No. 99-1163

In the Supreme Court of the United States

JAMES FERRELL, ET AL., PETITIONERS

v.

ANDREW CUOMO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Department of Housing and Urban Development was required to continue to comply with a 1979 consent decree when continued compliance would have been contrary to the 1996 amendments to the National Housing Act.

2. Whether the court of appeals improperly ruled on the merits of the case when, in reviewing a preliminary injunction, the court determined that petitioners had no likelihood of success on the merits and remanded the case to the district court for further proceedings.

3. Whether the 1998 amendments to the National Housing Act require the Department of Housing and Urban Development to operate an equivalent substitute to the mortgage assignment program required by the 1979 consent decree.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 186 F.3d 805. The opinion of the district court (Pet. App. 19a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1999. A petition for rehearing was denied on October 13, 1999 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on January 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1973, petitioners—low and moderate income families who had purchased homes with mortgages insured under Sections 203 and 235 of the National Housing Act, 12 U.S.C. 1709, 1715z—filed a nationwide class action against the Secretary of Housing and Urban Development (HUD) in which they alleged that HUD had violated its duty to provide mortgage-foreclosure avoidance relief to homeowners with HUD-insured mortgages. Pet. App. 2a. The parties joined in a settlement agreement, which was entered as a consent decree with court approval on July 29, 1976. *Ibid.*; see *Ferrell* v. *Pierce*, 743 F.2d 454, 455-457 (7th Cir. 1984). Under the consent decree, HUD agreed to provide foreclosure avoidance relief through an assignment program. Pet. App. 2a. The program, which applied to single-family home mortgages fully insured by FHA, provided "foreclosure relief by allowing HUD to pay off the mortgage debt of a mortgagor in default, take assignment of the mortgage from the mortgagee, and then work out a payment plan for forbearance agreement with the mortgagor." *Ibid.*

In 1979, the parties agreed to an Amended Stipulation, which superseded the 1976 consent decree. Pet. App. 2a-3a. Under the Amended Stipulation, HUD agreed to operate the assignment program for five years, after which HUD would "provide assistance or relief in the form of the present assignment program or an equivalent substitute to permit mortgagors in default on their mortgages to avoid foreclosure and to retain their homes during periods of temporary financial distress." *Ferrell*, 743 F.2d at 458; Pet. App. 3a. The statutory authority for HUD's operation of a mortgage assignment program was, at that time, contained

in former Section 230 of the National Housing Act, 12 U.S.C. 1715u (1964 & Supp. IV 1968). Pet. App. 3a.

2. In 1996, Congress enacted The Balanced Budget Downpayment Act, I (Downpayment Act), Pub. L. No. 104-99, § 407(b), 110 Stat. 45, which amended Section 230. The amended Section, entitled "AUTHORITY TO ASSIST MORTGAGORS IN DEFAULT," no longer contains the provision that had authorized the mortgage assignment program. 110 Stat. 45. See 12 U.S.C. 1715u(e) (Supp. IV 1998).[1] Furthermore, amended Section 230 prohibits any "provision of this chapter, or any other law," from being construed "to require the Secretary to provide an alternative to foreclosure for mortgagees" or "to accept assignments of such mortgages." Downpayment Act, § 407(b), 12 U.S.C. 1715u(f) (Supp. IV 1998). In place of the eliminated assignment program, the Secretary is authorized to establish a program to pay partial claims to mortgagees for actions they have taken to cure mortgages in default, and to accept assignment of mortgages that mortgagees have modified to cure defaults, if repooling of the loans is not possible. 12 U.S.C. 1715u(b) and (c) (Supp. IV 1998).[2] In addition, the Act prohibits judicial review of any "decision by the Secretary to exercise or forego exercising any authority under [Section 230.]" 12 U.S.C. 1715u(d) (Supp. IV 1998).

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[1] In this brief, we cite the statutory provisions as renumbered by the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1998 (1998 HUD Appropriations Act), Pub. L. No. 105-276, Tit. II, 112 Stat. 2469.

[2] Under a partial claims program, HUD pays a partial claim to a mortgagee that agrees to apply the payment to a mortgage in default, and the mortgagor then agrees to repay HUD for the partial claim.

On April 26, 1996, the effective date of the Downpayment Act, HUD stopped accepting new applications for mortgage assignment under the program described in the Amended Stipulation. Pet. App. 5a. HUD promulgated an interim regulation, effective August 2, 1996, which established a comprehensive approach to promote alternatives to foreclosure. *Ibid.* The new approach employs partial claims, as well as other techniques such as special forbearance plans, loan modifications, and deeds in lieu of foreclosure. See 61 Fed. Reg. 35,014 (1996) (codified at 24 C.F.R. Pts. 203, 206).

