

Courting Confusion: How State Laws Regulating Emotional Support Animals in Housing Add to Public Confusion, Stigmatize Emotional Support Animal Users, and Increase the Risk of Fair Housing Act Liability

Christopher Ligatti*

INTRODUCTION	3
I. BACKGROUND: A HISTORY OF CONFUSION	8
A. The Reasonable Accommodation Framework	8
B. The Americans with Disabilities Act Only Acknowledges Service Animals as Opposed to Other Assistance Animals....	12
C. 2020 Changes to the Air Carrier Access Act	14
D. 2020 Fair Housing Act Guidance from the Department of Housing and Urban Development	16
II. STATES ADDRESS IMAGINED ASSISTANCE ANIMAL FRAUD THROUGH STRICTER REQUIREMENTS.....	18
A. State Laws Defining the Therapeutic Relationship and Legitimate Documentation.....	19
B. State Laws Addressing Miscellaneous Issues Related to Emotional Support Animals	21
C. State Laws Addressing the Misrepresentation of Pets as Assistance Animals	23
III. ANALYSIS.....	25
A. The Effect of Differing State and Federal Standards in Fair Housing Cases Concerning Reasonable Accommodation	25
1. Preemption Doctrine Invalidates State Laws that Conflict with Federal Law	25

* Trial Attorney, United States Department of Housing and Urban Development, Chicago, IL; J.D., New England School of Law, 2007. The author wishes to thank all those who encouraged the research and writing of this article and all those who provided valuable assistance by commenting on the manuscript or providing sources. The views or opinion professed within this article are of the author only and in no way the official policies, opinion, or views of the United States government or any department thereof.

- 2. State Laws Provide No Defense to Federal Fair Housing Claims27
- B. State Laws on Emotional Support Animals Jeopardize the Local Control They Seek to Assert27
- C. Practical Issues Created by Recent Laws.....29
 - 1. State Law Therapeutic Relationship Requirements Either Misunderstand or Disregard Issues of Access to Healthcare29
 - 2. State Assistance Animal Fraud Laws Further Stigmatize, Stereotype, and Interfere with the Chosen Treatment of those with Psychiatric Illnesses.....32
 - 3. Unclear State Assistance Animal Misrepresentation Laws Threaten Disabled Individuals and Dissuade Legitimate Healthcare Treatment35
 - 4. Creating Confusion over the Relevant Standards for Emotional Support Animals Increases Housing Provider Liability38
- D. Many States Emotional Support Animal Laws Substitute Lawmaker and Landlord’s Judgment for Provider and their Patient’s Judgment41
- CONCLUSION.....44

INTRODUCTION

Since the mid-2010s, stories about emotional support animals have seemed to appear everywhere.¹ And rarely are these stories positive. Most display a “cynical, dismissive, [and] suspicious tone,” portraying many of those seeking to travel or live with their emotional support animals as grifters or scammers.² Articles about kangaroos in McDonalds³ and pigs⁴ and peacocks⁵ on airplanes appear to ridicule the need for emotional support animals. Exposés show reporters exploiting confusion over the terms “emotional support animal”⁶ and “service animal” to make a point about alleged widespread assistance animal fraud by bringing animals into public areas where they would otherwise not be allowed.⁷ In one of the

1. Doron Dorfman, *Suspicious Species*, 2021 U. ILL. L. REV. 1363, 1379–83 (2021) (providing a comprehensive look at the media reporting on this issue); Amanda M. Foster, *Don't Be Distracted by the Peacock Trying to Board an Airplane: Why Emotional Support Animals Are Service Animals and Should Be Regulated in the Same Manner*, 82 ALA. L. REV. 237, 241–47 (2017–18); see also Rebecca Huss, *Pups, Paperwork, and Process: Confusion and Conflict regarding Service and Assistance Animals under Federal Law*, 20 NEV. L.J. 785, 788 n.11 (2020) (citing a number of media reports on emotional support animal fraud from 2014–2019, including a recap of a major broadcast television series in which a character portrays his pet as a support animal to his landlord); Ansley Fantaski, *No Pets Allowed: The Need to Address Increasing Abuses of Assistance Animal Regulations Under Federal Law*, 36 GA. ST. U. L. REV. 939, 939–40 n.1, 3 (2020) (citing multiple media reports mentioning “emotional support animals” from 2015–2018).

2. Dorfman, *supra* note 1, at 1369.

3. Ryan Grenoble, *Woman Brings Kangaroo to McDonalds In Wisconsin, Gets Kicked Out*, HUFFINGTON POST, (Feb. 5, 2015), https://www.huffpost.com/entry/mcdonalds-kangaroo-beaver-dam-wisconsin_n_6623206 [<https://perma.cc/2HDF-EMAK>].

4. Emanuella Grinberg, *Airline: “Emotional Support” pig kicked off flight for being disruptive*, CNN (Dec. 1, 2014), <https://www.cnn.com/2014/11/30/travel/emotional-support-pig-booted-flight/index.html> [<https://perma.cc/B2N5-2GWP>].

5. Daniella Silva, *Emotional support peacock denied flight by United Airlines*, NBC NEWS (Jan. 30, 2018), <https://www.nbcnews.com/storyline/airplane-mode/emotional-support-peacock-denied-flight-united-airlines-n842971> [<https://perma.cc/TFR6-FWWH>].

6. Pursuant to the HUD guidance described in Section I.D of this Article, the term “assistance animal” is used to encompass emotional support animals, service animals, and any other category of animals that support the disabled. When this Article uses the term “emotional support animal” or “service animal,” it refers only to that category of animals.

7. Patricia Marx, *Pets Allowed-Why Are So Many Animals Now in Places Where They Shouldn't Be?*, NEW YORKER (Oct. 13, 2014), <https://www.newyorker.com/magazine/2014/10/20/pets-allowed> [<https://perma.cc/8D8T-WU3H>] (describing her experience of exposing emotional support animals by parading around New York City with a turtle, alpaca, snake, turkey and pig). For similar propositions, see, e.g., Lillian M. Hernández Caraballo, *Florida legislature to define and tighten emotional support animal laws*, NSM TODAY (Dec. 7, 2019), http://www.nicholsonstudentmedia.com/news/florida-legislature-to-define-and-tighten-emotional-support-animal-laws/article_7f5261fc-171d-11ea-9568-876e02e77a39.html [<https://perma.cc/BCA6-TVJA>] (describing an individual making a point about false online certifications who “registered Muffin Top, my [eleven] ton African elephant, . . . registered

earliest articles on this subject, Patricia Marx of the *New Yorker* wrote: “What a wonderful time it is for the scammer, the conniver, and the cheat . . . the able-bodied adults who drive cars with handicapped license plates, the parents who use a phony address so that their child can attend a more desirable public school The latest group to bend the law is pet owners.”⁸ While most of the evidence for this alleged “problem” was anecdotal,⁹ a consensus grew that lax emotional support animal regulation was to blame,¹⁰ despite evidence to the contrary.¹¹ This skepticism led to questions about the efficacy or even existence of emotional support animals.¹² These questions arose even though many patients and professionals have confirmed the positive benefits of such animals.¹³

Harry Henderson, which is basically Bigfoot; Odin, the Norse god of war; and . . . took a picture of my cactus plant and registered it as Freddy, my emotional support cactus.”)

8. Dorfman, *supra* note 1, at 1369 (quoting Patricia Marx’s article and explaining that this article was the first in a wave of similar stories).

9. Emily Barigye, *Note: Peacocks, Pigs, and Poorly Trained Dogs: The Relationship Between Misrepresented Service and Emotional Support Animals and Disabled Americans: A Call for Legislative Clarity*, 24 QUINNIPIAC HEALTH L.J. 327, 350 (2021).

10. See generally Adrienne Matel, *The number of fake emotional support dogs is exploding – why?*, THE GUARDIAN (August 13, 2019), <https://www.theguardian.com/lifeandstyle/2019/aug/12/fake-emotional-support-animals-service-dogs> [<https://perma.cc/HQA2-HBS3>]; Scott Taylor, *Questionable Emotional Support Animal Letters Flood Internet, Cause Backlash*, ABC 7 NEWS (Sept. 1, 2021), <https://wjla.com/features/i-team/questionable-emotional-support-animal-letters-09-01-2021> [<https://perma.cc/ZF5R-TJ38>].

11. Regina Schoenfeld-Tacher, et al., *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 INT’L J. ENV’T. RES. PUB. HEALTH 642, 642 (2017) (explaining that despite the “negative press surrounding the issue of misrepresentation of assistance animals” surveys demonstrate that “the true prevalence of behavior is likely lower than portrayed by the media, or at the very least, members of the general public perceive it to be lower.”).

12. See, e.g., Karen Brulliard, *Therapy Animals are Everywhere, Proof They Help is Not*, WASH. POST (July 2, 2017), <https://www.washingtonpost.com/news/animalia/wp/2017/07/02/therapy-animals-are-everywhere-proof-that-they-help-is-not/> [<https://perma.cc/FS6G-BHAS>]; Kat Thayer, *Despite the popularity of emotional support animals, experts say there is little evidence they work*, CHI. TRIB. (May 30, 2018), <https://www.chicagotribune.com/lifestyles/ct-life-emotional-support-animals-evidence-20180521-story.html> [<https://perma.cc/P3VT-Y53D>]; Foster, *supra* note 1, at 248–49 (citing AM. VETERINARY MED. ASS’N, *Assistance Animals: Rights of Access and the Problem of Fraud* 1,2 (Feb. 24, 2022) [<http://perma.cc/4AVU-UL4C>]). The article cited by Foster argued that emotional support animals should be allowed to accompany their handlers into public areas as they help manage and reduce the symptoms of psychiatric disabilities.

