No. 13-56454

In the United States Court of Appeals
for the Ninth Circuit

EUGENE EVAN BAKER,

Plaintiff-Appellant,

v.

LORETTA E. LYNCH, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
(CV 10-3996-SVW (AJWx))

APPELLANT'S REPLY TO APPELLEES' OPPOSITION TO APPELLANT'S MOTION FOR FULL REMAND

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INTRODUCTION

Once this Court ruled that Baker could plead a sufficient as applied challenge to 18 U.S.C. § 922(g)(9), it was error for the district court to dismiss that same claim with prejudice on remand. Intervening court decisions confirm that Baker has pleaded a viable Second Amendment claim. And dismissal without sufficient notice, a hearing, or an opportunity to amend was improper. This Court should reverse the district court's order and remand for further proceedings.

Simply regurgitating concessions made in Baker's moving papers, the Attorney General sets forth nothing to undermine the many reasons the Court must remand. Ignoring the particulars of this case and misrepresenting the procedural posture at dismissal, she fails to establish that the district court did not abuse its discretion in granting dismissal without leave to amend. Nor does she establish that Baker's claims must suffer the same fate that met the claims in *Chovan* and *Enos* in light of the fact that Baker never had the opportunity to present evidence.

At the end of the day, the Attorney General asks this Court to excuse her failure to respect basic rules of motions practice and the district court's refusal to honor its obligation to provide Baker with a meaningful opportunity to respond to its concerns before dismissal with prejudice. At the same time, she seeks to require of Baker supernatural powers to have foreseen what factual showing *Chovan* and *Enos* would require of him *before* those cases came down. She asks too much.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT TREATED INFORMAL BRIEFING AS A RULE 12 MOTION AND DISMISSED BAKER'S CLAIMS WITHOUT NOTICE, A HEARING, OR THE OPPORTUNITY TO AMEND

To review, the Attorney General failed to comply with rules 6 and 12 of the Federal Rules of Civil Procedure and rules 6-1, 7-3, and 7-4 of the Central District Local Rules by: (1) Failing to file a notice of motion at least 28 days before the hearing; (2) failing to serve said notice on each of the parties; (3) failing to provide a concise statement of the relief sought; (4) failing to contact opposing counsel to discuss any intention to file a Rule 12 motion to dismiss; (5) failing to meet with opposing counsel in an effort to obtain an out-of-court resolution on said motion; and (6) failing to include a statement confirming the conference of counsel. Mot. 15-16. Truly, nothing about the Attorney General's "motion to dismiss" complied with the most basic rules of motions practice, prejudicing Baker when the district court opted to nonetheless entertain and ultimately grant her "motion" without sufficient notice, a hearing, or leave to amend. Mot. 16.

While the district court is entitled to great deference in the interpretation and application of its own local rules, Opp'n 12 (quoting *Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007); *Hinton v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir. 1993), it is *not* entitled to flatly disregard the Federal Rules of Civil Procedure, which require "[a] *written motion and notice of the hearing* [to be] served at least

14 days before the time specified for the hearing," unless "a court order—which a party may, for good cause, apply for ex parte—sets a different time." Fed. R. Civ. P. 6(c)(1) (emphasis added). No court order set a different time for the filing of a motion to dismiss, and even if it did, no written notice was *ever* served.[1] The Attorney General's informal request for dismissal, buried within the pages of her informal issue briefing, hardly conforms to notice requirements that serve to ensure fair play and to protect due process. It should have been denied on that basis alone.

In any event, as Baker recognized in his moving papers, the court was within its authority to dismiss Baker's claims sua sponte. Mot. 17 (citing Fed. R. Civ. P. 12(b)(6); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987)). But again, "[t]he power is not absolute"—a fact the Attorney General's opposition conveniently ignores. *Cal. Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974) (citing *Beshear v. Weinzapfel*, 474 F.2d 127, 133 (7th Cir. 1973)); *but see* Opp'n 12. It is well-settled that, absent a finding that the complaint

