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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

In 2010, Leon Thomas, a chronically ill amputee relegated to solitary confinement, filed this *Bivens* lawsuit against Defendant Jurgensen, then the Associate Warden at the Victorville Federal Correctional Center, to protest shocking indifference to his serious medical needs. For nearly a decade, the federal government defended Associate Warden Jurgensen's conduct on the merits. It did so in a motion to dismiss, in a motion for summary judgment, and on interlocutory appeal to this Court.

During this hard-fought litigation on the merits, the government asserted—more than a dozen times—that Mr. Thomas had exhausted his administrative remedies against Defendant Jurgensen. It proclaimed as much in exhibits attached to dispositive motions, in statements of undisputed fact, in briefs, and under penalty of perjury in sworn statements and open court. The government was unequivocal.

Just weeks before trial, however, the government reneged without any explanation, and argued for the first time that Mr. Thomas had filed his initial *pro se* complaint several weeks before the Bureau of Prisons ("BOP") issued its untimely final denial of Mr. Thomas's administrative appeals. As a result, it sought dismissal.

Mr. Thomas argued below in response that the federal government, through its actions and its words, had long since relinquished the right to seek dismissal on the basis of an affirmative defense that it had consistently disclaimed for nearly a

decade, and that its eleventh-hour about-face was acutely prejudicial. The district court criticized the government in stark terms, describing its conduct as "unfair," and noted that it "appears to have had all the facts [it] needed to raise this argument years ago." ER15. Nonetheless, the district court dismissed Mr. Thomas's case mere weeks before trial.

Before this Court, Mr. Thomas once again argued that the government's belated assertion of an affirmative defense that it had long disavowed was both prohibited in light of prior conduct and prejudicial. As Mr. Thomas explained in his opening brief, the federal government pleaded potential affirmative defenses, including exhaustion, in boilerplate fashion in both its 2010 and 2012 answers. Opening Br. 9-10. Between the 2010 and 2012 answer, however, it disowned exhaustion at least twice, and subsequent to the 2012 answer it disavowed exhaustion at least a dozen or more times prior to its sudden and unexpected change of heart in 2019.

That conduct, Mr. Thomas argued before this Court, constitutes textbook waiver or forfeiture of an affirmative defense. Under the circumstances, the equitable doctrine of estoppel also bars the government from benefiting from its belated assertion. Finally, the government's multiple assertions amount to a binding judicial admission from which it was not free to depart.

The government's brief before this Court mischaracterizes the relevant facts in order to twist the law in its favor. To start, the government's account of the procedural history below contains a seven-*year* gap—between 2012 answer and 2019 argument for dismissal—an apparent attempt to frame its position on exhaustion as consistent. Appellees' Br. 9. During that seven-year interval, however, the government asserted more than a dozen times that Mr. Thomas had exhausted his claims against Defendant Jurgensen. Next, the government insists that it asserted below only that Mr. Thomas "*eventually*" exhausted his claims against Defendant Jurgensen. *Id.* at 21. But that qualification is absent from the two statements the government cites for the assertion, and it is at odds with the myriad other statements that the government ignores. Then the government asserts that its 2019 assertion of exhaustion was at the invitation of the district court, *id.* at 20 n.11, when in fact that invitation was to 2013 summary judgment proceedings concerning a different claim.

The government's account of the law is equally misleading. First, the government asserts that Mr. Thomas's waiver and forfeiture allegations are unpreserved notwithstanding the fact that Mr. Thomas's arguments were so clearly directed at waiver and forfeiture that the government itself defended against Mr. Thomas's charge by contesting waiver and forfeiture. As to the substance of Mr. Thomas's charge, the government argues that an affirmative defense is preserved where it is pleaded in an answer but subsequently disclaimed. The case law,

however, says otherwise. The government also asserts that Mr. Thomas's estoppel argument was raised for the first time on appeal, although the record tells a different story. The government's challenge to estoppel fares little better on the substance. Finally, the government argues that its statements below do not amount to binding judicial admission because the issue of whether a prisoner exhausts is a question of law. *Id.* at 31 n. 15. That point does not help the government here.[1]

Notwithstanding the government's misdirection and mischaracterization, nothing in its responsive brief counsels any result other than reversal. After ten long years, Mr. Thomas is entitled to an opportunity to prove his claims against Defendant Jurgensen.

