No. 20-1670

In The
Supreme Court of the United States

WILLIAM J. GOLZ,

Petitioner,

v.

MARCIA L. FUDGE,
in her official capacity as Secretary of the
United States Department of Housing
and Urban Development,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is timely and of national importance. Ten million homeowners are behind on their mortgage payments and 2.7 million of 11-million Government-backed mortgages are in forbearance.[i] Housing and Urban Development (HUD) practices are an inevitable exemplar to all lenders. Acting as the named lender, HUD broke in, changed the lock, and an agency attorney falsely stated to law-enforcement that HUD had foreclosed and taken possession of the Golz-home (forcible entry). HUD then requested a search and opened every door in the home for the police officer (search). The lower courts struck Petitioner's defenses denying discovery for his extensive body of facts, positing that a HUD foreclosure is protected under a congressional authorization of broad equitable relief to serve an important national policy and that the forcible entry was permitted by the deed of trust. Colorado is a "lien-theory" state where the Colorado Supreme Court "prohibits a mortgagee from acquiring possession of mortgaged property until a foreclosure and sale have occurred." *Martinez v. Continental Enter.*, 730 P.2d 308, 314 (Colo. 1986) (en banc).

1. Whether a Federal Housing Administration (FHA) loan is an important national policy which gives license to a lender's forcible entry and seizure of an occupied home prior to foreclosure and sale and without court order—in violation of a forcible entry and detainer statute (Colo. Rev. Stat. §§ 13-40-101, *et seq.*) and the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56, 67 (1992); and whether federal courts can enforce an FHA deed of trust signed by a decedent and purportedly granting the lender a possessory right to forcibly enter and direct law enforcement to search an occupied home. *Chapman v. United States*, 365 U.S. 610 (1961).

2. Whether equitable estoppel will lie to prevent the Secretary of HUD, acting pursuant to the National Housing Act's sue-and-be-sued clause (12 U.S.C. § 1702) as named lender on an FHA-insured loan, from unjustly evading an authorized, written, loan-payoff agreement that meets the requirements of a contract; and if estoppel is a defense to foreclosure, whether facts pleaded that satisfy Federal Rule of Civil Procedure (Rule) 9(b), which include documentation that HUD administrators fraudulently represented agency regulations to reject Petitioner's tender of the loan payoff, can be dismissed on a Rule 12(f) motion prior to discovery.

3. Whether a defendant whom was the former executor and sole devisee of a decedent's estate has standing to appeal the denial of a remedy for his palpable injury traceable to the District Court's affirmative acts asserting administrative authority over a probate estate for an eleven-month period following the defendant-executor's filing in the State Court of a closing statement conforming to state law and executed with his sworn oath that the estate had been fully administered.

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i Joseph R. Biden, "Fact Sheet: Biden Administration Announces Extension of COVID-19 Forbearance and Foreclosure Protections for Homeowners." *The White House*, Feb. 16, 2021, www.whitehouse.gov/briefing-room/statements-releases/2021/02/16/fact-sheet-biden-administration-announces-extension-of-covid-19-forbearance-and-foreclosure-protections-for-homeowners/.

PARTIES TO THE PROCEEDING

Petitioner, William J. Golz, was defendant-appellant below.[ii]

Respondent, Marcia L. Fudge, in her official capacity as Secretary of HUD, replaces former Secretary Benjamin S. Carson, whom was plaintiff-appellee below.

RELATED PROCEEDINGS

UNITED STATES DISTRICT COURT (D. COLO.):

Carson v. Golz, No. 17-cv-01152-RBJ-MEH (Apr. 8, 2019)

UNITED STATES COURT OF APPEALS (10TH CIR.):

In re William J. Golz, No. 18-1373 (Oct. 25, 2018) (denying petition for a writ of mandamus and prohibition)

In re William J. Golz, No. 19-1083 (May 13, 2019) (denying petition for a writ of mandamus, including for an evidentiary hearing, which was mooted by the order and final judgment, D. Colo. Apr. 8, 2019)

Carson v. Golz, No. 19-1242 (Sept. 21, 2020), petition for rehearing denied, Dec. 14, 2020

SUPREME COURT OF THE UNITED STATES:

Golz v. Carson, No. 18A692 (Feb. 19, 2019) (denying application to stay proceedings in the District Court)

Golz v. Carson, No. 20A133 (Jan. 15, 2021) (denying application to stay the mandate)

COURT OF APPEALS BRIEFS

CARSON v. GOLZ, NO. 19-1242 (10TH CIR. SEPT. 21, 2020):

Brief for Appellant (Docket No. 10710059) (Docket Date: 01/15/20)

Attachments (separately bound volume that includes P. Ct. filings)

Addendum for Appellant (10710060) (01/15/20) (2 audio-CDs; Tr.s; Stmt. of Evid.; and 28 U.S.C. § 1746(2) Decl.s under penalty of perjury)

Brief for Appellee (10717453) (02/12/20)

Reply Brief for Appellant (10732238) (04/10/20)

Appellant's Petition for Rehearing En Banc (10790585) (12/01/20)

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ii Concurrent with this petition, Petitioner is notifying the Clerk of the Court and all parties that the District Court entered a default on August 15, 2017 for Marcus J. Golz and Matthew J. Golz whom have no interest in the outcome of this petition. Supreme Court Rule 12.6.

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iii 1 R. 337–39, cites to the record on appeal (ROA), Vol. 1, pp. 337–39.

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iv Definitions required in this petition are of terms well established in case law which is retained in the the fifth edition but has been eliminated from more-recent editions.

TABLE 1. HUD's break-in, lock-out, and law-enforcement search.		
DATE	DESCRIPTION	REFERENCE
05/11, 06/06 & 07/06/16	Dr. Golz's June 6, 2016 letter to the Secretary and Novad[v] responding to HUD's May 11 and June 6 door hangers asked the agency to cease entering onto the Property without permission. HUD trespassed on July 6.	1 R. 270 ¶¶ 122–23 & 2 R. 122 ¶ 2
08/01 & 08/02/16	Dr. Golz wrote to the Secretary, Novad, and USAO Civ. Div. Chief Kevin Traskos: "You are hereby advised that any entry onto my property ... is an illegal trespass prosecutable under §§ 4-502 to 504, 18 C.R.S." (122 ¶ 3).	1 R. 270 ¶¶ 124-25 2 R. 114–25
10/09/16	Dr. Golz reminded the USAO "his family was occupying the Property and that: 'HUD dispatched their agents to trespass on our property – on May 11th, June 6th, and July 6th, ignoring my repeated written instructions to cease ... the agency's effort to orchestrate a possessory right to the property per Paragraph 23 of the deed[.]' "	1 R. 271 ¶ 126 & n.16
12/02/16	Det. Darragh O'Nuallain apprehended two men inside the Golz home who admitted forcibly entering and installing a "HUD lock" and presented HUD documents as the authority for their acts. See Exhs. A and B, *infra.*	1 R. 271–72 ¶¶ 127–29
	"Housing and Urban Development Property Access Record"; "Property Address: 130 Beaver Creek Dr."; "Date 12-2-2016"; "Representative of BLM CO".	1 R. 278 Exh. A
	"New Work Order Assigned 03201115"; "Address: 130 Beaver Creek Drive"; "W/O Date: 12/1/2016"; "Vendor: RAREO - Phillip Cuizon"; "Property [ ]: Acquisition"; "Management by: Terrah.Anderson@blmco.com".	1 R. 279–80 Exh. B
	"'Zach'"[vi] told Det. O'Nuallain "'the home had been foreclosed and HUD had taken possession of the [P]roperty.'"	1 R. 272 ¶ 129 & n.17
12/27/16	Sgt. Manes emailed BLM CO's Tracy Willingham, regarding: "130 Beaver Creek Dr. ... case number 16-7379 ... burglary/trespass, criminal mischief and other property damage associated with two persons employed by BLM CO ... Work order assignment 03201115."	1 R. 272–73 ¶ 130 nn.18 &19 & 282 Exh. D

v For Novad and other novel terms, see the glossary. *Infra.*

vi Upon information and belief, "'Zach'" is Zach Mountin, former HUD Trial Attorney and former agency counsel for this case. Supp. 2 R. 11; see 3 R. 54; 1 R 273 ¶ 131.

12/29/16	Sgt. Manes' report documented unanswered 12/27/16-emails and voice-messages to "Field Service Manager of BLM Colorado Tracy Willingham 435-674-0057 ... [and] John P Denny Colorado HUD supervisor 918-292-8954."	1 R. 281 Exh. C
01/20/17	BCSO "Records Request Recipient Tracy Willingham–BLM";" Witness2: DAndrea, Deborah Lee" Golzes' neighbor was present when Messrs. Cuizon and Scott broke in and led Det. O'Nuallain on a search opening every door in the home; includes "Property ... Photos of Doors."	1 R. 371–73
06/06/17	The USAO Civil Division replied to Dr. Golz: "'HUD staff [did not] commit a criminal trespass by virtue of their entry onto the property on December 2, 2016, [because:] ... HUD ... shall be entitled to enter upon, take possession of and manage the Property[.]' Deeds of Trust ¶ 23."	3 R. 24 ¶ 2
11/29/17	Pleaded: "HUD administrators ... HUD and USAO Attorneys ... with knowledge that Dr. Golz's family was occupying the Property, conspired to forcibly enter into the Property for the purpose of removing Defendants' personal belongings and taking possession of the Property[.]"	1 R. 273 ¶ 131
12/06 & 12/07/17	Dec. 6: Dr. Golz emailed Messrs. Mountin and Mock: "I will [ ] appreciate your both replying ... so that I can assure [my wife] that HUD will not repeat its actions of December-2, 2016." Dec. 7: Mr. Mock replied, copying Mr. Mountin, "HUD has a contractual right under the Deeds of Trust to enter upon and manage the property."	Supp. 2 R. 364 ¶ 2 and see 4 R. 24:9–13
	Dr. Golz's Dec.-7 letter responded to Messrs. Mountin and Mock's email of Dec.-7 stating: "HUD's forced entry ... was an intentional and unlawful entry into the 'dwelling of another' which is felony trespass (C.R.S. § [18-]4-502) chargeable against the person or persons that issued the order for, or provided aid and advice to facilitate, the December-2, 2016 break-in at the Property."	3 R. 58
12/13/17	"'HUD and their agents' [could not have] committed a criminal trespass, forcible entry, and criminal mischief, and had intent to commit burglary under Colorado law ... for the simple reason that the Deeds of Trust expressly authorize HUD to enter upon and manage the property."	1 R. 300 ¶ 1 see also Br. for Appellee 43 (cites DOT)

