don't think you do.

ANDREW EILER: The question becomes, the questions becomes, whether or not this proposal, with its requirements, would enhance public safety. Now, let's take a question of liability. Liability law imposes severe financial penalties if harm occurs as a result of failure to do something. This law imposes some penalties for failing to follow those requirements, which are vastly less than what OSHA imposed on the store where somebody died. So, the question in terms of the adequacy of this proposal putting something in place, is whether or not this really does put any incentives in play that are greater than the incentives that already exist to make people do the right thing. And given the legisl--given the proposals, one of the concerns that we raised is the triggering mechanisms. Now, this calls for licensing and activity, but the triggering mechanisms are so vague and ambiguous, you would be very hard-pressed to tell whether or not the activity needs to be licensed. Now, the

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2 even occurs on one day. They're supposed to be  
3 giving us informa--or getting the license 60 days  
4 in advance. We wouldn't know whether a, whether a  
5 sale is going to be held. We would not find out  
6 until two, three, four days beforehand. And then,  
7 we're supposed to, then you're going to use the  
8 licensing mechanism to try to enforce this, with  
9 the vague requirements for whether or not you even  
10 need a license? By the time you got through all  
11 that, the sale would be a month over. So, I mean,  
12 what you're asking that you're--my point is, we  
13 did look at this. We raised issues about the  
14 adequacy of this proposal to address the very  
15 serious issues. And our point was that there are  
16 things that really the proposal falls short.  
17 We're not denying the importance of having  
18 safeguards to ensure that the public is adequately  
19 protected. We raise the issues about whether or  
20 not this proposal will advance those goals. We  
21 don't think so.

22 COUNCIL MEMBER GENNARO: And that  
23 is fine for, for the agency to come in here to  
24 criticize, as you should do, and to show where  
25 there are, you know, shortcomings in the approach

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2 that we have taken. But when I think of the vast  
3 resources of this administration and all of its  
4 transportation professionals, and all of its  
5 building professionals, and all of its public  
6 safety professionals, and all of its Department of  
7 Consumer Affairs professionals, you know, this  
8 administration and, you know, any mayoralty, you  
9 know, has a significant amount of professional  
10 expertise, you know, to bear on this problem. And  
11 I don't see any, you know, concrete proposals sort  
12 of coming from the Administration, as to what we  
13 could, you know, realistically do. I see  
14 criticisms of what we have proposed, and that's  
15 fine and appropriate to do that, but rather than,  
16 you know, just, you know, criticize the efforts  
17 that we have taken in this proposal and to show  
18 how, in our opinion, and in the Administration,  
19 and in the opinion of your agency, and of this  
20 Administration, how they don't get the job done,  
21 it is more constructive for the Administration to  
22 come here and tell us how we can provide, you  
23 know, for the public safety, of these people who,  
24 you know, come onto these long lines. And that,  
25 in my opinion, hasn't been done. So, just as, you

1  
2 know, you are criticizing what, you know, we have  
3 done here, I don't think this is a good day for  
4 the Department of Consumer Affairs, or for the  
5 Bloomberg Administration, with regard to taking  
6 this issue seriously and giving us concrete  
7 proposals, like they've tried to do in other  
8 jurisdiction, like you know, Nassau County where  
9 this happened. And that I see as a problem. You  
10 know, not coming here with, you know, some sort of  
11 concrete thing that we could try to do, to get  
12 this serious need corrected. And you know, your  
13 statement basically is that there's, you know,  
14 nothing we can do. And you know, we have  
15 liability laws, and people, if they don't live up  
16 to the liability laws, people are going to get  
17 hurt, people are going to get killed, and you  
18 know, recourse is that, you know, people are going  
19 to get sued. And that is, I think, you know,  
20 unsatisfactory, to go forward with that as our  
21 posture. Because you tell that to the families of  
22 the people who get, you know, injured or killed,  
23 and that they can take, you know, scant, you know,  
24 comfort from the fact that, you know, the people  
25 who set this chain of events in motion, are going