[1] It is no answer to say that the district court's minute order requesting informal issue briefing effectively relieved the Attorney General of her duty to provide written notice of her intention to move for dismissal. *See* Opp'n 12. Surely, the exception to rule 6 that arises when a court issues an order that "sets a different time" contemplates specific orders shortening time, usually granted for good cause upon an ex parte motion, which orders themselves reference the sort of motion to be filed—not generic minute orders setting a schedule for simultaneous briefing on the issues. The fact that Baker did not object to informal briefing to inform the court of the remaining issues after remand and agreed to the court's proposed schedule for the same, Opp'n 11, is irrelevant as to whether the Attorney General provided sufficient notice of her motion to dismiss.

cannot be corrected, the court abuses its discretion when it fails to provide "*notice of [its] intention to dismiss*, an opportunity to submit a written memorandum in opposition to such motion, *a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court*." *Cal. Diversified Promotions*, 505 F.2d at 281 (citing *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir. 1970); *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972)) (emphasis added).

Here, the district court decidedly failed to exercise its discretion in that regard. While its order rescheduling the hearing on the parties' issue briefing did signal (for the first time) that the court might treat the Attorney General's briefing as a motion to dismiss, the court did not indicate its intention to grant that relief. District Court Scheduling Notice-Text Only Entry, *Baker v. Holder*, No. 10-3996 (C.D. Cal. Feb. 1, 2013). Nor did it hold a hearing on the matter—eliminating any opportunity for Baker to respond to the court's concerns regarding the complaint's deficiencies. District Court In Chambers Order-Text Only Entry, *Baker*, No. 10-3996 (C.D. Cal. Mar. 8, 2013). Having provided *none* of the necessary procedural safeguards, and having made no finding that amendment would be futile (a point the Attorney General does not dispute (Opp'n 11-12)), the district court improperly dismissed Baker's claims with prejudice, denying him the opportunity to amend.

The Attorney General mischaracterizes the posture of this case at dismissal when she claims that Baker was given sufficient opportunity to be heard before his

claims were set aside. Opp'n 11-12. On October 15, 2012, just four days after Baker filed an amended complaint to satisfy Article III deficiencies perceived by this Court in *Baker v. Holder*, 475 F. App'x 156 (9th Cir. 2012), the district court held a status conference to discuss the issues remaining after remand and to determine, as the Attorney General described it, "next steps." Ex. D (Reporter's Transcript of Hearing (Oct. 15, 2012)); Opp'n 11. Neither the merits of Baker's claims nor the grounds for future dismissal were argued; nor was any plan for discovery discussed. Ex. D. The simultaneous issue briefing that the court requested from all parties was complete by January 16, 2013. *And then* the court signaled it would treat the Attorney General's brief as a motion to dismiss. District Court Scheduling Notice-Text Only Entry, *Baker*, No. 10-3996 (C.D. Cal. Feb. 1, 2013). In response, Baker raised his procedural objections again, but weighed in on the propriety of dismissal out of an abundance of caution. Plaintiff's Opposition to Defendants' Motion to Dismiss, *Baker*, No. 10-3996 (C.D. Cal. Feb. 4, 2013). On March 8, 2013, the court dismissed the case without a hearing. District Court In Chambers Order-Text Only Entry, *Baker*, No. 10-3996 (C.D. Cal. Mar. 8, 2013).[2]

[2] In defending the district court's dismissal for failure to state a claim, the Attorney General also makes much of the fact that Baker conducted no discovery, but in stunningly circular fashion, claims he would not have been entitled to it anyway because the court found he had failed to state a claim. Opp'n 11. In any event, the Attorney General ignores the posture of this case at dismissal. It is no surprise that Baker never requested discovery, for this case moved exceedingly fast—from the amended complaint to simultaneous issue briefing to dismissal, in

Contrary to the Attorney General's unsupported claims, Opp'n. 12, Baker is entitled to more than a pre-dismissal amendment made to address unrelated standing issues, a case status conference to discuss procedural "next steps," and informational briefing conducted *before* the district court made clear its intention to dismiss Baker's claims with prejudice. *See Cal. Diversified Promotions*, 505 F.2d at 281. Because the court did not even address whether amendment to the complaint would be futile, Baker was entitled to notice that the court intended to dismiss, a hearing regarding *dismissal*, and the opportunity to amend "*to overcome the deficiencies raised by the court*," *id.* (emphasis added), none of which the district court provided him. The court thus abused its discretion in dismissing Baker's claims with prejudice, requiring reversal and remand.

