No. 20-15085

In the United States Court of Appeals
for the Ninth Circuit

DIAMOND SJ ENTERPRISE, INC.,
Plaintiff-Appellant,

v.

CITY OF SAN JOSE,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of California, No. 5:18-cv-01353-LHK

BRIEF OF *AMICI CURIAE* FIRST AMENDMENT LAWYERS ASSOCIATION, TECHFREEDOM, AND FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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/s/ Edward S. Rudofsky

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INTEREST OF AMICI CURIAE*

The **First Amendment Lawyers Association** is comprised of attorneys whose practices emphasize defense of Freedom of Speech and of the Press, and advocates against all forms of government censorship. Since its founding, its members have been involved in many of the nation's landmark free expression cases and it frequently addresses First Amendment issues *amicus curiae* in the Supreme Court and Federal and State appellate courts nationwide.

TechFreedom is a nonprofit, nonpartisan organization that advances public policy allowing technological progress to benefit the human condition. TechFreedom works tirelessly to defend the free and open Internet where vibrant discourse thrives, unfettered and un-chilled by government overreach. TechFreedom regularly educates lawmakers and regulators on the First Amendment implications of proposed interventions and appears often as *amicus curiae* when government action threatens expressive rights online.

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* No party's counsel authored any part of this brief. No one, apart from *amici* and their counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

The **Foundation for Individual Rights and Expression** (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights on campuses nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases that implicate expressive rights. In June 2022, FIRE expanded its public advocacy beyond the university setting and now defends First Amendment rights both on campus and in society at large. FIRE represents plaintiffs in lawsuits across the United States seeking to vindicate First Amendment rights without regard to the speakers' political views.

SUMMARY OF ARGUMENT

When the government licenses expression it must not grant the licensing authority "unbridled discretion to grant or revoke permits." *See Kaahumanu v. Hawaii*, 682 F.3d 789, 802 (9th Cir. 2012). A licensing scheme "subjecting … First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional." *Staub v. City of Baxley*, 355 U.S. 313 (1958). That's because the existence of broad discretion necessarily

invites "the opportunity to discriminate … on the basis of what the licensee intends to say." *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666, 675 (11th Cir. 1984). *See also ISKON v. Eaves,* 601 F.2d 809, 822–23 (5th Cir. 1979) ("The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable.").

The panel's holding that San Jose's ordinances comport with the precision and constraint of administrative discretion required by the First Amendment subverts these principles, enabling broad, subjective, and easily abused discretion that imperils expression. The panel erred in concluding that the Nuisance Provisions provide "appropriately limited" discretion in two ways; each warrants rehearing.

First, the panel found that the Nuisance Provisions do not provide unbridled discretion because the California Supreme Court has held that California's nuisance law, which reaches "anything which is … indecent or offensive to the senses" is cabined by an "objective" standard requiring a nuisance to be "unreasonable" and "substantial." Yet while such a limitation may avoid unconstitutional applications in judicial proceedings, it does not adequately constrain the discretion of a city administrator acting as investigator, prosecutor, judge, and jury in determining whether a business constitutes a public nuisance for licensing purposes.

Second, the panel failed to address the discretion granted in the revocation provision, which allows the Chief of Police to determine, in his sole authority, whether or not a public nuisance warrants suspension or revocation. The threat of selective enforcement on improper grounds, especially when the underlying determination is highly subjective and discretionary, is incompatible with the rigid protection for expression that the First Amendment demands of licensing schemes.

This Court should grant the petition for rehearing *en banc* to fully account for the First Amendment's strictures.

ARGUMENT

I. The Panel Erred in Holding the Nuisance Provisions Do Not Grant Unbridled Discretion

The panel held that the Chief of Police's licensing discretion is appropriately limited because the nuisance standard imported by the ordinances were described by the California Supreme Court as "objective" in *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997) (noting that a public nuisance must be unreasonable and substantial to a reasonable person). But *Acuna* involved a challenge to a particular abatement injunction on overbreadth and vagueness grounds and did not address the discretion afforded to government administrators; the panel's

decision erroneously collapses these related, yet separate, inquiries into one. The "objective" standard is not alone sufficient to protect essential First Amendment freedoms.

The vagueness and overbreadth of a regulation may so exacerbate broad grants of discretion that they become susceptible to facial challenge. But a licensing scheme that incorporates an external regulation not itself facially defective can still confer unbridled discretion. *See ACORN v. City of Tulsa*, 835 F.2d 735, 740–41 (10th Cir. 1987) (ban on erecting "structures" in parks was not unconstitutionally vague, but the discretion of officials to issue permits allowing structures was unconstitutionally broad). *See also City of Hallandale*, 734 F.2d at 675 (allowing officials to deny or revoke licenses upon their determination that a licensee violated any municipal ordinances was unconstitutional); *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1312 (11th Cir. 2003) (striking ordinance allowing denial of permits if the "granting of the application would violate either a statute or ordinance or an order from a Court … or if the applicant fails to comply with Florida law regarding corporations … ."). Those more subtle forms of discretion can threaten First Amendment rights just as much as their bolder, flashier cousins.

