No. 21-15414

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARIO GURROLA and FERNANDO HERRERA,

Appellants,

v.

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

Appellees.

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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

If a theme runs through the responses, it is this: plaintiffs cannot vindicate their constitutional rights in federal court. Civil-rights plaintiffs cannot sue the officers who enforce state law. Civil-rights plaintiffs cannot sue without exhausting state remedies. Civil-rights plaintiffs cannot sue because of the rational-basis test. Something, surely, means that officials do not have to defend their unconstitutional actions in federal court.

This theme does not reflect the law. For more than a century, plaintiffs denied their civil rights have been able to sue in federal court. Foundational cases like *Ex parte Young* and *Patsy v. Board of Regents* mean that the courthouse doors are still open. Plaintiffs can sue in federal court, and—as the long list of cases in the opening brief shows—plaintiffs can prove that flat criminal-history bans are unconstitutional. If so, plaintiffs challenging these kinds of flat bans must be able to survive the much lower standard imposed by a motion to dismiss.

In this reply, Appellants Dario Gurrola and Fernando Herrera proceed through Appellees' smorgasbord of defenses one by one. Dario

and Fernando first address procedure by showing that they have standing and that Falck and Kepple are proper defendants. Dario and Fernando then address the merits by showing that, at this early stage, they have pleaded plausible claims. The Court should thus reverse the dismissal below.

PROCEDURE

To recap: Appellees Kepple and Falck are county-level officials who enforce the state's ten-year and lifetime bans against EMT-certification seekers like Dario and Fernando. ER-83–84 (¶¶ 11–12). Kepple enforces the lifetime ban against Dario, ER-96 (¶ 132), and Falck enforces both the ten-year and lifetime bans against Fernando, ER-97 (¶ 140). They are required to by a state-level official, Appellee Duncan. ER-83 (¶ 10).

Kepple and Falck raise what are essentially three groups of procedural defenses: (1) that they were just following state law and thus are improper defendants under *Monell*, (2) that Dario and Fernando lack standing because they have not exhausted state remedies, and (3) that Fernando lacks standing because he did not preemptively address standing in his opening appeal brief.

Dario and Fernando address these defenses in the next sections.[1]

I. This case falls under *Ex Parte Young*, not *Monell*.

Kepple and Falck first argue that, because they enforce nondiscretionary state law, they act as state officers, not municipal officers. Falck Br. 11–12 ("In complying with the State regulations, Dr. Falck is not acting as a policymaker for the SSVEMS Agency, but rather as a policymaker for the State."); Kepple Br. 14–16 ("Dr. Kepple asserts the same.") This, they argue, means they are immune from suit because, under *Monell*, municipal officials can be sued about only municipal policy. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

This argument is wrong because Dario and Fernando did not bring *Monell* claims. The *Monell* doctrine is chiefly about when municipalities may be sued for money. (*Monell* itself was about women trying to obtain

[1] A fourth defense from Kepple, that Fernando lacks standing to sue *him*, is correct, although the reason is traceability. *See* Kepple Br. 16–17. Fernando's claims are against Falck and Duncan (but not Kepple) because Fernando would apply for certification from Falck. Similarly, Dario's claims are against Kepple and Duncan (but not Falck) because Dario would apply for certification from Kepple.

back pay from New York City after sex discrimination.) Money damages against cities had been a thorny question, and the Supreme Court had held municipalities immune in *Monroe v. Pape*, 365 U.S. 167 (1961), because a municipality might not have been a "person" under 42 U.S.C. § 1983. *Monell* overturned *Monroe* and explained when a city can be sued for damages because of the actions of its employees.

The *Monell* doctrine about municipal liability for money damages has nothing to do with this case. Kepple and Falck *are* acting as state officers, just as they say. And Dario and Fernando are seeking only prospective relief. ER-96 (¶ 127); ER-82 (¶ 4). This case is thus an official-capacity suit against *state* officials for *injunctive* relief. Those suits have been allowed for more than a century per *Ex parte Young*, 209 U.S. 123 (1908). *See, e.g.*, *Doe v. Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 839 (9th Cir. 1997).

