No. 21-15414

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARIO GURROLA and FERNANDO HERRERA,

Appellants,

v.

DAVID DUNCAN, in his official capacity as director of the California Emergency Medical Services Authority; JEFFREY KEPPLE, in his official capacity as medical director of Northern California EMS, Inc.; and TROY FALCK, in his official capacity as medical director of Sierra–Sacramento Valley Emergency Medical Services Agency,

Appellees.

On appeal from the United States District Court
for the Eastern District of California
The Honorable John A. Mendez, United States District Judge
District Court Case No. 2:20-cv-01238-JAM-DMC

APPELLANTS' OPENING BRIEF

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STATEMENT OF JURISDICTION

This lawsuit, originally filed in the United States District Court for the Eastern District of California, is a Fourteenth Amendment challenge to a California regulation. It arises under 42 U.S.C. § 1983, so the district court had federal-question jurisdiction under 28 U.S.C. § 1331. ER-81 (Am. Compl. ¶ 1).

The district court dismissed all the claims under Fed. R. Civ. P. 12(b)(6) and entered judgment for the defendants. ER-3–4. These were final appealable orders, giving this Court jurisdiction under 28 U.S.C. § 1291. The appeal is timely because the district court entered final judgment on February 10, 2021, and the plaintiffs noticed their appeal on March 8, 2021, within the 30 days allowed by Fed. R. App. P. 4(a)(1)(A). ER-3 (judgment), ER-110 (notice of appeal).

STATEMENT OF THE ISSUE

California bans anyone with a felony conviction from being certified as an emergency medical technician for ten years after release from incarceration, and it bans anyone with two felony convictions for life. As a result, people the state uses to fight fires while they are incarcerated are often prohibited from working as fulltime firefighters after release. The plaintiff–appellants are two rehabilitated men who are banned from EMT certification for life despite their qualifications. The issue is whether they have stated a claim, either facially or as applied, that California's felony bans do not rationally relate to fitness for EMT certification.

INTRODUCTION

California trains and uses prisoners to fight wildfires and then, after they have served their sentences, bars those same people from becoming fulltime firefighters because of their criminal histories. The reason is that fulltime firefighting almost always requires certification as an emergency medical technician, but the state bans most people with felony convictions from getting certified as EMTs. It bans people with one felony conviction for ten years after release from incarceration. It bans people with two or more felony convictions for life. It does this even though it has separate authority to reject anyone who would threaten public safety.

This case is a civil-rights challenge to these felony bans. Although states have wide latitude to regulate occupations, the Fourteenth Amendment sets boundaries they cannot cross. Regulations governing entry into an occupation must have a rational connection with fitness to practice that occupation. According to the Amended Complaint, these regulations—sweeping bans for a simple certification—have no such rational basis.

The district court dismissed the case for failure to state a claim. But courts repeatedly hold that laws like this are unconstitutional, so the court below should have granted the plaintiffs the chance to prove their claims. It is plausible that the bans are irrelevant, overbroad, and subject to many other irrationalities, particularly when the state already has the power to deny applicants for relevant crimes. At a minimum, the bans are plausibly irrational as applied to the plaintiff–appellants. Every indication is that these men's criminal histories from years ago do not bear on their fitness for certification today. They deserve the chance to offer evidence of the bans' irrationality.

The bans are harming a politically unpopular group. And, if the facts in the Amended Complaint are true, they are doing it without a legitimate reason. This Court should remand this case for discovery.

BACKGROUND

I. California bans people convicted of felonies from getting certified as EMTs.

California categorically bans most people with a felony conviction from receiving EMT certification. By regulation, the state refuses to certify

people with two or more felony convictions forever. 22 Cal. Code Regs. § 100214.3(c)(3). The state will also not certify a person with a single conviction "for any offense punishable as a felony" for ten years after release from incarceration for the offense. *Id.* § 100214.3(c)(6).

The bans' origin is something of a mystery. The regulation appeared in 2010. 2010 Ca. Reg. Text 191595; 22-Z Cal. Regulatory Notice Reg. 798 (May 28, 2010). But, then and now, the statute governing EMT certification did not mention felonies. It limited conviction-based denials to "substantially related" offenses (and drug and certain sex crimes). Cal. Health & Safety Code § 1798.200(c)(6), -(8), -(12)(C). And no other state has a ban this strict for EMTs. The vast majority, thirty-six,[1] have no flat bans of

[1] Ala. Code § 22-18-6(f)(8); Colo. Rev. Stat. § 25-3.5-203(1)(b) and Colo. Code Regs. § 1015-3-7.3; Conn. Gen. Stat. § 19a-14(a)(6)(B); Fla. Stat. § 401.411(1) and Fla. Admin. Code r. 64J-1.017; Ga. Code § 31-11-51 and Ga. Comp. R. & Regs. 511-9-2.12(8)(c); Haw. Rev. Stat. § 453-32 and Haw. Code R. § 16-85-51; 210 Ill. Comp. Stat. § 50/3.50(d)(8)(H) and Ill. Admin. Code tit. 77, pt. 515.190(e); Ind. Code §§ 16-31-3-14(d) and 16-31-3-14.5; Iowa Code § 147A.4(2) and Iowa Admin. Code r. 641-131.4(1) and 641-131.7(4)(u); Kan. Stat. § 65-6133(a)(5); La. Stat. § 40:1133.7; Me. Stat. tit. 5, §§ 5302–03, Me. Stat. tit. 32, § 90-A(5)(G), and 16-163-11 Me. Code R. § 1(4); Md. Code, Educ. Law § 13-516(h)(1) and Md. Code Regs. 30.02.04.02(C) and 30.02.04.01(T); Mass. Gen. Laws ch. 111C, § 3(b)(3) and

any kind. Twelve have flat bans only for specific, listed crimes.[2] There is just one other state, Arizona, that has any sort of categorical ban on

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105 Mass. Code Regs. 170.920(A)(3); Mich. Comp. Laws § 333.20958(1)(h); Minn. Stat. § 144E.28, subdiv. 5(a)(3); Miss. Code § 73-77-5 and 15-6 Miss. Code R. § 6.11; Mo. Rev. Stat. § 190.165 and Mo. Code Regs. tit. 19, § 30-40.365; Mont. Code § 37-1-307(1) and Mont. Admin. R. 24.156.2705(1)(a); Neb. Rev. Stat. § 38-178 and 172 Neb. Admin. Code, § 10-005; N.J. Rev. Stat. §§ 2A:168A-2 and 26:2K-65, and N.J. Admin. Code § 8:40A-7.1; N.M. Stat. § 24-10B-5.2 and N.M. Code R. § 7.27.2.14(G)(3)(d); N.Y. Pub. Health Law § 3002(2) and N.Y. Comp. Codes R. & Regs. tit. 10, § 800.6; N.C.G.S. § 143B-943(d); N.D. Cent. Code § 23-27-04.3 and N.D. Admin. Code 33-36-01-05; Ohio Rev. Code § 4765.301(C) and Ohio Admin. Code 4765-8-01(B)(3); Okla. Stat. tit. 63, § 1-2509.1 and Okla. Admin. Code §§ 310:641-5-11(e) and 310:641-5-33(a)(7); Or. Rev. Stat. § 682.220(2)(L) and Or. Admin. R. 333-265-0040(4); 35 Pa. C.S.A. § 8121 and 28 Pa. Code § 1031.3(14); 23 R.I. Gen. Laws § 23-4.1-10(b) and 216 R.I. Code R. § 20-10-2.5(G)(1); S.D. Codified Laws § 34-11-6.1 and S.D. Admin. R. 44:05:01:02; Tenn. Code § 68-140-311(a)(1)(E); Vt. Stat. tit. 18, § 906(10) and 12-5 Vt. Code R. § 17:14.1.4; Wash. Rev. Code §§ 18-73-240 and 18-130-055(1)(c), and Wash. Admin. Code § 246-976-141; W. Va. Code § 16-4C-8(e) and W. Va. Code R. § 64-48-6.3.6; Wyo. Stat. § 33-36-103 and 048-0023-16 Wyo. Code R. §§ 3(c) and 12(a). Note, however, that North Carolina appears to have an unenforced (and ultra vires) flat-ban administrative regulation. *Compare* 10A N.C. Admin. Code 13P.1507(b)(10) (purporting to have a flat ban) *with* N.C.G.S. § 143B-943(d) (requiring individualized consideration) *and* Frequently Asked Questions, https://info.ncdhhs.gov/dhsr/EMS/faqcomp.htm (last visited May 7, 2021) (explaining that, except for registered sex offenders, convictions are evaluated case by case).

[2] Ark. Code § 20-13-1106; Idaho Code § 56-1004A and Idaho Admin. Code

applicants with felony convictions, and its ban lasts only five years after *conviction*.[3]

Even so, California bans many people for a decade after *release*, and it bans many others forever. Thousands of people with felony records—no matter how qualified, no matter how rehabilitated—cannot get certified as EMTs or, for those who want to, work as fulltime firefighters. The people barred for life include the plaintiff–appellants, Dario Gurrola and Fernando Herrera.

