21-15414
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARIO GURROLA and FERNANDO HERRERA,

Plaintiffs-Appellants,

v.

DAVID DUNCAN, in his official capacity as director of the California Emergency Medical Services Authority, and 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,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:20-cv-01238
John A. Mendez, Judge

APPELLEE DUNCAN'S ANSWERING BRIEF

ROB BONTA
Attorney General of California
CHERYL L. FEINER
Senior Assistant Attorney General
GREGORY D. BROWN
Supervising Deputy Attorney General

LISA A. TILLMAN
Deputy Attorney General
State Bar No. 126424
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-7910
Fax: (916) 324-5567
Email: Lisa.Tillman@doj.ca.gov
Attorneys for Appellee David Duncan

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INTRODUCTION

This Court should affirm the District Court's dismissal of Appellants' constitutional challenge to the California Emergency Medical Services Agency's (EMSA) regulations requiring denial of an application for emergency medical technician (EMT) certification where the applicant has (a) two or more felony convictions and/or (b) has been incarcerated in the previous ten years on a felony offense. These two regulations implement the statutory requirement that any disqualifying events have a "substantial relationship" to the duties of an EMT. Both regulations are subject to a state statute permitting an applicant to petition their committing state court to expunge their felony convictions and render them non-disclosable to a licensing agency. The District Court properly found the regulations rationally related to the societal interest in safeguarding the health and safety of members of the public served by EMTs, often in exigent and vulnerable circumstances; hence, the regulations satisfied the Equal Protection and Due Process Clauses. Appellants conceded the Privileges or Immunities claim was foreclosed as a matter of law. Therefore, this Court should uphold the decision to grant EMSA Director Duncan's motion to dismiss the first amended complaint without leave to amend.

The District Court correctly determined that granting leave to amend would be futile. Appellants did not seek leave to amend before the District Court and do

not seek such leave before this Court. For all these reasons, this Court should uphold the dismissal of the Appellant's first amended complaint without leave to amend.

JURISDICTION

Appellants asserted jurisdiction on two bases: the Civil Rights Act of 1871 (42 U.S.C. § 1983) and the Declaratory Judgment Act (28 U.S.C. § 2201). ER-82. The District Court exercised federal question jurisdiction over this matter pursuant to 28 U.S.C. § 1331. ER 82, ER-111.

The District Court's order granting Appellees' motion to dismiss the first amended complaint was filed on February 10, 2021. ER 4-22. Judgment was entered on the same date. ER-3. The District Court's order dismissing Appellants' action was a final order appealable as of right, and this Court has jurisdiction over the appeal of this order pursuant to 28 U.S.C. § 1291.

Appellants filed a timely notice of appeal on March 8, 2021. ER-109; Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF LAW

A. The EMS Act

The California Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act (EMS Act) was enacted to "provide the state with a statewide system for emergency medical services" and to "ensure the provision of effective and efficient emergency medical care." Cal. Health &

Safety Code §§ 1791.1, 1797.6, subd. (a); *County of Butte v. EMS Authority*, 187 Cal. App. 4th 1175, 1181 (2010). The EMS Act established a two-tiered system: the state EMSA, which is responsible for the coordination of all state activities concerning emergency medical services, and local EMS agencies (LEMSAs). Cal. Health & Safety Code §§ 1791.1, 1797.4, 1797.100; Cal. Gov't Code § 12803, subd. (b).

The state EMSA was established "to promote the development, accessibility, and provision of emergency medical services to the people of the State of California." Cal. Health & Safety Code § 1797.5; *see Memorial Hospitals Ass'n v. Randol*, 38 Cal. App. 4th 1300, 1307 (1995). The state EMSA establishes minimum standards and promulgates regulations for the training and scope of practice for emergency medical technicians (EMT-I & EMT-II). Cal. Health & Safety Code §§ 1797.54, 1797.107, 1797.109, 1797.170, 1797.208. An Emergency Medical Technician I-A is an individual trained in all facets of basic life support according to standards prescribed by statute and who has a valid certificate issued pursuant to statute and regulations. *Id*. § 1797.80; *see* Cal. Code Regs. tit. 22, § 100063 (Basic Scope of Practice of EMT).

1. The EMS Act and EMT certification.

An application for EMT certification is determined by the "EMT certifying entity:" a "public safety agency or the Office of the State Fire Marshal," or "the

medical director of a local EMS agency (LEMSA)." Cal. Code Regs. tit. 22, § 100342; *see* Cal. Code Regs. tit. 22, § 100058. The EMT certifying entity's decision to grant or deny EMT certification must consider the applicant's criminal history, as stated in the EMS Act and implementing regulations.

On three occasions the Legislature has amended the EMS Act to specifically address the risk of criminal acts posed by EMTs with criminal records. In 1999, the State Legislature responded to "[c]ases of physical and sexual abuse by paramedics" by amending the Act to require the mandatory submission of an applicant's fingerprints for a federal criminal check. 1999 Cal. Legis. Serv. Ch. 549 (A.B. 1215) (WEST). In 2008, the Legislature recognized that EMTs "provide vital, lifesaving, prehospital attention to the public and assist in transporting the sick or injured to an appropriate medical facility" in contexts ranging from childbirth to gunshot wounds. 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST). However, given the interest in "[e]nsuring the safety of the public, as well as that of first responders," the Legislature amended the Act to enable any EMSA entity employing EMTs to "have access to pertinent information concerning any applicant's background and criminal history as a condition of his or her employment." 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST); *see* Cal. Health & Safety Code § 1797.117. Further, Health and Safety Code section 1797.184 was added to authorize EMSA's adoption of "[r]egulations for the

issuance of EMT-I and EMT-II certificates by a certifying entity that protects the public health and safety." 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST); *see* Cal. Health & Safety Code § 1797.184(b); *see* Cal. Health & Safety Code § 1797.107.

In accord with this emphasis on ensuring the public health and safety, the EMS Act expressly lists those "actions" that "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." Cal. Health & Safety Code § 1798.200(c) (emph. added). The list includes:

> 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.

Cal. Health & Safety Code § 1798.200(c)(6).

2. The EMSA regulations.

EMSA's regulatory scheme defines when a criminal conviction is "substantially related" for the purpose of denying an application for EMT certification, pursuant to Health and Safety Code section 1798.200(c)(6). A substantial relationship between an applicant's criminal act(s) and the position's qualifications, functions, or duties exists "if to a substantial degree it evidences unfitness . . . to perform the functions authorized by the certificate in that it poses a threat to public health and safety." Cal. Code Regs. tit. 22, § 100208, subd. (a).

Even if a substantial relationship exists between the conviction and the duties of an EMT, evidence of the applicant's rehabilitation may be considered, under the following factors:

> (1) nature and severity of the acts or crimes;
>
> (2) actual or potential harm to the public;
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> (3) actual or potential harm to any patient;
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> (4) prior disciplinary record;
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> (5) prior warnings on record or prior remediation;
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> (6) number/variety of current violations;
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> (7) aggravating evidence;
>
> (8) mitigating evidence;
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> (9) rehabilitation evidence;
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> (10) in the case of a criminal conviction, compliance with terms of the sentence or court-ordered probation;
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> (11) overall criminal record;
>
> (12) time that has elapsed since the act(s) or offense(s) occurred;
>
> (13) evidence of expungement proceedings pursuant to Penal Code section 1203.4.

Cal. Code Regs. tit. 22, § 100208.

However, the LEMSA medical director "shall" deny an EMT application in nine specific contexts. Cal. Code Regs. tit. 22, § 100214.3, subd. (c)(1)-(9). The two regulations relevant to this appeal are:

> (i) if the applicant has been "convicted of two (2) or more felonies" (Cal. Code Regs. tit. 22, § 100214.3, subd. (c)(3)),
>
> (ii) if the applicant has been "convicted and released from incarceration for said offense during the preceding ten (10) years for any offense punishable as a felony" (*Id.*, § 100214.3, subd. (c)(6)).[1]

3. The administrative appeal process for denial of EMT certification.

An applicant has the "right to appeal a denial of an EMT or Advanced EMT certificate." Cal. Code Regs. tit. 22, § 100214.3, subd. (g). The appeal is heard in accordance with the processes of the California Administrative Procedure Act (California APA). Cal. Gov't Code, § 11500 et seq.

