No. 19-55937

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEON THOMAS,
Plaintiff-Appellant,

v.

A.W. JURGENSEN, Associate Warden/Acting Warden, official capacity,
Defendant-Appellee,

K. LOPEZ, ZUMKHER, JEFFREY ALLEN, FRANCISCO QUINTANA,
Defendants.

On Appeal from the United States District Court
for the Central District of California
No. 2:10-cv-02671-JGB-MRW
Hon. Jesus G. Bernal, *District Judge*

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Ten years ago, Leon Thomas filed this *Bivens* suit while imprisoned in unsafe conditions at the Victorville Federal Correctional Center in California. Thomas, a chronically ill amputee who must use a wheelchair, required basic mobility devices at Victorville—*e.g.*, a grab bar—to accomplish daily tasks that many of us take for granted: getting into and out of bed, using the toilet, showering. For nearly a year, however, Bureau of Prisons ("BOP") personnel consigned Thomas to solitary confinement cells lacking even rudimentary accommodations. As a consequence, Thomas suffered repeated injuries. Defendant Jurgensen, then Victorville's associate warden, was deliberately indifferent to these unconstitutional conditions of confinement, and this Court previously affirmed the district court's denial of his motion for summary judgment.

This appeal does not concern the merits of Thomas's Eighth Amendment claim, however. Instead, this appeal concerns the government's conduct in litigating that claim. For eight years, the government consistently and affirmatively represented—in statements sworn under penalty of perjury, in briefs and motions, and in open court—that Thomas had complied with the BOP's complicated administrative grievance regime and fully exhausted his claim against defendant Jurgensen. On the eve of trial, however, the government adopted a blatantly contradictory posture without explanation, arguing for the first time that Thomas

had filed suit several weeks before receiving the BOP's final denial of Thomas's grievance and, accordingly, that dismissal was warranted.

The district court noted the "unfair" and "colossally wasteful" nature of the government's about-face. Nonetheless, it granted the government's motions on the pleadings and for summary judgment. Its decision is erroneous in every respect.

First, exhaustion is an affirmative defense and not a pleading requirement, but the district court granted the government's motion on the pleadings because Thomas had not demonstrated exhaustion on the face of his complaint. Second, the government repeatedly and unambiguously disavowed the exhaustion affirmative defense over many years. Its conduct amounts to textbook waiver or forfeiture that the district court was not entitled to excuse. Third, the equitable doctrine of laches bars the government's delinquent assertion of the exhaustion defense. Its inexplicable, inexcusable, and unreasonable delay has deprived Thomas of any mechanism to vindicate his constitutional rights, and undermined the public interest. Fourth, the government is equitably estopped from using Thomas's reasonable reliance on its consistent misrepresentations as a sword that irreparably prejudices him. Finally, the government's consistent and long-standing factual representations, often made under penalty of perjury, constitute binding judicial admissions.

"[T]he public has an interest in seeing its government deal carefully, honestly and fairly with its citizens." *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975). The government egregiously violated that maxim in this case, and the district court rewarded it for doing so. Reversal is called for. Any other result is a blank check to engage in further conduct "hardly worthy of our great government." *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970).

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 because Mr. Thompson sued under *Bivens* to redress violations of his constitutional rights. ECF 1-1. This Court has jurisdiction under 28 U.S.C. § 1291. This is an appeal from a final judgment entered on June 10, 2019.[1] ER5.[2] This appeal was noticed on August 9, 2019, ER1-2, so it is timely under 28 U.S.C. § 2107(b).

ISSUES PRESENTED FOR REVIEW

I. Was the government entitled to judgment on the pleadings on the basis that Thomas did not plead that he administratively exhausted, when exhaustion is an affirmative defense rather than a pleading requirement?

Raised at ECF 233 at 6-10 and ruled on at ER11-13.

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[1] The court below dismissed Thomas's complaint without prejudice. Normally such a dismissal is not final for purposes of appeal. Where, as here, the defect in the complaint cannot be cured, the dismissal is final for purposes of appeal. *See Butler v. Adams*, 397 F.3d 1181, 1183 (9th Cir. 2005).

[2] The Ninth Circuit Rule 30-1 excerpts of record are cited as "ER" followed by a page number. Other record material is cited as "ECF" followed by a document number and optional page number.

II. Was the government entitled to summary judgment on the basis that Thomas failed to exhaust administrative remedies, when the government consistently asserted for nearly a decade that Thomas had properly exhausted his claims that subjecting a chronically ill amputee to hazardous solitary confinement conditions violated the Eighth Amendment, then reversed course on the eve of trial after the statute of limitations had expired and Thomas could no longer cure the defect?

Raised at ECF 237 at 3, 5-7; ruled on at ER13-15.

STATEMENT OF THE CASE

A. Thomas, a Chronically Ill Amputee, Was Consigned to Hazardous Solitary Confinement Cells, Where He Was Injured.

Leon Thomas, imprisoned at Victorville between August 14, 2008, and March 25, 2011, is a critically ill individual. ECF 110-1 at 5; ECF 150-2 at 8; ER8. To start, a history of gangrene compelled the amputation of his right leg in 1989, necessitating the use of a wheelchair. ECF 150-2 at 2. He is "morbidly obese." ECF 150-2 at 8. He further suffers from epileptic seizure disorder, painful gluteal ulcers, recurrent urinary tract infections, high blood pressure, phantom limb pain, poor circulation, and diabetes. ECF 150-2 at 8.

According to Thomas's BOP physician, Victorville lacked "the specialized equipment to address [Thomas's] specialized needs." ECF 150-2 at 8. It was "very evident that [Thomas] need[ed] a higher level of care [than Victorville] can provide." ECF 150-2 at 8. Among the care that Thomas required, but Victorville could not offer, were "ambulatory devices" such as a "trapeze" that would enable

Thomas to transfer safely to and from his bed, wheelchair, shower, and toilet. ECF 150-2 at 8.

Without the requisite level of care, Thomas's Victorville physicians could only utilize "short term accommodations" such as a back brace, "wheelchair cushions and special shoe[s] to minimize the risk of . . . further deterioration of his progressive diseases, both vascular and physical." ECF 150-2 at 2-3, 7-8. What was necessary, according to the BOP physician, was a transfer to U.S.P. Phoenix, an appropriate medical care facility. ECF 150-2 at 2-3, 7-8.

