Yolano-Donnelly Tenant Ass'n v. Cisneros

United States District Court for the Eastern District of California
March 8, 1996, Decided ; March 8, 1996, Filed
CIV. NO. S-86-846 MLS PAN

Reporter: 1996 U.S. Dist. LEXIS 22778
YOLANO-DONNELLY TENANT ASSOCIATION, et al., Plaintiffs, v. HENRY CISNEROS, in his official capacity as Secretary of the U.S. Department of Housing and Urban Development, et al., Defendants.

Disposition: Motions were ruled upon by the district court. Defendants' motion to dismiss plaintiffs' first and third claims for relief was denied. Defendants' motion to dismiss plaintiffs' second claim for relief was granted. Defendants' motion to dismiss plaintiffs' fourth claim for relief was granted. The court declined to rule on defendants' motion to dismiss or motion for summary judgment on plaintiffs' fifth claim for relief because the court did not consider this to be a claim for relief that is separate and distinct from plaintiffs' other claims for relief. Defendants' motion to dismiss plaintiffs' sixth claim for relief was denied as was the defendants' motion for summary judgment on this claim. Defendants' motion to dismiss plaintiffs' seventh claim for relief was granted.

Counsel: [*1] For YOLANO-DONNELLY TENA, MARIA LEYVA-VALENZUELA, RAMONA BERBER, ELODIA JIMENEZ, EMILY LOPEZ, plaintiffs: Carole F. Grossman, Legal Services of Northern California, Sacramento, CA. Alice Bussiere, National Center for Youth Law, San Francisco, CA. Gen Fujioka, Asian Law Caucus, San Francisco, CA. Richard S Kohn, California Rural Legal Assistance, San Francisco, CA. David Scott Pallack, San Fernando Valley, Neighborhood Legal Services, Pacoima, CA. Rod Field, NOT ED-CA ADMITTED, Legal Aid Foundation of Los Angeles, Los Angeles, CA. Richard M Pearl, Law Offices of Richard M Pearl, Berkeley, CA.

For SAMUEL PIERCE, DUNCAN HOWARD, ALFRED MORAN, HENRY G. CISNEROS, ANDREW M CUOMO, defendants: W Scott Simpson, Michael Sitcov, United States Department of Justice, Civil Division, Washington, DC.

Judges: MILTON L. SCHWARTZ, UNITED STATES DISTRICT JUDGE.

Opinion by: MILTON L. SCHWARTZ

Opinion

MEMORANDUM OF DECISION AND ORDER

This case is before the court on defendants' alternative motions to dismiss plaintiffs' complaint or for summary judgment thereon.

I. Background.

Plaintiffs filed their original complaint on July 15, 1986. They raise various statutory and constitutional challenges [*2] to section 214 of the Housing and Community Development Act of 1980 ("section 214"), codified at 42 U.S.C. § 1436a, and to certain sections of the Department of Housing and Urban Development ("HUD") regulations implementing section 214, both of which restrict federal housing assistance for the exclusive benefit of U.S. citizens and certain eligible aliens.

On December 18, 1986, the court granted plaintiffs' motion for a preliminary injunction and certified this case as a class action. [1] Subsequently, Congress amended section 214, and HUD issued new implementing regulations. These changes in the law necessitated plaintiffs' filing of a superseding complaint on August 21, 1995. The superseding complaint alleges that:

> (1) section 214 and certain sections of its current implementing regulations ("the 1995 final rule") violate plaintiffs' *Fifth Amendment* rights to due process and equal protection;
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> (2) section 214 constitutes an improper delegation of legislative power;

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[1] The class is defined as:

> All United States citizens and "eligible aliens" as defined in 42 U.S.C. § 1436a nationwide who would be eligible, either presently or prospectively, for subsidized housing under the United States Housing Act of 1937, section 235 or 236 of the National Housing Act, or section 101 of the Housing and Urban Development Act of 1965, but for the presence in the family of an adult who is an ineligible alien.Memorandum and Order, filed December 18, 1986, at 12:1-6.

(3) HUD violated the Fair Housing Act, 42 U.S.C. §§ 3601-3619, by granting discretion to public housing authorities to deny certain forms of housing assistance; [*3]

(4) the 1995 final rule constitutes arbitrary and capricious conduct by HUD in violation of the Administrative Procedure Act, *5 U.S.C. § 706(2)*;

(5) HUD enacted the 1995 final rule in violation of the National Environmental Policy Act, *42 U.S.C. § 4332(2)(C)*; and;

(6) HUD abused its discretion by finding that the 1995 final rule does not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. § 605(b)*, and by finding that the 1995 final rule does not constitute a "major" rule as defined in Executive Order 12291.Based on these allegations, plaintiffs seek a declaration that section 214 and the 1995 final rule violate federal law and an injunction prohibiting defendants from enforcing the challenged provisions of the 1995 final rule.

[*4] On September 20, 1995, defendants filed their motion to dismiss or, in the alternative, for summary judgment. Defendants insist that plaintiffs have failed to state any claim upon which relief can be granted; however, if plaintiffs have stated a claim, then defendants maintain that they are entitled to summary judgment on that claim.

II. Standards of Review for Defendants' Motions.

A. Motion to Dismiss.

Defendants bring their motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* ("*Rule 12(b)(6)*"). A *Rule 12(b)(6)* motion is decided by primary reference to the allegations in the complaint. *See* 5A Wright and Miller, Federal Practice and Procedure § 1357, at 299 (1990). "For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff and its allegations are taken as true." ***Id.*** at 304; ***Cruz v. Beto***, 405 U.S. 319, 322, 31 L. Ed. 2d 263, 92 S. Ct. 1079 (1972).

> Basically, the court will accept the pleader's description of what happened to him along with any conclusions that can reasonably be drawn therefrom. However, the court will not accept conclusory allegations concerning the [*5] legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself.Wright and Miller, *supra*, § 1357 at 319-320.