II. THE COURT'S PREVIOUS DECISION IN THIS CASE AND ITS RECENT DECISIONS IN *CHOVAN* AND *ENOS* CONFIRM THAT THE DISTRICT COURT CLEARLY ERRED WHEN IT DISMISSED BAKER'S AS APPLIED CLAIMS

As an initial matter, the Attorney General does not dispute that it was clear error for the district court to rely solely on case law pre-dating this Court's first decision to remand this case. *See* Mot. 8-10; *but see* Opp'n 8-11. Indeed, the Attorney General wholly ignores Baker's arguments on that point. Opp'n 8-11. While she argues that the district court's holding that Baker failed to state a Second

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the span of just a few months. At no point did the parties discuss a discovery plan. Because Baker never had the opportunity to conduct discovery, little regarding his ability to provide evidence supporting his claims can be gleaned from that fact.

Amendment claim was "consistent with the decisions of every court of appeals to consider [similar] challenges," Opp'n 8 (citing Ex. B at 6-8), she neither cites those out-of-circuit cases, nor admits that each was decided before this Court issued its ruling that Baker *does* have some cognizable as applied constitutional challenge to section 922(g)(9) in this circuit. Again, because every one of the cases the lower court relied on pre-dates this Court's previous determination that Baker had brought a Second Amendment claim sufficient to overcome dismissal, the district court's subsequent use of those cases to reach the opposite result is clear error.

What's more, the Attorney General is mistaken to the extent she argues that *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 187 (2014), and *Enos v. Holder*, 585 F. App'x 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015), confirm that the district court correctly dismissed Baker's claims. Opp'n 8-11. To the contrary, they reaffirm what this Court's previous ruling in this case suggests—that Baker could mount a constitutional claim sufficient to overcome dismissal *if given the chance*.

The intermediate scrutiny analysis that this circuit now applies to Second Amendment claims like Baker's requires a court to weigh the government's evidence that a substantial relationship exists between an important government interest and the means chosen to advance it against the challenger's evidence that it does not. *Chovan*, 735 F.3d at 1139 (citing *United States v. Chester*, 628 F.3d 673,

683 (4th Cir. 2010)); *Enos*, 585 F. App'x at 447-48. In this case, that would require Baker to "present[] evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high" and/or to directly prove that "a domestic abuser [who] has not committed domestic violence for [*x*] years . . . is highly unlikely to do so again." *Chovan*, 735 F.3d at 1142. Because the district court set aside Baker's claims on a motion to dismiss, Baker never had the opportunity to support, *with evidence*, his claim that as applied to him section 922(g)(9) is not "substantially related to the government's important interest . . . ." *Id.* at 1142.

The Attorney General's claim that Baker's as applied challenge is not "meaningfully distinguishable" from those presented in *Chovan* and *Enos* is wildly overstated. Opp'n 10. Of course the cases are distinguishable. Baker acknowledges that, to the extent his single prohibiting offense occurred nearly 20 years ago and he has not since engaged in criminal behavior, Mot. 2-5, some of the facts underlying his claims resemble those presented in *Chovan* and *Enos*. But what materially distinguishes this case from *Chovan* and *Enos* is that Baker has *never* had the opportunity to present any evidence whatsoever. **The appellants in both *Chovan* and *Enos* had that opportunity, but they did not take it.** *Chovan*, 735 F.3d at 1141 (describing Chovan's only evidence that he was unlikely to recidivate as two studies regarding recidivism rates generally, not rates for those convicted of

domestic violence crimes); *Enos*, 585 F. App'x at 447-48 ("there is no evidence in this record demonstrating the statute is unconstitutional as applied to the [a]ppellants. . . . [and,] when questioned [by the trial court], counsel for [a]ppellants declined to suggest such evidence exists"). Baker's constitutional claims should not be barred based on the litigation decisions of counsel in two separate cases to which he was not a party.

