

No. 24-5566

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GARY SANCHEZ,
Plaintiff and Appellant,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant and Appellee.

**On Appeal from the United States District Court
for the Southern District of California**

No. 24-cv-767-RSH-MSB

Hon. Robert S. Huie, District Judge

**APPELLEE'S SUPPLEMENTAL EXCERPTS OF RECORD
VOLUME 1 OF 2**

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United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Gary R Sanchez

Civil Action No. 24-cv-0767-RSH-MSB

Plaintiff,

V.

Rob Bonta, in his official capacity as
Attorney General of the State of
California

JUDGMENT IN A CIVIL CASE

Defendant.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The Court GRANTS Defendant’s motion to dismiss. The Complaint is DISMISSED without leave to amend, the case is hereby closed.

Date: 8/28/24

CLERK OF COURT
JOHN MORRILL, Clerk of Court

By: s/ S. Nyamanjiva

S. Nyamanjiva, Deputy

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GARY R. SANCHEZ,
Plaintiff,
v.
ROB BONTA, in his official capacity as
Attorney General of the State of
California,
Defendant.

Case No.: 24-cv-767-RSH-MSB

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS**

[ECF No. 11]

On June 24, 2024, Defendant filed a motion to dismiss Plaintiff’s Complaint. ECF No. 11. For the reasons below, the Court grants the motion.

I. BACKGROUND

On April 29, 2024, plaintiff Gary Sanchez, proceeding pro se, filed this lawsuit against the Attorney General of California. ECF No. 1. Plaintiff’s Complaint challenges the constitutionality of California Penal Code § 33410 (“Section 33410”), which provides that possession of a silencer is a felony offense. Plaintiff’s Complaint alleges that this statute, on its face, violates the Second Amendment to the U.S. Constitution, as

1 incorporated by the Fourteenth Amendment.¹ ECF No. 1. The Complaint seeks a judicial
2 declaration that Section 33410 is unconstitutional on its face, as well as an injunction
3 preventing Defendant from “enforcing Section 33410 in its entirety.”² *Id.*

4 On June 24, 2024, Defendant moved to dismiss the Complaint for failure to state a
5 claim. ECF No. 11. The motion is fully briefed. ECF Nos. 13, 15.

6 **II. LEGAL STANDARD**

7 A motion to dismiss under Rule 12(b)(6) “tests the legal sufficiency of a claim.”
8 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short and
9 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P.
10 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to relief that is
11 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R.
12 Civ. P. 12(b)(6). The plausibility standard demands more than a “formulaic recitation of
13 the elements of a cause of action,” or “‘naked assertions’ devoid of ‘further factual
14 enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S.
15 at 555, 557). Instead, a complaint “must contain sufficient allegations of underlying facts
16 to give fair notice and to enable the opposing party to defend itself effectively.” *Starr v.*
17 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

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20 ¹ Section 33410 provides: “Any person, firm, or corporation within this state
21 possesses a silencer is guilty of a felony and upon conviction thereof shall be punished by
22 imprisonment . . . or by a fine not to exceed ten thousand dollars . . . or by both that fine
23 and imprisonment.” Under California Penal Code § 17210, a “silencer” is defined as “any
24 device or attachment of any kind designed, used, or intended for use in silencing,
25 diminishing, or muffling the report of a firearm,” including “any combination of parts,
26 designed or redesigned, and intended for use in assembling a silencer or fabricating a
27 silencer and any part intended only for use in assembly or fabrication of a silencer.”

28 ² The Complaint attaches documents reflecting that on April 29, 2024, Plaintiff had
applied to the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) for
authorization to create a 3D-printed silencer for use with 5.56 caliber rounds. ECF No.1-2
at 1. The ATF rejected his application as inconsistent with California law. *Id.* at 8.