The court may not dismiss the complaint under *Rule 12(b)(6)* unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him or her to relief. ***Hishon v. King & Spaulding***, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). But the court is not to assume that plaintiff can prove facts not alleged or that defendant has violated the law in ways that have not been alleged. ***Associated Gen. Contractors v. California State Council***, 459 U.S. 519, 526, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983).

B. Motion for Summary Judgment.

Defendants move in the alternative for summary judgment on plaintiffs' complaint pursuant to *Fed. R. Civ. P. 56* ("*Rule 56*"). *Rule 56(c)* provides that summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter [*6] of law." The "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (*quoting* Adv. Comm. Note on 1963 Amends. to *Fed. R. Civ. P. 56(e)*).

In summary judgment practice, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (*quoting**Fed. R. Civ. P. 56(c)*). However, a summary judgment motion "may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file," without any affidavits, if the nonmoving party will bear the burden of proof at trial on a dispositive issue. ***Id.*** at 324. [*7]

If the moving party meets its initial responsibility, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact. *Fed. R. Civ.*

P. 56(e); ***Matsushita***, 475 U.S. at 585-86. The nonmoving party may not simply rely upon its pleading denials, but must tender evidence of specific facts in the form of affidavits or admissible discovery material, or both, in support of its contention that a genuine issue of material fact exists. *Fed. R. Civ. P. 56(e)*; ***Celotex***, 477 U.S. at 324. The evidence of the nonmoving party must be believed, and all reasonable inferences that can be drawn from that evidence must be drawn in favor of the nonmoving party. ***Anderson***, 477 U.S. at 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505.

The nonmoving party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." ***First Nat'l Bank v. Cities Serv. Co.***, 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968). However, should it appear that the nonmoving party [*8] cannot present "facts essential to justify the party's opposition," the court may "refuse the application for judgment" or may grant a continuance to permit further discovery. *Fed. R. Civ. P. 56(f)*.

With these standards in mind, the court now turns to its analysis of defendants' motions.

III. Analysis.

Because defendants have made alternative motions, each of plaintiffs' claims will be examined under the *Rule 12(b)(6)* standard, and then if necessary, under the *Rule 56* standard. However, a review of the statutory and regulatory framework is necessary before examining plaintiffs' individual claims.

A. The Statutory and Regulatory Framework.

As previously stated, section 214 restricts federal housing assistance for the exclusive benefit of U.S. citizens and certain eligible aliens. To lessen the effect of this restriction on families that contain both members who are eligible for financial assistance and those who are not ("mixed families"), Congress amended section 214 in 1988 to include a "Preservation of Families" provision. This provision gives discretion to public housing authorities ("PHAs") [2] and to HUD to grant a mixed family either continued provision of [*9] financial assistance ("continued assistance") or deferred termination of financial assistance ("deferred termination") provided that the mixed family meets the statutory criteria. 42 U.S.C. § 1436a(c). [3]

On March 20, 1995, HUD published the 1995 final rule, which implements section 214 as amended. 24 C.F.R. Part 200 *et al.* (1995). The effective date of the 1995 final rule was [*10] June 19, 1995. ***Id.*** The 1995 final rule carries out section 214's prohibition of financial assistance to mixed families and also incorporates section 214's scheme for the preservation of families. 24 C.F.R. §§ 200.182, 200.187, 812.10, 905.310, 912.5, and 912.10. Therefore, with respect to PHA-supervised programs, the 1995 final rule gives PHAs discretion to grant an eligible mixed family continued assistance or deferred termination. 24 C.F.R. §§ 812.10(b)(2), 905.310(r), and 912.10. However, with respect to HUD-supervised programs, HUD has exercised its discretion by *requiring* that continued assistance or deferred termination be granted where the mixed family meets the statutory criteria. 24 C.F.R. § 812.10(b)(1). Additionally, in both PHA-supervised and HUD-supervised programs, the 1995 final rule requires that an eligible mixed family be offered prorated assistance. 24 C.F.R. § 812.10(b)(1) and (2). [4] Consequently, a mixed family participating in a PHA-supervised program who meets the statutory criteria for continued assistance or deferred termination may or may not [*11] be granted one of these types of relief, but a mixed family participating in a HUD-supervised program who meets the statutory criteria is guaranteed either continued assistance or deferred termination. In either case, a mixed family who is not receiving either type of relief must be offered prorated assistance.

B. Plaintiffs' *Fifth Amendment* Claims.

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[*12] **1. Defendants' Motion to Dismiss.**

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[2] PHAs are entities created by state and local governments "whose mission is the acquisition, construction, operation, and maintenance of low-cost housing for low-income tenants . . . ." ***Hous. Auth. of Seattle v. Washington***, 629 F.2d 1307, 1308 (9th Cir. 1980). PHAs work in conjunction with HUD to administer federal housing assistance programs.

[3] The court denominates those housing programs for which PHAs have discretion to grant or deny continued assistance and deferred termination as "PHA-supervised programs" and those for which HUD has discretion as "HUD-supervised programs."

[4] The 1995 final rule provides that a mixed family is eligible for prorated assistance if it is not receiving continued assistance or deferred termination. 24 C.F.R. § 812.11(a). Additionally, a mixed family may elect prorated assistance at the end of the period of deferred termination. 24 C.F.R. § 812.10(d).

[5] Plaintiffs' first claim for relief challenges the constitutionality of section 214, and their third claim for relief challenges the constitutionality of the 1995 final rule. Because these claims raise the same issues, they will be examined together.

Plaintiffs allege that section 214 and the challenged provisions of the 1995 final rule (hereafter collectively referred to as "the housing assistance restrictions"), by granting discretion to PHAs to deny continued assistance or deferred termination in PHA-supervised programs, infringe plaintiffs' right to cohabit with family members in violation of the substantive due process and equal protection guarantees of the *Fifth Amendment to the United States Constitution*.

