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' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND FRAP 35 STATEMENT

To Appellants' knowledge, the panel opinion here is the first this Court has issued about a state law that bans people from a certification based on criminal history. It affects thousands of people in California.

Even so, the panel opinion reflects an odd pattern in the Court's motion-to-dismiss cases: a repeated refusal to apply notice-pleading standards to rational-basis claims. At least for challenges to statutes and regulations, it has become effectively impossible for these claims to survive a motion to dismiss. At the same time, the Court continues to recognize these claims when they arrive here on evidentiary records. That makes no sense. It should be easier, not harder, to defeat a motion to dismiss than to win judgment on a fact record.

If the panel does not rehear the case to correct a misunderstanding of fact, en banc consideration is thus necessary to secure uniformity of the Court's decisions.

STATEMENT OF THE CASE

The facts concern California's felony bans for certification as an emergency medical technician. An EMT certification is a state-granted educational credential that shows "proof of the individual's initial competence to perform" "basic life support." Cal. Health & Safety Code §§ 1797.60, 1797.80, 1797.210(a). Alone among the states, California bans people with any felony conviction from being certified for ten years after release from incarceration, and it bans people with two felony convictions for life. 22 Cal. Code Regs. § 100214.3(c)(3), (c)(6); *see also* Appellants' Br. 4–6 (collecting laws from other states). These restrictions underlie the state's bizarre practice of using prisoners as firefighters and then later preventing those same people from working as full-time firefighters because of their criminal histories.[1]

[1] *See, e.g.*, Adesuwa Agbonile, *Inmates help battle California's wildfires. But when freed, many can't get firefighting jobs*, Sacramento Bee, (Sept. 7, 2018). The problem is that full-time firefighting almost always requires EMT certification. ER-89. So, even though California uses prisoners as firefighters "to provide them with skills to improve their lives when they leave" prison, ER-89–90, it bans them from receiving the credential they need for a career putting those skills to use.

Given the many cases holding that criminal-history-based bans like this are (or could be) irrational,[2] two qualified, rehabilitated men sued under the Fourteenth Amendment. One, Dario Gurrola, trained for years and passed a national exam. He is subject to the lifetime ban because of two old felonies—one for possessing a concealed knife in 2003 and the other for fist-fighting with a bouncer in 2005. ER-84–87. The other, Fernando Herrera, also completed EMT training. Now almost twenty-three, he is

[2] *See Perrine v. Mun. Ct.*, 5 Cal. 3d 656 (1971); *Shimose v. Haw. Health Sys. Corp.*, 345 P.3d 145 (Haw. 2015); *Chunn v. State ex rel. Miss. Dep't of Ins.*, 156 So. 3d 884 (Miss. 2015); *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Fields v. Dep't of Early Learning*, 434 P.3d 999 (Wash. 2019); *Lewis v. Ala. Dep't of Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993); *Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980); *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974); *Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986); *Carr v. Thompson*, 384 F. Supp. 544 (W.D.N.Y. 1974); *Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978); *Gregg v. Lawson*, 732 F. Supp. 849 (E.D. Tenn. 1989); *Brewer v. Dep't of Motor Vehicles*, 93 Cal. App. 3d 358 (1979); *Cronin v. O'Leary*, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001); *Tanner v. De Sapio*, 150 N.Y.S.2d 640 (N.Y. Sup. Ct. 1956); *Peake v. Pennsylvania*, 132 A.3d 506 (Pa. Commw. Ct. 2015) (en banc); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commw. Ct. 2012) (en banc); *Warren Cnty. Hum. Servs. v. State Civ. Serv. Comm'n*, 844 A.2d 70 (Pa. Commw. Ct. 2004).

barred by the ten-year ban, and even after 2028, he will still be barred by the lifetime ban because of two assaults he committed when he was a fourteen- and fifteen-year-old child. ER-87–89. No amount of training or rehabilitation will ever be enough for California to say these men know "basic life support" like CPR, so they can never work as full-time firefighters, even though both men protected California from wildfires while they were in custody.

