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

FEDERAL APPELLEE'S OPPOSITION TO APPELLANT'S MOTION FOR SUMMARY REVERSAL

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INTRODUCTION

This Court has recognized that a motion for summary disposition is appropriate only "[w]here the outcome of a case is beyond dispute," and that, "where the outcome is not so clear, such a motion unduly burdens the parties and the court, and ultimately may even delay disposition of the appeal." *United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam). Other courts have similarly recognized that summary reversal is an "extraordinary remedy," *Vietnam Veterans Against the War/Winter Soldier Org. v. Morton*, 506 F.2d 53, 56 n.7 (D.C. Cir. 1974), and a party seeking summary disposition bears a "heavy burden." *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297-98 (D.C. Cir. 1987); *see United States v. Powell*, 365 F. App'x 540, 543 (4th Cir. 2010) (unpublished) (noting that "a motion for summary disposition" is "reserve[d] for extraordinary circumstances not present here"); *United States v. Holy Land Found. for Relief and Dev.*, 445 F.3d 771, 781 (5th Cir. 2006) (finding that "the merits of the opposing positions at bar are not so clear as to warrant summary disposition"). In order to succeed on such a motion, the moving party must show that "the merits of his claim so clearly warrant relief as to justify expedited action." *United States v. Allen*, 408 F.2d 1288 (D.C. Cir. 1969) (per curiam).

Plaintiff here, relying on this Court's decisions in *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) and *Enos v. Holder*, 585 F. App'x 447 (9th Cir. 2014) (unpublished), seeks summary reversal of the district court's decision dismissing

his constitutional challenge to 18 U.S.C. § 922(g)(9). But this Court rejected as-applied challenges to section 922(g)(9) in *Chovan* and *Enos*, and those decisions only further confirm that dismissal of plaintiff's claims was correct.

Plaintiff's request for summary disposition is particularly misplaced because he already had an opportunity to amend his complaint, never asked for discovery below, and still has not indicated what additional facts he might allege that would be relevant to his claims. Plaintiff's argument that the district court erred procedurally is similarly without merit—plaintiff never objected to the court's order for supplemental briefing and had a full opportunity to brief the merits of his claims before the district court entered its order. Plaintiff therefore has identified no basis for the extraordinary remedy of summary reversal.

STATEMENT

A. Regulatory Background

1. In 1996, Congress concluded that "[e]xisting felon-in-possession laws . . . were not keeping firearms out of the hands of domestic abusers, because 'many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies.'" *United States v. Hayes*, 555 U.S. 415, 426 (2009) (quoting 142 Cong. Rec. 22985 (1996) (statement of Sen. Lautenberg)). Congress sought to "close this dangerous loophole," by prohibiting those "convicted in any court of a misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9), from possessing

firearms. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996) (Lautenberg Amendment).

In prohibiting those convicted of a misdemeanor crime of domestic violence from possessing firearms, Congress enacted a "restoration of rights" provision similar to that applicable to felony convictions. *Compare* 18 U.S.C. § 921(a)(20) (felonies), *with id.* § 921(a)(33)(B)(ii) (misdemeanor crime of domestic violence). A person is thus not considered to have been convicted of a misdemeanor crime of domestic violence "if the conviction has been expunged or set aside," or if the misdemeanor crime of violence is "an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id.* § 921(a)(33)(B)(ii). Congress also provided that a conviction for a crime of domestic violence does not qualify if the defendant pled guilty but did not "knowingly and intelligently waive[] the right to have the case tried by a jury." *Id.* § 921(a)(33)(B)(i).

2. California law provides that persons convicted of certain misdemeanor violations, including misdemeanor battery, may not purchase or possess firearms "within 10 years of the conviction." Cal. Penal Code § 29805. In 1993, the California legislature extended these restrictions to persons convicted of corporal injury to a

spouse or cohabitant. *In re David S.*, 133 Cal. App. 4th 1160, 1166-67 (Cal. Ct. App. 2005).

