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 OPENING BRIEF

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Eugene Evan Baker brought this suit against Defendants-Appellees Eric Holder, Jr., in his official capacity as Attorney General of the United States, Kamala D. Harris, in her official capacity as Attorney General for the State of California, and the State of California Department of Justice. The district court had original jurisdiction pursuant to 28 U.S.C § 1331 because this suit arises under the Constitution and laws of the United States, and pursuant to 28 U.S.C. § 1343(a)(3) because this suit seeks to redress the deprivation of rights protected by the Constitution under the color of the laws of the United States and the State of California.

On July 31, 2013, the district court issued an in chambers order, dismissing plaintiff's First Amended Complaint without leave to amend for failure to state a claim, pursuant to Federal Rules of Civil Procedure, rule 12(b)(6). Excerpts of Record, volume ("E.R.") I 001-09.

Appellant filed a timely notice of appeal on August 20, 2013, pursuant to Federal Rules of Appellate Procedure, rules 3 and 4, and Ninth Circuit rules 3-1, 3-2, and 3-4. E.R. II 010-23. Pursuant to 28 U.S.C. § 1291, this Court therefore has jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. This Court has established that, properly pleaded, a viable Second Amendment challenge to 18 U.S.C. § 922(g)(9) is feasible. Relying on out-of-circuit case law, however, the district court dismissed Baker's claims with prejudice for failure to state a claim. Did the court err as a matter of law?

2. Where fundamental rights, like the right to keep and bear arms, are asserted under the Equal Protection Clause, classifications which interfere with those rights are subject to heightened scrutiny. Baker brought an Equal Protection challenge to 18 U.S.C. § 922(g)(9), which classifies him as disqualified from exercising his fundamental right to arms. The district court applied rational basis review and summarily dismissed his claims. Did the court err?

3. Absent a finding that amendment is futile, a district court abuses its discretion when it dismisses a complaint with prejudice—especially if it fails to give notice of its intention to dismiss *and* an opportunity to oppose in writing *and* at a hearing. Without articulating that Baker's complaint could not be corrected, the district court dismissed Baker's claims without notice, a hearing, or an opportunity to amend. Did the district court err?

STATEMENT REGARDING ADDENDUM

Pursuant to rule 28(f) of the Federal Rules of Appellate Procedure and Ninth Circuit rule 28-2.7, an addendum of relevant constitutional, statutory, and regulatory provisions is bound together with this brief.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rules of Appellate Procedure, rule 34(a)(1), Baker requests the opportunity to present oral argument. Oral argument is appropriate as this case involves important issues concerning procedural safeguards for pleading and critical constitutional issues that, once clarified, may further inform the extent to which government can prohibit those convicted of domestic violence misdemeanors from exercising their right to keep and bear arms.

STATEMENT OF THE CASE

I. Baker's Background

In 1997, Appellant Eugene Baker pleaded *nolo contendere* to a single misdemeanor count of violating California Penal Code section 273.5(a), and was sentenced to a three-year probationary sentence. E.R. II 073-74. California Penal Code section 273.5(a) qualifies as a misdemeanor conviction of domestic violence ("MCDV") under 18 U.S.C. § 921(a)(33)(A)(i). Baker's conviction thus resulted in a 10-year ban on the possession of firearms under state law, California

Penal Code section 29805, and a lifetime ban under federal law, 18 U.S.C. § 922(g)(9).

Baker successfully completed the terms of his probation and, in 2002, applied to withdraw his plea and have the conviction set aside pursuant to California Penal Code section 1203.4. E.R. II 074. The state court granted that relief and signed an order expunging Baker's conviction, withdrawing the *nolo contendere* plea, entering a plea of not guilty, and dismissing the original criminal complaint. E.R. I 002, II 074.

Baker's California-based ten-year suspension of firearm rights expired in 2007, and he currently faces no firearm restrictions under state law. E.R. II 074. Since his 1997 arrest, Baker has never been convicted of, or reported to have committed, any other criminal behavior, including any crime which would disqualify him from receiving or possessing a firearm under federal or state law. E.R. II 074. Baker has maintained a friendly relationship with his ex-wife, the victim of his 1997 MCDV, without incident ever since.