Instead, Victorville personnel threw Thomas in hazardous solitary confinement[3] cells, ECF 110-1 at 5, and confiscated the "short term accommodations" prescribed by BOP medical personnel, ECF 110-1 at 5-8. Without them, Thomas rapidly deteriorated. ECF 110-1 at 4-8. The general worsening of his health was exacerbated by the conditions of solitary confinement. ECF 110-1 at 5-6; ECF 150-2 at 8. Despite his obvious disability, Thomas's solitary confinement cells lacked ambulatory devices, such as a grab bar and safety railings, that would have permitted him to move to and from his bed, wheelchair, toilet, and shower without risk. ECF 110-1 at 5; ECF 150-2 at 8. Thomas attempted

[3] Below, Thomas's conditions of confinement were referred to as the "S.H.U." *E.g.*, ECF 11 at 3. We follow Justice Kennedy's example and call it "solitary confinement." *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring); *see also Apodaca v. Raemisch*, 139 S. Ct. 5, 6 (2018) (statement of Sotomayor, J.) (similar).

to jerry rig these devices out of old socks and torn sheets, but the contraptions frequently tore mid-transfer, injuring Thomas repeatedly. ECF 110-1 at 5.

Further exposing Thomas to danger, the entrance to the cell shower was raised, which prevented Thomas from accessing it from his wheelchair. ECF 110-1 at 5. Even if he could have maneuvered across the shower threshold, the stall itself was too narrow to safely accommodate his extra-wide wheelchair. ECF 110-1 at 5. And, in any event, Thomas could not reach the water valve from his wheelchair. ECF 110-1 at 6. Thomas described the ordeal:

> I would lock my wheelchair outside the shower, try to balance my weight and stand on my one leg while reaching for the very edge of the "L" shaped rails (if I slipped, I would fall…), and then, while still trying to hold on, I would lift myself up a little further, and hop on one leg towards the shower seat and quickly sit down. But even after I got to the seat, I would have to lunge up to reach the top shower button, further exposing myself to serious injury and a bad fall, because the bottom shower button that was reachable from the seat, and which controlled the lower shower faucet, was broken.

ECF 110-1 at 6. Ultimately, after ten months, Thomas was removed from the treacherous solitary confinement cells. ECF 110 at 8.

B. Thomas Filed a *Bivens* Suit Against Defendant Jurgensen, and the Government Consistently Asserted for Many Years That Thomas Properly Exhausted Two Eighth Amendment Claims Against Him.

Prior to his transfer, Thomas repeatedly sought to informally resolve his concerns with defendant Jurgensen, then the associate warden at Victorville, and other BOP personnel. *E.g.*, ECF 110-1 at 6-7. On at least fifteen occasions,

Thomas informed defendant Jurgensen that he had been injured—and was at risk of further injury—because BOP personnel had confiscated his necessary medical accommodations and were subjecting him to unsafe conditions. ECF 110-1 at 6-7.

When defendant Jurgensen refused to return Thomas's medical devices or authorize the installation of safety rails, ECF 110-1 at 7, Thomas invoked the formal grievance process by filing grievance 566304, which the BOP received on November 24, 2009, ER159; ER175. Throughout the process, he complained that BOP personnel were wrongfully withholding necessary medical equipment, confining him in injurious cells, and refusing to transfer him to a medically appropriate BOP facility. ER175-80. At each stage, however, Thomas's grievances were denied. ER175-80. Finally, on April 28, 2010, five days after its extended deadline expired, the BOP's Office of General Counsel ("OGC"), the final arbiter of the BOP grievance process, affirmed all prior denials of grievance 566304.[4] ER180.

[4] The BOP has a four-step administrative remedy process that a prisoner must complete to exhaust administrative remedies. ECF 233 at 3-4; 28 C.F.R. § 542.10-542.19. First, a prisoner is required to attempt informal resolution. ECF 233 at 3-4; 28 CFR § 542.13. If the issue is not resolved informally, the prisoner must file a "BP-9" form with the warden. ECF 233 at 4; 28 CFR § 542.14. Third, a prisoner must appeal any adverse decision from the warden by submitting a "BP-10" form to the regional director. ECF 233 at 4; 28 CFR § 542.15. Finally, a prisoner must appeal any adverse decision from the regional director to OGC. ECF 233 at 4; 28 CFR § 542.15; 28 CFR § 542.18. OGC has 40 days to respond but may extend its own deadline by 20 days if it notifies the prisoner of the extension in writing. ECF 233 at 4; 28 CFR § 542.18.

On March 3, 2010, Thomas, proceeding pro se, brought a *Bivens* suit.[5] ECF 4. Thomas sought to hold defendant Jurgensen responsible for violating the Eighth Amendment's prohibition on cruel and unusual punishment by denying him necessary medical equipment and holding him in hazardous conditions of confinement.[6] ECF 4 at 11-12. The district court screened Thomas's claim, and dismissed it on June 28, 2010, with explicit instructions to refile without adding new claims or defendants. ECF 11 at 10. On July 16, 2010, Thomas filed his first amended complaint. ECF 14.

On April 7, 2011, the government moved to dismiss Thomas's complaint. ER137. In connection with an excessive force claim brought against a former defendant, the government argued that Thomas had failed to exhaust his administrative remedies. ER146-48. In connection with the claims against defendant Jurgensen, in contrast, the government sought dismissal on the grounds that Thomas had failed to state a claim and that defendant Jurgensen would be entitled to qualified immunity in any event. ER149-52. The government attested

[5] Several years later, pro bono counsel appeared for Thomas. *See* ECF 75 (notice of appearance by Steptoe & Johnson).

[6] Thomas raised other claims against defendant Jurgensen and other BOP personnel. ECF 4 at 3-12. Those other claims and defendants were either dismissed below or on a prior to appeal to this Court, and Thomas does not seek to revive them now. Only the Eighth Amendment claims against defendant Jurgensen remain.

under penalty of perjury that Thomas had exhausted his administrative remedies in connection with grievance 566304, in which Thomas complained that BOP personnel were wrongfully withholding necessary medical equipment, confining him in injurious cells, and refusing to transfer him to a medically appropriate BOP facility. ER159 (Declaration of Attorney Sarah Schuh). Indeed, the fact that Thomas had fully exhausted his administrative remedies on those claims, the government argued, was proof positive that Thomas had no excuse for failing to exhaust the excessive force claim. ER133 ("Mr. Thomas does know how to exhaust administrative remedies because he did so as to the other claims in this case.").

