UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RONALD NORDSTROM, Plaintiff, v. VENTURA COUNTY SHERIFF GEOFF DEAN, Defendant.	Case No. CV 15-7607 DMG (FFMx) **ORDER RE: DEFENDANT'S MOTION TO DISMISS, MOTION FOR MORE DEFINITE STATEMENT, AND MOTION TO QUASH, AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT [9, 10]**

I.
PROCEDURAL BACKGROUND

On September 28, 2015, Plaintiff Ronald Nordstrom filed a Complaint against Defendant Geoff Dean, Ventura County Sheriff, bringing a 42 U.S.C. section 1983 claim for violation of his Second Amendment rights. [Doc. # 1.] The claim stems from the Sheriff's April 7, 2015 denial of Nordstrom's application for a permit to carry a concealed weapon ("CCW Permit").[1] (*Id.* ¶¶ 5-18.) Nordstrom seeks an order requiring the Sheriff to issue a CCW permit to Nordstrom and to process future permit applications in conformance with the law, for such damages as permitted by law, and for attorneys'

[1] Plaintiff's Complaint uses the word "permit" while the relevant California statutory law uses the term "license." *See* Cal. Penal Code section 26150 *et seq.* The Court will treat these terms as interchangeable for the purpose of ruling on these motions.

fees and costs. (*Id.* at ¶ 14-18.[2])

On October 30, 2015, the Sheriff filed a motion to dismiss ("MTD"), motion for a more definite statement, and motion to quash service of summons. [Doc. # 9.] On November 3, 2015, Nordstrom filed a motion for summary judgment and an opposition to the MTD ("MTD Opp."). [Doc. ## 10, 11.] For the reasons set forth below, the Court **GRANTS** the MTD with leave to amend and **DENIES** the motion for summary judgment as premature.

II.
FACTUAL BACKGROUND[3]

A. California's Regulatory Scheme for Firearms

With some exceptions, California law prohibits a person from carrying a concealed weapon outside the home without a license.[4] Cal. Penal Code §§ 24500(a), 25655. California law also prohibits the open public carrying of both loaded and unloaded

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[2] Paragraph numbers 14-18 are repeated in the Complaint. The Prayer for Relief is contained in the second repetition of paragraph numbers 14-18, on page 3 of the Complaint.

[3] The Court takes all facts alleged in the Complaint as true for the purpose of deciding the motion to dismiss, but does not accept legal conclusions as true.

[4] Nordstrom alleges that "[t]he California Legislature has mandated that the only method by which a resident of the State can bear arms for the purpose of self-defense outside the home is with a permit to carry a concealed weapon" and that he "cannot exercise this [Second Amendment] right without a permit from Defendant." (Compl. ¶¶ 1, 6.)

The Sheriff responds that this is a misstatement of law, given that there are a number of exceptions to the general prohibition on carrying a concealed weapon without a license. (MTD at 2, n. 3.) For example, there are exceptions for (1) persons who believe they are in "immediate, grave danger" and that carrying the weapon is necessary for the immediate preservation of person or property (Cal. Penal Code § 26045(a)); (2) persons on their own property, including campsites and places of business (Cal. Penal Code §§ 25605, 26035, 26055); (3) persons in certain unincorporated areas (Cal. Penal Code §§ 25850(a) and 26350(d)); and (4) persons keeping the concealed firearms unloaded and locked in the trunk of a vehicle or locked container within the vehicle (Cal. Penal Code §§ 25505, 25610, 25850).

Notwithstanding the fact that there are *some* exceptions to the prohibition on unlicensed concealed weapons outside the home, there is a general prohibition on carrying a concealed firearm without a license, and, given the facts as pleaded, it does not appear that any of the enumerated exceptions apply to Nordstrom.

firearms. Cal. Penal Code §§ 25850 (prohibiting public carry of a loaded firearm), 26350 (prohibiting public open carry of an unloaded firearm).

The issuance of CCW Licenses in California is governed by California Penal Code sections 26150 *et seq.* and 26155. Section 26150 provides that, when a person applies for a license to carry a concealed firearm, the sheriff of a county may issue a license to that person upon proof that: (1) the applicant is of good moral character; (2) good cause exists for issuance of the license; (3) the applicant is a resident of the county; and (4) the applicant has completed an appropriate course of training. Cal. Penal Code § 26150(a). The licensing authority may also require that an applicant undergo psychological testing. Cal. Penal Code § 26190(f).

The statute requires that each licensing authority publish and make available a policy summarizing the relevant provisions of sections 26150 and 26155(a)-(b). Cal. Penal Code § 26160. The licensing authority must give written notice to an applicant of whether the application is granted or denied within 90 days of the initial application for a new license or 30 days after receipt of the applicant's criminal background check from the Department of Justice, whichever is later. Cal. Penal Code §§ 2602, 26205. If the applicant's request for a license is denied, the notice from the licensing authority must include the reason from the department's published policy why the determination was made. Cal. Penal Code §§ 2602.

