

Tentative Order re: Motion for Preliminary Injunction

Plaintiffs Dorothy McKay (“McKay”), Diana Kilgore (“Kilgore”), Phillip Willms (“Willms”), Fred Kogen (“Kogen”), David Weiss (“Weiss”), and The CRPA Foundation (“CRPA”) (collectively, “Plaintiffs”) move pursuant to Federal Rule of Civil Procedure 65(a) for a preliminary injunction against Defendants Sheriff Sandra Hutchens (“Sheriff Hutchens” or “the Sheriff”) and the Orange County Sheriff-Coroner Department (“OCSD”) (collectively, “Defendants”). (Motion for Preliminary Injunction, Docket No. 6.) Plaintiffs seek to enjoin Defendants from enforcing Sheriff Hutchens’ policy implementing the “good cause” criterion of California Penal Code § 26150(a)(2) in any manner that does not recognize “a general desire for self-defense as satisfying the ‘good cause’ criterion” of § 26150(a). (Id.) Alternatively, Plaintiffs seek to enjoin Defendants from enforcing the “good cause” requirement of § 26150(a)(2).<sup>1</sup> (Id.) Defendants argue that Plaintiffs are unlikely to succeed on the merits of their claims for relief based on the Second and Fourteenth Amendments. (Opposition to Motion for Preliminary Injunction (“Opp. Br.”), Docket No. 15.)

For the following reasons, the Court **DENIES** Plaintiffs’ Motion for Preliminary Injunction.

I. BACKGROUND

California law generally and with certain exceptions prohibits individuals from carrying a concealed firearm in public, whether loaded or unloaded. See Cal. Penal Code §§ 25850, 26350, 25400.<sup>2</sup> One can obtain a license to carry a firearm

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<sup>1</sup>The State of California is not a party to the action.

<sup>2</sup>California carves out exceptions to the statute. See, e.g., Cal. Penal Code §§ 25525, 25530, 25535, 25550 (excluding transport between person’s place of business or residence or other private property owned or possessed by that person, transport related to coming and going from gun show or swap meet, transport to or from lawful camping site); 25600 (allowing for justifiable violation of § 25400 when a person who possesses a firearm reasonably believes she is in grave danger because of circumstances forming basis of current restraining order). Nothing

“capable of being concealed upon the person.” Cal. Penal Code § 26150(a).<sup>3</sup> An applicant must demonstrate that she is of “good moral character,” must provide “good cause for issuance of the license,” and must complete a training course. Id. California grants the issuing authority “extremely broad discretion” concerning the issuance of the concealed weapons license “to applicants meeting the minimum statutory requirements.” Gifford v. City of Los Angeles, 88 Cal. App. 4th 801, 805 (2005) (quotations omitted) (interpreting Cal. Penal Code § 12050); Erdelyi v. O’Brien, 680 F.2d 61, 63 (9th Cir. 1982). The sheriff must make the investigation and determination on an individual basis on every application. Gifford, 88 Cal. App. 4th at 805 (quoting Salute v. Pitchess, 61 Cal. App. 3d 557, 560–61 (1976)).

OCSD created an official written policy regulating the issuance of concealed carry licenses to Orange County residents.<sup>4</sup> (CCW License Policy.) Under the policy, “good cause” is evaluated by Sheriff Hutchens and her authorized representatives “on an individual basis.” (Declaration of Lt. Sheryl Dubsky (“Dubsky Decl.”), Docket No. 15-5, at ¶¶ 3, 6.) The CCW License Policy enumerates criteria that “may establish good cause,” including but not limited to: specific evidence of a credible threat of great bodily harm against the applicant, being in a business or occupation subjecting the applicant to high personal risk and/or criminal attack “far greater” than the general population, and having business tasks requiring transportation of large sums of money. (CCW License Policy, at 1.) “Threats to personal safety [of the applicant or his/her family or employees] may be verbal or demonstrated through actual harm committed in the place of work, neighborhood or regular routes of travel for business.” (Id.) The applicant must “articulate the threat.” (Id.) Particularly relevant here, “[n]on-specific, general concerns about personal safety are insufficient.” (Id.)

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prevents a person from carrying a handgun, concealed or otherwise, in her home, place of business, or other private property she owns or lawfully possesses. Id. § 25605.

<sup>3</sup>Cal. Penal Code § 26150 previously was codified as § 12050. Both sections contain the “good cause” requirement. “Section 26150 continues former Section 12050(a)(1)(A) & (D) without substantive change.” Law Revision Commission Comments, Cal. Penal Code § 26150.

<sup>4</sup>The Court takes judicial notice of the CCW License Policy, an official public document. See Fed. R. Evid. 201 (judicial notice of adjudicative facts permitted); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (judicial notice of public documents permitted).