The district court dismissed the excessive force claim for failure to exhaust, denied the government's motion to dismiss with respect to defendant Jurgensen, and ordered an answer to Thomas's complaint. ECF 47; ECF 55. The government answered on April 12, 2012, pleading thirteen affirmative defenses, including failure to exhaust, in shotgun fashion and without any detail. ECF 56 at 5. On December 5, 2012, the district court held a status conference to resolve Thomas's request to file a second amended complaint. ECF 80; ER108. The government noted that Thomas's proposed second amended complaint contained one superfluous sentence referencing an unexhausted claim—distinct from the claims against defendant Jurgensen—but stated a claim in all other respects. ER112.

Thomas agreed to remove the gratuitous sentence prior to filing the second amended complaint, ER113-14, which he did on December 17, 2012, ECF 84. The government answered with an identical array of substance-free, boilerplate, affirmative defenses. ECF 85 at 4.

On September 30, 2013, defendant Jurgensen moved for summary judgment, arguing that the undisputed facts undermined Thomas's Eighth Amendment claims against him, and claiming entitlement to qualified immunity. ER79, 85, 94-95. Once again, the government affirmatively stated that Thomas had properly exhausted these claims, attesting under penalty of perjury that "administrative remedy request relevant to this matter, i.e., claim 5663304" is "the only one where Plaintiff exhausted the administrative remedy process." ER 211-12 (Declaration of Senior Attorney Sarah Quist); *see also* ER98 ("This lawsuit stems from actions… between August 26, 2009 … and April 28, 2010, the date he exhausted the administrative remedy process.").

On October 22, 2014, the district court denied the government's motion for summary judgment, holding that there was a genuine dispute of material fact whether Thomas "received the medical equipment and cell he needed for his medical conditions," that a reasonable juror could find defendant Jurgensen "deliberately indifferent to Plaintiff's medical needs," and that he was not entitled

to qualified immunity. ECF 137 at 30-38. The government's motion for reconsideration was also denied. ECF 141.

The government then took an interlocutory appeal. This Court affirmed in part as to defendant Jurgensen, holding that the conditions to which Thomas was subjected created "an objective risk of 'significant injury or the unnecessary and wanton infliction of pain,'" that Thomas could "not safely shower, use the toilet, and move to, from, and within, the bed," that a reasonable juror could find that defendant Jurgensen was deliberately indifferent to the conditions of Thomas's confinement, and that defendant Jurgensen was not shielded by qualified immunity. ER19-20 (citing *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014)).[7]

After remand, the parties prepared for trial. On February 2, 2015, the government filed a motion in limine to exclude "testimony and evidence regarding any claims outside the scope of plaintiff's exhausted administrative remedy." ER61. The government asserted therein that Thomas had "properly exhausted each of the . . . two claims" raised against defendant Jurgensen—i.e., that he had "denied him adequate medical care" and "denied him a proper handicapped cell." ER63; *see also* ER63 n.1 (noting that Thomas "complet[ed] his exhaustion of claim AR 566304"); ER65 ("In this case, Plaintiff's exhausted AR 566304 now

[7] This Court reversed denial of summary judgment on Thomas's claim that defendant Jurgensen had violated the Eighth Amendment by denying him a back brace and a wheelchair cushion. ER22.

defines the scope of Plaintiff's action at trial."); ER66 ("Defendants seek an order precluding Plaintiff from introducing evidence regarding any claims for any alleged incidents occurring after the date that AR 566304 was finally exhausted, *i.e.*, April 28, 2010, when the OGC denied his appeal in AR 566304."). In a supporting declaration, the government asserted under penalty of perjury that "Plaintiff has exhausted the administrative remedy process regarding AR 566304." ER68 (Declaration of Paralegal Werner Guth). Likewise, the government asserted in a pretrial memorandum of contentions of fact and law that Thomas "exhausted Administrative Remedy 566304 and that defines the scope of Plaintiff's action at trial." ER56. Finally, in a separate brief, the government asserted yet again that Thomas had exhausted the claims against him:

> Defendants seek an order precluding Plaintiff from introducing evidence or testimony regarding any claims that are not identified in Plaintiff's Administrative Remedy ID 566304 ("AR 566304"), the only exhausted claim[s] at issue in this case. It is uncontroversial what those claims are: *First*, Plaintiff alleges that . . . BOP employee-defendant[] . . . Jurgensen, denied him adequate medical care by denying him medical supplies. . . . *Second*, Plaintiff alleges that . . . Jurgensen denied him a proper handicapped cell during his stay at FCI I Victorville.

ER33.

C. On the Eve of Trial, the Government Took a Blatantly Contradictory Position, Arguing for the First Time That Thomas Had Not Properly Exhausted the Eighth Amendment Claims Against Defendant Jurgensen, and the District Court Dismissed the Case Pursuant to the Prison Litigation Reform Act.

Nearly a decade after Thomas brought this *Bivens* suit, and on the eve of trial, the government reversed course, arguing for the first time that Thomas had filed his original complaint prematurely and, accordingly, that dismissal was warranted under the Prison Litigation Reform Act ("PLRA").[8] ECF 233 at 3, 7-9. As relevant to this appeal, Thomas argued in response that the government had forgone its opportunity to seek dismissal for failure to exhaust in light of both the government's multiple prior contrary assertions and significant prejudice to Thomas.[9] ECF 237 at 3-5, 7.

The district court was sharply critical of the government's "unfair" litigation choices, which it described as "colossally wasteful" of the "time and resources" of the litigants and the courts. ER15-16. These choices were particularly egregious in

[8] Thomas does not dispute that he "brought" his complaint on March 3, 2010, whereas OGC's initial deadline to respond was April 3, 2010, that deadline was later extended to April 23, 2010, and OGC ultimately denied his appeal on April 28, 2010, five days after its deadline expired.

[9] Thomas also argued both that he had, in fact, exhausted because his first amended complaint, which was filed after OGC denied his appeal, was the operative complaint for purposes of the analysis, and that "technical" noncompliance should be excused. ECF 237 at 5. Further, Thomas sought sanctions against the government. ECF 237 at 7-8. Thomas does not press these arguments on appeal.

light of the fact that the government "appears to have had all the facts [it] needed to raise this argument years ago." ER15. Nonetheless, in the court's view, the government's prior representations did not warrant excusing Thomas's premature filing. ER 13-15.