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r. 16.05.06.210 (5-year or lifetime bans only for enumerated offenses); Nev. Rev. Stat. § 450B.180(2) and Nev. Admin. Code § 450B.320(1)(e) (7-year or lifetime bans only for enumerated offenses); Alaska Stat. § 18.08.082(a)(1) and Alaska Admin. Code tit. 7, § 26.950 (10-year, 15-year, or lifetime bans only for enumerated offenses); Utah Code § 26-8a-310 and Utah Admin. Code r. 426-5-3200(6) (15-year ban only for enumerated offenses); Del. Code tit. 16, § 6712(b) and 1-700-710 Del. Admin. Code § 15.0; S.C. Code § 44-61-80(D) and S.C. Code Regs. 61-7 § 902.B.4; Tex. Health & Safety Code §§ 773.0614(a) and 773.0615, and 25 Tex. Admin. Code §§ 157.36(c)(3) and 157.37(e)(5); Va. Code § 32.1-111.5 and 12 Va. Admin. Code § 5-31-910; Wis. Stat. §§ 111.321, 111.335, and 256.15(6)(a)(1), and Wis. Admin. Code DHS § 110.06(1)(f) (lifetime bans only for enumerated offenses); Ky. Rev. Stat. §§ 311A.050(2)(n) and 335B.020; N.H. Rev. Stat. § 153-A:13(I)(h) and N.H. Code Admin. R. Saf-C 5922.03(c)(5) (lifetime bans only for related offenses).

[3] Ariz. Rev. Stat. § 36-2211(A)(2) and Ariz. Admin. Code § R9-25-402(A) (5-year ban for felonies, 10-year ban only for enumerated offenses).

II. Dario Gurrola

A. Dario's criminal history and rehabilitation

Today, Dario Gurrola is a seasonal firefighter living in Northern California. ER-84 (Am. Compl. ¶ 13). As a young man, however, Dario had trouble finding his footing. In high school in southern San Diego, he was involved with a tough crowd, and he spent time in state custody after a juvenile proceeding. ER-84, ER-91 (*Id.* ¶¶ 14, 83). Then, in 2003, when he was 22, the police stopped him and spotted the kitchen knife he was carrying in his jacket pocket for protection. He was convicted of carrying a concealed dagger, his first felony. ER-84 (*Id.* ¶ 15). Two years later, in 2005, he was convicted of his second felony, assault, based on a drunken fight he had with a security guard. ER-84 (*Id.* ¶ 16). And, over the next few years, he was convicted of several misdemeanors (or crimes later reduced to misdemeanors) that have since been expunged. ER-84 (*Id.* ¶ 17).

As his twenties were ending, however, Dario accepted responsibility for his crimes and decided to change his life. ER-84 (*Id.* ¶ 18). He cut ties with his friends. He reconnected with his father, a retired San Diego sheriff.

He joined a church. ER-85 (*Id.* ¶ 19). And he has not been convicted of a crime since 2011. ER-84 (*Id.* ¶ 17). Put simply, he turned his life around. ER-85 (*Id.* ¶ 21).

More than that, he dedicated himself to becoming a first responder like his dad. ER-85 (*Id.* ¶ 20). Thinking his criminal history would keep him out of law enforcement, Dario decided to become a firefighter. He recalled the advice he was given, while serving his juvenile sentence, that "if you ever want to change your life, [firefighting] is something that you can do." ER-91 (*Id.* ¶ 83).

Dario spent years working toward becoming a firefighter. ER-85 (*Id.* ¶¶ 22, 24). In 2013 and 2015, he worked as a seasonal firefighter for the U.S. Forest Service. ER-85 (*Id.* ¶ 25). In 2017, he worked as a certified medical transport driver. ER-85 (*Id.* ¶ 27). In 2018, he finished training at a fire academy and then completed more coursework, including on airway and defibrillation rescue. ER-85 (*Id.* ¶¶ 28–29). He has dozens of certifications. ER-85 (*Id.* ¶ 29). Finally, in 2019, he served for the third time as a seasonal firefighter, this time with the Cal Pines Fire Department in Alturas, near

the Oregon border. ER-85 (*Id.* ¶ 30). There was only one step left to becoming eligible for fulltime firefighter jobs: EMT certification. ER-87, ER-95, ER-96 (*Id.* ¶¶ 40, 122, 133).

B. The state denies Dario EMT certification.

EMT certification is a basic credential that most California fire departments require for career positions. ER-87 (*Id.* ¶ 42). It is an educational certification, "proof of the individual's initial competence to perform at the designated level," not a license. Cal. Health & Safety Code § 1797.210. (You can legally provide first aid without certification.) Certification simply shows that "an individual [is] trained in all facets of basic life support." *Id.* § 1797.80. "Basic life support," in turn, means "emergency first aid and cardiopulmonary resuscitation procedures … without invasive techniques"—things like taking temperatures, checking blood pressure, performing CPR, and administering oxygen. *Id.* § 1797.60; 22 Cal. Code Regs. § 100063(a). This basic work does not include administering most drugs or performing advanced, paramedic-level procedures like intubation. ER-93 (Am. Compl. ¶¶ 102–03). The entire EMT

certification takes only 170 hours of training—about a month of fulltime classes. 22 Cal. Code Regs. § 100074(a). Again, it is not a license to *be* an emergency medical technician (nor is it a certification to drive an ambulance). Rather, it is a credential held by some 60,000 Californians, used in many kinds of businesses ranging from gyms and outdoor adventure groups to event spaces and factories. ER-93–94 (Am. Compl. ¶¶ 104–05, 107–08).

In California, EMT certification is regulated by a two-tier system. The California Emergency Medical Services Authority (through its director, Defendant–Appellee David Duncan) is responsible for statewide regulations. *See* Cal. Health & Safety Code §§ 1797.100 *et seq.* But certification decisions enforcing those regulations are made by county-level, local emergency medical services agencies, sometimes called LEMSAs (through their medical directors, people like Defendant–Appellees Jeffrey Kepple and Troy Falck). *See id.* § 1797.210.

In 2019, after preparing for years, Dario was ready. On top of his firefighting training, he had completed a 212-hour EMT course. ER-85 (Am.

Compl. ¶ 26). He had passed the qualifying test with the National Registry of Emergency Medical Technicians. ER-86 (*Id.* ¶ 31). So he went to his local agency, Northern California EMS, and applied for certification from its medical director, Defendant–Appellee Kepple. ER-86 (*Id.* ¶ 32).

But because of his past, the door was shut. After an initial denial, Dario sought an administrative hearing to present evidence of his rehabilitation. ER-86 (*Id.* ¶¶ 33–34). He brought his certifications. He brought letters of recommendation. One letter, from a fire captain Dario had worked for, called him "professional, courteous, compassionate and respectful." ER-86 (*Id.* ¶ 35). It didn't matter. As the administrative judge explained, "Nor-Cal EMS [was] prohibited from granting [Dario] an EMT certification, even on a probationary basis, based on his two felony convictions." ER-86 (*Id.* ¶ 36). Dario emailed the agency, but neither he nor it could do anything. A representative wrote back that the agency is "bound by the California Code of Regulations" and that, although it "very much respect[ed Dario's] desire to help [his] community," it "[u]nfortunately" could not "issue an EMT certification." ER-86 (*Id.* ¶ 37).

Because of two fifteen-year-old felonies, Dario was barred for the rest of his life.

Even so, Dario has not given up on first response. After his denial, he started his *fourth* round of seasonal firefighting, this time for CAL FIRE, California's Department of Forestry and Fire Protection. ER-86 (*Id.* ¶ 38). In that role, he successfully responded to medical calls, regularly entering people's homes. ER-86 (*Id.* ¶ 39). Without the lifetime ban, he would re-apply for, and receive, EMT certification from Defendant–Appellee Kepple and then be eligible for fulltime firefighting jobs. ER-96 (*Id.* ¶¶ 132–33).

III. Fernando Herrera

Fernando Herrera has a similar story. Fernando is a supervisor at the California Conservation Corps, a skills-building state agency that hires young men and women for emergency response and other conservation projects under the motto "Hard Work, Low Pay, Miserable Conditions and

More!" ER-88 (*Id.* ¶ 59).[4] But Fernando was not always so driven. Like millions of other people, Fernando made mistakes as a teenager.

Growing up the son of a disabled single mother in Marysville (in Yuba County), Fernando struggled to fit in. ER-87 (Am. Compl. ¶¶ 46–47). When he was 14 and 15, there were two related incidents where he committed crimes against another boy. ER-87–88 (*Id.* ¶¶ 48–51). He pleaded no contest to assault with a deadly weapon for the first incident (the boy was not injured) and witness tampering for the second—two adult felonies. ER-88 (*Id.* ¶ 52). Fernando was sentenced to prison at the age of 15. ER-88 (*Id.* ¶ 53).

