



**AMERICAN ATHEISTS  
LEGAL CENTER**

718 7th Street NW, Washington DC 20001

Mr. J. Paul Compton, Jr.  
Office of the General Counsel  
Rules Docket Clerk  
Department of Housing and Urban Development  
451 7th St, SW, Room 10276  
Washington, DC 20410-0001

**Re: Docket No. FR-6111-P-02: HUD's Implementation of the Fair Housing Act's  
Disparate Impact Standard**

Dear Mr. Compton:

American Atheists writes in response to the Department of Housing and Urban Development's ("HUD") notice concerning the implementation of the Fair Housing Act's ("FHA") Disparate Impact Standard ("Proposed Rule").<sup>1</sup> American Atheists has grave concerns regarding the impact the Proposed Rule will have on the ability of atheists and others in the nonreligious community to protect their right to be free from discriminatory housing practices. Specifically, the Proposed Rule would place additional, unnecessary barriers between individuals and the administrative mechanisms intended to help them protect and enforce their rights.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism is respected and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. As advocates for religious liberty and equality, American Atheists opposes laws and policies which would favor religion over non-religion or provide special privileges to religious organizations.

The Proposed Rule would alter the longstanding analytical regime governing claims of discrimination in which policies and practices disparately impact protected suspect classes, including religion, as well as race, color, sex, handicap, familial status, or national origin. The existing Disparate Impact Rule affords vital housing protections for nonreligious individuals and members of minority religions and allows advocates to challenge unjust policies that harm families. Similarly, the FHA's disparate impact theory has been used to challenge housing policies that restrict families from accessing certain amenities.

Under the Proposed Rule, individuals alleging disparate-impact discrimination would not only have to allege the existence of a disparity that has a harmful impact on a protected class but also must also allege facts showing that the disparate impact was directly caused by the defendant's action. These new requirements go far beyond the considerations the Supreme Court outlined in *Texas Department of Housing and Community Affairs v. Inclusive*

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<sup>1</sup> Docket No. FR-6111-P-02.

*Communities Project, Inc.*<sup>2</sup> Although the Court stated in *Inclusive Communities Project* that a plaintiff bringing a disparate impact claim under the FHA must allege some causal connection between the challenged policy and the discriminatory result,<sup>3</sup> the Proposed Rule would require the plaintiff allege facts sufficient to show that the policy was the *direct* cause of the discriminatory effect. This is a deliberate misreading of the Supreme Court's holding in *Inclusive Communities Project* and will have the ultimate effect of preventing numerous individuals in protected classes from enforcing their statutory rights.

HUD's Proposed Rule would impose a drastically higher burden on victims of housing discrimination, rendering it much more difficult to challenge policies and practices that disproportionately harm religious minorities and the nonreligious. Under the proposed rule, a policy practice that creates a profit for corporations would be virtually immune from challenge for its discriminatory impact, business practices that rely on statistics or algorithms will generally be exempt from liability, and businesses will no longer be required to collect data that show when policies and practices have a discriminatory effect.

In addition to being subjected to intentional discrimination,<sup>4</sup> atheists and other nonreligious individuals often face subtle but pernicious forms of housing discrimination through policies and practices that, while not discriminatory on their face, nonetheless are discriminatory in effect against the nonreligious and members of religious minorities. For example, a management company overseeing a retirement community in New Jersey established policies that, in effect, required all residents to conform to the practices of the Orthodox Jewish community while using the community's pool.<sup>5</sup> The company created strict pool-use rules that not only effectively prevented husbands and wives from using the pool together on all but one day a week,<sup>6</sup> but even went so far as to prohibit individuals using the pool during the gender-segregated periods from listening to music performed by someone of the opposite gender.<sup>7</sup> Although the policy was intended as a religious accommodation for one subset of residents, the result required all residents to act in conformity to a particular religious belief in order to have access to their retirement community's private pool, a discrimination on the basis of religion that is prohibited by the FHA.

Similarly, homeowners associations may not institute policies that, though facially neutral, have the effect of discriminating along religious lines. For example, a homeowner would have a disparate impact claim if a homeowners association prohibited outdoor lights or decorations generally but permitted winter holiday decorations.

## Conclusion

For the aforementioned reasons, American Atheists urges HUD to withdraw the Proposed Rule. The amended analytical framework contained in the Proposed Rule will have a detrimental

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<sup>2</sup> \_\_\_ U.S. \_\_\_, 135 S. Ct. 2507, 2523-24 (2015).

<sup>3</sup> *Id.*

<sup>4</sup> Rose Hackman, *The Michigan Town Where Only Christian Are Allowed to Buy Houses*, The Guardian (Feb. 9, 2018, 5:00 AM), [theguardian.com/us-news/2018/feb/09/christians-only-town-bay-view-michigan](http://theguardian.com/us-news/2018/feb/09/christians-only-town-bay-view-michigan); Consent Order, 1:17-cv-622, Doc. # 61, ¶ 8 (W.D. Mich. July 18, 2019).

<sup>5</sup> *Curto, et al. v. A Country Place Condominium Assoc.*, 921 F.3d 405, 407 (3d. Cir. 2019) (finding facial gender discrimination and therefore not reaching the merits of the religious discrimination question).

<sup>6</sup> *Curto, et al. v. A Country Place Condominium Assoc.*, 921 F.3d 405, 407 (3d. Cir. 2019)

<sup>7</sup> Deposition of Fagye Engleman, 3:16-cv-5928, 107:17-108:06 (D.N.J. Mar. 6, 2017).

impact on the communities that the FHA was enacted to protect. Furthermore, the change to the analytical framework is not aligned with the Supreme Court's ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*

If you should have any questions regarding American Atheists' opposition to the Proposed Rule, please contact me at (908) 276-7300, ext. 310 or by email at [gblackwell@atheists.org](mailto:gblackwell@atheists.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Blackwell', written in a cursive style.

Geoffrey T. Blackwell, Esq.  
Litigation Counsel  
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