To state a claim for a deprivation of substantive due process, plaintiffs must allege the interference with a fundamental right. *See* ***P.O.P.S. v. Gardner***, 998 F.2d 764, 767-69 (9th Cir. 1993); ***Halet v. Wend Inv. Co.***, 672 F.2d 1305, 1309-11 (9th Cir. 1982). The Supreme Court has never directly held that the right to live with one's family members is protected by the Constitution. ***Lipscomb ex rel. DeFehr v. Simmons***, 962 F.2d 1374, 1378 (9th Cir. 1992) (en banc). However, "there is substantial authority for the proposition that due process places a limit on the [government's] ability to interfere with certain extant [*13] relationships among family members." ***Id.*** (citing ***Moore v. City of East Cleveland***, 431 U.S. 494, 499, 503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (plurality); ***Cleveland Bd. of Educ. v. LaFleur***, 414 U.S. 632, 639-40, 39 L. Ed. 2d 52, 94 S. Ct. 791, 67 Ohio Op. 2d 126 (1974); ***Loving v. Virginia***, 388 U.S. 1, 12, 18 L. Ed. 2d 1010, 87 S. Ct. 1817 (1967); ***Pierce v. Society of Sisters***, 268 U.S. 510, 534-35, 69 L. Ed. 1070, 45 S. Ct. 571 (1925); ***Meyer v. Nebraska***, 262 U.S. 390, 399, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)).

Plaintiffs allege that the grant of discretion to PHAs in the housing assistance restrictions creates a system for administering federal housing assistance under which mixed families participating in PHA-supervised programs will be forced "to either expel their ineligible family members or move out of subsidized housing." Super. Complt. at P9. Thus, plaintiffs have sufficiently alleged that the housing assistance restrictions implicate their right to cohabit with certain family members, thereby stating a claim under the substantive component of the *due process clause* [*14] *of the Fifth Amendment*.

To state a claim for violation of their right to equal protection, plaintiffs must allege that they are treated differently from other similarly situated persons. [6]***City of Cleburne v. Cleburne Living Center***, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). Plaintiffs claim that "families living in federally subsidized rental units, whose assistance is implemented by PHAs, may be denied assistance they would automatically receive if their federal subsidies were implemented by non-PHA housing providers." Super. Complt. at P6. Thus, plaintiffs allege that similarly situated mixed families are given different levels of assistance based solely on whether they participate in PHA-supervised programs or HUD-supervised programs. This allegation states a claim for a violation of the equal protection guarantee of the *Fifth Amendment*.

[*15] Because plaintiffs have alleged facts regarding their *Fifth Amendment* claims that, if proved, could result in a judgment in their favor, defendants' motion to dismiss plaintiffs' first and third claims for relief must be denied. Accordingly, the court must next determine whether these claims can withstand defendants' motion for summary judgment.

2. Defendants' Motion for Summary Judgment.

a. Standard of Review.

The analytical starting point on both plaintiffs' substantive due process claims and equal protection claims is the determination of what level of review the claims require. Plaintiffs argue that the housing assistance restrictions should be subject to strict scrutiny, while defendants insist that a rational basis review should apply. [7] If strict scrutiny is applied, the housing assistance restrictions must be struck down unless they are "suitably tailored to serve a compelling [government] interest." ***Cleburne***, 473 U.S. at 440 (citations omitted); ***Christy v. Hodel***, 857 F.2d 1324, 1329 (9th Cir. 1988) (citations omitted), *cert. denied.*, *490 U.S. 1114, 104 L. Ed. 2d 1038, 109 S. Ct. 3176 (1989)*. If, on the other hand, the rational basis [*16] standard is applied, the housing assistance restrictions are presumed constitutional and will be upheld so long as they are rationally related to a legitimate government interest. ***Id.***

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[6] The *Fifth Amendment* does not explicitly guarantee equal protection of the laws; however equal protection claims brought under the *due process clause of the Fifth Amendment* are treated the same as equal protection claims brought under the Fourteenth Amendment. ***Weinberger v. Wiesenfeld***, 420 U.S. 636, 638 n.2, 43 L. Ed. 2d 514, 95 S. Ct. 1225 (1975).

[7] Defendants argue vigorously that the housing assistance restrictions represent immigration legislation subject to very limited review. The court finds defendants' argument and cited authority unpersuasive. This case does not involve aliens' admission to or exclusion from the United States. Moreover, plaintiffs here challenge welfare legislation on behalf of United States citizens and eligible aliens rather than exclusively on behalf of aliens. Thus, this case is distinguishable from those cited by defendants. *See* ***Fiallo v. Bell***, 430 U.S. 787, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977); ***Mathews v. Diaz***, 426 U.S. 67, 48 L. Ed. 2d 478, 96 S. Ct. 1883 (1976); ***Sudomir v. McMahon***, 767 F.2d 1456 (9th Cir. 1985); ***Azizi v. Thornburgh***, 908 F.2d 1130 (2d Cir. 1990); ***Blackwell v. Thornburgh***, 745 F. Supp. 1529 (C.D. Cal. 1989).

[*17] A regulation that "directly and substantially impairs" or imposes a "genuinely significant deprivation" of a fundamental right requires strict scrutiny. ***P.O.P.S.***, 998 F.2d at 768 (citing ***Zablocki v. Red Hail***, 434 U.S. 374, 387, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1988); ***Halet***, 672 F.2d at 1311. Plaintiffs insist that the housing assistance restrictions meet this test. They argue that if a PHA exercises its discretion to deny continued assistance or deferred termination, some mixed families will be forced either to expel family members who are ineligible for assistance or to move out of assisted housing. Plaintiffs maintain that prorated assistance is not a sufficient protection because many mixed families will be unable to afford the increased rent under the proration scheme. Therefore, plaintiffs say, mixed families who wish to keep their families intact will be evicted and, in areas without other affordable housing, will become homeless. This denial of housing assistance, say plaintiffs, directly and substantially interferes with their fundamental right to cohabit.