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2 to be subject to a \$7,000 fine, and, you know,  
3 some kind of fine. I don't think it would be  
4 terribly difficult for us as a City to figure out  
5 a way to mandate that the entities who do these  
6 kinds of sales, and do these kinds of events,  
7 where people are going to be congregating without  
8 any kind of supervision, I don't think it'd be  
9 difficult to in some way mandate that they do what  
10 many retailers already do. There are many  
11 retailers that do this on a regular basis, they're  
12 very concerned about liability, they make sure  
13 that they have security personnel, they make sure  
14 that they have barricades, they make sure that the  
15 crowd is, you know, monitored, and you know,  
16 somehow informed as to, you know, when the doors  
17 are going to open, or whatever. And the cops are,  
18 you know, notified as to what's going on. I don't  
19 think it's difficult to get everybody to do what  
20 many of the major actors on this playing field  
21 like already do. I don't think that's difficult.  
22 But according to you, to quote, "There's nothing  
23 we can do," and I think that's a sorry state of  
24 affairs.

25 ANDREW EILER: Thank you very much.

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2 COUNCIL MEMBER GENNARO: Thank you,  
3 Mr. Chairman.

4 CHAIRPERSON COMRIE: I'm going to  
5 have Councilman Barron go first.

6 COUNCIL MEMBER BARRON: Thank you  
7 very much, Mr. Chair. You know, I find it ironic  
8 that the Mayor's Consumer Affairs Protection seems  
9 to be more concerned about protecting retailers  
10 and business folk than consumers. And the reason  
11 why I say that, you usually have some pretty  
12 intelligent responses to our bills; this one falls  
13 far short. Number one, you say that small  
14 businesses and businesses would have difficulties  
15 letting you know that sales are going to happen 60  
16 days in advance. What's the problem? They tell  
17 you three days now, you're saying, but 60 days is  
18 that they won't be able to do that, that that's  
19 not reasonable, that's not thinkable? Many  
20 businesses have ten year visions, they have  
21 detailed plans for a year. I don't see why they  
22 couldn't get information to you about,  
23 particularly on so-called Black Friday, that comes  
24 every year, they know that's going to happen a  
25 year in advance, and there's some other times

1 where they know these sales are going to happen.  
2  
3 When I see some of this, this is when we get  
4 suspicious, whether the Mayor's protecting his  
5 business friends or are you really trying to  
6 protect consumers, because that one doesn't make  
7 sense. And then to prioritize suing over safety  
8 doesn't make sense, even if there's anything that  
9 could happen that can bring safety, you don't want  
10 to have to sue, 'cause you don't want a person to  
11 die, you don't want a person to be injured. So it  
12 seems that a plan that could possibly prevent an  
13 injury, prevent a death, gives less weight than  
14 their ability to sue after death, or after an  
15 injury. That doesn't make sense, either. And  
16 then, you say that it would be illusory for us to  
17 be able to determine how many people will show up,  
18 well that's with everything. You know, I've done  
19 a lot of demonstrations and the police ask us how  
20 many people are going to be there. We don't know  
21 whether it's really going to be 500 or 1,000 or  
22 2,000, so people take their estimate and they make  
23 a plan on the best estimate. So to say that it's  
24 'cause you can't predict the number of people  
25 because you won't be able to really sue, and that



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2 you, you know, you won't know how to do sales in  
3 advance, makes absolutely zero sense. So that's  
4 why, and I agree with Council Member Gennaro, it  
5 makes, makes us think, "What's really behind  
6 this?" because that really doesn't make sense.  
7 What's wrong with having a plan and be licensed  
8 and trying to prevent death? We all agree, we all  
9 agree that people have died and have been injured  
10 and fights have occurred. So obviously whatever's  
11 in place is not working. So something else has to  
12 happen. So to me, this is just a marginal step in  
13 the right direction, and it can be made stronger,  
14 better, whatever, but it is a step in the right  
15 direction. I just don't understand this weak  
16 response to a very, very serious issue.

17                   ANDREW EILER: Well, I mean,  
18 whether or whatever this bill does, or any system,  
19 the only thin that, as I said before, nothing, no  
20 law requirements that are put in place will  
21 prevent things from happening. The only thing  
22 that any kind of law can effectively do, or any  
23 kind of standard or rule, is to hold people  
24 accountable for the actions that they take, that  
25 are deemed to be inappropriate, in whatever manner

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2 or way it is deemed to be appropriate. And that's  
3 what liability law does, it does hold people  
4 accountable, clearly. And--