B. Nordstrom's Application for a CCW License

Nordstrom is a resident of Ventura County. (Compl. ¶ 2.) On September 22, 2014, Nordstrom submitted an application for a permit to carry a concealed weapon to Dean, the Ventura County Sheriff. (*Id.* ¶¶ 2, 7.) Within 24 hours of submitting the application, the Sheriff received the result of Nordstrom's Criminal Background check, which confirmed that he was "not prohibited from owning or possessing a firearm." (*Id.* ¶ 8.)

In early June 2015, Nordstrom was called in for an interview. (*Id.* ¶ 11.) Nordstrom appeared on June 18, 2015, and answered all questions posed to him during

the interview. (*Id.*) Plaintiff alleges that he is a law-abiding citizen who has complied with all of the requirements for the issuance of a permit to carry a concealed weapon, and is not otherwise prohibited from owning or possessing a firearm. (*Id.* ¶ 16.)

On July 22, 2015, Nordstrom was advised that his background check was complete, and that he was to proceed with paying the final fees and securing the required training in order to obtain his CCW License. (*Id.* ¶ 12.) On August 4, 2015, Nordstrom provided the Sheriff's Office with proof that the required training had been completed and paid the final fees requested. (*Id.* ¶ 13.)

On August 7, 2015, the Sheriff advised Nordstrom that his CCW permit had been denied, and that there was no appeal process available to him. (*Id.* ¶¶ 14-15.) The complaint does not specify what reason, if any, was given for the denial.

II.
LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds on which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)).

The complaint must allege sufficient facts, taken as true, "to state a claim to relief that is plausible on its face.'" *Taylor v. Yee*, 780 F.3d 928, 935 (9th Cir. 2015) (quoting *Twombly*, 550 U.S. at 570) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant has acted unlawfully" or "facts that are 'merely consistent with' a defendant's liability." *Id.* (citing *Twombly* at 557.)

Although a complaint need not contain "detailed factual allegations," it must contain "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 555). In evaluating the sufficiency of a complaint, courts must accept all factual allegations as true. *Iqbal*, 556 U.S. at 678 (internal citation omitted). Legal conclusions, in contrast, are not entitled to the assumption of truth. *Id.*

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A motion to dismiss should be granted if the pleading party fails to present a "cognizable legal theory" or fails to allege sufficient facts to support a cognizable legal theory. *Taylor*, 780 F.3d at 935 (internal citation omitted).

Should a court grant a motion to dismiss, it must also decide whether to grant leave to amend. Federal Rule of Civil Procedure 15(a) provides that a party may amend a pleading with the court's leave, and that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Moss v. Secret Serv.*, 572 F.3d 962, 972 (9th Cir. 2009) (leave to amend should be granted with "extreme liberality"). "Leave to amend should be granted unless the district court 'determines that the pleading could not possibly be cured by the allegation of other facts.'" *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009) (quoting *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*)).

III.
DISCUSSION

A. Second Amendment Claim

The Second Amendment to the United States Constitution states that "[a] well regulated Milita, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., Amend. II.

1. *Heller* and *McDonald*

In 2008, the Supreme Court struck down a District of Columbia law that banned the possession of handguns in the home and required all firearms to be kept unloaded and disassembled or "bound by a trigger lock or similar device" while in the home. *District of Columbia v. Heller*, 554 U.S. 570, 635, 128 S. Ct. 2783, 2822, 171 L. Ed. 2d 637 (2008). The *Heller* court expressly held for the first time that the Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense. *Id.* In 2010, the Supreme Court held that the Second Amendment was fully applicable to the states by virtue of the Fourteenth Amendment's incorporation doctrine.[5] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750, 130 S. Ct. 3020, 3023, 177 L. Ed. 2d 894 (2010).

While holding that the Second Amendment does protect an individual's right to bear arms for self-defense, the *Heller* court cautioned that:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts [have] routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the

[5] There was no majority consensus in the *McDonald* decision regarding which clause of the Fourteenth Amendment incorporates the individual right to bear arms for the purpose of self-defense. Justice Alito's opinion finds support for incorporation in the Due Process Clause, 561 U.S. at 746, while Justice Thomas's concurrence contends that the Privileges and Immunities Clause justifies incorporation, *id.* at 806 (Thomas, J., concurring).

> Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearm in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercials sale of arms.

