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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** BENJAMIN R. WARD, ET AL., Petitioners V.  
ROCK AGAINST RACISM

**CASE NO:** 88-226

**PLACE:** WASHINGTON, D.C.

**DATE:** February 27, 1989

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 BENJAMIN R. WARD, ET AL., :  
4 Petitioners :  
5 v. : No. 88-226  
6 ROCK AGAINST RACISM :  
7 -----x

8 Washington, D.C.

9 Monday, February 27, 1989

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 10:38 o'clock a.m.

13 APPEARANCES:

14 LEONARD J. KOERNER, ESQ., Chief Assistant Corporation  
15 Counsel, City of New York, New York, New York; on  
16 behalf of the Petitioners.

17 WILLIAM M. KUNSTLER, ESQ., New York, New York; on behalf  
18 of the Respondent.

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1 PROCEEDINGS

2 (10:38 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 88-226, Benjamin R. Ward v. Rock Against  
5 Racism.

6 Mr. Koerner?

7 ORAL ARGUMENT OF LEONARD J. KOERNER

8 ON BEHALF OF THE PETITIONERS

9 MR. KOERNER: Mr. Chief Justice, and may it  
10 please the Court:

11 The opinion of the Second Circuit of the Court  
12 of Appeals is flawed in two respects. It ignored the  
13 history leading up to the sound amplification guideline,  
14 along with the district court findings, most of which  
15 were based on uncontradicted evidence; and it applied  
16 the least restrictive alternative to suggest a  
17 hypothetical solution which had not been urged by either  
18 side up to the point of the circuit court of appeals'  
19 decision.

20 The bandshell, which is the subject of the  
21 sound amplification guideline, is located in the heart  
22 of Central Park. It's surrounded by two major roads,  
23 Central park West and Fifth Avenue. In both areas, it's  
24 heavily residential.

25 In addition, to the southwest of the bandshell



1 within 150 yards, is the Sheep Meadow which was  
2 designated by the mayor as a quiet -- a place for  
3 repose. Individuals who go there cannot use radios.  
4 They can only sit, read, et cetera.

5 QUESTION: How long ago was that?

6 MR. KOERNER: Nineteen eighty-five, Your Honor.

7 QUESTION: Just three years ago.

8 MR. KOERNER: Yes, that is correct.

9 Between 1979 and 1986 --

10 QUESTION: (Inaudible) preceded the quiet area?

11 MR. KOERNER: Yes, Your Honor.

12 Between 1979 and 1986, Rock Against Racism  
13 conducted concerts in the bandshell. During this  
14 period, there was a great deal of arguments between the  
15 city and the -- and the RAR concerning the loudness.  
16 The following occurred during the -- during this period.

17 In 1983 the police attempted to lower the  
18 sound at the mixing board, and as a consequence, the  
19 sponsor got up and told the audience that the police  
20 were trying to lower the sound and it caused a  
21 confrontation. There was some tension, and eventually  
22 the sound was lowered, and then it went back up. This  
23 was the pattern each year. There would be the  
24 interaction between the park officials and the promoter  
25 resulting in this tension each time.

1 QUESTION: Mr. -- Mr. Koerner, may I ask about  
2 the tension? Did the -- the excess sound, having it too  
3 loud, violate any city ordinance or any city rule?

4 MR. KOERNER: There was a general guideline  
5 for all parks that prohibited excessive sound. And,  
6 indeed, summonses could be issued for that guideline and  
7 summonses were issued in this case during some of the  
8 years, but the summonses were not paid.

9 QUESTION: Were -- were the -- and the  
10 violation of that guideline is subject to penalties.

11 MR. KOERNER: That's correct.

12 QUESTION: And -- and why didn't the city  
13 collect those penalties --

14 MR. KOERNER: Basically they --

15 QUESTION: -- If they had the right to?

16 MR. KOERNER: The record does not show why.

17 QUESTION: But why wouldn't that be an  
18 adequate means of preventing excessive sound in  
19 following years?

20 MR. KOERNER: Because we -- as I understand  
21 it, we -- they just went unpaid. The city tried to  
22 enforce them, but this is a not-for-profit group that  
23 shows up once a year. As a practical matter, it just  
24 wasn't enforced.

25 QUESTION: Well, maybe you could deny them a

1 permit. I suppose one of the remedies would be denial  
2 of a permit for violation of the law preceding years.

3 MR. KOERNER: Yes, that could be an  
4 alternative. But, frankly, we would just be in  
5 litigation each year in determining whether or not the  
6 nature of the violation was such --

7 QUESTION: Well, whenever you enforce a law,  
8 you get in litigation. I mean, that's one of the -- one  
9 of the things you have to do to enforce the law is you  
10 have to litigate.

11 MR. KOERNER: Yes. We don't deny that there  
12 could have been other alternatives. But this one was  
13 tried without success.

14 QUESTION: Are you saying that the troubles  
15 with RAR was the reason for the adoption of the  
16 ordinance?

17 MR. KOERNER: No. There were two other --  
18 there were two other -- It was one of the reasons. The  
19 bleeding out of sound into the Sheep Meadow areas and in  
20 the residence was one of the grounds.

21 The two other reasons were that they wanted to  
22 unify the system of permits. The bandshell is the most  
23 frequently used place in Central Park. And as a result,  
24 it was a very diffuse process where the applications had  
25 to be made to many different entities, and they wanted

1 to centralize it in one person.

2 The second thing is that many of the groups  
3 who come to the bandshell are unfamiliar with outdoor  
4 concerts. As a consequence they come with machines that  
5 are under-powered and many people don't even have the  
6 machines, and want to know what the source would be to  
7 rent such machines. So, the second purpose was to  
8 assure every group that participated in the bandshell  
9 that they would have the high-quality mechanics that  
10 would allow them to sponsor their broadcast.

11 QUESTION: Mr. Koerner, the --

12 QUESTION: Is it your position that the  
13 quality of the sound is the same whether or not the  
14 technician is the city technician or the Rock technician?

15 MR. KOERNER: Precisely, Your Honor. Indeed,  
16 if I can answer that in some depth. That goes to the  
17 heart of the issue.

18 The testimony at trial was precisely that.  
19 The city-hired sound consultant, Gary Floyd, was asked  
20 that both on direct and cross-examination. What he  
21 pointed out is that when you reflect the mix, you do it  
22 based on your technical knowledge and the knowledge that  
23 you obtain by talking to the performers, that this  
24 happens all the time. And that by doing sound checks in  
25 advance, sending out technical information to each of



1 the performers and, in addition, by talking to them on  
2 the phone in advance of the concert and allowing the  
3 performer, if he desires, to set someone down next to  
4 you to give you the technical advice, you can reflect  
5 exactly what the mix is supposed to be. Indeed, that's  
6 precisely what the district court found.

7 And when Alan Thompson, who was the technician  
8 for RAR, testified, he pointed out precisely that's the  
9 method he used.

10 Two things I would like to elaborate on in  
11 response to your question.

12 First, one year they didn't even use Alan  
13 Thompson. They rented out the equipment. So, they used  
14 precisely the same type of program that we used. The  
15 person came on, and he reflected the mix through the  
16 same process I just described.

17 In addition, Alan Thompson rented his  
18 equipment, and so -- just as we rent our equipment. So,  
19 it was very similar.

20 And finally --

21 QUESTION: So, the sound technician is not as  
22 important as, say, a conductor of a symphony?

23 MR. KOERNER: That is correct. The sound  
24 technician is merely a mechanic, and he can reflect, as  
25 the testimony shows, within five minutes precisely what

1 the performer wants.

2 When Alan Thompson, RAR's technician, was  
3 asked how he achieves the mix, he said exactly what Gary  
4 Floyd said. He speaks to the performer, he does a sound  
5 check at the beginning of the concert, and finally he  
6 allows the performers to have a technician at his side  
7 in order to reflect the concert. So, that's precisely  
8 right.