13. Kristin M. Bourland, *Advocating change within the ADA: the struggle to recognize emotional-support animals as service animals*, 48 U. LOUISVILLE L. REV. 197, 205–06 (2009). Subsequent clinical evidence has only reinforced these benefits. See Grace Ward, *Emotional support animals really do emotionally support us*, POPULAR SCIENCE (June 4, 2021), <https://www.popsci.com/environment/emotional-support-animals/> [<https://perma.cc/MLW5-9BTL>] (explaining the benefits of emotional support animals on individuals’ health); Chelsea Hernandez-Silk, *They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals*, 21 RICH.

However, there was another reason for the increased attention on emotional support animals. The 2016 presidential election brought a resurgence of conservative thought, which saw emotional support animals as an example of individual weakness and an overreach by the disability rights movement. Like Ronald Reagan’s often-referenced “welfare queens,”¹⁴ emotional support animals provided a vivid image to represent two modern conservative obsessions with liberal society: (1) that hard working Americans were being taken advantage of by individuals exploiting overly generous laws,¹⁵ and (2) that societal “toughness” was

PUB. INT’L L. REV. 313, 318–319 (2018) (“Although emotional support dogs are not specifically trained to perform work or a task, they can be trained to provide comfort and affection for individuals who suffer from emotional and cognitive disabilities.”); Janet Hoy-Gerlach, et al., *Exploring Benefits of Emotional Support Animals (ESAs): A Longitudinal Pilot Study with Adults with Serious Mental Illness (SMI)*, 10 HUMAN-ANIMAL INTERACTION BULLETIN 1, 4–5 (2022), <https://www.cabidigitallibrary.org/doi/pdf/10.1079/hai.2022.0016> [<https://perma.cc/N6GN-KSEX>] (explaining emotional support animals role in mental health recovery); Joshua D. Carroll, et al., *Laws and Ethics Related to Emotional Support Animals*, 48 J. AM. ACAD. PSYCHIATRY LAW 509, 509–518 (Sept. 1, 2022), <https://jaapl.org/content/jaapl/early/2020/09/16/JAAPL.200047-20.full.pdf> [<https://perma.cc/4HK6-QGJE>] (explaining that emotional support animals have positive effects on mental illness). As is apparent to anyone who has represented clients with emotional support animals, the descriptions of how these animals have helped individuals is often profound. See generally Helen Brooks, et al., *Ontological security and connectivity provided by pets: a study in the self-management of the everyday lives of people diagnosed with a long-term mental health condition*, 16 BMC PSYCHIATRY 409, 409 (2016), <https://bmcp psychiatry.biomedcentral.com/articles/10.1186/s12888-016-1111-3> [<https://perma.cc/2JGV-ZWA6>].

14. See generally Bryce Covert, *Myth of the Welfare Queen*, THE NEW REPUBLIC (July 2, 2019), <https://newrepublic.com/article/154404/myth-welfare-queen> [<https://perma.cc/VZQ2-4CBV>] (explaining how anti-big government and anti-poor resentment resulted in negative stereotypes around black women).

15. See Alan Fortuna, *Polarization: Rhetorical Strategies in the Tea Party Network*, NEW RHETORIC, 115–16, 142, 146 (2019) (discussing the Tea Party’s creation from a speech differentiating individuals who “carry the water” from those who “drink the water,” calls for civil war between the “Makers and the Takers,” and the elevation of this rhetoric during the 2012 presidential campaign); David D’Amato, *The History of “Makers” and “Takers” in Libertarian Thought*, FOUND. ECON. EDUC. (Mar. 4, 2018), <https://fee.org/articles/the-history-of-makers-and-takers-in-libertarian-thought/> [<https://perma.cc/ED8N-9E2V>] (“In free-market and limited government circles today, Americans on welfare are frequently characterized as freeloaders who do not contribute to society, content in their indolence, gaming the system to laze about while the rest of us are hard at work.”); *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH CTR (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/views-of-the-economic-system-and-social-safety-net/> [<https://perma.cc/7P TL-4DX2>] (“About three-quarters of Republicans and Republican leaners (74%) say poor people have it easy because of the government benefits they can receive.”); Mark Rank, et al., *Welfare fraud is actually rare, no matter what the myths and stereotypes say*, SALON (Apr. 11, 2021), <https://www.salon.com/2021/04/04/welfare-fraud-is-actually-rare-no-matter-what-the-myths-and-stereotypes-say/> [<https://perma.cc/X86Y-JUD5>] (describing conservative “[e]mphasis on atypical cases such as this contributes to the overestimation of program abuse and perception of recipients as “takers” who do not contribute to a broader society.”); *Image of ‘Typical’ Welfare Recipient Linked With Racial Stereotypes*, ASS’N FOR PSYCH. SCI. (Dec. 13,

degrading as struggles previous generations dealt with as a fact of life are now cause for handwringing and offense-taking.¹⁶ Conservative columnist George Will derided the concept of emotional support animals as an indication that “a cult of personal fragility is becoming an aspect of the quest for the coveted status of ‘victimhood’” and complained of those who “embrace the therapeutic mission of assuaging the anxieties of the emotionally brittle.”¹⁷ Rather than focus on those who may abuse acceptance of emotional support animals, Will’s column ridicules the concept of an emotional support animal at large to further his narrative of broad societal decay.¹⁸

Conservative commentators, like Will, have often been outspoken in labeling those with emotional support animals as either entitled, exploitive, or simply weak. When the Trump administration treated fraudulent support animals as a significant housing issue,¹⁹ even liberal

2016), <https://www.psychologicalscience.org/news/releases/image-of-typical-welfare-recipient-linked-with-racial-stereotypes.html> [<https://perma.cc/Q6ZG-37UN>].

16. Karen Heller, *Jordan Peterson is on a crusade to toughen up young men. It’s landed him on the cultural divide*, WASH. POST (May 2, 2018), https://www.washingtonpost.com/lifestyle/style/jordan-peterson-is-on-a-crusade-to-toughen-up-young-men-its-landed-him-on-our-cultural-divide/2018/05/02/c5baf4e8-31d6-11e8-94fa-32d48460b955_story.html [<https://perma.cc/PQ65-HUTV>] (describing the conservative former professor’s thoughts on “girlie men,” “victim mentality,” and the prevalence of “excuse[s] for weakness, even from people who’ve experienced cancer, abuse, horror.”); David French, *The New Right’s Strange and Dangerous Cult of Toughness*, THE ATLANTIC (DEC. 1, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/the-new-rights-strange-and-dangerous-cult-of-toughness/620861/> [<https://perma.cc/N8LE-AURT>]; Jane Coaston, *The intersectionality wars*, VOX (May 20, 2019), <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> [<https://perma.cc/MK5U-LYA5>] (describing conservative commentator Ben Shapiro’s thoughts on society’s “hierarchy of victimhood”); Derek Robertson, *How “owning the libs” became the GOP’s core belief*, POLITICO MAGAZINE (Mar. 21, 2021), <https://www.politico.com/news/magazine/2021/03/21/owning-the-libs-history-trump-politics-pop-culture-477203> [<https://perma.cc/69H7-UU7D>] (quoting a commentator saying, “It’s a spirit of rebellion against what people see as liberals who are overly sensitive, or are capable of being triggered, or hypocritical”); Kyle Mann, *Why the Woke Can’t Take a Joke*, WALL ST. J. (Nov. 9, 2021), <https://www.wsj.com/articles/the-woke-joke-free-speech-comedy-polarization-censorship-dave-chappelle-netflix-chesterton-11636473581> [<https://perma.cc/6QYK-E3VS>].

17. George Will, *Emotional-support animals on planes signal a cult of victimhood*, WASH. POST. (Feb. 7, 2018, 7:42 PM), https://www.washingtonpost.com/opinions/a-snake-on-a-plane-for-emotional-support/2018/02/07/3931607c-0b69-11e8-8b0d-891602206fb7_story.html [<https://perma.cc/F9CJ-J59K>].

18. See also Dorfman, *supra* note 1, at 1397 (explaining findings of a study on public suspicions of assistance animal fraud which found that, “Political ideology had a small statistically significant effect on the level of suspicion in that [b]eing conservative increased the level of suspicion by nearly 8 percentage points.”).

19. Rachel M. Cohen, *Donald Trump’s Civil Rights Office Has Found the Real Problem: Pets*, THE INTERCEPT (Mar. 23, 2018, 9:51 AM), <https://theintercept.com/2018/03/23/emotional-support-animals-housing-law/> [<https://perma.cc/HUL8-LT7S>]. It should be noted

lawmakers embraced the narrative that emotional support animal abuse was a pressing problem. In 2022, California, one of the most progressive states in the country, passed a law enacting stricter requirements on the documentation needed to prove to a housing provider that a person is entitled to a support animal.²⁰ California's law mimics state laws passed in recent years that tighten state requirements for requesting an emotional support animal as a reasonable accommodation in housing. In many states where such laws have not passed, they have at least been introduced and remain under consideration.²¹

Despite the attention and confusion surrounding this issue, the federal government's position on emotional support animals in housing has remained consistent. The Department of Housing and Urban Development ("HUD"), which enforces the disability discrimination prohibitions of the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3604(f), has retained the same legal interpretation of emotional support animals as reasonable accommodations for at least fifteen years. This definition has remained constant through two Republican and one Democratic administration. While supporters of recent restrictive state laws may claim that the laws address a problem the federal government has failed to recognize, these laws also result in a myriad of new issues that remain largely unexamined. Further, state laws regulating emotional support animals do not change housing provider liability under the federal Fair Housing Act and jeopardize the very local control states seek to assert, all while reinforcing negative stereotypes of those with mental health conditions.

that the fears about HUD's guidance expressed by the author and quoted advocates were misplaced, as demonstrated by HUD's 2020 guidance described in Section I.D of this Article.