ARGUMENT

I. The Government Was Not Entitled to Summary Judgment on the Basis that Mr. Thomas Failed to Exhaust Administrative Remedies.

The government waited nearly a decade—long after the statute of limitations expired—to change its story and argue exhaustion. The district court granted the government's motion for summary judgment, despite the obvious injustice. It erred in doing so.

[1] The government argues for the first time on appeal that "laches is not available to plaintiffs" to assert. Appellees' Br. 29. Mr. Thomas has always acknowledged that this argument was novel. See ECF 237 at 5 ("Although generally asserted by defendants, Plaintiff is unaware of any case law that prohibits a plaintiff from asserting the equitable doctrine when a defendant's delay will cause undue prejudice to him.")

First, the government waived, or at least forfeited, its right to contest exhaustion by disavowing it for years. Second, the government's consistent pattern of affirmative representations that it did not contest exhaustion equitably estopped it from reversing course on the eve of trial. Finally, the government's long-standing assertions constitute judicial admissions. The government is bound by its own clear words. These are just some of them:

- "Plaintiff has exhausted the administrative remedy request regarding his request for medical supplies." ER 159 (Decl. of Att'y-Advisor Sarah Schuh; Ex. 1 to Def. Jurgensen's May 25, 2011 Mot. to Dismiss; ECF 31-1);
- "Mr. Thomas does know how to exhaust administrative remedies because he did so as to the [Defendant Jurgensen] claims in this case." ER 133 (Def. Jurgensen's June 21, 2011 Reply Br. in Supp. of Mot. to Dismiss; ECF 43);
- "There's one paragraph, literally one sentence, which we think contains an unexhausted claim, and if we were to make a motion to dismiss, it would be just on that one claim which is a couple years prior in time to the rest of the Complaint." ER 112-13 (Statement of AUSA Chittenden; Tr. of Dec. 5, 2012 Status Conference; ECF 259 (cleaned up));
- "On February 22, 2010, the Office of General Counsel received plaintiff's [administrative] appeal. Plaintiff alleged he had bed sores, had not had medical supplies for 7 months, his cushion arrived but Jurgensen would not allow him to have it. On April 28, 2010, the Office of General Counsel denied the appeal. (Entry under 566304-A1). Any allegations in the Complaint made about incidents after April 28, 2010, should be dismissed for failure to exhaust because . . . the above administrative remedy is the only one where Plaintiff exhausted the administrative remedy process." ER 211-212 (Decl. of Senior Att'y Sarah Quist; Sept. 30, 2013);
- "This lawsuit stems from actions while Plaintiff was designated to the Federal Correctional Complex in Victorville, California ('FCC Victorville") between August 26, 2009, the date Plaintiff transferred to the Federal Correctional Institution I ('FCI I') in Victorville, and April

28, 2010, the date he exhausted the administrative remedy process." ER 98 (Def. Jurgensen's Statement of Uncontroverted Facts and Conclusions of Law in Supp. of Mot. for Summ. J.; Nov. 5, 2013; ECF 105);

