No. 21-15414

IN THE 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
Case No. 2:19-cv-05394-DLR

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLANTS SEEKING REVERSAL

Christina Fletes-Romo (CA 312661)
cfletes@aclunc.org
Brandon Greene (CA 293783)
bgreene@aclunc.org
Emilou Maclean (CA 319071)
emaclean@aclu.org
Grayce Zelphin (CA 279112)
gzelphin@aclunc.org
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
(415) 621 2493

Counsel for ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties

Sherrilyn A. Ifill (NY 2221422)
sifil@naacpldf.org
Janai S. Nelson (NY 2851301)
jnelson@naacpldf.org
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

Mahogane D. Reed (LA 37274)
mreed@naacpldf.org
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, amici curiae move for leave to file the concurrently submitted amicus brief in support of Appellants. Pursuant to Rule 29(a)(2), counsel for amici curiae certify that amici curiae sought consent from all parties to the filing of this brief. Counsel for Appellants and for Appellee David Duncan have consented to the filing of this brief. At the time of filing, amici curiae have not received a position from the other Appellees.

Amici curiae are non-profit organizations dedicated to furthering the principles of liberty and equality embodied in the United States Constitution and this Nation's civil rights laws. Amici the American Civil Liberties Union ("ACLU") of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties (together, the "ACLU Affiliates in California") work to advance the civil rights and civil liberties of Californians in the courts, in legislative and policy arenas, and in the community, including by working to repair the current and historic harms wrought by race-based segregation, discrimination, and deprivation of economic and other opportunities.

Amicus curiae National Association for the Advancement of Colored People Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law firm. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on advancing civil rights for all people in education, economic justice, political participation, and criminal justice. LDF has long a long history of fighting for economic justice and equal opportunity in the workforce, including in the

seminal 1971 Supreme Court case *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). LDF maintains a strong interest in ensuring the racial discrimination that pervades the criminal legal system does not interfere with formerly incarcerated people's employment opportunities.

Amici are familiar with the issues presented in this case and write separately to inform the Court about issues that are not directly raised by the parties but that are implicated by California's Emergency Medical Training certification ban. Specifically, amici's brief elucidates the effect of the disproportionate criminalization of Black and Latinx people on post-incarceration employment opportunities, including opportunities that require employment licenses and certifications.

Because of its unique perspective and its abiding interest in the issues now before the Court, amici respectfully seek permission to file the accompanying proposed brief in support of Appellants.

Dated: May 18, 2021

Respectfully by,

/s/ Christina Fletes-Romo
Christina Fletes-Romo
Brandon Greene
Emilou Maclean
Grayce Zelphin
ACLU FOUNDATION OF NORTHERN CALIFORNIA

Counsel for ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties

Sherrilyn A. Ifill
Janai S. Nelson
Mahogane D. Reed
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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Christina Fletes-Romo (CA 312661)
cfletes@aclunc.org
Brandon Greene (CA 293783)
bgreene@aclunc.org
Emilou Maclean (CA 319071)
emaclean@aclu.org
Grayce Zelphin (CA 279112)
gzelphin@aclunc.org
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
(415) 621 2493

Counsel for ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties

Sherrilyn A. Ifill (NY 2221422)
sifil@naacpldf.org
Janai S. Nelson (NY 2851301)
jnelson@naacpldf.org
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200

Mahogane D. Reed (LA 37274)
mreed@naacpldf.org
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW
Washington, DC 20005
(202) 682-1300

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29 (4)(a), *amici curiae* the American Civil Liberties Union ("ACLU") of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties (together, the "ACLU Affiliates in California") and the National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc. ("LDF") state that they are all non-profit organizations under section 501(c)(3) of the Internal Revenue Code; that none of *amici curiae* has any parent corporations; and that no publicly held company owns ten percent or more of any stock in any of *amici curiae*.

Dated: May 18, 2021

Respectfully by,

/s/ Christina Fletes-Romo
Christina Fletes-Romo

Counsel for ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") Affiliates in California are regional affiliates of the ACLU, a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the U.S. Constitution and this Nation's civil rights laws. For decades, the ACLU Affiliates in California have advocated to advance economic and racial justice for all Californians. The ACLU Affiliates in California have participated in cases, both as direct counsel and as amici, involving the enforcement of constitutional guarantees of equal protection and due process for Black and Latinx persons, including in connection with harms resulting from their involvement with the criminal legal system.

The National Association for the Advancement of Colored People Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law firm. Founded in 1940 under the leadership of Thurgood Marshall, LDF focuses on advancing civil rights for all people in education, economic justice, political participation, and criminal justice. LDF has a long history of fighting for economic justice and equal opportunity in the workforce, including in the seminal

[1] Pursuant to Rule 29(a)(2), counsel for *amici curiae* certify that *amici curiae* have sought consent from all parties to the filing of this brief. Counsel for Appellants and for Appellee David Duncan have consented to the filing of this brief. At the time of filing, *amici curiae* have not received a position from the other Appellees. Pursuant to Rule 29(a)(4)(e), counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

1971 Supreme Court case *Griggs v. Duke Power Company*, 401 U.S. 424 (1971). LDF maintains a strong interest in ensuring that the racial discrimination that pervades the criminal legal system does not interfere with formerly incarcerated people's employment opportunities.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Appellants challenge California's broad regulatory ban limiting people with felony convictions from obtaining Emergency Medical Training (EMT) certification. Amici agree with Appellants that the ban lacks any rational basis and violates the Fourteenth Amendment's Equal Protection and Due Process clauses. Amici write to make a critical point bearing on this Court's review of California's EMT certification ban: because the legal system disproportionately criminalizes Black and Latinx people, California's EMT ban disproportionately bars Black and Latinx people from obtaining EMT certification and attendant stable employment opportunities. The ban thus perpetuates the systemic racial discrimination that mars our criminal legal system and prohibits formerly incarcerated people from obtaining steady employment. The consequences of this ban are untenable when reviewed with any level of scrutiny.