20. CAL. HEALTH & SAFETY CODE § 122318 (West 2023).

21. H.B. 1201, 70th Gen. Assemb., Reg. Sess. (Colo. 2016) (requiring in-person evaluation); H.B. 5751, 101st Gen. Assemb., 1st Reg. Sess. (Mich. 2021) (requiring a 30-day relationship with the provider); H.B. 5356, 99th Gen. Assemb., 1st Reg. Sess. (Mich. 2017) (requiring the assistance animal to have obedience training); S.C.R. 13, 63rd Gen. Assemb. (Utah 2020) (requiring in-person evaluation); H.B. 2486, 89th Gen. Assemb., 1st Reg. Sess. (Iowa 2021) (requiring patient to have seen provider within the past six months, have a "bona fide" provider-patient relationship, for the provider to have a physical Iowa location, and for the provider to not have received compensation for making the finding); H.B. 2152, 88th Leg. (Kan. 2019) (requiring in-person evaluation and recertification on an annual basis); H.B. 2057, 89th Leg. (Kan. 2021) (limiting documentation to in-state providers); S.B. 0663, 99th Leg., 1st Sess. (Mich. 2018) (requiring six-month relationship with provider); H.B. 3606, 91st Reg. Sess. (Minn. 2019) (limiting documentation to in-state providers); A.B. 348, 220th Leg. (N.J. 2022) (regarding animals on veterans' residential facilities and requiring emotional support animals to be licensed, trained, or certified to do work or perform tasks); H.B. 801, 87th Leg. (Tex. 2021) (requiring state level certifications for emotional support animals including obedience courses and an evaluation by a certain class of health professionals).⁹²

This Article will first briefly provide the framework for analyzing reasonable accommodation requests for emotional support animals under the FHAA. It will then discuss how the difference between the FHAA's and the Americans with Disabilities Act's ("ADA") definition of service animal creates confusion about how to evaluate reasonable accommodation requests regarding emotional support animals, an uncertainty furthered by recent changes to the Air Carrier Access Act. This Article will next examine recent state laws passed, at least in part, because of growing media attention. It will then address the argument that state laws prevent enforcement of the FHAA.²² State laws that require more from someone using an emotional support animal misunderstand the therapeutic use of emotional support animals, reinforce hostility towards individuals with disabilities, subject legitimate users of emotional support animals and their doctors to fear of criminal prosecution, and increase the risk of liability for housing providers under the FHAA. The Article will conclude that any reasonable regulation of emotional support animal fraud will need to come from the healthcare community; instead, federal or state legal involvement should focus only on regulating those who sell fraudulent paperwork and/or equipment misidentifying service or emotional support animals.

I. BACKGROUND: A HISTORY OF CONFUSION

A. The Reasonable Accommodation Framework

To understand the problems caused by state laws regulating approval of emotional support animals in housing, it is helpful to first understand the legal framework by which accommodation requests are made and evaluated. In the case of emotional support animals living with tenants in "no pet" housing, the most important concept is the right of qualified individuals with disabilities to reasonable accommodations. Under the FHAA,²³ reasonable accommodations from a housing provider's policy or practice are required under certain circumstances.²⁴ The FHAA was passed and signed into law in 1988, amending Title VIII of the Civil Rights Act

22. While not discussed in this piece, local municipal codes or state or local level guidance may also create conflicts with the federal Fair Housing Act. See Foster, *supra* note 1, 36–40 (describing municipal laws on these topics); OHIO CIVIL RIGHTS COMM'N, T-31.3, *The Application of Animal Assistants in Housing*, <https://civ.ohio.gov/decisions-and-publications/policy-and-guidance/AnimalAssistants> [<https://perma.cc/EC9W-FVBW>] (listing factors a landlord can consider as including the size and weight of the animal). Further research into this area would prove useful.

23. Fair Housing Amendments Act, Pub. L. No. 100–430 §§ 5–6, 102 Stat. 1619 (1988) (codified and combined in 42 U.S.C. § 3604).

24. 42 U.S.C. § 3604(f)(3)(B).

of 1968 (known as the Fair Housing Act)²⁵ to include disability protections and obligations.²⁶ The FHAA covers almost all housing—including private housing with no government subsidy—in the United States.²⁷ Housing providers are required to grant FHAA accommodations when: (1) a reasonable accommodation request is made, (2) by a disabled individual, (3) the provider knew or should have known of the disability, and (4) the request may be necessary to provide the tenant with an equal opportunity to use and enjoy their property.²⁸

As a preliminary matter, to meet the definition of “person with a disability,” individuals must show that they have a physical or mental impairment that impacts one or more major life activities.²⁹ Both the impairment prong and the concept of major life activities are interpreted broadly. For instance, the impairment prong expressly includes mental or psychiatric disabilities.³⁰ Courts have held that major life activities include working,³¹ sleeping,³² concentrating,³³ self-care (including grooming and household maintenance),³⁴ and interacting with others.³⁵

Accommodation requests must also meet the necessity requirement and be “reasonable.” Necessity does not need to be strict necessity, but rather only a “showing that the desired accommodation will affirmatively

25. 42 U.S.C. §§ 3601–3614.

26. Pub. L. No. 100–430.

27. 42 U.S.C. § 3603.

28. *E.g.*, *Overlook Mut. Homes, Inc. v. Spencer*, 415 F. App’x 617, 621 (6th Cir. 2011); *Giebeler v. M & B Associates*, 343 F.3d 1143, 1147 (9th Cir. 2003); *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1037 (D.N.D. 2011); *Stevens v. Hollywood Towers and Condominium Ass’n*, 836 F. Supp. 2d 800, 808 (N.D. Ill. 2011).

29. 42 U.S.C. § 3602(h)(1).

30. *Id.* (defining “handicap” to include physical and mental impairments); 24 C.F.R. § 100.201(a)(2) (defining “handicap” to include mental and emotional “illness[es]”).

31. *DeMar v. Car-Freshner Corp.*, 49 F. Supp. 2d 84, 90 (N.D.N.Y. 1999); *see also* 24 C.F.R. § 100.201 (including caring for oneself as an example of a major life activity).

32. *E.g.*, *Pack v. Kmart Corp.*, 166 F.3d 1300, 1305 (10th Cir. 1999)

33. *E.g.*, *DeMar*, 49 F. Supp. 2d at 90.

34. 24 C.F.R. § 100.201 (including caring for oneself as an example of a major life activity); *Bragdon v. Abbott*, 524 U.S. 624, 656 (Ginsburg, J., concurring) (holding that caring for oneself is a major life activity) (citing 45 C.F.R. § 84.3(j)(2)(ii) (2002)); *Cehrs v. Northeast Ohio Alzheimer’s Rsch. Ctr.*, 155 F.3d 775, 781 (6th Cir. 1998) (accord); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995) (defining “caring for oneself” as including everything from driving and grooming to feeding oneself and cleaning one’s home); *see also* Bryan P. Stephenson, *I’m So Lonesome I Could Cry . . . but Could I Sue?: Whether ‘Interacting with Others’ Is A Major Life Activity Under the ADA*, 31 PEPP. L. REV. 773, 801 (2004).

35. *Rodriguez v. Vill. Green Realty, Inc.*, 788 F.3d 31, 49 (2d Cir. 2015); 24 C.F.R. § 100.201(b) (including “interacting with others” as a major life activity within the ADA regulations); but *see generally* Stephenson, *supra* note 34 (explaining the circuit split on this issue).

enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability."³⁶

In terms of reasonableness, it is well-accepted that the law does not require a housing provider to do "everything humanly possible" to accommodate the tenant.³⁷ Typically, accommodation requests are reasonable unless they would result in a "fundamental alteration" of the housing provider's program or entail an "undue financial and administrative burden."³⁸ A fundamental alteration alters the very nature of a provider's operation.³⁹ For instance, a request that a tenant be driven to the supermarket or to doctor's appointments by building staff would be a fundamental alteration if this service (transportation) was not already provided by the landlord.⁴⁰ Undue burden analysis usually focuses on the financial costs of a request to the housing provider and involves factors such as the cost to and the financial resources of the housing provider, the benefits to the requestor, and the availability of less expensive alternatives that would still meet the disability-related need.⁴¹

In addition, housing providers may reject a reasonable accommodation where, even with the accommodation, the tenant poses a direct threat to the health or safety of other residents or when the tenancy would result in substantial physical damage to the property of others.⁴² While there is currently a circuit split as to whether the plaintiff or defendant has the burden of proving reasonableness or unreasonableness,

36. See *Dadian v. Vill. of Wilmette*, 269 F.3d 831, 838 (7th Cir. 2001) (quoting *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) and noting accommodations are a highly fact-specific inquiry).

37. E.g., *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1047 (6th Cir. 2001) (quoting *Bronk*, 54 F.3d at 429).

38. E.g., *Schaw v. Habitat for Humanity of Citrus Cty., Inc.*, 938 F.3d 1259, 1265 (11th Cir. 2019) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412 (1979)).

39. *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, U.S. DEP'T OF HOUS. & URBAN DEV. & DEP'T OF JUSTICE, at 8 (May 17, 2004), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf [<https://perma.cc/TNM6-BJ6M>].

40. *Id.*

41. *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, *supra* note 39, at 9; Jennifer L. Dolak, *The FHAA's Reasonable Accommodation & Direct Threat Provisions as Applied to Disabled Individuals Who Become Disruptive, Abusive, or Destructive in Their Housing Environment*, 36 IND. L. REV. 759, 766 (2003) (describing how many courts characterize this as a balancing test since the analysis weighs the burden to the housing provider against the benefit to the person with a disability).