About two years later, while watching his mother cry during a visit, Fernando realized he had to change. ER-88 (*Id.* ¶ 54). And he did. ER-88 (*Id.* ¶ 57). Fernando accepted responsibility for the harm he had caused. ER-88 (*Id.* ¶ 55). He was released from incarceration in 2018 and successfully completed parole in 2019. ER-88 (*Id.* ¶ 58). He has not been convicted of

[4] *See also* About the CCC, https://ccc.ca.gov/who-we-are/about/ (last visited May 7, 2021).

any more crimes. ER-88 (*Id.* ¶ 56). He has worked as a productive member of society, first at a lumber mill, then at a restaurant, and now at the Corps, where, among other things, he helped fight the deadliest wildfire in California history. ER-88 (*Id.* ¶¶ 59–60). Like Dario, he turned his life around. ER-88 (*Id.* ¶ 57).

And, also like Dario, Fernando wants to use his second chance to get certified as an EMT. ER-88 (*Id.* ¶ 61). He, too, took and passed an EMT training course. ER-88 (*Id.* ¶ 62). But, like Dario, Fernando has two felony convictions. That means he is barred for the rest of his life because of crimes he committed as a child. Fernando is also separately barred by the ten-year ban. He was released from incarceration for two felonies in 2018. So, even if there were no lifetime ban, he could not get certified until 2028. Without these bans, he would apply for, and receive, certification from the medical director of the LEMSA overseeing Marysville, Defendant–Appellee Falck. ER-83–84, ER-97 (*Id.* ¶¶ 12, 140).

IV. The fire camps

As it turns out, these bans apply well beyond Dario and Fernando. In fact, they underlie a strange aspect of California's criminal justice system: the state uses prisoners as firefighters and then (because fulltime firefighting jobs require EMT certification) bars those same people from firefighting careers because of their criminal histories. ER-89 (*Id.* ¶ 69).[5]

Inmates fight fires in a voluntary program called the Conservation Camp Program, which is jointly administered by the California Department of Corrections and Rehabilitation and CAL FIRE. ER-89 (*Id.* ¶ 70). Its mission, in the words of one representative, "is to provide inmates with skills to improve their lives when they leave." ER-89–90 (*Id.* ¶ 71). Prisoners fight fires in 24-hour shifts, earning about two to five dollars per day, plus another dollar per hour during active firefighting. ER-90, ER-91 (*Id.* ¶¶ 76, 81). Pre-pandemic, there were thousands of inmate firefighters,

[5] Citing Adesuwa Agbonile, *Inmates help battle California's wildfires. But when freed, many can't get firefighting jobs* (Sacramento Bee Sept. 7, 2018); Editorial, *Inmates risking their lives to fight California's wildfires deserve a chance at full-time jobs* (L.A. Times Nov. 1, 2019).

outnumbering CAL FIRE seasonal firefighters about two to one—and saving the state some $90 million each year. ER-90 (*Id.* ¶¶ 77–79). But, because of the felony bans, these same firefighters often cannot become fulltime firefighters after release.

That includes Dario and Fernando. While incarcerated, Fernando served in a camp and helped fight a major fire. He loved the work and thought it was something he could do for the rest of his life. ER-91 (*Id.* ¶ 84). Dario fought two fires while in juvenile custody. Again, his captain told him, "If you ever want to change your life, this is something that you can do." ER-91 (*Id.* ¶ 83). But it isn't. As one prisoner reentry counselor told the Sacramento Bee, "I have to tell people right out—I'm sorry, you can't do this … [EMS agencies] are just turning people away with felonies, period." ER-91 (*Id.* ¶ 85).

To be sure, California has taken a small step toward fixing this problem. In September 2020, it enacted A.B. 2147, which allows some former inmate firefighters to seek discretionary expungements for some convictions. ER-91 (*Id.* ¶ 86); *see also* ER-43–46 (bill text). But the new law is

a narrow workaround to the bans—giving *some* former inmate firefighters the *possibility* of a discretionary expungement if they petition for it. A.B. 2147 did not repeal the bans themselves.[6]

V. Procedural history

With the bans still on the books, and their criminal histories forever blocking a fair shot at getting certified, Dario and Fernando sued to protect their constitutional rights. They brought three claims under the Fourteenth Amendment: (1) that the bans violate the Equal Protection Clause by irrationally distinguishing between people with and without felony convictions, (2) that the bans violate the Due Process Clause because they are not rationally related to EMT certification and because they are unconstitutional irrebuttable presumptions, and (3) that the bans violate the Privileges or Immunities Clause. ER-97–106 (Am. Compl. ¶¶ 142–214).[7]

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[6] The new law does not apply to Dario, and for Fernando to benefit, he would have to hire a lawyer far from where he lives to seek an expungement that a judge would have discretion to deny. ER-91–92 (Am. Compl. ¶¶ 87–88).

[7] The plaintiff–appellants of course recognize that the Privileges or Immunities claim fails under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). They preserve the issue for appeal given the "overwhelming

The district court granted the defendants' motions to dismiss. ER-4 (D. Ct. Op.). Although the court rejected a hodgepodge of procedural defenses, it ultimately held that Dario and Fernando had failed to state a claim for relief. ER-11–22. The court recognized that the relationship between a felony record and public safety is "tenuous," but, even so, held that:

> It is not irrational for the government to believe that those with two or more felonies or recent convictions, are more likely to harm others in the future. The wisdom, fairness, or logic of this legislative choice is not for the Court to decide.

ER-20 (citing *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993)). The heart of the court's reasoning—indeed, the court's entire reasoning—was the theory that:

> the very act of committing a felony more than once, regardless of the underlying offense, can be relevant. As the government argues, "[t]hose applicants with a judicial record of two or more felony convictions have a proven unwillingness to conform to the social norm to 'do no harm' to others." Barring such persons from becoming EMT certified advances the government's legitimate interest in ensuring public safety, as

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consensus among leading constitutional scholars" that *Slaughter-House* was "egregiously wrong." *McDonald v. Chicago*, 561 U.S. 742, 756–57 (2010) (mentioning the view of amici scholars).

> EMTs often deal with vulnerable persons in responding to emergencies.

ER-21 (citation omitted).

Dario and Fernando now appeal.

SUMMARY OF THE ARGUMENT

The district court's error was treating the rational-basis test as hollow enough to doom a well-pleaded complaint. Dario and Fernando agree that the test is deferential. But dozens of winning rational-basis cases show that it is also meaningful and evidence based. That includes the legion of cases, unmentioned by the district court, that have invalidated criminal-history bans like this one. Because plaintiffs win these kinds of cases, their well-pleaded complaints must be able to survive motions to dismiss so that they have the chance to prove their claims.

Under a proper understanding of the rational-basis test, it is plausible that the felony bans are irrational on their face. Because LEMSAs have separate power to bar people for *relevant* crimes, the bans necessarily act on only *irrelevant* crimes. In an age when there are too many crimes to count, bans this sweeping are overbroad, especially for a basic skill certification.

The bans irrationally ignore individual circumstances. They are both unusually harsh and riddled with exceptions. They are, in many cases, arbitrary. And they resemble other "irrebuttable presumptions"—conclusions that cannot be challenged by any legal process—that courts have struck down.

At the very least, it is plausible that the bans are irrational as applied to Dario and Fernando. Their crimes do not bear on certification, were committed at young ages, and date to long ago. Both men have changed their lives, so much so that the state has repeatedly trusted both to be first responders. If they can prove what they have alleged—that there is no risk to certifying them today—it is irrational to withhold certification for the rest of their lives.

ARGUMENT

I. Legal principles

A. Review of a dismissal for failure to state a claim

This Court reviews a Rule 12(b)(6) dismissal of plaintiffs' claims de novo. *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 814 (9th Cir. 2016). At the motion-to-dismiss stage, the question is only whether the plaintiffs have

pleaded enough facts to cross the low bar that separates "plausible" claims from "speculative" ones. *Id.* In answering that question, the Court accepts the plaintiffs' allegations as true. *Id.*

B. Rational-basis scrutiny applies to the plaintiff–appellants' Fourteenth Amendment claims.

The substantive standard is a narrowed form of the rational-basis test. Usually the rational-basis test asks whether a challenged law is "rationally related to a legitimate state interest." *E.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). But when the state is regulating entry into an occupation, the test is narrower. In those cases, federal courts have recognized for more than fifty years that "any such regulation must be rationally related, not merely to a legitimate state interest, but more specifically to … 'the applicant's fitness or capacity to practice' the profession itself." *Dittman v. California*, 191 F.3d 1020, 1030 (9th Cir. 1999) (quoting *Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957)). Combining that substantive standard with the pleading standard gives the ultimate question: have Dario and Fernando plausibly alleged that, in California, the bans do not rationally relate to fitness for EMT certification?