3. On September 27, 1996, HUD filed a motion to vacate its obligation under the Amended Stipulation to operate the mortgage assignment program or an equivalent substitute. Pet. App. 7a. On October 2, 1996, petitioners filed a motion to hold HUD in civil contempt for failing to comply with the Amended Stipulation. *Ibid.* Petitioners' motion included a request that the district court order HUD to reinstate the assignment program or an equivalent substitute pending the court's ruling on HUD's motion to vacate the Amended Stipulation. *Ibid.* The district court treated the request for reinstatement of the assignment program or an equivalent substitute as a motion for a preliminary injunction and agreed to rule on that motion while the other motions remained under consideration. *Ibid.*

The district court denied plaintiffs' motion to require HUD to reinstate the mortgage assignment program on the ground that plaintiffs had not shown irreparable injury. Pet. App. 7a. Subsequently, petitioners filed a renewed motion with evidence of harm allegedly constituting irreparable injury. *Id.* at 7a-8a.

4. On March 31, 1998, the district court issued a memorandum opinion and order granting a preliminary

injunction that required HUD to reinstate "either the assignment program or an 'equivalent' substitute, in the form of a mandatory partial claim program, until further order from [the] court." Pet. App. 8a. The district court acknowledged that Section 407(a) of the Downpayment Act amends the National Housing Act to eliminate the statutory authority for HUD to operate the assignment program, but the court held that 42 U.S.C. 1441 and 42 U.S.C. 3535 together authorize HUD's continued operation of the program. Pet. App. 8a. Section 1441 declares that the goal of national housing policy shall be "a decent home and a suitable living environment for every American family" and directs HUD to exercise its powers, duties, and functions consistently with that policy. Section 3535 authorizes the Secretary to "make such rules and regulations as may be necessary to carry out his functions, powers, and duties," to sell or exchange securities or obligations, and to consent to the modification of any term of any contract or agreement to which he is a party or which has been transferred to him. See 42 U.S.C. 3535(d), (i)(3) and (5).

Further, the district court held that the Downpayment Act did not alter HUD's obligation to seek modification of the Amended Stipulation from the court before terminating the assignment program. Pet. App. 9a. Finding that petitioners were likely to succeed on their motion to hold HUD in contempt, that they had shown irreparable harm, and that "no adequate remedy at law exists for the loss of one's home due to the denial of foreclosure assistance," the court issued the preliminary injunction described above. *Id.* at 9a-10a. HUD appealed.

5. The court of appeals reversed. Pet. App. 1a-18a. Initially, the court noted that, in assessing the probabil-

ity of success on the merits, the district court should have focused on whether HUD was required to continue to operate the mortgage assignment program or an equivalent substitute after enactment of the Downpayment Act, rather then on whether HUD was in civil contempt for terminating compliance with the Amended Stipulation before receiving the district court's consent. *Id.* at 11a-12a. The court explained that, "[e]ven if HUD might be found in contempt for its delay in seeking modification of the Amended Stipulation, this shortcoming would not justify a preliminary injunction unless it is also true that [petitioners] have some likelihood of prevailing on the ultimate issue of HUD's obligation to continue the assignment program." *Id.* at 12a.

The court of appeals concluded that "[v]arious provisions of the Downpayment Act manifest Congress' intent to terminate the mortgage assignment program required by the Amended Stipulation." Pet. App. 12a. As the court explained, amended Section 230 (1) provides that no law shall be construed to require the Secretary to provide an alternative to foreclosure or to accept mortgage assignments, 12 U.S.C. 1715u(f) (Supp. IV 1998); (2) precludes judicial review of any decision by the Secretary to exercise or forgo exercising any authority under that Section, 12 U.S.C. 1715u(d) (Supp. IV 1998); and (3) requires mortgagees to take certain foreclosure avoidance and loss mitigation actions but expressly excludes from those required actions the assignment of mortgages to the Secretary, 12 U.S.C. 1715u(a) (Supp. IV 1998). Pet. App. 13a. The court also noted that Section 407(a) of the Downpayment Act amended Section 204(a) of the National Housing Act (12 U.S.C. 1710(a) (Supp. IV 1998)) to authorize HUD to pay insurance benefits to mortgagees who take

foreclosure avoidance actions but excluded from such recompensable actions the assignment of mortgages to the Secretary. Pet. App. 13a.