5 COUNCIL MEMBER BARRON: I got that.  
6 So let me, let me be clear with that.

7 ANDREW EILER: And this, so that's  
8 really the question--

9 COUNCIL MEMBER BARRON: I got that  
10 part. So you're saying that all--your theory on  
11 laws is they're not preventative, that they're  
12 just, so long--

13 ANDREW EILER: Well, they seek to--

14 COUNCIL MEMBER BARRON: Well, you  
15 said any law, so that no law on the books is  
16 really there to prevent anything from happening,  
17 instead of--

18 ANDREW EILER: No, no, no, no.

19 COUNCIL MEMBER BARRON: It's to  
20 hold people accountable after it happens.

21 ANDREW EILER: No, no, no, no,  
22 that's not what I said. What I said was--

23 COUNCIL MEMBER BARRON: Well, I  
24 heard you say that.

25 ANDREW EILER: No, no standard put

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2 in place will by itself, because of violations,  
3 that's why we have courts, that's why all of this  
4 happens. So that basically, the law can set out  
5 what standards people must comply with--

6 COUNCIL MEMBER BARRON: Right.

7 ANDREW EILER: --and to hold them  
8 accountable for failing to comply with those  
9 standards.

10 COUNCIL MEMBER BARRON: That's one  
11 part of it, there's also--

12 ANDREW EILER: Okay, now--

13 COUNCIL MEMBER BARRON: --laws put  
14 on the books to prevent--

15 ANDREW EILER: Correct.

16 COUNCIL MEMBER BARRON: --people  
17 from doing things.

18 ANDREW EILER: And that is, that is  
19 that if the incentive, whatever's put in place,  
20 hopefully people will abide by it. Therefore,  
21 they will conform in their behavior to what the  
22 law requires. So it's not only sanctions that  
23 make people comply, but the willingness and  
24 understanding that it ought to be done. Now, the  
25 question that we, the point, or the concerns that

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2 we raised here, is that it does not appear to us,  
3 that the proposals in this kind of a context,  
4 would significantly enhance the incentives that  
5 are already in place to make people do what needs  
6 to be done to avoid these kind of harms.

7 COUNCIL MEMBER BARRON: But what  
8 incentives?

9 ANDREW EILER: Now, there may be  
10 other--

11 COUNCIL MEMBER BARRON: They don't  
12 even have to tell you that a sale is happening but  
13 two-three days before it happens.

14 ANDREW EILER: Well--

15 COUNCIL MEMBER BARRON: They don't  
16 even have to tell you that.

17 ANDREW EILER: Well--

18 COUNCIL MEMBER BARRON: So how  
19 much, how serious--

20 ANDREW EILER: We could, we could  
21 look at an alternative of dealing with the  
22 situation. I'm here talking about this proposal,  
23 and how it would advance the goals that it has.  
24 We have doubts about whether that will do, that  
25 would, will advance those goals.

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COUNCIL MEMBER BARRON: So saying that we have to have a plan--

ANDREW EILER: So--

COUNCIL MEMBER BARRON: --saying that it has to take in consideration all of the things that's in our proposal. Saying that you will be, have to be accountable, you have to really think this thing through, you just can't be thinking about maximizing profits and say, "Come on down to the big sale," and could care less who's on line, and how long they've been on line, what happens on line. None of that, we don't have to plan for that, don't have to prepare for that, don't have to prevent any injuries, nothing, just come on down, let's make these sales, and if anybody gets hurt, just sue 'em. That's basically what's happening. This goes beyond that, at least we talking about a plan, we talking about some preparation for it, precautions being taken to save lives, and stop injury. And I think it does do that, and we can always go further with some other legislation, but it does at least that. But anyway, I'll stop, 'cause we're repeating ourselves, I think all of us are saying the same

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thing. Thank you very much.

CHAIRPERSON COMRIE: Okay, so since I won't be repetitive, I think you got the message from all of the members up here, that we would like the City to come up with something, and to assist us with being able to protect the crowds, recognizing that there are actually more of these type events happening not just on Black Friday but especially in a City like New York with having where artists where come, or where people come with special sales, such as I referred to that's happening on, happening tomorrow in Flatbush, at the corner of Flatbush and - - Avenue at 8:00 o'clock, they're offering gift cards, putting out incentives to the people for the first 100 shoppers. Where we know that's going to be a melee of people trying to get there, where you have, you know, special promotions going on, and you're asking people to come and model. And people got trampled trying to get to a site in midtown. Where you have the situation that someone did earlier this year where they did a promotion with the supposedly bringing old Jets players and offering tickets, and people wound up

1  
2 getting into a melee and having a fight. There  
3 needs to be a plan to protect other consumers and  
4 the individuals. So, while I don't disagree that  
5 DCA should be the point person, I do agree that  
6 the Administration should work with us to come up  
7 with something sooner rather than later. So, with  
8 that, I want to thank you for being here.