The plaintiffs filed a 214-paragraph complaint in the Eastern District of California, but the court dismissed for failure to state a claim. On appeal to this Court, fifteen amici—the ACLUs of Northern California, Southern California, and San Diego; the Cato Institute; the Collateral Consequences Resource Center; DKT Liberty Project; the Due Process Institute; Law Enforcement Action Partnership; MacArthur Justice Center; the NAACP; the National Association of Criminal Defense Lawyers; Pacific Legal Foundation; R Street Institute; the Sentencing Project; and a scholar—urged reversal. The panel affirmed in a three-page unpublished opinion.

In the next sections, Appellants explain why rehearing is warranted. They first explain the fact error that justifies panel rehearing. After that, they explain the systemic legal error that justifies rehearing en banc.

REASON FOR PANEL REHEARING

The panel should rehear this case because it misunderstood a key fact. The panel assumed that this case is about *being* an EMT:

> In light of the responsibilities of an EMT, the felony bans are rationally related to fitness. Felonies, especially recent ones, reasonably call into question a person's moral character. A state may require good moral character as a qualification for entry into a profession, when the practitioners of the profession come into close contact with patients or clients. There are no more potentially vulnerable patients than those who are involved in the medical emergencies to which EMTs respond.

Op. 3–4 (citation and quotation marks omitted).

But, as Appellants pleaded, an EMT certification does not concern only that one job. Rather, the Complaint alleged that:

- "EMT certification is not itself a job position. It is a hiring credential in many kinds of businesses."
- "For example, rock-climbing gyms and outdoor adventure businesses advertise that some employees are EMT certified. EMTs also work at factories, amusement parks, stadiums, and event venues. Some EMTs work as dispatchers and do not interact in person with the public at all."

ER-94. By overlooking this allegation, the panel deprived Appellants of the chance to put on evidence showing that few people certified as EMTs work in that role. For instance, one source from the University of California San Francisco says that *at most* twenty-seven percent of people with EMT certification work mainly as EMTs. And it suggests that the correct number is closer to four percent.[3]

That allegation means that the panel ruled on the wrong facts. Rather than rule on the facts in the Complaint, the panel took the "responsibilities of an EMT" from one of the *defendant's* briefs:

> EMTs have access to prescription medication, including narcotics. They use sharp objects and have ready access to them.

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[3] Patricia E. Franks et al., *Emergency Medical Technicians and Paramedics in California*, UCSF Ctr. for Health Pros., 2004, at 2, *available at* https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.569.6691&rep=rep1&type=pdf. This report states that "there are approximately 60,000 certified EMTs and 13,500 licensed Paramedics in the State of California, even though only 16,010 work primarily as EMTs and Paramedics." If one assumes that people licensed as paramedics are far more likely to work in the field than people merely certified as EMTs (since paramedic licensure requires ten times the investment in training, ER-93), then the 16,010 people working as EMTs or paramedics should mostly be the 13,500 licensed as paramedics. That leaves about 2,510 people working mainly as EMTs out of the 60,000 certified, which is just four percent.

> At times they take actions that make the difference between life and death. They deal with people when they are most vulnerable and at their worst due to pain, high emotions, and confinement during transport.

Op. 3 (quoting Appellee Kepple's Br. 28). The Complaint alleged nothing about "sharp objects"; the only time it mentioned medication was to say that EMTs *do not* "administer[] most drugs"; and the only time it mentioned "transport" was to say that "EMT certification does not empower certificate-holders to drive ambulances." ER-93. But even if it were permissible to take facts from a defense brief rather than a complaint, it would still be plausible that the panel's description is false for nearly everyone with EMT certifications. Again, the Complaint mentions things like outdoor guides, dispatchers, and staff at gyms, amusement parks, stadiums, and event venues. ER-94. For these and the perhaps ninety-six percent of certified people who do not work as EMTs, there is no reason to assume—especially on a motion to dismiss—that they have access to narcotics, use sharp objects, or transport anyone anywhere.

In sum, this case is about a credential, not a job. The bans are less like a prohibition on working in a specific field and more like a ban on people

with felony records getting a specific associate degree. Especially given the case law, on a motion to dismiss, a law like that is at least plausibly irrational. The panel overlooked this aspect of the Complaint, so the case should be reheard.