42. 24 C.F.R. § 3604(f)(9); *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1125–26 (D.C. Cir. 2005) (explaining that under well-established federal Fair Housing Act caselaw, a direct threat must be such that no possible reasonable accommodation would protect the health, safety, and property of neighbors).

it is clear that the burden of proving that a tenant or their animal constitutes a direct threat rests squarely upon the housing provider.⁴³

Accommodation requests need not be in any specific form, may be written or oral, can be requested at any time, and do not need to use any specific language.⁴⁴ In eviction cases, for example, a tenant can make a reasonable accommodation request at any time prior to the actual, physical eviction of the tenant.⁴⁵ Courts have held that reasonable accommodation claims are a fact-specific inquiry that lends itself to case-by-case determinations.⁴⁶

Courts have granted reasonable accommodations in a variety of circumstances, including requiring housing providers to allow emotional support animals for tenants with psychiatric disabilities such as post-traumatic stress disorder or anxiety-related disorders.⁴⁷ The failure of a housing provider to make a reasonable accommodation can result in awards of economic damages, such as the cost of finding new housing,⁴⁸ or the difference in rent between the tenant's current unit and the one they were evicted from or denied,⁴⁹ as well as emotional distress damages,⁵⁰ and punitive damages.⁵¹ Civil money penalties may also be ordered.⁵²

43. ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §§ 11D:3, 11D-23, 24 (2011); *Groner*, 250 F.3d at 1044–45.

44. See e.g., *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, *supra* note 39, at 10.

45. *Douglas*, 884 A.2d at 1121 (citing *Radecki v. Joura*, 114 F.3d 115, 116 (8th Cir. 1997)).

46. *U.S. v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1418 (9th Cir. 1994); *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1516 (2d Cir. 1995); *Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, *supra* note 39, at 7 (explaining that decisions of reasonableness are made on “a case-by-case basis”).

47. See e.g., *Overlook Mut. Homes*, 666 F. Supp. 2d at 860–61 (concluding emotional support animals can qualify as reasonable accommodations under the FHA).

48. *Krueger v. Cuomo*, 115 F.3d 487, 492 (7th Cir. 1997).

49. See, e.g., *Morgan v. Sec'y of Hous. & Urban Dev.*, 985 F.2d 1451, 1458 (10th Cir. 1993).

50. See SCHWEMM, *supra* note 43, at 25–34, 35 (explaining that while it is impossible to gauge how such intangible damages will be calculated, two important factors are the egregiousness of Defendant's conduct and Plaintiff's reaction). A review of the relevant cases shows that depending on these factors, including the willfulness of Defendant's behavior and the proof of distress by Plaintiff, awards can vary from nominal damages to over \$100,000.

51. 42 U.S.C. § 3613(c)(1) (discussing punitive damages in federal court).

52. 42 U.S.C.A. § 3612(g)(3); 24 C.F.R. § 180.671 (implementing the civil money penalty provisions).

B. The Americans with Disabilities Act Only Acknowledges Service Animals as Opposed to Other Assistance Animals.

Reasonable accommodations to “no pet” policies for emotional support animals have been accepted by courts since the 1970s.⁵³ With rare exceptions, the treatment of this topic by federal courts and HUD administrative law judges stayed consistent in the following decades, in that courts would apply the typical reasonable accommodation framework without any additional requirements.⁵⁴ Changes to HUD’s regulations in a small number of its programs bolstered this understanding of the accommodation framework, even though the changes did not affect all housing subject to the FHAA.⁵⁵ In 2010, however, changes were made to the ADA that created confusion over the correct standard.

The ADA is the most well-known disability law in the country. In fact, most of the public and some attorneys believe the ADA controls all disability law, including housing.⁵⁶ Under the ADA, places of public accommodation are required to allow the presence of service animals and may only make a limited inquiry of a person with the animal, specifically asking only: “(1) is the animal required because of a disability, and (2) what work or task has it been trained to perform?”⁵⁷ In 2008, the Department of Justice proposed a rule formally defining “service animal” under the ADA.⁵⁸ In 2010, this rule became final.⁵⁹ As explained in the 2008 proposed rule, prior ADA regulations stated in “implementing Title III [of the ADA], ‘service animal’ was defined as ‘any guide dog, signal dog, or other animal,’ and the Department believed, at the time, that leaving the species selection up to the discretion of the person with a disability was the best course of action.”⁶⁰ However, the 2010 regulation limited the definition of service animals to dogs and, in a separate section,

53. See generally *Majors v. Hous. Auth. of Cty. of De Kalb*, 652 F.2d 454 (5th Cir. 1981) (applying the Rehabilitation Act, 29 U.S.C. § 701).

54. See Christopher Ligatti, *No Training Required: The Availability of Emotional Support Animals as a Component of Equal Access for the Psychiatrically Disabled under the Fair Housing Act*, 35 T. MARSHALL L. REV. 139, 159–63 (2012).

55. See *id.*

56. Caroline J. Cordova, *Preventing the Delegitimization of Service Animals: A Proposal to Keep Service Animal Law from Going to the Dogs*, 23 CHAP. L. REV. 247, 254 (2020) (“Most people think the ADA controls all disability law in the United States.”).

57. 28 C.F.R. § 36.136(i); Fantaski, *supra* note 1, at 958 (citing multiple media reports from 2015–2018).

58. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508 (June 17, 2008).

59. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,236 (Sept. 15, 2010).

60. Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508, 34,516 (June 17, 2008).

miniature horses. Service animals had to be individually trained to do work or perform tasks for a person with a disability.⁶¹ Drawing a distinction between service and emotional support animals, the regulation stated:

Although in many cases similar provisions of different statutes are interpreted to impose similar requirements, there are circumstances in which similar provisions are applied differently because of the nature of the covered entity or activity, or because of distinctions between the statutes. For example, emotional support animals that do not qualify as service animals under the Department's title III regulations may nevertheless qualify as permitted reasonable accommodations for persons with disabilities under the [FHAA] and the ACAA . . . The Department's position is based on the fact that the title II and title III regulations govern a wider range of public settings than the housing and transportation settings for which the Department of Housing and Urban Development (HUD) and the DOT regulations allow emotional support animals or comfort animals. The Department recognizes that there are situations not governed by the title II and title III regulations, particularly in the context of residential settings and transportation, where there may be a legal obligation to permit the use of animals that do not qualify as service animals under the ADA, but whose presence nonetheless provides necessary emotional support to persons with disabilities.⁶²

61. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56236; 28 C.F.R. § 36.104 (defining service animal); 28 C.F.R. § 36.136(i) (regarding miniature horses).

62. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,240. This distinction was actually consistent throughout the rulemaking process. The proposed rule from 2008 similarly stated:

The Department's rule is based on the assumption that the title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals. The Department recognizes, however, that there are situations not governed exclusively by the title II and title III regulations, particularly in the context of residential settings and employment, where there may be compelling reasons to permit the use of animals whose presence provides emotional support to a person with a disability. Accordingly, other federal agency regulations governing those situations may

The regulation made clear that places of public accommodation regulated by the ADA only had to allow “service animals” as opposed to “emotional support animals.”⁶³ While expressly narrowing its applicability to titles II and III of the ADA, this distinction still created confusion, not just among the public and housing providers, but also amongst lawyers and judges.⁶⁴ In fact, the possibility of confusion was raised during the public comment phase in response to the original rule but not addressed directly in the final rule.⁶⁵ The difference between the ADA’s application to places of public accommodation and the FHAA’s regulation of housing was a distinction lost on many.

C. 2020 Changes to the Air Carrier Access Act

Confusion over the meaning of “emotional support animal” and “service animal” and the legal requirements for each was compounded, especially in the public eye, by changes to the regulations implementing the Air Carrier Access Act (“ACAA”). Aircraft are not subject to the ADA.⁶⁶ Changes to the ACAA regulations are the best example of how the “moral panic” over emotional support animals has driven changes in the law.⁶⁷ Since 2009, ACAA regulations have required travelers with animals to give advance notice and have imposed certain requirements on health provider documentation.⁶⁸ While some disability advocates argued that the Department of Transportation (“DOT”) should amend unduly restrictive rules, airline carriers argued that the regulations should be stricter to curb fraud and prevent safety issues that may arise with untrained animals.⁶⁹ In fact, DOT responded to growing incidents

appropriately provide for increased access for animals other than service animals.

Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. at 34,516.

63. See Nondiscrimination on the Basis of Disability in State and Local Government Services 75 Fed. Reg. at 56,240.

64. Butwin, *supra* note 61, at 223; Cordova, *supra* note 56, at 258; Dorfman, *supra* note 1, at 1370.

65. Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,268.

66. Huss, *supra* note 1, at 807 n.120 (2020).

67. Dorfman, *supra* note 1, at 1367–68.

68. Huss, *supra* note 1, at 810–11 (explaining that those with emotional support animals were required to give up to 48 hours’ notice advance notice to the air carrier, check in earlier than the public, and provide a medical provider note containing license information).

69. *Id.* at 816–19, 807–30 (2020) (providing the most comprehensive account of administrative back and forth over these changing rules).

involving support animals on planes and media attention to these incidents by proposing administrative changes.⁷⁰ In May 2018, DOT gave advance notice of rulemaking and solicited public comment on a variety of issues related to emotional support animals.⁷¹ DOT's rulemaking focused particularly "on the containment of [emotional support animals], citing to the belief by some organizations that the increase in [emotional support animals] is the reason for the increasing number of behavioral issues and the fact that some airports already require [emotional support animals] to be contained in a pet carrier."⁷² In 2020, the final rule promulgated by DOT became official.⁷³ This rule only allowed service animals as defined in the ADA to fly as reasonable accommodations and allowed airlines to relegate emotional support animals to the status of pets.⁷⁴ In addition, this regulatory change created heightened standards for documentation of service animals flying as such.⁷⁵

Of course, an airplane cabin is a unique, limited space that is more analogous to public accommodations (including public transportation) than to a person's private residence, which the U.S. Department of Justice ("DOJ") described in their comments as a place where a wider variety of assistance animals would be appropriate.⁷⁶ Still, media attention surrounding this change has only increased the public's confusion and has elevated those voices raising grievances regarding fraudulent emotional support animals in housing.