It is a troubling but inescapable reality that criminalization and race are inextricably entwined in this country. The history underlying policing, prosecution, and sentencing has created stark and well-documented racial inequalities that plague the criminal legal system. Modern-day policies and practices perpetuate a system in which Black and Latinx people are more likely than white people to be labeled as felons during their lifetime because of their race or ethnicities. For this reason,

scrutinizing bans against people with felony convictions cannot be abstracted from race.

Racial disparities are present at every point in the criminal legal system. Black and Latinx people are disproportionally stopped by police officers, and these stops disproportionally turn into arrests. Prosecutors are more likely to use their discretion to prosecute Black and Latinx defendants for more severe charges than white people and are less likely to offer Black and Latinx people favorable plea deals. The result of these compounded discrepancies is the greater likelihood that a Black or Latinx person will be charged with, and convicted of, a felony than a similarly situated white person.

Over-criminalization of Black and Latinx communities results in extreme economic consequences. Black and Latinx people who become entangled with the criminal legal system are typically bridled with hefty criminal administrative fees. This debt, while often crippling on its own, is compounded by steep obstacles to finding employment because of prior criminal records. The impact of prior convictions on employability is disproportionally borne by Black and Latinx people. Blanket bans against anyone with a felony conviction—like California's EMT certification requirement—erect an insurmountable obstacle to some forms of employment. Such explicit bans target and classify one group—comprised disproportionately of Black and Latinx people—to exclude them from an opportunity even to compete for employment in a particular field.

As explained by Appellants, the blanket ban at issue here is not supported by any legitimate state interest and fails any form of rational basis review. The ban

instead imports, and exacerbates, the stark racial discrimination from the criminal legal system into an important certification requirement. Such discrimination confirms that California's blanket ban on people with prior felony convictions from EMT certification is irrational.

ARGUMENT

I. RACIALLY DISPARATE TREATMENT OF BLACK AND LATINX PEOPLE IN THE CRIMINAL LEGAL SYSTEM MAKES THEM MORE LIKELY THAN WHITE PEOPLE TO BE CONVICTED OF FELONIES.

Racial discrimination in the criminal legal system is well-documented. Police officers, prosecutors, and judges disproportionately stop, arrest, prosecute, and harshly sentence Black and Latinx people. As a result, it is more likely that Black and Latinx people will be convicted of felonies and incarcerated than similarly situated white people.

A. Racial Disparities Are Prevalent in Policing.

Racial discrimination in U.S. policing has a long, entrenched history. Policing was created in part to maintain slavery and enforce a system of racial apartheid throughout the South.[2] Modern policing in the U.S. has roots in slave patrols—gangs of vigilantes that enforced slavery-related laws—as well as police enforcement of

[2] Alex S. Vitale, *The End of Policing,* Verso, 45-48 (Aug. 28, 2018).

Jim Crow laws.[3] Today, racial discrimination in policing results in racially disparate rates at which Black and Latinx people are stopped, searched, and arrested.[4]

California-specific statistics confirm that police disproportionately stop, search, and arrest Black and Latinx people in the state. In 2018, a study revealed that across law enforcement agencies, Black and Latinx people in California were disproportionately stopped by police officers, and Black people were stopped much more frequently than any other racial group.[5] In California's largest cities, Black people were stopped at a rate multiple times their percentage of the population.[6] The study also confirmed that Black people are more likely to be detained, handcuffed, and searched than their white counterparts. This is the case even though when officers search Black and Latinx people in California, they are less likely to find

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[3] *See* Connie Hassett-Walker, *How You Start is How You Finish? The Slave Patrol and Jim Crow Origins of Policing,* American Bar Association (Jan. 12, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/how-you-start-is-how-you-finish/; Philip S. Foner, *History of Black Americans: From Africa to the Emergency of the Cotton Kingdom,* Praeger at 206 (Aug. 21, 1975).

[4] *See* Elizabeth Hinton *et al.*, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Legal System*, Vera Inst. of Just. at 7 (May 2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

[5] *See* Open Just., *2018 Racial and Identity Profiling Act (RIPA)*, https://openjustice.doj.ca.gov/exploration/stop-data/stop-data-2018 (last visited May 18, 2021) (collecting stop data from law enforcement agencies across the state).

[6] *See* Darwin Bond Graham, *Black People in California Are Stopped Far More Often by Police, Major Study Proves*, The Guardian (Jan. 3, 2020), https://www.theguardian.com/us-news/2020/jan/02/california-police-black-stops-force.

drugs, weapons or other contraband compared to when they search white people.[7] National studies reflect similar trends.[8]

Widespread racial disparities in stops, arrests, searches, and detentions demonstrate how the very first point of contact with the criminal legal system is tainted by racial discrimination.