9           ANDREW EILER: No, we're always  
10 willing to talk about how to make things better.

11           CHAIRPERSON COMRIE: Well, I'm not,  
12 I'm not blaming this just on you, Andy [laughter]  
13 I think the message that from, came from all three  
14 members and myself is that we need to get the  
15 Administration to sit down with us to work out  
16 something, not necessarily your agency, but I  
17 really think that the PD and DOT and the  
18 Department of Buildings should sit down with a  
19 taskforce and come up with something sooner than  
20 later. Because it's now Black Friday, is going to  
21 be almost every Friday between now and the holiday  
22 season. The phenomenon of creating special events  
23 to attract people to come and visit retailers or  
24 to come to events is going to be a regular  
25 phenomenon, not just on Black Friday. And I think

1  
2 we need to prepare the City to deal with it. So,  
3 thank you for being here this morning. Sorry that  
4 you got, you were the victim of our venom towards  
5 a larger problem.

6 ANDREW EILER: That's alright,  
7 happens all the time.

8 CHAIRPERSON COMRIE: Thank you.  
9 The next person that we have coming in, if anyone  
10 would like to testify, we do have the appearance  
11 cards here, if you are interested in speaking on  
12 this issue. But we have Mr. Edward Gershowitz,  
13 attorney at law.

14 EDWARD GERSHOWITZ: [off mic] Thank  
15 you, Mr. Chair. Good morning, Council Members.

16 CHAIRPERSON COMRIE: Morning. Mr.  
17 Gershowitz is the attorney for the family of the  
18 person that was trampled and murdered at the Wal-  
19 Mart incident last year.

20 MALE VOICE: Yeah, sure.

21 [background noise]

22 EDWARD GERSHOWITZ: Good morning,  
23 Council People. I have to tell you that, well, we  
24 do represent my office, the estate of--

25 CHAIRPERSON COMRIE: I know you



1  
2 speak loud ,but we have to record it, so if you  
3 don't mind speaking into the microphone--

4 EDWARD GERSHOWITZ: Sure.

5 CHAIRPERSON COMRIE: --so the  
6 recording can be--

7 EDWARD GERSHOWITZ: Yes, sir.

8 CHAIRPERSON COMRIE: --spot on.

9 EDWARD GERSHOWITZ: Alrighty.

10 CHAIRPERSON COMRIE: Thank you.

11 EDWARD GERSHOWITZ: Alright. We  
12 represent, my firm, the estate of Jdimytai Damour,  
13 everyone knows the situation that occurred last  
14 Black Friday. And I'm here on behalf of the  
15 estate to comment on the unfortunate, to say the  
16 least, events that took place last year on Black  
17 Friday, and the proposed, what I consider life-  
18 saving, literally, legislation that seeks to  
19 prevent such an incident from occurring again in--  
20 from occurring again in the future. And as many  
21 know, we've been through it here in the last hour  
22 or so. Every year the large retailers, Wal-Mart  
23 for example, entice customers to attend their  
24 doorbuster sales, the day after Thanksgiving,  
25 which is known colloquially as Black Friday.

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2 These retailers, these big box stores, offer items  
3 at large discounts, for only a limited time, and  
4 the sales begin in the early hours of the morning.  
5 Wal-Mart, and the other retailers, encourage  
6 customers to amass outside the entrance of their  
7 stores, and literally, quite literally, bust down  
8 the doors in order to reap the benefits of the  
9 discounted items. Advertising and marketing  
10 campaigns for doorbuster sales are specifically  
11 designed to create a climate of competition among  
12 the customers. Sales only last for a limited  
13 time, there're only scant quantities of the  
14 discounted products available, encouraging patrons  
15 to arrive early in order to literally beat out  
16 their fellow patrons for the biggest deals of the  
17 season. This atmosphere of competition, of  
18 competitive shopping, saw its natural result in  
19 the ill-fated, yet inevitable, culmination last  
20 year when Jdimytai was trampled to death by a mob  
21 of shoppers at the Long Island Wal-Mart. Wal-Mart  
22 attracted the bargain hunters to swell outside the  
23 store's entrance, and then promptly at 5:00  
24 o'clock a.m., the floodgates opened. Upon the  
25 store's opening, the customers surged into the