9 QUESTION: I might have had some trouble with  
10 that proposition if it just depended on my own  
11 knowledge, but the record seems to bear you out.

12 MR. KOERNER: Not only does the testimony  
13 confirm that, but the district court on two occasions  
14 reviewed that testimony. The first time it specifically  
15 noted that the technician defers to the sponsor as to  
16 the mix.

17 And then RAR made a motion to clarify the  
18 order to determine who was to control the mixing board.  
19 In response to that motion, the district court judge  
20 issued a second opinion in which he said as far as the  
21 regulation is concerned, the city is required -- he read  
22 into the regulation a requirement that they defer to the  
23 sponsor on the mix. And then he pointedly noted that  
24 there had been no evidence to indicate that the city  
25 could not reflect the mix properly. And in addition,

1 there had been evidence to indicate that the city could  
2 reflect. And that was the overwhelming testimony.

3 QUESTION: Well, if -- if -- if the city is  
4 going to reflect the mix a performer wants, why does the  
5 city want control of the mix?

6 MR. KOERNER: Because it's the only way to  
7 also control the sound to make sure that the bleeding  
8 doesn't occur to the --

9 QUESTION: So, you say there's just no  
10 practical way of just controlling the sound?

11 MR. KOERNER: Yes.

12 QUESTION: You have to do them both together.

13 MR. KOERNER: Yes, because when the sound  
14 consultant was given the job of considering  
15 alternatives, they considered, one, just having the city  
16 technician, but having the sponsor's equipment. But  
17 then the mix would have suffered because a technician is  
18 only as good as familiarity with his equipment. If he  
19 is not familiar with the equipment, he can't do the  
20 job. So, that was rejected.

21 The other thing they thought about was  
22 negotiating a decibel level. But they had tried that in  
23 1984, indeed at the suggestion of RAR, and RAR, on the  
24 eve of a concert, did not agree to it and said that no  
25 decibel level would be appropriate.

1           Indeed, consistent with that, in the testimony  
2 by Alan Thompson, RAR's chief witness, when he was asked  
3 at what level it would be appropriate for the city to  
4 interfere with the concert, he said only when the  
5 audience's ears bleed, which gives you an idea of their  
6 reaction to any attempt on the part of the city to  
7 protect the unwilling listeners in the Sheep Meadow.

8           Also --

9           QUESTION: He didn't really say only. I mean,  
10 I -- I think he was --

11          MR. KOERNER: Or painfully loud, he said.

12          QUESTION: That's right.

13          QUESTION: Well, how does -- excuse me.

14          How do -- how does the city control the sound?  
15 It controls the mix and the sound.

16          MR. KOERNER: And the -- the volume levels are  
17 right on the mixing board.

18          QUESTION: Right, right. Well, why -- let's  
19 assume there wasn't a city -- the city hadn't put this  
20 scheme in and that the performers were allowed to use  
21 their own equipment and -- to control the mix. Why  
22 couldn't a city technician sit with the performer's  
23 technician and control the sound?

24          MR. KOERNER: That is a possibility, Your  
25 Honor, but the problem is it causes the same interaction



1 between the sponsor's technician and the city's  
2 technician that creates the same confrontational  
3 atmosphere that the city had in 1983 when it tried to  
4 use the police to lower the sound.

5 QUESTION: Well, here's the city with its own  
6 equipment sitting there with a technician controlling  
7 the mix and the sound. They have next to them a  
8 technician from the performers who -- who, in effect,  
9 control the mix.

10 MR. KOERNER: Yes. That is --

11 QUESTION: Why doesn't that create the  
12 confrontation?

13 MR. KOERNER: That -- that is a possibility,  
14 but by having the city technician alongside with the  
15 sponsor's technician, you have the same type of  
16 atmosphere that we were trying to avoid, which is this  
17 interaction which never worked.

18 In addition, while each of these methods may  
19 be plausible, we believe that under that appropriate  
20 tests, which I will discuss in a little while -- that is  
21 not the test. The least restrictive alternative has  
22 never been a test of this Court. And the question is  
23 whether the city's method has been effective. And I  
24 would like to deal with that before we get to the law.

25 QUESTION: But just before we leave that

1 point, there is no finding that it is not feasible from  
2 a technical standpoint for one person to control volume  
3 and the other mixing?

4 MR. KOERNER: That's correct. Although I --  
5 what the record does show is that the technician, when  
6 he works both, he works them -- it's done immediately.  
7 So, these -- these knobs are constantly being put up and  
8 down. But you are quite correct. There's nothing  
9 directly on point in that.

10 I do want to point out that in 1986, 50 to 60  
11 concerts were held under this sound amplification  
12 guideline. In terms of whether the city could protect  
13 the mix of the sponsor, every group was satisfied, some  
14 of whom used the New York Sound group that was  
15 designated as sponsor for outdoor concerts. So, not  
16 only do we have a history and we have an expert that had  
17 been retained, but we have an in-fact use of this  
18 system, and every group reflected the mix -- said that  
19 the mix had been reflected properly.

20 QUESTION: But may I -- may I inquire?  
21 Supposing you had a less sophisticated problem and maybe  
22 a little different area that you want to avoid excessive  
23 sound in and the drummer played much too loud and they  
24 couldn't get him to quiet down, or the trumpet player  
25 played much too loud. Could the city say, well, we

1 can't seem to get him to control it, so we're going to  
2 insist on having our own drummer in this band?

3 MR. KOERNER: No.

4 QUESTION: Why not? What's the difference?

5 MR. KOERNER: Because in that particular case

6 --

7 QUESTION: And he's good. He's every bit as  
8 good as your mixer and all the rest. He's a talented  
9 artist.

10 MR. KOERNER: And the drummer is bleeding  
11 outside?

12 QUESTION: Well, he just plays too loud for  
13 the -- for the surroundings, and they keep saying to  
14 him, hey, you're too loud. And he says, well, this is  
15 the way I play.

16 MR. KOERNER: Then I -- then, yes, we could  
17 control the excessive sound if --

18 QUESTION: By -- by putting in your own  
19 drummer.

20 MR. KOERNER: No, by controlling the sound --

21 QUESTION: No, no. You don't have any fancy  
22 -- you just have old-fashioned musical instruments and  
23 in a living room or a smaller area. And you have a  
24 regulation in this neighborhood you can't -- you can't  
25 have excessive sound more than X number of decibels.

1 And you say it's too much trouble to enforce it by  
2 arresting people and putting them in jail. So, you say,  
3 well, we'll insist on having our own drummer in this  
4 band or our own trumpet player.

5 MR. KOERNER: No, because I think there --

6 QUESTION: What's the difference?

7 MR. KOERNER: -- you would be substituting  
8 your judgment for that as the esthetic, the drummer  
9 himself. But we're not doing that.

10 QUESTION: Well, no. You say your drummer --  
11 he'll play it exactly the way -- he'll play exactly the  
12 way your arranger thinks it ought to be played.

13 MR. KOERNER: Well, but that comes close --

14 QUESTION: And he's good.

15 MR. KOERNER: I agree, and that's a tougher  
16 case and it comes closer to substituting your judgment  
17 for that as the -- the musical --

18 QUESTION: No, I'm not substituting. Just  
19 have a different performer.

20 MR. KOERNER: But a different performer takes  
21 away from the -- in effect, the quality of the  
22 performance. I can see --

23 QUESTION: No, I'm assuming it doesn't. I'm  
24 assuming it doesn't. They just say we'd like to have  
25 our own drummer.