Indeed, it would not matter if Kepple and Falck were acting as municipal officers because *Ex parte Young* allows suits against municipal officers too. Here, for example, is this Court approving this kind of suit just three years ago:

> Actions under *Ex parte Young* can be brought against both state and county officials, so it is unnecessary for us to resolve the parties' dispute over whether the Sheriff acts on behalf of King County or the State of Washington when he executes writs of restitution. The only issue is whether the Sheriff has at least "some connection" to enforcement of the allegedly unconstitutional eviction procedure authorized by § 375. He does, because Washington law assigns county sheriffs the power and duty to serve and execute writs of restitution issued under § 375. The Sheriff's role in executing those writs makes him a proper defendant in an *Ex parte Young* suit seeking to enjoin enforcement of § 375.

Moore v. Urquhart, 899 F.3d 1094, 1103 (9th Cir. 2018) (citations omitted), *cert. denied sub nom. Johanknecht v. Moore*, 139 S. Ct. 2615 (2019).[2]

[2] Binding circuit precedent is enough, but authority for this point is ubiquitous. *E.g.*, *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 994 (6th Cir. 2019) ("The short answer is that the plaintiffs can sue the sheriff …. If he acts for the State, *Ex parte Young* permits this injunction action against him."); *Huminski v. Corsones*, 396 F.3d 53, 73 (2d Cir. 2005) ("He was therefore acting for the state when he engaged in the behavior that is at issue here. It follows that Elrick is immune in his official capacity from suit for retrospective relief. … Neither of these defendants is immune, however, from injunctive or other prospective relief for an ongoing violation of federal law.").

II. Exhaustion is not required for standing.

Kepple and Falck next argue that Dario and Fernando lack standing because they have not pursued various state procedures. In this theory, Dario and Fernando cannot vindicate their rights in federal court unless they first apply for expungements (under Cal. Penal Code § 1203.4); and for other, special expungements (under the new A.B. 2147); and even for pardons from the governor. Kepple Br. 17–21; Falck Br. 22. And Dario can never sue because he did not appeal his certification denial in 2019. Kepple Br. 21. And Fernando cannot sue because he has not applied for certification. Falck Br. 13–14.

There is a reason that Kepple and Falck cite only general principles of standing for these arguments and not factually analogous cases holding that plaintiffs lack standing until they exhaust state remedies. The reason is that exhaustion is almost never required in a federal suit to enforce constitutional rights. "The Civil Rights Act of 1871, after all, guarantees a federal forum for claims of unconstitutional treatment at the hands of state officials, and the settled rule is that exhaustion of state remedies is *not* a

prerequisite to an action under 42 U.S.C. § 1983." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2167 (2019) (cleaned up). This rule is settled, and it has been since *Patsy v. Board of Regents*, 457 U.S. 496 (1982). And it is just as true for procedural barriers equivalent to requiring exhaustion as it is for the exhaustion doctrine itself. *See Knick*, 139 S. Ct. at 2173; *Green v. City of Tucson*, 255 F.3d 1086, 1102 (9th Cir. 2001) (en banc) (explaining that the rule against requiring exhaustion would "necessarily" disapprove another rule equivalent to requiring exhaustion).

Looking at the big picture, the Court will see that standing here is obvious. Whatever contingencies might happen years from now if Dario or Fernando instigated various state procedures, the situation *today* is that Dario and Fernando want a government certification so that they can work, the law irrationally discriminates against them in seeking that certification, and they are certain to be denied the certification even if they apply for it. This injury is traceable to Appellees because Duncan makes Kepple and Falck inflict it. And the injury will be redressed if a federal court enjoins Appellees from categorically banning Dario and Fernando based on their

criminal histories. *See Real v. City of Long Beach*, 852 F.3d 929, 934 (9th Cir. 2017) (listing the three elements of standing). Just as in the many other flat-ban cases (in which, one assumes, the plaintiffs also could have sought expungements and pardons), that is enough for standing. *See* Appellants' Br. 27–29. Indeed, this is about as vanilla as standing gets. So long as a plaintiff is "able and ready" to apply for state recognition, *Carney v. Adams*, 141 S. Ct. 493, 499–503 (2020), certain denial of that recognition, *see Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013), or even the denial of a nondiscriminatory chance to receive the recognition, *Ne. Fla. Chapter Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993), is enough to confer standing. Dario and Fernando pleaded extensive fact histories showing that they would apply for EMT certifications if they were not barred by law from being certified. ER-84–92, 96–97 (¶¶ 13–88, 128–41). There is no requirement that they do anything else. *Real*, 852 F.3d at 932–34 (holding that an injured plaintiff had standing without undergoing more process that might fix the injury). So the district court got standing exactly right. ER-12–13 (citing these and other cases).