B. Prosecutorial Discretion Leads to Racially Disparate Charging and Sentencing Outcomes.

Prosecutors have a unique role in the criminal legal system: "[p]rosecutors enjoy more unreviewable discretion than any other actor in the criminal legal system" and wield substantial discretion over critical aspects of the legal process—including charging decisions, pretrial detention decisions and bail amounts, plea bargaining negotiations, and post-trial sentencing.[9] With such unfettered authority, prosecutors can inject unchecked racial biases, prejudices, and stereotypes into

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[7] *Id*.

[8] *See* Hinton, *supra* note 4, at 7 (citing Andrew Gelman *et al.*, *An Analysis of the New Yock City Police Department's 'Stop-and-Frisk' Policy in the Context of Claims of Racial Bias,* 102 J. of the Am. Stat. Ass'n 813, 821-22 (2007), http://www.stat.columbia.edu/~gelman/research/published/frisk9.pdf). *See also id*. (citing Police Accountability Task Force, *Recommendations for Reform: Restoring Trust Between the Chicago Police and the Communities They Serve* at 8 (Apr. 2016), https://igchicago.org/wp-content/uploads/2017/01/PATF_Final_Report_4_13_16-1.pdf); Tammy Rinehart Kochel, *et al., Effect of Suspect Race on Officers' Arrest Decisions*, 49 Criminology 473, 490, 495-96 (2011).

[9] Robert Smith & Justin Levinson, *The Impact of Racial Bias in the Exercise of Prosecutorial Discretion*, 35 Seattle Univ. L. Rev. 745, 805 (2012), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2082&context=sulr.

prosecutorial decision-making. Prosecutorial bias is "a major cause of racial inequality in the criminal legal system."[10]

Biased prosecution decisions make it more likely that Black, Latinx, and other people of color will be prosecuted for more severe charges, receive less favorable plea deals, and be subject to harsher prison sentences when compared to their white counterparts.[11] In 2018 the Vera Institute of Justice reviewed thirty-four studies to examine the effect of prosecutorial decision-making on racial disparities at different discretion points throughout the life of a criminal case.[12] Among them, one study found that federal prosecutors are more likely to charge Black people than similarly situated white people with offenses that carry higher mandatory minimum sentences,[13] and another study found that state prosecutors are more likely to charge

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[10] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 17 (1998), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3499&context=flr. It is well-accepted that prosecutors—like all people—harbor biases that influence their actions. For more, *see* Smith & Levinson, *supra* note 9, at 797-820.

[11] *An Unjust Burden*, *supra* note 4, at 8 (*citing* Besiki Kutateladze *et al.*, *Do Race and Ethnicity Matter in Prosecution?: A Review of Empirical Studies,* Vera Inst. of Just. (2012), https://www.vera.org/downloads/Publications/do-race-and-ethnicity-matter-in-prosecution-a-review-of-empirical-studies/legacy_downloads/race-and-ethnicity-in-prosecution-first-edition.pdf).

[12] *See An Unjust Burden*, *supra* note 4, at 8.

[13] *An Unjust Burden*, *supra* note 4, at 8 (*citing* Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 Yale L. J. 1 (2013), https://www.yalelawjournal.org/article/mandatory-sentencing-and-racial-disparity-assessing-the-role-of-prosecutors-and-the-effects-of-booker). Ethnicity can also impact the severity of a sentence. *See, e.g.*, Jeffery Ulmer *et al.*, *Prosecutorial Discretion and the Imposition of Mandatory Minimum Sentences*, 44 J. of R. in Crime and Delinq. at 427, 442 (2007) (Latino men almost twice as likely to receive a mandatory sentence as their white counterparts).

Black people under habitual offender statutes than similarly situated white people.[14] Bias can also infect plea-bargaining decisions. White people are generally more likely than Black people to have their most serious charges dropped or reduced by prosecutors. [15] As a result, Black and Latinx people are more likely to plead guilty to felony offenses as compared to white people.[16] These decisions result in disproportionately higher sentences for Black people. A 2017 report from the United States Sentencing Commission found that Black males received sentences that are "on average 19.1 percent higher than similarly situated White males," and that violence in a defendant's history did not account for these demographic differences in sentencing.[17]

C. Black and Latinx People Are Disproportionally Incarcerated.

Discrimination in policing and biased prosecutorial decision-making result in stark racial disparities in incarceration rates. As of 2019, Black and Latinx people were disproportionately represented in state and federal prisons across the country.[18] In 2019, more than one percent of all Black people in the U.S. were serving time in

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[14] Charles Crawford *et al.*, *Race, Racial Threat, and Sentencing of Habitual Offenders*, 36 Criminology at 481, 503 (2006).
[15] *See generally* Carlos Bedejó, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C.L. Rev. 1187 (2018), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3659&context=bclr
[16] *Id*. at 1191.
[17] Glenn R. Schmitt, *et al*, *Demographic Differences in Sentencing: An Update to the 2012 Booker Report*, U.S. Sent'g Comm'n (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf
[18] E. Ann Carson, *Prisoners in 2019*, U.S. Dep't of Just. at 10 (Oct. 2020), https://www.bjs.gov/content/pub/pdf/p19.pdf.