- "On February 22, 2010, the Office of General Counsel received plaintiff's appeal in AR 566304, and on April 28, 2010, the Office of General Counsel denied the appeal. As such, Plaintiff has exhausted the administrative remedy process regarding AR 566304." ER 68 (Decl. of Paralegal Specialist Werner Guth; Feb. 9, 2015; ECF 151-1);
- "Defendants Francisco J. Quintana and Bradley Jurgensen ('Defendants') seek an in limine order precluding Plaintiff Leon Thomas ('Plaintiff') from introducing evidence regarding any claims outside the scope of the administrative remedy Plaintiff exhausted before the Bureau of Prisons. Specifically, 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 at issue in this case." ER 63 (Def. Jurgensen's Mem. of P. & A.; Mot. in Limine to Exclude Test. and Evidence Regarding Any Claims Outside the Scope of Plaintiff's Exhausted Administrative Remedy; Feb. 9, 2015; ECF 151);
- "Plaintiff's Second Amended Complaint asserts two main claims for relief against Defendants. First, Plaintiff alleges that the two BOP employee-defendants, Quintana and Jurgensen, denied him adequate medical care by denying him medical supplies. Second, Plaintiff alleges that Messrs. Quintana and Jurgensen denied him a proper handicapped cell during his stay at FCI I Victorville. While at FCI I Victorville, Plaintiff properly exhausted each of the above two claims in AR 566304. Plaintiff, however, did not exhaust the administrative remedy process for any other claims in this case." ER 63-64 (Def. Jurgensen' Mem. of P. & A.; Mot. in Limine to Exclude Test. and Evidence Regarding Any Claims Outside the Scope of Plaintiff's Exhausted Administrative Remedy; Feb. 9, 2015; ECF 151 (internal citations omitted));
- "In this case, Plaintiff's exhausted AR 566304 now defines the scope of Plaintiff's action at trial and, consequently, the scope of his evidentiary presentation." ER 65 (Def. Jurgensen' Mem. of P. & A.; Mot. in Limine to Exclude Test. and Evidence Regarding Any Claims Outside the Scope of Plaintiff's Exhausted Administrative Remedy; Feb. 9, 2015; ECF 151);

- "Affirmative Defense No. 2: Plaintiff exhausted Administrative Remedy 566304 and that defines the scope of Plaintiff's action at trial. Plaintiff exhausted no other administrative remedies while at FCC Victorville regarding medical care or handicap accommodations." ER 56-57 (Def. Jurgensen's Pre-Trial Mem. of Contentions of Fact and Law; Feb. 13, 2015; ECF 154 (internal citations omitted));
- "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 at issue in this case. It is uncontroversial what those claims are: First, Plaintiff alleges that the two BOP employee-defendants, Quintana and Jurgensen, denied him adequate medical care by denying him medical supplies. Second, Plaintiff alleges that Messrs. Quintana and Jurgensen denied him a proper handicapped cell during his stay at FCI I Victorville. ER 33 (Def. Jurgensen's Reply in Supp. of Mot. in Limine to Exclude Test. Regarding Any Claims Outside the Scope of Plaintiff's Exhausted Administrated Remedy; Feb. 23, 2015; ECF 173 (internal citations omitted)).

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

The government makes three contentions related to waiver and forfeiture. First, the government elaborately proves the conceded point that, over a decade ago, Mr. Thomas brought his original complaint a few weeks prior to the Office of General Counsel's untimely final rejection. Appellees' Br. 4-9. Next, the government contends that Mr. Thomas did not make waiver or forfeiture arguments below, and that those arguments are therefore unavailable on appeal. *Id.* at 16-17. Alternatively, the government posits that its exhaustion defense was "timely." *Id.* at 17-20.

These arguments are variously unnecessary and unavailing. To start, Mr. Thomas conceded exhaustion in his opening brief. Next, Mr. Thomas may argue waiver and forfeiture here—both he and the government raised the issue in the district court. Finally, the government raised its affirmative defense well after the time to do so had expired.

1. Mr. Thomas Preserved His Waiver And Forfeiture Arguments.

Mr. Thomas argued waiver and forfeiture below. As Mr. Thomas explained in the district court, "[h]aving previously admitted that Plaintiff exhausted the administrative remedy process with respect to this action, Defendant cannot now claim otherwise now that trial is approaching." ECF 237 at 4. Mr. Thomas also noted that Defendant Jurgensen had ample opportunities to raise the affirmative defense, but "made no such argument on his own behalf" even as another Defendant sought dismissal of a different claim on exhaustion grounds. *Id.* at 2-3. Finally, at a hearing on Defendant Jurgensen's motion, counsel explained that "One of the principles of the PLRA . . . is judicial efficiency" and observed "[t]hat has completely gone out [the] window by bringing a motion to dismiss nine years after the fact." ER 29. These are classic waiver and forfeiture arguments. *See infra* at 11-13.