III. No one has waived standing.

Finally, Falck argues that by not preemptively addressing standing in the opening brief, Fernando has waived standing entirely. Falck Br. 17–18. With all respect, this argument is meritless. Fernando did not raise standing in his appeal because he is not challenging the district court's ruling that he has standing. ER-14. Dario and Fernando are unaware of a rule—and Falck has not cited one—requiring appellants to brief the issues that they won on below. (If that rule existed, there would be a standing argument in every opening brief to this Court.) Rather, the usual rule is that appellants can appeal the issues they lost on, and if the appellees have additional arguments about why the judgment should be affirmed, the appellants can meet those arguments in the reply brief. *See Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981) ("The issue … was not one first raised by the appellee's brief. Had it been, it could have been met in the reply brief."). In any event, Dario and Fernando alleged many, many facts in the opening brief making their standing clear. Appellants' Br. 7–16.

* * *

Respectfully, the procedural objections before this Court are not serious. So Dario and Fernando now turn to the merits.

MERITS

In the next sections, Dario and Fernando first address Appellees' two technical objections to their merits claims: (I) that EMT applicants with felony convictions are not similarly situated to a comparator group and (II) that the bans are not really a due process violation because they do not prevent Dario and Fernando from working in their chosen fields. After that, Dario and Fernando dig into the meat of this appeal: whether they plausibly pleaded that banning them and people like them does not rationally relate to fitness for EMT certification—especially when there is separate authority, which Kepple and Falck will retain, to deny certification for "substantially related" offenses.

I. People who want EMT certification are similarly situated to other people who want or have EMT certification.

Preliminarily, Duncan argues that people with felony convictions are never similarly situated to people without felony convictions. Duncan Br.

24–27. As Duncan puts it, "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." *Id.* at 25. Plus other laws distinguish people based on felony records. *Id.* at 26. So, the argument goes, for want of a similarly situated group, the equal protection claim must fail.[3]

This argument is wrong because it collapses the similarly situated analysis and the rationality analysis. In some cases, specific felony convictions might be a rational basis to exclude someone from a profession. (Someone just convicted of financial fraud probably should not be an accountant.) But it does not mean that one group of people who want to work in a field are dissimilarly situated to another group of people who want to work in the field. *See Guillory v. Orange County*, 731 F.2d 1379, 1383 (9th Cir. 1984) (allowing permit applicant denied for supposed lack of good

[3] As with standing, Appellants did not lose on the "similarly situated" analysis below, so they did not expound on it in their opening brief. ER-18–20. That is not, as Duncan argues, waiver of the point. Duncan Br. 25.

moral character to bring equal protection claim based on treatment of other applicants). If it did, people could never bring these kinds of equal protection claims, let alone win them. But, as Dario and Fernando briefed (at 27–29), plaintiffs do win equal protection challenges to felony bans. *See Chunn v. State ex rel. Miss. Dep't of Ins.*, 156 So. 3d 884 (Miss. 2015); *Barletta v. Rilling*, 973 F. Supp. 2d 132 (D. Conn. 2013); *Furst v. N.Y.C. Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986); *Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980); *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974); *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977); *Gregg v. Lawson*, 732 F. Supp. 849 (E.D. Tenn. 1989) (motion-to-dismiss ruling). Duncan cannot be right unless every one of these cases is wrong.

At bottom, Duncan is arguing that the state can treat people convicted of felonies differently because the state treats people convicted of felonies differently. It's begging the question. A state "classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." *Williams v. Vermont*, 472 U.S. 14, 27 (1985); *see also Nordlinger v. Hahn*, 505 U.S. 1, 34 (1992) (Stevens, J.,

dissenting) ("That a classification must find justification outside itself saves judicial review of such classifications from becoming an exercise in tautological reasoning.").