554 U.S. at 626-27.

The court noted that this list was not intended to be exhaustive, but rather to illustrate "presumptively lawful" limitations on the Second Amendment. *Id.* at 627, n. 26. This point was reiterated in *McDonald*. 561 U.S. at 786 ("Despite municipal respondents' doomsday proclamations, incorporation does not imperil every law regulating firearms.")

2. Ninth Circuit Post-*Heller* Cases

Since *Heller*, the Ninth Circuit has upheld a number of California laws restricting the possession of firearms. *See United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010) (upholding law prohibiting people with felony convictions from possessing firearms); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187, 190 L. Ed. 2d 146 (2014) (upholding law prohibiting people with domestic violence misdemeanor convictions from possessing firearms); *cf. Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014) (finding that the defendant County's CCW permitting requirements impermissibly infringed the Second Amendment). This line of cases has established a framework for determining what constitutes a Second Amendment violation.

a. *Vongxay* and *Chovan*

In *United States v. Vongxay*, the Ninth Circuit noted that "*Heller* did not establish that Second Amendment restrictions must be reviewed under strict scrutiny. Instead, the Court declined to establish a level of scrutiny for evaluating Second Amendment

restrictions, stating only that rational-basis scrutiny is not appropriate." 594 F.3d 1111, 1118 n. 5 (9th Cir. 2010) (internal citation, quotation marks, and brackets omitted).

In *United States v. Chovan*, the Ninth Circuit therefore adopted a "two-step inquiry," previously applied by the Third and Fourth Circuits, which (1) "asks whether the challenged law burdens conduct protected by the Second Amendment" and (2) "if so, directs courts to apply an appropriate level of scrutiny." 735 F.3d at 1136 (internal citation omitted). The *Chovan* court held that "[t]he level of scrutiny depends on (1) how close the law comes to the core of the Second Amendment right, and (2) the severity of the law's burden on the right." *Id.* at 1138 (internal citation and quotation marks omitted). The court found that a statute prohibiting those convicted of domestic violence misdemeanors from possessing firearms did burden rights protected by the Second Amendment, but that the statute passed constitutional muster under intermediate scrutiny, both on its face and as applied to the plaintiff, in that it was supported by an important government interest in preventing domestic gun violence and was substantially related to that interest. *Id.* at 1139, 1141.

b. *Peruta v. County of San Diego*

In *Peruta v. County of San Diego*, the Ninth Circuit overturned the district court's decision granting summary judgment in favor of defendant County of San Diego in a case involving a Second Amendment challenge to the County's policy regarding applications for concealed-carry licenses. 742 F.3d 1144, 1149 (9th Cir. 2014).

In that case, the plaintiffs challenged the County's interpretation and application of the "good cause" requirement of Cal. Penal Code section 26150(a)(2). *Id.*[6] Under the County's policy, "good cause" for a CCW license existed only where an applicant suffered "a unique risk of harm" due to "a set of circumstances that distinguish[ed] him

[6] Plaintiffs consisted of a group of San Diego County residents wishing to carry firearms for self-defense but unable to document specific threats against them who were either denied concealed-carry licenses for lack of "good cause" or decided not to apply because they did not believe they could establish "good cause" as the County's policy defined it. 742 F.3d at 1148.

from the mainstream and cause[d] him to be placed in harm's way." *Id.* at 1169 (internal quotation marks, brackets, and ellipses omitted). "[C]oncern for one's personal safety alone" was not considered sufficient good cause under the County's policy. *Id.* at 1148 (internal quotation marks omitted). For a CCW license to issue, the County required documentation of "a sufficiently pressing need for self-protection" which went beyond a general desire to carry firearms for self-defense. *Id*. The County's asserted reason for the policy was "to reduce the total number of firearms carried outside the home by limiting the privilege to those who can demonstrate 'good reason' beyond a general desire for self-defense." *Id.* at 1179.

The district court granted summary judgment in favor of the County, assuming without deciding that the Second Amendment encompassed plaintiffs' asserted right to carry a loaded handgun in public, and holding that intermediate scrutiny applied. *Id.* at 1148-49. The district court upheld the County's policy under intermediate scrutiny, finding that "California's 'important and substantial interest in public safety—particularly in reducing the risks to other members of the public posed by concealed handguns' disproportionate involvement in life-threatening crimes of violence'—trumped the applicant's allegedly burdened Second Amendment interest." *Id.* The Ninth Circuit reversed, finding that "[t]he district court erred in denying the applicant's motion for summary judgment on the Second Amendment claim because San Diego County's 'good cause' permitting requirement impermissibly infringes on the Second Amendment right to bear arms in lawful self-defense." *Id.* at 1179.