If so, the bans violate the Equal Protection Clause because they irrationally discriminate between two similarly situated groups: people without felony convictions seeking EMT certification and people with felony convictions seeking EMT certification. ER-98 (Am. Compl. ¶¶ 146–47).[8] And they violate the Due Process Clause because they restrict certification based on criteria that are not rationally related to fitness for certification. ER-103–04 (*Id.* ¶¶ 189–94).

C. The rational-basis test is meaningful.

The ultimate question, however, raises a question of its own. What, exactly, makes a relationship rational?

It is not hard to predict the cherry-picked phrases the Court will see in the appellees' opposition. Probably that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993). Or that "the judiciary may

[8] More precisely, the lifetime ban irrationally discriminates between certification seekers with and without two felony convictions, and the ten-year-ban irrationally discriminates between certification seekers who have or have not been released from incarceration for a crime punishable as a felony within the last ten years.

not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Or that "[i]f the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (cleaned up). But there is more to the rational-basis test than automatic deference to government rules. It is a *test*, after all, not a free pass.

Indeed, there must be more because plaintiffs regularly state or win rational basis claims. Since 1970, there are more than 20 examples[9] from the

[9] *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *Quinn v. Millsap*, 491 U.S. 95 (1989); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336 (1989); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *James v. Strange*, 407 U.S. 128 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Mayer v. Chicago*, 404 U.S. 189 (1971); *Reed v. Reed*, 404 U.S. 71 (1971);

Supreme Court. There are double digits from this Court as well.[10] These *outcomes* (unlike certain *rhetoric*) show that courts take rational-basis claims seriously. And they show two key circumstances in which courts hold laws unconstitutional: (1) when the logical connection[11] between the means and

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Turner v. Fouche, 396 U.S. 346 (1970).

[10] *Fowler Packing Co. v. Lanier*, 844 F.3d 809 (9th Cir. 2016); *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063–67 (9th Cir. 2014); *In re Levenson*, 587 F.3d 925, 931–34 (9th Cir. 2009); *Merrifield v. Lockyer*, 547 F.3d 978, 988–92 (9th Cir. 2008); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 589–92 (9th Cir. 2008); *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193 (9th Cir. 2002); *Navarro v. Block*, 72 F.3d 712, 716–17 (9th Cir. 1995), *as amended* (Jan. 12, 1996); *Pruitt v. Cheney*, 963 F.2d 1160, 1164–66 (9th Cir. 1991), *as amended* (May 8, 1992); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155–56 (9th Cir. 1990); *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985); *Parks v. Watson*, 716 F.2d 646, 654–55 (9th Cir. 1983) (per curiam); *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856, 860 (9th Cir. 1976).

[11] *See Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449–50 (1985) (home being too big not logical basis for permit denial when identical homes routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24–25 (1985) (encouraging Vermont residents to make in-state car purchases not logical basis for tax on car that Vermont resident bought out-of-state before becoming Vermont resident); *Zobel v. Williams*, 457 U.S. 55, 61–62 (1982) (refusing to fund new Alaska residents not rationally related to encouraging people to move to Alaska); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to land ownership); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stimulating the agricultural

the state interest is just too attenuated to be rational and (2) when the end is illegitimate,[12] such as animus against an unpopular group.

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economy not logically connected to whether people in a household are related); *Mayer v. Chicago*, 404 U.S. 189, 196 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then inability to pay no logical basis for denying transcript to misdemeanor defendant); *Turner v. Fouche*, 396 U.S. 346, 363–64 (1970) (no rational interest underlying property-ownership requirement for political office); *In re Levenson*, 587 F.3d 925, 932 (9th Cir. 2009) (denying benefits to encourage traditional heterosexual marriage is logically irrelevant to people who are already in same-sex marriages); *Merrifield v. Lockyer*, 547 F.3d 978, 988–92 (9th Cir. 2008) (requiring license based on pesticide interaction illogical when exterminators more likely to interact with pesticides exempted).

[12] *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (no legitimate interest in criminalizing consensual adult homosexual acts); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (no legitimate interest in anti-gay animus); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (no legitimate interest in dividing bona fide state residents into different classes); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (no legitimate interest in discriminating against out-of-state companies); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (no legitimate interest in animus against the mentally disabled); *Zobel v. Williams*, 457 U.S. 55, 64 (1982) (no legitimate interest in creating permanent classes of bona fide residents); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (no legitimate interest in anti-hippie animus); *id.* at 535 & n.7 (traditional morality rationale constitutionally dubious); *In re Levenson*, 587 F.3d 925, 932 (9th Cir. 2009) (same as *Romer*); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) (no legitimate interest in economic protectionism); *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590 (9th Cir. 2008) (no legitimate interest in bias against conservationists).

Similarly key is the importance of evidence. This circuit's rational-basis cases have "allowed plaintiffs to rebut the facts underlying defendants' asserted rationale for a classification, to show that the challenged classification could not reasonably be viewed to further the asserted purpose." *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590–91 (9th Cir. 2008); *accord St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality"). Thus, even though challenged laws warrant deference and the government has no affirmative evidentiary burden, courts should hesitate to dismiss rational-basis claims before discovery allows plaintiffs a chance to prove their claims. *Cf. Lockary v. Kayfetz*, 917 F.2d 1150, 1155–56 (9th Cir. 1990) (sending rational-basis claims to trial); *Parks v. Watson*, 716 F.2d 646, 654–55 (9th Cir. 1983) (same).

The rational-basis test is deferential, but it is not "toothless." *Navarro v. Block*, 72 F.3d 712, 717 (9th Cir. 1995). Plaintiffs can and do win rational-basis cases, and they can win them using evidence. That means that well-pleaded rational-basis claims should survive motions to dismiss.

D. Courts reject felony-history bans.

Indeed, rational-basis claims have won again and again *in cases like this one*. The district court did not cite—let alone analyze—even one case about the limits on states' use of criminal history in occupational standards. ER-18–22 (D. Ct. Op.). But the slate on which this Court will write is far from blank. Over and over, state high courts, federal district courts, and others have struck down criminal-history-based bans *on the merits*—including in education, childcare, private security, and other potentially sensitive fields. That has included bans on:

- Providing childcare, *Fields v. Dep't of Early Learning*, 434 P.3d 999 (Wash. 2019) (attempted robbery);
- Bail-bond work, *Chunn v. State ex rel. Miss. Dep't of Ins.*, 156 So. 3d 884 (Miss. 2015) (any felony);
- Trading precious metals, *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013) (any felony);
- Civil-service employment, *Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986) (any felony); *Kindem v. City of*

Alameda, 502 F. Supp. 1108 (N.D. Cal. 1980) (any felony); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974) (any felony);

- Being a private detective or security guard, *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977) (any felony);
- Public wrecker contracting, *Gregg v. Lawson*, 732 F. Supp. 849 (E.D. Tenn. 1989) (any felony) (denying motion to dismiss); *Lewis v. Ala. Dep't of Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993) (misdemeanors of moral turpitude);
- Selling cars, *Brewer v. Dep't of Motor Vehicles*, 93 Cal. App. 3d 358 (1979) (crimes of moral turpitude);
- Running a bookstore, *Perrine v. Mun. Ct.*, 5 Cal. 3d 656 (1971) (certain sexual and violent crimes);
- Providing eldercare, *Nixon v. Pennsylvania*, 839 A.2d 277 (Pa. 2003) (various crimes); *Peake v. Pennsylvania*, 132 A.3d 506 (Pa. Commw. Ct. 2015) (en banc) (same);
- Working in a public school, *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (en banc) (felony homicide);

- Providing child-protective services, *Warren Cnty. Hum. Servs. v. State Civ. Serv. Comm'n*, 844 A.2d 70 (Pa. Commw. Ct. 2004) (aggravated assault);
- Working as a radiology technician, *Shimose v. Haw. Health Sys. Corp.*, 345 P.3d 145 (Haw. 2015) (drug possession with intent) (statutory ruling denying motion for summary judgment); and
- Operating a cigarette wholesaler, *Sec'y of Revenue v. John's Vending Corp.*, 309 A.2d 358 (Pa. 1973) (crimes of moral turpitude) (statutory ruling).[13]

In nearly all these cases, the plaintiffs won outright. If plaintiffs can win cases like this one, it necessarily means they can survive motions to dismiss, which ask the much easier question of whether the claims are plausible.

[13] Courts likewise strike down bans based on disfavored noncriminal backgrounds. *See, e.g.*, *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973) (ban on public employment for less than honorably discharged veterans); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (ban on public employment for former drug users).

II. Dario and Fernando have stated equal protection and due process claims that the bans are unconstitutional on their face.