At minimum, people with felony convictions who want to get EMT certifications are similarly situated to people with felony convictions who already have EMT certifications. As Dario and Fernando explained, one of the reasons the bans are irrational is that they grandfather in people with the same felony convictions if they were certified before June 2010. Appellants' Br. 44–45 (citing 22 Cal. Code Regs. § 100214.3(f)). Even under Duncan's theory, in which felony convictions make all the difference, "[a]n applicant for a license who has committed one of the described felonies and a licensee who has done the same are similarly situated, and no justification exists for automatically disqualifying one and not the other." *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977), *aff'd*, 434 U.S. 356 (1978) (finding irrational criminal-history ban for chauffeur's licenses); *see also Nixon v. Pennsylvania*, 839 A.2d 277 (Pa. 2003); *Peake v. Pennsylvania*,

132 A.3d 506 (Pa. Commw. Ct. 2015). So Dario and Fernando have met the prerequisites for an equal protection claim.

II. The substantive due process prerequisites are also met.

Duncan also argues that Dario and Fernando's substantive due process claim fails at the outset because they have not shown that they are subject to a "complete prohibition" on working as fire fighters. Duncan Br. 41–45. This Court, however, does not require a "complete prohibition" to state a substantive due process claim.

To be sure, Dario and Fernando agree that a "brief interruption" or other minor interference is not enough. Duncan's cases show that a substantive due process claim will not lie when an arcade temporarily cannot offer crane games, *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 65 (9th Cir. 1994); when an attorney is detained one time and misses grand jury testimony, *Conn v. Gabbert*, 526 U.S. 286, 288–89, 292 (1999); or when a doctor is temporarily suspended from Medicaid reimbursement, *Guzman v. Shewry*, 552 F.3d 941, 954–55 (9th Cir. 2009). But under *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 997–98

(9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008), a substantive due process claim will lie when state action amounts to effectively keeping someone out of an occupation.

That is what was pleaded here. Dario alleged that "California's prohibition also *effectively prohibits* [him] from becoming a career firefighter because most of California's 900-plus fire departments require an EMT certification for career positions." ER-87 (¶ 42) (emphasis added). And that allegation was backed up with further pleading: "California newspapers have repeatedly highlighted the problem that California-trained incarcerated firefighters are often prohibited from later working as career firefighters because of the EMT restrictions." For this point, Dario cited an article from the Sacramento Bee titled "Inmates help battle California's wildfires. But when freed, many can't get firefighting jobs." And he cited an editorial from the L.A. Times called "Inmates risking their lives to fight California's wildfires deserve a chance at full-time jobs." ER-89 (¶ 69). On a motion to dismiss, these are not "bald assertions." Duncan Br. 43. They are facts that must be taken as true. And they show that Dario is effectively

banned from fulltime firefighting. To be sure, Dario has managed to work a seasonal firefighting job, but that is analogous to the situation in *Engquist*. There, the plaintiff's substantive due process claim was considered even though she was self-employed "doing the same type of work" since it was still not "a full-time job" and did not pay enough. *See* 478 F.3d at 991; ER-95 (¶ 123) ("Because of the lifetime ban, Dario must do less stable, lower-paying work."). So the pleading here is sufficient under *Engquist*.[4]

As with the sundry procedural arguments, it makes sense that the state would stress these kinds of technical barriers. Because if both the Equal Protection Clause and the Due Process Clause were as limited as the state suggests—if, effectively, there were no Fourteenth Amendment—the

[4] Duncan also argues that Fernando did not adequately plead that lack of EMT certification is limiting his employment. But the complaint cites articles about people like Fernando who cannot become firefighters. ER-89 (¶ 69). In the favorable light of the pleading stage, these citations imply that Fernando, too, is effectively prohibited from becoming a firefighter. If, however, the Court holds that the pleading is insufficient as to Fernando's substantive due process claim, Fernando is prepared to supplement the record on remand so that it is clear that he, too, is effectively prevented from working as a fulltime firefighter because of the bans.

state could do almost whatever it wanted to people with criminal histories. The irrationalities that the amici discussed would be just the beginning. Except those falling afoul of enumerated guarantees like the Cruel and Unusual Punishments Clause, no other restriction, no matter how irrational, could be challenged in federal court.

That should not be the law. And, as shown when plaintiffs win these cases, it isn't.

