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 BRIEF

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INTRODUCTION

The Attorney General's response brief fails to undermine any of the many reasons Baker is entitled to a remand. Her reading of this Court's precedent as foreclosing Baker's claims is simply wrong. The relevant opinions clearly contemplate as applied challenges, if the proper evidence is provided. The Attorney General does not dispute that Baker never had the opportunity to present such evidence. This alone entitles him to a remand.

While the Attorney General strives to dispute that Baker was deprived of formal procedural protections by the district court in the complete and permanent dismissal of his lawsuit, she fails. What she insists was sufficient notice and opportunity to be heard simply was not under the Federal Rules of Civil Procedure. And her justification for the district court's refusal to grant Baker leave to amend is equally unavailing.

Ultimately, the Attorney General asks this Court to excuse 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 evidentiary showing *Chovan* and *Enos* would require of him *before* those cases

came down and without any opportunity to even provide evidence. She asks too much. Remand is appropriate.

ARGUMENT

I. The Attorney General Misreads This Court's Precedent as Supporting the District Court's Dismissal of Baker's As Applied Claims

This Court's decisions in *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 denied*, 135 S. Ct. 187 (2014), and *Enos v. Holder*, 585 F. App'x 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015), are not dispositive of Baker's claims, as the Attorney General asserts. Both of those cases merely upheld the facial validity of the Lautenberg Amendment,18 U.S.C § 922(g)(9), and rejected specific as applied challenges to it; they did not foreclose all as applied claims against section 922(g)(9). Appellant's Opening Br. ("A.O.B.") 14-17 (citing *Chovan*, 735 F.3d at 1142, and *Enos*, 585 F. App'x at 447-48).

Indeed, this Court 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*. *Chovan*, 735 F.3d at 1141-42. Had the *Chovan* panel intended to foreclose all as applied challenges, the Court's analysis in *Enos*, a subsequent case involving such a challenge, would make no sense:

> Under *Chovan* (decided after *District of Columbia v. Heller*, 554 U.S. 570 (2008)), the Lautenberg Amendment is constitutional on its face, because the statute is substantially related to the important government purpose of reducing domestic gun violence. *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013). Additionally, ***there is no evidence in this record demonstrating the statute is unconstitutional as applied to the Appellants***. Further, when questioned, counsel for Appellants declined to suggest such evidence exists. Therefore, the district court correctly held that amendment of the complaint would be futile. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

Enos, 585 F. App'x at 447-48 (emphasis added). If, as the Attorney General asserts, *Chovan* shut the door on all as applied challenges to section 922(g)(9), the *Enos* Court would have had no reason to address the plaintiffs' lack of evidence. It would have simply disposed of the case as not being a viable challenge.

This Court has, therefore, not only twice declined the opportunity to declare that as applied challenges to section 922(g)(9) are unavailable, it has also provided guidance on the type of evidence plaintiffs might need in order to prevail when asserting Second Amendment claims like Baker's. *Enos*, 585 F. App'x at 447-48; *Chovan*, 735 F.3d at 1142 (finding that intermediate scrutiny cannot be met in the absence of "evidence to directly contradict the government's evidence that the rate of domestic violence recidivism is high" and/or to prove that "a domestic abuser [who] has not

committed domestic violence for [*x*] years . . . is highly unlikely to do so again"). The Attorney General's assertion that this precedent forecloses any as applied challenge to section 922(g)(9) is not consistent with those decisions and should be rejected.

Likewise, the Attorney General's argument that Baker's as applied challenge is not "meaningfully distinguishable" from those presented in *Chovan* and *Enos* is wildly overstated. Federal Appellee's Br. ("F.A. Br.") 15. 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, A.O.B. 3-6, 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 ("[T]here 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.") (emphasis added). The Attorney General provides no justification for why Baker's constitutional claims should be barred based on the litigation decisions of counsel in previous cases to which he was not a party. And for good reason: there is none.

