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FILED

FEB 17 2023

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALEXANDER STEWART; ANDREW CONWAY, Plaintiffs-Appellants, v. CITY AND COUNTY OF SAN FRANCISCO; et al., Defendants-Appellees.	No. 22-16018 D.C. No. 4:22-cv-01108-YGR MEMORANDUM[*]

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Submitted February 15, 2023[**]
San Francisco, California

Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

Alexander Stewart and Andrew Conway (collectively, "Appellants") appeal the denial of their motion to preliminarily enjoin the City and County of San

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Francisco (the "City") from enforcing San Francisco Park Code § 7.03(m).[1] As the parties are familiar with the facts of this case, we do not recite them here. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

1. The district court did not err in considering only § 7.03(h) and § 7.03(m) in its preliminary injunction order.[2] At the preliminary injunction hearing, counsel for Appellants affirmatively represented that they sought only to enjoin § 7.03(h) and § 7.03(m). Because a party is "bound by concessions made . . . at oral argument," the district court did not err by taking Appellants at their word. *See Hilao v. Est. of Marcos*, 393 F.3d 987, 993 (9th Cir. 2004). "In general, an appellate court does not decide issues that the trial court did not decide." *CoreCivic, Inc. v. Candide Grp., LLC*, 46 F.4th 1136, 1145 (9th Cir. 2022) (citation omitted). This rule applies even if the issue "was raised but conceded by the party seeking to revive it on appeal." *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). In any event, "[c]onsistent with our role as 'a court of review, not of first view,'" we decline to exercise our discretion to consider Appellants' constitutional arguments in the first instance. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

[1] Section 7.03(m) requires a permit to "[c]onduct or sponsor any event which utilizes sound amplification equipment, as defined in Part II, Chapter VIII (Police Code) of the San Francisco Municipal Code."

[2] Although the district court preliminarily enjoined § 7.03(h), the City does not challenge that holding, and it is thus not at issue on appeal.

2. Because § 7.03(m)'s permit requirement constitutes a reasonable time, place, and manner restriction, the district court did not abuse its discretion by concluding that Appellants were unlikely to succeed on the merits of their claims that § 7.03(m) violates the First Amendment and the Liberty of Speech Clause of the California Constitution.[3] *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 917–18 (9th Cir. 2003) (en banc) (standard of review and factors for preliminary injunction). "To evaluate his likelihood of success on the merits, we address [a plaintiff's] state constitutional claim, rather than his First Amendment claim, because the California Constitution's protection of public speech sweeps more broadly than the First Amendment's protection." *Cuviello v. City of Vallejo*, 944 F.3d 816, 827 (9th Cir. 2019). "In accordance with California law, we look to federal standards to resolve this inquiry." *Id.*

By requiring a permit for the use of sound-amplifying equipment in the City's parks, § 7.03(m) constitutes a prior restraint on speech. *See id.* A city may "promulgate permit systems that place reasonable time, place, and manner restrictions on speech in a public forum." *Id.* To withstand constitutional scrutiny,

[3] The City's argument that Appellants lack standing is unpersuasive. Appellants challenge § 7.03(m) as an unconstitutional prior restraint because it "establishes a permit requirement in advance of public speech and bans an instrumentality of speech absent a permit." *Cuviello*, 944 F.3d at 827. Because the record shows that Appellants "have declined to speak, or have modified their speech, in response to the permitting system," they have standing. *See Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012).

a permit requirement "must not be based on the content of the message," "must be narrowly tailored to serve a significant governmental interest," "must leave open ample alternatives for communication," and "must not delegate overly broad licensing discretion to a government official."[4] *Id.*

Section 7.03(m) is content-neutral as it applies to all events regardless of content. *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003) ("[S]peech-regulating rules are content-neutral when the rule is not related to the subject or topic of the speech.").

The City's interest in protecting parks from excessive noise is significant. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989) (holding that a city has "a substantial interest in protecting its citizens from unwelcome noise" and "may act to protect even such traditional public forums as . . . parks from excessive noise" (citation omitted)). Section 7.03(m) is narrowly tailored because it sets forth "limitations that tailor the permit requirement to circumstances" where the City's interest is "actually at risk." *See Cuviello*, 944 F.3d at 830; *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1038 (9th Cir. 2006) ("[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less

[4] Appellants do not argue that § 7.03(m) delegates overly broad discretion, so we do not address this issue.

effectively absent the regulation.'" (quoting *Ward*, 491 U.S. at 799)). Unlike the ordinance in *Cuviello*, § 7.03(m) is expressly limited to parks, a specific area where the City possesses a significant interest in controlling noise levels for the enjoyment of park users. *See Ward*, 491 U.S. at 797. Nor is the City's concern speculative. Indeed, Appellants have alleged that their use of unpermitted amplified sound in the City's parks generated complaints. Because the City's "substantial interest in limiting sound volume is served in a direct and effective way by the requirement . . . as is evidenced by the complaints about excessive volume generated by [Appellants'] past [services]," § 7.03(m) is narrowly tailored. *See id.* at 800.

Although Appellants assert that the City should instead require permits based on decibel levels, rather than amplification, their hypothesized alternative "reflect[s] nothing more than a disagreement with the city over how much control of volume is appropriate or how that level of control is to be achieved." *See id.* As the City points out, estimating decibel levels in advance to issue permits and enforcing the ordinance based on decibel levels are less feasible. Thus, the City "reasonabl[y] determin[ed] that its interest in controlling volume would be best served by" its amplification regulation. *See id.* Because § 7.03(m) is not substantially broader than necessary to achieve the City's interest, it is not "invalid simply because a court concludes that the government's interest could be

adequately served by some less speech-restrictive alternative." *Id.*

Section 7.03(m) leaves open ample alternative channels for communication because it "continues to permit expressive activity in the [park], and has no effect on the quantity or content of that expression beyond regulating the extent of amplification." *Id.* at 802. In addition, as Appellants have found, there are other public spaces within San Francisco available for their religious worship.

Accordingly, because Appellants have failed to show even "serious questions going to the merits," *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (citation omitted), we need not consider the remaining preliminary injunction factors, *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).[5]

AFFIRMED.

[5] To the extent Appellants argue that the permit requirement's permit fee and refundable deposit are constitutionally infirm, this contention is also meritless. *See S. Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1139 (9th Cir. 2004) ("A state may . . . impose a permit fee that is reasonably related to legitimate content-neutral considerations, such as the cost of administering the ordinance, the cost of public services for an event of a particular size, or the cost of special facilities required for the event.").