In a final effort to deny Baker the opportunity to present evidence to support his claims, the Attorney General argues that neither *Chovan* nor *Enos* suggest "section 922(g)(9) would be vulnerable to an as applied challenge." Opp'n 10-11. Instead, she argues, *Chovan* merely "credited 'the government's evidence that the rate of domestic violence recidivism is high,' in the absence of any countervailing evidence." Opp'n 11 (quoting *Chovan*, 735 F.3d at 1142). But her selective quotation misrepresents the holding of *Chovan*. In full, the quotation reads:

> Chovan has not presented evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high. Nor has he directly proved that if a domestic abuser has not committed domestic violence for fifteen years, that abuser is highly unlikely to do so again. *In the absence of such evidence*, *we conclude that the application of § 922(g)(9) to Chovan is substantially related to the government's important interest of preventing domestic gun violence.*

Chovan, 735 F.3d at 1142 (emphasis added). The Court did more than simply credit the government's evidence of its compelling interest, it *expressly* found that Chovan had not carried his burden to rebut evidence that application of section

922(g)(9) is substantially related to an important government interest *as applied to him. Id.* But it did *not* suggest that no as applied challenge could succeed.

The Attorney General provides no good reason the Court should ignore the policy that leave to amend should be granted with "extreme liberality," *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987), and deny Baker the opportunity to perfect his complaint. The "one opportunity" Baker had to amend, Opp'n 11, came in response to this Court's concerns about justiciability—*before* the district court ruled on the sufficiency of the pleading to state a claim. Without the benefit of direction from the Ninth Circuit as to the proper analysis for his as applied Second Amendment challenge, it should come as no surprise that Baker could not foresee then what specific facts might be necessary to fully state his claim. Now, with *Chovan* and *Enos* final, Baker is entitled to the opportunity to amend his complaint and to provide evidence supporting those facts.

CONCLUSION

Based on the foregoing, Appellant Baker respectfully requests full remand of his claims to the district court for further proceedings.

Date: November 19, 2015

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2015, an electronic PDF of Appellant's Reply to Appellees' Opposition to Appellant's Motion for Full Remand was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: November 19, 2015

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel
C. D. Michel
Counsel for Plaintiff-Appellant

EXHIBIT D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE STEPHEN V. WILSON, U.S. DISTRICT JUDGE PRESIDING

EUGENE EVAN BAKER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 2010-3996-SVW
	)	
	)	
ERIC H. HOLDER, JR.,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, OCTOBER 15, 2012

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- - - - -

LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 15, 2012; 1:30 P.M.

- - - - -

THE CLERK: Item 7, CV 2010-3996-SVW, Eugene Evan Baker v. Eric H. Holder, Jr.

Counsel, please state your appearance.

MS. RIDER: Tamara Rider, counsel for the plaintiff, Eugene Evan Baker.

MR. DeJUTE: Good afternoon, Your Honor. David DeJute, assistant United States attorney, for defendant Holder.

THE COURT: This is a status conference, and can you, Ms. Rider, bring the court up to date with where we are. I have a sense that there are problems with some electronic filings, at least at some point. But where are we now?

MS. RIDER: That's correct. Essentially, what happened is the Ninth Circuit did take up the appeal, and the Ninth Circuit ruled that the motion should be reversed to allow the plaintiff to allow -- excuse me -- to amend his complaint for standing purposes, because the Ninth Circuit indicated in their memorandum that they didn't receive all the pages in the complaint, but they did receive his attachment. So to make sure that --

THE COURT: Do you have a copy of the Ninth Circuit order?

MS. RIDER: Yes, I do.

THE COURT: Can I see it.

MS. RIDER: Yes.

THE COURT: What is your understanding at the end of the memorandum when the court says, "The Jennings decision did not address the question of whether Section 922(g)(9)" -- is that felon in possession? What is 922(g)(9))?

MS. RIDER: 922(g)(9) relates to a misdemeanor crime of domestic violence.

THE COURT: Oh, that's the state violation.

-- "violates the Second Amendment and therefore does not control Baker's Second Amendment claim."

What do you understand the issue to be, assuming that the amended complaint is in place? Is it whether the Supreme Court's recent Heller decision supports the defendant's argument that notwithstanding the state conviction, he's entitled to bear a firearm?