TABLE 2. The Secretary's Payoff Agreement with Petitioner.		
DATE	DESCRIPTION	PAGES
01/18/02 – 12/05/05	The lender breached the loan at origination with a lien on Verna Mae Golz's separate, vacant lot; when HUD rejected 2005 requests from Boulder County Housing and Aging Services to release its lien, USDA denied Verna Mae's loan to replace a dry well and crushed septic-tank.	Supp. 2 R. 175–215 & 285–91
05/23/14	Dr. Golz's initial certified-letter requested confirmation of the payoff as "the lesser of the current loan balance [ ] or 95% of the property's appraised value."	1 R. 257 ¶ 81
09/17 & 10/10/14	Estate's counsel noticed HUD: "Dr. Golz requests exercise of the right of family sale"; the OSFAM Director replied, "[o]n behalf of Secretary Castro, ... Dr. Golz may pursue the family sale option ... for the lesser of the loan balance or 95 percent of the appraised value."	1 R. 259 ¶ 88; 2 R. 231–33 & 237 ¶¶ 1–2
11/08/14	Dr. Golz notified HUD, that, at 8,600 feet in the mountains, because the "Property has material latent defects that are below ground-level, scheduling the appraisal inspection will be, 'hampered by the winter snows[.]' "	1 R. 259–60 ¶¶ 89
01/08/15	HUD delayed two-more months then canceled its appraisal when told that a lawyer or broker would meet the appraiser at the Property with written disclosures for the snow-covered defects: the well and septic tank.[vii]	1 R. 261 ¶¶ 93–95 & n.11
01/18/15	Dr. Golz documented for HUD how its illegal lien on the vacant lot had deprived Verna Mae of the means to replace her dry well and crushed septic-tank.	Supp. 2 R. 217–19
01/20/15	Deep snow was present and a winter-weather advisory in effect when a HUD appraiser with an order to complete an appraisal in two days contacted Dr. Golz.	1 R. 261 ¶ 96
01/21/15	Petitioner reminded the Secretary of his many letters to HUD in 2014 asking for an appraisal before deep, winter snows made a valid appraisal impracticable.	1 R. 261–62 ¶¶ 97–98 & n.12
02/19 & 03/18/15	Dr. Golz consulted DORA on state law for conducting appraisals when material defects were hidden then noticed HUD he would provide updates on the weather.	1 R. 262–63 ¶¶ 99–101

vii An FHA-Roster "appraiser is not required to disturb ... snow, ice or debris that obstructs access or visibility." HUD Handbook 4150.2, App. D, at D-3 ¶ 2.

04/08 & 04/21/15	OSFAM's Deputy Director disclaimed HUD's duty to meet its published standards for a valid appraisal.	1 R. 263–64 ¶¶ 102–03
05/05 – 05/14/15	Nine feet of snow fell from January to April; after the powerful Mother's Day Snowstorm, Mark Cohen, Esq., advised HUD that, as soon as "conditions are right for a full and complete inspection, I will contact" HUD.	2 R. 10 ¶ 2 & 1 R. 264 ¶¶ 104–06
05/18 & 05/20/15	OSFAM's Deputy Director wrote: "your Mother's reverse mortgage will be referred for foreclosure on or about May 18, 2015." Mr. Cohen replied: "the family wishes to exercise its right to purchase the property[.]"	1 R. 265 ¶¶ 107–08
06/03 & 06/16/15	Dr. Golz's checks for 95% of the Estate's FHA-appraisal were returned by OSFAM's Deputy Director who wrote "VOID" on the checks because "purchase of a HECM property ... must fully comply with HUD regulations and requirements at 24 C.F.R. § 206.125(b) and (c)[.]"	1 R. 265 ¶ 109–10 & Supp. 2 R. 297–98
06/20 & 08/04/15	Mr. Cohen advised HUD the Estate's appraisal and checks satisfied the Payoff Agreement. AGC Millicent Potts replied, "HUD's longstanding interpretation of ... 24 C.F.R. 206.125(b) is that ... HUD will only accept appraisals ... ordered by and delivered directly to HUD[.]"	1 R. 265–66 ¶¶ 111–12 & 2 R. 253
08/17 & 08/24/15	Mr. Cohen made two, additional requests to AGC Potts for the "dates HUD proposes to be able to schedule their appraisal inspection so that I can arrange to have Dr. Golz, or an agent of the estate of Verna M. Golz, meet HUD's appraiser at the subject property."	1 R. 266–67 ¶¶ 113–16
09/08/15	AGC Potts replied, "HUD received your most recent letters dated August 17, 2015 and August 24, 2015 ... HUD has begun its process for foreclosing on the property and will continue the process."	1 R. 267–68 ¶ 117–18 & 2 R. 258
08/16/16	HUD filed an Aug. 2016 BPO falsely stating to the court that the home has a "2 Car Garage", "Repairs Total: $0", and is comparable to homes with "New kitchen cabinets. ... New Carpet ... Fresh paint inside and out."	Reply Br. for Appellant 19–20, Part G
02/12/20	By HUD's own recitation to the court, "24 C.F.R. § 206.125 did not apply to Ms. Golz loan in 2014."	Br. for Appellee 27

GLOSSARY

Term	*Definition*
AGC	Associate General Counsel (of HUD)
BCSO	Boulder County Sheriff's Office
BLM or BLM CO[viii]	HUD's field service manager for Colorado
BPO	(real-estate) Broker's Price Opinion
DORA	Dept. of Regulatory Agencies (Colo. Div. of Real Est.)
HECM	Home Equity Conversion Mortgage
NOVAD or Novad[viii]	HUD's mortgage servicer
OSFAM	Office of Single Family Asset Management (of HUD)
USAO	United States Attorney's Office (for the District of Colorado)
USDA	United States Department of Agriculture (Rural Development)

viii Not an initialism but the name under which the entity conducts business.

OPINIONS BELOW

The order and judgment of the Court of Appeals (App. A, *infra*, 1a–10a) is reported at 829 F. App'x 853 (unpublished). On April 8, 2019, the District Court issued both its final judgment and its order (App. B, *infra*, 11a–27a) accepting and adopting the Magistrate Judge's recommendations. This petition will cite to the version of the District Court's order in the record on appeal (ROA). 3 R. 354–68.[1]

JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. § 1345. The order and judgment of the Court of Appeals was entered on September 21, 2020. A petition for rehearing en banc was denied on December 14, 2020. App. C, *infra*, 28a–29a. The Court's March 19, 2020 order extended the time to file any petition for a writ of certiorari to 150 days from the date of the order denying a timely petition for rehearing. That order extended the deadline for filing this petition to May 13, 2021. The Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the U. S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[2] Selected federal and state statutes are reproduced in Appendix D. *Infra.*

1 3 R. 354–68 cites to the ROA, Vol. 3, pp. 354–68.

2 https://constitution.congress.gov/constitution/amendment-4/.

STATEMENT OF THE CASE: QUESTIONS 1 AND 2

Petitioner's mother, Verna Mae Golz, died on May 16, 2014. On September 16, 2014, the State Court appointed Petitioner personal representative (PR or executor) of her estate (Estate). The Estate's only asset was the 1,200 square-foot home at 130 Beaver Creek Drive, Nederland, Colorado, Unincorporated Boulder County (Property or home). Since 2002, the Property has secured a Home Equity Conversion Mortgage (HECM) loan. In 2004, the well ran dry in a historic drought and a truck crushed the septic tank. In 2005, the Boulder County Housing Authority made requests to HUD to release its illegal lien on Verna Mae's separate, vacant lot. HUD refused, and without the lot as security the U. S. Department of Agriculture terminated Verna Mae's loan to drill a well and replace her septic tank. In 2011, Verna Mae sued, HUD released its illegal lien, and the Secretary accepted assignment of the HECM loan as named "Lender" on the Second Note (Note) (1 R. 154 ¶ 1) and Second Deed of Trust (DOT). *Id.*, at. 167 ¶ 1.

I. FACTS PLEADED BY PETITIONER (DISMISSED PRIOR TO DISCOVERY)

On April 25, 2018, Petitioner citing to authority filed a list of ECF numbers which he defined as his body of pleadings. 2 R. 297–98, Part B. On January 8, 2019, Petitioner supplemented that authority with additional citations and discussion in a motion requesting that the court read his pleadings as a whole. Supp. 2 R. 352–55. Table 1 and Table 2, *supra*, provide chronological keys to the ROA for the body of facts and exhibits pleaded by Dr. Golz.[3]

3 William Golz pleaded facts in this case with a competence and accuracy commensurate to his earned Ph.D. (Louisiana Board of Regents' Fellow) and professional degrees of M.S. and B.S. (*cum laude*) in civil engineering. Dr. Golz has written all filings bearing his name beginning with and including the amended answer. See 2 R. 297 ¶ 3 and Supp. 2 R. 64 ¶ 2.

A. HUD's fraudulent evasion of the Secretary's Payoff Agreement with Petitioner

Petitioner submitted many appraisal requests in letters to HUD beginning May 23, 2014. In reply to a September 17, 2014 letter from Estate's counsel, the Office of Single Family Asset Management (OSFAM) Director, acting with the Secretary's authorization, on October 10, 2014 agreed to Petitioner's loan payoff of 95% of the Property's appraised value (Payoff Agreement). On November 8, Dr. Golz warned HUD that the then-impending snow at 8,600 feet would make a valid winter-appraisal impracticable. *Supra* Table 2: 01/18/02 through 11/08/14.[4]

HUD refused to order an appraisal until January 2015 then abruptly canceled it on January 8 when told that a professionally-licensed third-party would meet the appraiser with written disclosures for snow-covered defects. Dr. Golz was then contacted on January 20 by a HUD appraiser who had an order to complete the appraisal in two days when several feet of snow were already on the ground and a blizzard advisory was in effect.[5] *Id.*, at 01/08/15 through 01/20/15.

When the snow abated—nine feet fell from January through April 2015, Dr. Golz asked HUD to order an appraisal. HUD refused in a letter, stating "your Mother's reverse mortgage will be referred for foreclosure on or about May 18, 2015." HUD rejected Dr. Golz's June-3 checks for 95% of the Estate's FHA Roster-appraiser's report (*see* Ariz. Rev. Stat. § 14-3707; App. D, *infra*, 35a) in a June-16

4 Part I is a chronology. Facts and events are presented with definite dates. Each paragraph ends with a citation to Table 1 or Table 2, which are timelines: in each row, the date (left column) corresponds to a description of facts (center column) and a citation to the ROA (right column).