REASONS FOR REHEARING EN BANC

This case should also be reheard en banc so that the Court can address a latent problem in its case law: the tension between notice pleading and the rational-basis test.

On one side, Rule 8(a) requires only a "short and plain statement of the claim." Adopted in 1938, this Rule capped a century-long evolution away from the labyrinthine English writ system, so that it would "no longer [be] necessary for a complaint to comply with all the technical requirements" that often sunk meritorious claims. Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1066 (1955). Under Rule 8, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what … the claim is and the grounds on which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)

(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (alteration in original). This Rule works with Rule 12(b)(6) to ensure that meritorious claims are not dismissed. Thus, a claim for relief need be only "plausible on its face." *Twombly*, 550 U.S. at 570. This "plausibility standard is not akin to a 'probability requirement,'" meaning that plaintiffs need not show that they are likely to prevail. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, a complaint need only "nudge[] [its] claims across the line from conceivable to plausible." *Twombly*, 556 U.S. at 570.

On the other side is the rational-basis test, which defers the other way. This substantive standard requires courts to uphold a law "if there is any reasonably conceivable state of facts that could" justify it. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). That said, because rational-basis review allows "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," *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 590–91 (9th Cir. 2008), the full weight of rational-basis deference should come to bear only on a full record. Indeed,

the benchmark Supreme Court descriptions of a deferential rational-basis test all come from cases with fact records, not just pleadings. *See Armour v. City of Indianapolis*, 566 U.S. 673 (2012); *Heller v. Doe*, 509 U.S. 312 (1993); *Beach Commc'ns*, 508 at 307; *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).[4]

On a motion to dismiss, the conflict is obvious. Does the rational-basis test require a complaint to allege every fact necessary to negate every "conceivable basis" for the law? If so, do plaintiffs need sprawling complaints that look like summary-judgment or trial records? If so, how does that square with Rules 8 and 12?

The Supreme Court has never addressed this conflict. But appellate courts have long been vexed. Other circuits recognize that "[a] perplexing situation is presented when the rational basis standard meets the standard applied to a dismissal under Fed. R. Civ. P. 12(b)(6)." *Wroblewski v. City of*

[4] The chief case on which the panel relied, *Dittman v. California*, was also not decided on the pleadings. 191 F.3d 1020. 1023 (9th Cir. 1999) (appeal from grant of summary judgment).

Washburn, 965 F.2d 452, 459 (7th Cir. 1992); *see also Abigail All. for Better Access to Dev. Drugs v. Von Eschenbach*, 495 F.3d 695, 712 n.20 (D.C. Cir. 2007) ("tension"); *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) ("dilemma"); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995) ("[c]ompeting standards"). This Court does not appear to have ever discussed this tension explicitly.

But it has resolved it implicitly. In rational-basis cases, at least in practice, this Court does not allow plaintiffs to survive motions to dismiss when they challenge broad classifications (such as those made by statutes, regulations, and policies). That practice, in turn, has caused two intra-circuit conflicts that only the en banc Court can resolve. The first is a difference between class-of-one claims (which can survive a motion to dismiss) and claims challenging broad classifications (which can't). The second is a strange difference about challenges to broad classifications. Even as the Court rejects them at the 12(b)(6) stage, it accepts them on a fact record.

I. Conflict One: Class-of-One Versus Broader Classifications

The first conflict is the different treatment of two types of rational-basis claims: class-of-one claims on the one hand and broader statutory or regulatory challenges on the other.

Class-of-one claims allege that officials deliberately discriminated in a discretionary act. In *Lazy Y Ranch*, for example, the plaintiff alleged it was discriminated against in a state auction of grazing leases. 546 F.3d at 583. And, in that case, this Court simply refused to accept the defendants' justifications at the 12(b)(6) stage because the plaintiff had pleaded "numerous facts that, if proven, would tend to establish [its] theory." *Id.* at 590. Indeed, at one point, the Court appeared willing to sustain the complaint based on a single fact allegation "[r]ead in the light most favorable to" the plaintiff. *Id.* at 591. The Court had no problem stressing that "our circuit has 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." *Id.* 546 F.3d at 590–91. In cases like this, the Court at

least sometimes accepts complaints at face value. *See also Fowler Packing Co., Inc. v. Lanier*, 844 F.3d 809, 813 (9th Cir. 2016) (claim of discrimination as a political concession to farm workers' union);[5] *Sierra Lake Rsrv. v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991) (claim that "officials obstructed … applications at almost every turn").[6]