a state or federal prison.[19] This rate was five times the rate of white people and two times the rate of Latinx people.[20] California-specific statistics also show that Black and Latinx people are overrepresented among the state's jail and prison populations.[21] As of 2015, Black people constituted six percent of the state's overall population but twenty percent of the local jail population and twenty-eight percent of the state prison population.[22] Similarly, Latinx people constituted thirty-eight percent of the state's population but forty-one percent of the jail population and forty-four percent of the prison population.[23]

Reports also show that the percentage of the Black population—and specifically the Black male population—with felony convictions has grown substantially. A 2017 study estimated that nationwide, the percentage of Black men who had experienced imprisonment increased from six percent in 1980 to fifteen percent in 2010.[24] As of 2010, one-third of adult Black males had a felony conviction, compared to thirteen percent of Black men in 1980.[25] The trend holds in

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[19] *Id*.
[20] *Id*.
[21] *See* The Vera Institute, *Incarceration Trends in California: Incarceration in Local Jails and State Prisons*, https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-california.pdf.
[22] *Id*.
[23] *Id*.
[24] Sarah K.S. Shannon *et al.*, *The Growth, Scope, and Distribution of People with Felony Records in the United States*, 1948–2010, Population Ass'n of Am. at 1807 (Sept. 11, 2017).
[25] *Id.*

California, as Black and Latinx people are more likely to have a felony conviction relative to white people and to be imprisoned for their conviction.[26]

II. FORMERLY INCARCERATED PEOPLE FACE ECONOMIC BURDENS AND LIMITED, LOW-PAYING, AND SEGREGATED EMPLOYMENT OPPORTUNITIES, AND THESE IMPACTS ARE COMPOUNDED BY RACE.

A significant factor contributing to the economic fallout from incarceration and criminal convictions is that formerly incarcerated people with criminal convictions face barriers to obtaining employment.[27] Occupational entry requirements, such as licensing and certification requirements that are tied to a person's criminal history, limit access to economic sustainability for people of color. Furthermore, formerly incarcerated people are typically required to pay back extraordinary fees associated with their prosecution. These employment and economic barriers create a devastating situation for people with criminal convictions seeking to cover their basic needs, live with dignity and respect, and successfully re-enter society.[28]

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[26] *See* Letter from Martin Hoshino, Judicial Council, to Diane F. Boyer-Vine, Legislative Counsel, Erika Contreras, Secretary of State, and E. Dotson Wilson, Chief Clerk of the Assembly, Judicial Council of Cal. at 12, 17 (Feb. 14, 2019), https://www.courts.ca.gov/documents/lr-2019-JC-disposition-of-criminal-cases-race-ethnicity-pc1170_45.pdf (felony conviction rate for white people is fifty-five percent, but fifty-eight percent for Latinx people and sixty-two percent for Black people; and rates of prison sentences were twenty-eight percent for white people compared to thirty-eight to forty percent for Latinx and Black people).

[27] Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, Prison Pol'y Initiative (July 2018), https://www.prisonpolicy.org/reports/outofwork.html (over twenty-seven percent of people who are formerly incarcerated are unemployed).

[28] *Id*. *See also* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. of Socio. 937 (2003), https://scholar.harvard.edu/pager/publications/mark-criminal-record.

A. Formerly Incarcerated People Face Higher Unemployment Rates; When They Do Find Employment, It Is Often for Unsustainable Wages.

Black and Latinx people's disproportionate involvement with the criminal legal system has exposed them to a substantial reduction in financial earning potential. According to a report by the Brennan Center for Justice, an individual's annual earnings are reduced according to their level of involvement with the criminal legal system.[29] A person's earning potential is reduced by sixteen percent if they have a misdemeanor conviction; 21.7 percent if convicted of a felony but not incarcerated; and 51.7 percent if imprisoned for any period of time.[30] The disproportionate involvement of Black and Latinx people with the criminal legal system disproportionately impacts their earning capacity and economically burdens their communities.

Approximately one-third of formerly incarcerated people are unemployed.[31] This rate is striking when compared to the under four percent pre-pandemic unemployment level for the entire U.S. population.[32] Further, about sixty percent of people who are formerly incarcerated are unemployed a year after being released,

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[29] Terry-Ann Craigie *et al.*, *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality,* Brennan Ctr. for Just. (Sept. 15, 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal.
[30] *Id.*
[31] Policy Brief, *Finding Employment After Contract with the Carceral System*, Instit. for Rsch. on Lab. and Emp. (May 2019).
[32] *Id.*

and many struggle to find employment for much longer than that.[33] People with criminal records are half as likely to get a callback relative to those without a criminal record.[34]

This impact is especially profound for people of color. For example, several studies have shown that white men with a criminal record are more likely to receive a positive response from an employer compared to Black men without a criminal record.[35] Another study estimates that the effect of having a criminal record is forty percent more damaging for Black men compared to white men.[36] Studies have shown that Latina women are sixty-one percent less likely than white women with a criminal record to receive a favorable response from prospective employers,[37] and another study found that formerly incarcerated white women were ninety-three percent more likely to be contacted for an interview or offered a job than formerly incarcerated Black women.[38]