5 HUD Handbook 4150.2, App. D, at D-3 ¶ 2 provides: "The appraiser is not required to disturb ... snow, ice or debris that obstructs access or visibility." Br. for Appellant 5, ¶ 2.

letter, citing "HUD regulations and requirements at 24 C.F.R. § 206.125(b) and (c) [.]" FHA Program Counsel AGC Millicent Potts elaborated on August 4, that "HUD's longstanding interpretation of ... 24 C.F.R. 206.125(b) is that ... HUD will only accept appraisals that are performed by FHA Roster Appraisers and are ordered by and delivered directly to HUD[.]" As HUD stated for the Court of Appeals on February 12, 2020, "24 C.F.R. § 206.125 did not apply to Ms. Golz loan in 2014." *Supra* Table 2: 01/21/15 through 08/04/15 and 02/12/20.

In August 2015, Petitioner's counsel made additional written requests for the HUD-ordered appraisal the agency had stated was required to conclude the Payoff Agreement. Those requests were rejected by AGC Potts who replied in a September 8, 2015 letter: "HUD received your most recent letters dated August 17, 2015 and August 24, 2015 ... HUD has begun its process for foreclosing on the property and will continue the process." *Id.*, at 08/17/15 through 09/08/15. HUD executed that foreclosure on December 2, 2016 when it forcibly entered, installed a "HUD lock" to exclude the Golz family, and Zach Mountin told Det. Darragh O'Nuallain that, "'the home had been foreclosed and HUD had taken possession of the [P]roperty.'"[6] *Supra* Table 1: 12/02/16 (brackets in original).

B. HUD's break-in, lock-out, and effectuation of a law-enforcement search of Petitioner's home

HUD entered onto the Property on May 11, 2016 and on June 6 circled the home looking into windows when the Golzes' son was home. HUD, disregarding Dr. Golz's June-6 letter to stop entering onto the Property, trespassed on July 6. Petitioner's August 1 and August 2, 2016 letters—to the Secretary, Novad, and Kevin

6 On December 5, 2016, a locksmith removed the "HUD lock." Reply Br. for Appellant 23 ¶ 2.

Traskos, USAO Civil Division Chief, stated, "any entry onto my property ... is an illegal trespass prosecutable under §§ 4-502 to 504, 18 C.R.S." Dr. Golz's October-9 letter to the USAO reiterated "his family was occupying the Property" and HUD must "'cease ... the agency's effort to orchestrate a possessory right to the property per Paragraph 23 of the deed[.]'" *Supra* Table 1: 05/11/16 through 10/09/16.

The Golzes' neighbor rushed over on December 2, 2016 as two men destroyed the dead-bolted storm-door, broke through the front door, and installed a "HUD-lock." Det. O'Nuallain, responding for the Boulder County Sheriff's Office (BCSO), identified Phillip Cuizon whom presented a BLM work-order and HUD "PROPERTY ACCESS RECORD" stating "ALL VISITORS TO HUD PROPERTIES ARE REQUIRED TO SIGN IN" with a "12-2-2016" entry for "BLM CO." Mr. Cuizon used a cell phone to call Zach Mountin who falsely stated to Det. O'Nuallain that, "'the home had been foreclosed and HUD had taken possession of the property.'" HUD requested a search and Mr. Cuizon led Det. O'Nuallain through the home opening every door. *Id.,* at 12/02/16 and 01/20/17.

Sgt. William Manes' December 29, 2016 report (BCSO Case No. 16-7379) stated that court records showed HUD had no possessory right to the Property and that BLM manager Tracy Willingham had not returned Sgt. Manes' December-27 voice-message and email. Ms. Willingham knew about the investigation because the BCSO fulfilled a records request for her labeled: "16-7379"; "Recipient Tracy Willingham – BLM"; "January 20, 2017." HUD filed three pages of Ms. Willingham's BCSO-records-request (1 R. 371–73) claiming that they showed, "the police sergeant recommended closing the case without bringing any charges." *Id.*, at 300,

n. 8. HUD's exhibit is a mountain-duty deputy's report who was assigned by his supervisor to take pictures only. The last page of the deputy's report states, "Recommended Case Status: Open[.]" *Supra* Table 1: 12/27/16 through 1/20/17.[7]

In a June 6, 2017 letter, the USAO Civil Division advised Dr. Golz that "HUD staff" did not "commit a criminal trespass by virtue of their entry onto the property on December 2, 2016," because,

> 'upon acceleration under Paragraph 9 of the Deeds of Trust'—which occurred no later than May 16, 2014—HUD '(in person. by agent or by judicially appointed receiver) shall be entitled to enter upon, take possession of and manage the Property.' Deeds of Trust[1 R. 173] ¶ 23.

Supra Table 1: 06/06/17 (brackets omitted). HUD's claim that acceleration occurred when Verna Mae died on May 16, 2014 is contrary to the optional language in the acceleration clauses in the Note (1 R. 155 ¶ 7(A)) and DOT (*id.*, at 170 ¶ 9(a)): "Lender may require immediate payment[.]" HUD accelerated five months after its forcible entry when the agency filed its foreclosure complaint on May 9, 2017.

For a DOT like HUD's with an, "Acceleration clause[ ] premised on default ... the creditor must perform some clear, unequivocal affirmative act evidencing his intention to take advantage of the accelerating provision. Letters sent by the creditor to the debtor threatening foreclosure if the default is not cured are not enough[.]" *Paggen v. Bank of Am.*, No. 17-cv-01241-RBJ, at *8 (D. Colo. Aug. 27, 2018) (citations and internal quotations marks omitted), aff'd, No. 18-1390 (10th Cir. July 31, 2019). Even if HUD had taken action to accelerate the Note, Colorado law "prohibits a mortgagee from acquiring possession of mortgaged property until a

7 Petitioner's records-request "yielded fifty pages of responsive documents, evidence, and photographs[.]" Br. for Appellant 11 ¶ 2.

foreclosure and sale have occurred. Section 38-35-117, 16A C.R.S. (1982)[.]" *Martinez v. Continental Enter.*, 730 P.2d 308, 314 (Colo. 1986).

Petitioner pleaded those facts within his personal knowledge, facts obtained through correspondence with HUD, the USAO, and the BCSO, and that:

> Upon information and belief, ... HUD administrators and BLM staff ... HUD and USAO Attorneys ... with knowledge that Dr. Golz's family was occupying the Property, conspired to forcibly enter into the Property for the purpose of removing Defendants' personal belongings and taking possession of the Property and ... committed a first-degree criminal trespass (C.R.S. § [18-]4-502 *et seq.*) and criminal mischief (C.R.S. § 18-4-501) with the intent to commit second-degree burglary (C.R.S. § 18-4-203)[.]

Supra Table 1: 11/29/17. Respondent's position in the District Court and Court of Appeals, is that "'HUD and their agents' could not have":

> committed a criminal trespass, forcible entry, and criminal mischief, and had intent to commit burglary under Colorado law ... for the simple reason that the Deeds of Trust expressly authorize HUD to enter upon and manage the property.

Id., at 12/13/17 (brackets omitted). Correspondence from Dr. Golz to and from HUD and the USAO (*id.*, at 06/06/17 and 12/06 & 12/07/17) shows that HUD's claim of possessory right under the DOT is in direct conflict with Petitioner's substantive rights under Colorado's forcible entry and detainer statute (Colo. Rev. Stat. §§ 13-40-101, *et seq.*) (App. D, *infra*, 36a–47a); Colorado Supreme Court precedent (*Martinez v. Continental Enter.*, *supra,* at 314); and the Fourth Amendment (*Soldal v. Cook County,* 506 U.S. U.S. 56, 67 (1992); *Chapman v. United States*, 365 U.S. 610 (1961)). Br. for Appellant 43–46 (Parts (ii)–(v)) and 48–49 (Parts (ii)–(iii)).

II. PROCEEDINGS BELOW (PETITIONER'S CASE TERMINATED ON A 12(f) MOTION)

HUD stated that "Dr. Golz's contentions of estoppel and unclean hands are insufficient affirmative defenses. Neither defense is available, because HUD is acting in the public interest[,]" Br. for Appellee at 12 ¶ 2. When appealing from the District Court's termination of his case prior to any discovery, Petitioner preserved affirmative defenses from the "clean hands" doctrine (unclean hands), estoppel, and setoff or recoupment.[8] The discussion below of the termination of Petitioner's affirmative defenses on a Federal Rule of Civil Procedure (Rule) 12(f) motion prior to any discovery supplies Questions 1 and 2 and questions subsidiary thereto.

A. The lower courts' application of summary judgment to HUD's 12(f) motion is in conflict with established precedent

Prior to any discovery, HUD moved under Rule 12(f) to strike Petitioner's affirmative defenses (HUD's 12(f) motion). 1 R. 283–302. Petitioner's defenses are supported by factual allegations in the amended answer (*id.*, at 254–73 ¶¶ 71–131) and attached exhibits. *Id.*, at 278–82. Petitioner's response to HUD's 12(f) motion also attached exhibits (2 R. 27–264), and additional exhibits were filed (Supp. 2 R. 284–98) that were material to an objection to the Magistrate Judge's recommendation on HUD's 12(f) motion. All but one of the abovementioned exhibits (2 R. 260–64, Exh. T[9]) were included in the amended answer by attachment or specific reference. *E.g., Elhelbawy v. Pritzker*, No. 14-cv-01707-CBS, at *19, n. 5 (D. Colo. Sep.

8 Petitioner detailed his counterclaim against HUD for its forcible entry at the April 16, 2018 hearing. 4 R. 22:14–24:17 and 33:11–34:1; Appellant's Pet. for Reh'g En Banc 5–6 (Parts (E),(F)). Pursuant to the court's instructions, Petitioner filed an SF-95 on May 31, 2018 and filed his claim with the court on January 8, 2019. Br. for Appellant 18 ¶ 2 and 50 ¶ 2.

9 Exhibit T is a May 8, 2017 letter requesting a response from Acting U.S. Attorney Robert Troyer. The letter summarized December 25, 2016 through April 27, 2017 correspondence from Dr. Golz and his wife, Annette Golz, detailing facts of the forced entry and search.