The government understood Mr. Thomas to be arguing as much. For example, the government responded:

> Plaintiff further contends Defendant should be precluded from raising the affirmative defense as he did not do so in an earlier motion to dismiss or motion in limine. To the contrary, courts have determined that the affirmative defense of exhaustion is not waived even if it is not raised in a motion to dismiss or motion for summary judgment.

ECF 238 at 1. The district court interpreted Mr. Thomas's position similarly. As it noted:

> Plaintiff's Opposition largely relies on the combination of the following facts: (1) Defendant did not join a co-defendant's motion to dismiss based on failure to exhaust; (2) Defendant made affirmative arguments in the MIL that Plaintiff properly exhausted his administrative remedies; and (3) Defendant waited a long time to raise this exhaustion issue.

ER 13 (citations omitted).

Mr. Thomas's argument on appeal does not differ meaningfully. *See* Opening Br. 17-22. No magic words are necessary to preserve an argument. Rather, the question is whether the thrust of the argument below is the same as on appeal. *See, e.g.*, *Trs. of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 931 (9th Cir. 1986). Here, the arguments on appeal and below are essentially identical.

The government's contrary caselaw is readily distinguishable. In *Ventress v. Japan Airlines*, this Court refused to consider an argument raised for the first time in "passing" on appeal, and without references to the record or any legal authority. 747 F.3d 716, 723 n.8 (9th Cir. 2014). Here, by contrast, the government's repeated failure to raise the exhaustion defense was well documented with references to the record and supporting caselaw, both below and on appeal. Similarly, in *Smith v.*

Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999), this Court declined to consider an argument meaningfully "raised for the first time in a *reply* brief" on appeal. Finally, this is not, as the government suggests, a case where this Court must "do an appellant's work for it, either by manufacturing its legal arguments, or by combing the record on its behalf for factual support." Appellees' Br. 17 (citing *Western Radio Servs. Co. v. Qwest Corp*., 678 F.3d 970, 979 (9th Cir. 2012)). Rather, Mr. Thomas argued below, as he does on appeal, with record support in each instance, that Defendant Jurgensen disclaimed exhaustion far too often and raised it far too late to benefit from the affirmative defense. The argument is preserved.

2. The Government Waived, Or at Least Forfeited, The Affirmative Defense Of Exhaustion When It Disavowed And Failed To Press The Defense For Eight Years.

Without disputing the prejudice to Mr. Thomas occasioned by its maneuver, the government argues that it was entitled to resuscitate an affirmative defense after disclaiming it for years. To start, the government contends that its 2012 boilerplate version of the affirmative defense—tucked into an answer alongside a dozen other affirmative defenses—inoculates it from its subsequent conduct. Appellees' Br. 18. The government then suggests that because the trial court said it could bring a *different* exhaustion defense in a 2013 summary judgment motion, it had license to hold off on making *Defendant Jurgensen's* exhaustion argument until trial loomed in 2019. *Id.* at 20 n.11. Finally, the government claims that its consistent litigating

position since 2012—that Mr. Thomas exhausted his claim against Jurgensen—was merely a recognition that he had *eventually* exhausted his claim, not an assertion that he had done so *properly*. *Id.* at 21. These arguments are contrary to the facts and to the law.

First, boilerplate language in an answer does not immunize against waiver and forfeiture allegations when subsequent actions, statements, and filings evince the abandonment of the affirmative defense. *See, e.g.*, *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998), *as amended on denial of reh'g and reh'g en banc* (June 15, 1998) (noting that a defense raised by answer "may be waived as a result of the course of conduct" subsequently "pursued by a party during litigation"). The government's attempt to distinguish the caselaw is unpersuasive. First, the government claims *Walden v. Nevada*, 945 F.3d 1088 (9th Cir. 2019) is "materially distinguishable" because in *Walden*, "a vague reference to immunity was the *only* time the State arguably raised the issue of state sovereign immunity before the district court," whereas the government raised the issue twice—in both its 2010 and 2012 answers—disclaimed it for years and then reversed course in 2019. Appellees' Br. 18-19 (emphasis in original).