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[33] Saneta deVuono-powell, *et al.*, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Ctr. (2015), http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf (citing Lior Gideon & Hung-En Sung, eds., *Rethinking Corrections: Rehabilitation, Reentry and Reintegration*, SAGE Publications, Inc. at 332 (2010); Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration* Univ. of Mich. at 4 (July 30, 2015), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf).
[34] Michelle Natividad Rodriguez & Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, Nat'l Emp. L. Project (Apr. 2016).
[35] Beth Avery *et al.*, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, Nat'l Emp. L. Project (Dec. 2019), https://s27147.pcdn.co/wp-content/uploads/FairChanceLicensing-v4-2019.pdf.
[36] *Id.*
[37] *Fair Chance Licensing Reform*, *supra*, note 35; Couloute & Kopf, *supra* note 27.
[38] *Id.*

For these reasons, many people with criminal convictions are unable to find work, increasing their likelihood of re-offending and returning to prison.[39] For those who can find work, their employment options are often limited to low-wage jobs that provide little economic security and employment stability.[40] And the impact of incarceration on wages is staggering. Studies have shown that prison time may reduce wages by up to twenty percent, with that wage reduction being significantly greater for Black and Latinx workers than white workers, sometimes even twice as great.[41]

The fines, fees, and costs associated with involvement in the criminal legal system also result in further wealth extraction from already economically vulnerable communities. A recent report by the Fines and Fees Justice Center estimated that the amount of debt held by courts nationally likely exceeds $276.5 billion dollars.[42] This national debt is disproportionately borne by, and disproportionately destabilizes, the already-lacking economic foundation of Black and Latinx families.[43] According to a study by the Ella Baker Center on the impact of fines and fees on incarcerated

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[39] Tianyin Yu, *Employment and Recidivism*, EBP Society (Jan. 30, 2018), https://www.ebpsociety.org/blog/education/297-employment-recidivism.
[40] deVuono-powell, *supra*, note 33.
[41] *Id.* (*citing* Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67.4 Am. Soc. Rev. 526, 536 (Aug. 2002), https://scholar.harvard.edu/files/brucewestern/files/western_asr.pdf); Policy Brief, *Reentry and Employment for the Formerly Incarcerated and the Role of American Trades Unions*, Nat'l Emp. Law Project (Apr. 6, 2016), https://www.nelp.org/publication/reentry-and-employment-for-the-formerly-incarcerated-and-the-role-of-american-trades-unions/
[42] Briana Hammons, *Tip of the Iceberg: How Much Criminal Justice Debt Does the U.S. Really Have?*, Fines & Fees Just. Ctr. (Apr. 28, 2021).
[43] deVuono-powell, *et al.*, *supra* note 33.

people and their families, "forty-eight percent of families . . . were unable to afford the costs associated with a conviction, while among poor families (making less than $15,000 per year), 58% were unable to afford these costs."[44]

B. Formerly Incarcerated People Are Shut Out from Occupations That Require a License or Certificate.

Since the 1950s, the share of U.S. workers needing an occupational license or certification to pursue employment has increased nearly fivefold.[45] Today, about one quarter of workers require a license or certification to work at their job. Many of these occupations have licensing and certification restrictions that block people with a criminal record from obtaining a license or certification. This means that about "1/4 of the economy [is] off the table" for people who are formerly incarcerated.[46]

Occupational license and certification requirements create additional barriers to entering various professions and can relegate those who are excluded from licensing and certification opportunities to lower wages and greater instability. For example, unlicensed workers with similar levels of education, training, and experience as licensed workers earn ten to fifteen percent lower wages,[47] and licensed workers are more likely to enjoy higher wage increases over time compared to unlicensed workers.[48] Licensing and certification requirements that include

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[44] *Id*. at 7.
[45] The White House, *Occupational Licensing: A Framework for Policymakers* (July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.
[46] *Fair Chance Licensing Reform*, *supra* note 35.
[47] The White House, *supra* note 45.
[48] *Fair Chance Licensing Reform*, *supra* note 35.

blanket exclusions for those who are formerly incarcerated "regardless of whether their records are relevant to the job for which they are applying," such as the EMT certification requirement in question, "perpetuat[e] unstable economic situations for these individuals."[49]

A 2015 White House report on occupational licensing, certification, and registration recognized that occupational regulation schemes that exclude individuals with criminal records disproportionately impact Black and Latinx workers.[50] This is because licensing and certification requirements that wholly exclude people with criminal convictions, like California's EMT certification requirement, "rest on a shaky foundation—a criminal legal system born out of systemic racism."[51]

Occupational licensing and certification regimes control various economic sectors and industries across the country and are prerequisites to many occupations in California from emergency medical technicians to barbers and architects.[52] A blanket ban, such as California's EMT certification requirement serves to fully exclude an entire subset of the population while fueling racial economic inequality.

The racialized effect of the ban is present in the applicant pool for EMT certifications—where individuals would not apply because of criminal convictions which would bar them. While 6.5 percent of Californians identify themselves as

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[49] The White House, *supra* note 45.
[50] *Id.*
[51] *Unlicensed and Untapped*, *supra* note 34.
[52] *See* Cal. Emergency Med. Serv. Auth., EMT, https://emsa.ca.gov/emt/; Cal. Dep't of Consumer Aff., *DCA Boards & Bureaus*, https://www.dca.ca.gov/about_us/entities.shtml.