California Penal Code § 1203.4 establishes procedures for ex-offenders to obtain relief from "penalties and disabilities resulting from the offense." *Jennings v. Mukasey*, 511 F.3d 894, 898 (9th Cir. 2007) (quotation marks omitted). "The limitations on this relief are numerous and substantial," *id.*, however, and include the reservation that "[d]ismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm," Cal. Penal Code § 1203.4(a)(2); *see also United States v. Hayden*, 255 F.3d 768, 772 (9th Cir. 2001). Thus, "Section 1203.4 does not, properly speaking, 'expunge' the prior conviction." *Jennings*, 511 F.3d at 898 (quoting *People v. Frawley*, 98 Cal. Rptr. 2d 555, 559-60 (Cal. Ct. App. 2000) (quotation marks omitted)). A person "remain[s] convicted for [Gun Control Act] purposes" despite "receiv[ing] relief under section 1203.4." *Id.*

B. Facts and Prior Proceedings

1. Plaintiff Eugene Baker was convicted in 1997 of inflicting corporal injury to a spouse or cohabitant, and was sentenced to three years of probation. *See* First Am. Compl. (FAC) ¶ 14; Cal. Penal Code § 273.5(a). Because of his conviction, plaintiff is prohibited from possessing firearms by 18 U.S.C. § 922(g)(9). Plaintiff states that he obtained relief from his conviction under California Penal Code § 1203.4. *See* FAC ¶

15. That relief, however, did not restore his right to possess firearms for purposes of federal law. *See Jennings*, 511 F.3d at 898.

Plaintiff filed a complaint in the Central District of California seeking declaratory and injunctive relief, including a declaration that he was not subject to 18 U.S.C. § 922(g)(9) due to a state court order purporting to set aside his prior conviction. The district court dismissed the complaint without prejudice under Federal Rule of Civil Procedure 12(b)(1), because plaintiff's complaint failed to state facts sufficient to satisfy standing. The court also dismissed the complaint with prejudice under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, concluding that plaintiff's claims were precluded by this Court's decision in *Jennings*.

On appeal, this Court affirmed the district court in part and reversed in part. *See Baker v. Holder*, 475 F. App'x 156 (9th Cir. 2012) (unpublished). This Court agreed with the district court that plaintiff had failed to allege facts sufficient to establish standing, but that plaintiff could amend his complaint to satisfy Article III requirements. *See id.* at 157. It also agreed that "*Jennings v. Mukasey*, 511 F.3d 894, 898-99 (9th Cir. 2007), forecloses [plaintiff's] statutory argument that his state court order purporting to 'set aside' his misdemeanor domestic violence conviction renders § 922(g)(9) inapplicable." *Id.* But it remanded the case to the district court to consider plaintiff's constitutional claims in light of the Supreme Court's decision in *District of Columbia v. Heller,* 554 U.S. 570 (2008). *See Baker*, 475 F. App'x at 157-58.

2. Following remand, plaintiff filed an amended complaint. The district court held a status conference, during which the court acknowledged plaintiff's remaining constitutional claims and explained that "it seems that the way to get this before the court is by briefing it, correct?" Status Conference Tr., Dkt. No. 31, at 11:2-3 (Oct. 15, 2013). Plaintiff's counsel responded, "That's correct." *Id.* at 11:4. The court proposed that the parties file simultaneous opening briefs and then simultaneous opposing briefs, and neither party objected. *Id.* at 11:5-11.

In their opening briefs, the government argued that plaintiff's constitutional claims should be dismissed for failure to state a claim, *see* Def. Opening Br. (Dkt. No. 36), and plaintiff argued that he should prevail on the merits of his claim, *see* Pl. Opening Br. (Dkt. No. 38). Plaintiff did not request discovery. *Id.* In his opposing brief, plaintiff again addressed the merits of his claim. Pl. Reply at 1-13 (Dkt. No. 41). He also objected that government violated local rules by not providing him adequate notice of its motion to dismiss, but he again did not request an opportunity for discovery or identify any undeveloped facts that might be relevant to his claim. *See id.* at 13-15.