21, 2015) (" The pleading is deemed to include any document attached to it as an exhibit, Fed. R. Civ. P. 10(c), or any document incorporated in it by reference.") (citation, internal quotation marks, and parentheses omitted).

1. HUD's 12(f) motion challenged only the legal sufficiency of Petitioner's defenses and made no attempt to demonstrate that there were no disputed facts

a. Questions 1 and 2, respectively, address the affirmative defenses of equitable estoppel (*supra* Part I.A; 1 R. 275 ¶ 137) and unclean hands (*supra* Part I.B; 1 R. 276 ¶ 141). HUD's 12(f) motion asserted that, "None of these defenses are legally valid." 1. R. 285 ¶ 1. HUD did not challenge Petitioner's facts.

b. The District Judge — going in the opposite direction, construing a motion for partial summary-judgment as a Rule 12(f) motion in *Quick v. Grand Junction Lodging LLC*, No. 13-cv-02917-RBJ (D. Colo. Dec. 18, 2014) — stated, "discovery has ended and both parties have cited to evidence in their filings[.]" *Id.*, at *4. The Magistrate Judge, quoting *Quick v. Grand Junction Lodging*, stated, "when both parties have submitted evidence outside the pleadings in connection with a Rule 12(f) motion to strike, as they have done here, [']the Court will consider []both legal insufficiency and factual insufficiency on the record before the Court.' *Id.*, at *[5]." 2 R. 330 ¶ 3 (internal quotation-mark and page-citation corrected).

c. The Magistrate Judge's recommendation to grant HUD's 12(f) motion (Recommendation; *id.*, at 324–43) was reviewed *de novo* by the District Judge and adopted. *Id.*, at 417 ¶ 2. The Court of Appeals affirmed, stating "the district court considered evidence outside the pleadings and applied a summary-judgment standard. We therefore review the decision de novo." App. A, *infra*, 3a.

2. The panel contravened the summary-judgment standard adopted by the Circuit as set forth by the Court in *Adickes v. Kress Co.*

a. The author of the panel's decision, Circuit Judge Baldock, also wrote the opinion for the Circuit in *Reed v. Bennett*, 312 F.3d 1190, 1193 (10th Cir. 2002), which hinged on "the determinations required by Fed.R.Civ.P. 56(c)[,]" stating:

> [T]he burden on the nonmovant to respond arises only if the summary judgment motion is properly 'supported' as required by Rule 56(c). Accordingly, summary judgment is 'appropriate' under Rule 56(e) only when the moving party has met its initial burden of production under Rule 56(c). If the evidence produced in support of the summary judgment motion does not meet this burden, 'summary judgment must be denied *even if no opposing evidentiary matter is presented.*' [*Adickes v. S.H. Kress Co.*, 398 U.S. 144,]160[(1970)], 90 S.Ct. 1598 (quoting Fed. R. Civ. P. 56 advisory committee notes to the 1963 amendments) (emphasis added).

Reed v. Bennett, supra, at 1194.

b. HUD's 12 (f) motion "failed to show the absence of any disputed material fact (*Adickes v. Kress Co., supra*, at 148), and "'the party moving for summary judgment has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.' 6 J. Moore, Federal Practice ¶ 56.22 [2], pp. 2824-2825 (2d ed. 1966)." *Adickes v. Kress Co., supra*, at 161.

3. The Rule 12(f) standard required the lower courts to accept Petitioner's well-pleaded factual allegations as true and correct

" To grant a Rule 12(f) motion,"

> The Court must be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed. The standard that must be met is undis-

> puted: only if a defense is insufficient as a matter of law will it be stricken. A defense is insufficient as a matter of law if, on the face of the pleadings, it is patently frivolous, or if it is clearly invalid as a matter of law.
> ...
> As with a Rule 12(b)(6) motion, when a Rule 12(f) motion is being considered the Court does not weigh evidence. Instead, it must assume that the facts set forth in the pleading sought to be stricken are true and correct.

Mazel v. Hopkins (*In re Hopkins*), No. 7-13-11871 TA, at *6–7 (Bankr. D.N.M. May 29, 2014) (citations, internal quotations marks, and parentheses omitted).

B. The defense of unclean hands: HUD's forcible entry, seizure, and law-enforcement search of Petitioner's home

1. The court's assertion that HUD's DOT can grant the claimed right of forcible entry, seizure, and search of the Golz-home conflicts with state law and the Court's Fourth Amendment precedents

a. The Recommendation concluded, with respect to the unclean hands defense, "I do find it compelling [ ] that the deeds of trust explicitly provide HUD with the right to enter and manage the Property." (2 R. 342 ¶ 2). The District Judge agreed, that the "'forcible entry' appear[s] to have been consistent with the deed of trust, provided that HUD's decision to terminate its attempts to obtain an appraisal was reasonable." *Id.*, at 416 ¶ 2.

b. The presumption that HUD's rejection of Petitioner's checks and refusal to order its own appraisal was a *reasonable*[10] *termination*[11] of the Payoff Agreement and that by some measure of reasonableness HUD could claim rights

10 *Reasonable.* "[S]ynonymous with rational, honest, equitable, fair, suitable, moderate, tolerable." Black's Law Dictionary 1138 (5th ed. 1979) (hereinafter Black's).

11 *Termination* implies a legal ending "before the end of the anticipated term of the lease or contract, which termination may be by mutual agreement or may be by exercise of one party of one of his remedies due to the default of the other party." Black's 1319.

that violate the law raises a list of serious questions that should not have been decided on a Rule 12(f) motion. *E.g., Mazel v. Hopkins, supra*, at *6–7.

c. In *Chapman v. United States*, 365 U.S., at 610, "State police officers, acting without a warrant but with the consent of petitioner's landlord, ... entered petitioner's rented house in his absence through an unlocked window[.]" The Court, reversing the Fifth Circuit, stated, "to uphold such an entry, search and seizure without a warrant would reduce the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords." *Id.*, at 616–17 (citation, internal quotation marks, and brackets omitted).

d. In *Soldal v. Cook County*, 506 U.S., the Court stated, "we reaffirm today our basic understanding that the protection against unreasonable searches and seizures fully applies in the civil context" (*id.*, at 67, n. 11), adding that the Fourth "Amendment's protection would be triggered by a search or other entry into the home incident to an eviction or repossession." *Id.*, at 67 (citation and internal quotation marks omitted). "What matters is the intrusion on the people's security from governmental interference. Therefore, the right against unreasonable seizures would be no less transgressed if the seizure of the house was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no reason at all." *Id.*, at 69.

2. The panel's extension of *McKennon v. Nashville Banner's* important-national-policies' criterion to an FHA lender's forcible entry and search of a family's home is at odds with congressional intent

a. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 354 (1995), involved, "whether an employee discharged in violation of the Age Discrimination in

Employment Act of 1967 [29 U.S.C. § 621 *et seq.*] is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing[.]" Br. for Appellant 38–39 (Part II(A)(i)).

b. The District Judge (2 R. 415 ¶ 1) quotes the Court, citing the Magistrate Judge's Recommendation which states: "The Supreme Court has 'rejected the unclean hands defense where a private suit serves important public purposes.'" 2 R. 341 ¶ 5–342 ¶ 1 (quoting *McKennon v. Nashville Banner*, *supra*, at 360). The Court of Appeals also quotes that: "'unclean hands ... has not been applied where Congress authorizes broad equitable relief to serve important national policies.'" *Ibid.*; App. A, *infra*, 6a (parentheses omitted).

c. One can be certain that when Congress declared a national housing policy—dedicated to "the goal of a decent home and a suitable living environment for every American family ... and to the advancement of the growth, wealth, and security of the Nation" (42 U.S.C. § 1441)—its intent did not include granting federal courts a charter to license HUD's or any other FHA lender's violation of federal and state law to forcibly enter, seize, and search a family's home.

3. The District Court misstated and misapplied a case "striking an unclean hands defense in the context of the [Fair Housing Act]"

The Magistrate Judge defined "Federal Housing Administration ('FHA')" in his Recommendation. 2 R. 325. The District Judge's order on the Recommendation uses FHA when discussing HUD regulations, does not redefine it, and states: "Protection of the public treasury by means of a HUD foreclosure has been deemed to be an important public purpose. *See, e.g., McFadden v. Meeker Housing Author-*

ity, No. 16-cv-2304-WJM-GPG, 2018 WL 3368411, at *3 (D. Colo. July 10, 2018) (striking an unclean hands defense in the context of the FHA)." 2 R. 415. In *McFadden*, FHA is the Fair Housing Act. 42 U.S.C. §§ 3601 *et seq.* It involved a discriminatory policy where therapy-pet owners sought a remedy under the Rehabilitation Act. 29 U.S.C. §§ 794 *et seq.* *McFadden* is inapposite. Br. for Appellant 39.

4. The panel referred to an unmet "high standard for proceeding with" unclean hands where the District Court cited Rule 9(b)

a. The panel did not cite to any objective standard when it stated: "Having reviewed the arguments and record, we are not persuaded that Dr. Golz satisfies the high standard for proceeding with the defense[.]" App. A, *infra*, 6a.

b. The District Judge stated, "'the clean-hands [inquiry] looks for fraudulent and deceitful conduct.' *Yeager*[*v. Fort Knox Security Products*], 602 F. App'x[423,] at 429[(10th Cir. 2015) (unpublished)].[12] Fraud and deceit must be pled with particularity. Fed. R. Civ. P. 9(b)." 2 R. 417 ¶ 1.

c. Rule 9 (b) provides, "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

d. "The purpose of Rule 9(b) is to afford [plaintiff] fair notice of [defendant]'s claims and the factual ground upon which they are based[.]" *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (citations, internal quotation marks, and brackets omitted).

e. *Schwartz v. Celestial Seasonings, supra*, at 1250, states that Rule 9(b) requires: "(1) the time, place and contents of the fraudulent misrepresentations or

12 To correct the quote, the word "inquiry" replaces "doctrine"; the citation to "F. App'x 432," (see 2 R. 415) is corrected to "F. App'x 423".

omissions; (2) the identity of the party alleged to have made the misrepresentations or omissions; and (3) the consequences of those misrepresentations or omissions."

f. "'Allegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and the [answer] sets forth the factual basis for the [defendant]'s belief.'" *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1255 (10th Cir. 2016) (citation and parentheses omitted); *accord Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990).