The panel misplaced its analysis by presuming that the "cabined" standard for public nuisances necessarily limits discretion. The "objectively unreasonable and substantial" standard may limit nuisance law's reach enough to save it from facial invalidity in adversarial settings such as abatement proceedings or criminal prosecutions. But that standard does *not* sufficiently constrain the discretion of licensing officials empowered to deny or revoke licenses on their own conclusion that something is "indecent or offensive to the senses." Objectivity in measuring the effect does not remedy the preceding definitional subjectivity in this case.

For this reason, the panel's reliance on *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) is also misplaced. *Thomas* primarily addressed whether the strict prior restraint regime adopted in *Freedman v. Maryland*, 380 U.S. 51 (1965) should apply to a park permitting system which applied to everyone regardless of whether they intended to engage in a speech event. The Court determined that a lesser standard should apply and that challenges to such permitting schemes are better handled through as-applied challenges.

When the *Thomas* Court addressed Chicago's permitting standards in dicta, it found that allowing for denial on the grounds of "unreasonable danger to … health or safety" provided narrowly drawn, reasonable, and

definite standards. *Id.* at 324. While one may question how narrow and definite that standard truly is, the constraint on discretion suggested by "unreasonable" at least has the benefit of having been vetted by courts. But when coupled with "indecent" and "offensive," that language has long been a hallmark of First Amendment violations. *See U.S. v. Williams,* 553 U.S. 285, 306 (2008) (noting the Court's history of striking down laws couched in the "wholly subjective" word "indecent").

Indeed, *amici* are unaware of any decision upholding the incorporation of California's nuisance laws in licensing schemes on the grounds of their "objectivity." Quite the contrary. In cases decided *after* the Restatement "crystallized" the objective test for public nuisances, California courts disapproved of the bare incorporation of nuisance law into licensing schemes.

In *Burton v. Municipal Court*, the California Supreme Court invalidated a provision remarkably similar to the ones at issue here, which allowed police commissioners to deny permits to "a business which has been or is a public nuisance." 441 P.2d 281 (Cal. 1968). Noting that California nuisance law is enforceable in appropriate judicial proceedings, the court concluded:

> "[T]he police board is not a legislative agency, and we are not concerned here with whether particular activity has been properly defined as a nuisance but only with

> whether an administrative board may refuse to grant a permit … because in its subjective opinion the business … 'has been or is a public nuisance.'"

Id. at 693.

Following *Burton,* a California appellate court held that, even if construed as proscribing only public nuisances, an ordinance allowing license revocation "on the ground that the public health, welfare and safety is threatened and harmed" confers an unconstitutional level of discretion. *Barry v. City of Oceanside*, 107 Cal. App. 3d 257, 263–64 (4th Dist. 1980) ("the governing board must spell out with reasonableness and definiteness what constitutes a 'public nuisance' justifying the denial of a license.").

These precedents accord with a broader principle: adjudication of law violations—even objective ones—by licensing authorities as part of their decisionmaking is unconstitutional discretion. Examining an ordinance allowing for bookstore license denial if the applicant or their associates "committed" any enumerated crime, the California Supreme Court found too much discretion, in part because the licensor was "not limited to denying a license on the basis of a conviction … but must determine whether the applicant or any of his associates have committed any of those crimes, a determination that may be fraught with uncertainty … ." *Perrine v. Municipal Court*, 488 P.2d 648, 663 (Cal.

1971). Other courts have reached similar conclusions. *See City of Hallandale*, 734 F.2d at 675 ("the city commission [must] … apply the specific facts surrounding a given applicant's case to the general body of law … to determine if the applicant has violated a provision therein, and if so to deny him the right to do business. This is an adjudicative function, as such necessarily involves the exercise of considerable discretion."); *Chicago Newspaper Pub. v. City of Wheaton*, 697 F. Supp. 1464, 1467 (N.D. Ill. 1988) (striking down an ordinance allowing a city manager to revoke a newsrack permit for "violation of any city ordinance."). *Cf. Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1367 (C.D. Cal. 1995) (provision allowing revocation if "the building or structure … is hazardous to the health of safety … [under the] Uniform Building, Uniform Plumbing, or Uniform Fire Codes" did not provide narrow, objective and definite criteria).

The Nuisance Provisions here arguably present the worst permutation of both lines of cases: an administrator solely adjudicates whether a licensee has violated an external body of law steeped in manifestly subjective judgments, with a common result being censorship and the curtailment of First Amendment protected speech.