1 When reviewing a motion to dismiss under Rule 12(b)(6), courts assume the truth of
2 all factual allegations and construe them in the light most favorable to the nonmoving
3 party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996) (citing *Nat’l*
4 *Wildlife Fed’n v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995)). But a court “disregard[s]
5 ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
6 statements.’” *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010) (quoting
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)). Likewise, “conclusory allegations of law
8 and unwarranted inferences are not sufficient to defeat a motion to dismiss.” *Pareto v.*
9 *FDIC*, 139 F.3d 696, 699 (9th Cir. 1998) (citing *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922,
10 926 (9th Cir. 1996)). “After eliminating such unsupported legal conclusions, [courts]
11 identify ‘well-pleaded factual allegations,’ which [are] assume[d] to be true, ‘and then
12 [courts] determine whether they plausibly give rise to an entitlement to relief.’” *Telesaurus*
13 *VPC*, 623 F.3d at 1003. Dismissal under Rule 12(b)(6) is proper where there is no
14 cognizable legal theory to support the claim or when there is an absence of sufficient factual
15 allegations to support a facially plausible claim for relief. *Shroyer v. New Cingular*
16 *Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010).

17 A facial challenge to the constitutionality of a statute “is the ‘most difficult challenge
18 to mount successfully,’ because it requires [the challenger] to ‘establish that no set of
19 circumstances exists under which the Act would be valid.’” *United States v. Rahimi*, 144
20 S. Ct. 1889, 1897 (2024) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The
21 government “need only demonstrate that [the statute] is constitutional in some of its
22 applications.” *Id.*

23 **III. ANALYSIS**

24 **A. The Second Amendment**

25 The Second Amendment to the U.S. Constitution guarantees: “[T]he right of the
26 people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of*
27 *Columbia v. Heller*, 554 U.S. 570 (2008), the U.S. Supreme Court held that this amendment
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1 “guarantee[s] the individual right to possess and carry weapons in case of confrontation,”
2 *id.* at 592, while noting that this right, like most others, is subject to limits, *id.* at 626.
3 Thereafter, in *State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme
4 Court adopted the following standard for analyzing Second Amendment challenges:

5 When the Second Amendment’s plain text covers an individual’s
6 conduct, the Constitution presumptively protects that conduct. The
7 government must then justify its regulation by demonstrating that it is
8 consistent with the Nation’s historical tradition of firearm regulation.
9 Only then may a court conclude that the individual’s conduct falls
10 outside the Second Amendment’s unqualified command.

11 *Id.* at 2126 (internal quotation marks omitted).

12 The plain text of the Second Amendment covers the right to keep and bear “Arms.”
13 *Heller* observed that “[t]he 18-century meaning [of “Arms”] is no different from the
14 meaning of today,” and offered two eighteenth-century definitions: “[w]eapons of offence,
15 or armour of defence,” and “any thing that a man wears for his defence, or takes into his
16 hands, or useth in wrath to cast at or strike another.” 554 U.S. at 581. The Court stated that
17 “the Second Amendment extends, prima facie, to all instruments that constitute bearable
18 arms, even those that were not in existence at the time of the founding.” *Id.* 582; *accord*
19 *Rahimi*, 144 S. Ct. at 1897.

20 **B. Silencers Are Not “Arms”**

21 Defendant argues, as a threshold matter, that silencers are not “Arms” and are
22 therefore outside the scope of the Second Amendment’s protection. ECF No. 11-1 at 14.
23 Defendant contends that a silencer has no inherent offensive or defensive capability, but
24 rather is an accessory that is not necessary to the operation of a firearm. *Id.* at 15-16. The
25 Complaint alleges that “accessories for arms are arms themselves,” ECF No. 1 at 2, and
26 Plaintiff’s opposition contends that silencers are arms because they can be used in both
27 offensive and defensive situations, ECF No. 13 at 2. Plaintiff argues that silencers reduce
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1 recoil and muzzle flash, thereby improving marksmanship; and that they help the user
2 maintain a hidden position while retaining the ability to hear the user’s surroundings. *Id.*