By contrast, rational-basis challenges to broad classifications have no meaningful chance of prevailing on 12(b)(6) motions. Other than gay-rights cases[7] (which have always enjoyed some form of heightened review[8]), Appellants have been unable to find even a single published opinion from the last 40 years in which a challenge to a broad classification survived a motion to dismiss. The sole win that Appellants found at the 12(b)(6) stage

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[5] Although *Fowler Packing* did involve a statute, the statute was alleged to affect only four companies and was narrow enough that the plaintiffs brought a Bill of Attainder claim. *Id*. at 812, 813 & n.2.

[6] *Judgment vacated sub nom. City of Rocklin v. Sierra Lakes Rsrv.*, 506 U.S. 802, 113 S. Ct. 31, 121 L. Ed. 2d 4 (1992), and *opinion vacated in irrelevant part*, 987 F.2d 662 (9th Cir. 1993).

[7] *See Whitmire v. Arizona*, 298 F.3d 1134 (9th Cir. 2002); *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1991).

[8] *See Pruitt*, 963 F.2d at 1165 (distinguishing "'active' rational basis review").

is an unpublished opinion about a technical distinction in health care reimbursement, and the full analysis, footnote included, is five sentences long. *See AIDS Healthcare Found. v. Douglas*, 457 F. App'x 676 (9th Cir. 2011). If anything, the Court seems to bend over backwards to see rationality in statutes and regulations. It of course routinely affirms 12(b)(6) dismissals of rational-basis claims. *See, e.g.*, *Am. Soc'y of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 964–66 (9th Cir. 2021)[9]; *San Francisco Taxi Coal. v. City & County of San Francisco*, 979 F.3d 1220, 1223–26 (9th Cir. 2020). And in the one traditional rational-basis case besides *AIDS Healthcare* in which the Court said a law might be irrational on the pleadings, it addressed the irrationality by rewriting the law to make it *more* restrictive and thus still denied the plaintiffs the relief they sought. *Silveira v. Lockyer*, 312 F.3d 1052, 1089–92 (9th Cir. 2002) ("because the … exception is an arbitrary

[9] *Cert. denied*, No. 21-1172, 2022 WL 2295432 (U.S. June 27, 2022).

classification in violation of the Fourteenth Amendment, we sever that provision").[10]

The panel opinion here is a perfect example. For any other kind of legal claim, this Court accepts the allegations of the complaint and strives to read it in favor of the plaintiff. *See, e.g.*, *Jackson v. Barnes*, 749 F.3d 755, 764 (9th Cir. 2014) ("Construing Jackson's complaint liberally, Jackson has met the *Iqbal* standard if only because he has made a critical factual allegation …"); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1077 (9th Cir. 2013) ("At this stage of the proceedings, where, as here, there is no allegation regarding a BPD officer's duties with respect to meeting and cooperating with IA, we must resolve the ambiguity in Dahlia's favor."). It would never accept facts from a defense brief instead. *See, e.g.*, *In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 (9th Cir. 2018) ("Zappos argues that this allegation is implausible, but it does so by relying on facts outside the Complaints … which makes its argument one that may be appropriate for summary

[10] *Overruled on other grounds by District of Columbia v. Heller*, 554 U.S. 570 (2008).

judgment but not one that may support a facial challenge to standing at the motion to dismiss stage."); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) ("While evidence outside the complaint indicates that Officers Stone and Barnes interviewed additional witnesses, such extraneous evidence should not be considered in ruling on a motion to dismiss."). Under any other substantive standard, the 25-page, 214-paragraph complaint here would constitute "a short and plain statement of the claim." Fed. R. Civ. P. 8. But not under the rational-basis test.

The upshot? Most rational-basis cases challenge statutory classifications, but 12(b)(6) motions are insurmountable in this Court because it has rejected liberal pleading standards for those claims. The only rational-basis claims plaintiffs can hope to win at the 12(b)(6) stage involve class-of-one/personal animus claims. There is no doctrinal basis for this discrepancy.