Under the California APA, the administrative law judge (ALJ) hears the contested case and then delivers their proposed decision to the relevant agency. Cal. Gov't Code § 11517, subd. (c). The agency may:

> (A) adopt the proposed decision in its entirety; (B) reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed decision; (C) make technical or other minor changes in the proposed decision and adopt it as the decision; (D) reject the proposed decision and refer the case to the same ALJ if reasonably available; or (E) '[r]eject the proposed decision, and decide the case upon the record, including the

[1] The subject regulations are hereinafter referred to as "section 100214.3(c)(3)" and "section 100214.3(c)(6)."

> transcript, or upon an agreed statement of the parties, with or without taking additional evidence.' (§ 11517, subd. (c)(2).)

Ventimiglia v. Bd. of Behavioral Sciences, 168 Cal. App. 4th 296, 303-304 (2008).

A party may seek reconsideration of the administrative decision within 30 days "after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period. . . ." Cal. Gov't Code § 11521, subd. (a).

B. The State Judicial Processes to set Aside Felony Convictions.

Against this statutory and regulatory backdrop, the California Legislature enacted two Penal Code provisions permitting state courts to set aside a felony conviction.

1. California Penal Code section 1203.4.

California Penal Code section 1203.4 addresses circumstances where a former convict who has "fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a state court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section." Cal. Penal Code § 1203.4(a)(1). Such a person shall be "permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty" and, except as

otherwise indicated in the statute, the court shall dismiss the accusations or information against the defendant. *Id*.

With an order issued under Penal Code section 1203.4, the state court thus releases the defendant "from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code." Cal. Penal Code § 1203.4(a)(1). However, the court's order "does not relieve" the petitioner of their "obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission." *Id*.

2. California Penal Code section 1203.4b.

More recently, the Legislature enacted California Penal Code section 1203.4b (Assembly Bill 2147). ER-75. Effective January 1, 2021, Penal Code section 1203.4b provides that a former criminal defendant who participated in the California Conservation Corp as an incarcerated, individual hand crew member or as a member of a county-incarcerated individual hand crew, and who has been released from custody, except a defendant convicted of certain listed crimes, may bring a petition for relief from certain felony convictions to a superior court judge in their sentencing county. Cal. Penal Code § 1203.4b(a)(1) & (b)(1). The

defendant may make the application and change of plea in person or by attorney. *Id*. § 1203.4b(c)(3). Penal Code section 1203.4b provides, in pertinent part:

> If the requirements of this section are met, the court, in its discretion and in the interest of justice, may permit the defendant to withdraw the plea of guilty or plea of nolo contendere and enter a plea of not guilty, or, if the defendant has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty, and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which the defendant has been convicted, except as provided in Section 13555 of the Vehicle Code.

Cal. Penal Code § 1203.4b(c)(1).

A defendant who is granted a Penal Code 1203.4b order "*shall not be required to disclose* the conviction on an application for licensure by any state or local agency." Cal. Penal Code § 1203.4b(b)(5)(a) (emph. added). However, "the order does not relieve the defendant of the obligation to disclose response to any direct question contained in any questionnaire or application for licensure by the Commission on Teacher Credentialing, a peace officer, public office, or for contracting with the California State Lottery Commission." *Id*. § 1203.4b(d)(2).

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STATEMENT OF THE CASE

I. FACTUAL AND PROCEDURAL BACKGROUND OF GURROLA'S CLAIMS

Gurrola committed multiple crimes, including felonies, in his twenties. ER 84-85.[2] In 2003, at the age of 22, Gurrola was convicted of his first felony, carrying a concealed weapon, and sentenced to a year in jail. ER-54-56, ER-84. He was allegedly associating with a "tough crowd" and carried a knife to defend himself; however, the knife was discovered when police responded to his argument with an ex-girlfriend. ER-56. In 2005, Gurrola was convicted of a second felony, assault with a deadly weapon or force likely to cause great bodily injury. ER-54, ER-84. This felony arose when Gurrola, who was "out one night after drinking and abusing drugs," assaulted a security guard who tried to calm him. ER-54, ER-57, ER-84. In 2008, Gurrola was convicted of a misdemeanor, resisting arrest. ER-54.

At the age of 28, Gurrola decided to change his life. ER-57. But he then committed more felonies. *Id*. He was convicted of a third felony, burglary, and misdemeanor theft in 2010. ER-54, ER-57, ER-84. A year later, he was convicted of his fourth felony, receipt of stolen property. ER-53.

[2] Because Appellants are adults, Appellee Duncan refers to Appellants by their last names.

Gurrola, who served in a fire camp while in custody as a juvenile, learned of employment opportunities with the U.S. Forest Service. ER-57, ER-85. He served as a seasonal firefighter in 2013 and 2015 for the U.S. Forest Service. ER-85.

In 2017, Gurrola successfully applied for dismissal of three of his convictions under Penal Code section 1203.4. ER-53-54, ER-84. He obtained dismissal of his 2008 misdemeanor conviction for resisting arrest, his 2010 felony conviction for felony burglary and misdemeanor theft, and his 2011 felony conviction for receipt of stolen property. *Id.*

In 2017, Gurrola completed EMT basic training and, in the following year, he completed firefighter training. ER-85. In 2019, Gurrola served as a seasonal firefighter for the Cal Pines Fire Department in Alturas. *Id*.

On August 8, 2019, Gurrola filed an application for EMT certification with Nor-Cal EMS, a local EMS agency. ER-53, ER-86. Nor-Cal EMS denied the application due to Gurrola's criminal history, which included multiple felony convictions. *Id*.

Gurrola's administrative appeal of the denial was heard by an administrative law judge on November 12, 2019. ER-53, ER-86.

On December 5, 2019, the administrative law judge issued a proposed decision upholding the denial of the application on two grounds. ER 52-61. First, Gurrola's two felony convictions disqualified him, pursuant to section

100214.3(c)(3). ER-61. Second, Gurrola's convictions were substantially related to the duties of an EMT, pursuant to Health and Safety Code section 1798.200(c)(6). *Id*. In a letter dated December 11, 2019, Nor-Cal EMS Medical Director Kepple informed Gurrola that the proposed decision was adopted by Nor-Cal EMS, and effective December 11, 2019. ER-63.

Gurrola did not file a petition for writ of mandamus in Sacramento or Shasta County Superior Courts for judicial review of the administrative decision. ER-17-18, ER-66.

II. FACTUAL AND PROCEDURAL BACKGROUND OF HERRERA'S CLAIMS

Herrera grew up in Yuba County, California. ER-87. At the ages of 14 and 15 years old, Herrera committed two felonies, assault with a deadly weapon and witness tampering, against the same child victim. ER 87-88. He plead guilty to both felonies as an adult. ER-88. He was sentenced to prison, released in 2018, and completed parole in 2019. *Id*. While incarcerated, Herrera served in a fire camp. ER-91.

Herrera is currently employed as a supervisor with the California Conservation Corps. ER-88. While Herrera "took and passed an EMT training class in 2020," he has "not taken further steps toward certification, however, because he knows his record currently makes it pointless." *Id*. It has been less

than 10 years since Herrera was released from incarceration for a felony conviction. ER-89.

Troy Falck is the medical director of Sierra-Sacramento Valley Emergency Medical Services Agency, which administers EMT certification in Yuba County and other parts of Northern California. ER-83-84.

A. The Subject Action.

1. The initial and first amended complaints.

On June 19, 2020, Gurrola filed the initial complaint in this action against Appellees Duncan and Kepple in their official capacities. ER-7, ER-112; see Falck Supplemental Excerpts of Record (FalckSER), 029. The complaint alleged section 100214.3(c)(3), as applied and facially, violated the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment of the Federal Constitution. ER 7-8; FalckSER-029-051.

Both Duncan and Kepple filed motions to dismiss the complaint. ER-113.

On August 18, 2020, Gurrola, Duncan, and Kepple filed a joint status report. ER-114; FalckSER-023. In the report, Gurrola stated that a first amended complaint, with a second plaintiff and a new claim challenging the validity of section 100214.3(c)(6), would be filed. FalckSER-024. The parties stipulated to the filing of the first amended complaint by September 15, 2021. *Id*. The parties

also stipulated that no discovery would be conducted until the Court determined the Appellees' motions to dismiss the first amended complaint. *Id*.