70. Media attention on emotional support animals seemed to intensify in early 2018. *Id.* at 807–08 (discussing the rationale of airline carriers based on increased incidents with animals on flights); Silva, *supra* note 5; Karen Brulliard, *Fur and fury at 40,000 feet as more people bring animals on planes*, WASH. POST (Jan. 22, 2018), <https://www.washingtonpost.com/news/animalia/wp/2018/01/22/fur-and-fury-at-40000-feet-as-more-people-bring-animals-on-planes/> [<https://perma.cc/8FAB-8BNZ>]; Leslie Josephs, *People have a lot to say about emotional support animals on planes*, CNBC (May 22, 2018), <https://www.cnbc.com/2018/05/22/public-comments-about-emotional-support-animals-are-pouring-in.html> [<https://perma.cc/Y55V-JAEZ>]; Bart Jansen, *Following Peacock Fiasco, United Airlines Tightens Policy for Comfort Animals*, USA TODAY (Feb. 1, 2018), <https://www.usatoday.com/story/travel/2018/02/01/united-joins-delta-updating-policies-deal-flood-comfort-animals/1086683001/> [<https://perma.cc/PW45-GKLX>].

71. Huss, *supra* note 1, at 823–25.

72. *Id.* at 823 n.241.

73. *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742 (Dec. 10, 2020).

74. *See Traveling by Air with Service Animals*, 85 Fed. Reg. 79, 742–43 (Dec. 10, 2020) (stating the airlines may treat emotional support animals as pets).

75. *Traveling by Air with Service Animals*, 85 Fed. Reg. at 79,748; 14 C.F.R. § 382.75.

76. *Traveling by Air with Service Animals*, 85 Fed. Reg. at 79,742.

D. 2020 Fair Housing Act Guidance from the Department of Housing and Urban Development

The treatment of emotional support animals under the FHAA is well settled,⁷⁷ and HUD guidance on the legitimacy of emotional support animals as a reasonable accommodation has remained consistent. Fair housing caselaw has continually acknowledged emotional support animals as reasonable accommodations under the FHAA, although some confusion over the proper standard for evaluating requests has continued among lawyers and courts. This confusion is often based on whether training, an ADA requirement, is required for animals under such requests, and often tenants, landlords, lawyers, and judges all have different understandings of terms such as emotional support animal, service animal, therapy animal, and assistance animal.

In 2020, HUD provided a Fair Housing and Equal Opportunity (FHEO) Notice that expounded on previous guidance.⁷⁸ The Notice provided guidance on how to assess a reasonable accommodation request for an animal in housing and set forth the broad category of “assistance animals” before breaking the term down to “service animals” and “assistance animals other than service animals.”⁷⁹ The guidance made clear that only dogs can be service animals under the ADA, and that such dogs must be “individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”⁸⁰ Only where it is not “readily apparent” that the dog performs a disability-related task can housing providers make a very limited inquiry into whether the animal is needed because of a disability and what work or task the animal has been trained to perform.⁸¹

For animals that are not service animals, what this Article calls “emotional support animals,” the inquiry is different and more searching

77. Butwin, *supra* note 61, at 210.

78. FHEO Notice: FHEO-2020-01, *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, U.S. DEP’T OF HOUS. & URBAN DEV. (Jan. 28, 2020), <https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf> [<https://perma.cc/HPF7-66F5>]. Previous guidance had been provided in FHEO Notice: FHEO-2013-01, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, U.S. DEP’T OF HOUS. & URBAN DEV. (Apr. 25, 2013), https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf [<https://perma.cc/LX4D-WYCR>].

79. *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, *supra* note 79, at 7.

80. *Id.* at 6.

81. *Id.* at 6–7.

in some respects.⁸² In evaluating reasonable accommodation requests for such animals, a housing provider can request information to support the request when the disability and/or benefit of the animal is not obvious.⁸³ Without limiting the type of information that can be regarded as sufficient, the guidance states: “Reasonably supporting information often⁸⁴ consists of information from a licensed health care professional—*e.g.*, physician, optometrist, psychiatrist, psychologist, physician’s assistant, nurse practitioner, or nurse—general to the condition but specific as to the individual with a disability and the assistance or therapeutic emotional support provided by the animal.”⁸⁵ Housing providers cannot require that such documentation take a certain form or be sworn to under oath.⁸⁶ The guidance provides a set of suggestions to help health care professionals write adequate letters, where appropriate, such as suggesting that documentation contain:

The patient’s name, [(1)] Whether the health care professional has a professional relationship with that patient/client involving the provision of health care or disability-related services, and [(2)] The type of animal(s) for which the reasonable accommodation is sought . . . [(3)] Whether the patient has a physical or mental impairment, [(4)] Whether the patient’s impairment(s) substantially limit at least one major life activity or major bodily function, and [(5)] Whether the patient needs the animal(s) (because it does work, provides assistance, or performs at least one task that benefits the patient because of his or her disability, or because it provides therapeutic

82. *Id.* at 6–18.

83. *Id.* at 9–12.

84. While the following are examples of the type of documentation from professionals that would be sufficient, HUD-DOJ guidance also indicates that in certain situations, information obtained from the individual directly would be sufficient. *See Joint Statement of the Department of Housing and Urban Development and the Department of Justice: Reasonable Accommodations Under the Fair Housing Act*, *supra* note 39, at 13 (“Depending on the individual’s circumstances, information verifying that the person meets the [Fair Housing] Act’s definition of disability can usually be provided by the individual himself or herself (e.g., proof that an individual under 65 years of age receives Supplemental Security Income or Social Security Disability Insurance benefits *or a credible statement by the individual.*”) (emphasis added).

85. *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, *supra* note 79, at 12.

86. *Id.* at 16 (“Housing providers may not require a health care professional to use a specific form (including this document), to provide notarized statements, to make statements under penalty of perjury, or to provide an individual’s diagnosis or other detailed information about a person’s physical or mental impairments.”).

emotional support to alleviate a symptom or effect of the disability of the patient/client, and not merely as a pet).⁸⁷

Only where the animal requested is unique and “not commonly kept in households” does the guidance suggest providing additional information such as:

[(1)] The date of the last consultation with the patient,
[(2)] Any unique circumstances justifying the patient’s need for the particular animal (if already owned or identified by the individual) or particular type of animal(s), and [(3)] Whether the health care professional has reliable information about this specific animal or whether they specifically recommended this type of animal.⁸⁸

In no case is a housing provider allowed to impose pet rules or fees on the emotional support animal, reject a reasonable accommodation request solely based on the breed or size of the animal⁸⁹ (as opposed to the behavior of the specific animal in question), or “insist on specific types of evidence if the information which is provided or actually known to the housing provider meets the requirements of this guidance”⁹⁰ Additionally, the guidance specified that “[d]isclosure of details about the diagnosis or severity of a disability or medical records or a medical examination cannot be required.”⁹¹

II. STATES ADDRESS IMAGINED ASSISTANCE ANIMAL FRAUD THROUGH STRICTER REQUIREMENTS

While many states have vague provisions that mirror the FHAA, at least ten states have laws that can be read to conflict with HUD and the courts’ interpretation of the FHAA. Some states have passed laws defining the therapeutic relationship required for a healthcare professional to write

87. *Id.* at 17.

88. *Id.* at 17–18.

89. While illegal breed and size limitations are more common, some housing providers prohibit certain species, identify preferred species in their policies, or respond to requests to keep an emotional support dog or cat with statements such as “get a fish,” an example not unique in the author’s experience. Presumably, such a housing provider thinks that they have demonstrated their openness to a reasonable accommodation and their lack of animus to the disabled. Such a housing provider would be incorrect.

90. *Assessing a Person’s Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, *supra* note 79, at 14.

91. *Id.*

a note supporting a person's need for an emotional support animal, limiting who can provide such documentation, and imposing penalties for misrepresenting an animal as an assistance animal. These laws, while usually well intentioned, allow housing providers to reject requests for reasonable accommodations for reasons that would not be allowed under federal law, thus creating conflict between state and federal law. While the states that have passed such laws are relatively few, this is a recent trend and similar bills have been proposed in a number of additional states.⁹²

A. State Laws Defining the Therapeutic Relationship and Legitimate Documentation

As explained above, federal guidance only requires that a tenant have reliable documentation of the animal's status. Federal law contains no specific requirements for the therapeutic relationship that must exist between a tenant and their health care provider for the provider to write a recommendation regarding the tenant's need for an emotional support animal. However, some states are imposing such requirements, allowing housing providers to reject documentation that would still be considered reliable under federal law. Likewise, while federal guidance provides no requirements for where the healthcare professional is licensed or what their professional title is, states have begun imposing limits on what qualifies as "valid" documentation: Requiring certain types of providers be licensed within the state where they are submitting the documentation, restricting out-of-state documentation, and limiting the type of provider-patient relationships that can result in legally sufficient documentation.

California's 2022 statute on emotional support animals is one of the most recent, and has been described as the most stringent.⁹³ The statute is aimed at health care providers and requires that they can only provide documentation to individuals if they have "establishe[d] a client-provider relationship with the individual for at least 30 days prior to providing the documentation requested."⁹⁴ California's code requires that such documentation be provided by a healthcare provider, which is defined to include only those licensed under the state's own process, seemingly barring out-of-state documentation.⁹⁵

92. See *supra* note 21.

93. Elain Povich, *States Struggle to Curb Fake Emotional Support Animals*, PEW STATELINE (Nov. 4, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/11/04/states-struggle-to-curb-fake-emotional-support-animals> [<https://perma.cc/Y6AF-HMR5>].