Against this backdrop, Dario and Fernando have stated a facial claim that California's bans are irrational. Among other things, they alleged these facts:

- "the bans do nothing but exclude people whose felony records are unrelated to EMT work," ER-95 (Am. Compl. ¶ 118);
- "Many felonies have no bearing on whether someone would be a dangerous EMT," ER-100 (*id.* ¶ 162);
- "many people with felony convictions have been rehabilitated and would present no unique risk to the public if they were certified as EMTs," ER-100 (*id.* ¶ 159);
- "people who served sentences for two felonies long ago would present no unique risk to the public if certified as EMTs because recidivism decreases with age," ER-100 (*id.* ¶ 160);
- "people who committed factually identical conduct can and do receive vastly different legal outcomes," ER-100 (*id.* ¶ 163);

- EMT certification means that someone is trained in only "basic life support," ER-93 (*id.* ¶ 99);
- EMTs do not perform advanced procedures, ER-93 (*id.* ¶ 103);
- "EMT certification requires only 170 hours of training," ER-93 (*id.* ¶ 106);
- EMT certification is a common credential, not a license or job position, that is used in many kinds of businesses, ER-93, ER-94 (*id.* ¶¶ 105, 107–08);
- "There is no evidence that California's bans protect the public from bad EMTs," ER-94 (*id.* ¶ 113);
- "Categorically banning people with two or more felony convictions from EMT certification for life is not rationally related to the duties of EMTs" or "any legitimate government interest," ER-103 (*id.* ¶¶ 189–90); and
- "Categorically banning people with a conviction for an offense punishable as a felony for ten years after release is not rationally

related to the duties of EMTs" or "any legitimate government interest," ER-104 (*id.* ¶¶ 192–93).

In the end, these allegations mean that the "bans harm the public by making it harder for people with felony records to get EMT training and, ultimately, to help others," ER-94 (*id.* ¶ 112)—a plausible allegation when the state goes beyond its power to ban applicants with relevant crimes at the same time that firefighter shortages make headlines.

If all this is true—if the bans operate on only irrelevant convictions, if most felony convictions do not relate to this simple certification, if the public is worse off—the bans really would be irrational. And, lacking any "plainly legitimate sweep," they would fail on their face. *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018); *see also Jackson v. City & County of San Francisco*, 746 F.3d 953, 961–62 (9th Cir. 2014) (explaining that a simple "flat prohibition" is well-suited to a facial challenge); *Barletta*, 973 F. Supp. 2d at 138 ("To survive even rational basis review, the defendants and the State must do more than suggest that some felons would be unsuitable for licensure. Most irrational classifications, for

example, left-handed people, obese people, people with tattoos, people born on the first day of the month, divorced people and college dropouts, will include some persons properly excluded from licensure.").

In the next sections, Dario and Fernando elaborate on their argument. In Part A, they explain that the bans are necessarily irrational. In Part B, they explain that the bans are overbroad. In Part C, they explain that the bans irrationally disregard individual circumstances. In Part D, they explain that the bans are atypically harsh. In Part E, they explain that the bans are rife with exceptions, making them irrationally underinclusive. In Part F, they explain that the label "felony" can be a poor indicator of seriousness. Finally, in Part G, they explain that felony bans are improper "irrebuttable presumptions." Most of these reasons are independently sufficient to show that the bans are plausibly irrational. Taken together, they are more than sufficient.

A. The felony bans are necessarily irrational.

Most importantly, as pleaded, California's bans are unrelated to fitness for certification as a matter of pure logic. ER-94–95 (Am. Compl.

¶¶ 115–18). That is because California already has a statute under which LEMSAs may deny applicants who have been convicted "of any crime which is substantially related to the qualifications, functions, and duties of" emergency personnel. Cal. Health & Safety Code § 1798.200(c)(6). So the only times the felony bans do any work is—necessarily—when the LEMSAs use it to reject applicants for convictions that are *not* "substantially related" to EMT certification.

Under the rational-basis test, courts tend to doubt the means–end relationship when another law already addresses the claimed state interest. For example, the Fifth and Sixth Circuits have held that preventing people other than licensed funeral directors from selling caskets is not a rational way to prevent consumer fraud in part because fraud is separately covered by normal anti-fraud laws. *See St. Joseph Abbey*, 712 F.3d at 225–26; *Craigmiles v. Giles*, 312 F.3d 220, 226 (6th Cir. 2002). The point here is far stronger. Here, the only time the bans do anything is when they operate on crimes that are not substantially related to "the applicant's fitness or

capacity to practice the profession." *Dittman*, 191 F.3d at 1030 (cleaned up). That means every application of the law is necessarily irrational.

B. The felony bans are overbroad.

But even without that flaw, the bans would still be irrational because many felonies do not bear on whether someone should be certified (or, for that matter, rationally relate to any other conceivable government interest). ER-100 (Am. Compl. ¶ 162); *see, e.g.*, *Barletta*, 973 F. Supp. 2d at 138 ("Felony crimes range widely, and many do not implicate the purposes identified by the State as justifying the ban."); *Chunn*, 156 So. 3d at 886 ("the statute's broad reach includes many felonies that bear no relationship to trustworthiness"); *Fussenich*, 440 F. Supp. at 1080 ("The critical defect in the blanket exclusionary rule here is its overbreadth."). The Amended Complaint pleads that EMT certification is simple, common, and used in various fields. It pleads that many felonies are irrelevant. ER-93–94 (*Id.* ¶¶ 99–113).

This overinclusion exists because the category of "felony" has swollen tremendously. At common law, felonies comprised a handful of

serious crimes: murder, rape, manslaughter, robbery, larceny, arson, mayhem, and burglary.[14] Today, the label has metastasized far beyond that limited set. Shoplifting more than $250 in merchandise can be a felony. Mass. Gen. Laws ch. 266, § 30A. Deliberately using the Netflix password an ex accidentally left on your computer is a felony. *See United States v. Nosal*, 844 F.3d 1024, 1028, 1039 (9th Cir. 2016) (interpreting 18 U.S.C. § 1030). Snooping on email can be a felony. 18 Pa. C.S.A. § 7613. Teenagers having sex with each other have been prosecuted for committing a felony. *Matter of A.B.*, __ P.3d __, 2021 WL 1230862, at *1 (Kan. Apr. 2, 2021) (discussing Kan. Stat. § 21-5507). A teen texting a nude picture *of herself* is committing a felony. *See, e.g.*, 18 U.S.C. § 2252A; *see also Amy Adele Hasinoff*, Opinion, *Teenage Sexting Is Not Child Porn* (N.Y. Times Apr. 4, 2016) (noting an estimate that "7 percent of people arrested on suspicion of child

[14] Sodomy was also a felony. Will Tress, *Unintended Collateral Consequences: Defining Felony in the Early American Republic*, 57 Clev. St. L. Rev. 461, 464 (2009).

pornography production in 2009 were teenagers who shared images with peers consensually").

Indeed, at the federal level alone, there are so many crimes that no one knows how many crimes there are. *See, e.g.*, Paul Larkin Jr. & Michael Mukasey, *The Perils of Overcriminalization* (Heritage Foundation, 2015) (noting that neither the Justice Department nor the ABA has been able to figure it out); Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws* (Wall St. J. July 23, 2011) (giving estimates from 3,000 to 300,000). Whole books tell of the incredible reach of criminal law. *See, e.g.*, Harvey Silvergate, *Three Felonies A Day: How the Feds Target the Innocent* (2011); Mike Chase, *How to Become a Federal Criminal: An Illustrated Handbook for the Aspiring Offender* (2019). Today, fully one in twelve Americans has a felony conviction. ER-94 (Am. Compl. ¶ 110). It is just not rational to believe that eight percent of the population has been a ticking time bomb for ten years after release.

C. The felony bans disregard individual circumstances.

On top of ignoring the relevance of the type of crime, the bans also ignore all the other facts of a particular case. ER-100, ER-101 (*Id.* ¶¶ 159–60, 164). Courts routinely reject that kind of mandatory blindness. *See, e.g.*, *Barletta*, 973 F. Supp. 2d at 139 (rejecting a felony ban for precious-metals traders because "the ban prohibit[ed] consideration of the nature and severity of the crime, the nature and circumstances of an applicant's involvement in the crime, the time elapsed since conviction, and the degree of the applicant's rehabilitation"); *Fussenich*, 440 F. Supp. at 1080 (rejecting a felony ban for private detectives and security guards because "the statute's across-the-board disqualification fail[ed] to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation."). Specifics matter.

Take age at commission. Usually the law recognizes that young people "have diminished culpability and greater prospects for reform."

The Supreme Court has called that "common sense." But flat bans ignore what "any parent knows." *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

Or take time since commission of the offense. Pennsylvania, for example, used to have a lifetime ban that prevented people with convictions for crimes of moral turpitude from running cigarette wholesalers. *John's Vending*, 309 A.2d at 360–61. But the state supreme court refused to read the ban literally as applied to twenty-year-old convictions because the result was "absurd and harsh." As it explained:

> To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.