1 Wal-Mart creating a treacherous stampede. The  
2 dangerous conditions were easily, easily avoidable  
3 if Wal-Mart had only properly prepared for the  
4 massive crowds, the consumer frenzy, which it had  
5 deliberately created. There was a lack of  
6 sufficient plans for crowd control, there was no  
7 provision for crowd management training, no tools  
8 that were necessary to safely manage what they  
9 knew to be a substantial crowd. This was in utter  
10 disregard for human life and limb, in that it  
11 created, Wal-Mart created an extremely hazardous  
12 condition, which took the death the Jdimytai, took  
13 his life. The proposed legislation, this  
14 lifesaving legislation, if you will, and I don't  
15 really think that it's saying too much to call it  
16 that, because I'm sure that many major decision,  
17 major bills are passed upon in this room. I think  
18 this is one of the most important ones. It goes  
19 to the very heart of consumers, which is what the  
20 Department of Consumer Affairs should be here to  
21 protect: consumers. In any event. The  
22 legislation calls for retailers to apply for a  
23 license to conduct such a sales event, and create  
24 and implement appropriate crowd control measures.  
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2 These steps are important to ensure that retail  
3 leviathans such as Wal-Mart, are vigilant to  
4 protect those persons who are invited onto their  
5 premises for the purpose, for the purpose, for the  
6 purpose of profit. Unfortunately, greed and a  
7 lack of concern for the public welfare  
8 demonstrated by corporate giants, too often the  
9 companies are holiday season. This legislation,  
10 this legislation will compel retailers to consider  
11 the safety of their customers first, instead of  
12 only their bottom line. This legislation, I  
13 submit, Council Members, puts people over profits.  
14 Thank you.

15 CHAIRPERSON COMRIE: Thank you for  
16 your testimony. We'll hear from Council Member  
17 Gennaro, and then Councilman Barron, have  
18 questions for you.

19 COUNCIL MEMBER GENNARO: Thank you.  
20 Sir, if it's okay for you to stand for questions.

21 EDWARD GERSHOWITZ: Sure.

22 COUNCIL MEMBER GENNARO: Is that  
23 okay?

24 EDWARD GERSHOWITZ: Yeah, I'll be  
25 happy to.

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COUNCIL MEMBER GENNARO: Oh, sure.

EDWARD GERSHOWITZ: To the extent that I'm able, but--

COUNCIL MEMBER GENNARO: Okay, sure, and at the outset of your statement, I didn't catch your name, sir, I want to call you by name.

EDWARD GERSHOWITZ: Oh, Edward Gershowitz from the Law Office of Gershowitz, Libo and Korek.

COUNCIL MEMBER GENNARO: Okay. Mr. Gershowitz, first of all thank you for coming here today. We know that your in depth involvement with this tragedy puts you in a good position to speak about the human impacts of what's going on, and you know, certainly you are a legal expert that can speak to some of the underpinnings of the presentation put forward by the Administration, who came here and said that the liability laws as they currently exist are probably the only things that we can do. And it was, I don't want to speak for them, but they basically indicated that those would have to be sufficient to protect consumers. And I would think that you would disagree with

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2 that, and could you, if you could, just talk a  
3 little bit about how the current legal framework  
4 of liability in these cases is not sufficient to  
5 protect people like your client, and others that  
6 come to these gatherings.

7 EDWARD GERSHOWITZ: Well, Council  
8 Member, I have to tell you, as I listened to the  
9 DCA representative, I felt like I had fallen  
10 through the looking glass, with all respect. Here  
11 I have an Administration spokesperson for the  
12 Consumer Affairs agency, is coming in here telling  
13 us that we have lawsuits, and we have a legal  
14 system that's set up and designed to protect  
15 people. So I had to scratch my head on that one,  
16 basically. But to hear somebody say, from the  
17 Administration, that there should not be standards  
18 in effect which would be able to lessen or abate  
19 the number of lawsuits. And not that I'm saying  
20 there are a lot of lawsuits that are out there,  
21 they're there for very meritorious reasons--to  
22 protect the consumers and protect people. But we  
23 have the, not to go off on too far a tangent here,  
24 but you know, we have building code, labor law  
25 regulations and safety standards to ensure that