94. CAL. HEALTH & SAFETY CODE § 122318(a)(3)(A).

95. CAL. HEALTH & SAFETY CODE § 122318(b).

Wisconsin and Kentucky also include the requirement that supporting documentation be from a provider licensed within the state,⁹⁶ and Kentucky includes a statement that out-of-state providers' documentation may be allowed if the person has an "ongoing therapeutic relationship with the provider."⁹⁷ Wisconsin's law does not seem to contemplate the validity of any out-of-state documentation.⁹⁸ Similarly, Indiana requires that out of state documentation be from a provider with an "ongoing treatment relationship" with the individual.⁹⁹

Florida appears to allow documentation from an in-state health care provider regardless of the method (in-person, telephonic, online, etc.) by which care is provided, but requires out-of-state documentation "only if such out-of-state practitioner has provided in-person care or services to the tenant on at least one occasion."¹⁰⁰

Confusingly, South Dakota defines "service animal" as including emotional support animals, and states that "documentation shall originate from a licensed health care provider who does not operate in this state solely to provide certification for service or assistance animals."¹⁰¹ While this language is unclear, it has been interpreted by South Dakota's multifamily housing trade association to mean that any provider submitting documentation must be in-state.¹⁰² North Dakota's code contains a similar provision: "Reliable supporting documentation may be provided by a physician or medical professional who does not operate in this state solely to provide certification for service or assistance animals."¹⁰³ Much like South Dakota's law, North Dakota's code could be reasonably interpreted to limit supporting documentation to that provided by a medical professional within the state.

Other state laws are unclear about who can provide documentation, creating the potential for further confusion. Alabama defines valid documentation as "only includ[ing] documentation from a medical provider of the person in need of the reasonable accommodation."¹⁰⁴ While seemingly allowing out-of-state providers, Alabama's language is unclear, as "medical provider" is not defined within Alabama law and it is

96. KY. REV. STAT. § 383.085(b)(1-5); WIS. STAT. § 106.50(1mx).

97. KY. REV. STAT. § 383.085(b).

98. WIS. STAT. § 106.50(1mx).

99. IND. CODE § 22-9-7-10.

100. FLA. STAT. § 760.27(2)(b)(4).

101. S.D. CODIFIED LAWS § 43-32-35.

102. S.D. MULTI-HOUSING ASSOC., *New Animal Law* (May 2, 2018), <https://www.sdmha.com/news/new-animal-law> [<https://perma.cc/A8KF-UZCB>].

103. N.D.C.C. § 47-16-07-5.

104. ALA. CODE § 24-8A-2.

uncertain if the term would cover professionals, such as clinical social workers, expressly allowed under federal guidance.

B. State Laws Addressing Miscellaneous Issues Related to Emotional Support Animals

In addition to restricting who can provide documentation for emotional support animals and the relationship between the individual seeking documentation and the provider, states have enacted varied laws that may or do conflict with federal guidance.

Some state laws directly contradict well-established federal law. West Virginia’s law contains a provision that directly conflicts with the FHA’s weight and breed guidance, defining “assistance animal” as “mean[ing] any service, therapy or support animal, weighing less than one hundred fifty pounds”¹⁰⁵ While Alaska law correctly defines service animals as separate from other assistance animals, it also states that “a landlord may demand or receive an additional security deposit from a tenant who has a pet on the premises that is not a service animal,” seemingly allowing housing providers to charge a fee for an emotional support animal.¹⁰⁶ Iowa law requires documentation to be provided on a specific form created by the state.¹⁰⁷ Iowa’s fair housing law also seems to depart from the federal definition of disability to instead mean “the physical or mental condition of a person which constitutes a substantial disability,”¹⁰⁸ without ever defining “substantial disability” in its code. All of the above provisions contradict HUD guidance and court precedent in interpreting the FHAA.

Other states have passed laws that are vague and could be read to conflict with federal standards. Kentucky and Oklahoma have provisions stating: “The person receiving the request [for a reasonable accommodation to maintain an assistance animal in a dwelling] may independently verify the authenticity of any supporting documentation.”¹⁰⁹ While independently verifying authenticity is appropriate if limited to contacting a provider’s office to ask if the documentation is genuine, the law could be read to conflict with federal standards without the clarification that landlords cannot inquire further into the “nature or

105. W. VA. CODE § 5-11A-3.

106. ALASKA STAT. § 34.03.070.

107. IOWA CODE § 216.8C(3)–(4); see STATE OF IOWA, *Request for Assistance Animal in Housing Health Care Professional Form* (2020), https://icrc.iowa.gov/sites/default/files/publications/2020/Request%20for%20Assistance%20Animal%20in%20Housing%20Health%20Care%20Professional%20Form_2020.pdf [<https://perma.cc/S6RE-RNJJ>].

108. IOWA CODE § 216.2(5).

109. KY. REV. STAT. § 383.085(3); OKLA. STAT. tit. 41, § 113.2(B).

severity” of the tenant’s disability¹¹⁰ and cannot require the individual to waive medical confidentiality. Multiple states have fair housing laws that allow service animals as a reasonable accommodation in housing but do not mention emotional support animals or other assistance animals.¹¹¹ While these laws do not outright prohibit the use of emotional support animals in housing, they could cause confusion amongst housing providers and lead to arguments that emotional support animals should be interpreted as excluded.¹¹²

Finally, some states have passed laws attempting to crack down on assistance animal fraud, which may invalidate reliable documentation or have a chilling effect on individuals seeking assistance animals. California’s law seeks to deter assistance animal fraud by requiring that the provider must communicate “a verbal or written notice to the individual [seeking documentation] that knowing and fraudulently representing oneself to be the owner or trainer of any canine licensed as, to be qualified as, or identified as, a guide, signal, or service dog is a misdemeanor violation of Section 365.7 of the Penal Code.”¹¹³ Indiana’s law excludes from the definition of health service providers anyone “whose sole service to the individual is to provide a verification letter in exchange for a fee.”¹¹⁴ The breadth of this provision could be chilling to providers and invalidate letters from providers who are visited by individuals for the purpose of discussing their emotional support animal and getting documentation. Similarly, Oklahoma’s code states that “[s]upporting documentation that was acquired through purchase or exchange of funds for goods and services shall be presumed to be fraudulent supporting documentation,” as if the exchange of money for services is not an essential feature of most health care relationships.¹¹⁵

110. See 24 C.F.R. § 100.202(c).

111. See, e.g., D.C. CODE § 7-1006 (regulating only service animals, although not expressly precluding emotional support animals); NEB. REV. STAT. § 20-131.04 (regulating and prohibiting fees only for service animals in housing); R.I. GEN. LAWS § 34-37-4 (regulating only service animals or personal assistive animals and defining personal assistive animals to include only those trained through a certified program); VT. STAT. tit. 9, § 4503(a)(9) (stating only that it is illegal “[t]o discriminate in the sale or rental of a dwelling because a person relies upon aids such as attendants, specially trained animals . . .”).

112. The arguments could be raised using the expression *unius personae vel re est exclusion alterius* canon: The expression of one thing is the exclusion of the other. See Kevin Tobia, et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 236 (Jan. 2022).

113. CAL. HEALTH & SAFETY CODE § 122318(a)(5).

114. IND. CODE § 22-9-7-4 (regarding in-state providers); IND. CODE § 22-9-7-10(b) (applying the same restriction to documentation from an out-of-state provider).

115. See OKLA. STAT. tit. 41, § 113.2(B). Minnesota’s statute provides a helpful contrast to the Indiana and Oklahoma laws, as it states that “A licensed professional does not include any person who operates primarily to provide certification for a service or support animal.” MINN.

C. State Laws Addressing the Misrepresentation of Pets as Assistance Animals

In addition to these provisions, a majority of states have made it illegal to misrepresent an animal as either an emotional support or service animal.¹¹⁶ While these may seem like common-sense laws, most states leave it unclear as to how these laws will be enforced or what standards will be applied to determine that a misrepresentation has taken place.

Most of the laws on misrepresentation of pets as assistance animals provide for no enforcement regime at all. In essence, these statutes serve as general warnings without a thought-out process for investigation or enforcement. As most of these laws describe violations as misdemeanors, in the absence of any other enforcement mechanisms, enforcement would seem to fall to local police.¹¹⁷ Michigan is an exception, as it allows complaints to be filed with the state Office of Civil Rights, who then may refer the complaints to law enforcement.¹¹⁸ Regardless, almost no state statutes contemplate how to determine if misrepresentation is occurring (e.g., what evidence can be considered, what questions can be asked, whether accused individuals will be forced to waive medical confidentiality) or what evidence will be sufficient to show that the person does need their animal. Out of twenty-seven states, only one statute provided any detail as to reporting or enforcement; web searches of the twenty-six states without a statutory process found no information in any state on how to file such a complaint.¹¹⁹

Only Washington State's code provides detail on what an investigation will look like, and even this focuses only on service animals,

STAT. § 504B.113 subd. 1(e). By focusing on how the provider operates, rather than the specific transactions between the provider and individual, the potential chilling effect created by the Indiana statute can be mitigated.

116. See Fantaski, *supra* note 1, at 958 (“[M]ore than half of the states have enacted laws that criminalize fraudulent representation of a person claiming the right to be accompanied by an assistance animal.”); Dorfman, *supra* note 1, at 1404 (“As of February 2020, forty-two states have either a statute in place or a bill waiting for final approval that specifically forbids misrepresentation of pets as service animals, primarily by criminalizing such an act as a misdemeanor or as a civil matter.”).