Following briefing, the district court dismissed plaintiff's challenge for failure to state a claim. *See* Order (July 31, 2013), Dkt. No. 48 (Op.). The court noted that "[e]very single court that has ruled upon the constitutionality of Section 922(g)(9) has upheld it against Second Amendment challenges." Op. 6-7 (emphasis omitted) (citing

United States v. White, 593 F.3d 1199, 1206 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009); *United States v. Staten*, 666 F.3d 154, 168 (4th Cir. 2011); *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010)). The court further relied on the district court opinion in *Enos v. Holder*, 855 F. Supp. 2d 1088, 1090-91 (E.D. Cal. 2012), which rejected another as-applied challenge to section 922(g)(9) and was later affirmed by this Court in *Enos v. Holder*, 585 F. App'x 447, (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015).

The court acknowledged plaintiff's argument that "he is different from the typical Section 922(g)(9) offender," because "he has committed no crimes other than the 1997 charge of domestic violence (either before or since), and has maintained a 'peaceful and amicable relationship' with the victim of that incident." Op. 7. But the court observed that "every court to consider a similar argument has rejected it." *Id.* "Plaintiff has not identified—nor has this Court found—any case that has adopted Plaintiff's argument that the Second Amendment demands that an individual who has been convicted of a crime of domestic violence be permitted to own a gun if he or she remains law abiding for a certain period of time thereafter." Op. 8 n.7. The court therefore concluded that "Plaintiff's Second Amendment claim must be dismissed." Op. 8. Because plaintiff had not identified any impermissible burden on his Second

Amendment right, the court also dismissed plaintiff's equal protection claim. Op. 8 (citing *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010)).

Plaintiff appealed, and this Court granted plaintiff's unopposed requests to stay appellate proceedings pending this Court's resolution of *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014), and *Enos v. Holder*, 585 F. App'x 447, (9th Cir. 2014) (unpublished). This Court has since rejected the constitutional challenges in both cases.

ARGUMENT

A. This Court's Decisions Confirm that the District Court Correctly Dismissed Plaintiff's Constitutional Claims.

The district court correctly held that plaintiff failed to state a claim that 18 U.S.C. § 922(g)(9) violates the constitution as applied to him. That holding was consistent with the decisions of every court of appeals to consider such challenges, *see* Op. 6-7, and with the district court opinion in *Enos v. Holder*, 855 F. Supp. 2d 1088, 1090-91 (E.D. Cal. 2012). Following the district court's decision in this case, this Court issued decisions in *United States v. Chovan*, 735 F.3d 1127 (2013) and *Enos v. Holder*, 585 F. App'x 447 (9th Cir. 2014) (unpublished), rejecting similar as-applied challenges to section 922(g)(9). Those decisions confirm that the district court was correct to dismiss plaintiff's claim.

In *Chovan*, 735 F.3d at 1141, this Court rejected the plaintiff's argument "that § 922(g)(9) is unconstitutional as applied to him because his 1996 domestic violence conviction occurred fifteen years before his § 922(g)(9) conviction, he is unlikely to recidivate, and he has in fact been law-abiding for those fifteen years." The Court explained that even "assum[ing] that Chovan has had no history of domestic violence since 1996, 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." *Id.* at 1142. The Court noted "that if Chovan's as-applied challenge succeeds, a significant exception to § 922(g)(9) would emerge." *Id.* The Court declined to create such an exception, instead concluding that "Congress permissibly created a broad statute that only excepts those individuals with expunged, pardoned, or set aside convictions and those individuals who have had their civil rights restored." *Id.*

In *Enos*, 585 F. App'x at 447-48, this Court relied on *Chovan* to affirm a district court decision rejecting another as-applied challenge to section 922(g)(9). The plaintiffs in that case had each been "convicted in California of a misdemeanor crime of domestic violence over ten years ago," and had "later petitioned for and received record clearance under California Penal Code § 1203.4." *Enos v. Holder*, 855 F. Supp. 2d 1088, 1090-91 (E.D. Cal. 2012). This Court nonetheless concluded that "there is

no evidence in this record demonstrating the statute is unconstitutional as applied to the Appellants." *Enos*, 585 F. App'x at 447-48.