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2 our workers who are working on skyscrapers and  
3 window washing at high elevations in our buildings  
4 in New York City are protected, and that the onus  
5 is put on the people and the contractors and the  
6 owners who have the ability to ensure that there  
7 is a safe place to work. These are regulations  
8 and standards that are derived, such as here, so  
9 that you will not have such a torrent of  
10 litigation, so to speak, which is what I've always  
11 thought this Administration was against,  
12 basically. So to hear them say they don't want to  
13 impede people from bringing lawsuits, again I was  
14 looking for the rabbit in Alice in Wonderland.  
15 So, the other thing I did notice on the statement  
16 that was handed in by the DCA representative,  
17 concerned that, the Administration was concerned  
18 about taking away people's right to sue, and that  
19 if there had been licensing requirements that had  
20 been adhered to, then people wouldn't have their  
21 day in court. But how is that any different, I  
22 would submit, than the City of New York granting a  
23 building permit to a construction company, to come  
24 in and to do some work. You can't bring a case  
25 against the City just upon the basis that they

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2 gave a permit to a contractor that wasn't  
3 qualified or didn't do the right job and someone  
4 gets hurt. This sets a floor, I submit, this sets  
5 a good paradigm that will protect people as they  
6 wait in line to do their shopping. Especially in  
7 today's economic times, I mean, you can't turn on  
8 the television and not hear how people are  
9 suffering. And for the Wal-Mart's of the world,  
10 and I go back to that name, but any big box  
11 retailer to, you know, object to complying with  
12 duly promulgated standards that are set out, that  
13 they have to follow, so that they can ensure that  
14 there will be rules and regulations and safety  
15 concerns that will be adhered to, how can anybody  
16 argue against that? It doesn't make any sense to  
17 me. It makes no sense at all. Safety, safety,  
18 safety's where it's at. And that we have to  
19 protect the people that are out there. And that  
20 somebody would come in here and say that we don't  
21 want any rules or regulations or standards? I  
22 mean, how can you do something like that? I mean,  
23 how can you tell the Damours, how can you tell the  
24 Damours? How can I go back and tell my clients  
25 that there was somebody who showed up here from



1  
2 the Administration and said that this is not a  
3 good thing to do? And they're going to ask me,  
4 when I get out of here, and I speak with them, and  
5 they say, "How did it go?" And I have to say  
6 there was somebody there from the City of New York  
7 that said we shouldn't have this? They're going  
8 to scratch their heads. So, I just want to  
9 commend the Council Person, Gennaro, for--

10 COUNCIL MEMBER GENNARO: Oh, that's  
11 me.

12 EDWARD GERSHOWITZ: But--yeah, I  
13 gathered.

14 COUNCIL MEMBER GENNARO: [laughs]

15 EDWARD GERSHOWITZ: For putting  
16 forth this legislation, at least taking a  
17 significant part, if not the lead, in putting as I  
18 say, and I've got to back to it, and that's what  
19 we lawyers are about that we're out there for  
20 people, that we're putting people over profits.

21 COUNCIL MEMBER GENNARO: Thank you  
22 for, as I said, for being here and to, bearing  
23 witness to what we're trying to do, and how that  
24 can be of help in preventing further tragedies.  
25 Do you have any knowledge, and you may not,

1  
2 certainly, of other jurisdictions and what they  
3 may have tried to do to speak to this issue and  
4 provide protections? In your handling of this  
5 case, have you come across other jurisdictions  
6 that have grappled with this and tried to come up  
7 with something that provides protections?

8 EDWARD GERSHOWITZ: Well, without  
9 speaking particularly to other jurisdictions, I do  
10 note that the National Federation of Retailers and  
11 Manufacturers come out with some sort of  
12 promulgations and rules. And if we're going to  
13 rely on a private trade industry group to come out  
14 with regulations, I mean how can a municipality,  
15 of all places the City of New York, or any  
16 governmental entity, not take the lead or be in  
17 lockstep in terms of discussing and putting for  
18 the these kinds of measure to protect the  
19 populace? Just with regard to your question about  
20 any other particular regulations that might be in  
21 place, I was, woke up this morning to the Today  
22 Show, was it? And they were talking about,  
23 although, well, whatever the Sarah Palin book, and  
24 I think up in Rochester and how there are people  
25 getting wristbands, and then they're coming back,

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2 and they have a whole system by which there won't  
3 be, if you can believe it, a stampede to get  
4 there. There's also the, some movie out there,  
5 "Twilight" or something like that, I think,  
6 there's a new movie coming out.