3 Numerous courts have held, post-*Bruen*, that silencers are not “Arms” protected by
4 the Second Amendment. *See United States v. Cox*, 906 F.3d 1170, 1186 (10th Cir. 2018)
5 (“A silencer is a firearm accessory; it’s not a weapon in itself (nor is it ‘armour of defence’).
6 Accordingly, it can’t be a ‘bearable arm’ protected by the Second Amendment.”); *United*
7 *States v. Berger*, --- F. Supp. 3d ---, 2024 WL 449247, at *17 (E.D. Pa. Feb. 6, 2024)
8 (“[T]he Court joins the other federal courts to have squarely addressed whether silencers
9 are ‘Arms’ under the Second Amendment in concluding a silencer is not a bearable ‘Arm’
10 under the Second Amendment because it is merely an accessory which is unnecessary to
11 the essential operation of a firearm.”); *Capen v. Campbell*, --- F. Supp. 3d ---, 2023 WL
12 8851005, at *17 (D. Mass. Dec. 21, 2023) (“[S]ome accessories, such as silencers, do not
13 affect the essential operation of a weapon and so do not fall within the scope of the Second
14 Amendment’s protection.”); *United States v. Peterson*, No. 22-231, 2023 WL 5383664, at
15 *2 (E.D. La. Aug. 21, 2023) (“A silencer is not a ‘weapon of offence or an armour of
16 defence’ because it cannot on its own cause any harm and is not useful independent of its
17 attachment to a firearm. Consequently, silencers are not bearable arms within the score of
18 the Second Amendment even in light of *Bruen* or its progeny.”); *United States v.*
19 *Cooperman*, No. 22-CR-146, 2023 WL 4762710, at *1 (N.D. Ill. July 26, 2023) (“The plain
20 text of the Second Amendment does not protect accessories that are not bearable arms,
21 such as silencers.”); *Cox v. United States*, No. CR11-22RJB, 2023 WL 4203261, at *7 (D.
22 Alaska June 27, 2023) (“Silencers are firearms accessories and not ‘arms’ for purposes of
23 Second Amendment Protection.”); *United States v. Villalobos*, No. 19-cr-40, 2023 WL
24 3044770, at *12 (D. Idaho Apr. 21, 2023) (“[S]ilencers are not bearable arms within the
25 meaning of the Second Amendment and are not constitutionally protected.”); *United States*
26 *v. Saleem*, 659 F. Supp. 3d 683, 695 (W.D.N.C. 2023) (“[S]ilencers are not ‘bearable arms’
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1 within the meaning of the Second Amendment.”). The Court is not aware of any court
2 reaching the opposite conclusion.

3 The Court agrees with the conclusion and reasoning of the cases cited above. A
4 silencer is neither a weapon in itself, nor a defensive armor. As Plaintiff concedes, it is an
5 accessory. Nor does Plaintiff dispute that, unlike ammunition, a silencer is an accessory
6 unnecessary to the essential operation of a firearm—however desirable the silencer may be
7 to a user in reducing noise, flash, or recoil, or in allowing the user to stay hidden while
8 firing. *See Cox*, 906 F.3d at 1186 (rejecting arguments that silencers merit Second
9 Amendment protection because they protect the shooter’s hearing, reduce “muzzle flinch”
10 and disorientation, enhance shooting accuracy, and save time in a defense situation;
11 silencers are nonetheless accessories rather than “bearable arms”). The Court concludes
12 that silencers are not “bearable arms” for purposes of the Second Amendment.
13 Accordingly, Plaintiff’s facial constitutional challenge to Section 33410 fails to state a
14 claim.³

15 **C. Leave to Amend**

16 Defendant requests dismissal without leave to amend. ECF No. 11-1 at 31. Plaintiff
17 has not requested leave to amend.

18 Under Federal Rule of Civil Procedure 15(a)(2), the Court “should freely give leave
19 [to amend] when justice so requires.” “A district court should not dismiss a pro se
20 complaint without leave to amend unless ‘it is absolutely clear that the deficiencies of the
21 complaint could not be cured by amendment.’” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th
22 Cir. 2012) (quoting *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir.1988)). Applying
23 this standard, it is clear to the Court that the deficiency identified herein cannot be cured
24 by amendment. Accordingly, the dismissal is without leave to amend.

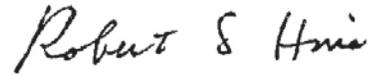
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27 ³ In light of this ruling, the Court declines to address Defendant’s alternative
28 arguments for dismissal.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS** Defendant’s motion to dismiss. The
3 Complaint is **DISMISSED** without leave to amend. The Clerk of Court is directed to close
4 the case.

5 **IT IS SO ORDERED.**

6 Dated: August 28, 2024



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Hon. Robert S. Huie
United States District Judge