Id. at 362; *see also Fields*, 434 P.3d at 1005 ("Because Fields's sole disqualifying conviction occurred long ago under circumstances that no longer exist, it is highly likely that her permanent disqualification is erroneously arbitrary."). The bans here ignore the pleaded fact that old convictions are not probative. *See* ER-100 (Am. Compl. ¶ 160).

Or take rehabilitation. It is not just one "of the goals" of the criminal justice system; it is the "ideal." *Graham v. Florida*, 560 U.S. 48, 71, 73–74 (2010). Just because a person *had* "a proven unwillingness to conform" with a particular law does not mean that person *has* an "unwillingness to conform" years later. *Contra* ER-19 (D. Ct. Op.). But the bans—especially the lifetime ban—ignore the pleaded fact that people can change. ER-100 (Am. Compl. ¶ 159).

The list could go on. There are other aspects of individualized consideration, all of which flat bans by definition ignore. The point is that without case-by-case analysis, there could well be no rational relationship between sweeping categories of convictions and occupational fitness.

D. The felony bans are uniquely harsh.

Moreover, laws this severe are rare. Across the board—from the EMT statute to the general licensing statute to the statutes for law and medicine—California almost always recognizes that flat felony bans are inappropriate. That further suggests they are irrational here.

That starts in EMT certification itself. When an applicant with two irrelevant felonies—perhaps draft dodging and bigamy, *see Barletta*, 973 F. Supp. 2d at 138–39—applies, the ban is absolute. But, bizarrely, if a LEMSA ever assessed the fitness of an applicant with a "substantially related" criminal history under that criterion, it would appropriately weigh the "[n]ature and severity of the … crime(s)," the "[t]ime that has elapsed since the act(s) or offense(s) occurred," "[r]ehabilitation evidence," and so on. 22 Cal. Code Regs. § 100208(c). Weighing these factors when considering relevant crimes and ignoring them for irrelevant ones is irrational. Again, this goes back to the statute governing EMT certification, in which the Legislature decided *not* to include a flat felony-ban. Cal. Health & Safety Code § 1798.200(c). If the rational-basis test gives deference to "*legislative* policy determinations," *Dukes*, 427 U.S. at 303 (emphasis added), that deference shows that flat bans are inappropriate. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983) (explaining, though for arbitrary and capricious review, that the Court does "not view as equivalent the presumption of constitutionality afforded

legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate").

More broadly, courts regularly reject felony bans when there are more lenient rules for other fields with similar risks. That is true here: for most occupational regulation in California, felony history is presumptively *irrelevant*. The usual rule is that convictions are grounds for denial only when they "substantially relate[]" to the occupation and only for seven years after release. Cal. Bus. & Prof. Code § 480(a)(1). And if those limited conditions are met, the state still must assess "[t]he nature and gravity of the offense," "[t]he number of years elapsed since the date of the offense," and "evidence of rehabilitation." *Id.* § 481. If flat bans are not needed for psychology and chiropractic and engineering, it is plausible that they are irrational for EMT certification. *See Fussenich*, 440 F. Supp. at 1080 ("Finally, the irrationality of the enactment becomes most pronounced when it is compared with another Connecticut statute … which prohibits state agencies (other than law enforcement departments) from rejecting applications for licenses 'solely because of a prior conviction of a crime.'").

Indeed, individualized consideration is the norm in medicine and law, the most regulated professions of all. *See* Cal. Bus. & Prof. Code §§ 2236, 2236.1 (doctors); *id.* §§ 6101, 6102 (lawyers). That is an irrational inconsistency. The district court based its reasoning on the assumption that "EMTs often deal with vulnerable persons." ER-19.[15] Whatever can be said about all the ways unscrupulous lawyers can prey on their clients, doctors deal with physically vulnerable people every day. Pediatricians are alone with children, gynecologists perform pelvic exams, anesthesiologists use drugs to knock people unconscious. Yet none of them are automatically disqualified for felonies. So it is plausible that a much harsher rule for EMT certification could be irrational. *See Fussenich*, 440 F. Supp. at 1080 (striking down felony ban for private detectives and security guards in part because there were "no automatic exclusions of felons from the practice of law or medicine"); *Fields*, 434 P.3d at 1005 (finding unconstitutional lifetime

[15] The Amended Complaint alleges nothing about how often people with EMT certifications (a broader category than EMTs) deal with vulnerable people, or whether they do so in teams or unsupervised.

robbery-conviction ban as applied to childcare provider when there was only a five-year ban on fostering children); *Butts*, 381 F. Supp. at 581 (striking down felony ban for civil-service positions in part because it did not apply to high-level positions like treasurer and city manager).

No other state has a flat felony ban for EMT certification. And this state generally recognizes that flat bans are inappropriate. So flat bans may be irrational for EMT certification.

E. The felony bans are rife with exceptions.

Another reason the bans are plausibly irrational is that they are shot through with exceptions. As shown by its own behavior, California does not really think that felony convictions hinder safe EMT certification (or advance any other legitimate government interest). Courts reject similarly underinclusive laws as irrational.

For one, the state grandfathers in all the pre-ban certifications. In general, the bans do "not apply to those EMT's … who obtain[ed] their California certificate prior to" June 2010. 22 Cal. Code Regs. § 100214.3(f). Presumably the idea is that, by the time the bans appeared, there had not

been safety problems with the already-certified people with felony histories. But "if convicted criminals who had been" certified before June 2010 "were capable of essentially rehabilitating themselves so as to qualify them … there should be no reason why other convicted criminals were not, and are not, also capable of doing the same." *Nixon*, 839 A.2d at 289–90 (holding criminal-history ban on working with "the elderly, disabled, and infirm" irrational as applied because of grandfathering clause); *see also Peake*, 132 A.3d at 521 (extending *Nixon* to the statute on its face).

Similarly, California just enacted another recognition that some people with felony convictions can appropriately be certified. *See* ER-43–46 (bill text). A.B. 2147 lets some people who served in prison fire camps have their convictions expunged so that they can get certified as EMTs (or, indeed, as doctors). What are the chances that, of the one-in-twelve Californians with felony histories, only the few thousand people who

happened into a particular prison program are certifiable? Is redemption really that rare?[16]

F. The felony bans are unpredictable.

The bans' defects go on. The bans are also more likely to be irrational because "felony" is an inconsistent category. ER-100 (Am. Compl. ¶ 163).

For one, the same conduct may or may not be a felony, depending on which state you happen to be in. Adultery, for example, is a felony in some states but a misdemeanor—or outright legal—in others. *Compare, e.g.*, N.Y. Penal Law § 255.17 (adultery is a misdemeanor) *with* Okla. Stat. tit. 21 § 872 (adultery is a felony).

Even within the same state, "the fortuity of plea bargaining may reduce felonious conduct to a misdemeanor conviction—or not, depending on the quality of legal counsel, the exercise of prosecutorial discretion, and the proclivities of different judges." *Barletta*, 973 F. Supp. 2d at 139. That is

[16] There are further exceptions in the specific context of firefighting. Seasonal and volunteer firefighters, including Dario, who do not have EMT certifications can perform the same work as fulltime EMT-certified firefighters, but they cannot enjoy the stability, pay, and benefits of fulltime firefighting. ER-91, ER-95 (Am. Compl. ¶¶ 82, 119–20, 123).

especially true in California, which defines a broad swath of crimes as "wobblers." For a wobbler, the same conduct is a felony or a misdemeanor, depending on the sentencing court's discretion. *See California v. Superior Ct. (Alvarez)*, 928 P.2d 1171, 1174 (Cal. 1997) (discussing Cal. Penal Code § 17(b)). People who engage in identical conduct may or may not be labeled a felon. ER-100 (Am. Compl. ¶ 163). *See Barletta*, 973 F. Supp. 2d at 139 (striking down felony ban for precious-metals traders in part because of the inconsistencies in felony convictions).

In brief, the label "felony" can apply arbitrarily. So these bans, which turn on that label, might be arbitrary too.

G. The felony bans are irrebuttable presumptions.

Finally, the bans could be unconstitutional because they are irrebuttable presumptions. *See Pordum v. Bd. of Regents*, 491 F.2d 1281, 1287 n.14 (2d Cir. 1974) ("If the hearing were to proceed in this manner, with the irrebuttable presumption that a person who has been convicted of committing a crime and who is on probation is unfit to teach in the public schools, it might raise serious constitutional difficulties."); *Fussenich*, 440 F.

Supp. at 1081–82 (similar statement for felony ban for private detectives and security guards). This possibility stems from a series of Supreme Court cases that struck down "irrebuttable presumption[s] often contrary to fact." *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973).