7 COUNCIL MEMBER GENNARO: Oh, yes,  
8 yes.

9 EDWARD GERSHOWITZ: All the  
10 teenagers are excited about that one, and I heard  
11 that they're--

12 COUNCIL MEMBER GENNARO: Opens this  
13 Friday, my daughter already has her ticket.

14 EDWARD GERSHOWITZ: Well, alright,  
15 so did she get the wristband and stand in line?  
16 Because they're doing that for that, also.

17 COUNCIL MEMBER GENNARO: Yeah, one  
18 of the, one of the mothers kind of, you know,  
19 organized the whole thing. But my daughter has  
20 tickets and she's very happy. She's counting down  
21 the hours until Friday night, to--

22 EDWARD GERSHOWITZ: And just  
23 separate and aside from that, Councilperson, just  
24 to go back to your question, I would think that  
25 the whole country would basically stand up and

1  
2 take notice of New York City when New York City  
3 does something. I mean, the whole nation listens.  
4 And we should be at the forefront of specific  
5 licensing requirements, so that nothing ever  
6 happens like what happened with our neighbor, and,  
7 in Nassau County.

8 COUNCIL MEMBER GENNARO: Sure.

9 EDWARD GERSHOWITZ: And that the,  
10 you know, I could go on about the whole thing with  
11 the Nassau County District Attorney's agreement,  
12 but I won't, don't think this is the proper forum  
13 for that.

14 COUNCIL MEMBER GENNARO: Okay,  
15 well, once again, you have my thanks, and I'm sure  
16 you have the whole Committee's thanks for being  
17 here today. We certainly appreciate what you're  
18 trying to do for this family that's been so deeply  
19 affected by what big box retailers do, and your  
20 presence today I think is going to help in our  
21 quest to try to get something done here in New  
22 York City, that hopefully can be a bellwether for  
23 the rest of the country. And I thank you once  
24 again for being here. And thank you, Mr.  
25 Chairman, and Mr. Chairman, I haven't said so far,

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2 but I want to thank you publicly for your support  
3 and your sponsorship of this bill. You are a  
4 sponsor of this bill, and I thank you for doing  
5 that, and for having this, having this hearing,  
6 'cause we wouldn't be here if not for your  
7 leadership. So thank you, Mr. Chairman.

8 CHAIRPERSON COMRIE: Thank you,  
9 Council Member, and I do believe in the idea  
10 behind this bill, I do believe we need to sit  
11 down, and hopefully with the Administration, work  
12 on something quickly. You know. And I hope that  
13 the Administration will open its, open its mind to  
14 getting something done seriously here. Council  
15 Member Barron?

16 COUNCIL MEMBER BARRON: Yes, I just  
17 wanted to say, you know, this is, to me,  
18 capitalism at its greedy worst. And it promotes  
19 competition over cooperation, as you said, it  
20 prioritizes profits over people. And even the  
21 idea of doorbuster, you know, come bust a door  
22 down, you know, they're encouraging breaking and  
23 entering, you know [laughs] it's like, maybe we  
24 should arrest 'em for that, could we do a citizens  
25 arrest or something, when they just use that

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2 title. But I want to go back, you may have  
3 answered it already, but I just wanted to be a  
4 little clearer on their claim that the license  
5 would absolve the store owners for any, you know,  
6 civil actions and legal responsibility, so if we  
7 do license them, that it absolves them from that,  
8 you know.