III. The bans are irrational on their face.

With that, Dario and Fernando turn to the heart of the issue: whether they have plausibly pleaded that the bans are irrational. To be clear, that *constitutional* challenge is the substance of this case. At times, Kepple suggests that this Court is reviewing an administrative decision. *See* Kepple Br. 13–14 ("In review of a state agency decision, this Court generally applies a highly deferential standard of review and is confined to the administrative record."). Duncan, at times, suggests that the Court is reviewing the California rulemaking process. Duncan Br. 47–48 ("Appellants' amended complaint does not allege any violation of the

California Administrative Procedure Act"). The question, however, is whether the complaint adequately pleads that the bans are irrational and thus unconstitutional. ER-81 (¶ 1); ER-96 (¶ 127).

As Dario and Fernando showed in their opening brief, the answer is a resounding yes. Some fifteen analogous cases have found flat criminal-history bans unconstitutional. Appellants' Br. 27–29 (collecting cases). And to that long list, one could add bans in:

- Health and human services job with unsupervised client contact, *Cronin v. O'Leary*, 2001 WL 919969 (Mass. Super. Ct. Aug. 9, 2001) (manslaughter and armed robbery);
- Massage parlors, *Pentco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978) (any two felonies within five years or any sex crime within five years); and
- Cosmetology, *Tanner v. De Sapio*, 150 N.Y.S.2d 640 (N.Y. Sup. Ct. 1956) (grand larceny).

On top of that, Dario and Fernando showed that the bans are redundant. Appellants' Br. 33–35. And that they are overbroad. *Id.* at 35–37; *see also*

Tennessee v. Garner, 471 U.S. 1, 14 (1985) ("[W]hile in earlier times the gulf between the felonies and the minor offences was broad and deep, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies." (cleaned up)). Dario and Fernando also showed that the bans are irrationally rigid, Appellants Br.' 38–40; uniquely harsh (whether compared to the law in other states or to the law in other occupations), *id.* at 4–6 nn.1–3, 40–44; rife with exceptions, *id.* at 44–46; and unpredictable, *id.* at 46–47. In sum, Dario and Fernando adequately pleaded, at the motion to dismiss stage, that the laws are irrational on their face.

Appellees say quite a bit in response, but it can be grouped into two categories: (A) the case law supports them rather than Dario and Fernando and (B) there are rational bases for the bans. As Dario and Fernando show next, neither of these arguments is persuasive.

A. The cases support Dario and Fernando.

Duncan criticizes the long list of cases from the opening brief for several reasons: they are not binding and some were decided under

Pennsylvania state constitutional law and others involved bans for one felony (rather than two felonies or one felony within the last ten years) and others involved bans on all municipal employment. Duncan Br. 32–34. This is fair, but only to a point.

Neither Dario and Fernando nor Appellees identified a controlling Ninth Circuit case, and the cases Dario and Fernando cited are similar but not identical. Yes, Pennsylvania's rational basis test is slightly more rigorous than the federal one (although it still affords a "strong presumption" that a law is constitutional, *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1108–10 (Pa. 2020)). Two felonies are more than one (although a ban for two felonies has been held unconstitutional too, *see Pentco*, 474 F. Supp. at 1005, and the difference between two felonies and one can be "the quality of legal counsel, the exercise of prosecutorial discretion, and the proclivities of different judges," *Barletta*, 973 F. Supp. 2d at 139). Ten years is less than a lifetime (although shorter bans have been invalidated, *see Pentco*, 474 F. Supp. at 1005, and ten years is longer than the time that California usually believes convictions are relevant to licensing,

see Cal. Bus. & Prof. Code § 480(a)(1)). And, sure, municipal hiring is broader than EMT certification. Dario and Fernando agree that none of these cases is *exactly* on all fours. The point is that there is wall of precedent in which plaintiffs win similar claims on the merits. If so, Dario and Fernando should be able to merely state a claim at the pleading stage.

Indeed, these cases are far more analogous than the ones cited by Appellees. Those cases concern less harsh punishments, tighter relationships between the misconduct and the profession, or full fact records. They include:

- the discretionary revocation of a dentist's license, on a full record, months after he was convicted of Medicaid fraud, *Weiss v. N.M. Bd. of Dentistry*, 798 P.2d 175 (N.M. 1990);
- the five-year, discretionary suspension, on a full record, of an optometrist who had sexually assaulted two patients a few years earlier, *Warmouth v. Del. State Bd. of Exam'rs in Optometry*, 514 A.2d 1119 (Del. Super. Ct. 1985);

