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2 Dec 13 2000

3 Clerk, U.S. District Court

4 Eastern District of

5 California

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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA

10 -----ooOoo-----

11 SEAN SILVEIRA; et al.,

12 Plaintiffs,

NO. CIV. S-00-0411 WBS/JFM

13 v.

MEMORANDUM AND ORDER

14 BILL LOCKYER, Attorney General, State of California;

15 GRAY DAVIS, Governor, State of California,

16 Defendants.

17 -----ooOoo-----

18 Defendants, Bill Lockyer and Gray Davis move to dismiss  
19 plaintiffs' first, third, fourth, sixth, seventh and eighth claims for  
20 failure to state a claim upon which relief can be granted pursuant to  
21 Federal Rule of Civil Procedure 12(b)(6), and plaintiffs' second and fifth  
22 claims for lack of subject matter jurisdiction pursuant to Federal Rule of  
23 Civil Procedure 12(b)(1).

24  
25 I. Facts

26 On January 1, 2000, Senate Bill 23 became state law as  
27 part of California Penal Code section 12280. Pursuant to section 12280,  
28 members of the public who, on or before December 31, 1999,

1 lawfully possessed assault weapons, as they are now defined in  
2 California Penal Code section 12276.1, have until December 31,  
3 2000, to register their assault weapons with the California  
4 Department of Justice, or remove the characteristics which make  
5 the firearm an assault weapon.

6 Section 12280 was intended to expand the definition of  
7 assault weapons and to place restrictions on the manufacture,  
8 sale, possession, and use of the firearms described in the  
9 legislation. Section 12280 also bans the sale of large capacity  
10 magazines, defined as "any ammunition feeding device" capable of  
11 holding more than ten rounds of ammunition, but does not ban the  
12 possession of them.

13 Plaintiffs filed this action for three stated purposes,  
14 only two of which are relevant to this motion. "First, it is a  
15 specific challenge to the current state of the law in the Ninth  
16 Circuit holdings. Second, it challenges the constitutionality of  
17 the current State of California gun laws." (Opp'n at 4:16-17).

## 18 II. Discussion

### 19 A. Standards for 12(b) (1) and 12(b) (6)

20 Where a jurisdictional issue is separable from the  
21 merits of a case, the court may determine jurisdiction under Rule  
22 12(b) (1). Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.  
23 1987). However, where the jurisdiction issue is "dependent on  
24 the resolution of factual issues going to the merits," the court  
25 may not resolve such disputes before trial. Augustine v. United  
26 States, 704 F.2d 1074, 1077 (9th Cir. 1983). Instead, the court  
27 must assume that the allegations in the complaint are true,  
28 unless controverted by undisputed facts in the record. Roberts,

1 812 F.2d at 1177.

2 A district court must dismiss a complaint if it fails  
3 to state a claim upon which relief can be granted. See Fed. R.  
4 Civ. P. 12(b) (6). In ruling on a 12(b) (6) motion, the court must  
5 view all allegations and draw all inferences in the light most  
6 favorable to the non-moving party. See NL Indus., Inc. v.  
7 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). "A complaint should  
8 not be dismissed . . . unless it appears beyond doubt that the  
9 plaintiff can prove no set of facts in support of his claim which  
10 would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-  
11 46 (1957).

12 B. Plaintiffs' First Cause of Action

13 In their first cause of action plaintiffs allege that  
14 section 12280 violates their Second Amendment right to bear arms  
15 "by virtue of its incorporation into the State Constitution and  
16 by virtue of the Fourteenth Amendment." Plaintiffs' claim fails  
17 for two reasons. First, the Ninth Circuit has clearly held that  
18 the Second Amendment does not constrain the states by virtue of  
19 the Fourteenth Amendment. See Fresno Rifle & Pistol Club, Inc.  
20 v. Van De Ramp, 965 F.2d 723, 729-31 (9th dr. 1992); see also  
21 Hickman v. Block, 81 F.3d 98, 103, n.10 (9th Cir. 1996).

22 Second, following precedent from the United States  
23 Supreme Court in United States v. Miller, 307 U.S. 174 (1939),  
24 the Ninth Circuit has also clearly held that the Second Amendment  
25 guarantees a collective right of the states to maintain armed  
26 militia rather than an individual right. Hickman, 81 F.3d at  
27 102.

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1                   Accordingly, plaintiffs cannot prove any set of facts  
2 whereby they can sustain a claim for relief, and their first  
3 cause of action must be dismissed.