The *Peruta* court described the two-step methodology prescribed by *Heller* as follows: "it addressed, first, whether [the restricted activity] amount[ed] to 'keeping and bearing arms' within the meaning of the Second Amendment and, next, whether the challenged laws, if they indeed did burden constitutionally protected conduct, 'infringed' the right." *Id.* at 1150. The *Peruta* court instructed that, under *Heller* and *McDonald*, a court "must consult 'both text and history'" in order to determine the scope of the Second Amendment right. *Id.* at 1150 (quoting *Heller*, 554 U.S. at 595.) After engaging in an

extensive textual and historical analysis, the court held that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense, though subject to traditional restrictions, constitutes 'bear[ing] Arms' within the meaning of the Second Amendment." *Id.* at 1166. The court noted that "as in *Heller*, [it] consider[ed] the scope of the right only with respect to responsible, law-abiding citizens." *Id.* at 1150, n. 2.

Peruta noted the "sliding-scale" or "tiered-scrutiny" approaches previously taken by the Second, Third, and Fourth Circuits. *Id.* at 1167 (internal citations omitted). These courts agreed, as a general matter, that "the level of scrutiny applied to gun control regulations depends on the regulation's burden on the Second Amendment right to keep and bear arms." *Id.* (internal citations omitted). "Under this general approach, severe restrictions on the 'core' right have been thought to trigger a kind of strict scrutiny, while less severe burdens have been reviewed under some lesser form of heightened scrutiny." *Id.* at 1167-68.

The court contrasted this perspective with the "alternative approach for the most severe cases" set forth in *Heller*, which assesses whether a given restriction effected a "*destruction* of the right rather than merely *burdening* it," and was therefore impermissible under any standard of review. *Id.* at 1168 (emphasis in original). The court noted that it had applied intermediate scrutiny to a Second Amendment claim in *Chovan*, a case which involved a "substantial burden on" on a right "outside the core of the Second Amendment," but that "[i]ntermediate scrutiny is not appropriate . . . for cases involving the destruction of a right at the core of the Second Amendment." *Id.* at 1168, n. 15.

The *Peruta* court specifically declined to apply any particular standard of heightened scrutiny "[b]ecause [its] analysis paralleled the analysis in *Heller* itself." *Id.* at 1175. The court held that a policy which completely enjoins the right of a "responsible, law-abiding citizen" to carry a handgun in public for self-defense "cannot be sustained under any standard of scrutiny." 742 F.3d at 1175. The court found that, given the prohibition on *open* carry of a firearm in public under California law, a policy

which entirely enjoined the *concealed* carry of firearms by a responsible, law-abiding citizen would not pass constitutional muster. *Id.* at 1175 (emphasis added). The court instructed that it was "not holding that the Second Amendment requires the states to permit concealed carry" but that "the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home." *Id.* at 1172. (emphasis in the original).

Chief Judge Sidney Thomas dissented, asserting that restrictions on carrying concealed weapons are "presumptively lawful" under *Heller*, and that "[t]he majority opinion conflicts with *Heller*, the reasoned decisions of other Circuits, and our own case law." *Id.* at 1179 (Thomas, C.J., dissenting).

The dissent noted that "[t]he Supreme Court has not as yet defined the extent to which the Second Amendment applies outside the home, and that issue has been the subject of intense debate in the intermediate appellate courts." *Id.* at 1180. The dissent engaged in its own extensive analysis of the historical right to carry a concealed weapon in public, or lack thereof, emphasizing that, "[a]s the Supreme Court recognized in *Heller*, courts and state legislatures have long recognized the danger to public safety of allowing unregulated, concealed weapons to be carried in public." *Id.* at 1180-91. The dissent concluded that the act of carrying concealed weapons in public is not protected by the Second Amendment. *Id.* at 1191.

The dissent also asserted that, even if such a right were protected by the Second Amendment, the policy at issue "easily survives intermediate scrutiny" in that the government has identified "significant, substantial, or important objectives and provided a reasonable fit between the challenged regulation and the asserted objective." *Id.* at 1193-94.

c. *Richards v. Prieto*

In *Richards v. Prieto*, the Ninth Circuit applied the *Peruta* holding to an essentially identical policy of Yolo County regarding the "good cause" requirement for issuing a CCW License. *Richards v. Prieto*, 560 F. App'x 681, 682 (9th Cir. 2014), *reh'g en banc*

granted, 782 F.3d 417 (9th Cir. 2015). Chief Judge Thomas concurred in the judgment, stating that *Peruta* did compel such an outcome, but that, "[a]bsent *Peruta*" he would hold that Yolo County's "good cause" requirement was constitutional, because carrying concealed weapons in public is not protected by the Second Amendment and, in the alternative, because the policy would survive intermediate scrutiny. *Id.* (Thomas, C.J., concurring).