9 EDWARD GERSHOWITZ: Well, if you  
10 get a driver's license and you go out on the  
11 street--

12 COUNCIL MEMBER BARRON: Hello.

13 EDWARD GERSHOWITZ: --to use the  
14 Councilperson Koppell's example earlier, and you  
15 speed, you just say, "Hey, I got my license, you  
16 can't do anything to me"? It doesn't work like  
17 that. A license ensures a floor, a license  
18 ensures a minimal standard, a license ensures that  
19 there's been due notice on the part of the  
20 profiteer in this situation, the big box retailer,  
21 if you will, that they are cognizant, and they  
22 will take into account, that they have a  
23 responsibility to the people, the patrons, who are  
24 patronizing them, and coming into their commercial  
25 enterprise. So, I don't see the fact at all, and

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2 I find it quite bizarre with all respect, that the  
3 mere fact that there is a license will prevent  
4 people from being able to exercise their rights to  
5 access to civil justice. And the civil justice  
6 laws, to digress for just a moment, or maybe to  
7 put it back into the spotlight, so to speak, set  
8 out certain standards, certain rules of reasonable  
9 conduct and reasonable care. And for a jury of  
10 one's peers, other citizens to come forth and  
11 listen, the best thing we've ever had, the jury  
12 system and the Seventh Amendment. And it enables  
13 them to hear the evidence as to whether or not in  
14 a particular situation, the retailer, for example,  
15 has acted appropriately and responsibility, or  
16 whether or not negligence has caused, proximately,  
17 is the legal term, an injury, or god forbid as in  
18 this case, a death. But evidence of particular  
19 standards, are some evidence of negligence that  
20 can be admitted into the tribunal so that that can  
21 be brought before the trier of fact, the jury, and  
22 the for the judge to pass on, and to let the jury  
23 hear that. That's some evidence of negligence.  
24 But I don't understand, and I'm not putting myself  
25 forth here as a legal expert by any means, but I

1  
2 don't understand how it is if someone is licensed  
3 that's prima facie, they use the term proof up  
4 front, if you will, that that's the beginning and  
5 the end of the whole matter. You still have to  
6 show that you adhere to certain standards of  
7 reasonable care. And if there are promulgations  
8 from the City Council or a municipality, then  
9 that's something that can be brought in front of  
10 the jury for them to consider. They'll have their  
11 right to explain away if they need to. But don't  
12 go convoluting, if you will, somebody's decent  
13 legislation, that if anything will save lives and  
14 prevent injuries, and say that that's a wrong  
15 thing to do, because then people won't be able to  
16 sue. I think Council Member Barron had it  
17 correct, when he was talking about sort of putting  
18 the horse before the cart, am I using that right,  
19 in that, you know, they, they're encouraging  
20 lawsuits, and you won't even have to get to those,  
21 if you just adhere to what's basically out there.

22 COUNCIL MEMBER BARRON: Exactly.

23 Thank you very much.

24 EDWARD GERSHOWITZ: Alright. Thank  
25 you very much for the opportunity to be heard, and



1  
2 on behalf of the family of Jdimytai Damour, who  
3 could not be here, thank you very much.

4 CHAIRPERSON COMRIE: I want to  
5 express my appreciation to you for your stepping  
6 up to help the family during its difficult time.  
7 And from your presentation today, I think that if  
8 I ever get in trouble, I'm going to give you a  
9 call. [laughter] Thanks for being here.

10 EDWARD GERSHOWITZ: Thanks, thanks  
11 a lot.

12 CHAIRPERSON COMRIE: With that, we  
13 will declare the hearing closed, unless there's  
14 someone else that has anything else they wanted to  
15 add. I want to thank Councilman Gennaro for  
16 bringing us this bill. I think that I agree with  
17 him that the Administration did not step up and  
18 take an opportunity to get something resolved  
19 here. And while we do have testimony from  
20 Lawrence Mandelker, on behalf of the New York  
21 Metropolitan Retail Association, that was brought  
22 before the Committee, yes, and we are--I'm not  
23 sure what he's saying, but it's testimony that  
24 he's--and I think he's representing the Metro--oh,  
25 yes, the Metropolitan Retail Association. So, I'm

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2 hoping that they are submitting some testimony  
3 acknowledging the fact that they need to do  
4 better. With that, I'll declare the hearing  
5 closed. Thank you very much.

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[gavel]

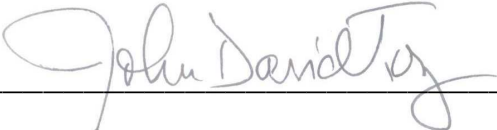
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C E R T I F I C A T E

I, JOHN DAVID TONG certify that the foregoing transcript is a true and accurate record of the proceedings. I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

Signature  \_\_\_\_\_

Date November 30, 2009