Walden does not help the government's cause. There, this Court denied the late attempt to assert immunity because the defense "was not raised early enough in the proceedings to provide fair notice to Plaintiffs" and gave the State "a significant

tactical advantage" that would "generate seriously unfair results." *Walden*, 945 F.3d at 1095. (quoting *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002)). The same holds true here. The government's about-face was sufficiently belated to create the ultimate unfair tactical advantage. As the district court noted, Mr. Thomas was not slapped with the defense "until the statute of limitations ha[d] run." ER 29.

Next, the government calls *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8th Cir. 2001), "inapposite" because in that case "a defendant waived an affirmative defense where it pled the defense in its answer but did not press the defense in its response to the plaintiff's motion for summary judgment or in its own motion for summary judgment." Appellees' Br. 19. But that is exactly what happened here. In 2012, the government pled the defense in boilerplate fashion amidst a dozen other affirmative defenses. SER 125. The government then failed to press that defense for years, including in a 2013 summary judgment motion. ECF 105. Here, of course, the government's conduct amounts to more than a failure to press a defense. Rather, it disclaimed it more than a dozen times across a multi-year period before reversing course on the eve of trial. As in *Picht*, the government's actions and words amount to waiver.

Finally, the government tries to cabin the holding of *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993) to the personal jurisdiction context. In that case,

the Seventh Circuit found waiver based on the defendant's delay in bringing a motion on a "threshold" issue. *Id*. at 1296-97. Like personal jurisdiction, exhaustion is a threshold issue in PLRA cases. *See Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014) ("[T]he exhaustion question in PLRA cases should be decided as early as feasible. … [S]ubject-matter jurisdiction, *personal jurisdiction*, venue, abstention, *and exhaustion* are all issues of 'judicial administration' that are appropriately decided early in the proceeding.") (emphasis added) (citations omitted). Thus, like in *Continental Bank*, the failure to bring a motion on a threshold issue for multiple years of litigation constitutes waiver.

After contesting the caselaw, the government misleadingly implies that the trial court instructed it to save exhaustion arguments for summary judgment. The government states: "Moreover, during that status conference, the court noted that Defendants were free to raise exhaustion, albeit as to the different claim, 'as part of a summary judgment motion just to save it for later on.'" Appellees' Br. 20 n.11 (citing Opening Br. 9; ER 113)). While the government concedes that this license referred to a *different* claim, it neglects to acknowledge the fact that the court was also referring to a *different* summary judgment motion filed *six years* before the motion relevant to this appeal.

Instead of raising exhaustion in that summary judgment motion, the government continued to confirm—on occasion after occasion— that Mr. Thomas's

claim was exhausted. Faced with these statements, the government awkwardly attempts to maneuver around its long-standing and oft-stated position, disingenuously arguing that its prior assertions merely stood for the proposition that "Thomas *eventually* exhausted his administrative remedies as to his claim against Jurgensen." Appellees' Br. 21. But as the selected statements recited above make clear, the government asserted much more than that. In word and conduct, the government asserted that Mr. Thomas "properly" exhausted his claims against Defendant Jurgensen, and, accordingly, that he was entitled to his day in court. Under these circumstances, the government is prohibited from un-ringing the bell.

B. The Government's Consistent Assertions that Mr. Thomas Had Exhausted Administrative Remedies Estopped It from Taking a New and Severely Prejudicial Position on the Eve of Trial.

The government argues that Mr. Thomas failed to preserve his equitable estoppel argument and, in any case, that neither the traditional nor the special estoppel factors favor Mr. Thomas. The government is wrong on both accounts.

1. Mr. Thomas Preserved His Equitable Estoppel Defense.

The government argues that "Thomas failed to argue estoppel" below. Appellees' Br. 22. It is incorrect. The district court described Mr. Thomas's argument as proposing "some kind of estoppel effect," and asked Mr. Thomas's counsel "[d]o you want to make that argument?" ER 28-29. To that question, Mr. Thomas's counsel replied, "Yes, your honor," and continued, "[t]his case . . . has been going