5. Petitioner's facts, as pleaded, satisfied Rule 9(b)

a. Petitioner pleaded HUD's 2016-acts beginning with the May 11 entry onto the Property. When HUD's agent peered into windows on June 6, HUD was noticed to cease entering the Property. HUD's July-6 entry was a criminal trespass. On December 2, 2016, Mr. Cuizon used false documents and Mr. Mountin falsely stated that HUD had foreclosed and taken possession. *Supra* Part I.B and Table 1.

b. Petitioner pleaded the names of HUD administrators and Government lawyers alleging facts that made scienter plausible and met the Rule 9(b) standard. HUD's unrelenting claim that its DOT licensed the forcible entry makes it clear that Respondent had "fair notice of [Petitioner]'s claims and the factual ground upon which they are based[.]" *Schwartz v. Celestial Seasonings, supra*, 1252 (brackets in original omitted) (brackets are Petitioner's).

6. Unclean hands is a defense to an FHA foreclosure and to a contract; the Secretary has a legal remedy in the Payoff Agreement

a. As the Michigan Supreme Court pointed out in *Stachnik v. Winkel*, 394 Mich. 375 (Mich. 1975), "No citation of authority is necessary to establish that one

who seeks the aid of equity must come in with clean hands. [ ] The clean hands maxim is an integral part of any action in equity. The United States Supreme Court captured the essence of the maxim when it said:"

> The clean hands maxim is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein v Heath*, 6 How [47 US] 228, 247 [12 L Ed 416 (1848)]. *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814[ ] (1944).

Stachnik v. Winkel, supra, 394 Mich., at 382.

b. In *United States v. Georgia-Pacific Company*, 421 F.2d 92, 103 (9th Cir. 1970), the court, granting the estoppel, noted, "A second equitable defense here is that of clean hands, a doctrine somewhat akin to, but distinguishable from, that of estoppel. Like estoppel, the doctrine of clean hands is based on conscience and good faith." And, "The Government comes before this Court seeking the equitable remedy of specific performance, a decree for which can be denied if the plaintiff has not come into court with clean hands." *Ibid.* "Although the Government is not always to be treated like a merely private suitor, there is authority limiting this privilege when it is the Government which has instituted the suit, ... in its proprietary (rather than sovereign) capacity. *Id.*, at 104 n. 35. "Pomeroy," the court continued, "in noting the applicability of the doctrine of clean hands to the remedy of specific performance, stated, (2 Pomeroy § 400, at 100):"

> A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse h[er] the remedy of a specific performance, and will leave h[er] to h[er] legal remedy by action for damages.

United States v. Georgia-Pacific, supra, at 104. The Secretary has a legal remedy in her Payoff Agreement with Petitioner whom worked assiduously to satisfy his obligation to that contract.

c. "Like the district court," the panel stated, "we assume without deciding that the defense of unclean hands is not categorically barred against the government. *See Deseret Apartments, Inc. v. United States*, 250 F.2d 457, 458 (10th Cir. 1957)" where the court stated, "'[T]he Government may not invoke the aid of a court of equity if for any reason its conduct is such that it must be said it comes into court with unclean hands.'" App. A, *infra*, 5a (parentheses omitted). In *Deseret Apartments v. United States, supra*, at 457, "The United States, acting for the Federal Housing Commissioner, brought [an] action against Deseret Apartments, Inc., to foreclose a real estate and chattel mortgage on certain housing units[.]"

C. The equitable defense of estoppel is available to prevent HUD from unjustly evading its obligations under the Payoff Agreement

1. HUD misused the Payoff Agreement inducing Petitioner's detrimental reliance from which the Secretary stands to benefit

a. When Petitioner entered into the Payoff Agreement with HUD, OSFAM Director Ivery Himes was acting, "On behalf of Secretary Castro," with actual authority, "for the development and implementation of policies for mortgage servic-

ing, claims, and property disposition that helps FHA to mitigate losses to the Mutual Mortgage Insurance Fund and assist homeowners to avoid foreclosure whenever possible." FHA Ann. Mgmt. Rep., FY 2019, p. 13 (Nov. 16, 2019). Br. for Appellant 35, n. 21. HUD did not contest the District Court's statement that OSFAM Director "Himes did indeed speak for HUD," (2 R. 414 ¶ 3).

b. The Payoff Agreement, as pleaded (Table 2: 09/17 & 10/10/14), is a contract: "An implied-in-fact [or express] contract with the government requires proof of (1) mutuality of intent, (2) consideration, (3) an unambiguous offer and acceptance, and (4) actual authority on the part of the government's representative to bind the government in contract." *Lawndale Restoration Ltd. P'ship ex re Boulevard v. United States*, 95 Fed.Cl. 498, 507 (Fed. Cl. Nov. 23, 2010) (internal quotation marks omitted) (quoting *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003)). " Thus, the requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs." *Ibid.*; Appellant's Pet. for Reh'g En Banc 7 ¶ 1 (enlarging on Br. for Appellant 40).

c. For the five-year period, June 2014 to June 2019: (1) Petitioner was denied economic use of the Property for 60 months by HUD's repudiation of the Payoff Agreement which precluded obtaining financing for the $90,880 in repairs (crucially, to the well and septic) needed to meet minimum habitability standards. Br. for Appellant 37; (2) Petitioner incurred carrying costs of $30,331. *Ibid.*; and (3) HUD data shows that single family homes in the Boulder area appreciated 54% (9% per year over five years compounded annually). 3 R. 472, nn. 1–4.

d. For the seven-year period June 2014 to June 2021: (1) Loss of use totals 84 months. *See United States v. James Daniel Good Real Property*, 510 U.S. 43, 54 (1993) (pecuniary loss, computed as lost rent, "represents a significant portion of the exploitable economic value of [a] home."); (2) Petitioner incurred $42,463 in carrying costs (which excludes costs incurred for exterior repairs and painting); and (3) HUD stands to benefit from the cumulative market-appreciation of 83%. [13]

2. Equitable estoppel

a. Federal law abhors a fraud or falsehood to accrue financial gain from the losses of another

The facts of the estoppel in this petition are similar to "*Faxton v. Faxon* (28 Mich. 159)[(Mich. 1873)], [where] a mortgagee holding several mortgages prevailed on a son of the deceased mortgagor, then intending to remove to a distance, to remain on the premises and support [his father's] family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years the mortgagee proceeded to foreclose. He was held to be estopped by his assurances upon which the son had acted.'" *Dickerson v. Colgrove*, 100 U.S. 578, 581 (1879).

"In *Dickerson v. Colgrove*, 100 U.S. 578, 580, 25 L. Ed. 618, it is said[of equitable estoppel]: 'The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is *sternly forbidden*. It involves fraud and falsehood, and

13 Carrying costs and market appreciation are computed by extending the per-annum figures contained in the ROA for 2014–2019 (supra, paragraph c) for 2020 and 2021.

the law abhors both.' (Italics ours.)" *Mahoning Inv. Co. v. United States*, 3 F. Supp. 622, 629 (Ct. Cl. 1933).

b. The Government can be equitably estopped by the authorized acts of its agents

Circuit Judge Baldock was on the panel in *Penny v. Giuffrida*, 897 F.2d 1543, 1546 (10th Cir. 1990), where the court acknowledged, "Of course, the government is ordinarily bound by the *authorized* acts of its agents under traditional concepts of agency or contract law." (italics in original). *E.g., Oil Shale Corporation v. Morton*, 370 F. Supp. 108, 125 (D. Colo. 1973) ("The government *can* be estopped by the conduct of its agents, *within the scope of their authority.*"); *accord Portmann v. United States*, 674 F.2d 1155, 1161 (7th Cir. 1982) ("[C]ourts have tended to find no significant obstacles to the use of estoppel based on the conduct of government agents acting within the scope of their actual or apparent authority.").

"Perhaps most important of the[ ] equitable considerations is the concern that we do not allow transactions between the government and its citizens to become subject to whimsical, unilateral, reversals at administrative will." *Tosco Corp. v. Hodel*, 611 F. Supp. 1130, 1207 (D. Colo. 1985), appeal vacated as moot upon settlement, 826 F.2d 948 (10th Cir. 1987).

c. Equitable estoppel is available against the Government even when there is a public interest or title to land is involved

The District Court in *Tosco Corp. v. Hodel, supra*, quoted "an annotation dealing with the acquisition or disposal of interests in real property: "

> 'despite any public interest involved ... the government might be estopped, on equitable principles, to assert a claim or defense, where a private party relied to his detriment upon statements or conduct of government officers

> or agents made in connection with negotiations or agreements to which their authority extended.' Annotation, *Modern Status of Applicability of Doctrine of Estoppel Against Federal Government and Its Agencies*, 27 A.L.R. Fed. 702, 736 (1976).

Tosco Corp. v. Hodel, 611 F. Supp., at 1207 (ellipsis in original). *Accord United States v. Georgia-Pacific*, 421 F.2d, at 97, n. 7 ("It is long-settled that an equitable estoppel may be invoked even where land or title thereto is involved. *Kirk v. Hamilton*, 102 U.S. 68, 76-78[ ] (1880)").

3. The panel cited three cases and not one supports dismissal of an estoppel-defense before discovery

a. The panel misconstrued *FDIC v. Hulsey* which cited to *FHA, Region No. 4 v. Burr* and remanded the estoppel for trial

(1) *FDIC v. Hulsey*, 22 F.3d 1472 (10th Cir. 1994) is an appeal from a District Court decision that, in relevant part, granted post-discovery summary-judgment on Hulsey's promissory estoppel defense. The Circuit reversed and remanded with instructions for a trial on the merits for the estoppel defense.

(2) As the panel pointed out, Petitioner "posits that HUD should be subject to equitable defenses because, in this case, it is acting in the nature of a private party seeking to enforce a contract." App. A, *infra*, 4a. The Circuit, in *FDIC v. Hulsey*, *supra*, at 1480, confirmed Petitioner's position when it stated, "In *FHA, Region No. 4 v. Burr*, 309 U.S. 242[ ] (1940), the Supreme Court interpreted the 'sue and be sued' clause applicable to the Federal Housing Administration. The Court explained that when Congress authorizes an agency to engage in commercial and business transactions with the public, it should be as amenable as private business to the judicial process and courts should not be quick to imply restraints on suit. *Burr*, 309 U.S., at 245[.]"

(3) *FDIC v. Hulsey, supra*, at 1481, states, "The district court granted summary judgment on the *defense* of breach of contract on the basis that there was legally insufficient evidence of ... whether the parties reached a [loan] settlement agreement." The Circuit concluded, "Viewing the evidence in the light most favorable to [Larry O. Hulsey] Co., ... summary judgment was improper. We remand this issue to the district court for a trial on the merits." *Id.*, at 1482.