Black and 39.4 percent identify themselves as "Hispanic or Latino",[53] the representation of Black and Latinx candidates in the applicant pool for EMTs is less than half that—three percent "Black/African American" and twenty-two percent "Hispanic or Latino."[54]

Additionally, the relationship between the racialized nature of the criminal legal system and California's EMT certification requirement further shuts Black and Latinx workers out of a profession that fails to reflect the racial demographics of the State. Many careers require EMT certification, including many California fire departments. Certification requirements exacerbate the glaring underrepresentation of Black and Latinx people in firefighting. For example, more than seventy percent of the Sacramento Fire Department's employees are white, and only three percent are Black.[55] White Sacramento Fire Department employees are overrepresented by thirty-nine percent relative to the city's population, while Black employees are underrepresented by eight percent and Latinx employees are underrepresented by

[53] U.S. Census Bureau, *QuickFacts: California*, https://www.census.gov/quickfacts/CA.
[54] Emergency Med. Serv. Auth., California Health and Human Services Agency, *Criminal History Impact on EMT Certification* at 5 (Dec. 2020), https://emsa.ca.gov/wp-content/uploads/sites/71/2020/12/CriminalHistoryImactOnEMTCertification2019.pdf.
[55] Off. of the City Auditor, City of Sacramento, *City Auditor's 2020 Audit of City Workforce Diversity and Salary Trends* (Nov. 2020), https://www.cityofsacramento.org/-/media/Corporate/Files/Auditor/IBA-Reports/2020-Audit-of-City-Employees-Workforce-Diversity-and-Salary-Trends.pdf?la=en.

seventeen percent.[56] Similarly, while close to forty percent of the state is Latinx,[57] only about twenty-one percent of firefighters in California are Latinx.[58] This is not just an issue in California: the firefighting occupation is overwhelmingly white across the United States.[59]

III. A CATEGORICAL CERTIFICATION BAR RESTING ON RACIAL BIASES IN THE CRIMINAL LEGAL SYSTEM CANNOT WITHSTAND CONSTITUTIONAL SCRUTINY.

California's blanket ban preventing people with prior felony convictions from obtaining EMT certification necessarily incorporates the racial biases and discrimination rampant in the criminal legal system. The disproportionate exclusion of people of color from EMT certification, and the regulatory ban's application to people who fought fires while incarcerated, compound the ban's irrationality. The ban cannot stand under even deferential scrutiny.

A. California's Overbroad and Categorical Bar Does Not Survive Rational Basis Review.

As Appellants argue, the overbroad employment ban at issue in this case fails the rational basis test. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432,

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[56] *Id.*
[57] Hans Johnson *et al.*, *Just the Facts: California's Population*, Public Policy Institute of California (Mar. 2021), https://www.ppic.org/publication/californias-population/#:~:text=No%20race%20or%20ethnic%20group,the%202019%20American%20Community%20Survey.
[58] CSULB Enterprise Reporters, *Latino Firefighters' Double Duty: Fighting Race and Fire*, Voicewaves Long Beach, (Dec. 11, 2017), https://voicewaves.org/2017/12/latino-firefighters-double-duty-fighting-race-and-fire/.
[59] *Id.*

440 (1985). California cannot demonstrate a rational connection between a person's "fitness or capacity" to serve as an EMT and its categorical bar on employment for people with certain prior criminal convictions. *Schware v. Bd. of Bar Exam'r of State of N.M.*, 353 U.S. 232, 239 (1957) (equal protection analysis in context of occupational licensing).

Numerous courts have recognized that regardless of the legitimacy of the asserted state interest, these interests are not served by categorical bars prohibiting those with criminal convictions from various forms of licensing and employment. In two cases, the U.S. District Court for the District of Connecticut found unconstitutional categorical bars of people with felony convictions from, respectively, employment as a precious metal dealer, *Barletta v. Rilling*, 973 F. Supp. 2d 132, 138 (D. Conn. 2013) (no "rational nexus between a conviction for any and every felony offense and the fitness to act as a precious metals dealer"), and a private detective or security guard. *Smith v. Fussenich*, 440 F. Supp. 1077, 1080 (D. Conn. 1977) (the categorical bar did not "recognize the obvious differences in the fitness and character of those persons with felony records" or the "probable and realistic circumstances in a felon's life").

In both cases, the court considered relevant that the state statute at issue—similar to the statute at issue here—did not "distinguish among felons in terms of when they were convicted and how severely they were sentenced," and "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." 973 F. Supp. 2d at 139. *See also Butts*

v. Nichols, 381 F. Supp. 573, 580 (S.D. Iowa 1974) (three-judge district court) (involving a similar categorical ban on hiring people with felony convictions, with the court holding "[t]here is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests"); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1112 (N.D. Cal. 1980) (holding unconstitutional a city's "across-the-board ban on hiring ex-felons" as it was "not tailored along any lines to conform to what might be considered legitimate government interests"); *Lewis v. Ala. Dep't of Pub. Safety*, 831 F. Supp. 824, 826 (M.D. Ala. 1993) (holding that a bar on contracting with tow operators who had certain categories of misdemeanor convictions violated the Equal Protection Clause as it was "both over inclusive and under inclusive"); *Gregg v. Lawson*, 732 F. Supp. 849, 856 (E.D. Tenn. 1989) (holding that wrecking operator presented a cognizable equal protection claim in a challenge to law which categorically barred operators with prior felony convictions).