on for nine years," the government "admit[ed] numerous times throughout the litigation, and even in the moving papers in this situation that it's been exhausted," and "[o]ur client has relied upon that." ER 29. Counsel then explained that Defendant Jurgensen's conduct in this fashion had prejudiced him because it "completely precludes him from having his day in court" since it deprived him of the "opportunity to refile" his complaint post-exhaustion. *Id.* Finally, counsel complained that the government's conduct was contrary to the public interest because "[i]t gives the government an incentive to wait as long as possible" and only spring an exhaustion defense once the plaintiff has lost the ability to cure the defect. *Id.* In briefing before the district court, Mr. Thomas makes much the same argument. ECF 237 at 3-4, 6-7. These prototypical estoppel arguments, *see United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978), entitle Mr. Thomas to argue estoppel on appeal. *See*, *e.g.*, *Trs. of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 931 (9th Cir. 1986).

2. The Estoppel Factors Weigh In Favor of Mr. Thomas.

To start, all the traditional estoppel factors weigh in favor of Mr. Thomas. The government knew that Mr. Thomas had not exhausted. Mr. Thomas had every right to believe the government's representations that Mr. Thomas had exhausted. Mr. Thomas was ignorant of the true facts—*i.e.*, that he filed suit prematurely. Therefore, Mr. Thomas reasonably and detrimentally relied on the government's position. The

additional factors necessary to estop the government also weigh heavily in Mr. Thomas's favor. The government's conduct amounts to a pattern on false promises constituting affirmative misconduct. And those false promises undermine the interests of justice and the public interest.

a. The Government Knew That Mr. Thomas Filed Prematurely.

The government does not dispute that it knew that Mr. Thomas filed prematurely. In fact, the government goes to great lengths to emphasize that, on two occasions, it described exhaustion as having been completed on April 28, 2010—*i.e.*, after Mr. Thomas first brought suit. *See, e.g.*, Appellees' Br. 20-21. Under these circumstances then, it has no excuse for its tardy reversal.

b. Mr. Thomas Had Every Reason To Believe the Government's Serial Representations.

Mr. Thomas relied on the government's position—affirmed through nearly a decade of litigation—that it was not contesting exhaustion as to the Jurgensen claim. Such reliance was inevitable. The government suggests that its boilerplate defenses to Mr. Thomas's complaint put him on notice that the government was not foregoing the defense. *Id.* at 26. To the contrary, the government's repetitive subsequent disavowals all but compelled Mr. Thomas to disregard the boilerplate contained within its earlier answers. *See, e.g., Johnson v. Willford*, 682 F.2d 868, 872 (9th Cir.

1982) (concluding, based upon the government's affirmative conduct, that the plaintiff had the right to believe that the government would not take certain action).

c. Mr. Thomas Was Unaware of The True Facts.

The government contends that Mr. Thomas must have known that he filed before exhausting for two reasons. First, he attached the final disposition of his administrative remedy—dated April 28, 2010—to his first amended complaint, which was dated July 10, 2010. Appellees' Br. 26. Second, Mr. Thomas was apparently an expert in the exhaustion requirements of the PLRA because he "attended two classes regarding the program upon his arrival at FCC Victorville" and had filed numerous grievances before bringing suit against Defendant Jurgensen. *Id.*

These arguments utterly miss the mark. Mr. Thomas attached his fully exhausted grievance to the complaint he filed after his original complaint was dismissed in its entirety. That his original complaint controlled for the purposes of exhaustion timing in this particular case, even though the amended complaint would have controlled in some other cases, *see, e.g.*, *Cano v. Taylor*, 739 F.3d 1214, 1221 (9th Cir. 2014) (holding that "federal claims which are added to a suit via an amendment and which are administratively exhausted prior to that amendment, comply with the PLRA's exhaustion requirement"), was a subtle nuance surely lost on Mr. Thomas, who was proceeding pro se at the time. Likewise, that Mr. Thomas

attended two orientation classes is of little significance when the very records the government cites for the proposition show that administrative exhaustion was one topic among at least twenty-six jammed into a short prison introduction. SER 60-62. Mr. Thomas did not take an advanced course in proper administrative exhaustion. Finally, the government suggests that Mr. Thomas was a grievance mastermind because he filed more than two dozen administrative complaints. It says nowhere, however, whether any those grievances were properly and fully exhausted; indeed, the government's own record makes clear that they were not. *See* SER 34; SER 85 (noting that several of Mr. Thomas's appeals for assistance with medical devices were rejected for various "procedural filing errors").