4           C. Plaintiffs' Second Cause of Action

5                   Plaintiffs allege in their second cause of action that  
6 "their property is now devalued since they are unable to obtain  
7 the highest value that their property would be worth in an open  
8 and free market." (Am. Compl. 91 85). The amended complaint  
9 further alleges that the plaintiffs' property has "now been  
10 rendered worthless." (Id.) Plaintiffs claim this is a  
11 deprivation of the use and enjoyment of their property without  
12 due process of law, in violation of their rights under the Fifth  
13 and Fourteenth Amendments. See Lucas v. South Carolina Coastal  
14 Council, 505 U.S. 1003 (1992).

15                   The Ninth Circuit addressed the converse of this  
16 argument in San Diego County Gun Rights Committee v. Reno, 98  
17 F.3d 1121 (9th Cir. 1996). The plaintiffs in that case, who  
18 claimed to be potential purchasers of firearms, argued that the  
19 price of banned firearms increased as much as 100% when the  
20 federal government enacted the Crime Control Act. at 1130.  
21 Plaintiffs here, presumably potential sellers, argue that their  
22 weapons have been "rendered worthless." However, the standing  
23 analysis is the same: failure to prove an economic injury that is  
24 traceable to the government's action results in a lack of  
25 standing. See Lujan v. Defenders of Wildlife, 504 U.S. 555,  
26 (1992).

27                   Because plaintiffs' alleged economic injury occurred in  
28 a market environment, they cannot trace their injury to any

1 action taken by the government. See San Diego County, 98 F.3d at  
2 1130, citing Common Cause v. Department of Energy, 702 F.2d 245,  
3 251 (D.C. Cir. 1983) (“{W}here injury is alleged to occur within  
4 a market context, the concepts of causation and redressability  
5 become particularly nebulous and subject to contradictory, and  
6 frequently unprovable analyses.”). Furthermore, any decrease in  
7 the value of the identified assault weapons will be the result of  
8 third party action by dealers or manufacturers. San Diego  
9 County, 98 F.3d at 1130.

10 Accordingly, because plaintiffs do not have Article III  
11 standing, this court lacks subject matter jurisdiction and their  
12 second claim must be dismissed. *Id.*; see also Lujan, 504 U.S. at  
13 560.

14 D. Plaintiffs’ Third Cause of Action

15 Plaintiffs allege in their third cause of action that  
16 section 12280 violates their substantive due process rights under  
17 the Fourteenth Amendment because it infringes on their individual  
18 right to possess firearms. (Am. Compl. ¶ 91). Plaintiffs claim  
19 their individual right to possess firearms is a “liberty interest  
20 imbedded in both the Second Amendment and Fourteenth Amendment  
21 . . . .” *Id.* Plaintiffs further claim that section 12280 infringes  
22 on that interest because the “highly technical” and obscure  
23 statute criminalizes conduct that is not “inherently evil,” thus  
24 creating the possibility that individuals will be held  
25 accountable for unknowingly violating the law. (Am. Compl. ¶¶  
26 91–97).

27 Liberty interests protected by the Due Process Clause  
28 are limited to the specific freedoms found in the Bill of Rights

1 and those precisely described by the Supreme Court. See  
2 Washington v. Glucksberg, 521 U.S. 702, 719–20 (1997)  
3 Therefore, in order to allege a protected liberty interest, the  
4 plaintiffs must be able to point to either a freedom identified  
5 in the Bill of Rights or one of the liberty interests identified  
6 by the Supreme Court. Id. at 720–22.

7 Plaintiffs specify the Second Amendment as the basis  
8 for their alleged liberty interest in individually possessing  
9 firearms. As discussed above, the Second Amendment contains no  
10 such guarantee. See Hickman, 81 F.3d at 101. Not surprisingly,  
11 neither has the Supreme Court ever identified an individual’s  
12 right to possess firearms as a protected liberty interest under  
13 the Fourteenth Amendment. It is not for this court to expand the  
14 definition of “liberty” to include a right which is found neither  
15 in the Bill of Rights nor in the concrete examples deliberately  
16 supplied by the Supreme Court. See Glucksberg, 521 U.S. at 722.<sup>1</sup>