II. Conflict Two: Complaints Versus Fact Records

The Court's rejection of notice pleading for rational-basis claims has created another conflict. As noted, on a *12(b)(6) motion*, it is next to

impossible for a rational-basis plaintiff challenging a regulatory classification to win before the Court. But if a plaintiff is lucky enough to avoid appearing here on a 12(b)(6) motion, her chances skyrocket on the merits. *See Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064–67 (9th Cir. 2014) (preliminary injunction; driver's license restriction likely irrational); *Merrifield v. Lockyer*, 547 F.3d 978, 989–92 (9th Cir. 2008) (summary judgment; licensure requirement held irrational); *Servin-Espinoza v. Ashcroft*, 309 F.3d 1193, 1196–99 (9th Cir. 2002) (grant of habeas corpus; deportability classification held irrational); *Navarro v. Block*, 72 F.3d 712, 715–17 (9th Cir. 1995) (summary judgment; rationality of police policy sent to trial); *Bunyan v. Camacho*, 770 F.2d 773 (9th Cir. 1985) (summary judgment; residency credit held irrational).[11]

[11] Class-of-one claims succeed on fact records too. *See Gerhart v. Lake County*, 637 F.3d 1013, 1021–24 (9th Cir. 2011) (summary judgment; rationality of permit denial sent to trial); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1507–09 (9th Cir. 1990) (summary judgment; rationality of development denial sent to trial); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155–56 (9th Cir. 1990) (summary judgment; rationality of water-hookup denial sent to trial); *Parks v. Watson*, 716 F.2d 646, 654–55 (9th

This precedent is exactly backwards. It should be easier, not harder, to prevail at the 12(b)(6) stage. This upside-down situation suggests that this Court's abandonment of Rules 8 and 12 for rational-basis claims has led to wrongful dismissals over the years. (It certainly suggests that challenges to other criminal-history-based bans, which survived in five state supreme courts, would have ended on the pleadings here. *See* note 2, above.) This is because this Court's 12(b)(6) and non-12(b)(6) decisions cannot be reconciled: plaintiffs' victories on a full record can easily be reimagined as 12(b)(6) dismissals.

Take *Merrifield v. Lockyer*, the Court's rational-basis case most analogous to this one. It concerned a non-pesticide pest controller who challenged a license that was nominally premised on the use of pesticides. 547 F.3d at 980. Although this Court directed summary judgment for Merrifield, he easily could be reimagined as losing here at the 12(b)(6) stage. After all, there was *some* justification for the law: the *Merrifield* court

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Cir. 1983) (summary judgment; rationality of development denial sent to trial).

held over and over that the license related to Merrifield's pest-control work. *Id.* at 986–88. That would have been enough for the panel here.

But Merrifield then won because of the fact record. As the facts showed, other pest controllers who were more likely to encounter pesticides were exempt from licensure. *Id.* at 991. And, as it turned out, the fact "record highlight[ed]" that this "irrational singling out … was designed to favor economically certain constituents." *Id.* The *Merrifield* panel would have never reached that result if it had simply seen some reason for the license and affirmed dismissal at the 12(b)(6) stage. (Nor would *Arizona Dream Act Coalition* have relied on statistics and defense testimony if that case had simply accepted the hypothesizing in the defendants' briefs. *See* 757 F.3d at 1066.)

Merrifield alone should control the case here. As Appellants explained, Appellants' Br. 40–44, even California doctors—who have much more to do with the purported state interest in controlling "narcotics" and "sharp objects" and "the difference between life and death" than do people with a 170-hour educational credential—do not face lifetime bans. The

people (much) closer to the claimed state interest are exempt. If that was enough to win in *Merrifield*, how can it not be enough to survive on the pleadings here?

Applying notice pleading to rational-basis claims does not mean that rational-basis claims can never be dismissed at the 12(b)(6) stage (or that survival of a claim at the 12(b)(6) stage amounts to a judgment for the plaintiff). There will be times, as in every other area of law, when complaints fail to state a claim. S*ee, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 472–73 (1991) (noting many unassailable justifications for a mandatory retirement provision). But, broadly speaking, Rules 8 and 12 require courts to avoid dismissing potentially meritorious claims. After all, "[i]f material allegations of fact are mistaken, summary judgment or trial can so establish." *Flynn v. Holder*, 684 F.3d 852, 859 (9th Cir. 2012).