As the courts recognized in these and other related cases, many felony offenses may bear no relationship to the State's interest. *See also Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331, 1338 (E.D.N.Y. 1986) ("Before excluding ex-felons as a class from employment, a municipal employer must demonstrate some relationship between the commission of a particular felony and the inability to adequately perform a particular job."). As Appellants persuasively argue, the types of crimes that qualify as felonies are many and wide-ranging in the underlying conduct they proscribe. *See* Appellants' Br. at 35–37. It is irrational for California to use felony convictions as a basis for exclusion from EMT certification without

asserting a relationship between the proscription and whether someone should be certified.

It is especially irrational for California to do so when it recruits and trains incarcerated people to fight fires. California has trained and entrusted imprisoned people to fight fires since the 1940s, with incarcerated people making up around one third of the state's wildfire-fighting personnel.[60] Incarcerated people "work an average of 10 million hours each year responding to fires and other emergencies."[61] Facing an unprecedented number of wildfires, the state relied on more than two thousand incarcerated people to perform the life-threatening work of combating fires throughout the state, with many working shifts of up to seventy-two hours while making only one dollar per hour plus two dollars per day.[62] It is wholly irrational for California to exploit the labor of imprisoned people to fight fires while incarcerated while subsequently denying formerly incarcerated people the opportunity to pursue long-term careers as firefighters after their release.[63]

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[60] Annika Nekalson, *California is Running Out of Inmates to Fight Its Fires*, The Atlantic, (Dec. 7, 2017), https://www.theatlantic.com/politics/archive/2017/12/how-much-longer-will-inmates-fight-californias-wildfires/547628/.

[61] *Id*.

[62] German Lopez, *California Is Using Prison Labor to Fight Its Record Wildfires*, Vox, (Aug. 9, 2018), https://www.vox.com/2018/8/9/17670494/california-prison-labor-mendocino-carr-ferguson-wildfires.

[63] A new law, AB 2147 (2020), allows a path to more quickly expunge convictions for most people who fought fires while incarcerated. However, this neither eliminates the categorical certification ban for people with felony convictions nor allows for a path to certification for people with felony convictions who did *not* participate in firefighting while incarcerated (for instance, because they were not incarcerated for long enough or while there were ongoing wildfires or in a jail or prison where this was an option).

B. Biases in the Criminal Legal System Render the EMT Certification Requirement Ill-Suited for the State's Purported Interests.

The racial justice issues in this case only serve to highlight the irrationality of the EMT certification requirement and confirm that a widespread ban does not serve to advance the asserted state interest. The existence of significant, detrimental and racialized consequences—as well as the importance of the interest affected—suggest that this Court should consider the purported justification for the EMT certification carefully, even under rational basis review.

Rational basis review is applied with either more or less rigor depending on the context. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985) (instructing courts to apply the most deferential review to most social and economic legislation, "where the Constitution presumes that even improvident decisions will eventually be rectified by the democratic process"); *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (applying a heightened form of rational basis review that calls for "careful consideration" of whether the legislature has fulfilled its duty to act impartially); *Plyler v. Doe*, 457 U.S. 202, 223–24 (in applying a rational basis standard of review, recognizing as important in "determin[ing] the proper level of deference" the fact that the challenged law "imposes a lifetime hardship on a discrete class," and requiring the State to "overcom[e] the presumption that [the classification] is not a rational response to legitimate state concerns"); *Cleburne*, 473 U.S. at 452 (Stevens, J., joined by Burger, C.J., concurring) (arguing that the tiered approach to equal protection scrutiny represents a single standard whose application varies with context, and explaining that the term "rational"

"includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially").

"Careful consideration" is warranted when a challenged state action targets a "politically unpopular group," as this ban does in targeting people with criminal convictions, disproportionately people of color. *See Lawrence v. Texas* , 539 U.S. 558, 580 (2003 (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause."); *Doe v. Plyler*, 628 F.2d 448, 458 (5th Cir. 1980) (finding an equal protection violation and noting that the group targeted by the challenged law, undocumented immigrant children, are "saddled with . . . disabilities . . . [or] relegated to . . . a position of political powerlessness") (internal quotations omitted), aff'd, 457 U.S. 202 (1982).

A more searching review is also warranted when the challenged state action burdens a substantial right or important interest. *See, e.g.*, *Plyler*, 457 U.S. at 218-19[64]; *id.* at 221, 233 (Blackmun, J., concurring) ("[C]ertain interests, though not

[64] The burdened interest here bears similarities to the burdened interest identified by the Supreme Court in *Plyler v. Doe*. In *Plyler*, the Supreme Court conducted a demanding rational basis review of the State's asserted interest, and its nexus to the challenged law, ultimately holding that the State could not constitutionally deprive undocumented children of access to education. In doing so, the Court highlighted that "education prepares individuals to be self-reliant and self-sufficient participants in society." *Plyler*, 457 U.S. at 222, *quoting* Wisconsin *v. Yoder*, 406 U.S. 205, 221 (1972) ("The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle

constitutionally guaranteed, must be accorded a special place in equal protection analysis."). Employment is such an important interest. As the District Court of the District of Utah recognized in *Clayton v. Steinagel*: "'[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity' that the Constitution was designed to protect." 885 F. Supp. 2d 1212, 1216 (D. Utah 2012) (holding that a licensing scheme which required an African hair braider to obtain a state cosmetology license was unconstitutional) (*quoting Truax v. Raich*, 239 U.S. 33, 41 (1915)). *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93, 112 (1979) (Marshall, J., dissenting) ("A person's interest in continued Government employment, although not 'fundamental' as the law now stands, certainly ranks among the most important of his personal concerns that Government action would be likely to affect.").