Stanley v. Illinois is a good example. 405 U.S. 645 (1972). There, the state categorically presumed unwed single fathers (but not single mothers or widowers) to be unfit parents. *Id.* at 646–47. The Supreme Court held that this irrebuttable presumption violated the Due Process Clause. Even assuming the dubious idea that *most* unwed single fathers were unfit parents, the Court still held that it was unconstitutional to "view[] people one-dimensionally … when a finer perception could readily have been achieved … on an individualized basis." *Id.* at 654–55. The Court has likewise struck down irrebuttable presumptions about pregnancy and fitness to teach, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); residency and college tuition, *Vlandis v. Kline*, 412 U.S. 441 (1973); dependency and food stamps, *Murry*, 413 U.S. at 508; and car accidents and

driver's licenses—observing in this last case that the presumption was impeding "pursuit of a livelihood," *Bell v. Burson*, 402 U.S. 535, 539 (1971).

The logic extends to the felony bans. "[W]hen … the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over … important interests." *Stanley*, 405 U.S. at 657. To be sure, there is some debate about whether these cases concern process or substance. But, either way, courts continue to hold—as recently as 2019—that with flat criminal-history bans like these, the risk of erroneous deprivation is unconstitutionally high. *See Fields*, 434 P.3d at 1003–07; *Peake*, 132 A.3d at 521–22.

Again, if the facts in the Amended Complaint are true, the felony bans could fail for this reason alone. Together with their other deficiencies, they are that much more plausibly irrational at the pleading stage.

III. Dario and Fernando have stated equal protection and due process claims that the bans are unconstitutional as applied to them.

Beyond the facial claims, the felony bans are especially likely to be irrational as applied to Dario and Fernando. *See, e.g.*, *Fields*, 434 P.3d at 1001

(striking down criminal-history ban as applied to plaintiff); *Chunn*, 156 So. 3d at 889 (same). The district court conducted zero analysis of the as-applied claims. ER-18–22 (D. Ct. Op.). The implication is that if a law is constitutional on its face, it is constitutional in every application. But Dario and Fernando both pleaded that certifying them "would pose no risk to society." ER-87, ER-89 (Am. Compl. ¶¶ 44, 67). And they alleged more than enough facts to make that allegation plausible. Had the court considered relevance, age, rehabilitation, and all the factors other courts assess, it would have seen that these specific bans might be irrational for these specific plaintiffs.

Relevance. Dario assaulted a security guard and carried (but did not use) a concealed knife. ER-84 (*Id.* ¶¶ 15–16). Fernando twice fought with another boy. ER-87–88 (*Id.* ¶¶ 48–51). Assault is serious and blameworthy, and Dario and Fernando accept that their actions were wrong and harmful. ER-84, ER-88 (*Id.* ¶¶ 18, 55). Still, none of these crimes is an example of the only evil the district court identified: a crime directed at a medically vulnerable person in an emergency. Fighting with a peer does not seriously

suggest that Dario or Fernando would attack a vulnerable person that he only encountered in the first place because of a desire to provide medical help. *See Warren County*, 844 A.2d at 74 (rejecting that a CPS caseworker's aggravated assault conviction was rationally related to the possibility of him attacking the children he helped); *Johnson*, 59 A.3d at 13–14 (rejecting that counselor's voluntary manslaughter conviction was rationally related to the possibility of him killing the young fathers he counseled); *Fields*, 434 P.3d at 1001 (rejecting that childcare worker's robbery conviction was rationally related to the possibility of her robbing the children in her care).

Age at commission. Fernando committed his offenses at 14 and 15, when he was a child. By law, he was too irresponsible to drive a car or have a beer. Yet the bans hold him responsible for the rest of his life. Dario, although an adult, was still a young man when he committed his operative offenses: he was 22 and 23. Today he is 40. ER-84 (Am. Compl. ¶¶ 15–16). Courts weigh crimes at these ages less heavily. *See Fields*, 434 P.3d at 1005 ("Fields was 22 years old at the time of her offense [and] psychological and

neurological studies show that the parts of the brain involved in behavior control continue to develop well into a person's 20s." (cleaned up)).

Time since commission. Dario's offenses are 16 and 18 years old. ER-84 (Am. Compl. ¶¶ 15–16). Fernando's, although more recent, are still seven years old. ER-88 (*Id.* ¶ 56). Courts discount convictions from this long ago. *See John's Vending*, 309 A.2d at 490 (invalidating criminal-history ban for convictions about 20 years old); *Johnson*, 59 A.3d at 24 (noting for these kinds of bans that "seven years is a substantial interval of time").

Rehabilitation. Finally, as pleaded, the evidence of rehabilitation is overwhelming. Dario and Fernando both turned their lives around years ago. ER-84–85, ER-88 (Am. Compl. ¶¶ 18–21, 54–57). Dario has not been convicted of any crimes for a decade, and Fernando has not been convicted for more than six years. ER-84, ER-88 (*Id.* ¶¶ 17, 56). Both have completed EMT training, and Dario passed the national EMT exam. ER-85, ER-86, ER-88 (*Id.* ¶¶ 26, 31, 62). Government entities have repeatedly trusted both to be first responders, starting with firefighting in custody. ER-91 (*Id.* ¶¶ 83–84). The state later hired Fernando to fight the Camp Fire. ER-88 (*Id.* ¶ 60).

Dario has served as a seasonal firefighter for the U.S. Forest Service and the Cal Pines Fire Department and CAL FIRE, and he has worked as a certified medical transport driver. ER-85, ER-86 (*Id.* ¶¶ 25, 27, 30, 38). Indeed, in his most recent work, he successfully responded to medical-emergency calls *inside people's homes*. ER-86 (*Id.* ¶ 39). If rehabilitation exists, it's this.

These allegations far exceed "speculative." Again, for all the reasons discussed, it is plausible that the felony bans fail on their face. But if they do not—if the state can create the caste it wants—it is at least plausible that it cannot include Dario, Fernando, and other applicants with similar histories. Banning them would be irrational, and thus violate the Equal Protection and Due Process clauses.

CONCLUSION

This appeal is about the limited, gatekeeping question asked by a motion to dismiss. Maybe, later on, a full record will show that these indiscriminate bans really do differ from all the others that courts have struck down. That it makes sense to deprive people who have paid their debts to society of the chance to re-enter society. Maybe, maybe not.

But that is not the question today. The question today is only whether claims about the most restrictive EMT certification in the country are plausible. And it is, at the very least, plausible that sweeping restrictions broad enough to cover thousands of crimes are irrational. It is plausible that people like Dario are Fernando are more than their worst mistakes.

The Court should reverse the dismissal, vacate the judgment below, and remand so that Dario and Fernando have the chance to prove their claims.

Dated: May 11, 2021

s/ Andrew Ward
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation from Fed. R. App. P. 32(a)(7). The brief contains 10,571 words. It is written in 14-point Palatino Linotype.

s/ Andrew Ward_____

ADDENDUM

22 Cal. Code Regs. § 100214.3
Denial or Revocation of a Certificate

(a) A certifying entity, that is not a LEMSA, shall advise a certification or recertification applicant whose conduct indicates a potential for disciplinary cause, based on an investigation by the certifying entity prompted by a DOJ and/or FBI CORI, pursuant to Section 100210(a) of this Chapter, to apply to a LEMSA for certification or recertification.

(b) The medical director may deny or revoke any EMT or Advanced EMT certificate for disciplinary cause that have been investigated and verified by application of this Chapter.

(c) The medical director shall deny or revoke an EMT or Advanced EMT certificate if any of the following apply to the applicant:

(1) Has committed any sexually related offense specified under Section 290 of the Penal Code.

(2) Has been convicted of murder, attempted murder, or murder for hire.

(3) Has been convicted of two (2) or more felonies.

(4) Is on parole or probation for any felony.

(5) Has been convicted and released from incarceration for said offense during the preceding fifteen (15) years for the crime of manslaughter or involuntary manslaughter.

(6) Has been convicted and released from incarceration for said offense during the preceding ten (10) years for any offense punishable as a felony.

(7) Has been convicted of two (2) or more misdemeanors within the preceding five (5) years for any offense relating to the use, sale, possession, or transportation of narcotics or addictive or dangerous drugs.

(8) Has been convicted of two (2) or more misdemeanors within the preceding five (5) years for any offense relating to force, threat, violence, or intimidation.

(9) Has been convicted within the preceding five (5) years of any theft related misdemeanor.

(d) The medical director may deny or revoke an EMT or Advanced EMT certificate if any of the following apply to the applicant:

(1) Has committed any act involving fraud or intentional dishonesty for personal gain within the preceding seven (7) years.

(2) Is required to register pursuant to Section 11590 of the Health and Safety Code.

(e) Subsection (a) and (b) shall not apply to convictions that have been pardoned by the Governor, and shall only apply to convictions where the applicant/certificate holder was prosecuted as an adult. Equivalent convictions from other states shall apply to the type of offenses listed in (c) and (d). As used in this Section, "felony" or "offense punishable as a felony" refers to an offense for which the law prescribes imprisonment in the state prison as either an alternative or the sole penalty, regardless of the sentence the particular defendant received.