SUMMARY OF THE ARGUMENT

1. The district court granted the government's motion for judgment on the pleadings because Thomas did not establish exhaustion on the face of the complaint. But "failure to exhaust is an affirmative defense under the PLRA" and prisoners are "not required to specifically plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007).

2. For nearly a decade, the government asserted, sometimes under penalty of perjury, that Thomas had exhausted his administrative remedies against defendant Jurgensen. On the eve of trial, long after the statute of limitations ran—indeed, long after an unsuccessful appeal to this Court—the government changed its story. The district court granted the government's motion for summary judgment despite the obvious injustice. It should not have.

First, the government's disavowal of the affirmative defense amounts to a knowing and intelligent abandonment of a known right. The government's conduct is textbook waiver and waived claims cannot be resuscitated. The outcome is the same if principles of forfeiture are applied instead. Forfeited claims may be revived

only under extraordinary circumstances. Here, an apparent change of heart—not a blockbuster factual discovery or change in the law—propelled the reversal. That does not cut it under the case law. Second, the government's extraordinary and unexplained delay in raising an obvious affirmative defense calls for the application of laches against it. Where, as here, delay is unreasonable and prejudicial, laches will bar the government in the interests of justice. Third, the government is equitably estopped from inducing Thomas to sleep on his rights only to pounce once it was advantageous to do so. Estopping the government entails an analysis of six factors; each factor weighs heavily in Thomas's favor. Fourth, the government's assertions, consistent and long-standing, constitute judicial admissions. The government was bound by them.

STANDARD OF REVIEW

This Court reviews orders granting judgment on the pleadings and summary judgment de novo. *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011); *United States v. Phattey*, 943 F.3d 1277, 1280 (9th Cir. 2019). Questions of waiver and forfeiture are reviewed de novo. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). But this Court applies a "hybrid" standard of review to equitable claims sounding in laches and estoppel, reviewing questions of law de novo and factual matters for abuse of discretion. *See Eat Right Foods Ltd. v. Whole Foods Market, Inc.*, 880 F.3d 1109, 1115 (9th Cir.

2018) (applying "hybrid" standard of review to laches claim); *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1175 (9th Cir. 2000) (noting that equitable estoppel claims are reviewed de novo when the relevant facts are undisputed). Because the relevant facts are undisputed here, Thomas's laches and equitable estoppel claims are entitled to plenary review. Questions of "judicial admission" are reviewed for an abuse of discretion. *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1988). All facts and reasonable inferences are viewed in the light most favorable to Thomas. *See Keenan v. Hall*, 83 F.3d 1083, 1088 (9th Cir. 1996). Finally, Thomas's pro se submissions are interpreted liberally—a rule that is "particularly important in civil rights cases." *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

ARGUMENT

I. The District Court Erred in Granting the Government's Motion for Judgment on the Pleadings Because Exhaustion Is an Affirmative Defense Not a Pleading Requirement.

The district court granted the government's motion for judgment on the pleadings after concluding that Thomas's operative complaint was "facially deficient" because Thomas did not establish exhaustion on the face of his complaint. ER11. The district court has it backwards. "[F]ailure to exhaust is an affirmative defense under the PLRA, and . . . inmates are not required to specifically plead or demonstrate exhaustion in their complaints." *Jones v. Bock*,

549 U.S. at 216. Therefore, the district court's order granting the government's motion for judgment on the pleadings must be reversed.

II. The Government Was Not Entitled to Summary Judgment on the Basis that Thomas Failed to Exhaust Administrative Remedies Because the Government Consistently Asserted for Nearly a Decade That Thomas Had Properly Exhausted His Claims, and Then Disclaimed That Position on the Eve of Trial After the Statute of Limitations Had Expired and Thomas Could No Longer Cure the Defect.

A. The Government Waived—or at the Very Least, Forfeited—the Affirmative Defense of Failure to Exhaust by Disavowing It for Years.

"[T]he PLRA exhaustion requirement is not jurisdictional." *Woodford v. Ngo*, 548 U.S. 81, 101 (2006). Rather, it is an "affirmative defense, [which is] waived if the defendant does not raise it." *Lira v. Herrera*, 427 F.3d 1164, 1171 (9th Cir. 2005); *see also Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014) (noting that failure to exhaust is a waivable affirmative defense).

A party waives an affirmative defense by "knowingly and intelligently relinquish[ing]" it. *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012); *see also Day v. McDonough*, 547 U.S. 198, 211 (2006) (A party waives an affirmative defense when it "'strategically' with[olds] the defense or cho[oses] to relinquish it."). Waiver cannot be excused under any circumstances. *Wood*, 566 U.S. at 471 n.5.

Forfeiture, by contrast, is an inadvertent failure to assert a right. *Wood*, 566 U.S. at 470 n.4. Unlike waiver, forfeiture may sometimes be excused but *only* under "extraordinary circumstances." *Id.* at 471. A party seeking to rely on a

forfeited argument must show both that "exceptional circumstances" caused the forfeiture and that "the opposing party would suffer no prejudice" if the forfeited claim were reviewed. *See Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002).

That the government checked the box on exhaustion—and twelve other affirmative defenses—when answering the complaint, does not impact the analysis. The government may not avoid waiver or forfeiture by raising an affirmative defense in an answer and thereafter withholding it—or, as happened here, disclaiming it—before reversing course, not least because that tactic would grant a windfall to the government while "generat[ing] seriously unfair results" to plaintiffs. *Walden v. Nevada*, 945 F.3d 1088, 1095 (9th Cir. 2019) (quoting *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 619 (2005)); *see also, e.g.*, *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001) (finding waiver where party raised affirmative defense in an answer and then failed to reassert the defense in subsequent dispositive motions); *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296 (7th Cir. 1993) (holding defendants waived affirmative defense, despite pleading in answer, by "extensive participation in the merits of the lawsuit without raising the defense affirmatively"). This rule is doubly true in light of the fact that parties must contest exhaustion "as early as feasible." *Albino*, 747 F.3d at 1170.

Whether the government's disavowal of exhaustion for eight years is considered waiver or forfeiture, the result is the same: they were not entitled to dismissal on the basis of this affirmative defense.