In or around May 2009, with his California firearm restriction almost two years behind him and unaware of any other firearm restrictions, Baker attempted to purchase a firearm from a licensed California federal firearms dealer ("FFL"). E.R. II 074. The FFL contacted the California Department of Justice regarding Baker's request. As a federal "Point of Contact" for the National Instant

Criminal Background Check System ("NICS"), the California Department of Justice is obligated under state and federal law to assess the criminal backgrounds of firearms purchasers, and it is the final authority as to whether California FFLs can release firearms to purchasers. Pursuant to that authority, the Department responded to the FFL's request, informing the FFL that Baker was prohibited from possessing firearms and ordered the FFL not to release the firearm to him. E.R. I 002, II 074. Baker later learned that the Department had blocked the transfer of his firearm because it had identified a record of an MCDV conviction disqualifying him from purchasing or possessing firearms. E.R. I 002, II 074-75.

On March 11, 2010, Baker appeared before the Ventura County Superior Court and moved for an order declaring that his right to purchase and own firearms had been restored under both state and federal law. E.R. II 075. The court granted the order, declaring that Baker "is entitled to purchase, own and possess firearms consistent with the laws of the State of California." E.R. II 075, 098. Despite this declaration of his rights, Appellees continue to prohibit the sale or transfer of firearms to Baker.

Baker desires to obtain a firearm for his personal protection and the protection of his family. E.R. II 075-76. But if Baker attempts to exercise this Second Amendment right and is found to

be in possession of a firearm, he would be at risk of being arrested, charged, convicted, and punished pursuant to section 922(g)(9).

II. Proceedings Below

On May 27, 2010, Baker filed a complaint for declaratory judgment and injunctive relief against then United States Attorney General Eric Holder, in his official capacity, seeking a declaratory judgment that he is entitled to lawfully possess firearms under the laws of the United States. E.R. II 099.

The government moved to dismiss Baker's complaint. On October 26, 2010, the district court granted the government's motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). E.R. II 088-94. The district court ruled that Baker lacked standing to pursue the lawsuit and that Ninth Circuit case law pre-dating the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), precluded his action. *Baker v. Holder*, 475 Fed. Appx. 156, 157-58 (9th Cir. 2012).

On appeal, this Court determined that Baker argued sufficient facts that, if alleged in an amended complaint, would establish standing. *Id.* at 157. The Court also rejected the application of pre-*Heller* case law to an evaluation of the constitutionality of section 922(g)(9), holding that Baker had presented a viable claim that, as applied to him, the law may violate his Second Amendment rights. *Id.* at 157-58. The Court thus reversed the district court's

dismissal for failure to state a claim and remanded the matter for further proceedings. *Id.* at 158.

On remand, Baker filed an amended complaint, naming then United States Attorney General Holder, California Attorney General Kamala Harris, and the California State Department of Justice as defendants. E.R. II 072-73. Baker's First Amended Complaint sought declaratory and injunctive relief pursuant to the Second Amendment and the Equal Protection Clause of the United States Constitution. E.R. II 078-82.

The district court subsequently ordered the parties to file simultaneous briefs addressing the issues on remand. E.R. II 059. The parties filed their opening briefs on January 7, 2013. E.R. II 110.[1] Appellees explained in their court-ordered brief that they believed Baker's amended complaint should be dismissed. E.R. II 042-43. Appellees' informal issue briefing did not adhere to any of the notice or motion requirements of Federal Rules of Civil Procedure, rule 6, or Central District Local Rules, rules 6-1 and 7-4.[2]

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[1] On remand, Appellee Harris and the California Department of Justice, joined the briefs filed by Appellee Holder. E.R. II 036-40. The discussion of Appellees' briefs on remand thus refers to the substantive briefs filed by Appellee Holder on behalf of all Appellees.

[2] Unless the Federal Rules of Civil Procedure or a court order sets a different time, rule 6 demands the service of a written motion and notice of hearing at least 14 days in advance of the hearing. Fed. R.

Baker urged the court not to consider Appellees' argument as a Rule 12 motion unless and until all notice and procedure requirements were met. E.R. II 033-35. Despite the threat of prejudice to Baker, the district court improperly construed Appellees' brief as a motion to dismiss and granted a dismissal of Baker's First Amended Complaint *with* prejudice and *without* a hearing. E.R. I 009; E.R. II 111 ("Upon review of the parties' briefs, the Court concludes that the Motion is suitable for determination without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L. R. 7-15. The hearing scheduled for Monday, March 11, 2013, is VACATED.").