(4) The panel stated, "The district court followed *FDIC v. Hulsey*," *supra*, 1489-90. App. A, *infra*, 4a, ¶ 1. The panel, misstates *FDIC v. Hulsey, supra*, at 1490, suggesting that, without limit, the Supreme " 'Court has indicated that there must be a showing of affirmative misconduct on the part of the government.' " App. A, *infra*, 4a, ¶ 2. That quote omits the core condition: "the Supreme Court has indicated that to successfully assert estoppel *for unauthorized acts* of government agents, the asserting party must show affirmative misconduct on the part of the government." *FDIC v. Hulsey, supra*, at 1489 (emphasis added) (citing Judge Baldock's case *Penny v. Giuffrida*, 897 F.2d, at 1546–47). The excerpts above are from Part IV in *FDIC v. Hulsey,* which concludes: "We reverse the Order granting summary judgment in favor of the FDIC and remand to the district court to apply the law of estoppel as set out in this section." *Id.*, at 1490.

b. The Court of Appeals elided a quote from *Wade Pediatrics v. Dep't of Health & Human Servs.* and materially misstated and misapplied *Heckler v. Community Health Services*

(1) The panel, extending its misconstruction of *FDIC v. Hulsey, supra,* stated, "we see no reason why *Hulsey* should not apply. *See* [then-Circuit Judge Gorsuch's opinion for the court in] *Wade Pediatrics v. Dep't of Health & Human*

Servs., 567 F.3d 1202, 1206 (10th Cir. 2009)":

> "Courts are parsimonious about estoppel claims against the government for good reason .... [:'When the government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60[ ] (1984).']"

App. A, *infra*, 4a ¶ 3 (parentheses omitted).

(2) The Court of Appeals' ellipsis subverts the Court's meaning which contradicts the panel's contention. To evade its obligations under the Payoff Agreement, HUD fraudulently represented its regulations, paid for a BPO that materially misrepresented the Property's condition, and misused public funds for the forcible entry, seizure, and search of Petitioner's home. Only in the refusal to enforce an estoppel against HUD is "the interest of the citizenry as a whole in obedience to the rule of law [ ] undermined." *Heckler v. Cmty. Health*, *supra*, at 60.

c. *Adams Cty. Comm'rs v. Isaac* does not support the panel's decision to strike Petitioner's equitable-estoppel defense prior to discovery

(1) The panel, quoted *Bd. of Cty. Comm'rs of Cty. of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994), that, "'Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct.' Accordingly, the court did not err in striking the estoppel defense." App. A, *infra*, 5a (parentheses omitted).

(2) Citing to *Adams Cty. Comm'rs v. Isaac, supra*, at 1499, the court in *Equal Employment Opportunity Commission v. Genesco, Inc.*, Civ. No. 09-952 WJ/RHS (D.N.M. May 20, 2010), pointed out:

> Plaintiff also claims that as a governmental agency that serves a public interest, it is somehow exempt from an assertion of equitable estoppel. ... Plaintiff cites to a Tenth Circuit case which held that in order to assert equitable estoppel against the government, the party seeking relief must show that the government exhibited affirmative misconduct. *See, Bd. of County Comm'rs of County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994). However, *Adams* involved a review of an administrative order issued by the Federal Aviation Administration, including all the evidence contained in the record. Thus, that case does not provide a legal basis for striking Defendant's affirmative defenses for failure to show such affirmative misconduct in an Answer and at the inception of the lawsuit, prior to formal discovery.

Equal Employment Opportunity Commission v. Genesco, supra, at *6.

(3) Had Petitioner been required to plead affirmative misconduct, it is defined in *Adams Cty. Comm'rs v. Isaac, supra*, at 1499: "Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact." (citing cases). Petitioner pleaded affirmative misconduct in the form of fraud by named HUD administrators which satisfied Rule 9(b):

4. Petitioner's facts satisfied the mandatory federal-pleading standard but, as in *Erickson v. Pardus*, the Circuit interposed its own arbitrarily high standard

a. With detailed knowledge dating from 2005 of material defects that would be hidden by snow, HUD: (1) delayed while months of good weather passed; (2) scheduled, then immediately canceled, a January 2015-appraisal; (3) ordered a rush appraisal with several feet of snow present and a blizzard advisory in effect; and (4) refused to order any valid appraisal when snows abated. *Supra* Part I.A and Table 2: 1/18/02 through 09/08/15. The facts plausibly alleged that HUD in-

tended to conceal known material-defects for economic gain which met the Rule 9(b) standard where, "Allegations of fraud may be based on information and belief when ... the [answer] sets forth the factual basis for the [defendant]'s belief." *George v. Urban Settlement Servs.*, 833 F.3d, at 1255.

b. In its recitations to the court, HUD stated, "24 C.F.R. § 206.125 did not apply to Ms. Golz loan in 2014." *Supra* Table 2: 02/12/20. HUD, while refusing to order its own appraisal, rejected Petitioner's appraisal and tender of payment stating they did not "fully comply with HUD regulations and requirements at 24 C.F.R. § 206.125[.]" That now-admitted fraudulent representation made in signed letters from the OSFAM Deputy Director and AGC Potts were pleaded by Petitioner. *Supra* Table 2: 06/03 & 06/16/15 and 06/20 & 08/04/15. Those letters were signed, affirmative misrepresentations that met Rule 9(b) requirements for fraud. *Schwartz v. Celestial Seasonings,* 124 F.3d, at 1250.

c. Petitioner pleaded his letters notifying the Secretary, Novad, and AUSA Traskos that his family was occupying the home. HUD's December 2, 2016 forcible entry and search employed HUD documents claiming possession, and Zach Mountin represented to Det. O'Nuallain that, "'the home had been foreclosed and HUD had taken possession of the property.'" *Supra* Part I.B and Table 1: 05/11/16 through 12/02/16. The facts pleaded satisfy Rule 9(b).

d. In *Erickson v. Pardus*, 551 U.S. 89, 90 (2007) (*per curiam*), the Court stated that the Tenth Circuit "departs in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure that we grant review." And "The Court of Appeals' departure from the liberal pleading standards set forth by

Rule 8(a)(2) is even more pronounced in this particular case because ... [a] document filed *pro se* is 'to be liberally construed,'" *Id.* at 94 (citation omitted). William Erickson "in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings." *Ibid.*; 2 R. 298 ¶ 2; Supp. 2 R. 353 ¶ 3; Appellant's Pet. for Reh'g En Banc 1, 4–5.

e. Dr. Golz bolstered his amended answer with additional filings and exhibits. A list of ECF numbers was filed on April 25, 2018. 2 R. 297–98 (Part B). The list was updated on January 8, 2019 (Supp. 2 R. 352–54) and included the counterclaim Petitioner submitted to HUD on May 31, 2018 as an SF-95 (*id.*, at 357–69) in compliance with the court's April 16, 2018 instructions. See p. 8, note 8, *supra.*

STATEMENT OF THE CASE: QUESTION 3

I. THE PANEL'S DECISION THAT THE CLOSED ESTATE WAS A THIRD PARTY AND THAT PETITIONER LACKED STANDING TO APPEAL CONFLICTS WITH THE PLAIN LANGUAGE OF SETTLED LAW

By August 2017, a default had been entered (1 R. 7:30 and 8:33) for all named defendants (*id.*, at 127) except the Estate and Petitioner. Br. for Appellant 16 ¶ 3–17 ¶ 1. Dr. Golz, as PR, distributed the Estate's sole asset the Property to Dr. Golz, individually, then closed probate on May 2, 2018, pursuant to state law. Thereafter, Petitioner was the only defendant with any interest in the Property and the sole proper-party defendant. Beginning on May 8, 2018 and extending to April 8, 2019, the District Court asserted it had probate jurisdiction to extend the Estate's administrative period and to issue orders to Dr. Golz as its PR.

Petitioner appealed from the District Court's final order denying his second amended-answer pleading facts of the court's ongoing probate administration.

Petitioner also appealed from the court's order denying his motion to reopen the final order and judgment. Notice of App., 3 R. 463–64. The motion attached audio recordings and transcripts of statements the Magistrate Judge made at the unrecorded January 23, 2019 status-conference and through a lawyer directing Dr. Golz that he was required to retain licensed counsel for the closed Estate and that the court would enter a default judgment in favor of HUD. The Court of Appeals stated, "The appellant here is Dr. Golz individually, not Dr. Golz as the personal representative of the Estate." App. A, *infra*, 2a. "'[P]arties generally do not have standing to appeal in order to protect the rights of third parties.'" *Id.*, at 3a (citation and parentheses omitted). The panel wrongly concluded that, "Dr. Golz therefore has not established his standing to appeal from the delay in dismissing the Estate as a defendant." *Ibid.*

The issue on appeal and linchpin of Question 3 is that no third party existed after May 2018 unless the Court of Appeals has authority to arbitrarily enlarge the District Court's jurisdiction: (A) to reject the closing of probate pursuant to state law; (B) assume probate administration, reopen the Estate, and assert continuing jurisdiction over Dr. Golz as PR; (C) disregard Petitioner's Rule 12(b)(1) challenge to its probate jurisdiction; (D) materially violate the local rule governing the appointment of a lawyer from the court's *pro bono* panel; and (E) direct a lawyer contacted in violation of that rule to solicit Dr. Golz as a client by representing that federal law required him to retain licensed counsel for a closed estate.

The District "[C]ourt does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its

creators." *Stoll v. Gottlieb*, 305 U.S. 165, 171 (1938). The Court of Appeals "erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter." *Id.*, at 172.

The panel's effort to deny Petitioner a remedy for the wrong inflicted upon him by the District Court conflicts with the straightforward requirements of "Standing ... under Article III, § 2 ... [which] contains three requirements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 84 (1998) (citation omitted). Petitioner's appeal had every element required to establish standing. Br. for Appellant 11–26 (Part II); Appellant's Pet. for Reh'g En Banc xiii–xv (Table 3) and 12–21 (Part III).