Even assuming that some mixed families could face [*18] homelessness as a result of the housing assistance restrictions, the court must reject plaintiffs' argument that strict scrutiny applies here. The Ninth Circuit has held that a policy that simply denies the financial assistance necessary for a family to exercise its right to cohabit is not a direct and substantial interference with the right and therefore does not trigger strict scrutiny. ***Lipscomb***, 962 F.2d at 1378-79. In ***Lipscomb***, the court upheld Oregon's policy providing financial assistance to children who were placed in foster care with non-relatives but denying financial assistance to those placed with relatives. Explaining its decision not to apply strict scrutiny to the policy, the court stated:

> the existence of a negative right to freedom from governmental interference . . . does not dictate the recognition of an affirmative right on the part of foster children to be placed by the state with relatives. The government generally is under no obligation to facilitate or fund the exercise of constitutional rights.
>
> Significantly, Oregon's classification does not *prohibit* any foster child from living with his or her relatives. . . [*19] . Because Oregon has no affirmative obligation to fund plaintiffs' exercise of a right to maintain family relationships free from governmental interference, we decline to apply [strict] scrutiny . . . .

Id. (citations omitted). [8]

[*20] Here, the housing assistance restrictions do not allow PHAs to prohibit mixed families from residing together in assisted housing. Rather, PHAs are merely permitted to deny certain forms of financial assistance to mixed families. And in fact, under the proration provisions, a mixed family will not face a denial of all financial assistance. Rather, a mixed family's level of assistance may be adjusted to reflect the congressional decision to prohibit housing assistance to ineligible aliens. This funding decision does not strike at the right to cohabit itself, but merely has the incidental effect of making it more expensive for some mixed families to exercise this right. Although some mixed families may be unable to pay the increased rent and may therefore face eventual eviction, the obstacle to such a mixed family's continued cohabitation is its indigency and not the housing assistance restrictions. [9]

[*21] Because the government is under no affirmative obligation to fund the exercise of plaintiffs' right to cohabit, the grant of discretion to PHAs to deny continued assistance and deferred termination does not directly and substantially impair the right to cohabit. Therefore, the

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[8] Similarly, the Supreme Court has held that a woman's right to freedom of choice in the context of the decision to seek an abortion does not include the right to federal subsidization necessary to exercise that right. ***Planned Parenthood v. Casey***, U.S. , 505 U.S. 833, 112 S. Ct. 2791, 2819, 120 L. Ed. 2d 674 (1992) (plurality) ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."); ***Harris v. McRae***, 448 U.S. 297, 317-18, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980) (due process clause does not confer entitlement to funds necessary to realize advantages of protections it affords).

[9] Although not cited by plaintiffs, this case is distinguishable from ***Shapiro v. Thompson***, 394 U.S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969), and ***Memorial Hosp. v. Maricopa County***, 415 U.S. 250, 39 L. Ed. 2d 306, 94 S. Ct. 1076 (1974), which struck down, as a penalty on the right to travel, requirements that a person reside in the state or county for a specified time before becoming eligible for certain welfare benefits. In ***Shapiro*** and ***Memorial Hospital***, the classifications at issue distinguished between those who had recently exercised their right to travel and those who had not. The former were denied benefits, and the latter were not. Thus, the classifications were viewed as a penalty for the exercise of the right to travel. In this case, however, the classification is between mixed families who participate in HUD-supervised programs and mixed families who participate in PHA-supervised programs. Both classes are exercising their right to cohabit. Thus, the reduction in benefits is based not on the exercise of the right to cohabit, but on the agency supervising the housing program. Because this classification does not distinguish between those who exercise their right to cohabit and those who do not, it can not be said to penalize the exercise of the right.

housing assistance restrictions need only satisfy a rational basis review, and the court must decide whether the grant of discretion to PHAs is rationally related to a legitimate government interest. [10]

[*22] **b. Rational Basis Review.**

The general rule is that a legislative enactment is presumed valid and will be sustained provided that it is rationally related to a legitimate government interest. ***Cleburne***, 473 U.S. at 440 (citations omitted). Social and economic legislation is given wide latitude, and "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." ***Id.*** (citations omitted). Under the rational basis test, the government need not prove the actual purpose for the regulation; rather, "'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." **Heller v. Doe, 509 U.S. 312, 113 S. Ct. 2637, 2642-43, 125 L. Ed. 2d 257 (1993)** **(citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973))**. Moreover, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." [*23] 113 S. Ct. at 2643.

Defendants maintain that the grant of discretion to PHAs in the housing assistance restrictions is rationally related to the "long-standing federal policy of vesting in PHAs 'the maximum amount of responsibility in the administration of their housing programs.'" Defs.' Brf. at 23:11-15 (quoting 42 U.S.C. § 1437 ("section 1437")). Section 1437 provides in pertinent part:

> it is the policy of the United States to . . . assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income and . . . to vest in local [PHAs] the maximum amount of responsibility in the administration of their housing programs . . . .

This policy represents a congressional recognition that PHAs are the entities "best situated to understand and to deal with the particular circumstances of the locality." ***Newbury Loc. Sch. Dist. v. Geauga County Metro. Housing Auth.***, 732 F.2d 505, 509 (6th Cir. 1984). To this end, "Congress intended to rely heavily on state and local [PHAs] for individual decisions in [*24] administering the program." ***Ritter v. Cecil County Office of Hous. & Community Dev.***, 33 F.3d 323, 329 (4th Cir. 1994).