On September 15, 2020, a first amended complaint identifying Appellant Herrera as an additional plaintiff and Appellee Falck as an additional defendant was filed. ER-80, ER-114. The first amended complaint challenged section 100214.3(c)(3) as well as section 100214.3(c)(6). ER-81. Appellants filed the amended complaint "to account for" the change in law with the enactment of Penal Code section 1203.4b. ER-9.

The first amended complaint asserts sections 100214.3(c)(3) and (c)(6), as applied and facially, violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment as well as the Privileges or Immunities Clause of the Federal Constitution. ER-97-106. Appellants seek a judgment declaring the subject regulations unconstitutional, facially and as applied, and a permanent injunction preventing the enforcement of the regulations, and attorney fees and costs, pursuant to 42 U.S.C. § 1988. ER-106-107. Throughout the amended complaint, Appellants assert the regulations were subject to rational basis review. *See, e.g.,* ER-81-82, ER-102-104. They admit that the claim under the Privileges or Immunities Clause was "foreclosed by the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)." ER-106. Appellants seek a judgment declaring both regulations unconstitutional and an injunction to prevent the enforcement of the

regulations. *Id*. Gurrola specifically alleges that he "is not challenging his initial certification denial," but only "seeking relief prospectively for his next application." ER-96.

The first amended complaint alleges Gurrola's lack of fire camp experience renders him ineligible for Penal Code section 1203.4b's process. ER-91. Herrera does not allege any eligibility or ineligibility for relief under Penal Code section 1203.4b. ER 91-92. However, both Gurrola and Herrera would have to file "petitions in courts far from where they live (or find lawyers to do so)." ER-91-92. Because any petitions for relief under Penal Code section 1203.4b may be subject to a judge's discretionary denial, Penal Code section 1203.4b allegedly does not "conclusively redress the harm" to Herrera and Gurrola. *Id.*

2. The motions to dismiss.

Appellees filed motions to dismiss the first amended complaint. ER-9, ER-114-115. Duncan asserted that the first amended complaint failed to state a viable claim under the Equal Protection, Due Process, and Privileges or Immunities Clauses. ER-18-22. Further, Appellees asserted that both Appellants lacked standing: Herrera failed to apply for EMT certification and, upon denial, seek relief under Penal Code section 1203.4b (ER-11-14) while Gurrola's application was denied on the (alternative) basis of the substantial relationship between his criminal

convictions and EMT duties, pursuant to Health and Safety Code section 1798.200(c)(6) (ER-57-58).

On November 24, 2020, Appellants filed a combined response to the Appellees' motions to dismiss. FalckSER-003, ER-115. In their response, Appellants did not seek leave to file a second amended complaint nor leave to conduct discovery to bolster their claims. FalckSER-003-022. Instead, Appellants contended their first amended complaint alleged viable Equal Protection and Due Process claims. *Id*. at 017-022. In a footnote, Appellants simply stated they were "preserving a currently foreclosed Privileges or Immunities Claim." *Id*. at FalckSER-009.

Duncan and other Appellees filed replies to Appellants' combined response. ER-115. No oral argument was requested by the District Court. *Id.*

3. The District Court's order and the notice of appeal.

On February 10, 2021, the District Court issued its decision finding Appellants had standing to bring suit, but failed to state a viable constitutional claim. ER-4-22. On the Equal Protection claim, the District Court reasoned, in part:

> [Plaintiffs] point out that felonies encompass a wide variety of crimes, not all of which are relevant to EMT work. Opp'n at 13. But Plaintiffs fail to acknowledge 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." Duncan's Mot. at 14. Barring such persons from becoming EMT certified advances the government's legitimate interest in ensuring public safety, as EMTs often deal with vulnerable persons in responding to emergencies. Duncan Mot. at 14; Kepple Mot. at 14.

ER-19.

On the Due Process claim, the District Court found:

> Plaintiffs have not challenged any law mandating firefighters be EMT certified but have merely alleged it is something most full-time positions require. FAC ¶ 42. Accordingly, the Court limits its analysis to the question before it: whether the regulations have a rational connection to an applicant's fitness or capacity to be an EMT? For the same reasons described above, the Court finds they do.

ER-21.[3]

The Privileges or Immunities claim was dismissed as precluded by the *Slaughter-House Cases* decision. ER-22.

The District Court dismissed with prejudice, ruling that any "further amendment of any of the claims in the FAC would be futile." ER-22.

Appellants did not file a motion for reconsideration. ER-115.

On February 10, 2021, judgment was entered. ER-3, ER-115.

On March 8, 2021, Appellants filed their notice of appeal. ER-109.

[3] The District Court found the "Plaintiffs did not appear to have brought a procedural due process claim." ER-22, n.2.

Three amicus briefs have been filed in this matter.[4]

STATEMENT OF THE ISSUES

1. Did the District Court properly grant the motion to dismiss on the basis that the Appellants failed to state a claim, whether facial or as-applied, for violation of the Equal Protection Clause of the Fourteenth Amendment?

2. Did the District Court properly grant the motion to dismiss on the basis that Appellants failed to state a claim, whether facial or as-applied, for violation of the Due Process Clause of the Fourteenth Amendment?

3. Did the District Court properly grant the motion to dismiss the Privileges or Immunities claim for failure to state a claim?

4. Did the District Court abuse its discretion in granting the motion to dismiss with prejudice?

SUMMARY OF ARGUMENT

The District Court's decision to grant Director Duncan's motion to dismiss without leave to amend should be affirmed.

Appellants failed to state viable facial and as-applied claims under the Fourteenth Amendment to EMSA's regulations barring EMT certification to (1) persons with two or more felonies, and (2) persons incarcerated in the prior ten

[4] The amicus briefs are referred to by the lead organization's abbreviated name: DKT Liberty Project (DKT), American Civil Liberties Union (ACLU), and Pacific Legal Foundation (PLF).

years on a felony offense withstood rational basis scrutiny. Because Appellants do not establish that they are similarly situated to applicants without two or more felony convictions or who have been released from felony-based incarceration in the prior ten years, Appellants' Equal Protection claim was properly dismissed. In addition, Appellants do not have a cognizable Due Process interest. The regulations meet rational basis scrutiny under the Equal Protection and Due Process Clauses because "barring such persons from becoming EMT certified advances the government's legitimate interest in ensuring public safety, as EMTs often deal with vulnerable persons in responding to emergencies." ER-19. Appellants' Privileges or Immunities claim was properly dismissed as precluded by the *Slaughter-House Cases* decision. ER-22.

Appellants waived any request for leave to amend. Even if waiver did not occur, and any amendment of the complaint was futile; hence, the District Court properly dismissed the action without leave to amend. ER-22. For all these reasons, this Court should affirm the district court's dismissal of the action without leave to amend.

STANDARD OF REVIEW

I. STANDARD OF REVIEW FOR MOTION TO DISMISS UNDER RULE 12(B)(6)

The Court engages in a de novo review of a district court's dismissal for failure to state a claim. *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017). The

Court may affirm a district court's dismissal on any ground in the record. *Franklin v. Terr*, 201 F.3d 1098, 1100 n.2 (9th Cir. 2000). Further, the Court may affirm on grounds on which the district court has not ruled. *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1157 (9th Cir. 2000); *cf.* AOB 50 ("district court conducted zero analysis").

II. THE STANDARD FOR WAIVER

An appellant waives an issue by failing to address the issue in their opening brief. *See, e.g., United States v. Kama,* 394 F.3d 1236, 1238 (9th Cir. 2005) ("Generally, an issue is waived when the appellant does not specifically and distinctly argue the issue in his or her opening brief."); *Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir. 1999) ("[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.") Further, issues accompanied by undeveloped arguments are deemed waived. *See United States v. Alonso*, 48 F.3d 1536, 1544-45 (9th Cir. 1995).

In addition, "[i]ssues not presented to the district court cannot generally be raised for the first time on appeal." *United States v. Robertson*, 52 F.3d 789, 791 (9th Cir. 1994).