1 MR. KOERNER: I guess --  
2 QUESTION: Like we'd like to have our own  
3 mixer.  
4 MR. KOERNER: But I think the mixer is  
5 different in that --  
6 QUESTION: Why?  
7 MR. KOERNER: Because with respect to the  
8 drummer, you're replacing the instrument itself.  
9 QUESTION: Well, yes. You've got to use city  
10 on drums, too --  
11 MR. KOERNER: And maybe in that --  
12 QUESTION: -- like you say you got to use  
13 city-owned mixing equipment.  
14 MR. KOERNER: Maybe in that case, it would be  
15 unreasonable because the city would then be imposing its  
16 -- and substituting its choice for that of the actual  
17 instrument.  
18 QUESTION: Which is exactly what's happening  
19 here.  
20 MR. KOERNER: I understand where that's a more  
21 egregious situation, but I don't think that's what you  
22 have here.  
23 QUESTION: You basically don't -- don't  
24 believe that the drummer could be same, could be exactly  
25 the same.

1 MR. KOERNER: That's exactly right.

2 QUESTION: Whereas you do believe that the  
3 mixer could be the same.

4 MR. KOERNER: Here we -- we did exactly --

5 QUESTION: Just like replacing a ballet  
6 dancer, use our ballet dancer. He'll just be just as  
7 good. You don't believe he'll be just as good, do you?

8 MR. KOERNER: That's right.

9 QUESTION: But you can believe that a mixer  
10 might be just as good.

11 MR. KOERNER: That's right. And if I may give  
12 an example, Justice Stevens. If this individual was  
13 using an auditorium that had a built-in loudspeaker  
14 system, I suppose one could argue that depending on the  
15 nature of the loudspeaker system, it's affecting the  
16 quality of his performance.

17 But at some point you have to draw the line.  
18 And with the mix and the loudspeaker system, the  
19 evidence shows that we can precisely reflect what the  
20 performer wants, whereas your example is a little more  
21 extreme. And, indeed, that's exactly what the district  
22 court found.

23 QUESTION: Is there any such thing as quiet  
24 rock music?

25 (Laughter)

1 MR. KOERNER: No. But the issue -- the issue  
2 is not whether the rock music --

3 QUESTION: You're dealing -- you're dealing  
4 with loudness.

5 MR. KOERNER: Yes. But the issue --

6 QUESTION: And how loud is loud?

7 MR. KOERNER: That's correct.

8 QUESTION: Well, that's a hard thing to do.

9 MR. KOERNER: But the Supreme -- this Court  
10 held in Kovacs v. Cooper that you could establish  
11 standards for excessive sound and --

12 QUESTION: Kovacs was the difference between a  
13 loudspeaker and an ordinary voice.

14 MR. KOERNER: Yes.

15 QUESTION: But this is not involved in this.

16 MR. KOERNER: No. And we don't pretend to  
17 regulate the speech within the bandshell area. All we  
18 do is control loudness to the extent it doesn't bleed  
19 into the unwilling listener area.

20 And, indeed, as I keep pointing out --

21 QUESTION: Going back to Kovacs --

22 MR. KOERNER: -- I don't mean to belabor it,  
23 but I believe it's significant that of all the other  
24 groups -- and there was folk, reggae, other rock  
25 concerts -- every person was satisfied with the way the

1 city-designated technician made the mix. And  
2 interestingly enough, during the same year that RAR  
3 received a dispensation from using this system because  
4 it obtained injunctive relief, the Department of  
5 Environmental Protection for the city reviewed the sound  
6 levels at the concert. RAR was by far the highest and  
7 they generated complaints, whereas all the other groups  
8 used this mix to their satisfaction.

9 QUESTION: Let me go back to Kovacs for a  
10 second. There they can fix the level of sound that the  
11 sound truck can -- can distribute in the neighborhood.

12 MR. KOERNER: Yes.

13 QUESTION: Could the city have said we want  
14 our own driver on the truck?

15 MR. KOERNER: I --

16 QUESTION: We want our own driver on the  
17 truck. He's just as good as your driver and he -- we're  
18 sure that -- that he'll keep the sound levels down.

19 MR. KOERNER: And he would have controlled the  
20 sound?

21 QUESTION: Sure, he'd control it and he'd  
22 follow all the --

23 MR. KOERNER: So that it wouldn't bleed into  
24 other areas?

25 QUESTION: That's right.



1 MR. KOERNER: And he wouldn't substitute his  
2 judgment for that of one group?

3 QUESTION: That's exactly right.

4 MR. KOERNER: Yes, I believe that's a method  
5 that may have been appropriate under your Court's test.

6 This Court has dealt with the appropriate  
7 standard with reviewing time, place and manner. Time,  
8 place and manner presumes that there's going to be some  
9 limitation on free speech, but it recognizes that where  
10 there's a significant governmental interest, that the  
11 government has a right to make this limitation.

12 QUESTION: Well, you -- and your -- the  
13 government interest is controlling sound here.

14 MR. KOERNER: To the unwanted areas. That's  
15 correct.

16 QUESTION: And -- but you not only control the  
17 sound, but you control the mix. And -- and controlling  
18 the mix as such doesn't serve your interests in  
19 controlling the sound. It's just that you -- you say  
20 there -- you just can't separate them.

21 MR. KOERNER: It's the most appropriate way to  
22 control the sound. That's correct. And since  
23 mechanically the mix is not changed, and we have control  
24 over the sound, yes.

25 And if you look at Heffron and Albertini and

1 the Clark case, in each case alternative suggestions  
2 were made which were less extreme than the one the  
3 government had chosen in terms of regulating the  
4 constitutional right. But this --

5 QUESTION: Well, I know, but -- I know, but --  
6 but here your regulation is such that it -- it by --  
7 controlling the mix doesn't necessarily serve the  
8 government interest of controlling the sound.

9 MR. KOERNER: But -- it -- that's what -- I  
10 would respond it does because we believe it's the only  
11 effective way of controlling the sound because to have  
12 two people side by side creates the same confrontational  
13 problem that we had before when the police tried to  
14 control the sound, as did the other park rangers,  
15 between 1983 and 1986.

16 QUESTION: Well, if you're going to let the  
17 performers' technician sit with the city's technician, I  
18 don't know why that isn't the same confrontation.

19 MR. KOERNER: Because as a practical matter,  
20 whenever you have a -- a group that doesn't recognize  
21 sound limits, and you have a large audience there, and  
22 you have the city there, some things happen in the heat  
23 of battle that don't follow a normal, orderly plan.  
24 Indeed, the Second Circuit recognized that when they  
25 themselves had trouble with their own suggestions

1 because they recognized it dealt with -- it depended  
2 upon negotiation and agreement, ability to get along.  
3 So, they said as a last resort, pull the plug.

4 Well, pulling the plug penalizes the listeners  
5 who have come to the concert. It's the most  
6 confrontational. Yet, the circuit thought it was the  
7 least restrictive. And, indeed, the district court in  
8 discussing that aspect found it to be the most  
9 restrictive because it stops the concert.

10 It is not our position that there aren't  
11 alternatives. But each alternative is fraught with  
12 difficulty. Any attempt to negotiate, which we had  
13 tried between 1983 and 1987 failed, and --

14 QUESTION: Mr. Koerner, could I come back to  
15 the mix again? I -- I guess I don't understand this. I  
16 had thought that -- that you can't control the sound  
17 level without controlling the mix, that if -- if you  
18 just establish a single sound level -- some instruments  
19 carry further than others and, therefore, you just can't  
20 set it at a certain level and let the person mix the  
21 various instruments any way he wants. If you mix it a  
22 certain way, it's going to carry further than if you mix  
23 it another way. And the decibels and the -- and the --  
24 the instruments' relative strength are interdependent.  
25 Is that right, or am I wrong about that?

1 MR. KOERNER: The record is -- is a little  
2 unclear. What the record shows, though, is that the  
3 mixer operates all of these in tandem. And, indeed,  
4 Joseph Killian pointed out to support your conclusion,  
5 that many times concert promoters who are unfamiliar  
6 with outdoor concerts will use loudness to overcome the  
7 mixing problem so that they will make it loud as if that  
8 was the solution to properly reflecting the instruments.