Plaintiffs do not claim that vesting PHAs with the maximum authority in administering housing programs is an illegitimate government interest. Rather, they argue that the distinction between PHA-supervised programs and HUD-supervised programs does not rationally promote that policy because a PHA may operate federally assisted housing under both programs. [11] Thus, a PHA operating federally assisted housing under a HUD-supervised program does not have the discretion that a PHA operating federally assisted housing under a PHA-supervised program has to grant or deny continued assistance and deferred termination. Plaintiffs request additional time, pursuant to *Rule 56(f)*, to conduct discovery to show that there is no meaningful difference between HUD-supervised programs and PHA-supervised programs to support this inconsistent grant of discretion to PHAs.

[*25] Plaintiffs shoulder a heavy burden to demonstrate the irrational nature of the housing assistance restrictions. Furthermore, the court is aware that it must be extremely reluctant to second-guess the rationality of social and economic legislation. However, the court finds that in order to fulfill its responsibility under *Rule 56* to carefully analyze whether there is a triable issue of material fact as to the rationality of the housing assistance restrictions, plaintiffs' request for additional time to conduct discovery should be granted. Therefore, the court will defer ruling on defendants' motion for summary judgment on plaintiffs' *Fifth Amendment* claims, and plaintiffs may conduct discovery relevant to the resolution of this particular issue. [12]

[*26] **C. Plaintiffs' Improper Delegation Claim.**

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[10] Plaintiffs request, pursuant to *Rule 56(f)*, additional time to conduct discovery regarding the actual implementation of the housing assistance restrictions. Through discovery, plaintiffs believe they will develop evidence showing that as a result of the implementation of the housing assistance restrictions mixed families are evicted and, in areas without other affordable housing, these families become homeless. Decl. of Pallack, filed Nov. 3, 1995, at P3; Pls.' Opp'n at 8:24-10:9. In light of the court's conclusion that strict scrutiny does not apply, this evidence is immaterial.

[11] HUD-supervised programs include programs in which a PHA is a project owner and also programs where a private project owner contracts with a PHA but retains authority to administer housing assistance.

[12] The court cautions plaintiffs that any further consideration of defendants' motion for summary judgment will be limited to evidence regarding the rationality of the distinction between PHA-supervised programs and HUD-supervised programs. Any evidence

Plaintiffs allege that the grant of discretion to both HUD and PHAs in section 214 constitutes an improper delegation of legislative power.

The nondelegation doctrine prohibits Congress from delegating its legislative power to either of "the coordinate Branches;" however, it does not prohibit Congress from obtaining the "assistance" of those branches. ***Horsemen's Benevolent & Protective Assoc. v. Turfway Park Racing Assoc.***, 20 F.3d 1406, 1417 (6th Cir. 1994) (quoting ***Mistretta v. United States***, 488 U.S. 361, 372, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)). Additionally, the doctrine does not prohibit the delegation of power if Congress includes "'an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.'" ***Mistretta***, 488 U.S. at 372 (quoting ***J. W. Hampton, Jr., & Co. v. United States***, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S. Ct. 348, Treas. Dec. 42706 (1928)).

The nondelegation doctrine has rarely been used to invalidate congressional delegations of authority, and the doctrine's vitality is questionable. [*27] *See* ***Mistretta***, 488 U.S. at 373-375; ***Wileman Bros. & Elliott, Inc. v. Espy***, 58 F.3d 1367, 1384 (9th Cir. 1995); ***Leslie Salt Co. v. United States***, 55 F.3d 1388, 1396 n.3 (9th Cir.), *cert. denied*, *516 U.S. 955, 133 L. Ed. 2d 325, 116 S. Ct. 407 (1995)*. Furthermore, it is not clear whether the nondelegation doctrine applies to grants of authority to state and local agencies, such as PHAs. Although the Ninth Circuit has not decided this issue, the Sixth Circuit refused to apply the doctrine when the delegation of power was to a state. ***Turfway Park***, 20 F.3d at 1417 (nondelegation doctrine not implicated by delegation of power to the states).

Nevertheless, even if the doctrine applies to the delegation of power to both HUD and PHAs, section 214 does not lack the mere "intelligible principle" required to uphold the delegation. Rather, PHAs and HUD have discretion to grant continued assistance

> if necessary to avoid the division of a family in which the head of household or spouse is a citizen of the United States, a national of the United States, or an alien resident of the United [*28] States as described in any of paragraphs (1) through (6) of subsection (a) of this section. For purposes of this paragraph, the term "family" means a head of household, any spouse, any parents of the head of household, any parents of the spouse, and any children of the head of household or spouse.

42 U.S.C. § 1436a(c)(1)(A). Additionally, PHAs and HUD may grant deferred termination

> if necessary to permit the orderly transition of the individual and any family members involved to other affordable housing.42 U.S.C. § 1436a(c)(1)(B). The deferral must be for a 6-month period, renewable for an aggregate period

of 3 years. ***Id.*** Thus, section 214 contains boundaries for the exercise of discretion by PHAs and HUD. Accordingly, plaintiffs have failed to state a claim that the grant of discretion in section 214 constitutes an improper delegation of legislative power; and therefore, defendants' motion to dismiss this claim must be granted.

D. Plaintiffs' Fair Housing Act Claim.

Plaintiffs allege that the 1995 final rule allows PHAs to exercise their discretion in a manner that has a discriminatory effect [*29] on the basis of race, color, national origin, or familial status in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-3619. Plaintiffs request that the court issue an injunction "permanently enjoining the defendants from allowing PHAs to deny continued assistance or deferred termination under 24 C.F.R. §§ 812.10, 905.310(r) and 912.10 . . . ." Super. Complt. at 12, P4.

The Fair Housing Act ("the FHA") provides: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Accordingly, the FHA makes it unlawful "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). Additionally, the Secretary of HUD has an affirmative duty to administer HUD's programs and activities in a manner that furthers the policies of the act. 42 U.S.C. § 3608(e)(5).

Plaintiffs do [*30] not allege that defendants are aware of any discrimination by PHAs for which defendants have failed to take appropriate corrective action. Rather, plaintiffs claim that HUD failed to satisfy its affirmative duty because when HUD gave PHAs discretion to deny continued assistance or deferred termination, it failed to consider that PHAs could exercise their discretion in a discriminatory manner. Plaintiffs' allegation is not sufficient to state a claim for relief.