III. THE STANDARD OF REVIEW FOR DENIAL OF LEAVE TO AMEND

A district court's denial of leave to amend is reviewed for an abuse of discretion. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 760 (9th

Cir. 2017); *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011). "A district court acts within its discretion to deny leave to amend when amendment would be futile, when it would cause undue prejudice to the defendant, or when it is sought in bad faith." *Id.* at 725-26. The question of futility of amendment is reviewed de novo. *Chappel v. Laboratory Corp.*, 232 F.3d 719, 725 (9th Cir. 2000).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE AMENDED COMPLAINT DOES NOT STATE A VIABLE EQUAL PROTECTION CLAIM

The amended complaint fails to state a viable Equal Protection claim as a matter of law.[5] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)); see U.S. Const. amend. XIV, § 1. In analyzing Equal Protection claims, the "first step . . . . is to identify the state's classification of groups." *Country Classic Dairies, Inc. v.*

[5] Appellants' opening brief appears to conflate the Equal Protection and Due Process claims. AOB 21. Because "[t]here are differences between the two constitutional protections," Appellee Duncan addresses each claim and argument separately. *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988). Once the classified group is identified, then a control group, "composed of individuals who are similarly situated to those in the classified group in respects that are relevant to the state's challenged policy," *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) is identified. *Gallinger v. Becerra*, 898 F.3d 1012, 1016 (9th Cir. 2018). If the two groups are similarly situated, then the appropriate level of scrutiny is determined. *Ariz. Dream Act Coal.*, 855 F.3d at 969.

Appellants allege both facial and as-applied challenges to the regulations. For a facial challenge, the plaintiff must show that "no set of circumstances exists under which the [regulation] would be valid." *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)); see *Reno v. Flores*, 507 U.S. 292, 300-301 (applying rational basis test to federal regulation). Facial challenges are "disfavored" because they: (1) "raise the risk of premature interpretation of statutes on factually barebones records;" (2) run contrary "to the fundamental principle of judicial restraint"; and (3) "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) (citations omitted). For an as-applied challenge, the court's review includes the circumstances

surrounding the execution of the challenged regulation(s). See e.g. *U.S. v. Pitts*, 908 F.2d 458, 459-460 (1990).

Here, as explained below, Appellants fail to state an Equal Protection claim because the distinctions that they challenge do not discriminate between similarly situated groups, and in any event, the distinctions survive rational basis for review.

A. The Amended Complaint does not Establish that Appellants are Similarly Situated to those Applicants Without Two or More Felony Convictions.

The District Court properly rejected Appellants' Equal Protection claim because Appellants failed to show that they are similarly situated to applicants without two felony convictions or without a history of release from incarceration on a felony offense within the prior ten years. ER-18-20, ER-98-100. "While the group members may differ in some respects, they must be similar in the respects pertinent to the State's policy." *Taylor v. San Diego County*, 800 F.3d 1164, 1169 (9th Cir. 2015) (citing *Arizona Dream Act Coal. v. Brewer,* 757 F.3d 1053, 1064 (9th Cir. 2014)); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Hence, "[e]vidence of different treatment of unlike groups does not support an equal protection claim." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005) (citation omitted).

The District Court correctly found that Appellants failed to establish that the groups being compared are similarly situated. "Threadbare recitals of the elements

of a cause of action, supported by mere conclusory statements," "do not suffice" to state a claim. *Iqbal*, 556 U.S. at 678. Appellants' opening brief, like their amended complaint, merely asserts similarly situated status. AOB 22; ER-97-100; *see* FalckSER-018. Because Appellants' assertion is not supported by any citation to legal authorities, this Court should conclude that Appellants waived the issue. Fed. R. App. P. 28(a)(4); *see Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1548 (9th Cir. 1988).

Assuming arguendo no waiver occurred, this Court should affirm the District Court's finding that Appellants did not show that they and other applicants with two felony convictions were similarly situated to those applicants without two felony convictions for the purpose of the determining fitness to serve the public as a certified EMT. Appellants' felony convictions and felony-based incarceration demonstrate that they present a risk of harm to the public that applicants without such felony convictions or recent felony-based incarceration do not present. Indeed, the California legislature enacted statutory provisions enabling EMSA to obtain EMT applicants' criminal history in order to identify their potential risk of harm to the public. 1999 Cal. Legis. Serv. Ch. 549 (A.B. 1215) (WEST); 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST); see Cal. Health & Safety Code § 1797.117. EMSA properly recognized that "[t]hose applicants [for EMT certification] 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." ER-19 (citation omitted). Hence, the District Court properly found Appellants were not similarly situated to persons without felony convictions or felony-based incarceration in terms of the public safety purpose of the subject regulations.

This public safety concern is reflected in the California Penal Code's consistent distinction between persons with just one felony conviction and those persons with a non-felony (misdemeanor) conviction, with differing punishments accorded to these different classes of crimes. *See* Cal. Penal Code §§ 16, 17(a), 1170(h) (felons are subject to punishment by death and by imprisonment in state prison or county jail). Further, California's Three Strikes law "ensures longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." *Id*. § 667(b). Hence, a defendant with one prior conviction that qualifies as a strike will receive a mandatory state prison sentence of twice the term for the current offense while a defendant with two or more prior convictions that qualify as strikes will receive a mandatory indeterminate life sentence to state prison (with the minimum term of 25 years). ER 72-73. Given the California Legislature has enacted criminal laws that expressly differentiate persons with two or more felony convictions from those with one or no felony conviction, the District Court correctly found Appellant Gurrola cannot show that he or other applicants with two or more felony

convictions are similarly situated to applicants without two or more felony convictions in terms of their fitness (or their public safety risk) in serving the public as a certified EMT.

The same reasoning applies to the District Court's finding that Appellant Herrera cannot show that he is similarly situated to those applicants without a history of release from incarceration on a felony offense in the prior ten years. As stated above, California's Penal Code makes felony incarceration – and the length of incarceration – the tell-tale sign of someone who has been separated from general society for a period of time due to their proven and significant risk of harm to others. Cal. Penal Code §§ 16, 17(a), 1170(h). An EMT applicant who has not been released from incarceration in the prior ten years either (1) does not have any record of a felony conviction or (2) has been released for a sufficient period time that they can demonstrate – from their conduct over a ten-year period – that they are capable of living and working peacefully with others. Because release from incarceration within the prior ten years distinguishes Herrera and others with such records of incarceration from the general pool of applicants seeking EMT certification, the two groups are not similarly situated for the purpose of the regulation in question, and thus the Herrera's Equal Protection claim, whether as applied or facial, does not state a viable challenge to section 100214.3(c)(6).

B. The District Court Correctly Dismissed the Equal Protection Claim Because the Subject Regulations Satisfy the Rational Basis Standard.

Even if the challenged regulations were deemed to discriminate between similarly situated groups, Appellants' Equal Protection claim would still fail because the regulations satisfy rational basis review. The rational basis standard applies where regulations impose a difference in treatment between groups but do not infringe upon a fundamental right or target a suspect class. *Heller v. Doe*, 509 U.S. 312, 319-321 (1993). Indeed, a "classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity" and must be upheld "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.*

The courts have consistently found the public's health and safety is a legitimate government interest. *See Barsky v. Bd. of Regents of University*, 347 U.S. 442, 449 (1954) (as "a vital part of a state's police power," the state may "establish and enforce standards of conduct within its borders relative to the health of everyone there," including "the regulation of all professions concerned with health."); *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring in judgment) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"). In applying rational-basis review,

the Court is "free to consider any 'legitimate governmental interest'" that EMSA has in enacting the challenged regulations. *Gallinger,* 898 F.3d at 1018 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). "[A] State is not constrained . . . to ignore experience which marks a class of offenders or a family of offenses for special treatment." *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540 (1942).[6]

1. Because section 100214.3(c)(3)'s disqualification of applicants with two or more felony convictions meets the rational basis test, appellants' facial challenge under the Equal Protection clause was properly dismissed.

The District Court properly applied the rational basis standard in dismissing Appellants' facial and as-applied challenges to the regulatory bar on EMT certification to applicants with two or more felony convictions.