First, the government explicitly withdrew the defense, asserting numerous times, including under penalty of perjury, that Thomas had exhausted the Eighth Amendment claims against defendant Jurgensen. At no point has the government attributed its apparent change of heart to error or mistake. Rather, it raised exhaustion as to some claims and expressly disclaimed it as to others. That conduct evinces a decision to "knowingly and intelligently relinquish[]" a right, which constitutes textbook waiver. *Wood*, 566 U.S. at 470 n.4.; *see also Dalluge v. Coates*, No. CV-06-319-RHW, 2008 WL 678647, at *3 (E.D. Wash. Mar. 7, 2008) (where defendants "admitted 'that the grievance process is complete[]'" it "constitutes a waiver of the failure to exhaust defense"), *aff'd on other grounds*, 341 F. App'x 310 (9th Cir. 2009).

The outcome is no different if we assume for purposes of argument that the government's conduct constitutes forfeiture rather than waiver. The government has not even hinted at any explanation for its conduct, let alone one that constitutes extraordinary circumstances. See ECF 233. Likely that is because there simply are no "extraordinary circumstances" here that could conceivably excuse the government's flip-flop. There was no intervening legal development that would

call for leniency. *See Taniguchi*, 303 F.3d at 959 (characterizing a "change in the law" as an extraordinary circumstance). Nor was there an intervening factual development. *Handberry v. Thompson*, 446 F.3d 335, 342-43 (2d Cir. 2006) (refusing to excuse the government's reversal where "[t]he grounds upon which the [government] asserted a non-exhaustion defense ... were based on information that was available to them" when they disavowed exhaustion). Indeed, as the district court found, the government "appears to have had all the facts [it] needed to raise this argument years ago." ER15. Finally, this case simply does not raise those profound questions of public import that might tip the scale in favor of excusing forfeiture. *See Wood*, 566 U.S. at 471 (holding that forfeiture may be excused in "exceptional cases" that implicate the "harmonious relations between the state and federal judiciaries").

Second, the government's turnabout was both impermissibly untimely and massively prejudicial. As to the former, the government's conduct is contrary to this Court's rule that parties must contest exhaustion as "as early as feasible." *Albino*, 747 F.3d at 1170. With regard to the latter, the government's conduct robbed Thomas of any opportunity to vindicate his constitutional rights because the statute of limitations had long since expired by the time the government raised the exhaustion defense. Here, Thomas's claim accrued on August 21, 2009, when he was placed in a hazardous solitary confinement cell, ECF 110-1 at 5, and the

statute of limitations expired on February 22, 2014.[10] Far from a "purely technical matter," depriving Thomas of the opportunity to voluntarily dismiss and refile within the statute of limitations is paradigmatic prejudice. *Handberry*, 446 F.3d at 343.

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Waiver is always inexcusable; forfeiture is also inexcusable here. The government told Thomas over and over again, through years of hard fought litigation, that he had properly completed its complicated grievance process. He believed them. And the price for his justifiable reliance was the loss of his right to vindicate unconscionable and unconstitutional conduct. Under the circumstances, the government is prohibited from un-ringing the bell.

B. The Government's Extraordinarily Delayed Assertion of the Exhaustion Defense Is Barred by the Doctrine of Laches.

"Laches is an equitable defense that prevents a [party], who with full knowledge of the facts, acquiesces in a transaction and sleeps upon his rights."

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[10] In Section 1983 actions, federal courts apply the forum state statute of limitations from personal-injury claims and borrow the state's tolling rules. *Soto v. Sweetman*, 882 F.3d 865, 871 (9th Cir. 2018) *cert. denied*, 139 S. Ct. 480 (2018). California has a two-year statute of limitations for personal injury actions. Cal. Code of Civ. Proc. § 335.1; *see also Chestra v. Davis*, 747 F. App'x 626, 627 (9th Cir. 2019). In addition, California law extends that period for two years while a prisoner is incarcerated. Cal. Code of Civ. Proc. § 352.1(a); *see also Chestra*, 747 F. App'x at 627. Finally, the statute of limitations was tolled for a period equal the time Thomas spent exhausting. *Brown v. Valoff*, 422 F.3d 926, 942-43 (9th Cir. 2005).

Evergreen Safety Council v. RSA Network Inc., 697 F.3d 1221, 1226 (9th Cir. 2012) (internal citations and quotation marks omitted). To establish a laches defense against the government, Thomas must satisfy the following requirements. First, he must show unreasonable or "inexcusable delay." *Stevens Tech. Servs., Inc. v. S.S. Brooklyn*, 885 F.2d 584, 588 (9th Cir. 1989). Second, he must show "prejudice." *Id*. Third, the injustice to Thomas must outweigh the damage—if any—to the public's interest by the assertion of laches against the government. *Watkins v. U.S. Army*, 875 F.2d 699, 708 (9th Cir. 1989) (en banc); *see also United States v. Ruby Co.*, 588 F.2d 697, 705 n.10 (9th Cir. 1978) (observing that the affirmative misconduct standard for laches is consistent with the one applied when a party asserts equitable estoppel against the government). Finally, where—unlike here—laches is asserted against "a suit by [the government] to enforce a public right or protect a public interest," the private party must establish "affirmative misconduct" by the government. *Ruby Co.*, 588 F.2d at 705 n.10. Irrespective of whether Thomas must satisfy all four or just three of these requirements, the government's conduct in this case warrants the application of laches.

1. The Government's Delay In Reversing Course Was Unreasonable and Inexcusable.

Delay is measured from the date a party could have first asserted a belated claim. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001). Here, the government could have moved to dismiss Thomas's claim against defendant

Jurgensen for failure to exhaust on April 7, 2011, when it raised the same defense in connection with an excessive force claim. Instead, it disavowed the defense with respect to defendant Jurgensen for eight years.