17 =====

18 1 Even if plaintiffs had alleged a protected liberty  
19 interest, their third cause of action would still fail.  
20 Plaintiffs seem to suggest that the holding in Lambert v.  
21 California, 355 U.S. 225 (1997), should be read as a  
22 determination by the Supreme Court that statutes prohibiting  
23 otherwise lawful conduct are unconstitutional because individuals  
24 will not be “on notice” that they are breaking the law. (Am.  
25 Compl. ¶91 91-97). Plaintiffs’ reliance on Lambert is misguided.  
26 The Supreme Court found the statute in Lambert unconstitutional  
27 because it did not contain an element of intent. See Lambert,  
28 355 U.S. at 226. Section 12280, as interpreted by the California  
29 Supreme Court, does contain an element of intent. See In re  
30 Jorge N., 23 Cal. 4th 866 (2000) (“... the People must prove,  
31 that is, that a defendant charged with possessing an unregistered  
32 assault weapon knew or reasonably should have known the  
33 characteristics of the weapon bringing it within the registration  
34 requirements ....” Therefore, the narrow holding of Lambert is  
35 inapposite.

36 Furthermore, the Supreme Court has carefully limited  
37 the application of Lambert. See Texaco v. Short, 454 U.S. 516,  
38 537 n.33 (1982). The Fifth Circuit has noted the Supreme Court’s

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40 **[NOTE ON FOOTNOTES: Disregard number scheme, see original if you are**  
41 **going to cite them. Wording is correct per line, couldn’t fix numbering.]**

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Accordingly, plaintiffs cannot prove any set of facts whereby relief can be granted, and their third cause of action must be dismissed.

E. Plaintiffs' Fourth Cause of Action

Plaintiffs' fourth cause of action alleges that section 12280 violates the Equal Protection Clause of the Fourteenth Amendment because it allows peace officers, whether on duty, off duty, or retired, to possess assault weapons.<sup>2</sup> (Am. Compl. 9191 103-106.)

Section 12280 contains a classification on its face because it provides an exemption for law enforcement officials.<sup>3</sup> However, the exemption is not based on an inherently suspect classification such as race or national origin, nor does it involve a fundamental right. See Hickman, 81 E.3d at 101

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reticence to read Lambert too broadly, for fear the unique case would "swallow the general rule that ignorance of the law is no excuse." United States v. Giles, 640 F.2d 621, 628 (5th Cir. Unit A, 1981).

<sup>2</sup> The fourth cause of action also appears to allege a claim based on the Privileges and Immunities Clause of "Article I, Section 8 of the California Constitution." (Am. Compl. 91 21 106). However, "[t]o state a claim for relief in an action brought under § 1983, [plaintiffs] must establish that they were deprived of a right secured by the Constitution or laws of the United States." American Mfrs. Nut. Ins. Co., v. Sullivan, 526 U.S. 40, 49 (1999).

<sup>3</sup> Section 12280(f) states: "Subdivisions (a) and (b) shall not apply to the sale to, purchase by, or possession of assault weapons by the Department of Justice, police departments, sheriffs' offices, marshals' offices, the Youth and Adult Corrections Agency, the Department of the California Highway Patrol, district attorneys' offices, Department of Fish and Came, Department of Parks and Recreation, or the military or naval forces of this state or of the United States for use in the discharge of their official duties." Cal. Penal Code § 12280(f).

[NOTE ON FOOTNOTES: Disregard number scheme, see original if you are going to cite them. Wording is correct per line, couldn't fix numbering.]

1 (finding that the Second Amendment "does not protect the  
2 possession of a weapon by a private citizen"); see also San Diego  
3 County, 98 F.3d at 1125 (finding that the Ninth Amendment does  
4 not encompass "a fundamental, individual right to bear  
5 firearms"). Thus, to prevail on their equal protection claim,  
6 plaintiffs must show that section 12280 is not rationally related  
7 to a legitimate government purpose. See National Association for  
8 the Advancement of Psychoanalysis v. California 3d. of  
9 Psychology, 228 F.3d 1043, 1049 (9th cir. 2000) (the court  
10 applies rational basis review unless the statute involves an  
11 inherently suspect classification or interferes with a  
12 fundamental right).