MS. RIDER: Yes, that's correct. In District of Columbia versus Heller in 2008, the U.S. Supreme Court did declare that there is a fundamental Second Amendment right to keep and bear arms for self-defense purposes and --

THE COURT: In other words, what the Ninth Circuit seems to be setting up -- so to speak -- is the tension between that decision and a restriction under supervised release regarding the right to bear a firearm, correct?

MS. RIDER: That's correct.

THE COURT: So how, then, would that be resolved from your standpoint?

MS. RIDER: Well, essentially, Your Honor, my client sought permission from a court and did have his conviction expunged and so under state law, he is able to keep and bear a firearm for self-defenses purposes. Unfortunately, under federal law, it's a lifetime ban instead of a mere ten-year ban. And so he believes pursuant to District of Columbia versus Heller --

THE COURT: Slow down just a drop.

You're saying that he's had his state court 922(g)(9) conviction erased?

MS. RIDER: My understanding is he was convicted of a misdemeanor crime of domestic violence -- or he had a domestic violence order.

THE COURT: Right.

MS. RIDER: He served his probation term, and under California law, you're prohibited from owning and possessing a firearm for ten years. He had that ten-year period, and in addition to that, he also went to a Ventura courthouse, and a judge provided an order indicating he has the right to have a firearm.

So we have -- under state law, he is able to -- yeah, have a firearm, and now --

THE COURT: What was the conviction for in this

court?

MS. RIDER: I believe it was in 1997 -- let's see -- it was a guilty plea. My apologies. We just got substituted in recently.

THE COURT: Do you know --

MR. DeJUTE: Misdemeanor domestic violence, Your Honor.

THE COURT: But a different episode than the conviction in the state court, correct?

MR. DeJUTE: There's only one conviction in state court. That's for domestic violence.

THE COURT: But -- what was his conviction for in this court?

MR. DeJUTE: There was no conviction in this court, Your Honor. Plaintiff brought a cause of action in Baker v. Holder I, which said, I should be entitled under federal law to have a firearm, and the Jennings case -- which you just mentioned -- said that you're not entitled unless your conviction is expunged under state law. There is an expungement statute under Washington law --

THE COURT: So what is the court's jurisdiction?

MR. DeJUTE: Under federal law, which prohibits --

THE COURT: What federal law?

MR. DeJUTE: The federal law that says -- I don't have the statutory cite, but they do in the complaint -- the

one that says if you are convicted or plead guilty as misdemeanant to domestic violence, you may not own or possess a firearm unless that conviction is expunged under state law.

THE COURT: But what gives the court independent jurisdiction? What is the --

MR. DeJUTE: Federal question jurisdiction on the issue of whether or not that federal law which interprets state law is constitutional under Heller and --

THE COURT: I see. So if counsel, Ms. Rider, is correct that the domestic violence offense has been expunged, you're saying that that doesn't affect the federal law?

MR. DeJUTE: I'm saying something similar to that, Your Honor. If I could go back one step to --

THE COURT: Take the lectern, if you would.

MR. DeJUTE: Yes, Your Honor. If I could go back one step to Baker's original complaint. He essentially made two arguments: One was that he had a statutory right to possess a firearm, and as opposing counsel says, he went to the Ventura County Courthouse. Under state law, the court ruled that his record was expunged and --

THE COURT: When you say "statutory right," statutory right under California statute?

MR. DeJUTE: Yes, sir.

THE COURT: Okay.

MR. DeJUTE: And his conviction was expunged, and

there was nothing under state law preventing him from owning a handgun.

THE COURT: All right.

MR. DeJUTE: However, under federal law, the federal law looks at whether or not the conviction has been expunged, and so you have to have, sort of, an existential problem. It's expunged under state law, but it's not expunged under federal law because the manner in which states and the Ninth Circuit have interpreted California law is that it's not a true expungement statute, like Washington, for example.

THE COURT: I've come across that in a somewhat different context, in the guideline context, for example, because the expungement under California statute doesn't mean that, at least in many cases, that the conviction is totally wiped off the slate, it means that the conviction can't be used for certain purposes. In other words, can't be used for calculating a sentence or being a repeat violator or even for impeaching someone with a prior conviction.

And so am I correct that under federal law, expungement means -- at least as you argue it -- total erasure of the conviction? Which you say hasn't occurred under the state expungement process.