[6] Appellants suggest that a regulation motivated by alleged animus against a politically unpopular group requires a different standard of review. AOB 25 n.12. Since neither Appellees' amended complaint nor their opposition to the motion to dismiss invoked this notion of animus, the contention should be deemed waived. ER-80-107; FalckSER 003-022; *Solis*, 563 F.3d at 437; Fed. R. App. P. 28(a)(4). Even if considered, Appellants do not show that that the regulations have the objective of "a bare . . . . desire to harm a politically unpopular group." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 447 (1985). Animus "need not be explicit in the legislative history for a plaintiff to establish impermissible intent." *Gallinger*, 898 F.3d at 1020; see *City of Cleburne*, 473 U.S. at 447-50. "At the same time, we do not credit conclusory allegations of law that are unsupported by specific factual allegations." *Gallinger*, 898 F.3d at 1020; see *Mahoney v. Sessions*, 871 F.3d 873, 877 (2017).

The facial challenge was properly dismissed because section 100214.3(c)(3)'s disqualification of applicants with two or more felony convictions is rationally related to the legitimate government interest of ensuring public safety given EMTs' frequent interactions with vulnerable members of the public. Indeed, California's Legislature addressed repeat felony offenders by enacting the Three Strikes Law, subjecting those persons with two or more felonies to "longer prison sentences and greater punishment" in light of the offenders' failure to learn from their prior violation(s). ER-72; Cal. Penal Code, § 666. The Legislature also enacted statutory provisions enabling EMSA to obtain EMT applicants' criminal history to identify their potential risk of harm to the public. 1999 Cal. Legis. Serv. Ch. 549 (A.B. 1215) (WEST); 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST); *see* Cal. Health & Safety Code § 1797.117.

In light of this legislative guidance, EMSA properly recognized that "[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." ER-19 (citation omitted). Hence, preventing such repeat felony offenders from becoming EMT certified "advances the government's legitimate interest in ensuring public safety, as EMTs often deal with vulnerable persons in responding to emergencies." *Id*. (citation omitted); *see* also Cal. Code Regs. tit. 22, § 100063 (Basic Scope of Practice of EMT). Therefore, the rational basis standard is met by this regulation.

a. Appellants' challenge to section 100214.3(c)(3) as overbroad is not meritorious.

Appellants argue that section 100214.3(c)(3) is over-inclusive because the category of felony crimes has "swollen tremendously" (AOB-35), with persons convicted of "multiple felonies for a single incident" (ER-92). This argument "runs contrary to the Supreme Court's clear precedent upholding classifications that are "to some extent both underinclusive and overinclusive" under rational-basis review." *Gallinger*, 898 F.3d at 1018, citing *Vance v. Bradley*, 440 U.S. 93, 108 (1979). "[I]n a case like this perfection is by no means required." *Vance*, 440 U.S. at 108 [citations omitted]; see also *United States v. Thornton*, 901 F.2d 738, 740 (9th Cir. 1990). Felonies may "vary widely," but they are indicative of a crime that is neither minor in their nature nor in their prison time. *Lange v. California*, – U.S. –, 141 S.Ct. 2011, 2020 (2021) (discussing misdemeanors and Fourth Amendment's application to warrantless entry); see 1 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 1.8(c) (4th Ed. Supp. 2020) (misdemeanors address minor crimes). [7]

[7] The fact that one state, Oklahoma, classifies adultery as a felony and another state, New York, does not is particularly irrelevant where there is no evidence that either state engages in the criminal prosecution adultery as a felony offense. AOB 46; *see* Heiliczer, Ephraim, *Dying Criminal Laws: Sodomy and Adultery from the Bible to Demise*, 7 Va. Crim. L. 48, 108 (2019) (recent Supreme Court decisions signal the end to consensual sexual crimes like adultery).

Appellants list some 19 state court and federal district court decisions in support of their contention that the subject regulation is overbroad or a "ban." AOB 27-29. Such decisions do not provide precedential authority. *Employers Ins. of Wausau v. Granite State Ins. Co*., 330 F.3d 1214, 1220 n.8 (9th Cir. 2003) (unpublished state decisions have no precedential value); *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (federal district court decision not binding precedent). Even if considered, some of Appellants' cited decisions address only whether a *single* felony conviction can bar employment in a particular occupation. AOB 27-29; *see, e.g., Smith v. Fussenich,* 440 F.Supp. 1077, 1078 (D. Conn. 1977) (detectives and security guards); *Gregg v. Lawson,* 732 F.Supp. 849 (E.D. Tenn. 1989*)* (wrecker service list); *Perrine v. Municipal Court,* 5 Cal.3d 656 (1971) (bookstore license). Appellants' other cited decisions concern the use of a single felony conviction as a disqualification to *all* public employment. AOB 27-29; *see, e.g*., *Kindem v. Alameda*, 502 F.Supp. 1108 (N.D. Cal. 1980) (provision of city charter prohibiting municipal employment of ex-felons); *Butts v. Nichols*, 381 F.Supp. 573 (S.D. Ill. 1984) (ban on civil service employment of felons). None of these cited decisions discuss the use of two felony convictions as a proxy for determining entry into any occupation, particularly one so closely related to public health and safety as EMT certification.

Moreover, subsequent decisions have departed from the *Smith* and *Butts* courts' rulings that such employment bars were legally defective on the basis of overbreadth. The presumption that "those persons who have been convicted of a serious non-violent crime are more likely than the ordinary citizen to engage in violent crimes" is "very rational." *United States v. Giles*, 640 F.2d 621 (5th Cir. 1981); see also *Dixon v. McMullen*, 527 F.Supp. 711, 722 (N.D. Texas 1981) (state statute automatically excluding ex-felons from certification as police officers upheld as constitutional because persons who have committed serious crimes in the past have demonstrated a "greater potential for abuse" of rights and privileges). To paraphrase one of Appellants' cited cases, the "likelihood of engaging in illicit activity" is a rational basis for excluding certain persons from certification. *Barletta v. Rilling*, 973 F.Supp. 2d 132, 138 (D. Conn. 2013); see AOB-27.

Appellants also rely on inapposite Pennsylvania state court decisions addressing whether a state law prohibiting the employment of persons with a single felony conviction violates Pennsylvania's constitutional right to work. AOB-28, citing *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. Supreme Ct. 2003) (state constitution's guarantee of right to work violated by statute disqualifying persons with convictions from employment in senior care facilities); *Peake v. Commonwealth,* 132 A.3d 506 (Pa. Commw. Ct. 2015) (statute barring senior care facilities from employing of person with one conviction for enumerated crimes

violated state constitution's substantive due process provision); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Commonwealth Ct. 2012) (finding state statute banning employment of a school counselor convicted of felony voluntary manslaughter twenty-five years prior violated the counselor's state constitutional right to pursue an occupation). Because this action does not concern any state constitutional right to work, Appellants' cited Pennsylvania decisions are inapposite.

Furthermore, Appellants' reliance upon the decision of *Shimose v. Hawaii Health Systems Corp*., 345 P.3d 145 (Haw. 2015) is misplaced. In that case, the Hawaii Supreme Court reviewed whether the facts submitted in a health care provider's summary judgment motion established a rational relationship between an applicant's prior conviction for possession with intent to distribute crystal methamphetamine and the duties of a radiological technician. The *Shimose* court's fact-based summary judgment decision is inapposite to this District Court's decision to grant Duncan's motion to dismiss Appellants' challenge to the facial constitutionality of the subject regulations.

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b. Because Penal Code section 1203.4b erodes the alleged ban on employing applicants with two felony convictions, the Equal Protection challenge to section 100214.3(c) is not viable.

Assuming arguendo Appellants' claim of a "ban" is meritorious, that claim is undermined by the California State Legislature's enactment of Penal Code section 1203.4b to set aside and render felony convictions non-disclosable to licensing authorities. Herrera acknowledges that he has the option of bringing a petition under Penal Code section 1203.4b. ER 91-92, AOB 17 n.6. While Appellants' suggest Penal Code section 1203.4b is applicable to only a "rare" number of applicants, that suggestion is not factually supported. AOB 45-46.

Moreover, Appellants fail to appreciate that the California State Legislature may engage in health and safety reform "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 489 (1955) (citations omitted). First, the California Legislature enacted Penal Code section 1203.4 to enable former felons to seek dismissal of their convictions. Gurrola obtained dismissal of some of his convictions under that statute. ER-53-54. Then, the Legislature enacted Penal Code section 1203.4b to enable certain former felons to seek expungement of certain conviction. These steps alleviate the alleged "collateral consequence" of lost employment opportunities sustained by some persons

convicted of felony offenses. *See* DKT at 21-22; PLF at 10; ACLU at 15. Because the California Legislature's enactment of Penal Code section 1203.4b demonstrates that some former felony offenders will qualify for EMT certification, this Court should find that section 100214.3(c) does not violate the Equal Protection Clause.

c. Statutory schemes for regulating other professionals are inapposite to Appellants' Equal Protection claim.