The government's extraordinary delay is unreasonable and inexcusable when judged against the requisite metrics: (1) any justification for the delay; (2) the existing time bar. *See Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838 (9th Cir. 2002) ("[W]e decide whether the plaintiff's delay was reasonable. . . . We also consider whether the plaintiff has proffered a legitimate excuse for its delay." (citing *Danjaq*, 263 F.3d at 954-55)). Regarding the first metric, the government has provided no explanation whatsoever for its delay, let alone a satisfactory one. Assertion of the defense did not require years of analysis or discovery—the facts it alleged in its untimely motion were available to the government when it filed its motion to dismiss. ER15 ("Defendant appears to have had all the facts [it] needed to raise this argument years ago."). Nor did the government cite mistake or inadvertent error as the justification. Unjustified delay is presumptively "unreasonable" under a laches analysis. *See Romans v. Incline Vill. Gen. Improvement Dist.*, 658 F. App'x 304, 306 (9th Cir. 2016) (laches is warranted when the party against whom it is asserted "has offered no viable justification for the delay." (quoting *Danjaq*, 263 F.3d at 955)).

Regarding the second metric, the government's delay is unreasonable when judged against the statute of limitations. *Jarrow Formulas, Inc.*, 304 F.3d at 838 (citing *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 971 (9th Cir. 1979)). Here, the government allowed the statute of limitations to expire before asserting the defense. *See id.* at 838-39 (affirming the district court's finding of unreasonable delay because the party knew of the relevant time limitation but did not assert its right before the statute of limitations expired).

2. Thomas Suffered Incredible Prejudice As a Consequence of the Government's Misconduct.

The sort of prejudice that application of laches is intended to prevent occurs when one party, by reason of the other party's delay, "is or will be worse off than [it] would have been" if the delaying party "had enforced [its] rights in a timely fashion." *TransWorld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 696 (9th Cir. 1990). "The bare fact of delay creates a rebuttable presumption of prejudice." *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 958 (9th Cir. 1979). This Court has recognized "two chief forms of prejudice . . . —evidentiary and expectations-based" in the laches context. *Danjaq*, 263 F.3d at 955. Expectations-based prejudice occurs when one party takes action that it otherwise would not have had the adversarial party promptly asserted an affirmative defense. *Evergreen Safety Council*, 697 F.3d at 1227.

Thomas has suffered irreparable "expectations-based" prejudice as a result of the government's unreasonable delay. *Id.* at 1227; *see also Romans*, 658 F. App'x at 306-07. Because the government chose not to assert the defense in its initial dispositive motion, instead waiting nearly eight years to raise it, Thomas lost the opportunity to voluntarily dismiss his suit and refile; he could have done so without changing a word.

This Court has concluded that analogous behavior demands the application of laches. For example, this Court has barred litigants from asserting a right or a claim that results in prejudice to the opposing party in light of a time bar. *See, e.g.*, *Miller v. Glenn Miller Prod.*, 454 F.3d 975, 981 (9th Cir. 2006). Additionally, this Court has barred litigants from adopting a "wait and see" approach that both confers an advantage on them and prejudices their adversary. *See, e.g.*, *Danjaq*, 263 F.3d at 951 (quoting *Haas v. Leo Feist, Inc.*, 234 F. 105, 108 (S.D.N.Y. 1916) (Hand, J.)). Here, based upon consistent representations by the government over many years, Thomas litigated his claim under the reasonable belief that he had properly exhausted. Had the government asserted the defense earlier, Thomas could have voluntarily dismissed and refiled. That lost opportunity is the very "essence" of expectations-based prejudice. *See Patrella v. MGM*, 695 F.3d 946, 955-56 (9th Cir. 2012) *rev'd on other grounds*, 572 U.S. 663 (2014).

3. The Interests of Justice Call For Applying Laches Against the Government.

The injustice to Thomas must be weighed against the harm—if any—to the public's interest by applying laches against the government. *Watkins*, 875 F.2d at 708; *see also Johnson v. Williford*, 682 F.2d 868, 871-72 (9th Cir. 1982) (giving more weight to erroneously paroled prisoner's liberty interest than government's interest in revoking improvidently granted parole where premature reintegration into society did not threaten public safety). That balancing test comes down squarely on the side of Thomas.

First, the injustice to Thomas that would be marked by preventing him from ever litigating his decidedly meritorious claims are obvious. *See* ER30 (describing Thomas's predicament as "[u]nfortunate[]"). Second, the public's interest would be vindicated—not harmed—if the government were held accountable for its representations in this case. Citizens are entitled to "some minimum standard of decency, honor, and reliability in their dealings with their Government." *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60-61 (1984). As this Court has noted, "[t]he public has an interest in seeing its government deal carefully, honestly and fairly with its citizens." *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975); *see also Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."). Barring the government from asserting

its exhaustion defense after disavowing it for years upholds these values by sending a clear and public signal that the government—as with any other litigant—is held to its word. That surely promotes the public's interest.

4. The Government Engaged in Affirmative Misconduct.

The court below believed that *Ruby*'s dicta preaching caution in applying laches to the government in a "suit by it to enforce a public right or protect a public interest" all but foreclosed the claim. ER15. But this is not "a suit by [the government] to enforce a public right or protect a public interest," so *Ruby* is inapposite. *Ruby Co.*, 588 F.2d at 705 n.10.

Even if *Ruby* were applicable here, though, laches would be appropriate because the government's actions constitute "affirmative misconduct." Under such circumstances, laches may be invoked against the government seeking to enforce a public right. *Ruby Co.*, 588 F.2d at 705 n.10; *see also, e.g.*, *United States v. Rite Aid Corp.*, No. 2:12-cv-1699, 2020 WL 230202, at *4 (E.D. Cal. Jan. 15, 2020) (similar); *United States v. Innovative BioDefense, Inc.*, No. SA CV 18-0996, 2019 WL 7195332, at *8 (C.D. Cal. Nov. 15, 2019) (similar); *United States v. Gibson Wine Co.*, No. 1:15-cv-1900, 2016 WL 1626988, at *6 (E.D. Cal. Apr. 25, 2016) (similar); *Fed. Trade Comm'n v. Directv, Inc.*, No. 15-cv-01129, 2015 WL 9268119, at *3 (N.D. Cal. Dec. 21, 2015) (similar).