The Ninth Circuit has subsequently ordered both *Peruta* and *Richards* to be reheard *en banc*. *Peruta v. Cty. of San Diego*, 781 F.3d 1106, 1107 (9th Cir. 2015); *Richards v. Prieto*, 782 F.3d 417 (9th Cir. 2015).

3. Nordstrom's Claim

Here, the Court will apply the two-part test described in both *Chovan* and *Peruta*, which requires an inquiry first into whether the restricted activity is protected by the Second Amendment and, if so, whether the challenged law or policy impermissibly infringes that right. 735 F.3d at 1136; 742 F.3d at 1150.

a. Scope of the right

While in general a court must consult "both text and history" in order to determine the scope of the Second Amendment right, *Heller*, 554 U.S. at 595, the Court relies largely on the historical and textual analysis already undertaken by the Supreme Court and the Ninth Circuit and the express holdings of those courts in addressing the scope of the Second Amendment right potentially infringed by the denial of Nordstrom's CCW License.

In *Peruta*, the Ninth Circuit held that carrying a handgun outside the home for the purpose of self-defense, though still subject to traditional restrictions, is a right protected by the Second Amendment. 742 F.3d at 1166. The court found that, because California's regulatory scheme prohibited the open carry of firearms in public, concealed carry of firearms was the only remaining lawful option for exercising the right in California. *Id.* at 1175. The *Peruta* court specified, however, that "[i]n this case, as in *Heller*, we consider the scope of the right only with respect to responsible, law-abiding

citizens." *Id.* at 1150, n. 2.

Heller and its Ninth Circuit progeny have consistently held that the "core" of the individual Second Amendment right to keep and bear arms in self-defense is that of "responsible, law-abiding citizens." *See Heller*, 554 U.S. at 635 (addressing the rights of "law-abiding, responsible citizens to use arms in defense of hearth and home."); *Fyock v. Sunnyvale*, 779 F.3d 991, 996-97 (9th Cir. 2015) ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes.") (internal citation and quotation marks omitted); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015) ("[A] core right under the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home") (internal citation and quotation marks omitted); *Chovan*, 735 F.3d at 1138; ("*Heller* tells us that the core of the Second Amendment is the right of law-abiding, responsible citizens to use arms in defense of hearth and home."); *Vongxay*, 594 F.3d at 1115 ("*Heller* limits the protected class to law abiding, responsible citizens.") (internal quotation marks omitted); *Baker v. Kealoha*, 564 F. App'x 903, 904 (9th Cir. 2014) ("[T]he Second Amendment provides a responsible, law-abiding citizen with a right to carry an operable handgun outside the home for the purpose of self-defense.").

The *Peruta* court instructed that "[w]ith respect to irresponsible or non-law-abiding citizens, a different analysis—which we decline to undertake here—applies." 742 F.3d at 1150, n. 2. The *Peruta* court did not elaborate on the definition of "irresponsible" or "non-law-abiding," but cited to *Chovan*'s holding that regulation of possession of firearms by people with criminal convictions did not implicate the core Second Amendment right, 735 F.3d at 1138, and *Heller*'s admonition that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," 554 U.S. at 626, 128 S. Ct. 2783. *Id.*

Neither the Ninth Circuit nor the Supreme Court has outlined what factors beyond felony convictions, misdemeanor domestic violence convictions, and mental illness may

be considered in determining whether a person is "irresponsible" or "non-law-abiding" for Second Amendment purposes. Other types of convictions, arrests, criminal charges, restraining orders, evidence of psychological disturbance or other mental health issues, substance use, bankruptcy, or financial and other malfeasance may weigh toward a finding that a person is not entitled to the full scope of Second Amendment rights.[7]

Nordstrom has alleged that he is (1) a law-abiding citizen who was not disqualified from obtaining a license by his criminal background check, (2) a resident of Ventura County, (3) had submitted proof to the Sheriff's Office that he completed the required training, and (4) was denied a CCW license.

Nordstrom has not alleged any facts regarding the grounds given, if any, for the denial of his CCW License. As noted above, section 26150 provides that a sheriff may issue a CCW license upon proof that (1) the applicant is of good moral character; (2) good cause exists for issuance of the license; (3) the applicant is a resident of the county; and (4) the applicant has completed an appropriate course of training. Cal. Penal Code § 26150. Given the facts as alleged, it is not clear whether the license was denied for lack of good moral character, lack of good cause, some other reason, or no reason at all. Nordstrom must allege *some* facts which, taken as true, would establish that the permit was denied on impermissible grounds.