This Court should decline to consider Appellants' argument that 36 other states have "no flat bans" concerning the employment of ex-felons and "no other state has a ban this strict for EMTs." AOB 4-5 n.1- 3. Appellants do not proffer any authority showing the relevance of other states' laws or even other California state laws concerning ex-felons' employment in medicine and law. AOB 43 (Cal. Bus. & Prof. Code §§ 2236, 2236.1, 6101, 6102.) "While emotionally appealing," Appellants' argument "forgets that a legislature has a great deal of latitude in making statutory classifications involving social and moral legislation." *United States v. Weatherford*, 471 F.2d 47, 51 (7th Cir. 1972) (fact ex-felons are not excluded from other sensitive occupations in Illinois is not dispositive). Further, it is well-established that "the rational basis standard does not require that the state choose the fairest or best means of advancing its goals." *Robinson v. Marshall*, 66 F.3d 249, 251 (9th Cir. 1995) (rejecting Equal Protection challenge to Cal. Penal Code § 2900.5).

d. Section 100214.3(c)(3) is constitutional regardless of Appellants' view of the criminal justice system as racially-skewed.

The inflammatory characterization of felony convictions as the result of a racially-skewed and flawed criminal justice system does not invalidate the rational basis for these regulations. AOB 46 ("the fortuity of plea bargaining"); ACLU at 9-15 (racially disparate treatment of black and Latinx defendants). Because neither Appellant alleges a race-based Equal Protection claim, the characterization of the justice system as racially biased is inapposite. ER 80-106. Further, under the separation of powers doctrine, EMSA properly defers to the state criminal justice system's judgment that an applicant's criminal conduct towards others is worthy of a felony conviction. California Constitution, Art. III, § 3.

2. Appellants' as-applied challenge to section 100214.3(c)(3)'s disqualification of applicants with two or more felony convictions was properly dismissed.

Even when applied to Gurrola and Herrera, section 100214.3(c)(3) satisfies the rational basis standard. The facts of Appellants' convictions undermine their conclusory and somewhat inapposite argument that granting them EMT certification "would pose no risk to society." AOB 50, citing ER-87, 89. Gurrola's 2003 and 2005 felony convictions, even if the "only" ones on his "record," show harmful, felonious behavior in the context of repeated interpersonal strife and, as to one conviction, apparent substance abuse. ER-32-33, ER-84 (2003

conviction involved police responding to his argument with a girlfriend; 2005 conviction involved "drinking a lot of beers and taking barbiturates" before assaulting a security guard who tried to "calm him down.") Herrera's felony convictions for assault with a deadly weapon and witness tampering also demonstrate repeated harm to others. ER 87-88. Appellants' criminal convictions evidence the very interpersonal, physical harm that EMSA seeks to avoid by implementing section 100214.3(c)(3). 1999 Cal. Legis. Serv. Ch. 549 (A.B. 1215) (WEST); 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST). Because section 100214.3 (c)(3) bears a rational relationship to a legitimate state interest as applied to these Appellants, this Court should uphold the dismissal of Appellants' as-applied Equal Protection challenge to section 100214.3(c)(3).

3. Because section 100214.3(c)(6)'s disqualification of applicants released from felony-based incarceration in the prior ten years meets the rational basis test, Appellants' facial challenge was properly dismissed.

The District Court correctly found that section 100214.3(c)(6), by identifying applicants with a history of felony-based incarceration and requiring such applicants to establish a ten-year record of no recidivism, is rationally related to the legitimate state interest in protecting vulnerable members of the public.

Generally, an employer has a duty to exercise reasonable care in the hiring, training, supervision, and retention of an employees. Restatement (Second) of Torts § 319 (Am. L. Inst. 1965). In the wake of "[c]ases of physical and sexual

abuse by paramedics," the California Legislature specifically spoke to the duty of reasonable care by amending the EMS Act to enable LEMSAs to identify those applicants with criminal records by (a) mandatory submission of an applicant's fingerprints for a federal criminal check, and (b) having "access to pertinent information concerning any applicant's background and criminal history as a condition of his or her employment." 1999 Cal. Legis. Serv. Ch. 549 (A.B. 1215) (WEST); 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST); *see* Cal. Health & Safety Code § 1797.117.

The ten-year period under the regulation provides an applicant with sufficient time to establish a record of good conduct toward others, a record the LEMSA can rely upon in employing the former felon. Indeed, a regulation's restoration of eligibility to ex-felons after ten years is "more closely tailored to the state's legitimate interest." *Schanuel v. Anderson*, 546 F.Supp. 519, 524 (S.D. Ill. 1982). The recidivism statistics reported by amicus Pacific Legal Foundation bear out the public safety purpose of this ten-year period: in the United States "roughly 68% of released prisoners reoffend within three years after completing their prison sentence," and [t]hat number rises to 76.6% at five years from release." PLF at 17, citing Matthew R. Durose, et al., *Bureau of Justice Statistics, Recidivism of Prisoners Release in 30 States in 2005: Patterns from 2005 to 2010* (2014)). Further, in California, "roughly 50% of released inmates are convicted of a new

crime (that is a crime that does not include a parole violation or a condition of release) within three years of leaving prison." PLF at 17-18 n.5 (citing Cal. Dept. of Corrections and Rehabilitation, *Several Poor Administrative Practices Have Hindered Reductions in Recidivism and Denied Inmate Access to In-Prison Rehabilitation Programs* 1 (2019)). These statistics show the District Court correctly upheld the facial constitutionality of section 100214.3(c)(6) because the requisite ten-year period of non-criminal conduct following release from felony-based incarceration served the Legislature's rational and expressed interest in public safety.

4. Appellant Herrera's as-applied challenge to section 100214.3(c)(6)'s disqualification of applicants released from felony-based incarceration in the prior ten years was properly dismissed.

Herrera, the only appellant challenging section 100214.3(c)(6), fails to show that this regulation violates the Equal Protection Clause as applied. Herrera sustained repeated felony convictions, with one conviction for criminal conduct while in custody. While he allegedly "turned his life around" during his imprisonment, Herrera was released to society only in 2018 and completed parole a year after his release, in 2019. ER-88. Statistically speaking, Herrera remains at

risk for recidivism, notwithstanding his current employment status. PLF at 17.[8] Because Herrera's recent release from felony-based incarceration indicates the risk of recidivism, section 100214.3(c)(6)'s codification of an applicant's ten-year record of obedience to the law is constitutional as applied to Herrera.

II. THE DISTRICT COURT CORRECTLY HELD THAT APPELLANTS FAILED TO ESTABLISH A SUBSTANTIVE DUE PROCESS CLAIM

The Due Process Clause prohibits the government from depriving "a person of life, liberty, or property in such a way that. . . . interferes with rights implicit in the concept of ordered liberty." *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 948 (9th Cir. 2004) (ellipsis in original). "[A] restriction on the conduct of a profession will run afoul of substantive due process rights only if it is irrational." *In re Crawford*, 194 F.3d 954, 961 (9th Cir. 1999); *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996-97 (9th Cir. 2007). The District Court properly found (ER-20, 21) that Appellants could not establish a substantive Due Process claim because (a) the first amended complaint did not show that they are unable to pursue an occupation in their chosen profession, and, (b) even if Appellants could make that threshold showing, their claim would still fail because they cannot

[8] While Gurrola does not contest section 100214.3(c)(6), it is noteworthy that Gurrola realized he had to change as his "twenties were ending," and then took "nearly a decade" to "turn his life around." ER-84-85. That time period is longer than Arizona's bar on the EMT certification of former felons. AOB 6 n.3, citing 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).

establish that this inability is due to government actions that are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *FDIC v. Henderson*, 940 F.2d 465, 474 (9th Cir. 1991) (citations omitted); *see Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957) (state's occupational qualifications must have a "rational connection" with fitness to practice). Hence, this Court should uphold the dismissal of the first amended complaint.