In granting the dismissal, the district court did not analyze the specific circumstances of the case. It instead dismissed Baker's as applied Second Amendment claim, citing a number of out-of-circuit appellate decisions and two district court cases, each of which generally upheld section 922(g)(9). E.R. I 004-08. The district court similarly dismissed Baker's equal protection challenge, improperly holding that pre-*Heller* case law rejecting a similar challenge to

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Civ. P. 6. Local Rule 6-1 dictates that every motion must "be presented by written notice . . . filed with the Clerk not later than twenty-eight (28) days before the date set for hearing," unless otherwise provided by rule or order of the Court. C.D. Cal. L.R. 6-1. And rule 7-4 of the Central District Local Rules requires "a concise statement of the relief or Court action the movant seeks." Appellees' informal issue briefing complied with none of those requirements.

section 922(g)(9) controlled post-*Heller* and barred Baker's claim. E.R. I 008-09 (citing *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010), *United States v. Hancock*, 231 F.3d 557, 565-66 (9th Cir. 2000)).

Baker filed a timely notice of appeal on August 20, 2013. E.R. II 010-23. Shortly thereafter, the Court granted Baker a handful of unopposed requests to stay appellate proceedings pending the resolution of the related cases, *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 187 (2014), and *Enos v. Holder*, 585 Fed. Appx. 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015). *See* Ninth Cir. Order, May 6, 2014, ECF No. 9; Ninth Cir. Order, Oct. 10, 2014, ECF No. 11; Ninth Cir. Order 1, Nov. 17, 2014, ECF No. 13; Ninth Cir. Order, June 8, 2015, ECF No. 16.

With those cases finally resolved, Baker brought a motion for full remand. On January 8, 2016, Appellate Commissioner Shaw denied that motion without substantive comment. Baker now appeals the district court's dismissal of his lawsuit.

SUMMARY OF ARGUMENT

18 U.S.C. § 922(g)(9) permanently bars those convicted of a misdemeanor crime of domestic violence ("MCDV") from possessing firearms or ammunition, unless their respective state's law exempts them. Because California provides no such exemption to its

residents, Appellant Eugene Baker brought suit against the United States and California Attorneys General asserting that application of section 922(g)(9) to him is a violation of his Second Amendment right to keep and bear arms and his right to equal protection under the law in the exercise of that fundamental right.

Despite this Court expressly finding that Baker had presented a viable as applied Second Amendment challenge to section 922(g)(9) in a previous appeal of this case, the district court sua sponte dismissed Baker's lawsuit under Rule 12(b)(6) without engaging in the analysis this Court held his claim was entitled to. And it did so without providing Baker notice of its intention to dismiss, a meaningful opportunity to oppose dismissal, or a hearing. Nor did it provide Baker an opportunity to amend his complaint or a justification for denying him that opportunity.

The district court committed reversible error on each score. To the extent there was any doubt that this Court's previous order in this matter meant Baker's as applied Second Amendment challenge to section 922(g)(9) survives dismissal under Rule 12(b)(6), the district court was required to provide Baker those basic procedural safeguards or leave to amend to address the supposed deficiencies. Its failure to do so was an abuse of its discretion.

What's more, intervening Ninth Circuit authority has removed any doubt that Baker's claims are legally sufficient. At the very

least, it does not foreclose his Second Amendment claim. And, by recognizing that people in Baker's position are *not* outside of the Second Amendment's protections, this new authority eviscerates the district court's basis for dismissing Baker's equal protection claim under pre-*Heller* case law. Baker should be given the opportunity to present his case in light of this authority.

The district court's decision to dismiss Baker's lawsuit should thus be reversed and this matter remanded for further proceedings.

STANDARD OF REVIEW

The district court's dismissal of Baker's lawsuit for failure to state a claim under Federal Rules of Civil Procedure rule 12(b)(6) is reviewed de novo. *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013); *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008); *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 526 (9th Cir. 2008). Under this review, the court must accept Baker's allegations as true and construe them in the light most favorable to Baker, and will reverse dismissal unless the complaint fails to "state a claim to relief that is plausible on its face." *Carlin*, 705 F.3d at 866-67 (citations omitted). Dismissal is proper only " 'if it appears beyond doubt' that the non-moving party 'can prove no set of facts which would entitle him to relief.' " *Leadsinger Inc.*, 512 F.3d at 526 (citations omitted). Further, "[d]ismissal without leave to amend is [an abuse of discretion]

unless it is clear, upon *de novo review*, that the complaint could not be saved by any amendment." *Manzarek*, 519 F.3d at 1031.