- the disqualification of a physician for assaulting a patient, *Bhalerao v. Ill. Dep't of Fin. & Pro. Reguls.*, 834 F. Supp. 2d 775 (N.D. Ill. 2001);
- an administrative *grant* of a nursing license that was probationary because the applicant had been convicted of theft (which was upheld "only barely"), *Moustafa v. Bd. of Registered Nursing*, 29 Cal. App. 5th, 1119, 1140 (2018);
- a post-trial ruling rejecting the challenge of a plaintiff convicted of robbery to a felony-ban for police officers, which are "just simply a special category," *Dixon v. McMullen*, 527 F. Supp. 711, 721 (N.D. Tex. 1981);
- the discretionary administrative imposition of three years' probation on a doctor convicted of driving drunk several times in the last few years, *Griffiths v. Super. Ct.*, 96 Cal. App. 4th 757 (2002); and
- a summary-judgment ruling upholding a ten-year felony ban for detectives and security guards, when the plaintiff had been convicted

of robbery, *Schanuel v. Anderson*, 546 F. Supp. 519 (S.D. Ill. 1982), *aff'd*, 708 F.2d 316 (7th Cir. 1983).[5]

All these cases are distinguishable (procedurally, substantively, or both) from a pleading-stage case about flat bans for old, unrelated convictions. Considered among the many cases in the opening brief, Appellees' most analogous cases—*Dixon* and *Schanuel*—at most show that a fact record is needed.

The Supreme Court cases are similarly off-point. *Hawker*, about a felony ban in medicine, held only that the law did not violate the Ex Post Facto Clause, not that it was substantively rational. *Hawker v. New York*, 170 U.S. 189 (1898). The language substantively approving felony bans in the practice of medicine is dicta, it pre-dates the modern ubiquity of felonies by decades, and, anyway, it mostly raises the question why California has flat bans for EMTs but not for doctors. *See* Appellants' Br.

[5] *United States v. Giles*, 640 F.2d 621, 623 (5th Cir. 1981), is about felon-in-possession laws and does not concern employment.

42–44. *De Veau*, which upheld a felony ban for union office in New York, concerned the "notoriously serious situation" of the "New York waterfront," in which "the presence on the waterfront of convicted felons in many influential positions" helped lead to "corruption," "skulduggeries," "mounting abuses," and a generally "appalling situation." *De Veau v. Braisted*, 363 U.S. 144, 147 (1960). Here, nothing in the complaint suggests these kinds of problems among people with EMT certification. *See also* Duncan Br. 46 (qualifying "criminal conduct by EMTs towards consumers" with "however uncommon"). In the end, courts invalidate flat bans despite *Hawker* and *De Veau* because many of the thousands of criminal-history-based bans are distinguishable. *See* Appellants' Br. 27–29; *see also Fussenich*, 440 F. Supp. at 1081 ("In reaching our conclusion that the statute violates equal protection, we have not overlooked the decisions of the Supreme Court in *DeVeau* … and *Hawker* …."); *Gregg*, 732 F. Supp. at 856 (refusing to apply *De Veau* on the pleadings).

The apposite cases are Dario and Fernando's, not Appellees', which, again, are in different procedural postures, involve tighter nexuses, or concern special occupations.

B. The justifications for the bans are neither pleaded nor persuasive.

At the heart of things, the few justifications that Appellees offer just are not sufficient at the pleading stage. They are factually beyond the complaint, legally implausible, or both.

1. Public safety

The core of Kepple's argument is the bans are a rational way to preserve public safety:

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

Kepple Br. 28. Duncan similarly argues that the bans "ensur[e] public safety given EMTs' frequent interactions with vulnerable members of the public." Duncan Br. 30. Duncan says there have been "[c]ases of physical

and sexual abuse by paramedics." *Id.* at 38–39. And that recidivism statistics justify the ten-year (but not lifetime) ban. *Id.* at 39–40.