CONCLUSION

This case should be reheard by the panel to correct a misunderstanding of the pleadings, and it should be reheard en banc to address the confusion in the Court's cases about the rational-basis test.

Dated: July 25, 2022

s/ Andrew Ward
Counsel for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing/Responses

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9th Cir. Case Number(s) 21-15414

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Signature Andrew Ward **Date** July 25, 2022

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARIO GURROLA; FERNANDO HERRERA, Plaintiffs-Appellants, v. DAVID DUNCAN, in his official capacity as director of the California Emergency Medical Services Authority; et al., Defendants-Appellees.	No. 21-15414 D.C. No. 2:20-cv-01238-JAM-DMC MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted January 11, 2022
San Francisco, California

Before: GOULD, BENNETT, and R. NELSON, Circuit Judges.

This appeal arises from the dismissal of Appellants' complaint at the pleading stage after Appellees moved to dismiss under Federal Rule of Civil Procedure 12. Appellants are individuals with felonies challenging two California

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

felony bans for EMT ("emergency medical technician") certification, foreclosing individuals with recent or multiple felonies from qualifying for the EMT certification necessary to become a firefighter. Appellants are formerly incarcerated individuals who, while imprisoned, worked in fire camps fighting fires for the state of California. After release from incarceration, Appellants sought to become full-time firefighters but were barred from receiving EMT certification under California's felony bans. Appellants filed suit in the California district court seeking to enjoin California's EMS ("emergency medical services") agencies from enforcing the felony bans as unconstitutional. At the pleading stage, the district court dismissed Appellants' complaint.

We review the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 814 (9th Cir. 2016).

The parties agree that their claims are governed by rational basis review. Under rational basis review, the question before us is whether the felony bans on EMT certification are "rationally related to a legitimate state interest." *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The regulations at issue, 22 Cal. Code Regs. § 100214.3(c)(3), (6), state, in essence, the medical director shall deny or revoke an EMT certificate if the applicant: (a) has been convicted of two or more felonies; or (b) has been convicted of a felony offense and released within the preceding ten years.

Appellees argue that these two felony bans are rationally related to fitness to be an EMT because

> EMTs have access to prescription medication, including narcotics. They use sharp objects and have ready access to them. At times they take actions that make the difference between life and death. They deal with people when they are most vulnerable and at their worst due to pain, high emotions, and confinement during transport.

Appellants make two arguments challenging the rationality of the felony bans. First, Appellants contend that the felony bans "irrationally discriminate between two similarly situated groups: people without felony convictions seeking EMT certification and people with felony convictions seeking EMT certification." Second, Appellants assert that the felony bans "violate the Due Process Clause because they restrict certification based on criteria that are not rationally related to fitness for certification."

We reject Appellants' arguments because we have long held that "[r]egulations on entry into a profession, as a general matter, are constitutional if they have a rational connection with the applicant's fitness or capacity to practice the profession." *Dittman v. California*, 191 F.3d 1020, 1030 (9th Cir. 1999) (alteration in original) (citation and quotation marks omitted).

In light of the responsibilities of an EMT, the felony bans are rationally related to fitness. Felonies, especially recent ones, reasonably call into question a person's moral character. "A state may require good moral character as a qualification for

entry into a profession, when the practitioners of the profession come into close contact with patients or clients." *Id.* at 1032. There are no more potentially vulnerable patients than those who are involved in the medical emergencies to which EMTs respond. Additionally, the wisdom in the state legislature's decision to impose certain restrictions on entry to a profession is not for courts to judge. *See id.* "For in the end, it is for the legislature, not the courts, to balance the advantages and disadvantages of" the felony bans. *Id.* (citation and quotation marks omitted). Given the rational relationship between the felony bans and fitness to be an EMT, as well as the deference given to a state legislature's restrictions, we conclude that California's felony bans should be sustained under rational basis review and reject the challenge to the felony bans.

AFFIRMED.