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offered to prove that the housing assistance restrictions substantially burden the right to cohabit is irrelevant in light of the court's conclusion that strict scrutiny does not apply here.

Plaintiffs have not alleged any actionable wrongdoing on the part of HUD. The grant of discretion contained in the 1995 final rule is required by section 214. 42 U.S.C. § 1436a(c). Plaintiffs have cited no authority for their position that the FHA requires HUD to ignore this congressional directive and divest PHAs of discretion to grant or deny continued assistance and deferred termination. To enjoin HUD from allowing PHAs to exercise this discretion would be directly contrary to the mandate of section 214.

Plaintiffs request additional time to conduct discovery on this claim. They "intend to make document requests to HUD and various PHAs throughout the country through other legal services programs [*31] and community groups" to determine whether PHAs are implementing the housing assistance restrictions in a discriminatory manner. Decl. of Pallack, P6. However, even if plaintiffs were to discover evidence that PHAs are unlawfully discriminating, this evidence is not relevant to plaintiffs' present claim that HUD violated the FHA by granting discretion to PHAs. Rather, such evidence would only be relevant to a claim against a PHA itself for violation of the FHA or to a claim that HUD has failed to take appropriate corrective action against a PHA. These potential claims are factually distinct from the claim attempted here, and the court discerns no conceivable basis to charge HUD with a violation of the FHA based on the *potential* misconduct of a PHA. Therefore, no useful purpose could be served by permitting additional time for discovery on this issue.

Accordingly, plaintiffs have failed to state a claim that defendants have violated the FHA, and defendants' motion to dismiss this claim must be granted.

E. Plaintiffs' Administrative Procedure Act Claim.

Plaintiffs allege that HUD's promulgation of the 1995 final rule constitutes arbitrary and capricious conduct by HUD in [*32] violation of the Administrative Procedure Act, *5 U.S.C. § 706(2)*.

The Administrative Procedure Act requires the court to

> hold unlawful and set aside agency action, findings, and conclusions found to be - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law . . . .*5 U.S.C. § 706(2)(A)-(D)*.

Plaintiffs do not articulate, and the court does not discern, any possible theory upon which plaintiffs can base a claim for relief under the Administrative Procedure Act that is factually or legally distinct from any of plaintiffs' other claims for relief. Accordingly, the court declines to address this claim as a separate claim for relief.

F. Plaintiffs' National Environmental Policy Act Claim.

Plaintiffs allege that HUD violated the National Environmental Policy Act ("NEPA") by failing to prepare an adequate Environmental Impact Statement ("EIS") on the 1995 final rule. [*33] Specifically, plaintiffs challenge the procedural and substantive adequacy of the environmental assessment process by which HUD determined that it was not required to prepare an EIS.

1. Statutory Background.

NEPA requires federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment." *42 U.S.C. § 4332(2)(C)*. Federal regulations, such as the 1995 final rule, are considered "major federal actions" under NEPA. *See*40 C.F.R. § 1508.18 (1995). According to the Supreme Court, NEPA has twin objectives:

> First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.

Baltimore Gas and Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97, 76 L. Ed. 2d 437, 103 S. Ct. 2246 (1983).

The Council on Environmental Quality ("CEQ"), an entity created by NEPA, has promulgated regulations (the "CEQ regulations") [*34] setting forth detailed procedures that agencies must follow to determine whether to prepare an EIS. *See*40 C.F.R. §§ 1500.1, 1501.4. Under the CEQ regulations, unless an action is "categorically excluded" from the environmental review process, the relevant agency first should prepare an Environmental Assessment ("EA"). [13]40 C.F.R. § 1508.9. Based on the EA, if the agency concludes that the proposed action will not

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[13] Defendants do not contend that the 1995 final rule is categorically excluded from NEPA.

significantly affect the environment it may issue a Finding of No Significant Impact ("FONSI"). 40 C.F.R. §§ 1501.4(e), 1508.13. Otherwise, the agency must prepare an EIS. 40 C.F.R. § 1501.4.

In this case, HUD prepared an EA, determined that the 1995 final rule would not have a significant effect on the environment, and issued a FONSI on July 8, 1995. Defs.' Brf. at Ex. A-1. Plaintiffs contend that HUD's [*35] EA and FONSI are inadequate.

2. Standard of Review.

Judicial review of agency action taken pursuant to NEPA is governed by the arbitrary and capricious standard. *See5 U.S.C. § 706(2)*. This standard requires the court to

> ensure that an agency has taken [a] "hard look" at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors.

Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992) (citations omitted). If the court is satisfied that the agency took the requisite "hard look" at the potential environmental effect of its action, the court must defer to the agency's decision.
Id. On the other hand, the court should set aside an agency decision that does not comply with the procedural requirements of NEPA or the CEQ
regulations. *See* ***Save the Yaak Comm. v. Block***, 840 F.2d 714, 717 (9th Cir. 1988). Moreover, an agency's decision not to prepare an EIS should be considered arbitrary and capricious if the agency fails to supply a convincing statement [*36] of reasons why its action will not have a significant
environmental effect. ***Id.***

3. Defendants' Motion to Dismiss.

Plaintiffs allege that HUD's "unsupported assertion that the [1995] final rule would have no significant effect on the human environment and no impact on the physical environment was arbitrary, capricious, and an abuse of discretion." Super. Complt. at P39. Looking solely at the complaint, the court finds that plaintiffs conceivably could prove facts supporting their claim that HUD's decision not to prepare an EIS was arbitrary and capricious or not in accordance with law, in which case plaintiffs might be entitled to relief. Therefore, defendants' motion to dismiss for failure to state a claim must be denied. Accordingly, the court must next determine whether plaintiffs' NEPA claim can withstand defendants' motion for summary judgment.