As such, the district court erred in dismissing Baker's claim on the merits and this Court should give him the opportunity to make his case under the newly prescribed standard. But, even if this Court finds otherwise, Baker is entitled to a remand because the Federal Rules of Civil Procedure compel it.

II. The Attorney General's Claim that Baker Was Afforded the Process He Was Entitled to by the District Court Is Patently Erroneous

According to the Attorney General, Baker was entitled to no more than a single amended complaint, a status conference, and general issue briefing before the district court could properly dismiss his claims. F.A. Br. 18-19. The Federal Rules of Civil Procedure, which she wholly ignores, say otherwise. Her argument appears to be that the district court got close enough to meeting procedural requirements. Compliance with the Federal Rules, however, is not a game of horseshoes. Baker is definitively entitled to much more.

The Attorney General does not dispute that her "motion to dismiss"—which was tellingly titled "Federal Defendant's Opening Brief," E.R. II 032—failed to comply with the most basic rules of motions practice, which it unequivocally did. A.O.B. 7-8, 18. Rather, she argues that the district court properly exercised its authority to sua sponte dismiss Baker's claims. F.A. Br. 18-19. She is wrong.

While the court has authority to dismiss claims on its own accord, its "power is not absolute." *Compare* A.O.B. 19 (citing Fed. R. Civ. P. 12(b)(6); *Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *Cal. Divers. Promos., Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974)), *with* F.A. Br. 18-19. It is well-settled that, absent a finding that the complaint 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. Divers.*, 505 F.2d at 281 (citing *Bertucelli v. Carreras*, 467 F.2d 214 (9th Cir. 1972); *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir. 1970)) (emphasis added).

Here, the district court decidedly failed to meet its obligations in that regard. While its February 1, 2013 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. E.R. II 111 (February 1, 2013 order rescheduling hearing).[1] 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 perceived deficiencies. E.R. II 111 (March 8, 2013 order vacating oral argument on motion to dismiss).

The Attorney General disingenuously characterizes the district court's October 15, 2012 status conference as sufficient notice to Baker that his claims could be permanently set aside and, even more spectacularly, as a sufficient opportunity to be heard before they were. F.A. Br. 18. It was woefully insufficient on both counts.

At the status conference, the parties merely discussed the issues remaining after remand and were asked by the court to determine, as the Attorney General described it, "next steps." E.R. II 61-69. Neither the merits of Baker's claims nor the grounds for

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[1] The full text of the order read: "SCHEDULING NOTICE by Judge Stephen V. Wilson: The hearing on a motion to dismiss previously scheduled for 02/04/2013 1:30 PM has been rescheduled to 2/25/2013 at 1:30 PM before Judge Stephen V. Wilson. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY.(pc) TEXT ONLY ENTRY (Entered: 02/01/2013)." E.R. II 111.

future dismissal were raised; nor was any plan for discovery discussed. E.R. II 61-69. The simultaneous issue briefing that the court requested from all parties was complete by January 16, 2013. E.R. II 110-11. Only *after* the briefs were filed, did the court signal it would treat the Attorney General's brief as a motion to dismiss. E.R. II 111. In response, Baker raised his procedural objections again, but weighed in on the propriety of dismissal out of an abundance of caution. E.R. II 30-31. On March 8, 2013, the court dismissed the case without a hearing on the merits. E.R. II 111.[2] In short, Baker was provided no notice of or opportunity to be heard on the permanent dismissal of his claims following the generic status conference held several months prior. Such a hearing clearly

[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. F.A. Br. 18. 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 the span of just a few months. At no point did the parties discuss a discovery plan because they were awaiting word from the court following their ordered briefing. Because Baker never had the opportunity to conduct discovery, little regarding his ability to provide evidence supporting his claims can be gleaned from the fact that he conducted none.

does not meet the mandates of Federal Rule 12(b) as explained in *California Diversified*.