9 Basically what the testimony is is that it's  
10 all on one board, and one person moves all the handles  
11 in a synchronized fashion. So, whether it is possible  
12 to have two people sit side by side is unclear from the  
13 record. What is not possible is to have a volume  
14 control separate and discrete from the mixing board.  
15 That presents more problems than it resolves.

16 QUESTION: But you -- but you say that the  
17 city will let a -- the performer's technician sit with  
18 the city technician.

19 MR. KOERNER: Yes, that is correct. And,  
20 indeed, that's what Alan --

21 QUESTION: And dictate the mix.

22 MR. KOERNER: Absolutely, and the district  
23 court so found, and the circuit court upheld that  
24 particular portion. Basically this was a solution after  
25 much consideration by the special projects director and



1 the sound consultant expert.

2 And the reason for that is all the other  
3 methods that were selected with the exception of pulling  
4 the plug depended on the cooperation of each group.  
5 And, frankly, with respect to this particular group, the  
6 cooperation had been less than the optimum during the  
7 preceding history.

8 So, what the city wanted to do -- and they had  
9 two goals -- was to have a program that would reflect  
10 the sponsor's views and at the same time assure uniform  
11 high quality.

12 QUESTION: How does the -- how does the city  
13 technician know when it's too loud?

14 MR. KOERNER: What happens is Mr. Killian,  
15 who's a special events director -- he attends every  
16 concert. And he will go around the periphery of the  
17 bandshell and see whether or not the sound is bleeding  
18 into those areas. He then will take the sponsor back  
19 there and tell the sponsor that it's too loud. And they  
20 then will concur.

21 During 1986 there wasn't one problem for 50 to  
22 60 events. The only problem was the one with RAR where  
23 they had a dispensation because they had injunctive  
24 relief that allowed them to use their own concert mix.

25 With respect to the applicable case law,

1 Heffron, Albertini and Clark, the test as we see to  
2 extrapolate from those cases is not whether or not the  
3 particular solution is the best, but whether or not it  
4 is effective. Or does it serve the governmental  
5 interest in a substantial way?

6 In this case the record shows that what we did  
7 was effective. Every group was satisfied that used it.  
8 It shows that we controlled sound. There were no more  
9 complaints from the residential areas or the Sheep  
10 Meadow. And we preserved the interests of the unwilling  
11 listeners and we also preserved the sponsor's artistic  
12 integrity. That is precisely what time, place and  
13 manner is supposed to do. And for all those reasons, we  
14 ask that the sound amplification guideline be upheld.

15 I have not used all my time. If I may, Mr.  
16 Chief Justice, reserve some of it for reply if necessary.

17 QUESTION: Very well, Mr. Koerner.

18 Mr. Kunstler?

19 ORAL ARGUMENT OF WILLIAM M. KUNSTLER

20 ON BEHALF OF THE RESPONDENT

21 MR. KUNSTLER: Mr. Chief Justice, may I  
22 please the Court:

23 I want to start with agreeing in some respects  
24 with Justice Kennedy with reference to whether the -- a  
25 conductor of a symphony orchestra is like the man who

1 does the -- the mix. And I think they are very  
2 comparable. The man that does the mix, as all the  
3 testimony indicates -- I think on direct Mr. Thompson  
4 said he's part of the band. There is no leader, of  
5 course. He's part of the band. And then the city's  
6 expert, Gary Floyd, stated that "you have left the  
7 decisions and esthetic choices up to that individual,"  
8 the technician at the console.

9 And I was thinking we put in our brief several  
10 -- several analogies which I don't think are  
11 particularly apt such as mixing paints and so on, but I  
12 think there's a better analogy which would fit in with  
13 Justice Kennedy's question. The analogy would be if  
14 they had symphony orchestras, as they do, play in  
15 Central Park, and Zubin Mehta and the New York  
16 Philharmonic always played loud and therefore the city  
17 said, in order to control the noise, we're going to put  
18 Georg Solti in there because he's approved by  
19 everybody. Everybody likes him.

20 QUESTION: But there's no evidence in the  
21 record to bear you out. The trial court said that you  
22 suggested this for the first time only upon information  
23 and belief after the trial and that the evidence to the  
24 effect at trial was to the contrary.

25 MR. KUNSTLER: No. I think it was the other

1 way around because I think that on direct Alan Thompson  
2 said that the mixer is part of the band.

3 QUESTION: But that's not the finding of the  
4 district court, Mr. Kunstler.

5 MR. KUNSTLER: Well, I think that the  
6 testimony then is belied by the finding or the finding  
7 belied by the testimony because the court of appeals  
8 found that it was uncontroverted in the record, that the  
9 mixer is part of the band. He's the esthetic leader of  
10 the band.

11 And I think if you will look on page 370 of  
12 the -- of Fed. 2nd, you will find that the -- that the  
13 unanimous court said it is uncontroverted in the record.  
14 These claims are not controverted in the record, that  
15 the mixer is part of the band. He is the esthetic  
16 leader.

17 And you have the city's own technician -- own  
18 expert, Mr. Floyd -- and I quote him here. "You have  
19 left the decisions and esthetic choices up to that  
20 individual," the technician at the console. It is on  
21 Joint Appendix 180.

22 So, we have a situation where everyone agreed  
23 that the mixer is not just a mere technician who turns  
24 some knobs automatically. He is the leader of the band.  
25 He's part of the band. And to say that you're going to



1 put the city leader of the band in there, I think is  
2 very much like saying you're going to put Georg Solti in  
3 because he plays andante and dolce as against Zubin  
4 Mehta who plays loud because you're doing the esthetic  
5 mixing with reference to a city employee whom you must  
6 use.

7 QUESTION: I should have thought that is true,  
8 but the record doesn't bear it out.

9 MR. KUNSTLER: Well, I quoted to you what was  
10 said both by Alan Thompson and by Gary Floyd and what  
11 the court of appeals said about that. I think the  
12 record does bear it out.

13 Now, with reference to the alternatives here,  
14 I -- I was somewhat astonished to hear you say that it  
15 -- you don't use alternatives in cases like this. And I  
16 think Justice Stevens mentioned some. There are five  
17 alternatives that our friends, the National Park Service  
18 -- and I thought their brief was more for us than for  
19 the appellant in this case -- the -- or the Petitioner.

20 The National Park Service says in its  
21 regulation -- this is the Solicitor General's brief --  
22 in -- page 21 -- "In implementing its regulation, the  
23 Park Service relies on a number of alternatives."  
24 Ironically it's -- they add, this doesn't include what  
25 the New York City Department of Parks does. And there

1 are five alternatives here that are possible short of  
2 putting in your own mixer.

3 One is a limiter. It was testified to during  
4 the trial. There's an automatic limiter you can put on  
5 the sound, like a governor on an engine.

6 Second, a separate sound control is perfectly  
7 feasible, separate and off the console, and the record  
8 indicates that.

9 Thirdly, ordinances, which they say they don't  
10 enforce. But there are ordinances. New York City has  
11 an anti-noise ordinance, and there are nuisance  
12 ordinances, breach of the peace ordinances and so on.

13 Fourthly, they can pull the plug. That's one  
14 that the National Park Service uses.

15 And fifthly, they can negotiate --

16 QUESTION: Is that feasible when you have a  
17 crowd? I -- I've heard riots occurring when that  
18 happens.

19 MR. KUNSTLER: But they pull the --

20 QUESTION: You have a lot of people who are  
21 there for a rock concert, and the police come in and  
22 pull the plug. That's --

23 MR. KUNSTLER: Justice Scalia, they did it  
24 twice here. You'll find it on JA 140 to 141, pulled  
25 twice. There was no problem at all. These are not

1 large attended. They may have 3,000. They may have  
2 1,000.

3 QUESTION: Well, yours -- yours might not be.  
4 Some of the other events there may be. I -- I don't  
5 think that's a very happy solution, do you?