4. Defendants' Motion for Summary Judgment.

Plaintiffs contend that HUD's environmental assessment process was arbitrary and capricious because HUD failed to develop an adequate evidentiary record on the potential environmental impact of the 1995 final rule on "the quality of urban life, including the impact of [*37] evicting thousands of families on the housing market, urban density and congestion, and on the physical, mental, social and familial aspects of those evicted." Super. Complt. at P12. Plaintiffs also contend that HUD failed to properly involve environmental agencies and the public in its environmental assessment process. Thus, the key issue before the court is not whether HUD should have prepared a full-fledged EIS on the 1995 final rule, but whether HUD's EA and FONSI took the requisite "hard look" at the 1995 final rule's potential environmental effect as required by NEPA and the CEQ regulations.

The CEQ regulations define an EA as a "concise public document [that] briefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI]." 40 C.F.R. § 1508.9(a)(1). Specifically, the EA

> shall include brief discussions of the need for the proposal, of alternatives . . ., of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.40 C.F.R. § 1508.9(b). The CEQ regulations do not mandate public review of an EA, but [*38] they do require agencies to involve the public and other agencies in the EA's preparation "to the extent practicable." 40 C.F.R. § 1501.4(b).

The CEQ regulations define a FONSI as a

> document . . . briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an [EIS] therefore will not be prepared. It shall include the [EA] or a summary of it and shall note any other environmental documents related to it.40 C.F.R. § 1508.13. Before making a final significance determination, the agency must make its FONSI available for public review for thirty days if its proposed action is, or is similar to, one that normally requires the preparation of an EIS or if the nature of its action is without precedent. 40 C.F.R. § 1501.4(e)(2).

In this case, HUD issued a four-page memorandum on July 8, 1994, with the subject heading: "Environmental

Assessment and Finding of No Significant Impact under the National Environmental Policy Act for Proposed Rule Concerning Restriction on Assistance to Noncitizens . . . ." Defs.' Brf. at Ex. A-1. In [*39] this document, HUD states that the then-proposed 1995 final rule "does not constitute a major federal action having [a] significant effect on the physical environment, and therefore does not require the preparation of an [EIS] under [NEPA]." ***Id.*** The EA identifies the following findings as bases for its assessment and conclusion:

> 1. The denial of HUD financial assistance to ineligible noncitizens is not discretionary, but statutorily required by Section 214 of the Housing and Community Development Act of 1980;
>
> 2. The denial of HUD financial assistance, including the decision to evict, will not directly or indirectly affect the physical condition of specific project areas or building sites; and
>
> 3. There is, at most, only a remote chance of cumulative socio-economic effects upon any single neighborhood with large concentrations of ineligible noncitizens, should large numbers of persons be evicted during the same period of time, which is unlikely. Even if such socioeconomic effects were possible, economic and social effects are not intended by themselves to require preparation of an environmental impact statement as stated by [CEQ] in its regulations [*40] . . . . Nevertheless, the proposed noncitizens rule provides for procedural and other safeguards to prevent such socio-economic effects and to mitigate such effects during compliance processing for any persons subject to the rule . . . .

Id. at 1-2. The EA then briefly elaborates on each of these findings.

HUD's FONSI, which is also contained in the July 8, 1994 memorandum, states:

> Based on the foregoing assessment . . ., this proposed noncitizens rule will not have a significant impact on the environment, within the meaning of NEPA. The changes resulting from this proposed . . . rule are not changes in the physical environment. The consequences of this proposed rule are, at most, socioeconomic in nature resulting from the unique decisions of individual families who leave HUD housing in deciding where to live, given Congress' decision as to how limited federal housing assistance should best be allocated among the American public. Finally, in any event, it is noted that the statutory prohibition on assistance to ineligible noncitizens applies "notwithstanding any other provision of law" and thus appears, by its express terms, to supersede any statutory provisions [*41] that would impede implementation of section 214's prohibition.

Id. at 3-4. Notice that the EA and FONSI were available for public inspection at HUD's offices was published in the Federal Register. *See* 59 Fed. Reg. at 43916 (1994).

Plaintiffs have failed to show that HUD's *substantive* determination that no EIS was required was arbitrary and capricious. Indeed, HUD's decision is consistent with Ninth Circuit case law holding that socio-economic effects, such as those alleged by plaintiffs, cannot, by themselves, compel the preparation of an EIS. *See* ***Douglas County v. Babbitt***, 48 F.3d 1495, 1505 (9th Cir. 1995), *cert. denied*, *516 U.S. 1042, 116 S. Ct. 698, 133 L. Ed. 2d 655 (1996)*; ***Goodman Group, Inc. v. Dishroom***, 679 F.2d 182, 185 (9th Cir. 1982); ***Morris v. Myers***, 845 F. Supp. 750, 757 (D.Or. 1993). However, there is merit to plaintiffs' argument that HUD's EA and FONSI are *procedurally* deficient for the following reasons.

First, the EA is less than three pages long, and the FONSI consists of only one paragraph. While the CEQ regulations do not [*42] mandate specific page limits for these documents, the regulations clearly require a thorough, well-reasoned analysis. *See* CEQ "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," Question 36, 46 Fed. Reg. 18026, 18037 (1981) (recommending an EA of between 10 and 15 pages). The brevity of HUD's analysis is particularly troubling in light of this court's previous acknowledgment that the displacement of noncitizens may indeed significantly affect the physical environment. *See* Memorandum and Order, filed December 18, 1986, at 9.