For additional evidence that Mr. Thomas was ignorant of the true requirements of exhaustion, one need only look to the procedural history in this case. First, Mr. Thomas did not voluntarily dismiss and refile, when he could have done so without changing a word in his complaint. *Cf. United States v. Wharton*, 514 F.2d 406, 412 (9th Cir. 1975) (finding plaintiffs ignorant of true facts because otherwise they would have taken the correct procedural action). Second, the government affirmatively told him time and again that he exhausted. Presumably, the government does not wish to argue that private citizens should be disinclined to trust their government. *See 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.")

d. Mr. Thomas Suffered Irreparable Prejudice as a Consequence of the Government's Misconduct.

The government's repeated assertion that it was not contesting exhaustion irreparably harmed Mr. Thomas, and the government does not deny that. Appellees' Br. 26. Had the government pressed its failure to exhaust defense in a timely manner, Mr. Thomas could have voluntarily dismissed and refiled his claims against Defendant Jurgensen—all without changing a word in his complaint. By representing that his claims were exhausted, only to reverse course after the statute of limitations expired, however, the government denied Mr. Thomas any opportunity to seek redress for Defendant Jurgensen's misconduct. That is the very definition of prejudice. *See, e.g., Patrella v. MGM, Inc.*, 695 F.3d 946, 955-56 (9th Cir. 2012) *rev'd on other grounds*, 572 U.S. 663 (2014).

e. The Government's Pervasive Pattern of False Promises Constitutes Affirmative Misconduct Rather Than Mere Negligence.

The government contends that its repetitive assertions that Mr. Thomas did not exhaust constitutes mere negligence, and thus does not amount to the sort of affirmative misconduct necessary to satisfy the requirements for estopping the government. Appellees' Br. 27-28. But, as the government concedes, a "pattern of false promises" constitutes affirmative misconduct just as surely as "a deliberate lie."

Id. at 27 (citing *Mukherjee v. I.N.S.*, 793 F.2d 1006, 1009 (9th Cir. 1986). For many years, and on many occasions, the government unequivocally represented that Mr. Thomas had exhausted administrative remedies against Defendant Jurgensen. Such conduct goes well beyond a mere "failure to inform an individual of his or her legal rights nor the negligent provision of misinformation." *Sulit v. Schiltgen*, 213 F.3d 449, 454 (9th Cir. 2000).

Rather, the government's consistent affirmations represent a paradigmatic "pattern of false promises," *Mukherjee*, 793 F.2d at 1009. Beyond the statements, the government's actions to further litigate Thomas's "exhausted" claim reflect such a pattern. ER 32-36. In *Mukherjee*, this Court found that a single mistake by a vice-consul in an immigration proceeding was insufficient to constitute a pattern. 793 F.2d at 1009. But the government's representations in this case go much further than a simple mistake, on one occasion, by one government employee.

The government litigated this case for years—representing on numerous occasions that Mr. Thomas's claim against Defendant Jurgensen had been exhausted. While the government notes that two declarations stated only *when* the claim was exhausted, Appellees' Br. 31, that position again ignores the numerous other affirmations during the case's near-decade long litigation history. The government confirmed that the claim was exhausted in prior dispositive motions to dismiss, in open court, and in pre-trial proceedings. The government even prepared

motions in limine for trial and asked the district court to set "ground rules" for a trial that explicitly included Thomas's "exhausted" claim. ER 32-36. This behavior represents a "pattern" amounting to affirmative misconduct. *See Douglas Cty. v. U.S. Dep't of Homeland Sec.*, No. 3:09-CV-00544-RCJ-(RAM), 2010 WL 2521042, at *6 (D. Nev. June 9, 2010) (finding plaintiff could establish a pattern after "[d]efendants treated Plaintiff's appeal as timely in numerous interactions.").

f. Estopping the Government Will Prevent a Serious Injustice and Promotes the Public Interest.