The court of appeals next rejected the district court's conclusion that other statutory provisions authorize continued operation of the mortgage assignment program. Pet. App. 14a. The court concluded that the general authority conferred by 42 U.S.C. 1441 and 3535, which direct HUD to exercise its powers consistently with national housing policy and authorize HUD to make rules and regulations necessary to carry out its duties, see p. 5, *supra*, is insufficient to overcome the more specific directions of the Downpayment Act. Pet. App. 14a.

The court also rejected the district court's conclusion that HUD retained authority to operate an "equivalent substitute" for the mortgage assignment program in the form of a mandatory partial claims program under Section 407(b) of the Downpayment Act, 12 U.S.C. 1715u(b) (Supp. IV 1998). The court explained that the Act does not require the Secretary to establish a partial claims program and does not authorize the Secretary to require mortgagees to participate in such a program. Pet. App. 14a-15a. Thus, "the authority, and the obligations, of the Secretary under the newly enacted provisions are not the same as those under the earlier statutory scheme that the Amended Stipulation was intended to enforce." *Id.* at 15a.

The court of appeals noted that the 1998 HUD Appropriations Act, Pub. L. No. 105-276, Tit. II, 112 Stat. 2469, enacted while the appeal in this case was pending, confirms that Congress intended to terminate the Amended Stipulation's assignment program. Pet. App. 6a n.3, 15a n.7. Congress "made specific reference to the Downpayment Act's withdrawal of authority for the

mortgage assignment program and made clear its intent that HUD no longer operate the assignment program previously required by the Amended Stipulation." *Id.* at 15a-16a n.7 (citing 12 U.S.C. 1710(a)(9) (Supp. IV 1998)).[3] In addition, the court explained, "the Appropriations Act's amendments to Section 204(a)(2) of the National Housing Act (12 U.S.C. 1710(a)(2) (Supp. IV 1998)) contradict [petitioners'] argument that HUD retains authority to operate an 'equivalent substitute' for the assignment program in the form of a mandatory partial claim program." Pet. App. 16a n.7. Section 1710(a)(2) indicates that the mortgagee bears responsibility for loss mitigation actions and allows the Secretary to compensate the mortgagee for such actions with insurance benefits. Further, it expressly provides that "no action or failure to act by either the Secretary or a

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[3] Section 1710(a)(9) provides:

Treatment of mortgage assignment program

> Notwithstanding any other provision of law, or the Amended Stipulation entered as a consent decree on November 8, 1979, in Ferrell v. Cuomo, No. 73 C 334 (N.D. Ill.), or any other order intended to require the Secretary to operate the program of mortgage assignment and forbearance that was operated by the Secretary pursuant to the Amended Stipulation and under the authority of section 1715u of this title, prior to its amendment by section 407(b) of The Balanced Budget Downpayment Act, I (Public Law 104-99; 110 Stat. 45), no mortgage assigned under this section may be included in any mortgage foreclosure avoidance program that is the same or substantially equivalent to such a program of mortgage assignment and forbearance.

mortgagee under that paragraph shall be subject to judicial review." *Id.* at 16a n.7[4]

After concluding that Congress had deprived HUD of authority to operate the mortgage assignment program or an equivalent substitute, the court of appeals explained that a change in the law can require modification of a consent decree. Pet. App. 15a- 16a (citing cases). Applying that principle to this case, the court held that "there is no likelihood of [petitioners'] prevailing on the merits of their motion to require HUD to reinstate the assignment program." *Id.* at 16a-17a.

The court expressed concern that HUD delayed "almost eight months after Congress passed the Downpayment Act before petitioning the district court for modification of the Amended Stipulation," Pet. App. 17a, but the court concluded that the delay "cannot justify a preliminary injunction requiring HUD to do something that it no longer has the statutory authority to do." *Ibid.* The court also concluded that a civil contempt citation against HUD is not warranted. *Ibid.* Because the underlying order embodied in the Amended Stipulation is no longer valid, a civil contempt citation would not serve either of the purposes of civil

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[4] Section 1710(a)(2) provides:

Payment for loss mitigation

> The Secretary may pay insurance benefits to the mortgagee to recompense the mortgagee for all or part of any costs of the mortgagee for taking loss mitigation actions that provide an alternative to foreclosure of a mortgage that is in default (including but not limited to actions such as special forbearance, loan modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under paragraph (1)(A)). No actions taken under this paragraph, nor any failure to act under this paragraph, by the Secretary or by a mortgagee shall be subject to judicial review.