Second, the EA is full of conclusory language and provides virtually no factual support for its analyses and conclusions. For example, the EA provides no evidentiary support for its finding that "the denial of HUD financial assistance, including the decision to evict, will not directly or indirectly affect the physical condition of . . . project areas or building sites." Defs.' Brf. at Ex. A-1. Nor does the EA provide evidentiary support for its finding that "there is, at most, only a remote chance of . . .

socio-economic effects . . . should large numbers of persons be evicted during the same period [*43] of time . . . ." ***Id.*** at 2. Such conclusory statements of reasons supporting HUD's finding is clearly at odds with NEPA's mandate. *See* ***Foundation of Economic Trends v. Heckler***, 244 U.S. App. D.C. 122, 756 F.2d 143, 146-47 (D.C.Cir. 1985).

Finally, although HUD made its EA and FONSI available for public inspection at its offices, nothing in the record indicates whether HUD consulted with other agencies, the public, or other interested parties in reaching its decision to forego preparation of an EIS.

Based on the record and statements made at oral argument, this court is not convinced that HUD undertook the type of thorough, reasoned evaluation of the relevant factors that NEPA requires. Additionally, HUD's contention that NEPA is superseded by section 214 of the Housing and Community Development Act of 1980 is without merit. While there is authority suggesting that NEPA does not apply to nondiscretionary, or "ministerial," agency actions, the record indicates that HUD will, in fact, have substantial discretion in implementing and applying the 1995 final rule. *See* ***Sierra Club v. Babbitt***, 65 F.3d 1502, 1512 (9th Cir. 1995) (recognizing [*44] cases in which nondiscretionary agency action has been excluded from NEPA's scope).

Accordingly, because the record indicates that HUD may not have complied with the procedural requirements of NEPA and the CEQ regulations, this court finds that there are triable issues of fact concerning whether HUD took the requisite hard look at the 1995 final rule's potential environmental effect. Therefore, defendants' motion for summary judgment on this claim must be denied.

G. Plaintiffs' Regulatory Flexibility Act Claim.

Finally, plaintiffs allege that HUD abused its discretion by finding that the 1995 final rule does not have a significant impact on a substantial number of small entities under the Regulatory Flexibility Act, *5 U.S.C. § 605(b)*. [14]

[*45] The Regulatory Flexibility Act requires an agency proposing a rule or promulgating a final rule to prepare a regulatory flexibility analysis describing the impact of the rule on small entities. *5 U.S.C. §§ 603(a)* and *604(a)*. However a regulatory flexibility analysis is not required "if the head of the agency certifies that the rule will not . . . have a significant economic impact on a substantial number of small entities." *5 U.S.C. § 605(b)*.

The Regulatory Flexibility Act expressly prohibits judicial review of an agency's certification that the proposed or final rule does not require a regulatory flexibility analysis:

> (a) Except as otherwise provided in subsection (b), any determination by an agency concerning the applicability of any of the provisions of this chapter to any action of the agency shall not be subject to judicial review.
>
> (b) Any regulatory flexibility analysis prepared under *sections 603* and *604* of this title and the compliance or noncompliance of the agency with the provisions of this chapter shall not be subject to judicial review. When an action for judicial review of a rule is instituted, any regulatory flexibility [*46] analysis for such rule shall constitute part of the whole record of agency action in connection with the review.*5 U.S.C. § 611*. HUD's certification pursuant to *5 U.S.C. § 605(b)* that no regulatory flexibility analysis was necessary constitutes a determination by an agency concerning the applicability of any of the provisions of the Regulatory Flexibility Act, and

is therefore unreviewable. *See* ***American Mining Congress v. United States Envtl. Protection Agency***, 965 F.2d 759, 771 (9th Cir. 1992).

Accordingly, plaintiffs have failed to state a claim upon which relief can be granted, and defendants' motion to dismiss this claim must be granted.

IV. Conclusion.

For the foregoing reasons, IT IS HEREBY ORDERED that:

> 1. Defendants' motion to dismiss plaintiffs' first and third claims for relief, which challenge the constitutionality of section 214 and certain provisions of the 1995 final rule, is DENIED. The court defers ruling on defendants' motion for summary judgment on these claims in order to give plaintiffs time to conduct discovery necessary to respond to this motion.
>
> 2. Defendants' motion [*47] to dismiss plaintiffs' second claim for relief, which

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[14] Plaintiffs' complaint also includes the allegation that HUD abused its discretion by finding that the 1995 final rule does not constitute a "major" rule as that term is defined in Executive Order 12291 on Federal Regulation. Section 1(b); however, plaintiffs now concede that they can not state a claim based upon HUD's compliance with Executive Order 12291. Pls.' Opp'n at 24 n.11.

alleges that section 214 constitutes an improper delegation of legislative power, is GRANTED, and this claim is dismissed with prejudice.

3. Defendants' motion to dismiss plaintiffs' fourth claim for relief, which alleges that defendants violated the FHA, 42 U.S.C. §§ 3601-3619, is GRANTED, and this claim is dismissed with prejudice.

4. The court declines to rule on defendants' motion to dismiss or motion for summary judgment on plaintiffs' fifth claim for relief, brought pursuant to the Administrative Procedure Act, *5 U.S.C. § 706(2)(A) - (C)*, because the court does not consider this to be a claim for relief that is separate and distinct from plaintiffs' other claims for relief.

5. Defendants' motion to dismiss plaintiffs' sixth claim for relief, which alleges that defendants violated NEPA, *42 U.S.C. § 4332(2)(C)*, is DENIED. Additionally, defendants' motion for summary judgment on this claim is also DENIED.

6. Defendants' motion to dismiss plaintiffs' seventh claim for relief, which alleges that defendants' findings under the Regulatory Flexibility Act, *5 U.S.C. § 605(b)*, [*48] and Executive Order 12291 constitute an abuse of discretion, is GRANTED, and this claim is dismissed with prejudice.

Based on the foregoing, the court sets a special status conference for April 12, 1996 at 11:00 a.m. to address further scheduling of pretrial motions pertaining to plaintiffs' first, third, and sixth claims for relief.

DATED: March 8, 1996.

MILTON L. SCHWARTZ

UNITED STATES DISTRICT JUDGE