13           The court may properly consider the rational basis of a  
14 challenged statute on a motion to dismiss pursuant to Rule  
15 12(b)(6). Aleman v. Glickman, 217 F.3d 1191, 1200 (9th Cir.  
16 2000) (applying rational basis test in reviewing and affirming  
17 dismissal for failure to state a claim). In reviewing a statute  
18 to determine whether it has a rational basis, the court examines  
19 whether the statute is "rationally related to a legitimate state  
20 interest." California 3d. of Psychology, 228 F.3d at 1049. "[A]  
21 statutory classification . . . must be upheld against an equal  
22 protection challenge if there is any reasonably conceivable state  
23 of facts that could provide a rational basis for the  
24 classification. Id. at 1201 (quoting F.C.C. v. Beach  
25 Communications, Inc., 508 U.S. 307 (1993)). The law does not  
26 "require that the government's action actually advance its stated  
27 purposes, but merely [looks] to see whether the government could  
28 have had a legitimate reason for acting as it did." Id. (quoting



1 Dittman v. California, 191 F.3d 1020, 1031 (9th Cir. 1999)

2           The regulation of firearms under section 12280 is  
3 within the State's police power, which is "one of the most  
4 essential[,] . . . and always one of the least limitable of the  
5 powers of government." District of Columbia v. Alice Brooke, 214  
6 U.S. 138, 149 (1909); see United States v. Lopez, 514 U.S. 548,  
7 567 (1995) (concluding that to allow federal regulation of  
8 firearms possession in local school zones would be "to convert  
9 congressional authority under the Commerce Clause to a general  
10 police power of the sort retained by the States"). In accordance  
11 with this power, a State has a legitimate interest in restricting  
12 the possession of certain assault weapons. See Cal. Penal Code §  
13 12276 (defining assault weapons as "semiautomatic firearms" and  
14 providing a list of restricted weapons). Conversely, the State  
15 must insure that its peace officers are sufficiently armed to  
16 enforce the law. Thus, it is not merely "conceivable," but  
17 undeniable that the exemptions for law enforcement officers in  
18 section 12280 are rationally related to the government's duty to  
19 preserve the peace.

20           Plaintiffs argue that the exemption is over-inclusive  
21 because it includes off-duty and retired peace officers.  
22 However, it is not inconceivable that off duty police officers,  
23 or even retired ones, may be called upon to perform law  
24 enforcement functions which ordinary citizens may not be expected  
25 to perform. In performing those kinds of functions, it is not  
26 unreasonable for the legislature to allow those off duty or  
27 retired officers access to weapons which they would not want in  
28 the hands of the general civilian populace. "[L]egislatures are

1 given leeway under rational-basis review to engage in such line  
2 drawing." Taylor v. Rancho Santa Barbara, 206 F.3d 932, 936 (9th  
3 Cir. 2000). This court cannot conclude that the Legislature's  
4 decision to categorically exempt "sworn peace [officers]" from  
5 the prohibitions of section 12280 was irrational. Cal. Penal  
6 Code § 12280(f)-(i); cf. Autotronic Systems, Inc. v. City of  
7 C'Oeur D'Alene, 527 F.2d 106 at 108 (9th Cir. 1975) (declining to  
8 second guess the Legislature's actions).

9           Accordingly, plaintiffs cannot prove any set of facts  
10 whereby they could sustain a claim for relief, and their fourth  
11 cause of action must be dismissed.

12           F. Plaintiffs' Fifth Cause of Action

13           Plaintiffs' fifth cause of action alleges a violation  
14 of equal protection on the ground that "Sheriffs and State Law  
15 Enforcement officials are currently issuing concealed weapons  
16 permits on a discriminatory basis." (Am. Compl. 91 112). In  
17 addition, plaintiffs appear to allege that a separate statute,  
18 California Penal Code section 12031(b), violates equal protection  
19 because it exempts law enforcement officials from restrictions  
20 against the carrying of loaded firearms and allows them to obtain  
21 Carry Concealed Weapon permits ("CCW") without showing "good  
22 cause."<sup>4</sup>

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24           <sup>4</sup> Plaintiffs specifically allege that section 12031  
25 allows law enforcement officials to obtain concealed weapons  
26 permits without showing good cause, while civilians must show  
27 good cause to obtain a permit under section 12050. Section 12050  
28 provides that persons applying for a license to carry a concealed  
29 weapon must show "good moral character" and "good cause." Cal.  
30 Penal Code § 12050(a).

31           The language of Penal Code section 12031 provides:  
32 "(a) (1) A person is guilty of carrying a loaded firearm when he  
33

1           The court lacks subject matter jurisdiction over the  
2 fifth cause of action because there are no facts that would lead  
3 one to believe that plaintiffs have tried and failed to obtain a  
4 CCW. Moreover, defendants are not even the persons authorized to  
5 issue CCWs. See Cal. Penal Code § 12050 (a) (1) (A)-(B) (providing  
6 that the county sheriff or the chief of a municipal police  
7 department may issue a CCW).