117. MONT. CODE § 49-4-221 (allowing complaints to be made to local law enforcement); Nina Wu, *Proposed Fines for Fake Service Dogs in Hawaii Becomes Law*, STAR ADVERTISER (July 12, 2018), <https://www.staradvertiser.com/2018/07/12/breaking-news/proposed-fines-for-fake-service-dogs-in-hawaii-becomes-law/> [<https://perma.cc/5AZ8-KP6A>] (describing Hawaii's governor stating that “it appears [county police departments] would be the primary agencies responsible for enforcement.”).

118. MICH. COMP. LAWS § 752.64.

119. The author conducted searches on the Google search engine by searching the name of the state and “how to report a fake service animal” and “how to report service animal fraud.” In states where a term other than “service animal” was used in the statute, then the author used that term in the search and that term was substituted.

avoiding the more complicated issue of how investigation would work regarding emotional support animals:

(2)(a) An enforcement officer . . . may investigate and enforce this section by making an inquiry of the person accompanied by the animal in question and issuing a civil infraction. Refusal to answer the questions allowable under (b) of this subsection shall create a presumption that the animal is not a service animal and the enforcement officer may issue a civil infraction and require the person to remove the animal from the place of public accommodation.

(b) An enforcement officer or place of public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. An enforcement officer or place of public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. An enforcement officer or place of public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal, or require that the service animal demonstrate its task. Generally, an enforcement officer or place of public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for a person with a disability. . .¹²⁰

Such an inquiry, confined as it is by federal restrictions of what can be demanded of service animal owners, has a clearly limited effectiveness. While theoretically inquiries into emotional support animals could be more searching, there is still the question of how much information truly needs to be shared and whether such laws could require confidential medical information to be disclosed as part of an investigation.

The question of which animals these laws apply to is yet another area of confusion. While some of these laws only reference service animals,¹²¹

120. WASH. REV. CODE § 49.60.214.

121. ALA. CODE § 21-7-4; ARIZ. REV. STAT. § 11-1024; ARK. CODE § 20-14-310; CAL. PENAL CODE § 365.7; FLA. STAT. § 413.08; HAW. REV. STAT. § 347-2.6; KAN. STAT. § 39-1112

others also reference emotional support animals or “other assistance animals.”¹²² Most of the statutes criminalize the representation of an animal as one of these types of assistance animals, while some also criminalize or subject providers to discipline for the provision of documentation by providers not meeting certain requirements.¹²³ Wisconsin’s law is one of the most comprehensive: It includes emotional support animals and criminalizes misrepresentation of the need for an emotional support animal by both a patient and provider.¹²⁴

III. ANALYSIS

A. The Effect of Differing State and Federal Standards in Fair Housing Cases Concerning Reasonable Accommodation

Put simply, state laws requiring certain or specific documentation regarding emotional support animals offer no defense to the question of liability under the FHAA. While a good faith defense based on a misunderstanding of federal and state law could conceivably impact a judge or jury’s decision on damages, it would not impact whether the housing provider violated federal fair housing law. There are two main ways of viewing these state laws: Either they are preempted by federal law, or they impact only litigation brought under a state fair housing law claim.

1. Preemption Doctrine Invalidates State Laws that Conflict with Federal Law

Applying the preemption doctrine in this circumstance has support in caselaw. Preemption of state or local laws by federal law can be either express or implied.¹²⁵ Where implied, preemption can take place where it is impossible to comply with both federal and state or local law,¹²⁶ where

(using the term “assistance dog” to essentially mean service dog); MICH. COMP. LAWS § 752.61-63; MINN. STAT. § 609.833; MONT. CODE § 49-4-222; NEV. REV. STAT. § 426.805; N.H. REV. STAT. § 167-D:8; N.M. STAT. § 28-11-6; N.C. GEN. STAT. § 168-4.5; R.I. GEN. LAWS, § 40-9.1-3.1; S.C. CODE § 47-3-980; W. VA. CODE § 5-15-9; WASH. REV. CODE § 49.60.214.

122. IDAHO CODE § 18-5811A; KAN. STAT. 39-1112; 68 PA. CONS. STAT. § 405.5; WYO. STAT. § 35-13-203; COLO. REV. STAT. § 18-13-107.7; IDAHO CODE § 18-5811A (using the term “assistance animal,” albeit not defining it); IOWA CODE § 216.8B; ME. STAT. titl, 17, § 1314-A; MO. REV. STAT. § 209.204(3); N.D. CENT. CODE § 47-16-07.6; 68 PA. CONS. STAT. § 405.5-6; TENN. CODE § 39-16-304; UTAH CODE § 62A-5B-106; WIS. STAT. § 106.50(br)(5-6).

123. WIS. STAT. § 106.50(br)(5-6); CAL. HEALTH & SAFETY CODE § 122318(c).

124. WIS. STAT. § 106.50(br)(5-6).

125. *Morales v. TWA*, 504 U.S. 374, 383 (1992).

126. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013).

state or local law stands as an obstacle to federal law's objective,¹²⁷ or where the federal scheme is so pervasive as to "occupy the field" and leave no role for state or local laws on the subject.¹²⁸ The FHAA expressly states that "any law of a [s]tate, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."¹²⁹

While the state laws reviewed above do not mandate that housing providers take actions that would violate federal law, and while the FHAA contemplates state and local laws without attempting to occupy the field, many of these state laws encourage and permit housing providers to take actions that create liability under the FHAA.¹³⁰ These state laws are an obstacle to the FHAA. For instance, at least one court has found local laws banning certain dog breeds to be preempted by the FHAA.¹³¹ In this case, the court held that the parties' dispute over the breed of the dog was immaterial as the breed law stood in the way of the disabled person's need for their emotional support dog.¹³² Because the local law stood as an obstacle to the enforcement of the federal law, it was preempted.¹³³ Similarly, a court held that a local law requiring that no new adult care facilities operate within 1500 feet from existing facilities was preempted by the FHAA because the local law stood as an obstacle to the FHAA.¹³⁴ Preemption has also applied to state laws that indemnified developers from FHAA claims that the developments were designed and constructed to discriminate against persons with disabilities.¹³⁵ Federal courts have been clear that "to the extent that state statutes or local ordinances would undercut the FHAA's anti-discrimination provision, the former cannot be enforced" as "the FHAA itself manifests a clear congressional intent to

127. *Williamson v. Mazda Motor*, 562 U.S. 323, 330 (2011).

128. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

129. 42 U.S.C. § 3615.

130. See Katie Basalla, *Shortening the Leash: Emotional Support Animals under the Fair Housing Act*, 89 U. CIN. L. REV. 140, 154 (2020) (describing such local laws as undermining the purpose of the Fair Housing Act); John Ensminger & Frances Bretkop, *Service and Support Animals in Housing Law*, 26 GP SOLO 48, 49 (July/Aug. 2009) ("Courts that have faced inconsistencies between federal and state law regarding the rights of the handicapped with respect to service and emotional support animals have favored the federal laws.").

131. *Warren v. Delvista Towers Condo. Ass'n*, 49 F. Supp. 3d 1082, 1089 (S.D. Fla. 2014).

132. *Id.*

133. *Id.*; see also *Wilkison v. Arapahoe*, 302 Neb. 968, 973 (Neb. 2019).

134. *Larkin v. Mich. Dep't of Soc. Servs.*, 89 F.3d 285, 292 (6th Cir. 1996); *Human Res. Rsch & Mgmt. Grp. v. Suffolk*, 687 F. Supp. 2d 237, 241 (E.D.N.Y. 2010) (regarding a recovery home for those with substance use disorders).

135. *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 602 (4th Cir. 2010); *Miami Valley Fair Hous. Ctr., Inc. v. Campus Vill. Wright State*, No. 3:10cv00230, 2012 U.S. Dist. LEXIS 137922, at *16-17 (S.D. Ohio Sep. 26, 2012).

vitate the application of any state law that would permit discrimination based on physical [disability].”¹³⁶

Some states at least recognize this problem. The state of Virginia, after consulting with federal authorities, changed or clarified proposals regarding who could provide reliable documentation to more closely mirror federal law.¹³⁷ While California’s law seems to allow housing providers to reject out-of-state documentation and documentation that does not meet the thirty-day relationship requirement, it also contains a clause that renders the statute essentially ineffective: “Nothing in this section shall be construed to restrict or change existing federal and state law related to a person’s rights for reasonable accommodation and equal access to housing”¹³⁸ Like many of the state laws regarding emotional support animals, considering this provision, the California statute appears to be performative signaling rather than enacting a real solution to any problem.

2. State Laws Provide No Defense to Federal Fair Housing Claims

Even if preemption was not triggered and the state laws are valid and enforceable, these laws would still have no effect on the application of the FHAA. All states have fair housing laws which consider disability—except Mississippi, which has no state fair housing law at all.¹³⁹ While claims brought under a state fair housing statute could be dismissed based on the application of more stringent documentation requirements, a federal fair housing claim could still succeed based on the reliable information standard. Therefore, a state law, such as Wisconsin’s law requiring that documentation be from an in-state medical provider, could result in a state law claim against a landlord being dismissed based on this requirement, while the federal FHAA claim would be unaffected and could result in substantial liability.

B. State Laws on Emotional Support Animals Jeopardize the Local Control They Seek to Assert

Just as these more stringent state laws’ effect on FHA and FHAA liability is illusory, so is their justification as a means of local control.

136. *Astralis Condo. Ass’n v. Sec., U.S. DEP’T HOUS. AND URBAN DEV.*, 620 F.3d 62, 69, 70 (1st Cir. 2010).

137. *See Huss, supra* note 1, at 839.