Affirmative misconduct requires "an affirmative misrepresentation or affirmative concealment of a material fact by the government." *Watkins*, 875 F.2d at 707. It does not, however, require intent. *Id*. In the Ninth Circuit there is "no single test for detecting the presence of affirmative misconduct"; rather, "each case must be decided on its own particular facts and circumstances." *Watkins*, 875 F.2d at 707. This Court has articulated a number of benchmarks for aiding in determining whether the conduct at issue is not sufficiently serious to warrant applying laches against the government. For example, "a single oral misstatement by a government employee will ordinarily not constitute affirmative misconduct." *S & M Inv. Co. v. Tahoe Reg'l Planning Agency*, 911 F.2d 324, 329 (9th Cir. 1990). Moreover, this Court has said that "mere . . . delay" caused by a protracted administrative process does not warrant estoppel or laches. *Jaa v. United States I.N.S.*, 779 F.2d 569, 72 (9th Cir. 1986). The government's conduct in this case cannot be categorized as a single oral misstatement or "mere delay" in accordance with this Court's jurisprudence.[11]

In *Watkins*, for example, the Army represented that a soldier was eligible for reenlistment despite existing policy predicating enrollment upon heterosexuality. The government maintained for years—including in court filings—that the solider

[11] This Court relies upon the same affirmative misconduct standard for both laches and equitable estoppel claims. *See Ruby*, 588 F.2d at 705 n.10. Thus, that the cases below arise in the estoppel context is immaterial.

could reenlist. Years later, however, the Army reversed its position and refused to allow him to reenlist. *Watkins*, 875 F.2d at 703. After examining, the Army's "pervasive pattern" of communicating false promises to the soldier, this Court barred the government from prohibiting reenlistment. *Id*. at 708.

In *United States v. Wharton*, this Court estopped the government from asserting a claim to land because the Whartons had relied upon the government's misrepresentations to their detriment. 514 F.2d 406, 408 (9th Cir. 1975). This Court rejected the government's affirmative defense, observing that "morals and justice" demanded the result. *Id.* (citing *United States v. Georgia-Pacific Corp.*, 421 F.2d 92, 103 (9th Cir. 1970)).

And in *United States v. Lazy F C Ranch*, this Court barred the government based upon principles of "elementary fairness" and "justice and fair play." 481 F.2d 985, 988-89 (9th Cir. 1973). There, the government sued members of a corporate partnership for funds they had erroneously received based on improper advice from the government. *Id*. at 989-90. This Court observed that the government had to be barred, as it would be "a great injustice if the government were *not* held responsible" for its machinations. *Id.* (emphasis added).

The circumstances here, as in the preceding examples, constitute affirmative misconduct. The government represented on multiple occasions that exhaustion was not contested. This "pervasive pattern of affirmative misrepresentation"

Winter v. United States, 93 F. App'x. 145, 147 (9th Cir. 2004), caused Thomas to fall into a procedural trap. The government's "pattern of false promises" is the paradigmatic example of "affirmative misconduct" that bars the government from asserting what would otherwise be a right. *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184 (9th Cir. 2001) (citing *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1008 (9th Cir.1986)).

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Principles of fundamental fairness and justice animate this Court's laches jurisprudence. Those principles bar the government's unreasonably, inexplicably, and unjustifiably delayed assertion of a prejudicial affirmative defense that it disavowed years before wielding it as a sword.

C. The Government's Consistent Assertions That Thomas Had Exhausted Administrative Remedies Estopped It From Taking a New and Severely Prejudicial Position on the Eve of Trial.

Equitable estoppel shields litigants from "injustices" that are the result of reasonable and detrimental reliance upon another party's misleading conduct. *Holland v. Fla.*, 560 U.S. 631, 649-50 (2010); *see also Jablon v. United States*, 657 F.2d 1064, 68 (9th Cir. 1981) (characterizing equitable estoppel as "a shield" that is "used to bar a party from raising a defense . . . it otherwise would have"). Flexible application of equitable estoppel in order to serve the interests of justice is a "hallmark" of the doctrine. *Heckler*, 467 U.S. at 59. Thus, "[m]echanical rules"

that, if "strictly applied," would fail to "relieve hardships," are inappropriate. *Holland*, 560 U.S. at 650; *see also Heckler*, 467 U.S. at 59 (similar). This Court has long held that private citizens may be entitled to estop the government "where justice and fair play require it" and "the effects of estoppel do not unduly damage the public interest." *Johnson*, 682 F.2d at 871; *see also Watkins*, 875 F.2d at 706-07; *Lazy FC Ranch*, 481 F.2d at 988-89 (9th Cir. 1973). At least eight other circuits have reached the same conclusion. *Hansen v. Harris*, 619 F.2d 942, 959 (2d Cir. 1980) (Newman, J., concurring) (collecting cases.)

Determining whether a defendant should be equitably estopped from asserting an affirmative defense requires consideration of some or all of the following factors: (1) whether the plaintiff actually and reasonably relied on the defendant's representations; (2) whether the defendant actually or constructively knew its conduct was deceptive; and (3) whether the plaintiff was prejudiced by the defendant's conduct.[12] *See Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1176 (9th Cir. 2000). A party seeking to estop the government must satisfy three additional requirements: (1) that the government's conduct amounted to more than

[12] Whether to apply state or federal estoppel principles to a federal claim governed by a state statute of limitations appears to be an open question in the Ninth Circuit. *United States v. E. Mun. Water Dist.*, No. CV 04-8182, 2008 WL 11334421, at *3 n.1 (C.D. Cal. Apr. 3, 2008). The tests are largely the same, however, so the question is more academic than anything else. *Compare J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.*, 110 Cal. App. 4th 978, 990-91 (2003) *with Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992).

negligence; (2) that "serious injustice" will result unless the conduct is estopped; and (3) that estopping the government will not unduly damage the public interest. *Morgan v. Gonzales*, 495 F.3d 1084, 1092 (9th Cir. 2007) (quoting *Watkins*, 875 F.2d at 707). Each of these factors weighs heavily in Thomas's favor.[13]

1. Thomas Reasonably Relied on the Government's Serial and Longstanding Misrepresentations.

Thomas reasonably relied on the government's representations that it was not contesting exhaustion. The government repeatedly asserted, including under penalty of perjury, that Thomas had exhausted his claims against defendant Jurgensen. Thomas was entitled to rely upon the government's word. *See, e.g.*, *Heckler*, 467 U.S. at 60-61 (1984) (noting that citizens are entitled to "some minimum standard of decency, honor, and reliability in their dealings with their Government"); *Johnson*, 682 F.2d at 872 (concluding, based upon the government's affirmative conduct, that the plaintiff had a right to believe the government would not take certain action); *see also Martin v. Loadholt*, No. 1:10-cv-00156 2013 WL 1127607, at *4-5 (E.D. Cal. Mar. 18, 2013) (holding government defendant estopped from asserting untimeliness defense against prisoner's grievance because the defendant's actions reasonably implied that

[13] The district court reviewed Thomas's argument under the lens of "judicial estoppel" rather than equitable estoppel. ER 14.

timeliness was not a concern), *report and recommendation adopted*, 2013 WL 1800296 (E.D. Cal. Apr. 29, 2013).