MR. DeJUTE: Well, 100 percent correct. I would only add that it's not my saying it, Your Honor, it is this court, this court that said it -- because you cited Jennings v.

Mukasey, and it is now the Ninth Circuit in affirming this court's order that has said it -- Mr. Baker is precluded from making the argument in his amended complaint that his statute was not expunged for purposes of the federal law.

THE COURT: So now the question is, as Ms. Rider presented it, even if his conviction isn't expunged in accordance with federal law, does Heller versus District of Columbia -- is that the case -- give him the right to bear a firearm? And what is your argument there?

MR. DeJUTE: Well, at first, it's a procedural question. When Jennings was decided, Heller had not been decided, and so no court had ever considered the Second Amendment as applying a fundamental right to an individual. And so the Ninth Circuit said, We're going to punt -- excuse the expression -- and allow the district court to determine, first, the level of scrutiny to be determined and then secondly, whether or not using that level of scrutiny the statute passes constitutional muster. Our argument is one, that this court should do just that, determine the level of scrutiny, which has to be either rational basis or intermediate level, and then applying that level of scrutiny should find that the statute, as interpreted under federal law, does not violate Mr. Baker's constitutional rights. That is to say that Heller -- the reason for that is because --

THE COURT: But the -- when you say the statute

doesn't offend federal law, it seems like Ms. Rider is presenting it as a constitutional question.

MR. DeJUTE: It is, Your Honor.

THE COURT: When you mean "federal law," you mean the Constitution.

MR. DeJUTE: No, I meant the federal law which interprets expungement. It's very clear that his conviction was not expunged, and in the absence Heller, he would not be allowed to have a firearm. The only question is does Heller change the constitutional makeup to such a degree that the federal law that prohibits his use of the handgun is found to be unconstitutional.

THE COURT: Is there something -- I'm a little out of sync with Heller. What specifically was before the court in Heller, other than the issue of right to bear arms?

MR. DeJUTE: In both Heller and -- I think it's McDermott -- one for Chicago and one for D.C. -- the court found that the state's absolute ban without distinction for everyone to possess a handgun was unconstitutional because there as a fundamental Second Amendment right for personal use of a handgun. But in doing so, they limited it to law-abiding citizens; they limited it by the very terms of the order to cases where there were no -- not a convicted felon. That's been held to be upheld -- and they have language in there that longstanding prohibitions on gun use and gun control are not

affected by the statute.

THE COURT: Well, then, it seems that the way to get this before court is by briefing it, correct?

MS. RIDER: That's correct.

THE COURT: So maybe the best way to brief it would to be have opening simultaneous briefs and then opposing simultaneous briefs. In other words -- that way you're opposing each other's arguments. It isn't someone going first, second and third, and then at the hearing we can take up whatever thoughts you have, you know, that relate to the mutual or simultaneous oppositions.

When can you file the briefs? It sounds like an interesting question.

MR. DeJUTE: It sounds like a very interesting question. I just have two procedural points: One, we have not been served, so the first time I've seen the complaint was in the hallway and glancing over to. Secondly, this time, unlike the first time, Baker is adding two new defendants: The California Department of Justice, and Kamala Harris as Attorney General of California. So my suggestion is that the complaint should be properly served, and everyone should appear and perhaps then a different --

THE COURT: But what would the court's jurisdiction be over them? I mean, in other words, you're saying that they are the -- what relief do you want from the Attorney General?

MS. RIDER: Our understanding is that California is a point-of-contact state where the California Department of Justice is able to interpret and implement the laws -- the federal laws. As Kamala Harris is the Attorney General of California, she also is able to enforce those laws. Because California is prohibiting Mr. Baker from obtaining a firearm -- or from purchasing a firearm, we also amended the complaint to ensure that all of the adequate parties for defendants were included.

THE COURT: So the arguments -- the essential argument is the same or different with respect to the U.S. defendant and the California defendant.

MS. RIDER: The complaint is against all of the defendants with the same arguments against all the defendants.

THE COURT: So the complaint is against the Attorney General because the Attorney General has interpreted the Heller case in a way that prohibits your client from bearing a firearm.

MS. RIDER: That's correct.

THE COURT: But -- I see.

If Holder's actions were unconstitutional, would they automatically mean that the State Attorney General's actions are unconstitutional, too?