6 MR. KUNSTLER: Well, they did it twice and it  
7 caused no problem whatsoever.

8 QUESTION: Well, fine. Sometimes you're  
9 lucky. Sometimes you're not.

10 MR. KUNSTLER: But that's the last resort  
11 anyway.

12 QUESTION: It certainly depends upon the  
13 crowd, doesn't it?

14 MR. KUNSTLER: That's the last resort. Even  
15 the Park Service --

16 QUESTION: Well, I don't think that's a very  
17 feasible one, frankly. I -- in fact, I consider that  
18 more extreme than what was done.

19 MR. KUNSTLER: Well, that's the last resort,  
20 but there are so many before you even reach that point.  
21 What about a limiter? That was testified to. What  
22 about a separate sound control I think that Justice  
23 White was talking about? What about enforcing those  
24 ordinances?

25 QUESTION: Do you concede the

1 constitutionalty of a separate sound control?

2 MR. KUNSTLER: Yes, I do in -- because I think  
3 they have a right to regulate sound. Now, I have a  
4 problem with that because I know how much sound is part  
5 of the sound of a rock band, and I have a certain  
6 problem with it.

7 But for the sake of this argument, they  
8 have a right I think to control sound, and I would agree  
9 with that. We're not raising the question that they  
10 don't have a right to control sound. We agree they do.  
11 And I'm not sure a constitutional issue is involved  
12 there in a public park.

13 QUESTION: And you agree the record is  
14 ambiguous as to whether sound affects mix?

15 MR. KUNSTLER: Yes, I think I would agree with  
16 that. If I had tried this case, I think I would have  
17 worked in more about the question of sound and mix.

18 And by the way, the only three complaints  
19 here, Justice Kennedy, were three letters in the  
20 record. I think they're Exhibits H 1 to 3, one by Isaac  
21 Asimov, three letters that were put in over objection as  
22 hearsay from people who said they heard the sound at  
23 Central Park West.

24 QUESTION: Does -- RAR is not a performing  
25 group itself, is it?



1 MR. KUNSTLER: No, it's a promoter. It's Rock  
2 Against Racism. They have usually six bands --

3 QUESTION: And so -- so, you actually want to  
4 use your mixer for other bands?

5 MR. KUNSTLER: For the bands that come to the  
6 RAR concerts.

7 QUESTION: But aren't you doing the same thing  
8 the city is doing?

9 MR. KUNSTLER: Well, no, but they choose him.  
10 It's the same thing that the New York Philharmonic does  
11 when it chooses Zubin Mehta. They choose him. The  
12 bands want to work with him.

13 QUESTION: A hundred percent of the bands  
14 chose your promoter -- your -- your technician rather  
15 than the city's?

16 MR. KUNSTLER: Oh, I don't know if there was a  
17 vote on it, but every year we get much the same bands.  
18 Alan Thompson --

19 QUESTION: Well, but it's important if you're  
20 saying each -- each group has to have its own technician  
21 and it's like Zubin Mehta, and now you're saying that  
22 RAR does it for all the groups that appear.

23 MR. KUNSTLER: Yes. They do it --

24 QUESTION: It seems to me quite inconsistent.

25 MR. KUNSTLER: They do it for all with the

1 consent of the groups. He works with the groups before  
2 they get there. He works with them when they're there.  
3 They know him from past experience, and they like what  
4 he does.

5 QUESTION: Well, is there testimony that any  
6 of the specific groups objected to the city's technician?

7 MR. KUNSTLER: No, they never had it, not  
8 these groups. They never had it because they -- there  
9 was a dispensation for them. They got the -- the  
10 injunction, and then they got the ruling of the court of  
11 appeals. So, there is nothing in record about that.

12 I might add that the one way that I think is  
13 most feasible is negotiating the decibel level. And  
14 there's a misstatement in the reply brief of the  
15 Petitioner. On page 8, they say the evidence also  
16 showed that RAR repeatedly violated agreed-upon sound  
17 levels in the face of repeated requests by police to  
18 reduce the sound. That is untrue. And if you look at  
19 the Joint Appendix references there, you will find  
20 nothing in there about agreed-upon sound levels at all.  
21 They never proposed that.

22 In fact, as the court of appeals found -- and  
23 I'm quoting from page 371 -- the city rejected the  
24 alternative of negotiating a decibel level for each  
25 event with the sponsor. They rejected what would be the

1 least intrusive and the least restrictive way, which  
2 would be negotiating a decibel level, which is exactly  
3 what the National Park Service does. That's one of  
4 their recommended alternatives.

5 And, Justice Scalia, I think that is the most  
6 feasible way. You don't intrude. You don't force them  
7 to use a conductor they don't want or a sound mixer they  
8 don't want. And you negotiate a decibel level. It was  
9 never done in this case.

10 QUESTION: What do you do when they violate  
11 the decibel level? Pull the plug?

12 MR. KUNSTLER: Well, there are -- just what  
13 the Park Service says it does. Number one, the Park  
14 Service says -- and they spell it out very clearly --  
15 that when the volume gets over the level, they send over  
16 a representative or a ranger, park ranger, who says  
17 you're over it. Stop it. And if they don't stop it,  
18 then you have the alternatives of criminal actions. You  
19 have the alternatives of pulling the plug, which I would  
20 say -- agree with you should be the last in any  
21 concert. And by the way, Rock Against --

22 QUESTION: I thought that had been done with  
23 your group. Although there wasn't a specified decibel  
24 level, I thought there was indication in the record that  
25 the police had told the group you were playing too loud.

1 And they said, okay, we'll lower it, and then it went up  
2 again. And then the police came back --

3 MR. KUNSTLER: That is that evidence --

4 QUESTION: -- (inaudible) up and down.

5 MR. KUNSTLER: That evidence is in the record,  
6 but there was no negotiated decibel level before the  
7 concert.

8 QUESTION: Well, what difference does it make  
9 whether -- whether they tell you're too loud, and you  
10 say, okay, I'll lower it, and then you get too loud  
11 again, or whether they say you're too loud because  
12 you're three points over this decibel level?

13 MR. KUNSTLER: Justice Scalia, a policeman  
14 cannot judge decibel level without an instrument. There  
15 was never an instrument used here at all. There is a  
16 way to measure decibel level. The Park Service uses  
17 it. The police department is not equipped to do that,  
18 and they didn't do it.

19 QUESTION: Well, are you contesting the -- the  
20 accuracy of the evidence that they got louder again when  
21 the police left?

22 MR. KUNSTLER: Not at -- not at all, but how  
23 do you know what the decibel level --

24 QUESTION: Well, I don't know how much louder  
25 they got, but I know they got louder than they had



1 agreed to reduce it to.

2 MR. KUNSTLER: No. There was no agreement as  
3 to decibel level. That's what I'm trying to say. No  
4 agreement whatsoever. The city refused to negotiate  
5 that, and that's why the court of appeals said that they  
6 rejected that alternative. If there had been -- you  
7 were just saying to me a policeman said it was too loud.

8 QUESTION: Well, I don't know. Mr. Kunstler,  
9 you know, when I was a young man, occasionally I had  
10 been at parties that got a little loud. And -- and an  
11 officer would come by --

12 MR. KUNSTLER: Is this a confession?

13 QUESTION: An officer would come by. He would  
14 not have a decibel meter. He'd say the party is too  
15 loud.

16 (Laughter)

17 QUESTION: And I have heard that on some  
18 occasions, and not at parties I was at, it would get  
19 loud again.

20 (Laughter)

21 QUESTION: And the officer would come back  
22 without a decibel meter. I mean, I --

23 MR. KUNSTLER: I know.

24 QUESTION: This is just unrealistic.

25 MR. KUNSTLER: But, Justice Scalia, I think

1 what you're saying is unrealistic. What happens in a  
2 dorm or in a residential house, when a party gets too  
3 loud and the policeman says it's too loud, is different  
4 as to whether rock music or music is bleeding into  
5 another area. And they have tests to show I think --  
6 It's not in the record, but I'll tell you what I found,  
7 that 110 decibels is the proper decibel limit not to go  
8 into the Sheep Meadow. And I think when you've got to  
9 -- when you've got a thing like this, you can't use the  
10 analogy of a private party.