## II. LEGAL STANDARD

Plaintiffs seeking a preliminary injunction must establish: (1) a likelihood of success on the merits, (2) the possibility of irreparable injury in the absence of preliminary relief, (3) the balance of equities favors the plaintiff, and (4) an injunction is in the public interest. Winter v. Nat'l Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see also Raich v. Ashcroft, 352 F.3d 1222, 1227 (9th Cir. 2003). In the Ninth Circuit, the Winter factors may be evaluated on a sliding scale: “serious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134–35 (9th Cir. 2011).

A preliminary injunction is an extraordinary and drastic remedy. Winter, 555 U.S. at 25. The grant or denial of a preliminary injunction is within the discretion of the trial court. Deckert v. Independence Shares Corp., 311 U.S. 282, 290 (1940). Additionally, the trial court need not grant all relief sought by a movant and can modify its injunctive decree as needed for the particular case presented. See e.g., Maxam v. Lower Sioux Indian Cmty. of Minn., 829 F. Supp. 277, 284 (1993).

## III. DISCUSSION

### A. Likelihood of Success on the Merits

Plaintiffs argue that the Supreme Court in District of Columbia v. Heller, 554 U.S. 570 (2008), established that “the right to armed self-defense exists in both private and public settings” and that OCSD’s policy violates this right. The Court finds that there is a substantial question as to whether Plaintiffs have a likelihood of prevailing on the merits. Constitutional challenges to comparable laws and policies repeatedly have been rejected in California and other states. See, e.g., Peruta v. County of San Diego, 758 F. Supp. 2d 1106 (S.D. Cal. 2010) (declining to decide whether Second Amendment encompasses Plaintiff’s right to carry loaded handgun in public but holding that under intermediate scrutiny, sheriff’s policy requiring applicant for concealed carry license to demonstrate “good cause” did not violate right to bear arms); Richards v. County of Yolo, 821

F. Supp. 2d 1169 (E.D. Cal. 2011) (holding that Second Amendment does not create fundamental right to carry concealed weapon in public and that county's concealed weapon licensing policy was rationally related to goal of maintaining public safety and preventing gun-related crime); Piszczatoski v. Filko, 840 F. Supp. 2d 813 (D.N.J. 2012) (holding that New Jersey law requiring permit applicants to demonstrate "justifiable need" to carry a handgun did not burden protected conduct under Second Amendment and was sufficiently tailored to governmental interests in regulating possession of firearms outside the home). Further, other courts repeatedly have declined to extend Heller beyond its core holding regarding possession in the home for self-defense. See, e.g., United States v. Masciandaro, 638 F.3d 458, 574 (4th Cir. 2011) ("On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the [Supreme] Court itself."). Thus, at this stage, the Court finds that this factor heavily weighs against a preliminary injunction.

#### B. Irreparable Harm

Generally, irreparable harm is presumed if Plaintiffs show a violation of the Constitution. Goldie's Bookstore, Inc. v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984). Where a federal injunction is sought against a governmental entity, the party requesting relief must show a threat of "great and immediate," not conjectural or hypothetical, irreparable harm. City of Los Angeles v. Lyons, 461 U.S. 95, 113 (1983); see also Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 557 (9th Cir. 1990). Because of the substantial question about the extent of the Second Amendment right as recognized in Heller, the Court does not find that there is a likelihood of a real, immediate, and non-conjectural violation of a constitutional right. Further, California provides several exceptions to the restriction of concealed and open carry, including for self-defense and defense of the home. Thus, to the extent that the challenged statute and Defendants' policy burden conduct potentially falling within the scope of the Second Amendment, if at all, "the burden is mitigated by the provisions . . . that expressly permit loaded open carry for immediate self-defense." Peruta, 758 F. Supp. 2d at 1114-15 (detailing California's statutory scheme). Thus, the Court finds that this factor weighs against a preliminary injunction.

#### C. Balance of Equities & The Public Interest

“Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home,” the Court finds that “the risks associated with a judicial error” in enjoining “regulation of firearms carried in public are too great” to justify a preliminary injunction. Piszczatoski, 840 F. Supp. 2d at 829; see also Masciandaro, 638 F.3d at 475 (recognizing potential consequences to public interest if court miscalculates as to Second Amendment rights). The Court will not presume that Plaintiffs’ allegations of irreparable harm in the constitutional sense give rise to a presumption that the hardships entailed with a preliminary injunction favor the party claiming the constitutional violations, especially where neither California or OCSD categorically ban the public carrying of a handgun. Thus, the Court finds that the balance of equities and the public interest weigh against a preliminary injunction.

#### IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs’ Motion for Preliminary Injunction of the CCW License Policy and/or California Penal Code § 26150(a)(2).

IT IS SO ORDERED.