

NOV 30 2012

No. 12-57049

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

DOROTHY MCKAY et. al.,

*Plaintiffs-Appellants,*

v.

SHERIFF SANDRA HUTCHENS, et. al.,

*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
(SACV 12-1458JVS)

---

**APPELLANTS' EXCERPTS OF RECORD  
VOLUME I of II**

---

C. D. Michel (S.B.N. 144258)  
Glenn S. McRoberts (S.B.N. 144852)  
Sean A. Brady (S.B.N. 262007)  
Anna M. Barvir (S.B.N. 268728)  
MICHEL & ASSOCIATES, P.C.  
180 East Ocean Blvd., Suite 200  
Long Beach, CA 908502  
Tel. No. (562) 216-4444  
Fax No: (562) 216-4445  
e-mail: cmichel@michellawyers.com

**Counsel for Plaintiffs-Appellants**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

DOROTHY MCKAY et. al.,

*Plaintiffs-Appellants,*

v.

SHERIFF SANDRA HUTCHENS, et. al.,

*Defendants-Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA  
(SACV 12-1458JVS)

---

**APPELLANTS' EXCERPTS OF RECORD  
VOLUME I of II**

---

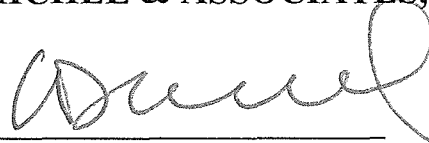
C. D. Michel (S.B.N. 144258)  
Glenn S. McRoberts (S.B.N. 144852)  
Sean A. Brady (S.B.N. 262007)  
Anna M. Barvir (S.B.N. 268728)  
MICHEL & ASSOCIATES, P.C.  
180 East Ocean Blvd., Suite 200  
Long Beach, CA 908502  
Tel. No. (562) 216-4444  
Fax No: (562) 216-4445  
e-mail: cmichel@michellawyers.com

**Counsel for Plaintiffs-Appellants**

Pursuant to Ninth Circuit Rule 30-1, Plaintiffs-Appellants Dorothy McKay, Diana Kilgore, Phillip Willms, Fred Kogen, David Weiss, and the CRPA Foundation, by and through their counsel of record, hereby confirm to the contents and form of Appellants' Excerpts of Record Volume I of II on appeal.

Date: November 28, 2012

**MICHEL & ASSOCIATES, P.C.**

A handwritten signature in black ink, appearing to read "C. D. Michel", written over a horizontal line.

C. D. Michel

Attorney for Plaintiffs/Appellants

## INDEX TO APPELLANTS' EXCERPTS OF RECORD

### VOLUME I

<b>CD Cal. Docket No</b>	<b>File Date</b>	<b>Document Description</b>	<b>Page</b>
21	11/1/2012	Order Denying Plaintiffs' Motion for Preliminary Injunction	ER000001 - ER000005

### VOLUME II

<b>CD Cal. Docket No</b>	<b>File Date</b>	<b>Document Description</b>	<b>Page</b>
25	11/9/2012	Notice of Appeal and Representation Statement	ER000006 - ER000015
17	10/16/2012	Plaintiffs' Reply to Opposition to Motion for Preliminary Injunction	ER000016 - ER000042
16	10/11//2012	Notice of Errata & Correction to Melissa Soto's Declaration in Support of Defendants' Opposition to Motion for Preliminary Injunction	ER000043 - ER000076

<b>CD Cal. Docket No</b>	<b>File Date</b>	<b>Document Description</b>	<b>Page</b>
15	10/9/2012	Defendants' Opposition to Motion for Preliminary Injunction	ER000077 - ER000112
		Declaration of Franklin E. Zimring	ER000113 - ER000149
		Declaration of Vicki Sands	ER000150 - ER000152
		Declaration of Kathleen Raley	ER000153 - ER000169
		Declaration of Cmdr. Donald Barnes	ER000170 - ER000175
		Declaration of Lt. Cheryl Dusky	ER000176 - ER000196
11	9/18/2012	Notice of Errata and Correction to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction	ER000197 - ER000232

<b>CD Cal. Docket No</b>	<b>File Date</b>	<b>Document Description</b>	<b>Page</b>
6	9/11/2011	Notice of Motion and Motion for Preliminary Injunction	ER000233 - ER000235
		Declaration of Dorothy McKay	ER000236 - ER000238
		Declaration of David Weiss	ER000239 - ER000241
		Declaration of Diana Kilgore	ER000242 - ER000244
		Declaration of Fred Kogen	ER000245 - ER000247
		Declaration of Phillip Willms	ER000248 - ER000250
		Declaration of Silvio Montanarella	ER000251 - ER000253
19	10/25/2012	Answer to First Amended Complaint	ER000254 - ER000267
4	9/7/2012	First Amended Complaint	ER000268 - ER000285
Docket	11/19/2012	Trial Court Docket	ER000286 - ER000290

**APPELLANTS' EXCERPTS OF RECORD**  
**VOLUME I of II**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 12-1458 JVS (JPRx) Date October 29, 2012

Title Dorothy McKay et al. v. Sheriff Sandra Hutchens et al.

Present: The James V. Selna  
Honorable

Nancy Boehme  
Deputy Clerk

Sharon Seffens  
Court Reporter

Attorneys Present for Plaintiffs:

C.D. Michel  
Sean Brady

Attorneys Present for Defendants:

Nicole Walsh  
Marianne Van Riper

**Proceedings: Plaintiffs' Motion for Preliminary Injunction (Fld 9-11-12)**

**Cause called and counsel make their appearances. The Court's tentative ruling is issued. Counsel make their arguments. The Court DENIES the plaintiffs' motion and rules in accordance with the tentative ruling as follows:**

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

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



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 12-1458 JVS (JPRx) Date October 29, 2012

Title Dorothy McKay et al. v. Sheriff Sandra Hutchens et al.

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 “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

---

<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 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).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 12-1458 JVS (JPRx) Date October 29, 2012

Title Dorothy McKay et al. v. Sheriff Sandra Hutchens et al.

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.*)

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

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

Case No. SACV 12-1458 JVS (JPRx) Date October 29, 2012

Title Dorothy McKay et al. v. Sheriff Sandra Hutchens et al.

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); Piszczaatoski 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

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 12-1458 JVS (JPRx) Date October 29, 2012

Title Dorothy McKay et al. v. Sheriff Sandra Hutchens et al.

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. Piszcatoski, 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.

Initials of Preparer

0 : 19  
kjt

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On November 29, 2012, I served the foregoing document(s) described as

**APPELLANTS' EXCERPTS OF RECORD  
VOLUME I of II**

on the interested parties in this action by placing

☐ the original

☒ a true and correct copy

thereof enclosed in sealed envelope(s) addressed as follows:

“See Attached Service List”

X (BY MAIL) As follows: I am “readily familiar” with the firm’s practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on November 29, 2012, at Long Beach, California.

X (FEDERAL) I declare that I am employed in the office of the member of the bar of this of this court at whose direction the service was made.

  
\_\_\_\_\_  
CLAUDIA AYALA

## **SERVICE LIST**

*Dorothy McKay, et al. v. Sheriff Sandra Hutchens, et. al.*

Appellate Court No. 12-57049

District Court No.: SACV 12-1458JVS (JPRx)

Nicholas S. Chrisos, County Counsel  
Marianne Van Riper, Supervising Deputy  
Elizabeth A. Pejueau, Deputy  
333 West Santa Ana Blvd., Suite 407  
Post Office Box 1379  
Santa Ana, CA 92702-1379