11 QUESTION: No matter what instruments you're  
12 using? I mean, if you're using, you know, a bank of  
13 flutes all at 110 decibels, it's the same as if you're  
14 using --

15 MR. KUNSTLER: No, but 110 is the maximum --

16 QUESTION: -- clarinets?

17 MR. KUNSTLER: -- is the maximum decibel  
18 strength that will bleed it into another area.

19 QUESTION: And -- and --

20 MR. KUNSTLER: Flutes won't do that. I agree  
21 with you. Flutes will not reach that decibel level.

22 QUESTION: Mr. Kunstler, as I understand the  
23 court of appeals' opinion here, they said that the city  
24 had to use the least intrusive means of regulating the  
25 volume. In your opinion, is that the correct test under

1 our cases?

2 MR. KUNSTLER: I think it is. I think --  
3 admitting they have a right to control noise, which I  
4 admit, I think that the least intrusive way into First  
5 Amendment expression must be used.

6 QUESTION: And what -- what is the leading  
7 case from our Court, do you think, that supports that  
8 proposition?

9 MR. KUNSTLER: Well, I think that essentially  
10 one of the tests which I think was used in O'Brien,  
11 although I don't think O'Brien and that four-prong test  
12 applies here when they use the term "least intrusive  
13 means" -- I think in many of your cases -- none are like  
14 this case. This is a sui generis case.

15 QUESTION: But what is the principal case you  
16 would rely on here to us for the proposition that the  
17 city must use the least intrusive means?

18 MR. KUNSTLER: I think, essentially, I would  
19 start with O'Brien and go through some of the other  
20 cases that you've talked about, Boos v. Barry, maybe --

21 QUESTION: What would you do about --

22 MR. KUNSTLER: -- Maybe Frisby v. Schultz. I  
23 mean, there are a number of cases.

24 QUESTION: What would you do -- what would you  
25 do about Clark and Albertini?

1 MR. KUNSTLER: I don't think they apply.

2 QUESTION: Well, they said --

3 MR. KUNSTLER: Sleeping in a park has nothing  
4 to do with sound levels.

5 QUESTION: I know, but this is a time, place  
6 and manner question, isn't it?

7 MR. KUNSTLER: I'm not even sure this is a  
8 time, place and manner.

9 QUESTION: Let's assume it is.

10 MR. KUNSTLER: They keep talking about that.

11 QUESTION: Assume it is. Assume it's a time,  
12 place and manner restriction. Then Albertini and Clark  
13 say that the least restrictive alternative hasn't any  
14 place in this kind of analysis.

15 MR. KUNSTLER: But I don't think this is a  
16 time, place and manner at all. I think this is a curb  
17 on free expression. This is an attempt to regulate free  
18 expression. Music is within the First Amendment. I  
19 think it's an attempt to regulate it. I don't think  
20 it's a question of saying time, place and manner like  
21 sleeping in Lafayette Park, for example, or Albertini,  
22 whether you can get on after being kicked off a military  
23 reservation.

24 QUESTION: Well, it's a -- it's saying what  
25 you have to do if you want to make noise in a park.



1 MR. KUNSTLER: Well, parks are a place where  
2 you're supposed to have all sorts of controversy. I  
3 think -- which is different than Hickam Air Force Base  
4 in Hawaii. And it's different than Lafayette Park. I  
5 don't agree with Clark.

6 QUESTION: I wouldn't think you would.

7 MR. KUNSTLER: It's community control, you  
8 know.

9 (Laughter)

10 MR. KUNSTLER: And -- and -- and, you know,  
11 I'm sensitive it was your opinion and I'm going into the  
12 storm by saying --

13 QUESTION: Well, it was the Court's opinion.

14 MR. KUNSTLER: I understand, but you authored  
15 it.

16 And what I'm saying is this, Justice White. I  
17 don't think it's a comparable situation. You're really  
18 not talking so much on -- although I agree thoroughly  
19 with Justice Marshall's definition and analysis of sleep  
20 in conjunction with the plight of the homeless in  
21 Lafayette Park, but here you're dealing with something  
22 else. You're dealing with an expression, an oral  
23 expression protected by the First Amendment. And I  
24 think you can make an argument, as you did, that sleep  
25 is not such an oral expression. But I think here you're

1 dealing with an oral expression.

2 I don't really think this is a time, place and  
3 manner case at all. I think this is a case, can you  
4 control artistic expression by using a state employee.  
5 And I think in that case, you -- though I recognize  
6 noise can be controlled, I think there you must use the  
7 least intrusive way.

8 QUESTION: But, Mr. Kunstler, let me  
9 interrupt. You -- you agreed earlier that noise control  
10 is permissible or something. Did you mean to say that  
11 you can control noise by using a state employee?

12 Supposing you just had a sound amplification  
13 system in a -- we may be making speeches and all the  
14 rest. You don't want it to get too loud because it  
15 disturbs the neighbors. Can you -- do you concede that  
16 the state could insist on having its own employee at the  
17 microphone?

18 MR. KUNSTLER: No. I answered Justice  
19 Kennedy's question arguendo. I don't think that noise  
20 should be controlled by the state that --  
21 constitutionally. I said, though, I would agree that  
22 noise can be controlled in some fashion, ordinances or  
23 what have you.

24 QUESTION: Oh, well, that's --

25 MR. KUNSTLER: I will not agree to the

1 constitutional aspect of it.

2 QUESTION: Well, that's obvious. But you  
3 don't agree that the --

4 MR. KUNSTLER: I don't want to give that --

5 QUESTION: Well, I thought you had. I thought  
6 you had agreed.

7 MR. KUNSTLER: I thought I had, too. That's  
8 why I'm making this second statement.

9 (Laughter)

10 QUESTION: Oh, okay. So, you would make  
11 basically the same argument if this was just you didn't  
12 have the mix to make it more of an artistic thing, but  
13 you just say the part of the artistic presentation is  
14 the sound volume, and we do not agree that you can have  
15 a state employee sitting with his thumb on the -- on the  
16 button.

17 MR. KUNSTLER: And, Justice Stevens, sound is  
18 an integral part of the artistic expression of rock  
19 groups. There's no question about it. And so, I didn't  
20 want to give the impression -- I guess I did -- that I  
21 agree that constitutionally you can just control noise.  
22 All I am saying essentially that you can create  
23 situations where you have ordinances against -- I think  
24 In the Kovacs case it said loud and raucous noise in  
25 sound trucks. And I think this Court has held a number

1 of times that that can be controlled, not by a man at  
2 the console, but by ordinances and criminal actions.

3 QUESTION: Well, you -- you mentioned that one  
4 of the possible alternatives was the automatic governor  
5 --

6 MR. KUNSTLER: Yes.

7 QUESTION: -- that would just be attached to  
8 the machine and here would be a -- here would be a state  
9 instrument.

10 MR. KUNSTLER: No, not by -- run by the state.

11 QUESTION: Well, I know it wouldn't be run.  
12 It would be automatic.

13 MR. KUNSTLER: It's automatic.

14 QUESTION: And so, when it gets too loud, it  
15 just turns it down.

16 MR. KUNSTLER: That's right.

17 QUESTION: Well, would that be constitutional?

18 MR. KUNSTLER: Well, I'm not -- it's not  
19 unconstitutional because no state official runs it.  
20 This is something the band would do voluntarily.

21 QUESTION: I know but it's something that --  
22 it's something that the state insists on. It insists  
23 that -- that people putting on the concert have this  
24 automatic noise regulator on their machine.