II. PROBATE PROCEEDINGS IN THE STATE COURTS

A. On September 16, 2014, the Superior Court of Arizona, Maricopa County, granted an application by Estate's counsel, Jon Kitchel (1 R. 251 ¶ 50 and 4 R. 52:5–53:11), to admit Verna Mae's testamentary document to informal probate and appoint Dr. Golz as PR. *In re Estate of Verna Mae Golz*, PB2014-051759 (Ariz. Super. Ct. 2018). On September 26, 2014, the District Court Boulder County, State of Colorado, admitted Dr. Golz as PR by Certificate of Ancillary Filing, *In re Estate of Verna Mae Golz*. 2014-PR-160 (Boulder Cty. Dist. Ct. 2018); see 2 R. 321 ¶¶ 2–3.

B. "An estate is a collection of the decedent's assets and liabilities. *See* A.R.S. § 14–1201(17) (defining 'estate' as 'the property of the decedent') .... As

such, it has no capacity to bring or defend a lawsuit. Simply put, an estate cannot 'act.' Rather, it can only sue and be sued through its personal representative, who 'acts' on behalf of the estate. *See* A.R.S. § 14–3701 (duties and powers of personal representative)." *Ader v. Estate of Felger*, 375 P.3d 97, 104 (Ariz. Ct. App. 2016).

C. Dr. Golz's Letters of PR, received by Director Himes by October 10, 2014 (2 R. 237), were filed in the District Court on February 2, 2018. *Id.*, at 233.

D. On April 23, 2018, Dr. Golz as PR distributed the Property to Dr. Golz individually with a PR's Deed. Boulder Cty. Recorder No. 03651957 (Apr. 24, 2018) (2 R. 321). The Estate's Closing Statement with Dr. Golz's sworn oath, "The Estate has been fully administered[,]" was notarized by Mr. Kitchel and filed on May 2, 2018 in the Superior Court of Arizona, Maricopa County. Supp. 2 R. 109–10.

E. "In an unsupervised administration, the personal representative can distribute assets and close an estate informally and without court order. A.R.S. §§ 14-3704, 14-3933." *In re McGathy*, 226 Ariz. 277, 278 (Ariz. 2010). "'Informal probate is conclusive as to all persons until superseded by an order [entered] in a formal testacy proceeding,' (A.R.S. § 14-3302) [.]" *Matter of Estate of Torstenson*, 125 Ariz. 373, 375 (Ariz. Ct. App. 1980) (brackets in original).

III. PROCEEDINGS IN THE DISTRICT COURT

A. The April 16, 2018 hearing[14]

1. The court warned Petitioner of a potential default-judgment because "an estate cannot be represented by a pro se litigant"

The Magistrate Judge stated, "at all times a Federal Judge has to look at

14 *Hearing* is used as the Magistrate Judge sought testimony from Dr. Golz in context "with definite issues of fact or of law to be tried, in which witnesses are heard[.]" Black's 649.

the jurisdiction that they have and the position of the parties. And Federal Law says that an estate cannot be represented by a pro se litigant, that it must be represented by an attorney" (4 R. 36:1–6), or "a default would be entered against them and a default judgment, because I didn't make the rules up, they just simply do not allow non-natural persons to be represented pro se." *Id.*, at 36:15–17. Petitioner stated, "a PR deed to the property from the Estate to myself ... would eliminate the Estate, and I would be the sole remaining Defendant, and it would simplify matters." *Id., at* 36:22–37:6. Br. for Appellant 11 ¶ 3–12 ¶ 1.

2. HUD's stated reason for alleging Verna Mae breached the Note as a claim on the Estate was to evade Petitioner's affirmative defenses arising from another contract—the Payoff Agreement

a. AUSA Jasand Mock stated, "I think Mrs. Golz had moved to Arizona by perhaps as early as 2009, which is a breach of the notes ... then we shouldn't be talking about any of this affirmative defense as to whether or not HUD -- [.]" 4 R. 41:2–12; Appellant's Pet. for Reh'g En Banc 13 ¶ 3–14 ¶ 2.

b. The Magistrate Judge pursued HUD's allegation, asking: "Doctor Golz, where was your mother living in 2010?" 4 R. 42:4–5. " [W]here your mother lived is relevant ... if a breach occurred as early as 2009 or 2010, ... thereafter whatever happened is not relevant to the issues in the case, because ... the debt was owed as early as seven or eight years ago." *Id.*, at 45:7–18; but see Supp. 2 R. 168 ¶ 3–170 ¶ 2, 175–219, and 273, n. 2 (documenting HUD's lender's material breach at loan origination and discussing Colorado contract-law).

c. Dr. Golz answered, "I have public records up and through 2013, you know, driver's license, pictures of her, dated with her friends, in front of her house,

and her eating out at a local restaurant .... All my mother did was, ... after living in 10 years of a sub-standard environment, she died on May 16, 2014, when she was down here visiting me." 4 R. 46:17–47:1. "So going back beyond May 16th, first of all, it has nothing to do with me and I can't testify to that. And I can't -- because I was not my mother's custodian, and that was her responsibility." *Id.*, at 48:19–22.

B. The court overruled Petitioner's closing of the Estate pursuant to state law and disregarded his assertion that the motion to dismiss the Estate should be evaluated pursuant to Rule 12(b)(1)

1. On April 25, 2018, Petitioner attached the PR's Deed to a one-paragraph motion to dismiss the Estate, stating, "Plaintiff's foreclosure claim attaches to the Property, and ... Defendant therefore moves the Court for the immediate dismissal of the Estate as a party to this action." 2 R. 305 ¶ 2; Br. for Appellant 12 ¶ 2.

2. On April 27, the District Judge referred the motion to dismiss to the Magistrate Judge whom "liberally construed [it] as brought pursuant to Fed. R. Civ. P. 12(b)(6) with documents outside the pleadings," (2 R. 323) (parentheses omitted). The documents—provided in answer to the court's April-16 question, "where was your mother living in 2010"—included: "Nederland Post Office, 07/29/2010, Sales Receipt, Golz, Verna, Box/Call Number 328, Paid by: Personal Check $44.00" (*id.*, at 312); and "Colorado Driver License, Issued: 04-26-2013, Verna Mae Golz, 130 N Beaver Road [*sic*], Nederland, CO 80466" (*id.*, at 319). The court, citing those documents, and the PR's Deed, *sua sponte* converted the motion to dismiss to a motion for summary judgment by the Estate (Court's Summary-Judgment Motion). *Id.*, at 323. Appellant's Pet. for Reh'g En Banc 13 ¶ 2–14 ¶ 2.

3. In a May-3, text-only entry (1 R. 15 : 107), the District Judge denied Pe-

titioner's objection (see Supp. 2 R. 100) to the April-27 minute-order converting the motion to dismiss the Estate into the Court's Summary-Judgment Motion.

4. Petitioner's May 7, 2018 response concerning *pro se* representation of the Estate stated, "that, as a matter of law, the Court must dismiss the Estate[.]" *Id.*, at 104 ¶ 2. The response attached the Closing Statement which was executed by Dr. Golz as, "An administrator appointed by a state court [a]s an officer of that court;" *Byers v. McAuley*, 149 U.S. 608 (1893). Br. for Appellant 12 ¶ 3–14 ¶ 1.

5. "'Without jurisdiction'"— to reopen probate administration —"'the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' *Ex parte McCardle*, 7 Wall. 506, 514 (1869)." *Steel Co. v. Citizens*, 523 U.S., at 94. On May 8, the court was required to note for the record that the Estate had been closed and that HUD's foreclosure would proceed against Dr. Golz. Instead, asserting authority to overrule the state-law closing of the Estate, the court issued a minute order stating:

> Dr. Golz filed a motion to dismiss the Defendant Estate of Verna Mae Golz from this case ... resolution of Dr. Golz's motion may be contingent on whether he may properly seek any relief on behalf of the Estate, *which will be resolved with the Court's consideration* of the Plaintiff's Statement [ECF No. 102] and Dr. Golz' response to the statement [see Minute Order, ECF No. 105].

Supp. 2 R. 117 ¶¶ 2,3 (brackets in original) (emphasis added); Br. for Appellant 14.

6. HUD's May-17 response to the Court's Summary-Judgment Motion begins, "Dr. Golz's motion to dismiss the Estate should be denied" (Supp. 2 R. 125), for which HUD claimed standing because the "Estate is a proper defendant. Under

federal law in the Tenth Circuit, an estate is a legal entity. *See United States v. Stubbs*, 776 F.2d 1472, 1475 (10th Cir. 1985)." Supp. 2 R. 135. HUD elided the Circuit's statement that, "A probate estate is a legal entity ... *during the period of administration.*" *United States v. Stubbs, supra,* 1475 (emphasis added). And Estate administration had been closed since May 2, 2018. Br. for Appellant 15 ¶ 1–16 ¶ 1; Appellant's Pet. for Reh'g En Banc 14 ¶ 4–15 ¶ 1.

7. The District Court disregarded Dr. Golz's May 22, 2018 reply (Supp. 2 R. 168 ¶ 2) that his "motion to dismiss the Estate should have been evaluated pursuant to ... Fed. R. Civ. P. 12(b)(l), for lack of subject-matter jurisdiction:" citing "*Byers v. Mcauley*, 149 U.S. 608 (1893); *see also, e.g., Sutton v. English*, 246 U.S. 199 (1918)." Supp. 2 R. 169 ¶ 2; Br. for Appellant 13 ¶ 2–14 ¶ 1; Appellant's Pet. for Reh'g En Banc 15 ¶ 2–16 ¶ 1.

8. "Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514[ ] (2006)[.]" *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

C. The judicial officers violated Attorney Rule 15 for the purpose of directing a lawyer to inform Dr. Golz that the closed Estate required licensed counsel

1. The District Judge affirmed his authority to decide whether to require licensed counsel for the closed Estate

After May 22, Petitioner's next filing, on September 14, began, "Without leave from the Court to do otherwise, Defendant is restricted to filing this Objection solely in his personal capacity." 2 R. 353 ¶ 1; Br. for Appellant 16 ¶ 3–18 ¶ 1. Addressing the Objection on October 4, 2018, the District Judge stated: Dr. Golz "clari-

fies that he is objecting solely in his personal capacity because it has not been determined whether he can represent the estate pro se. That is an issue that has been separately briefed and referred to the magistrate judge for a report and recommendation." 2 R. at 403, n. 3 (ECF Nos. omitted).

2. Meredith Callan told Dr. Golz, "I was contacted by Judge Hegarty" and "You do need representation on the Estate matter"

The Magistrate Judge had issued no report and recommendation on *pro se* representation of the Estate, but Dr. Golz was informed of the court's decision by Ms. Callan. Her December-19 email and letter to Petitioner each stated, "Judge Hegarty recommended that I contact you regarding 17-CV-01152" (3 R. 401–06). On January 8, 2019, Ms. Callan left a recorded voice-message:

> This is for William Golz. My name is Meredith Callan, my phone number is 720-636-0696. I'm an attorney in Denver. I've been trying to get a hold of you. I sent you an email and a letter to your address in Arizona. I was contacted by Judge Hegarty to assist you on your case. You do need representation on the Estate matter.