Given the total absence of facts alleged in the Complaint regarding the reason for the denial of the license, the pleadings do not support the inference that the Ventura County Policy prevents "the typical responsible, law-abiding citizen [from] bear[ing]

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[7] For example, courts in the Ninth Circuit have held that some active habitual drug or alcohol abusers may have forfeited their Second Amendment right. *Fisher v. Kealoha*, 976 F. Supp. 2d 1200, 1225-26 (D. Haw. 2013), *on reconsideration*, 49 F. Supp. 3d 727 (D. Haw. 2014) (evidence that a plaintiff was "adversely affected by drugs or alcohol" demonstrated that "Plaintiff has not established that he qualifies as an individual who may keep and bear arms under the Second Amendment"); *see also United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) ("[W]e see the same amount of danger in allowing habitual drug users to traffic in firearms as we see in allowing felons and mentally ill people to do so.").

arms in public for the lawful purpose of self-defense," *Peruta*, 742 F.3d at 1169, or considers factors reasonably related to determining whether a person is a responsible, law-abiding citizen with a cognizable Second Amendment right. In *Peruta*, the County policy failed both because the Plaintiffs were "responsible, law-abiding citizens" *and* because its "good cause" requirement depended on factors wholly unrelated to that consideration. Nordstrom has successfully alleged that he is a "law-abiding citizen,"[8] but without some facts establishing on what grounds the CCW license was denied and why those grounds were impermissible or inaccurate considerations, the Court cannot determine whether the Complaint states a claim that the Sheriff impermissibly restricted a genuine Second Amendment right and, if so, how close that right is to the "core" of the Second Amendment.[9]

b. Infringement of the Right

Because Nordstrom has not alleged sufficient facts to establish what Second Amendment rights, if any, have been restricted by the denial of his license, the Court need not reach the question of whether any such alleged right has been violated. In any case, Nordstrom has also failed to allege facts sufficient to establish whether a Second Amendment right has been impermissibly infringed.

Without the allegation of facts regarding the reason for the denial of Nordstrom's license or the substance of the County's policy, the the Complaint does not set forth sufficient facts regarding the scope of the restricted right, its proximity to the core of the Second Amendment, or whether any form of heightened scrutiny would be satisfied here. Because the Court cannot determine from the facts as currently alleged whether any such

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[8] The Complaint also does not allege sufficient facts which support an inference as to whether Nordstrom is a "responsible" citizen.

[9] For example, if Nordstrom's permit was denied on the ground that he is on a mental health registry, his claim would fail as a matter of law, regardless of the fact that he has alleged that he is a "law-abiding citizen." Some grounds for denial of a permit are in keeping with "those longstanding prohibitions" delineated by *Heller* as permissible, and some are not.

right may have been impermissibly infringed, Plaintiff's motion for summary judgment is premature.

B. Violation of Statutorily-Mandated Time Limit

Nordstrom also alleges that the Sheriff failed to adhere to the statutory time limits for issuing a CCW license. (Complaint ¶ 10; MTD Opp. at 1.) As Defendant notes, this does not give rise to a section 1983 claim, which is the only claim in Nordstrom's complaint. (MTD at 16-17.) Section 1983 applies only to the violation of federal constitutional or statutory rights. *Tatum v. Moody*, 768 F.3d 806, 814 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2312, 191 L. Ed. 2d 978 (2015) ("Section 1983 creates a private right of action against individuals who, acting under color of state law, violate *federal* constitutional or statutory rights.") (emphasis added). Violation of a state statutory time limit for issuing a permit may not be challenged under section 1983.

C. Immunity

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct *Kirkpatrick v. Cty. of Washoe*, 792 F.3d 1184, 1193 (9th Cir. 2015) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011)).

Whether or not the Sheriff has violated a constitutional right, it is clear that any such right was not "clearly established" at the time of the challenged conduct. While *Peruta* had been decided by the time Nordstrom's application was denied, "[t]he Supreme Court has not as yet defined the extent to which the Second Amendment applies outside the home, and that issue has been the subject of intense debate in the intermediate appellate courts." 742 F.3d. at 1180 (Thomas, C.J., dissenting). To the extent that Nordstrom seeks monetary damages against the Sheriff in his individual capacity, the Sheriff is shielded by qualified immunity.

"Qualified immunity, however, is a defense available only to government officials sued in their individual capacities. It is *not* available to those sued only in their official

capacities." *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 965 (9th Cir. 2010) (emphasis in original). Defendants contend that, to the extent that Nordstrom alleges any claims for damages against the Sheriff in his official capacity, he is entitled to Eleventh Amendment immunity. (MTD at 7.)

"[T]he Eleventh Amendment bars a section 1983 damages claim against state actors sued in their official capacities, [but] it does not bar suits against counties or similar municipal corporations." *Leon v. Cty. of San Diego*, 115 F. Supp. 2d 1197, 1200 (S.D. Cal. 2000) (internal citations and quotation marks omitted). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45 (1989). "As such, it is no different from a suit against the State [or county] itself." *Id.*

In *Scocca v. Smith*, the Northern District held that a county sheriff acting as a CCW Licensing authority acted as a representative of the State of California, not the county, for Eleventh Amendment purposes. 912 F. Supp. 2d 875, 882 (N.D. Cal. 2012).