ARGUMENT

I. Baker Has Pleaded Viable Claims Under Ninth Circuit Precedent

A. This Court Previously Ruled that Baker Could Plead a Sufficient Second Amendment Challenge to Section 922(g)(9)

This appeal deals with the district court's *second* dismissal of Baker's Second Amendment claim. When this case first came before the Ninth Circuit, the Court was asked to reverse an order dismissing Baker's complaint without prejudice for lack of standing and with prejudice for failure to state a claim. *Baker v. Holder*, 475 Fed. Appx. 156, 157-58. (9th Cir. 2012). The Court affirmed in part, reversed in part, and remanded for further proceedings. *Id.* at 158.

As is relevant here, the Court overturned the rule 12(b)(6) dismissal of Baker's Second Amendment claim with prejudice, reasoning that Ninth Circuit precedent did not foreclose Baker's constitutional challenge. More specifically, it held that while *Jennings v. Mukasey*, 511 F.3d 894, 898-99 (9th Cir. 2007), barred a "statutory argument that [Baker's] state court order purporting to 'set aside' his misdemeanor domestic violence conviction renders § 922(g)(9) inapplicable," *Jennings* does *not* foreclose a constitutional argument because it was decided before *Heller* affirmed that the

Second Amendment protects an individual right to arms and so did not address whether section 922(g)(9) infringes that right. *Id.* at 157-58 (citing *Heller*, 554 U.S. 570).

On remand, the lower court surprisingly dismissed Baker's case again for failure to state a Second Amendment claim, this time *with* prejudice. E.R. I 009. This second dismissal, which is appealed here, was based not on *Jennings*, but on a handful of out-of-circuit appellate decisions and two district court cases upholding section 922(g)(9)—all of which preceded this Court's July 2012 reversal of the district court's first dismissal of Baker's as applied claim. E.R. I 006-09 (citing *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154, 168 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010); *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009); *Enos v. Holder*, 855 F. Supp. 2d 1088, 1099 (E.D. Cal. 2012); *United States v. Smith*, 742 F. Supp. 2d 855, 869 (S.D. W. Va. 2010)).

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. Surely this Court was aware that other circuits had upheld section 922(g)(9) based on the law of those circuits and

the facts of each case. Yet this Court *still* determined that the unqualified dismissal of Baker's as applied challenge to that same law was improper. *Baker*, 475 Fed. Appx. at 157-58. This Court's decision could have meant no less than that Baker *does* have some cognizable as applied Second Amendment challenge to section 922(g)(9) in the Ninth Circuit. In dismissing Baker's claim a second time, the district court disregarded this Court's holding, and that error requires reversal and remand to the district court for further proceedings.

B. Intervening Decisions of this Court Confirm that Baker Has Pleaded a Claim that Can Survive a Motion to Dismiss

Following the dismissal of Baker's claims, this Court rendered final 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 Fed. Appx. 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015). Holding that those convicted of an MCDV are *not* unprotected by the Second Amendment, this new authority removes any doubt that Baker has viable challenges to section 922(g)(9) under both the Second Amendment and the Equal Protection Clause. He is entitled to an opportunity to provide the evidence necessary to support his claims.

1. Second Amendment

Both *Chovan* and *Enos* presented challenges to section 922(g)(9) on Second Amendment grounds. And while the law was ultimately upheld in both cases based on the facts presented in them, the Court's reasoning is clear that as applied challenges to 922(g)(9) are feasible. *Chovan*, 735 F.3d at 1142; *Enos*, 585 Fed. Appx. at 447-48.[3]

Indeed, the *Chovan* decision points to the very sort of evidence that might make such a claim successful:

> 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.

735 F.3d at 1142. "In the absence of such evidence," the Court continued, "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." *Id.* (emphasis added). The other side of the coin, of course, is that the presence of such evidence *could* establish that application of the law to an individual

[3] To the extent this Court concluded otherwise in *Chovan* or *Enos*, Baker reserves the right to challenge that conclusion as inconsistent with *Heller*.

is not sufficiently related to the government's interest of preventing domestic violence.[4]

Enos tacitly reaffirmed this reasoning. 585 Fed. Appx. 447-48. There, the Court held that "[t]here is no evidence in *this* record demonstrating the statute is unconstitutional *as applied* to the [a]ppellants. Further, when questioned, counsel for [a]ppellants declined to suggest such evidence exists." *Id.* (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)) (emphasis added). Again, this Court's reasoning suggests that, properly pleaded and proved up, an as applied challenge to section 922(g)(9) *could* succeed.