Dr. Golz did not reply to Ms. Callan's written- or voice-messages. 3 R. 408–14 (Tr.s) and Supp. 1 R. (audio CD). Br. for Appellant 18 ¶ 3–19 ¶ 1. Petitioner had made it clear to the court that he wished to proceed *pro se* and why. Supp. 2 R. 13 ¶ 2–14 ¶ 1 and nn. 1–2; *id.*, at 34, n. 1; and *id.*, at 63 ¶ 3–64 ¶ 2 and n. 14.

3. Magistrate Judge Hegarty stated, "the Government is simply going to win this case because an estate can't represent itself"

At the January 23, 2019 conference, Magistrate Judge Hegarty, referring to "Meredith" (3 R. 430:17), stated:

> I actually have a lawyer here – in the courtroom – who's willing to represent [the] estate ... But it looks like the

> Government is simply going to win this case because an estate can't represent itself. It has to be represented by a lawyer and not by a natural person. [*Id.*, at 430:2–8.] I'll be issuing an order to show cause why a default should not be entered for Mr. Golz and the Estate of Verna Mae Golz failure to appear at a scheduled court hearing. [*Id.*, at 431:11–13.]

Id., at 427–32 (Tr.); Supp. 1 R (audio CD); Br. for Appellant 19 ¶ 2–21 ¶ 1.

4. The judicial officers violated Attorney Rule 15

a. Magistrate Judge Hegarty's January-23 courtroom-minutes stated, "Meredith Callan, pro bono counsel [was] contacted to represent the Estate of Verna Mae Golz." 3 R. 109. The local rule (D.C.COLO.LAttyR 15: Civil Pro Bono Representation) (Attorney Rule 15) is provided in the ROA (3 R. 110–15) and in this petition (App. D, *infra*, 31a–35a). Petitioner had made no request and was not eligible (see Supp. 2 R. 298) for *pro bono* counsel. D.C.COLO.LAttyR 15(e). The judicial officers violated the appointment procedures of Attorney Rule 15:

b. In *Trujillo v. City of Denver*, No. 14-cv-02798-RBJ-MEH (D. Colo. Nov. 6, 2015), Magistrate Judge Hegarty granted a motion for an eligible "plaintiff, Ms. Trujillo, an impecunious [the court believed] and legally unsophisticated person." *Id.*, at *4. "This district has a Civil Pro Bono Program", Judge Jackson stated, where, "In cases deemed appropriate the court through the Clerk's Office contacts the volunteer panel[.]" *Id.*, at *2; D.C.COLO.LattyR 15(f).

D. The District Judge denied Petitioner a reconstruction and evidentiary hearing and leave to amend to fashion a remedy for his injury from the court's actions in 2018 and 2019 absent any jurisdiction

1. Petitioner's February 7, 2019 response to the court's January-24 order to show cause stated: "The Estate is a nullity which can neither be noticed nor appear at any conference nor can it retain legal counsel." Br. for Appellant 21 ¶ 2.

2. On February 20 (3 R. 146–47, Part (B)) and February 28 (4 R. 57:22–61:22 and Supp. 2 R. 414–17), Petitioner moved for a hearing to obtain testimony and enter evidence to reconstruct the unrecorded January-23 conference and determine the content of and reason for Magistrate Judge Hegarty's unlawful communications with Ms. Callan. On March 1, the District Judge denied Petitioner's evidentiary and reconstruction hearing, stating, "I reviewed the file entries for the period December 18, 2018 to January 23, 2019. I found absolutely nothing indicating any improper conduct by Magistrate Judge Hegarty." Br. for Appellant 21 ¶ 3–23 ¶ 1; Appellant's Pet. for Reh'g En Banc 17 ¶¶ 1–2.

3. On March 5, 2019, the Magistrate Judge issued a recommendation to "Dismiss the Estate as a Defendant" (ECF 156). 3 R. 167–70. Petitioner filed an "objection to ECF 156 as void for lack of jurisdiction" (*id.*, at 185–201), providing a timeline of District Court actions in context with State Court probate-filings with appropriate authority. Dr. Golz also notified the court of his impending request for an extension of time, or temporary stay, to research and write a second amended-answer and an objection to the Magistrate Judge's March-13 recommendation on HUD's summary judgment motion. *Id.*, at 200–01, Part (B). Petitioner advised the court of his prescheduled, international business-travel for the first three weeks of April. Br. for Appellant 23 ¶ 2.

4. Petitioner filed a March-27 motion, stating, "Facts and Defendant's schedule require this stay and extension" (Supp. 2 R. 427), disclosing that, "HUD would not oppose a 30-day extension to May 1, 2019 for that objection." *Id.*, at 425. As further good cause, Dr. Golz explained: "Notwithstanding that the 'absence of

any jurisdiction over a legal nullity was absolutely clear to the judicial officers ... *they demanded that Defendant draft needless responses and spend hundreds of hours in legal research.*' (Supp. 2 R. 423 ¶ 1)." Br. for Appellant 24 ¶ 1 (emphasis added) (brackets omitted).

5. On March 29, the District Judge denied Petitioner's stay and unopposed extension of time in a text-only entry. 1 R. 20:165. Dr. Golz canceled his prepaid international-travel to the conference he was to attend by invitation and filed a proposed, second amended-answer on April 1. That answer pleaded the facts of the misrepresentation of the court's probate-jurisdiction in 2018 and 2019 by the judicial officers, Plaintiff, its counsel, and a lawyer on the court's *pro bono* panel; this was a new defense where the court's claimed authority over probate administration was continuing.[15] 3 R. 251–60 ¶¶ 131–42; Br. for Appellant 24 ¶ 2.

6. The estate was closed on May 2, 2018. More than eleven months later the District Judge named the Estate as a defendant in his final order on April 8, 2019. 3 R. 354–68. That order described Ms. Callan's January 8, 2019 claim ("You do need representation on the Estate matter") and Judge Hegarty's January-23 direction from the bench ("the Government is simply going to win this case because an estate can't represent itself") as the court's "efforts to assist the Estate in obtaining counsel from this district's civil pro bono panel." 3 R. 366 ¶ 2.

7. It is plain on the face of the record that Judges Jackson and Hegarty violated Attorney Rule 15 to employ Ms. Callan in the misrepresentation that the

15 Although the facts were pleaded as a defense, "Federal Rule of Civil Procedure 8(c) provides that 'the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.'" *Reiter v. Cooper*, 507 U.S. 258, 263 (1993).

court had jurisdiction to extend probate administration and the authority to enter a default judgment against Dr. Golz if he did not acquiesce to Ms. Callan's "representation on the Estate matter."

8. "A district court has discretion to adopt local rules. *Frazier v. Heebe*, 482 U.S. 641, 645[ ] (1987) (citing 28 U.S.C. § 2071; Fed. Rule Civ. Proc. 83). Those rules have 'the force of law.' *Weil v. Neary*, 278 U.S. 160, 169[ ] (1929)." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010). "The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Id.*, at 196.

E. The District Judge's order denying the motion to reopen the final judgment, stating that Petitioner's recording of the January 23, 2019 "proceedings were surreptitiously recorded in Magistrate Hegartys court," is in conflict with settled law

1. As discussed above, the court denied Petitioner's right to an evidentiary and reconstruction hearing to admit the audio recordings and transcripts concomitant to the examination of witnesses, and that right was denied again when the court refused him leave to amend.

2. On May 6, 2019, Dr. Golz again attempted to secure his right to a hearing with witnesses with a "motion to open the final judgment to make new findings of fact and law... " (ECF 176). 3 R. 371–99. That motion transmitted audio recordings (1 R. 20:174) with typed transcripts of Ms. Callan's voice messages (3 R. 408–14) and of the unrecorded January-23 conference (*id.*, at 416–32). The audio recording and transcript of the January 23, 2019 conference was submitted with a declaration stating, in pertinent part, that:

> Pursuant to 28 U.S.C. § 1746, I, Annette T. Golz, make the following declaration: the status conference transcribed above originated at 10:27 a.m on January 23, 2019 when I answered my home phone (480) 816-5019. The caller ID reported the number as (720) 556-2776, and the caller identified himself as Assistant United States Attorney Jasand Mock.
>
> ...
>
> To the best of my ability, my above transcription and my audio recording from my iPhone 6s, including the copy of that recording (blue-sleeved CD) that I am providing with this transcription, are a complete and accurate record of the January 23, 2019 status conference. I declare, under penalty of perjury, that the foregoing is true and correct.

3 R. 432.

3. Two days after receiving the motion to open the final judgment and its exhibits, on May 8, the District Judge entered a text-only "ORDER denying 176 Motion to Alter Judgment. Furthermore, if proceedings were surreptitiously recorded in Magistrate Hegartys [*sic*] court, that is entirely inappropriate." *Id.*, at 440 (brackets omitted).

4. On May 13, 2019, Petitioner attached a memorandum of law to a motion which stated (*id.*, at 445 ¶ 4): "Arizona law, Colorado law, and federal law all permit the recording of phone calls by any party to the call. *E.g., United States v. John J. Johnson*, No. H-92-152 (S.D. Tex.), United States' Memorandum of Law on Admissibility of Tapes and Transcripts (Feb. 15, 1994)," (3 R. 453–58).

5. The typed transcript and audio recording of the January-23 conference (3 R. 434–37) were served through AUSA Mock who initiated and was present at the conference on Respondent (Supp. 2 R. 629–48) whom requested no corrections (*id.*, at 652) in Petitioner's statement of evidence (*id.*, at 654–77).

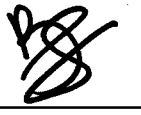
REASONS FOR GRANTING THE PETITION

As set forth in the petition, the actions of the District Court and the Court of Appeals' order and judgment sanctioning those actions directly and materially conflicts with Colorado Supreme Court precedent, the intent of Congress, Tenth Circuit law, and relevant decisions of the Court. *Hollingsworth v. Perry, supra*, 196 (Under the Supreme "Court's Rule 10(a) the Court will consider whether the courts below have 'so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power')" (ellipsis in original) (parentheses omitted).

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,



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MAY 13, 2021