The *Scocca* court found that there was not a sufficiently complete delegation of the licensing power from the State to the sheriff "such that a suit for abuse of that power is not a suit against the State." *Id.* (internal citation and quotation marks omitted). The court distinguished the sheriff's power to act as a licensing authority, which is granted and controlled by the State, from the actions of a sheriff in investigating a crime or overseeing a jail, which counties retain the power to control. *Id.* at 882-83. The court reasoned that the State retained control over the CCW licensing process in a number of ways, including the requirement that applications for licenses "shall be uniform throughout the state," that such a license "shall not be issued if the Department of Justice determines that the person is prohibited by state or federal law from possession, receiving, owning, or purchasing a firearm," and the general rule that a CCW License is applicable throughout the State. *Id.* at 883-84 (citing Cal. Penal Code §§ 26175(a)(1), 26225(b), and 26195(a), internal quotation marks omitted). The Court is persuaded by

the *Scocca* court's reasoning and finds that, in acting as a CCW licensing authority, the Sheriff acted as a representative of the State, and is accordingly immune from a claim for damages in his official capacity.

There is "one vital exception" to the general rule that state officials sued in their official capacities are entitled to Eleventh Amendment immunity: when sued for declaratory or injunctive relief, an official working in his official capacity is considered a "person" for section 1983 purposes, and is not immune from suit. *Flint v. Dennison*, 488 F.3d 816, 825 (9th Cir. 2007). "This exception recognizes the doctrine of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), that a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity." *Id.* Under the *Ex parte Young* doctrine, "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255, 131 S. Ct. 1632, 1638, 179 L. Ed. 2d 675 (2011); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, 104 S. Ct. 900, 910, 79 L. Ed. 2d 67 (1984) ("[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States.").

To the extent that Nordstrom seeks damages, the Sheriff is immune from any damages claim in both his individual and official capacities. This does not preclude Nordstrom from seeking injunctive relief, should he succeed in stating a claim.

D. Motion for More Definite Statement

Pursuant to Federal Rule of Civil Procedure 12(e), a party may move for a "more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). Rule 12(e) motions are "disfavored and rarely granted." *Griffin v. Cedar Fair, L.P.*, 817 F. Supp. 2d 1152, 1156 (N.D. Cal. 2011) (internal citation and quotation marks omitted). "The rule is aimed at unintelligibility rather than lack of detail and is only

appropriate when the defendants cannot understand the substance of the claim asserted." *Id*. Such a motion "is proper only where the complaint is so indefinite that the defendant cannot ascertain the nature of the claim being asserted." *True v. Am. Honda Motor Co.*, 520 F. Supp. 2d 1175, 1179 (C.D. Cal. 2007) (internal citations and quotation marks omitted).

Defendant moves for a more definite statement, complaining that Plaintiff (1) does not allege in what capacity the Sheriff is being sued; (2) misstates California law, and does not allege sufficient facts as to why the Sheriff's denial of a CCW license is a substantial infringement on his Second Amendment right to keep and bear arms; (3) does not allege sufficient facts for the Sheriff to determine whether Plaintiff making a facial or as-applied challenge to the statute; (4) does not allege facts regarding the Sheriff's basis for denial of the CCW Application; (5) does not specify whether he is attempting to allege that he has been denied equal protection under a "class of one" theory given that he does not allege that he was denied a CCW license when other similarly situated persons were approved. (*Id.* at 5-6.)

"Under the Federal Rules of Civil Procedure, a complaint need not pin plaintiff's claim for relief to a precise legal theory." *Kirkpatrick v. Cty. of Washoe*, 792 F.3d 1184, 1191 (9th Cir. 2015) (internal citation and quotation marks omitted). "Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Id.* (internal citation and quotation marks omitted). "[A] plaintiff does not need to plead specific legal theories in the complaint, as long as the opposing party receives notice as to what is at issue in the lawsuit." *Scott v. Mortgage Elec. Registration Sys., Inc.*, 605 F. App'x 598, 599 (9th Cir. 2015) (internal citation and quotation marks omitted); *see also Ibrahim v. Dep't of Homeland Sec.*, 538 F.3d 1250, 1254 n. 5 (9th Cir. 2008) (same). "Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief." *Kirkpatrick*, 792 F.3d at 1192 (internal citation and quotation marks omitted); *see also Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir.

2008) ("A complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss.").