The government argues that "justice and fair play do not merit estoppel." Appellees' Br. 23. The government does not say why, beyond reiterating both that Mr. Thomas had filed numerous grievances before bringing this suit and that it listed exhaustion among a dozen other affirmative defenses in its answer. *Id.* The first factoid is irrelevant, especially in light of the fact that the government merely asserts that Mr. Thomas had filed previous grievances—not that he had properly exhausted on numerous occasions. As stated previously, Mr. Thomas was hardly an administrative grievance mastermind sparring with the BOP on equal footing. And the second contention is incomplete and blatantly misleading—in reality, the government disclaimed that affirmative defense more than a dozen times after filing the answer. That these two arguments are the best the government can come up with is ample evidence that estopping it would lead to no manifest injustice.

On the flip side, the injustice to Mr. Thomas occasioned by permitting the government to obtain dismissal on the basis of an affirmative defense it had long disavowed is obvious. Most significantly, the government's course of conduct denied Mr. Thomas the opportunity to dismiss and refile his suit, thereby depriving him of any opportunity to seek recompense for Defendant Jurgensen's deliberate indifference.

The government also appears to suggest that the application of estoppel against it is inconsistent with the public interest, arguing that it would "inevitably undermine attainment of Congress's objectives in enacting the PLRA." *Id.* at 24. The government does not elaborate. But as the government itself is aware, Congress enacted the PLRA in order to improve the quality and reduce the quantity of prisoner suits, in part by enacting an exhaustion requirement directed at affording prison officials "an opportunity to correct [their] own mistakes" in order to "promote efficiency." *See id.* at 13 (citation omitted). The government does not explain why estopping it would undermine these Congressional objectives. In fact, the government not only failed to correct its own mistakes but its belated exhaustion assertion was, as the district court aptly described, a "colossally wasteful" expenditure of the parties' and the court's "time and resources." ER 15.

On one side rests the extreme prejudice against Mr. Thomas—who will lose his chance to litigate meritorious claims of shocking disregard that already survived

an appeal to this Court. ER 17-22. On the other side, there is no argument for the public interest *at all*. Far from harming the public interest, the application of estoppel here would further the interests of justice. The government disavowed the exhaustion defense for years. Mr. Thomas relied on those representations. People "naturally trust in their government, and ought to do so, and they ought not to suffer for it." *Menges v. Dentler*, 33 Pa. 495, 500 (1859); *see also Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 61 n.13 (1984) (collecting cases). It is decidedly in the public's "interest [to] see[] its government deal carefully, honestly and fairly with its citizens." *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975).

C. The Government's Assertions Constitute Binding Judicial Admissions

The government argues that when Mr. Thomas exhausted is a statement of fact, but whether he exhausted the claim properly is a legal conclusion. Appellees' Br. 31 n.15. But the government's numerous previous admissions were not legal theories involving "the application of rules of law to complex factual patterns" such as proximate cause or negligence. *MacDonald v. Gen. Motors Corp.*, 110 F.3d 337, 341 (6th Cir. 1997). Rather, Mr. Thomas's compliance with exhaustion, and the government's willingness to litigate his claim, was presented as a settled fact based on the government's review of Mr. Thomas's grievance filings. As such, the government should be bound to its repeated assertions that Mr. Thomas exhausted the claim against Defendant Jurgensen.

II. 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 Mr. Thomas's operative complaint was "facially deficient" because he did not establish exhaustion on the face of the complaint. ER 11. The government characterizes the district court's statement as an observation, rather than as a basis for the order, but does not dispute that the district court erred in granting judgment on the pleadings. *See* Appellees' Br. 13-14 n.6. While the district court's order may "sound[] primarily in summary judgment," *id.*, its grant of judgment on the pleadings is not surplusage. ER 11. The district court improperly characterized exhaustion as a pleading requirement, *see Jones v. Bock*, 549 U.S. 199, 216 (2007), and its order granting the government's motion for judgment on the pleadings must therefore be reversed.

CONCLUSION

For the aforementioned reasons, this Court should reverse and remand for a trial of Thomas's claims against Defendant Jurgensen. Mr. Thomas is entitled to his trial.

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Respectfully Submitted,

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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 5,927 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 August 3, 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.

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