II. The Panel Erred in Not Addressing the Revocation Provision's Unbridled Discretion

The Nuisance Provisions are still more unconstitutional because they also vest with the Chief of Police the sole and unguided discretion to determine which licenses to deny or revoke based on his subjective finding of a public nuisance. As one court explained: "[T]he city manager determines whether a violation has occurred. And, since revocation is not automatic, the city manager must next determine which violations warrant revocation. This is indeed 'considerable discretion' and cannot be squared with the First Amendment." *City of Wheaton*, 697 F. Supp. at 1467. *See also Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) (holding discretionary license revocation provisions unconstitutional); *Wortham v. City of Tucson*, 624 P.2d 334, 338 (Ariz. Ct. App. 1981) ("Since the director is merely given the power to revoke, but is not required to do so, it is … unconstitutional). The discretion to revoke licenses for some infractions but not others creates built-in discretion "rais[ing] the specter of content-based censorship" just as unbridled discretion in granting permits does. Yet the panel opinion failed to address this second form of vast discretion.

This case sits in a decidedly different posture from cases like *Thomas*. The revocation provision here is not part of a "permissive" scheme to allow more citizens to use a traditional public forum for more

speech. 534 U.S. at 325. Rather, it is a restrictive provision allowing the Chief of Police to decide which businesses to strip of the right to use private property for certain First Amendment activity—on his subjective judgment that they have done "anything … indecent or offensive to the senses." And if the panel is correct that the "objective" test ensures public nuisance law reaches only substantially egregious conduct, the discretionary revocation power becomes *more* suspect: the more egregious the conduct, the fewer legitimate reasons exist for selective revocation.

Furthermore, in permitting schemes as in *Thomas*, applications could be compared to ferret out unlawful discrimination. Here, licensees will face much more difficulty in maintaining as-applied challenges; the Chief of Police is not required to identify all public nuisances and then decide between them. Rather, he can declare one business to be a public nuisance and revoke its license while ignoring others entirely—creating an informational imbalance that hamstrings licensees' opportunity to prove an unlawful motivation.

The layering of unbridled discretion in determining which licenses to revoke on top of the discretion in declaring a nuisance in the first instance, renders the threat of content- and viewpoint-based discrimination particularly acute and difficult to remediate.

III. Failure to Correct These Errors Will Substantially Endanger First Amendment Rights

The panel's decision provides a roadmap for would-be censors to avoid facial challenges: incorporate an external body of law, provide an administrator with authority to adjudicate violations, and give them discretion to decide which violations warrant denial of the right to engage in future First Amendment activity.

These concerns are not hypothetical. Amid consternation about the alleged societal harms caused by social media, many have called for a federal licensing authority to be established for social media platforms. *Should Social Media Platforms Need a License to Operate?*, IPG Media Brands (Jan. 27, 2021), https://www.ipgmediabrands.com/should-social-media-platforms-need-a-license-to-operate/. Congress is considering one such proposal: The Digital Consumer Protection Commission Act, S. 2597, 118th Cong. (2023). It would require "dominant platforms" to obtain a license from the Commission, which the agency could revoke if it finds that a licensee "engaged in repeated, egregious, and illegal misconduct" causing "significant harm." *Id.*

The breadth of possibilities for abuse is staggering, particularly considering the voluminous (and conflicting) legislation attempting to regulate platforms. *See, e.g.*, *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439

(5th Cir. 2022) and *NetChoice, LLC v. Attorney Gen., Florida*, 34 F.4th 1196 (11th Cir. 2022) (state laws regulating content moderation currently pending before the Supreme Court). To provide a woefully abridged list of activities at risk of being deemed "illegal" by proposed or enacted legislation: "biased" content moderation, failure to remove "harmful" content, allowing minors to maintain accounts, failure to explain content moderation decisions, use of content ranking and promotion algorithms, and use of "dark patterns."

It is easy to envision the abuse of First Amendment rights that would accompany the broad discretion to revoke a social media platform's license. And yet, this grant of authority would potentially be sanctioned by the panel's ruling if a social media site was deemed an "objective" nuisance or harm to children or others.

This Court should be mindful of the controversies it will soon face. The panel's decision leaves open too many possibilities for administrative abuse, and rehearing is warranted to ensure that there are clear guidelines to constrain government discretion. *En banc* review is required to remedy the panel's unprecedented relaxation of standards applicable to prior restraints in the licensing context.

CONCLUSION

The petition for rehearing *en banc* should be granted.

June 18, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 2,600 words, excluding the parts exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced serif typeface, in 14-point font, using Microsoft Office 365.

/s/ Edward S. Rudofsky

CERTIFICATE OF SERVICE

On June 18, 2024, a copy of this brief was filed and served on all registered counsel through the Court's CM/ECF system.

/s/ Edward S. Rudofsky