These arguments, however, go far beyond the complaint. What, precisely, are the statistics about recidivism? Just how "uncommon" was abuse by paramedics (and did those people even have felony records)? Just how much opportunity is there for people with EMT certifications to commit crimes? These are facts that must be found, not simply resolved in favor of the defendants. Rather, the facts today are that:

- "the bans do nothing but exclude people whose felony records are unrelated to EMT work," ER-95 (Am. Compl. ¶ 118);
- "Many felonies have no bearing on whether someone would be a dangerous EMT," ER-100 (*id.* ¶ 162);
- "many people with felony convictions have been rehabilitated and would present no unique risk to the public if they were certified as EMTs," ER-100 (*id.* ¶ 159);

- "people who served sentences for two felonies long ago would present no unique risk to the public if certified as EMTs because recidivism decreases with age," ER-100 (*id.* ¶ 160);
- EMTs "are not paramedics," ER-93 (*id.* ¶ 102);
- "Paramedics, not EMTs, perform more advanced procedures such as intubation, accessing the veins, and administering most drugs," ER-93 (*id.* ¶ 103);
- EMT certification is a common credential, not a license or job position, that is used in many kinds of businesses, including gyms, factories, stadiums, and event venues, ER-93, ER-94 (*id.* ¶¶ 105, 107–08); and
- "There is no evidence that California's bans protect the public from bad EMTs," ER-94 (*id.* ¶ 113).

There are zero facts about assaults from 20 years ago, access to drugs, or research on recidivism.

Speculation does not trump the complaint. Consider *Flynn v. Holder*, 684 F.3d 852 (9th Cir. 2012). The plaintiffs there brought a rational-basis

equal-protection claim challenging a law that made it a crime to pay donors who gave blood containing certain stem cells even though it is legal to pay blood donors generally. *Id.* at 858. On a motion to dismiss, the government argued that the distinction was rational because the procedure for donating enhanced blood "poses greater health risks for the donor than [normal] blood donations do." *Id.* at 859. The Court rejected that conjecture because it was based on "information taken not from the complaint, which sa[id] that there is no significant risk." *Id.* This Court was unambiguous: "on a 12(b)(6) motion, the complaint controls." *Id.* The Court was also unambiguous about how to resolve disputes between the complaint and speculation outside the complaint: "If material allegations of fact are mistaken, summary judgment or trial can so establish." *Id.*

Beyond being factually premature, the public-safety defense is also legally unpersuasive. If the concern is "physical assault," bans that cover every state and federal felony are titanically overbroad. If the concern is sexual assault, there is separate authority to deny certification under Cal. Health & Safety Code § 1798.200(c)(12)(C). If the concern is narcotics, there

is separate authority to deny certification under Cal. Health & Safety Code § 1798.200(c)(8). And even if thin reeds like these could hold up the law generally, the bans would still be irrationally underinclusive. EMTs "use sharp objects"? There should be bans for all the barbers who hold straight razors to customers' throats. (Any one of whom could be Sweeney Todd.) "Prescription medication" and "high emotions"? What about psychiatrists? (Any one of whom could be Hannibal Lecter.) Bans for them do not exist. *See* Cal. Bus. & Prof. Code §§ 2236, 2236.1 (doctors), 7403 (barbers). Rather, the bans for EMT certification are harsher than the laws for just about every other form of occupational regulation in California. *See* Appellants' Br. 40–44.

Put simply, a motion to dismiss is not about an administrative agency's idea of common sense. It is about the allegations of the complaint and legal reasoning that stands up in case law.

2. Good moral character

Citing *Dittman v. California*, 191 F.3d 1020 (9th Cir. 1997), Appellees also argue that the bans are legitimate because they ensure good moral character. Duncan Br. 45; Kepple Br. 27. That is incorrect.

Dittman stands for the rule that the government "may require good moral character as a qualification for entry into a profession, when the practitioners of the profession come into close contact with patients or clients." 191 F.3d at 1032. Given the requirement of "close contact," this argument probably just rehashes the public-safety one. In any event, this case is not *Dittman*, in which the Court upheld a requirement that acupuncturists be current on child support and taxes. For one, felony convictions do not necessarily speak to good moral character because felonies are not automatically crimes of moral turpitude. *E.g.*, *Ceron v. Holder*, 747 F.3d 773, 779 (9th Cir. 2014) (en banc). But, more importantly, being delinquent on taxes or child support speaks to *present* character. The bans here, which turn on *past* conduct, do not judge people like Dario and

Fernando for what their characters are today. They judge people for who they were years or even decades ago.