A. Appellants do not have a Cognizable Due Process Interest.

"A threshold requirement" to a substantive Due Process claim is "the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994). "[I]t is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations." *Id*. at 65 n.4. "Although the precise contours of this liberty interest remain largely undefined," the Supreme Court has observed that "the line of authorities establishing the liberty interest [in pursuing a profession] all deal[ ] with a complete prohibition of the right to engage in a calling, and not [a] sort of brief interruption." *Conn v. Gabbert*, 526 U.S. 286, 292 (1999); *see Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999). A liberty interest in pursuing one's chosen profession has only been recognized "in cases where (1) a plaintiff

challenges the rationality of government regulations on entry into a particular profession, or (2) a state seeks permanently to bar an individual from public employment." *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009) (internal citations omitted). Further, "most courts have rejected the claim that substantive due process protects the right to a particular public employment position and the [Ninth Circuit] has yet to decide the issue." *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996-97 (9th Cir. 2007), aff'd on other grounds, *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008).

Appellants make bald assertions that they are "wholly barred from EMT certification and, thus, every job that might ever require EMT certification" (FalckSER-018) and that, absent EMT certification, they are not "eligible for full-time firefighter jobs." AOB 9, citing ER-87, ER-95-96. But Gurrola's substantive due process claim does not allege facts in support of these bald assertions. Gurrola alleges only that EMT certification is necessary to obtain a "career firefighter" position at "most" fire departments in California. ER-87. Because Gurrola has been and continues to be employed as a firefighter, he fails to show that the section 100214.3(c)(3) completely bars his alleged substantive due process right to employment as a firefighter. ER 83-86. Moreover, at least some fire departments do not require EMT certification for a career firefighter position. ER-87.

Therefore, Gurrola cannot show a protected Due Process interest in EMT certification for a career firefighter position in certain fire departments.

Herrera's claim also fails to establish a protected Due Process interest in EMT certification. Herrera is employed as a supervisor at the California Conservation Corps, where he "helped battle the Camp Fire" and does "other kinds of conservation work." ER-88. Herrera alleges his criminal record prevents him from "get[ting] certified as an EMT," but he does not allege EMT certification is necessary for his continued employment in the California Conservation Corps or a career path as a firefighter or other professional. ER-88-89. Further, assuming arguendo the subject regulations on their face act as a complete bar to Herrera's career as a certified EMT, the availability of expungement of his felony convictions under Penal Code section 1203.4b dispels that bar. ER-88.[9] In short,

[9] Herrera's portrayal of the section 1203.4b expungement process as arduous, requiring the filing of a petition "far from where" he lives or otherwise involving an attorney, is simply not credible. ER-91-92; AOB 17 n.6. First, the issue of distance is resolved by the availability of e-filings and virtual hearings in state court, including Yuba County. (Duncan RJN 1, Odyssey and Ace Legal E-Filing Lists; Duncan RJN 2, CourtCall List; Duncan RJN 3, Yuba County Stmt.; Req. J. Not.) Second, as stated in the statute, attorney representation is not necessary. Cal. Penal Code § 1203.4b(c)(3). Multiple resources are already available to a pro per petitioner seeking expungement under Penal Code 1203.4 and will likely be provided for expungement under Penal Code section 1203.4b, such as local Public Defender's offices, bar associations, and federally-funded legal services organizations. (Duncan RJN 4, San Diego and Sacramento County Public Defenders Stmts.; Duncan RJN 5, Inland Empire Latino Lawyers Association Clinic; Duncan RJN 6, Legal Services of Northern California & Legal

Herrera's allegations fail to establish that a substantive due process interest in any particular occupation is at stake in this action.

Therefore, this Court should find the first amended complaint was properly dismissed because Appellees failed to establish a substantive Due Process interest.

B. Appellants' Facial Challenge was Properly Dismissed Because the Regulations are Rationally Related to Fitness to Serve as a Certified EMT.

Assuming a cognizable Due Process interest is stated, the Due Process Clause is met where the State requires "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." *Dittman,* 191 F.3d at 1032; *see Schware*, 353 U.S. at 239 ("A State can require high standards of qualification, such as good moral character . . . , before it admits an applicant to the bar."). The *Dittman* court upheld a statute requiring acupuncturists to be compliant with the law, in terms of child support and tax obligations, as a condition of licensure. Likewise, the Supreme Court upheld a ban on all former felons from collecting union dues for waterfront unions where a legislative investigation established that the presence of ex-convicts in the controlling positions within waterfront unions resulted in "crime, corruption, and racketeering." *De Veau v. Braisted*, 363 U.S. 144, 150 (1960).

Aid Southern California; Req. J. Notice.) Further, Herrera's pro bono representation by multiple counsels in this matter indicates pro bono representation is available for prosecuting an expungement petition.

The same reasoning applies to the subject regulations. The evidence of criminal conduct by EMTs toward consumers, however uncommon, resulted in legislative enactments to enhance EMSA's ability to screen EMT applicants who posed a risk of criminal conduct. See e.g. 1999 Cal. Legis. Serv. Ch. 549 (A.B. 1215) (WEST); 2008 Cal. Legis. Serv. Ch. 274 (A.B. 2917) (WEST); see Cal. Health & Safety Code § 1797.117. The subject regulations further implement those enactments by barring EMT certification of those persons with two or more felonies and/or release from felony-based incarceration in the prior 10 years. These regulations are rationally related to the public interest, recognized by the state legislature, in providing EMT certificates to those who do not have a repeated or recent history of felony-based offenses, and therefore are constitutionally appropriate.

1. No Due Process claim arises from the regulations' implementation of the substantial relationship statute.

Contrary to Appellants' assertion, the mandatory determinations made under the subject regulations do not violate the Due Process Clause by depriving applicants of an individualized determination under the "substantial relationship" statute. Cal. Health & Safety Code § 1798.200(c)(6); AOB 34; DTK at 28 n.7. The subject regulations simply provide a rule of general application: two felony convictions or release from felony-based incarceration in the prior ten years is substantially related to an EMT's duties. "Even if a statutory scheme requires

individualized determinations, the decision maker has the authority to rely on rulemaking to resolve certain issues of general applicability" unless the legislature "clearly expresses an intent to withhold that authority." *Lopez v. Davis*, 531 U.S. 230, 243-244 (2001) [discussing Bureau of Prison's rulemaking authority under federal APA], quoting *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 612 (1991). Such "case-by-case decision making in thousands of cases each year – could invite favoritism, disunity, and inconsistency." *Lopez*, 531 U.S. at 244. Indeed, the agency is not required "continually to revisit "issues that may be established fairly and efficiently in a single rulemaking proceeding.'" *Id*., citing *Heckler v. Campbell*, 461 U.S. 458, 467 (1983).

In essence, EMSA has found that two prior felony convictions and/or release from felony-based incarceration in the past ten years are substantially related to the "qualifications, functions, and duties" of an EMT. Cal. Health & Safety Code 1798.200(c)(6). These regulations implement the EMSA statutory scheme. Cal. Gov't Code, § 11342.600. They interpret Health and Safety Code section 1798.200's "substantial relationship" test as met whenever an applicant presents with two or more felony convictions or with a release from incarceration on a felony offense in the prior ten years. Because Appellants' amended complaint does not allege any violation of the California Administrative Procedure Act by the promulgation of these regulations, Appellants have waived any contention that the

regulations do not implement the Health and Safety Code's substantial relationship test. ER 80-107; *Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009); Fed. R. App. P. 28(a)(4).

Contrary to Appellants' unsupported assertion, the subject regulations are not "only" used to "reject applicants for convictions that are not substantially related to EMT certification." AOB 34. In fact, the administrative law judge hearing Gurrola's administrative appeal upheld the denial of his certification on the basis the statutory substantial relationship test as well as section 100214.3(c)(3). ER-61.

Appellants' cited decisions concerning duplicative statutory schemes are inapposite to the viability of their Due Process claim. AOB 34, citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 225-226 (2013) and *Craigmiles v. Giles*, 312 F.3d 220, 226 (6th Cir. 2002). Indeed, these cited decisions concern statutes, allegedly for the prevention of consumer fraud, enacted against the backdrop of a preexisting statutory structure for the protection of consumers, where the subject statutes alleged aim of consumer protection actually was a guise for economic protectionism. Appellants do not establish that such duplication or duplicity is evident in these regulations. Given the regulations reiterate and implement the public health and safety concerns of the Health and Safety Code section 1798.200, the regulations are supported by the necessary rational basis to withstand Due Process scrutiny. *See supra*, Section II, Pt. B, subsection 2 & Section III, Pt. B.