8           To meet the case-or-controversy requirement of Article  
9 III of the United States Constitution, "a litigant must have  
10 'standing' to invoke the power of a federal court." Hickman, 81  
11 F.3d at 101 (9th Cir. 1996) ("Article III standing is a  
12 jurisdictional prerequisite."). A plaintiff has standing under  
13 Article III if (1) he has suffered an injury in fact; (2) there  
14 is a causal connection between the injury and the conduct  
15 complained of; and (3) it is likely that the injury will be  
16 redressed by a favorable decision. See Lujan, 504 U.S. at 560-  
17 561. "The party invoking federal jurisdiction bears the burden  
18 of establishing these elements." Id. at 560.

19           In their fifth cause of action, plaintiffs generally  
20 allege injury as a result of "the loss of use and enjoyment of  
21 constitutional rights." (Am. Compl. ¶ 122). However, plaintiffs  
22 allege no facts suggesting either a present or imminent injury as  
23 a result of conduct by defendants. As a result, plaintiffs do  
24 not have standing to raise an equal protection claim against

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26 or she carries a loaded firearm on his or her person or in a  
27 vehicle while in any public place or on any public street  
28 Cal. Penal Code § 12031 (a) (1). Section 12031(b) states that  
29 subdivision (a) shall not apply to peace officers, whether active or  
30 honorably retired. Cal. Penal Code § 12031(b).  
31

1 defendants for the alleged discriminatory issuance of CCWs or to  
2 challenge the statutory requirements for obtaining a CCW.  
3 Accordingly, plaintiffs cannot prove any set of facts whereby  
4 they can sustain a claim for relief, and their fifth cause of  
5 action must be dismissed.

6 C. Plaintiffs' Sixth Cause of Action

7 Plaintiffs allege in their sixth cause of action that  
8 section 12280 violates their right to privacy under the United  
9 States and California constitutions because the mandatory  
10 registration provision will allow the general public access to  
11 their private information,<sup>5</sup> and it will allow the government to  
12 "spy on them." (Am. Compl. ¶¶ 165-166).

13 There is no express right of privacy found in the  
14 United States Constitution. Rather, the constitutional right to  
15 privacy has been identified by the Supreme Court in discrete  
16 areas of conduct, falling within the "penumbra" of privacy rights  
17 that radiate from the Fourteenth Amendment. See Griswold v.  
18 Connecticut, 381 U.S. 479 (1965). The Ninth Circuit recognizes  
19 two distinct kinds of constitutionally protected privacy  
20 interests in Supreme Court precedent: (1) "... the individual  
21 interest in avoiding disclosure of personal matters," (2) "the  
22 interest in independence in making certain kinds of important  
23 decisions." Crawford v. United States Trustee, 194 F.3d 954, 958  
24 (9th Cir. 1999).

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26 5 Plaintiffs cite Gov't Code Section 6250 et seq., which  
27 provides that members of the public may access information  
28 contained within the Department of Justice. Therefore, because  
29 section 12280 mandates registration of assault weapons with the  
30 Department of Justice, the public will have access to the  
31 information that these individuals own assault weapons.  
32

1           Plaintiffs appear to argue that the mandatory  
2 registration of firearms violates the first type of  
3 constitutionally protected privacy interest, "informational  
4 privacy." Because the right to informational privacy is not an  
5 absolute right, plaintiffs must establish that their interest in  
6 keeping private their possession of assault weapons outweighs the  
7 government's interest in maintaining and properly disclosing  
8 information regarding the same. See Id.

9           The court considers the following factors, among  
10 others, when weighing plaintiffs' interest in keeping private the  
11 information that plaintiffs own assault weapons, against the  
12 government's interest in regulating firearms:

13                     . . . the type of record requested, the information it  
14 does or might contain, the potential for harm in  
15 any subsequent nonconsensual disclosure, the injury  
16 from disclosure to the relationship in which the record  
17 was generated, the adequacy of safeguards to prevent  
18 unauthorized disclosure, the degree of need for access,  
19 and whether there's an express statutory mandate,  
20 articulated public policy, or other recognizable public  
21 interest militating toward access.  
22 Crawford, 194 F.3d at 959 (citing Doe v. Attorney General, 941  
23 F.2d 780, 796 (9th Cir. 1991))

24           The Ninth Circuit found the government's prevention of  
25 fraud through dissemination of individual social security  
26 numbers, names and addresses, was not outweighed by an  
27 individual's right to keep that information private. Crawford,  
28 194 F.3d at 960. The court found the government's interest in  
29 preventing crime outweighed the potential for identity fraud  
30 alleged by the plaintiffs. Id. Certainly ownership of an  
31 assault weapon is not more personal than an individual's social  
32 security number, name and address.