The characteristics and effects of the certification ban challenged in this case compel a more searching review of the ban's benefits and harms, and its nexus to the state's asserted interest. *See Plyler*, 457 U.S. at 223–24, 228 n. 24 ("In determining the rationality of [the statute], we may appropriately take into account its costs" and whether the statute was "ineffective[]") (internal quotation marks omitted)); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (considering relevant in the equal protection analysis that "[the enactment] . . . inflicts . . . immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be

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of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause."). The same is also true with regard to access to employment.

claimed for it."). Here, the harms—denial of employment to otherwise qualified individuals, compounded discriminatory effects of the criminal legal system, reinforced severe racialized disadvantages, and bloated recidivism rates—are substantial. The purported benefits sought by the ban can be achieved by pre-existing law more appropriately tailored to respond to the State's asserted interest. *See* Appellants' Br. at 4 (statutory prohibition limited to "substantially related" offenses).[65] *See also U.S. Dep't of Agric. V. Moreno*, 413 U.S. 528, 536–37 (1973) (holding that an amendment to eligibility criteria for federal food stamps was an unconstitutional Equal Protection violation; and considering as significant that there were pre-existing statutory provisions which served the same stated aim).

The disparities in the criminal legal system exacerbate the EMT certification requirement's unsuitability for its stated purpose. The regulation has a purported intent to exclude from the profession individuals deemed unsafe because of their prior *actions*. However, relying on prior convictions and recent incarceration introduces the biases of the criminal legal system into state licensing and certification without improving public safety any more than pre-existing law.[66] The

[65] For nearly twenty years prior to the challenged regulation, continuing to the present, the underlying statute authorized the "denial, suspension, or revocation of a[n EMS] certificate or license" for the "[c]onviction of any crime which is *substantially related* to the qualifications, functions, and duties of prehospital personnel." Cal. Health & Safety Code § 1798.200(c)(6), (8), (9), added by Stats. 1993, c. 100 (C.B. 463, § 1.6, eff. July 13, 1993, operative Dec. 31, 1993 (emphasis added).

[66] To the extent that the categorical bar *prohibits* otherwise qualified people from serving as EMTs (including as firefighters), the bar may be *detrimental* to public safety by decreasing the number of eligible people able to provide lifesaving medical

disparities in policing, prosecution, severity of criminal charges, and harshness of criminal sentencing for people of color mean that actions taken by white people which violate the law result in very different outcomes than the same actions taken by people of color. For example, if a Black driver and a white driver are each unknowingly driving with stolen property, the Black driver is more likely to face criminal consequences because they are more likely to be stopped and searched by the police in the first instance, and to face discrimination in the legal system that would result in a conviction for a more serious offense and with a harsher sentence. Likewise Black and white drug users are likely to face very different outcomes from this illegal activity because of disparities in policing and treatment by the criminal legal system. In other words, despite similar *actions*, it is more likely that a Black person will be convicted of a felony and barred from EMT certification.

The racial disparities that plague the criminal legal system are directly imported into California's EMT certification scheme, a flaw that supports a claim of irrationality. "A proxy that serves its purpose only by happenstance is arbitrary and fails rational basis review." *Barletta v. Rilling*, 973 F. Supp. 2d 132, 137 (D. Conn. 2013). In addition, the ban's application to formerly incarcerated people who were trained by the state to fight fires while incarcerated, demonstrate that California's EMT certification ban has "at best a marginal relation to the proffered objective." *Eisenstadt v. Baird*, 405 U.S. 438, 448, 450, 454 (1972) (finding unconstitutional a

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and firefighting services where there is already an EMT shortage. *See, e.g.*, Adam Daigle, *How to Find EMTs, Paramedics Amid National Shortage*, Government Technology, Gov't Tech (Apr. 2, 2021), https://www.govtech.com/em/how-to-find-emts-paramedics-amid-national-shortage-.html.

statute which prohibited the distribution of contraceptives to unmarried persons because it was "overbroad" and violated the Equal Protection clause).

"Careful consideration" of California's EMT certification ban compels the conclusion that the blanket prohibition cannot be rationally related to any purported government interest. Excluding a politically disfavored group from stable employment, deepening the economic vulnerabilities of predominantly Black and Latinx people, and further extending the biases which exist in the criminal legal system cannot be justified by the purported ends of the statute.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's dismissal of Appellants' Fourteenth Amendment Equal Protection and Due Process claims.

Dated: May 18, 2021

Respectfully by,

/s/ Christina Fletes-Romo
Christina Fletes-Romo
Brandon Greene
Emilou Maclean
Grayce Zelphin
ACLU FOUNDATION OF NORTHERN CALIFORNIA

Counsel for ACLU of Northern California, ACLU of Southern California, and ACLU of San Diego & Imperial Counties

Sherrilyn A. Ifill
Janai S. Nelson
Mahogane D. Reed
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.

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