MS. RIDER: We believe so, solely to the effect that to the extent Mr. Holder is acting unconstitutionally, so is

the California Department of Justice in interpreting what he's directing them to do as a point-of-contact state for firearms dealers. And in addition to that, Ms. Kamala Harris is the Attorney General of California.

THE COURT: How do you -- you have no position regarding -- would your thinking be that, at least preliminarily, that the decision regarding the United States Attorney General would necessarily dictate the result as to the California Attorney General?

MR. DeJUTE: I appreciate the ability to wiggle out if we change our position --

THE COURT: Yes.

MR. DeJUTE: -- but I just saw the complaint, and I just learned about these two new defendants.

(Pause in the proceedings)

THE COURT: In any event, the amended complaint does name the State Attorney General, right?

MS. RIDER: Yes.

THE COURT: And so in terms of service, have you gone about serving the government as you have to?

MS. RIDER: Not at this point, no. The complaint we filed last week on the 11th, and we just received the conformed summons today. So we're planning on effectuating service.

THE COURT: Then you have to do that by what? Sending a certified copy to the Attorney General in Washington?

Are you with the Justice Department?

MR. DeJUTE: Yes, sir -- I'm with the U.S. Attorney's Office across the street.

THE COURT: So you -- in order to serve the government, you have to serve the U.S. attorney in the district, and you have to send -- what -- a certified copy of the complaint to the Attorney General in Washington?

MR. DeJUTE: That's correct. And in this instance, only those two because you always have to serve the Attorney General and the agency. In this case, the agency and the Attorney General are the same.

THE COURT: So all that the plaintiff has to do is send -- is send a certified copy to the Attorney General.

MR. DeJUTE: And serve the U.S. Attorney's Office, which has not yet been done. I'm right here.

THE COURT: But you can accept service?

MR. DeJUTE: I what?

THE COURT: You can accept service?

MR. DeJUTE: I can't under federal statute.

THE COURT: I see. How does she do it, then? Send a certified copy to you?

MR. DeJUTE: Not to me personally -- it's in the rules -- to the mail processing clerk, I believe, or by personal service by walking across the street --

THE COURT: What about the -- California? How do you

plan to serve them?

MS. RIDER: I need to look at the rules and make sure I do it right. I haven't --

THE COURT: Well, I would like you to effectuate service within 20 days, and I'm going to set up a briefing schedule on the assumption that that is accomplished, and the opening briefs should be exchanged, and within 30 days of the end of the 20-day period. So that means 50 days from today.

THE CLERK: Simultaneous opening briefs will be due December 3rd.

THE COURT: And then I'll give you ten days to file simultaneous oppositions. It would helpful, Ms. Rider, if you could get going with service as soon as you can. Thank you.

THE CLERK: I was wrong. Opening briefs will be due December 6th, and opposing briefs would then be due ten days later, which would be December 17th.

Will there be a hearing?

THE COURT: Yes, a hearing. Let's say the hearing will be -- first week in January.

THE CLERK: Hearing will be January 7th at 1:30.

THE COURT: Look forward to it.

MR. DeJUTE: Thank you very much, Your Honor.

MS. RIDER: One last point, just so I'm clear. On the briefs, you want us to specifically address the affect of the California Department of Justice and the State Attorney

General of California being involved in this?

THE COURT: Excuse me?

MS. RIDER: I'm confused.

THE COURT: I'm assuming that you're seeking relief against the Attorney General. My concern is assume you didn't name Holder, what jurisdiction would I have over a lawsuit against the Attorney General of the State of California?

MS. RIDER: I believe federal question as to whether or not the state's --

THE COURT: You mean the same issue? You're saying the same issue?

MS. RIDER: Yes.

THE COURT: Okay. So include the Attorney General in any argument you make as to them, or if it's an argument that just maintains that whatever relief is imposed on Holder follows to the Attorney General of California. Okay. Thank you.

MR. DeJUTE: Thank you, Your Honor.

MS. RIDER: Thank you.

(Proceedings concluded at 2:10 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript from the stenographic record of the proceedings in the foregoing matter.

November 13, 2012

/S/_____ _____

Deborah K. Gackle
Official Court Reporter

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