contempt—to coerce compliance with an underlying order or to compensate the complainant for loss sustained by disobedience. *Ibid.*

In light of its ruling that petitioners had no likelihood of success on the merits, the court declined to review the district court's findings regarding irreparable harm or the absence of an adequate remedy at law. Pet. App. 17a. The court reversed the grant of the preliminary injunction and remanded the case to the district court for further proceedings. *Id.* at 17a, 18a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners first argue (Pet. 9-15) that HUD must continue to operate the mortgage assignment program or an equivalent substitute until the district court vacates or modifies the Amended Stipulation. That argument is unavailing, however, because the court of appeals correctly determined that Congress withdrew HUD's statutory authority to operate the program or an equivalent substitute when it enacted the Downpayment Act. Pet. App. 12a-15a. Petitioners do not challenge that interpretation of the Downpayment Act in this Court. See Pet. 21 & n.6.[5]

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[5] Petitioners do contend (Pet. 21-25) that the 1998 HUD Appropriations Act authorizes HUD to run "an equivalent (loss mitigation-based) foreclosure-avoidance program under the amended Section 230(a), 12 U.S.C. § 1715u(a)." Pet. 21. As we explain at pages 14-15, *infra*, however, the court of appeals correctly held that the 1998 HUD Appropriations Act actually confirms Congress's intent to terminate the programs required by the Amended Stipulation.

The Amended Stipulation was premised on HUD's purported obligation under the National Housing Act to provide foreclosure avoidance relief through the operation of a mortgage assignment program. Pet. App. 2a. When Congress enacted the Downpayment Act and removed HUD's authority to operate such a program or its equivalent, modification of the Amended Stipulation was required. *System Fed'n No. 91* v. *Wright*, 364 U.S. 642 (1961). There was therefore no basis for a preliminary injunction mandating continued operation of the program.

Moreover, the court of appeals correctly determined that HUD's delay in notifying the district court that it had discontinued accepting applications under the program did not warrant the imposition of a civil contempt sanction. Pet. App. 17a. That is particularly true because the sanction that petitioners sought, and the district court entered, was a preliminary injunction requiring operation of the program. The purposes of a civil contempt sanction are to coerce compliance with the underlying order or to compensate the complainant for loss sustained by disobedience of the order. See, *e.g.*, *Blocksom & Co.* v. *Marshall*, 582 F.2d 1122, 1124 (7th Cir. 1978). Neither of those purposes is served by the district court's issuance of a preliminary injunction requiring continued operation of a program that federal law no longer authorizes.

The cases relied upon by petitioners (Pet. 10-12) for the general principle that parties must comply with court orders until those orders are vacated do not conflict with the decision of the court of appeals. None of those cases involved a situation in which Congress changed the law so that an injunctive order requiring continued compliance with a consent decree would have conflicted with congressional intent.

Petitioners place primary reliance on *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949), in which this Court held that civil contempt for violation of an injunctive order need not be premised on a finding that the violation was willful. *Id.* at 191. The portions of the opinion cited by petitioners (Pet. 10-11) explain that a claim that the scope of an injunctive order is unclear is not a defense to a contempt sanction for violation of the order. Nothing in *McComb* suggests that a civil contempt sanction is appropriate to enforce an injunction that requires actions that contravene federal law.

The other three decisions of this Court on which petitioners rely are equally unhelpful to them. In *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), the Court held that intervening precedent required modification of a school desegregation decree; the Court did not pass on the propriety of a civil contempt order. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967), involved criminal, rather than civil, contempt. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), involved an adjudication of both criminal and civil contempt. This Court held that violations of a court order are punishable by criminal contempt even if the underlying order is set aside on appeal; in contrast, a civil contempt sanction falls if the underlying order is proved on appeal to have been issued erroneously. *Id.* at 294-295. Thus, to the extent *United Mine Workers* is applicable, it supports our position that civil contempt cannot be sustained when the underlying order must be modified because of intervening congressional action.

Petitioners' reliance on two Seventh Circuit decisions as a basis for review by this Court is also unavailing. Any intra-circuit conflict would not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, the Seventh Circuit did not

uphold a finding of contempt in either *Kindred* v. *Duckworth*, 9 F.3d 638 (7th Cir. 1993), or *Komyatti* v. *Bayh*, 96 F.3d 955 (7th Cir. 1996). Rather, in both cases, the court remanded for consideration of whether modification of the underlying decree was necessary because of intervening legislation. See *Kindred*, 9 F.3d at 644; *Komyatti*, 96 F.3d at 962 & n.8, 964.