33 **[NOTE: Numbers screwed up on this page due to indented citation!!!!]**

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1 Plaintiffs cite no authority to support their  
2 proposition that public access to information regarding their  
3 ownership of assault weapons will violate their constitutional  
4 right to informational privacy. Further, plaintiffs have not  
5 alleged any facts to suggest a potential for harm, should the  
6 public obtain the information contained in the registry. On the  
7 other hand, the government has a recognized and legitimate  
8 interest in regulating firearms.

9 Accordingly, plaintiffs cannot prove any set of facts  
10 whereby they can sustain a claim for relief, and their sixth  
11 cause of action must be dismissed.<sup>6</sup>

12 H. Plaintiffs' Seventh Cause of Action

13 Plaintiffs allege in their seventh cause of action that  
14 section 12280 violates their First Amendment right to freedom of  
15 association because it forces plaintiffs "to become associated  
16 with a group of individuals employed by the government if they  
17 want to receive the same perks and advantages as others so  
18 situated." (Opp'n at 35:20-21)

19 In Besig v. Dolphin Boating & Swimming Club, 683 F.2d  
20 1271, 1276 (9th cir. 1982), the Ninth Circuit held that a  
21 statute, which by its express language neither forbids nor  
22 mandates association with any individual or group does not  
23 violate the First Amendment right to freedom of association nor

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25 <sup>6</sup> Assuming this court had jurisdiction to determine their  
26 challenges to the state constitution, plaintiffs' additional  
27 allegation that section 12280 violates their right to privacy  
28 under the California Constitution also fails. The California  
29 Supreme Court has clearly identified the regulation of firearms,  
30 including their registration, to be a proper police function.  
31 Galvan v. Superior Court, 70 Cal.2d 851, 866 (1969).  
32

1 its correlative right not to associate. Plaintiffs' assertion in  
2 this case that they will be "forced" to associate with peace  
3 officers is not based on express, mandatory language in the  
4 statute.

5 Accordingly, plaintiffs cannot prove any set of facts  
6 whereby they can sustain a claim for relief, and their seventh  
7 cause of action must be dismissed.

8 I. Plaintiffs' Eighth Cause of Action

9 In their eighth cause of action, plaintiffs allege that  
10 section 12280 violates their natural right to keep and bear arms  
11 pursuant to the Ninth and Fourteenth Amendments. Again,  
12 plaintiffs are advancing an argument that the Ninth Circuit has  
13 already summarily rejected.

14 First, the Ninth Amendment is not an independent source  
15 of constitutional rights. Schowengerdt v. United States, 944  
16 F.2d 483, 490 (9th Cir. 1991). The Ninth Amendment has been  
17 interpreted to contain no rights at all, but to be simply a guide  
18 for reading the Constitution. Id. (citing Laurence H. Tribe,  
19 American Constitutional Law 776 n.14 (2d ed. 1988).).

20 Second, the Ninth Circuit has unequivocally held that  
21 the Ninth Amendment "does not encompass an unenumerated,  
22 fundamental, individual right" to possess a firearm. San Diego  
23 County, 98 F.3d at 1125. Consequently, plaintiffs have no legal  
24 basis for their claim. Accordingly, plaintiffs cannot prove any  
25 set of facts whereby they can sustain a claim for relief, and  
26 their eighth cause of action must be dismissed.

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1                   IT IS THEREFORE ORDERED defendants' motion be, and the  
2 same hereby is, GRANTED. Plaintiff's first, second, third, fourth,  
3 fifth, sixth, seventh and eighth claims are hereby  
4 DISMISSED without leave to amend.

5 DATED: December 12, 2000

6   WILLIAM B. SHUBB

7   UNITED STATES DISTRICT JUDGE  
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United States District Court  
for the  
Eastern District of California  
December 13, 2000

\* \* CERTIFICATE OF SERVICE \* \*

2:00-cv-00411

Silveira

v.

Lockyer

---

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 13, 2000, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

Gary William Gorski                      SH/WBS  
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Jack L. Wagner, Clerk  
BY: \_\_\_\_\_  
Deputy Clerk