3. Statutory enforcement

Finally, Duncan argues that the bans, which exist in an administrative regulation, are entitled to deference because they "implement[] the substantial relationship statute." Duncan Br. 46–48. But as Dario and Fernando showed in their opening brief (at 41–42), the regulatory bans appear to *contradict* their enabling statute. Cal. Health & Safety Code § 1798.200 imposes a discretionary process connected to the occupation.[6] The statute says that "[t]he medical director of the local EMS agency *may*, upon a determination of disciplinary cause *and in accordance with regulations for disciplinary processes* … deny" EMT certification. *Id.* § 1798.200(a)(3) (emphasis added). And the grounds for doing so must be "substantially related" with prehospital functions: they include things like "[f]raud in the procurement of any certificate or licenses *under this division*";

[6] The text is in in the opening brief at ADD-6–15.

"mistreatment or physical abuse *of any patient*"; "failure to maintain confidentiality *of patient medical information*"; and, crucially, "[c]onviction of any crime *which is substantially related to the qualifications, functions, and duties of prehospital personnel*." *Id.* § 1798.200(c) (emphases added). It is hard to believe that this tailored, discretionary statute—in a state that prefers tailored, discretionary criminal-history statutes, *see* Cal. Bus. & Prof. Code § 480(a)(1)—is really implemented in a sweeping, mandatory regulation. If anything, the bans contradict legislative intent. They should get less deference.

IV. The bans are irrational as applied.

Dario and Fernando have also pleaded valid as-applied claims. *See* Appellants' Br. 49–53. Only Duncan responds with any substance. He argues that Dario "took 'nearly a decade'" to "'turn his life around,'" Duncan Br. 41 n.8, although that is just a misquotation of the complaint, which pleads that "Dario turned his life around" "[n]early a decade ago." ER-85 (¶ 21). He argues that Fernando's release from prison was too recent according to statistics that are not discussed in the complaint. Duncan Br.

at 40–41. But, for the most part, he simply argues that Dario and Fernando's old convictions are probative. *Id.* at 37–38, 51. This ignores the complaint: Dario and Fernando pleaded that they have been rehabilitated, that they have learned how to be EMTs, and that certifying them "would pose no risk to society." ER-87, ER-89 (Am. Compl. ¶¶ 44, 67). The cases hold blanket bans unconstitutional as applied to specific plaintiffs, so the Court here should hold that the claims are at least plausible. *See, e.g.*, *Fields v. Dep't of Early Learning*, 434 P.3d 999 (Wash. 2019); *Chunn*, 156 So. 3d at 889. Even if the bans were rational on their face, when the facts in the complaint are taken as true, the bans are not rational for Dario and Fernando. The complaint is the record that counts now. And, as Kepple himself admits, "the record casts no doubt on Mr. Gurrola's claim that he is rehabilitated." Kepple Br. 29.

CONCLUSION

In his introduction, Kepple invokes a slew of what-ifs suggesting that Dario and Fernando want the federal courts to rewrite California law and perhaps even constitutional law. Kepple Br. 2–3. This case is far more

modest than that—especially at the pleading stage. Dario and Fernando are not seeking newly heightened scrutiny or the invalidation of every felony ban. They are not, today, even seeking the invalidation of *these* felony bans. Facing bans that are redundant and overbroad, bans that are uniquely harsh in both California occupational law and nationwide EMT law, bans that seem to contradict the statute they purport to enforce, Dario and Fernando are just asking the Court to hold that the bans *could be* irrational. And then there will be discovery. The bans will not be enjoined until a fact record proves they should be enjoined. If they are, the district court will not "rewrite the regulations" or remove "all prior felonies … from consideration" or make "EMT applicants await the arrival of amended regulations." Kepple Br. 2. All that will happen is that medical directors like Kepple and Falck will apply their discretion in routine administrative proceedings to decide whether applicants, under the totality of the circumstances, should be excluded for "substantially related" convictions. Cal. Health & Safety Code § 1798.200; 22 Cal. Code Regs. § 100208. So long as that discretion is not abused, applicants who should be denied will be

denied, and applicants who should be certified will be certified. That is not so earth-shaking.

Appellees' procedural arguments are not significant. The only substantial question is whether Dario and Fernando have pleaded plausible claims. They have. The Court should reverse.

Dated: October 18, 2021

s/ Andrew Ward
Counsel for Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation from Fed. R. App. P. 32(a)(7). The brief contains 6,345 words. It is written in 14-point Palatino Linotype.

s/ Andrew Ward_____