2. The Government Had Constructive Knowledge That Thomas Filed Prematurely.

Second, the government had constructive knowledge that Thomas filed prematurely. The government—and no one else—implements and enforces the exhaustion regime at Victorville. Under such circumstances, they are held to have constructive knowledge of their misrepresentation. *Wharton*, 514 F.2d at 412 (finding the government had constructive knowledge because it controlled the application of the policies at issue); *see also Johnson*, 682 F.2d at 872 (explaining that where, as here, records in the possession of the government illustrate the true state of affairs, the government cannot insist it was unaware that its representations were inaccurate).

3. Thomas Was Severely Prejudiced by the Government's Misconduct.

Third, as explained above, Thomas was prejudiced by his reasonable reliance upon the government's word. Had the government timely raised the failure to exhaust defense, Thomas could have voluntarily dismissed and refiled his claims against defendant Jurgensen without changing a word in his complaint. Instead, the government induced him to permit the statute of limitations to expire while he litigated his claims in good faith.

4. The Government's Conduct Amounts to More Than Mere Negligence.

Over the course of many years, the government repeatedly represented that it was not contesting exhaustion, including under penalty of perjury, only to reverse course just before trial. This pervasive pattern of false promises amounts to more than mere negligence. *Watkins*, 875 F.2d at 708-09; *Winter*, 93 F. App'x at 146-47. This is particularly so where, as here, the government implemented, controlled, and was the selfsame arbiter of the exhaustion regime. *See Johnson*, 682 F.2d at 872.

5. Estopping the Government Will Prevent a Serious Injustice.

Estopping the government would stave off at least two serious injustices. First, Thomas could have dismissed and refiled his suit but for the government's false representations. *See* ER30 (describing Thomas's predicament as "[u]nfortunate[]"). Second, permitting the government to proceed without consequences could encourage similar conduct that "is hardly worthy of our great government." *Brandt*, 427 F.2d at 57.

6. Estopping the Government Promotes the Public Interest.

Incentivizing the government to deal fairly and honestly with its citizens surely benefits the public interest. *See Wharton*, 514 F.2d at 413. In contrast, where the government pays no price for conduct that is beneath it, public confidence in the administration of justice in cases involving the government may erode. *See United States v. Mark*, 795 F.3d 1102, 1107 (9th Cir. 2015) (McKeown, J.,

concurring) (observing that the government, by breaking its word, risks "the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice in a federal scheme of government." (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir.1972) (en banc))) .

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This Court has made clear that equitable estoppel "is based on the principle that a party should not be allowed to benefit from its own wrongdoing." *Estate of Amaro v. City of Oakland*, 653 F.3d 808, 813 (9th Cir. 2011) (quotation marks omitted). Affirming the decision below disregards that maxim by permitting the government to profit from its misconduct. By contrast, estopping the government avoids substantial injustice and promotes the public's interest. Accordingly, this Court should bar the government from asserting its untimely exhaustion defense.

D. The Government's Assertions Constitute Binding Judicial Admissions Prohibiting Its About-Face.

The district court reviewed arguments under a "judicial admissions lens" that was perhaps better suited to a waiver and forfeiture analysis. Nonetheless, Thomas is entitled to relief under the judicial admissions line of cases, too.

Judicial admissions are "formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *In re Barker*, 839 F.3d 1189, 1195 (9th Cir. 2016). "A statement in a complaint, answer or pretrial order is a judicial admission." *Am. Title Ins. Co.*

v., 861 F.2d at 226. Likewise, statements made in formal communications or proceedings other than the pleadings "may be considered admissions of the party in the discretion of the district court." *Id.* at 227.

The district court characterized the government's previous assertions that Thomas had exhausted his claims as "not a statement of fact, but a legal conclusion," referencing only the government's motion in limine and a single declaration. ER14. This ignores the fact that the government itself described its assertions about exhaustion as statements of fact. In its 2013 Motion for Summary Judgment, for example, the government's proposed *finding of facts* asserts that "April 28, 2010, [was] the date [Thomas] exhausted the administrative remedy process." ER98. A footnote within the section titled "Relevant Facts" references this same characterization of events, citing the Declaration of Attorney Sarah Quist as support. ER76. The government also asserted in several additional declarations that Thomas had fully exhausted the claims as issue. *E.g.*, ER 68 (Declaration of Paralegal Werner Guth). Because the government's statements effectively withdrew any question of fact from dispute over the date that his claim was exhausted, the government is bound by its earlier admissions. *Barker*, 839 F.3d at 1195.

The district court's conclusion that the government's assertions amount to "legal conclusion[s]" mischaracterizes the undisputed facts and the law. ER14.

Binding admissions, as opposed to "legal theories" are "unequivocal" statements that "require evidentiary proof." *MacDonald v. Gen Motors Corp.*, 110 F. 3d 337, 341 (6th Cir. 1997) (citing *Glick v. White Motor Co.*, 458 F. 2d. 1287 (3d Cir. 1972)).

Here, the government's previous admission was not a legal theory involving "the application of rules of law to complex factual patterns" such as proximate cause or negligence. *Macdonald*, 110 F. 3d at 341. Instead, the government's description of the facts was stated unequivocally and consistently. Exhaustion was presented as a settled fact, based on the government's review of Thomas's grievance filings.

Each of the instances where the government asserted that Thomas exhausted his remedies independently constitutes a sufficient binding judicial admission. Taken together, the government wholly obviated the need for factfinding as to administrative exhaustion. *See Barker*, 839 F.3d at 1195. Under the circumstances, the government is bound by its word.

CONCLUSION

For the aforementioned reasons, this Court should reverse and remand for a trial of Thomas's claims against defendant Jurgensen.

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Respectfully Submitted,

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STATEMENT OF RELATED CASES

In *Thomas v. Quintana*, Case No. 15-55313, the government took an interlocutory appeal after the district court denied its first motion for summary judgment in this matter. ER18. This Court affirmed in part, reversed in part, and remanded. ER22.

/s/ Daniel M. Greenfield
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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