In light of both *Chovan* and *Enos*, dismissal—particularly *with prejudice*—is clearly improper where, as here, the challenger has had no opportunity to present the evidence necessary to support his claim. If given the chance, Baker could present evidence that, as applied to him, section 922(g)(9) is not sufficiently related to the government's interest in combatting domestic violence. The lower court summarily dismissed Baker's claim without fully considering

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[4] Baker recognizes that *Chovan*'s ruling that a plaintiff has the evidentiary burden may have precedential effect here, and so he reserves the right to challenge that conclusion, as it is inconsistent with decisions of the Supreme Court, this Court, and others. *See e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664-68 (1994); *Porter v. Bowen*, 496 F.3d 1009, 1021 (9th Cir. 2007); *Heller v. District of Columbia*, 670 F.3d 1244, 1258-60 (D.C. Cir. 2011).

whether he could proffer sufficient evidence on that point because it did not believe that any viable Second Amendment challenge to section 922(g)(9) existed in the Ninth Circuit. E.R. I 001-08. But since *Chovan* and *Enos* are controlling intervening authority, the lower court's reasoning can no longer hold in light of their analyses.

2. Equal Protection

Chovan and *Enos* likewise demands reversal of the dismissal of Baker's equal protection claim. "[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966), and citing *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 633 (1969)). In short, such classifications must meet strict scrutiny. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

The district court refused to apply this case law to Baker's claim, reasoning that "domestic violence misdemeanants are not protected by the Second Amendment's right to bear arms." E.R. I 008-09. But, in light of *Chovan*'s express holding to the contrary, 735 F.3d at 1137, the lower court's decision on this claim cannot

stand and it should be remanded for analysis consistent with this new precedent.[5]

II. The District Court Abused Its Discretion by Dismissing Baker's Complaint with Prejudice

A. The District Court Did Not Find that Amendment Would Be Futile

After this Court first remanded this case, the district court ordered the parties to file opening and responsive briefs addressing the issues on remand. E.R. II 059. Appellees' brief expressed their position that Baker's complaint should be dismissed but made no formal motion for that relief. E.R. II 032-43. They did not provide Baker with proper notice of the motion or the statutory basis for dismissal as required by the local rules of the Central District of California and the Federal Rules of Civil Procedure. *See supra* Statement of the Case, Part II. The court nevertheless decided to unilaterally dismiss Baker's lawsuit. Such a sua sponte dismissal was an abuse of the court's discretion because it did not afford Baker *any* of the procedural safeguards he is entitled to (including the opportunity to amend).

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[5] To the extent the *Chovan* Court suggested that pre-*Heller* case law applies to all equal protection claims and not just the type asserted in *United States v. Hancock*, 231 F.3d 557 (9th Cir.2000), Baker reserves the right to challenge that conclusion, as it is inconsistent with decisions of the Supreme Court, this Court, and others, as noted above.

While a district court has authority to dismiss a claim sua sponte pursuant to rule 12(b)(6), *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987), "[t]he power is not absolute," *Cal. Diversified Promos., Inc. v. Musick*, 505 F.2d 278, 280 (9th Cir. 1974) (citing *Beshear v. Weinzapfel*, 474 F.2d 127, 133 (7th Cir. 1973)). Absent a finding that the complaint cannot be corrected, the trial court is bound to give "notice of [its] intention to dismiss, an opportunity to submit a written memorandum in opposition . . . , a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court." *Id.* at 281.

What's more, even when a formal motion is before the court, "[a]n outright refusal to grant leave to amend without a justifying reason is . . . an abuse of discretion" per se. *Manzarek*, 519 F.3d at 1034. The district court's failure to make any finding that amendment to Baker's complaint would be futile, together with its failure to provide the basic procedural safeguards this Court outlined in *California Diversified*, is reversible error.