Plaintiff's challenge is not meaningfully distinguishable from the as-applied challenges rejected in *Chovan* and *Enos*. Plaintiff asserts that he was convicted in 1997 of inflicting corporal injury to a spouse or cohabitant, that he obtained relief from his conviction under California Penal Code § 1203.4, and that he "has never been convicted of any other criminal behavior." FAC ¶¶ 14-16. Those allegations, which the district court accepted as true for purposes of the government's motion to dismiss, do not distinguish plaintiff from the plaintiffs in *Chovan* or *Enos*. *See Chovan*, 735 F.3d at 1142 (holding that the plaintiff's challenge fails, even "assum[ing] that Chovan has had no history of domestic violence since 1996"); *Enos*, 855 F. Supp. 2d at 1090-91 (rejecting challenge brought by plaintiffs "convicted in California of a misdemeanor crime of domestic violence over ten years ago," who had "later petitioned for and received record clearance under California Penal Code § 1203.4"), *affirmed by Enos*, 585 F. App'x at 447-48.

Plaintiff nonetheless claims that summary reversal is appropriate because he should have the opportunity to amend his complaint so that he can allege additional facts to support his as-applied challenge. *See* Pl. Mot. 13-14. He argues that *Chovan* and *Enos* "have made clear that there could be facts that, if sufficiently pleaded, would form the basis of a viable as applied challenge to section 922(g)(9)." Pl.

Mot. 14. Neither case stated that section 922(g)(9) would be vulnerable to an as-applied challenge. Rather, in *Chovan*, this Court simply credited "the government's evidence that the rate of domestic violence recidivism is high," in the absence of any countervailing evidence. *Chovan*, 735 F.3d at 1142. Plaintiff here does not claim the existence of such evidence. He has already had one opportunity to amend his complaint, offers no explanation of what additional facts he might allege if allowed to amend his complaint again, and is not entitled to summary reversal.

B. Plaintiff Has Not Identified Any Procedural Error by the District Court.

Plaintiff's argument that the district court erred procedurally also lacks merit. Following remand, the district court allowed plaintiff to amend his complaint and held a status conference to determine next steps. When the court suggested that the parties file simultaneous opening and responsive briefs on plaintiff's remaining constitutional challenges, plaintiff did not object. *See* Status Conference Tr., Dkt. No. 31, at 11:2-11 (Oct. 15, 2013). Plaintiff subsequently argued in his briefs that he should prevail on the merits of his claim. *See* Pl. Opening Br. (Dkt. No. 38); Pl. Reply at 1-13 (Dkt. No. 41). Plaintiff never requested discovery and still has not explained what additional factual development might have been relevant to his claim. Moreover, even if plaintiff had requested discovery, he would not be entitled to it if, as the district court correctly held, his complaint failed to state a claim on which relief could be granted.

While plaintiff claims that the district court violated local rules by treating the government's opening brief on remand as a motion to dismiss, Pl. Mot. 15-18, he concedes that the district court was entitled to dismiss his claims even absent a formal motion, *see id.* at 17 (citing *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987). Plaintiff had an opportunity to amend his complaint, to appear before the district court for a status conference, and to file an opening and response brief on the merits of his claim. He was entitled to no more.

In any event, plaintiff's argument with respect to the local rules is mistaken. The district court is entitled to "[b]road deference" in its "interpretation of its local rules," and "[a] district court's compliance with local rules is reviewed for 'an abuse of discretion.'" *Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007) (quoting *Hinton v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir. 1993)). Plaintiff does not identify any such abuse of discretion. While plaintiff claims that the government failed to comply with Central District of California Local Rule 6-1, that rule applies "[u]nless otherwise provided by rule or order of the Court." Here, the district court ordered briefing on the merits of plaintiff's claim on remand, and plaintiff did not object. Similarly, plaintiff relies on Local Rule 7-4, but that rule merely identifies circumstances under which the district court "*may* decline to consider a motion." C.D. Cal. L. R. 7-4 (emphasis added).

CONCLUSION

For the foregoing reasons, plaintiff's motion for summary reversal should be denied.

Respectfully submitted,

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NOVEMBER 2015

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on November 12, 2015. Participants in the case are registered CM/ECF users and service will be accomplished through that system.

/s/ Patrick G. Nemeroff
PATRICK G. NEMEROFF