2. Petitioners' argument (Pet. 15-20) that the court of appeals improperly foreclosed the district court's ultimate determination of the merits of this case is also incorrect. The court of appeals did not render a final judgment on the merits of the case. An appellate court reviewing a preliminary injunction must assess the plaintiff's likelihood of success on the merits. See, *e.g.*, *Brown* v. *Chote*, 411 U.S. 452, 456 (1973); *University of Tex.* v. *Camenisch*, 451 U.S. 390, 394 (1981). That is precisely what the court of appeals did here. Applying that standard, the court concluded that "there is no likelihood of [petitioners'] prevailing on the merits of their motion to require HUD to reinstate the assignment program." Pet. App. 16a-17a. Having made that determination, the court of appeals properly "reverse[d] the judgment of the district court and remand[ed] for further proceedings." *Id.* at 18a.

Contrary to petitioners' contention (Pet. 16-18), that action does not conflict with *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). In *Rufo*, the Court set out the standard that courts should use to evaluate requests to modify consent decrees. Nothing in *Rufo* prohibits a court of appeals, when reviewing the propriety of a preliminary injunction, from evaluating the likelihood that the party seeking the injunction will succeed on the merits of the underlying case.

3. Petitioners are also wide of the mark in contending (Pet. 21-25) that the 1998 HUD Appropriations Act

authorizes HUD "to run an equivalent (loss mitigation-based) foreclosure-avoidance program under the amended Section 230(a), 12 U.S.C. § 1715u(a)." Pet. 21. The court of appeals correctly determined that the Appropriations Act instead confirms that Congress withdrew HUD's authority to operate the mortgage assignment program or an equivalent substitute. Pet. App. 15a-16a n.7.

Petitioners do not challenge the court's conclusion that, under current law, HUD lacks authority to operate either the assignment program or a mandatory partial claims program. Pet. 21 & n.6. Petitioners instead complain (Pet. 22-23) that the court of appeals, in considering possible substitutes for the assignment program, focused only on a partial claims program. But the court of appeals focused on that particular substitute because petitioners focused on it in the brief they submitted to the court following enactment of the Appropriations Act.

In any event, just as the Appropriations Act confirms that HUD lacks authority to operate a mandatory partial claims program, see pp. 8-9 & n.4, *supra*, it also confirms that HUD may not operate the mandatory "special forbearance" and "[loan] modification" programs that petitioners now advocate (Pet. 23). Consistent with 12 U.S.C. 1710(a)(2) (Supp. IV 1998), on which the court of appeals relied in discussing the partial claims program, 12 U.S.C. 1715u(a) (Supp. IV 1998), on which petitioners rely, places the obligation to engage in loss mitigation efforts on the mortgagee, rather than HUD.[6] The failure of a mortgagee to engage in ap-

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[6] Section 1715u(a) provides: "Upon default of any mortgage insured under this subchapter, mortgagees shall engage in loss mitigation actions for the purposes of providing an alternative to

propriate loss mitigation efforts results in a severe penalty. See 12 U.S.C. 1735f-14(b)(1)(I), 1735f-14(a)(2) (Supp. IV 1998).[7] See also 24 C.F.R. 203.51 (describing loss mitigation techniques that mortgagees must consider).

Moreover, as the court noted with respect to the partial claims program, see pp. 8-9, *supra*, the Secretary's action or inaction with regard to other loss mitigation efforts, including "special forbearance" and "[loan] modification," is not subject to judicial review. 12 U.S.C. 1715u(a), 1715u(d) (Supp. IV 1998). Thus, the 1998 amendments provide no support for a judicial decree requiring the Secretary to operate a loss mitigation program. Rather, they reinforce the conclusion that the injunction that petitioners sought, and the district court imposed, is contrary to congressional intent.

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foreclosure (including but not limited to actions such as special forbearance, loss modification, and deeds in lieu of foreclosure, but not including assignment of mortgages to the Secretary under [12 U.S.C. 1710(a)(1)(A)]) as provided in regulations by the Secretary."

[7] Section 1735f-14(b)(1)(I) authorizes the Secretary to impose civil money penalties for a mortgagee's knowing and material "[f]ailure to engage in loss mitigation actions as provided in section 1715u(a)." Section 1735f-14(a)(2) provides that, "[i]n the case of the mortgagee's failure to engage in loss mitigation activities, as provided in [Section 1735f-14(b)(1)(I)], the penalty shall be in the amount of three times the amount of any insurance benefits claimed by the mortgagees with respect to any mortgage for which the mortgagee failed to engage in such loss mitigation actions."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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