25 MR. KUNSTLER: No, that wasn't my point, that



1 they would insist upon it. They would set the decibel  
2 limit, and then the band, in order to control itself and  
3 keep under -- from coming under the criminal statutes,  
4 could use the limiter or the governor on the band. I  
5 wasn't suggesting the state could do it at all.

6 And I'm not even suggesting, Justice White,  
7 it's the best thing for artistic music. I think the  
8 best thing is to negotiate decibel lengths -- or limits  
9 the way the parks department does -- National Park  
10 Service -- and then enforce the law.

11 They've never enforced the law here. They've  
12 never even negotiated the limits even though they say in  
13 their brief that they do. You won't find it in the  
14 record.

15 QUESTION: But, Mr. Kunstler, I don't  
16 understand what the source of their obligation to  
17 negotiate is. If they picked your 110 decibel level and  
18 said that's what we think is reasonable and you comply  
19 with it or you don't get a permit, what would be wrong  
20 with that?

21 MR. KUNSTLER: I don't think anything is wrong  
22 with it.

23 QUESTION: So, I mean, there really is no  
24 constitutional obligation to negotiate with you. They  
25 can make the rule that they think would protect the --

1 MR. KUNSTLER: They can make the rule.  
2 QUESTION: -- the citizens' interest --  
3 MR. KUNSTLER: And the normal thing --  
4 National Park Service has made the rule that we will  
5 establish a decibel level. And they say they have 1,500  
6 events a year where sound amplification is used. We  
7 will reach a decibel level with you and you stay under  
8 it, within it.  
9 QUESTION: Is there any testimony --  
10 MR. KUNSTLER: I think that's the least  
11 intrusive.  
12 QUESTION: Excuse me.  
13 Is there any testimony in this record that a  
14 decibel level is technically feasible for controlling  
15 rock music?  
16 MR. KUNSTLER: No, I don't remember any  
17 testimony about decibel level being feasible for rock  
18 music or unfeasible or nonfeasible for rock music.  
19 But I notice in the Park Service regulations  
20 and in the Solicitor General's brief that they have rock  
21 concerts at national parks, many of them, and that they  
22 establish a decibel level. They monitor it through a --  
23 an expert or a ranger or what have you, and they have  
24 all those alternatives.  
25 They use the word "ironically" about what

1 could happen here, and I think it is ironic that they're  
2 attempting really to become part of the band, to have a  
3 state official as part of the band.

4 QUESTION: Mr. Kunstler, they say monitor the  
5 decibel level. Do we know where they monitor it? Is it  
6 on the Sheep Meadow or where the -- where the music  
7 originates?

8 MR. KUNSTLER: We don't know. I don't think  
9 there was any testimony that I recall about --

10 QUESTION: Well, I -- I keep coming back --

11 MR. KUNSTLER: -- monitoring it.

12 QUESTION: -- to the fact, I am -- I am not  
13 sure that you can just set one decibel level and that  
14 every mix of music that you get is going to carry the  
15 same distance so long as it is only at that decibel  
16 level.

17 MR. KUNSTLER: Well --

18 QUESTION: I -- do we know from the record  
19 whether -- whether that's the case?

20 MR. KUNSTLER: No, but the Park Service says  
21 that they do it.

22 QUESTION: Well, that's pretty important  
23 because if how far it carries depends not just upon the  
24 decibel level, but also upon what instruments are being  
25 played and what the mix of those instruments is, then

1 all of your solutions regarding decibel level at the  
2 source are simply not solutions at all.

3 MR. KUNSTLER: Justice Scalia, I don't think  
4 it's hard to post someone at the Sheep Meadow who has  
5 ears and can hear if it's bleeding in. In fact, you  
6 will find in the record here, in the preliminary record,  
7 there was a man named Mr. Schulman who was their expert  
8 during the preliminary injunction hearings who said he  
9 stood at Central Park West and here's his testimony. He  
10 said he had a man standing there. He could hardly hear  
11 it. That's on page 449 of the first -- the Joint  
12 Appendix, Volume II of the Joint Appendix.

13 They can monitor that easily enough. That's  
14 just as much as a policeman standing outside your dorm  
15 who here's it bleed into other parts of the college. I  
16 assume this was in college, but I won't press you on it.

17 (Laughter)

18 QUESTION: I made it up, Mr. Kunstler.

19 (Laughter)

20 MR. KUNSTLER: But the point is it's easy to  
21 have someone stand at the Sheep Meadow. That has been  
22 designated since this all began as a quiet zone by Mayor  
23 Koch. To have someone stand there. If it's getting  
24 into the Sheep Meadow, then you don't even have to care  
25 about decibels. It's going too far.



1 But you can negotiate. They can negotiate  
2 decibel limits. And I agree; different instruments are  
3 different.

4 QUESTION: Not only different instruments, but  
5 different --

6 MR. KUNSTLER: (Inaudible). But you don't  
7 find flutes in a rock band.

8 QUESTION: No. It's not just different  
9 instruments, different weather conditions. If the wind  
10 is blowing --

11 MR. KUNSTLER: And weather conditions, wind  
12 conditions --

13 QUESTION: -- In one direction, you won't hear  
14 it in the Sheep Meadow.

15 MR. KUNSTLER: -- on a particular day. So,  
16 just negotiating a decibel limit is not by itself  
17 enough, because you can -- I think Justice Stevens  
18 correctly says that wind has a big factor. The humidity  
19 has a factor. Everything plays a factor as Alan  
20 Thompson testified. But then you have someone stand at  
21 the Sheep Meadow at the outskirts or on Central Park  
22 West or Central -- or Fifth Avenue. If it gets over  
23 there, it's beyond -- it doesn't matter what the decibel  
24 limit is, it's beyond what it should be. Then they go  
25 and report to the band.

1 QUESTION: You'd certainly have a different  
2 decibel level for the Philharmonic and these rock bands,  
3 wouldn't you?

4 MR. KUNSTLER: I'm not so sure. I've heard  
5 the Philharmonic on some --

6 QUESTION: As loud as a rock band?

7 MR. KUNSTLER: Well, when those kettle drums  
8 go, it's loud. I heard it at the Abyssinian Baptist  
9 Church when the Philharmonic came, and it is loud. Now,  
10 it's not as loud ordinarily as a close, confined club --

11 QUESTION: Sorry I asked.

12 MR. KUNSTLER: -- where you have a rock band.

13 (Laughter)

14 MR. KUNSTLER: What's your next question?

15 QUESTION: That was the 1812, Mr. Kunstler,  
16 you were talking --

17 (Laughter)

18 MR. KUNSTLER: I guess that would be it.

19 I've heard the Philharmonic, but the  
20 Philharmonic works in a much bigger auditorium where  
21 sound is dissipated, like Carnegie Hall. A rock band  
22 usually plays in the Bitter End or in a small room where  
23 you have close confinement, and they do love it loud.  
24 No question about it.

25 My daughter -- well, I won't go into that.

1 (Laughter)

2 MR. KUNSTLER: In any event, I think they --  
3 what they've done here -- I think -- I don't think this  
4 is just time, place and manner. I think this is a pure  
5 First Amendment freedom of expression case.

6 They want to put Georg Solti in for Zubin  
7 Mehta, essentially, even though this is a different type  
8 band and say everybody loves Georg Solti. He's a city  
9 employee. We all love him. Many have heard him, and  
10 therefore he's the man that's going to do it. And,  
11 Zubin Mehta, you stay out of the park because that's  
12 really what they're saying.

13 The sound mix man -- despite what Justice  
14 Kennedy tells me is not in the record, the sound mix man  
15 in the record is classified as part of the band as the  
16 esthetic creator. And in fact, you'll find in their own  
17 brief they talk about the city, and the Petitioner's  
18 brief talks about the fact that there is a -- an  
19 esthetic balance that the mixer does.