(f) This Section shall not apply to those EMT's, or EMT-IIs who obtain their California certificate prior to the effective date of this Section; unless:

(1) The certificate holder is convicted of any misdemeanor or felony after the effective date of this Section.

(2) The certificate holder committed any sexually related offense specified under Section 290 of the Penal Code.

(3) The certificate holder failed to disclose to the certifying entity any prior convictions when completing his/her application for initial EMT or Advanced EMT certification or certification renewal.

(g) Nothing in this Section shall negate an individual's right to appeal a denial of an EMT or Advanced EMT certificate pursuant to this Chapter.

(h) Certification action by a medical director shall be valid statewide and honored by all certifying entities for a period of at least twelve (12) months from the effective date of the certification action. An EMT or Advanced EMT whose application was denied or an EMT or Advanced EMT whose certification was revoked by a medical director shall not be eligible for EMT or Advanced EMT application by any other certifying entity for a period of at least twelve (12) months from the effective date of the certification action. EMT's or Advanced EMT's whose certification is placed on probation must complete their probationary requirements with the LEMSA that imposed the probation.

Cal. Health & Safety Code § 1798.200

Disciplinary investigations; procedures; suspension or revocation of licenses or certificates; probation of certificate holder; threats to public health and safety

(a)(1)(A) Except as provided in paragraph (2), an employer of an EMT-I or EMT-II may conduct investigations, as necessary, and take disciplinary action against an EMT-I or EMT-II who is employed by that employer for conduct in violation of subdivision (c). The employer shall notify the medical director of the local EMS agency that has jurisdiction in the county in which the alleged violation occurred within three days when an allegation has been validated as a potential violation of subdivision (c).

(B) Each employer of an EMT-I or EMT-II employee shall notify the medical director of the local EMS agency that has jurisdiction in the county in which a violation related to subdivision (c) occurred within three days after the EMT-I or EMT-II is terminated or suspended for a disciplinary cause, the EMT-I or EMT-II resigns following notification of an impending investigation based upon evidence that would indicate the existence of a disciplinary cause, or the EMT-I or EMT-II is removed from EMT-related

duties for a disciplinary cause after the completion of the employer's investigation.

(C) At the conclusion of an investigation, the employer of an EMT-I or EMT-II may develop and implement, in accordance with the guidelines for disciplinary orders, temporary suspensions, and conditions of probation adopted pursuant to Section 1797.184, a disciplinary plan for the EMT-I or EMT-II. Upon adoption of the disciplinary plan, the employer shall submit that plan to the local EMS agency within three working days. The employer's disciplinary plan may include a recommendation that the medical director of the local EMS agency consider taking action against the holder's certificate pursuant to paragraph (3).

(2) If an EMT-I or EMT-II is not employed by an ambulance service licensed by the Department of the California Highway Patrol or a public safety agency or if that ambulance service or public safety agency chooses not to conduct an investigation pursuant to paragraph (1) for conduct in violation of subdivision (c), the medical director of a local EMS agency shall conduct the investigations, and, upon a determination of disciplinary

cause, take disciplinary action as necessary against the EMT-I or EMT-II. At the conclusion of these investigations, the medical director shall develop and implement, in accordance with the recommended guidelines for disciplinary orders, temporary orders, and conditions of probation adopted pursuant to Section 1797.184, a disciplinary plan for the EMT-I or EMT-II. The medical director's disciplinary plan may include action against the holder's certificate pursuant to paragraph (3).

(3) The medical director of the local EMS agency may, upon a determination of disciplinary cause and in accordance with regulations for disciplinary processes adopted pursuant to Section 1797.184, deny, suspend, or revoke any EMT-I or EMT-II certificate issued under this division, or may place any EMT-I or EMT-II certificate holder on probation, upon the finding by that medical director of the occurrence of any of the actions listed in subdivision (c) and the occurrence of one of the following:

(A) The EMT-I or EMT-II employer, after conducting an investigation, failed to impose discipline for the conduct under investigation, or the medical director makes a determination that the

discipline imposed was not according to the guidelines for disciplinary orders and conditions of probation and the conduct of the EMT-I or EMT-II certificate holder constitutes grounds for disciplinary action against the certificate.

(B) Either the employer of an EMT-I or EMT-II further determines, after an investigation conducted under paragraph (1), or the medical director determines after an investigation conducted under paragraph (2), that the conduct requires disciplinary action against the certificate.

(4) The medical director of the local EMS agency, after consultation with the employer of an EMT-I or EMT-II, may temporarily suspend, prior to a hearing, any EMT-I or EMT-II certificate or both EMT-I and EMT-II certificates upon a determination that both of the following conditions have been met:

(A) The certificate holder has engaged in acts or omissions that constitute grounds for revocation of the EMT-I or EMT-II certificate.

(B) Permitting the certificate holder to continue to engage in the certified activity without restriction would pose an imminent threat to the public health or safety.

(5) If the medical director of the local EMS agency temporarily suspends a certificate, the local EMS agency shall notify the certificate holder that his or her EMT-I or EMT-II certificate is suspended and shall identify the reasons therefor. Within three working days of the initiation of the suspension by the local EMS agency, the agency and employer shall jointly investigate the allegation in order for the agency to make a determination of the continuation of the temporary suspension. All investigatory information not otherwise protected by law held by the agency and employer shall be shared between the parties via facsimile transmission or overnight mail relative to the decision to temporarily suspend. The local EMS agency shall decide, within 15 calendar days, whether to serve the certificate holder with an accusation pursuant to Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. If the certificate holder files a notice of defense,

the hearing shall be held within 30 days of the local EMS agency's receipt of the notice of defense. The temporary suspension order shall be deemed vacated if the local EMS agency fails to make a final determination on the merits within 15 days after the administrative law judge renders the proposed decision.

(6) The medical director of the local EMS agency shall refer, for investigation and discipline, any complaint received on an EMT-I or EMT-II to the relevant employer within three days of receipt of the complaint, pursuant to subparagraph (A) of paragraph (1) of subdivision (a).

(b) The authority may deny, suspend, or revoke any EMT-P license issued under this division, or may place any EMT-P license issued under this division, or may place any EMT-P licenseholder on probation upon the finding by the director of the occurrence of any of the actions listed in subdivision (c). Proceedings against any EMT-P license or licenseholder shall be held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(c) Any of the following actions shall be considered evidence of a threat to the public health and safety and may result in the denial, suspension, or revocation of a certificate or license issued under this division, or in the placement on probation of a certificate holder or licenseholder under this division:

(1) Fraud in the procurement of any certificate or license under this division.

(2) Gross negligence.

(3) Repeated negligent acts.

(4) Incompetence.

(5) The commission of any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, and duties of prehospital personnel.

(6) Conviction of any crime which is substantially related to the qualifications, functions, and duties of prehospital personnel. The record of conviction or a certified copy of the record shall be conclusive evidence of the conviction.

(7) Violating or attempting to violate directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of this division or the regulations adopted by the authority pertaining to prehospital personnel.

(8) Violating or attempting to violate any federal or state statute or regulation that regulates narcotics, dangerous drugs, or controlled substances.

(9) Addiction to, the excessive use of, or the misuse of, alcoholic beverages, narcotics, dangerous drugs, or controlled substances.

(10) Functioning outside the supervision of medical control in the field care system operating at the local level, except as authorized by any other license or certification.

(11) Demonstration of irrational behavior or occurrence of a physical disability to the extent that a reasonable and prudent person would have reasonable cause to believe that the ability to perform the duties normally expected may be impaired.

(12) Unprofessional conduct exhibited by any of the following:

(A) The mistreatment or physical abuse of any patient resulting from force in excess of what a reasonable and prudent person trained and acting in a similar capacity while engaged in the performance of his or her duties would use if confronted with a similar circumstance. Nothing in this section shall be deemed to prohibit an EMT-I, EMT-II, or EMT-P from assisting a peace officer, or a peace officer who is acting in the dual capacity of peace officer and EMT-I, EMT-II, or EMT-P, from using that force that is reasonably necessary to effect a lawful arrest or detention.

(B) The failure to maintain confidentiality of patient medical information, except as disclosure is otherwise permitted or required by law in Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code.

(C) The commission of any sexually related offense specified under Section 290 of the Penal Code.

(d) The information shared among EMT-I, EMT-II, and EMT-P employers, medical directors of local EMS agencies, the authority, and EMT-I and EMT-II certifying entities shall be deemed to be an investigative communication that is exempt from public disclosure as a public record

pursuant to subdivision (f) of Section 6254 of the Government Code. A formal disciplinary action against an EMT-I, EMT-II, or EMT-P shall be considered a public record available to the public, unless otherwise protected from disclosure pursuant to state or federal law.

(e) For purposes of this section, "disciplinary cause" means an act that is substantially related to the qualifications, functions, and duties of an EMT-I, EMT-II, or EMT-P and is evidence of a threat to the public health and safety described in subdivision (c).