In this case, it is clear that what is at issue is Sheriff's denial of Nordstrom's application for a CCW License, and the sources of the claims are the Second Amendment and 42 U.S.C. section 1983. Nordstrom is not required to lay out in detail whether he believes he will prevail on an equal protection "class of one" theory, whether he is challenging the statute on a facial or as-applied basis, or any other legal theory on which he believes he will prevail. A plaintiff need only allege facts showing that he "may be entitled to some relief." *Kirkpatrick*, 792 F. at 1192.

The Court has found that Nordstrom has failed to state a claim, but this is largely for a lack of factual detail, rather than unintelligibility. *True*, 520 F. Supp. 2d at 1179 (A motion for a more definite statement is "aimed at unintelligibility rather than lack of detail."). Nordstrom's complaint may have failed to state a claim, but it is sufficiently intelligible for Defendant to ascertain the nature of the claim against him.

Defendant's request for a more definite statement is **DENIED**.

E. Motion to Quash Service of Summons

Federal Rule of Civil Procedure 12(b)(4) permits a defendant to challenge the form of a summons for "insufficient process." Defendant contends that the Court should quash service of the summons on the Sheriff because the summons failed to identify whether he was being sued in his official capacity, his personal capacity, or both. (MTD at 18.)

"Rule 4 is a flexible rule that should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint." *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994) (citing *United Food & Commercial Workers Union, Locals 197, et al. v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (1984)). "Technical defects in a summons do not justify dismissal unless a party is able to demonstrate actual prejudice." *Id.* (internal citation omitted); *see also U.S.A. Nutrasource, Inc. v. CNA Ins. Co.*, 140 F. Supp. 2d 1049, 1052 (N.D. Cal. 2001) ("Dismissals for defects in the form of summons are generally disfavored. Such defects are considered 'technical' and hence are

not a ground for dismissal unless the defendant demonstrates actual prejudice.").

"Under California law, a summons must substantially comply with the statutory requirements in order for service of it to constitute effective service." *Matthews Metals Products, Inc. v. RBM Precision Metal Products, Inc.*, 186 F.R.D. 581, 582 (N.D. Cal. 1999). In *Matthews*, the court found that a defendant was not properly served where the plaintiff used an approved summons form containing all of the required language set forth in California Code of Civil Procedure section 412.20, but failed to give notice to the defendant that he was being sued personally, rather than as an officer of the corporate defendant. *Id.* The *Matthews* court made this finding in determining that the individual defendant was therefore not required to join in a request for removal. *Id.*

Nothing in section 412.20 requires notice to a defendant of whether she is being sued in her individual or official capacity. *See* Cal. Civ. Proc. Code § 412.20. The Sheriff has not identified a relevant statutory provision or case so requiring, nor is the court aware of any. There is no indication that Defendant did not receive sufficient notice of the complaint or that he was prejudiced by the failure to identify whether he was being sued in his individual or official capacity. In *Matthews*, the failure to distinguish between individual and official capacity was prejudicial, in that the defendant was not aware that he was required to join in the removal as an individual defendant. Here, given that the Sheriff is the sole Defendant, no such confusion has arisen.

The motion to quash summons is **DENIED**.

F. Leave to Amend

The defects in Nordstrom's complaint are largely those of omission, in that he fails to allege facts sufficient to allow the Court to determine whether he was denied a permit on impermissible grounds and therefore whether he has stated a claim which may entitle him to relief. It is not clear that it would be impossible for Nordstrom to allege additional facts that successfully state a claim, and leave to amend should be freely granted unless it is certain that amendment would be futile.

The Court notes that, in rehearing *Peruta* and *Richards en banc*, the Ninth Circuit is likely to revisit the relevant issues raised in *Peruta*, particularly: (1) whether the Second Amendment protects the carrying of a concealed weapon in public at all and (2) the applicability of intermediate scrutiny to county policies regarding CCW licensing requirements. The outcome of this rehearing would likely be significant, if not dispositive, in determining whether it would be futile for Nordstrom to amend his complaint. Nonetheless, the Court finds that it would not be futile to grant leave to amend under *current* Ninth Circuit law, and therefore dismisses the Complaint with leave to amend.

IV.
CONCLUSION

In light of the foregoing, the Court issues the following ruling:

(1) Defendant's motion to dismiss is **GRANTED** with leave to amend;

(2) Defendant's motion for a more definite statement is **DENIED**;

(3) Defendant's motion to quash summons is **DENIED**; and

(4) Plaintiff's motion for summary judgment is **DENIED** without prejudice as premature.

Plaintiff shall file any amended complaint within 21 days from the date of this Order. Defendant shall file his response within 21 days after filing and service of the amended complaint.

IT IS SO ORDERED.

DATED: January 8, 2016

DOLLY M. GEE
UNITED STATES DISTRICT JUDGE