20 In the Solicitor General's brief, there's one  
21 very interesting statement, which occurs on page 15.  
22 The Solicitor General says, "Here it could be said that  
23 the city's sound amplification guideline prohibits  
24 outright those aspects of artistic expression which are  
25 inherent in the selection and direct control of the

1 bandshell's sound system. There's the Solicitor  
2 General's brief that they say are in -- prohibit  
3 outright those aspects of artistic expression.

4 And that's what we have here. It's a sui  
5 generis case where the state is trying to essentially  
6 mix the sound of the band, a state employee using  
7 state-hired equipment.

8 And the fact that that man may satisfy  
9 others, that New York Sound may satisfy others -- others  
10 like it, does not mount to a hill of beans here. It's  
11 not what satisfies others; it's what satisfies the RAR  
12 and the bands which it employs.

13 In fact, on page 16 of the Petitioner's brief,  
14 they recognize the "esthetic balancing" of New York  
15 Sound, and that New York Sound showed "remarkable  
16 sensitivity to that problem." Well, that problem is  
17 what you have in this case, the problem of whether the  
18 state is going to mix the sound, under the First  
19 Amendment, of rock bands and that that satisfies the  
20 First Amendment.

21 I don't think it does, and I don't think any  
22 of your cases really have met this problem as to  
23 superimposing a state official to manipulate and to run  
24 esthetic balancing of rock bands.

25 QUESTION: But the finding is that -- that the



1 state would do whatever the -- whatever your client told  
2 them to do about the mix.

3 MR. KUNSTLER: You can't do that, Justice  
4 White, because there are some times --

5 QUESTION: Well, you did say -- you did say  
6 the court -- the finding was just wrong then.

7 MR. KUNSTLER: Remember the court's first  
8 finding was just the opposite when it issued the  
9 preliminary injunction. It changed during the hearing.

10 QUESTION: Well, after consideration.

11 MR. KUNSTLER: Well, but I think when it heard  
12 the words "until their ears bleed," I think that marked  
13 the change in Judge Haight's attitude toward this case.  
14 But I -- if you read -- in the testimony --

15 QUESTION: But he never -- it's -- I thought  
16 the way you judge this case on the basis that the state  
17 -- the state employee will follow the directions about  
18 mix given to him by the performer.

19 MR. KUNSTLER: But you can't do it. You see  
20 it in the record. You can't do it because there are  
21 over 200 operations in a single minute some time as to  
22 those knobs. You know, there are eight times 22 knobs.  
23 And to get a message across to the technician that, no,  
24 that's not the way they want it --

25 QUESTION: So, the judge just didn't know what

1 he was talking about.

2 MR. KUNSTLER: Well, I don't think you're  
3 under the -- the purely erroneous rule here of National  
4 Gypsum. I know that's cited by the adversary here. I  
5 think you've got a -- a pure First Amendment situation  
6 here. The judge in his findings did not dispute the  
7 fact it was an esthetic mix, and that the -- someone  
8 sitting next to the sound technician cannot do the  
9 trick. Alan Thompson testified that you cannot do the  
10 trick. You have to do it yourself.

11 And they allow five minutes a band here. If  
12 you notice, they have 45 minutes for, I think, eight or  
13 nine bands. And you just can't even get the drift in  
14 five minutes of these rock bands, which are very  
15 sensitive. This is all electronic music, and the mix is  
16 crucial to it. It's more crucial to it than with the  
17 Philharmonic which doesn't use -- thank God --  
18 electronic equipment, but uses the -- I think someone  
19 said -- Justice Stevens -- the old-fashioned instruments.

20 I think I've spoke my piece and I can't think  
21 of anything more to say. Unless there are questions  
22 from the Court, I will sit me down.

23 QUESTION: Very well, Mr. Kunstler.

24 MR. KUNSTLER: Thank you, Justice Rehnquist.

25 QUESTION: Mr. Koerner, you have six minutes

1 remaining.

2 REBUTTAL ARGUMENT OF LEONARD J. KOERNER

3 MR. KOERNER: Thank you, Mr. Chief Justice.

4 One of the problems with this case is that the  
5 Respondent has just carried his burden of going forward  
6 which he didn't do at the trial court. A lot of  
7 statements he made do not -- are not reflected in the  
8 record.

9 First, with respect to a decibel level, he  
10 indicated we never tried to negotiate a level. That is  
11 inaccurate. At page 343 and 384, it says quite clearly  
12 that in 1984 we suggested a decibel level, which was  
13 precipitated by their inquiry as to whether or not we  
14 should have one. And when we agreed to try it as a  
15 test, they didn't show up to try to revise it, and then  
16 took the position that any decibel level would violate  
17 their constitutional rights.

18 So, we tried that alternative, and it was  
19 because of their stubbornness, not ours, that it wasn't  
20 given a fair test.

21 Second, with respect to the mix itself, Gary  
22 Floyd, our sound consultant, did not say that the mix is  
23 part of the band. At 180 to 181, what he specifically  
24 said was a good mixer can reflect the band's artistic  
25 inclinations within five minutes.

1 Second, Alan Thompson, the Plaintiff's own  
2 witness -- I would like to just read this. It will only  
3 take a second, but it summarizes our case because he did  
4 not disagree. In asking to describe how he mixes at the  
5 board, he said specific --

6 QUESTION: Where are you reading?

7 QUESTION: Where are you reading from?

8 MR. KOERNER: At the bottom of page 100 to the  
9 top of 101 of the Joint Appendix. "Yes, I am at the  
10 board, and basically during the performance I am part of  
11 the band, because I am balancing all of their  
12 instruments together to sound right to their taste.

13 "How do you know what their taste is?

14 "They have their manager and their own sound  
15 mixer present at my elbow. Or they tell me what they  
16 want previously." And he goes on.

17 That's precisely what we do. And that is why  
18 the district court confirmed that we could reflect the  
19 mix.

20 With respect to the sound itself as to why we  
21 didn't set a decibel level, that was one of the options  
22 considered by our consultant. But the reason he didn't  
23 set a general decibel level is because it varies based  
24 on foliage, temperature and crowds. And, therefore, a  
25 decibel level for each -- for each event would not be



1 appropriate and it may not even be appropriate for the  
2 very event you set ore because the crowds keep forming.  
3 As the crowds get larger, the decibel level would have  
4 to be changed. And, therefore, there would be no  
5 objective standard they could count on.

6 Finally, with respect to the separate volume  
7 control, which has now come up as a suggestion because  
8 it was mentioned by the Second Circuit, that was never  
9 mentioned up to the point of the decision of the Second  
10 Circuit. No one ever suggested a separate volume  
11 control.

12 And, in fact, such a control would cause more  
13 problems than it would solve because a control such as  
14 that would have to be hooked into each mixer that was  
15 brought to the many concerts held at the bandshell. As  
16 a consequence, those mixers would have to be compatible.  
17 To the extent that the mixers are not compatible, we  
18 would not be able to offer the event.

19 Second, if you did have a separate volume  
20 control, far and away from the mixer, basically what you  
21 could have is competing controls. Each time we lowered  
22 the sound, an individual at the mixing board would be  
23 able to manipulate his portion through the amplifiers  
24 and nullify the competing controls.

25 Finally, in addition, by having a separate

1 volume control, it would cause a signal loss in the  
2 mixer and could upset the balance of the mix. So,  
3 frankly, that particular solution would actually affect  
4 the esthetics, and it would -- should be the least  
5 desirable. And that is why the city chose the method it  
6 did and why it was accepted by every person that used it  
7 for -- in the year 1986.

8 Thank you.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Koerner.

11 The case is submitted.

12 (Whereupon, at 11:35 o'clock a.m., the case in  
13 the above-entitled matter was submitted.)  
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No. 88-226 - BENJAMIN R. WARD, ET AL., Petitioners V. ROCK AGAINST RACISM

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BY Judy Freilicher  
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