2. The regulations do not establish an invalid irrebuttable presumption.

The District Court correctly found the irrebuttable presumption doctrine inapplicable to Appellants' Fourteenth Amendment claims.

First, as Appellants acknowledge, "there is some debate whether the irrebuttable presumption cases concern process or substance." AOB 49. However, Appellants' cited cases concern procedural due process, where an individualized hearing remediates any unconstitutional presumption of unfitness. AOB 49, citing *Fields v. Dept. of Early Learning*, 434 P.3d 999, 1003-1007 (2019) (procedural due process requires individualized determination on whether prior conviction disqualified employee from working at any child care facility); *Peake v. Commonwealth*, 132 A.3d 506, 521 (Pa. Commonwealth 2015) (requiring individualized risk assessments to evaluate applicants with criminal records on a case-by-case basis); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (procedural due process requires individual determination before suspension of uninsured driver's license). Because Appellants do not allege any procedural Due Process claim, the irrebuttable presumption doctrine is inapplicable to this action. ER-22 n.2.

Second, Appellants' irrebuttable presumption argument rests upon a series of inapposite and outmoded decisions largely concerning the termination of constitutionally protected family interests or a government benefit. AOB 48, citing in part *Stanley v. Illinois*, 405 U.S. 645 (1972) (widowed father loss of custody of

children); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632 (1974) (teacher subject to termination due to pregnancy); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (suspension of uninsured driver's license following accident); *U.S. Dept. Agriculture v. Murry*, 413 U.S. 508 (1973) (denial of food stamps where child claimed as dependent by another tax filer); *Vlandis v. Kline*, 412 U.S. 441 (1973) (state university's denial of in-state tuition rate to residents). None of these decisions concern a regulation governing entry into a health care occupation.

"Although no Supreme Court decision has formally overruled" these decisions "it is apparent that the use of that doctrine has been severely limited." *DeLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 683 n.16 (1978); see *Brennan v. Stewart*, 834 F.2d at 1258 ("The "irrebuttable presumption" doctrine was a strange hybrid of "procedural" due process and equal protection invented by the Supreme Court in the early 1970's, and laid to rest soon after.") The "constitutionality of irrebuttable presumptions in social programs has been well settled." *Regents of the Univ. of Cal. v. Shalala*, 82 F.3d 291, 296 (9th Cir. 1996) (citations omitted). Similarly, a "statutorily defined irrebuttable presumption ... is not unconstitutional in statutes which regulate economic matters" where "the subject of the legislation does not interfere with the exercise of fundamental rights." *Burlington N.R.R. v. Dep't of Pub. Serv. Reg.*, 763 F.2d 1106, 1113 (9th Cir. 1985). Because the subject regulations concern an economic matter

(certification as an EMT) and not a fundamental right, the irrebuttable presumption doctrine does not apply.

Third, even if the irrebuttable presumption doctrine applies, then this appeal "must ultimately be analyzed as calling into question ... the adequacy of the 'fit' between [a statute's] classification and the policy the classification serves." *Michael H. v. D.,* 491 U.S. 110, 121 (1989) (citations omitted). As discussed above, the subject regulations adequately fit the public policy of providing for the safe care of vulnerable patients, as discussed above. Hence, this Court should affirm the District Court's decision upholding the subject regulations in the face of the irrebuttable presumption doctrine.

C. Appellants' As-Applied Due Process Claim was Properly Dismissed.

The District Court correctly ruled that Appellants failed to establish that the subject regulations, as applied, violated the Due Process Clause. As discussed above, Appellants' own criminal convictions showed that the presented a risk of harm to others, including vulnerable members of the public. ER 56-57, ER 84, ER-87-88; *see supra*, Section I, Pt. B, subsection 2 & Section III, Pt. B. Because these regulations serve the rational interest of determining the fitness to perform EMT duties, including serving vulnerable members of the public, their application to Appellants met the Due Process Clause.

III. THE DISTRICT COURT CORRECTLY DISMISSED THE PRIVILEGES OR IMMUNITIES CLAIM

Appellants conceded that their Privileges or Immunities Claim is "fails under the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)," and thus they are raising this claim solely to preserve it for a potential further appeal. AOB 17-18 n.7; ER-22, ER-106. This Court should therefore affirm the District Court's dismissal of this claim.

IV. THE MOTION TO DISMISS WAS PROPERLY GRANTED PRIOR TO ANY DISCOVERY

As a matter of federal law, the District Court need not "hesitate" to grant a motion to dismiss in order to permit Appellants the opportunity to conduct discovery and "prove their claims." AOB 26. Discovery is generally conducted after the District Court determines the complaint is properly plead, e.g. after a motion to dismiss is heard and denied. Indeed, the purpose of a 12(b)(6) motion is to "enable defendants to challenge the legal sufficiency of a complaint without subjecting themselves to discovery." *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). Further, "the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process." *Ashcroft,* 556 U.S. at 684-685. Because EMSA's decision to enact these regulations "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data,"

discovery is irrelevant to the issues presented in the motion to dismiss. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. at 315.

Moreover, Appellants waived any argument that discovery should have been permitted. Fed. R. App. P. 28(a)(4). They signed a joint status agreement waiving any right to conduct discovery during the pendency of the 12(b)(6) motions. FalckSER-024. Appellants did not file any request for leave to conduct discovery before or after the District Court's decision. ER-109-115. Hence, this Court should affirm the District Court's decision to determine the motions to dismiss prior to any party engaging in discovery.

V. THIS COURT SHOULD UPHOLD THE DISTRICT COURT'S DECISION TO DENY LEAVE TO AMEND

A. Appellants Waived any Challenge to the Denial of Leave to Amend.

Appellants did not seek leave to amend from the District Court and do not seek leave to amend from this Court. FalckSER-17-22; AOB 54; *see* ER-22. This Court should therefore find Appellants have waived any request for leave to amend the subject complaint. *See Cook v. Schriro*, 538 F.3d 1000, 1014 n.5 (9th Cir. 2008).

B. Any Amendment is Futile.

Assuming arguendo that this Court reviews the denial of leave to amend sua sponte, the District Court properly denied leave to amend on the basis of futility. ER-22. The "general rule that parties are allowed to amend their pleadings . . . .

does not extend to cases in which any amendment would be an exercise in futility or where the amended complaint would also be subject to dismissal." *Steckman v. Hart Brewing, Inc*., 143 F.3d 1293, 1298 (9th Cir. 1998). Amendment is futile when "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Sweaney v. Ada Cty., Idaho*, 119 F.3d 1385, 1393 (9th Cir. 1997).

Here, the District Court correctly found Appellants could not state a viable theory of recovery. ER-20, ER-22. The two regulations met the Equal Protection and Due Process Clauses on a facial and as-applied basis. Appellants conceded their claim under the Privileges or Immunities Clause was foreclosed. Therefore, the District Court's decision to deny leave to amend should be affirmed.

CONCLUSION

For all the reasons stated, this Court should affirm the judgment of the District Court.

Dated: August 25, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
CHERYL L. FEINER
Senior Assistant Attorney General
GREGORY D. BROWN
Supervising Deputy Attorney General

s/ Lisa A. Tillman

LISA A. TILLMAN
Deputy Attorney General
Attorneys for Appellee David Duncan

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DARIO GURROLA and FERNANDO HERRERA,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: August 25, 2021

Respectfully submitted,

ROB BONTA
Attorney General of California
CHERYL L. FEINER
Senior Assistant Attorney General
GREGORY D. BROWN
Supervising Deputy Attorney General

s/ Lisa A. Tillman
LISA A. TILLMAN
Deputy Attorney General
Attorneys for Appellee David Duncan

CERTIFICATE OF SERVICE

Case Name: ***Dario Gurrola v David Duncan, Jeffrey Kepple, et al.*** No. **21-15414**

I hereby certify that on August 25, 2021, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

APPELLEE DUNCAN'S ANSWERING BRIEF

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 25, 2021, at Fresno, California.

Whitney S. Linder	***s/ Whitney S. Linder***
Declarant	Signature

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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