What's more, the district court never made a finding that Baker's claims could not be sufficiently amended to withstand dismissal—a fact the Attorney General does not attempt to dispute. *Compare* A.O.B. 18-21, *with* F.A. Br. 18. The court did not make such a finding in its order. A.O.B. 21; E.R. I 001-09. Nor did it provide Baker an opportunity *at a hearing* to explain how he could amend before dismissing. A.O.B. 21; E.R. II 110-11. There is no evidence that the district court "even consider[ed] the viability of any potential amendments to the complaint before dismissing the complaint with prejudice," as was required of it. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034 (9th Cir. 2008), which the Attorney General does not even address, is grounds for reversal.

Rather than explain how the district court's handling of Baker's claims could satisfy the mandates of *Manzarek*, because she cannot, the Attorney General tries to liken Baker's pleading to that of the plaintiff in *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981 (9th Cir. 2009), whose claims were dismissed after his multiple attempts to perfect the pleading had failed. F.A. Br. 18-19.

But *Zucco* is clearly distinguishable. The Court should follow the reasoning of *Manzarek*.

In *Zucco*, the plaintiff was afforded two opportunities to amend to plead sufficient facts to state a claim. 552 F.3d at 789. Baker has never been afforded a single opportunity to do so, as his only amendment was done to address Article III deficiencies perceived by this Court in *Baker v. Holder*, 475 F. App'x 156, 157 (9th Cir. 2012). A.O.B. 12. Moreover, it is not even certain that Baker would need to plead any additional "facts" to assert a proper claim under *Chovan* and *Enos*. Those cases merely call for an evidentiary showing by a plaintiff that he is not of a class that the government can show is likely to recidivate. *Chovan*, 735 F.3d at 1141-42; *Enos*, 585 F. App'x at 47. Baker was denied that opportunity. 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 or evidence might be necessary to fully state his claim. Now, with *Chovan* and *Enos* final, Baker is entitled to the opportunity to provide evidence supporting those facts or to amend his complaint.

Even if Baker does need to plead additional facts to state a claim, he certainly need not meet, as the Attorney General contends, the standards of *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009), in his briefing before this Court. F.A. Br. 16. *Iqbal* concerns the sufficiency of *complaints*, not requests for leave to amend them. 556 U.S. at 667-78. Moreover, the Attorney General is asking this Court to ignore its obligation to "express no view on the viability of these potential amendments or whether the complaint can stand without amendment" because "[t]he district court should have the opportunity to reconsider its ruling on the original complaint and to consider the proposed amendments in the first instance." *Manzarek*, 519 F.3d at 1035. In any event, by failing to make a finding as to why Baker could not amend to make such a showing in dismissing his claims without prejudice, the district court committed plain error, entitling Baker to a remand to be provided such a finding. *Id.*; A.O.B. 21.

Further, the Attorney General's assertion that Baker has already had an opportunity to amend his complaint to address the district court's concerns is false. Baker filed his First Amended Complaint to perfect standing. The amending of his complaint was not necessary to address his Second Amendment claim. Indeed, this Court has already concluded that it was error for the district court to have dismissed the Second Amendment claim in Baker's original complaint. *Baker*, 475 F. App'x at 157.

In sum, contrary to the Attorney General's unsupported claims, 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. Divers.*, 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), *Manzarek*, 519 F.3d 1034, none of which the district court provided him. 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) (quotations omitted), and deny Baker the opportunity to perfect his complaint.

Finally, Defendant California Attorney General Kamala Harris does not dispute Baker's assertion that, if necessary, he could amend his complaint to assert new claims against her. *Compare* A.O.B. 18, 21-23, *with* F.A. Br. 18-19. As such, Baker should, at minimum, be allowed leave to amend to assert those claims.

CONCLUSION

Based on the foregoing, as well as the arguments in Appellant's Opening Brief, it is clear that the district court abused its discretion in dismissing Baker's claims with prejudice. Appellant Baker thus respectfully requests reversal of the district court's order and remand of his claims for further proceedings.

Date: May 27, 2016

Respectfully submitted,

s/ C. D. Michel

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) because it contains 2762 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii).

The foregoing brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Bookman Old Style font.

Date: May 27, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, an electronic PDF of Appellant's Reply Brief 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: May 27, 2016

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