In *California Diversified*, this Court had before it an appeal of a preliminary injunction denial followed by the sua sponte dismissal of all claims without providing "notice of th[at] action, a hearing, [or] an opportunity to amend." 505 F.2d at 280. The Court there recognized that fundamental notions of due process require "an opportunity to be heard upon such notice and proceedings as are

adequate to safeguard the right for which the constitutional protection is invoked." *Id.* To that end, the Court held, "it is error to dismiss a claim on the merits without notice, a hearing, and an opportunity to respond, unless the complaint could not be corrected by amendment." *Id.* (citing *Worley v. Cal. Dept. of Corr.*, 342 F.2d 769 (9th Cir. 1970)). Without providing notice of its intent to dismiss, a hearing, or leave to amend, the *California Diversified* trial court wrongly dismissed the suit sua sponte, and this Court reversed.

Similarly, in *Manzarek*, this Court held that a district court abused its discretion by dismissing a lawsuit with prejudice without providing the plaintiffs adequate justification for doing so or opportunity to rebut. 519 F.3d at 1034-35. In so holding, the *Manzarek* Court reasoned, inter alia, that the district court "never explained at a hearing that it intended to dismiss the complaint with prejudice" and "never allowed [plaintiffs] a chance to explain how they could amend the complaint if allowed to do so." *Id.* at 1034. "Indeed," continued the Court, "it appears that the district court did not even consider the viability of any potential amendments to the complaint before dismissing the complaint with prejudice." *Id.* The district court's signing an order stating that " '[a]mendment of Plaintiffs' First Amended Complaint would be futile

because plaintiffs would be unable to allege facts that would alter these strictly legal determinations,' " was not sufficient. *Id.* at 1030.

What happened to Baker in the district court here is practically indistinguishable in *Manzarek*. The district court did not make any finding on the futility of amendment to Baker's complaint. And not only did the Court fail to notify Baker of its intent to dismiss, it did not afford him an opportunity to respond to any concern the Court might have harbored regarding the futility of amendment, let alone provide a hearing on the matter. E.R. I 111. The failure of the district court to provide those basic procedural safeguards when denying leave to amend is clear error demanding reversal and remand.

Ultimately, "dismissal order[s] predicated upon fatally defective pleading[s]," are not favored. *Bertucelli v. Carreras*, 467 F.2d 214, 215 (9th Cir. 1972). "[W]hen they are made, ample opportunity for amendment should be provided in all except the most unusual cases." *Id.* This is not such a case.

B. Amendment Would Not Be Futile

As explained above, the *Chovan* and *Enos* cases have made clear that there could be facts that, if sufficiently pleaded, would form the basis of a viable as applied challenge by Baker to section 922(g)(9). *Chovan*, 735 F.3d at 1142; *Enos*, 585 Fed. Appx. 447-48; *see also supra* Argument, Part I.B. To the extent it does not already

sufficiently do so, Baker should be given the opportunity to amend his existing complaint in order to raise those facts now—with the benefit of this Court's analyses in *Chovan* and *Enos* to guide him. To deny him such would improperly leave him without remedy where one clearly is available.

What's more, Baker has alleged independent claims against State of California Defendants. E.R. II 072-73, 78-83. Neither *Chovan* nor *Enos* is directly dispositive of those claims. And the district court failed to even acknowledge them in its ruling. E.R. I 001-09. So even if his claims against the Federal Defendant cannot stand, Baker's claims against the State Defendants remain viable. To the extent they require amendment, Baker could allege, for example, that the State Defendants, as a Point of Contact for the federal NICS system, *see supra* Statement of Facts, Part II, intentionally interpret California law to preclude an exception to section 922(g)(9)'s disqualification, despite not furthering any interest by doing so. Baker could also allege that the Second Amendment requires California to provide an exception to section 922(g)(9)'s disqualification, and thus an existing provision in California law must be construed as providing such.

This Court should "express no view on the viability of these potential amendments or whether the complaint can stand without amendment. The 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.

CONCLUSION

Based on the foregoing, Appellant Baker respectfully requests that this Court reverse the district court's order and remand for further proceedings.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Baker asserts that he is unaware of any pending related cases.

The two cases recently before this Court that raised related issues have both been finalized. *See United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), *cert denied*, 135 S. Ct. 187 (2014); *Enos v. Holder*, 585 Fed. Appx. 447 (9th Cir. 2014) (unpublished), *cert. denied sub nom. Enos v. Lynch*, 135 S. Ct. 2919 (2015).

Date: February 16, 2016

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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 5037 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: February 16, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2016, an electronic PDF of APPELLANT'S OPENING 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: February 16, 2016

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