138. CAL. HEALTH & SAFETY CODE § 122319; *see also* COLO. REV. STAT. § 12-240-144(2)(c)(including a similar provision, albeit with less limiting language about documentation).

139. POLICY SURVEILLANCE PROGRAM, *State Fair Housing Protections*, LAW ATLAS, <https://lawatlas.org/datasets/state-fair-housing-protections-1498143743> [<https://perma.cc/ACY7-CJMJ>] (current only through August 1, 2019 but confirmed).

Under HUD's Fair Housing Assistance Program ("FHAP"), HUD provides funding "annually on a noncompetitive basis to state and local agencies that administer fair housing laws that provide rights and remedies that are substantially equivalent to those provided by the Fair Housing Act."¹⁴⁰ HUD's website currently lists seventy-seven state or local agencies participating in the FHAP program.¹⁴¹ Where a state or locality's laws are found to be substantially equivalent to the FHAA, HUD refers all complaints to state and local agencies who are responsible for investigating complaints and bringing claims.¹⁴² These complaints are investigated and a determination is made of whether there is cause to believe discrimination occurred. If so, the parties go to a hearing in state court or before an administrative judge in the state or local agency.¹⁴³ HUD's certification of substantial equivalency involves finding that both the state law and the state or local agency operates effectively to provide a substantially equivalent process as under the FHAA.¹⁴⁴

However, if the state or local laws allow conduct that would be prohibited under the FHAA, the state or locality may lose both its status as substantially equivalent and HUD funding associated with the localities' investigation of affected fair housing complaints.¹⁴⁵ When lawmakers proposed changes to Virginia law, HUD warned that the proposed restrictions on who could provide "reliable verifying information" and creation of a defense that allowed rejecting a reasonable accommodation when it would have a "negative impact" on insurance coverage for the development could lead to conflicts with the federal law.¹⁴⁶ Without substantial equivalency, complaints related to emotional support animals would be investigated and prosecuted directly by HUD, with the distinct possibility of prosecution by the U.S. Department of Justice in federal district court,¹⁴⁷ instead of being investigated by a state

140. U.S. Dep't of Hous. and Urb. Dev., *Fair Housing Assistance Program (FHAP)*, https://www.hud.gov/program_offices/fair_housing_equal_opp/partners/FHAP [<https://perma.cc/PH54-K849>].

141. *Id.*

142. 42 U.S.C. § 3610(f) (2002); 24 C.F.R. § 103.100(a); Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 89 (1993) (describing this process); Margaret M. Jackson, *Fair Housing in Boom Times and Beyond*, 91 N.D. L. REV. 513, 530-32 (2015) (describing the requirements of substantial equivalency and their application to the 2015 North Dakota law).

143. 24 C.F.R. § 115.204(a-b).

144. 24 C.F.R. § 115.201(a-b).

145. 24 C.F.R. § 115.211.

146. *See Huss, supra* note 1, at 838.

147. 42 U.S.C. §§ 3612, 3614.

or local organization and heard by state or local courts or agencies.¹⁴⁸ Therefore, while state laws regulating reasonable accommodations for emotional support animals may seem to be a way of asserting local control, such laws would result in complaints being investigated and heard by the federal government and federal courts rather than in state or local agencies.

C. Practical Issues Created by Recent Laws

1. State Law Therapeutic Relationship Requirements Either Misunderstand or Disregard Issues of Access to Healthcare

One issue with many of these laws is that they presuppose an effective nationwide system of mental health services. It is well established that persons with mental health problems often have difficulty accessing mental health services, especially if they are low-income or live in rural areas.¹⁴⁹ Behavioral health networks under insurance plans are often inadequate¹⁵⁰ and have low treatment limits on services.¹⁵¹ Parity laws, designed to ensure equal affordability of mental health services to physical

148. *See supra* note 143.

149. COMM. ON THE SCIENCE OF CHANGING BEHAVIORAL HEALTH SOCIAL NORMS, ENDING DISCRIMINATION AGAINST PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS: THE EVIDENCE FOR STIGMA CHANGE 45–47 (2016), https://www.ncbi.nlm.nih.gov/books/NBK384915/pdf/Bookshelf_NBK384915.pdf [<https://perma.cc/3XNQ-LVBK>] (discussing studies on the lack of adequate mental health services in the United States); Fritze Reinert, et al., *The State of Mental Health in America 2023* 23, MENTAL HEALTH AM. (Oct. 2022), <https://mhanational.org/sites/default/files/2023-State-of-Mental-Health-in-America-Report.pdf> [<https://perma.cc/K2T4-7WKH>] (explaining that 28.2% of adults with mental illness report an unmet need for treatment and for 42% of these individuals the issue is cost); NAT'L INST. OF MENTAL HEALTH, *Mental Health and Rural America: Challenges and Opportunities* (May 30, 2018), <https://www.nimh.nih.gov/news/media/2018/mental-health-and-rural-america-challenges-and-opportunities> [<https://perma.cc/8X9H-8XUA>] (“60% of rural Americans live in mental health professional shortage areas, . . . more than 90% of all psychologists and psychiatrists and 80% of Masters of Social Work, work exclusively in metropolitan areas.”).

150. NAT'L ALL. ON MENTAL ILLNESS, *The Doctor is Out: Continuing Disparities in Access to Mental and Physical Health Care* 10 (Nov. 2017), <https://www.nami.org/Support-Education/Publications-Reports/Public-Policy-Reports/The-Doctor-is-Out/DoctorIsOut> [<https://perma.cc/F2GH-QXYD>]; Nicole Rapfogel, *The Behavioral Health Care Affordability Problem*, CTR. FOR AM. PROGRESS (May 26, 2022), <https://www.americanprogress.org/article/the-behavioral-health-care-affordability-problem/> [<https://perma.cc/H5LY-4J5R>]; Guin Becker Bogusz, *Health Insurers Still Don't Adequately Cover Mental Health Treatment*, NAT'L ALL. ON MENTAL ILLNESS (Mar. 13, 2020), <https://www.nami.org/blogs/nami-blog/march-2020/health-insurers-still-don-t-adequately-cover-mental-health-treatment> [<https://perma.cc/834D-LQ75>].

151. Nicole Rapfogel, *The Behavioral Health Care Affordability Problem*, CTR. FOR AM. PROGRESS (May 26, 2022), <https://www.americanprogress.org/article/the-behavioral-health-care-affordability-problem/> [<https://perma.cc/H5LY-4J5R>].

health services, are often unenforced.¹⁵² And these are just the inadequacies of the system for the insured; the uninsured face even more challenges, especially involving accessibility and affordability.¹⁵³ Combined with the other struggles faced by those with mental health disabilities, such as potential difficulties with stable employment¹⁵⁴ and housing,¹⁵⁵ these create substantial challenges in obtaining consistent psychiatric care. The requirement of some of the laws set forth above that requestors require an appointment, but also mandate at least a month of a stable therapeutic relationship is simply unrealistic.

Further, a person does not need to be in consistent therapy to benefit from an emotional support animal any more than a person need be in consistent therapy to benefit from pharmaceutical intervention. A primary care doctor or psychiatrist may prescribe medication with only occasional check-in appointments after receiving the prescription, but the laws described above envision a more substantial, and costly, relationship with a healthcare provider.¹⁵⁶ It is entirely reasonable that an individual with a

152. *Id.*; Guin Becker Bogusz, *Health Insurers Still Don't Adequately Cover Mental Health Treatment*, NAT'L ALL. ON MENTAL ILLNESS (Mar. 13, 2020), <https://www.nami.org/blogs/nami-blog/march-2020/health-insurers-still-don-t-adequately-cover-mental-health-treatment> [<https://perma.cc/834D-LQ75>].150

153. See Fritze Reinert, et al., *The State of Mental Health in America 2023*, at 23, MENTAL HEALTH AM. (Oct. 2022), <https://mhanational.org/sites/default/files/2023-State-of-Mental-Health-in-America-Report.pdf> [<https://perma.cc/K2T4-7WKH>] (showing that 10.8% of individuals with mental illness are uninsured); Panchal Nirmata, et al., *How Does Use of Mental Health Care Vary by Demographics and Health Insurance Coverage?*, KAISER FAMILY FOUND. (Mar. 24, 2022), <https://www.kff.org/health-reform/issue-brief/how-does-use-of-mental-health-care-vary-by-demographics-and-health-insurance-coverage/> [<https://perma.cc/MK74-X3DY>].

154. Evelien P.M. Brouwers, *Social stigma is an underestimated contributing factor to unemployment in people with mental illness or mental health issues: position paper and future directions*, 8 BMC PSYCHIATRY 36, 36 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7171845/> [<https://perma.cc/JY66-9AWZ>] (“Previous research has shown that people with severe and common mental disorders are 7 and 3 times more likely to be unemployed, respectively, than people with no disorders.”); see generally Yoshitomo Fukuura & Yukako Shigematsu, *The Work Ability of People with Mental Illnesses: A Conceptual Analysis*, 18 INT. J. ENVIRON. RES. & PUB. HEALTH 10712, 10712 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8508570/pdf/ijerph-18-10712.pdf> [<https://perma.cc/64NL-LFYW>] (“[J]ob retention and absenteeism remain a significant problem for those with mental illness.”).

155. Deborah K. Padgett, *Homelessness, housing instability and mental health: making the connections*, 44 BJPSYCH BULL. 197, 197–201 (Oct. 2020), <https://www.cambridge.org/core/journals/bjpsych-bulletin/article/homelessness-housing-instability-and-mental-health-making-the-connections/9F3CE592DBF5909AF29330FCCE5BD4C4> [<https://perma.cc/FJM4-NYJJ>] (describing a “plethora of research linking mental and physical health to housing stability” in a “bi-directional” relationship, albeit while arguing that structural housing issues are under-considered).

156. See Shih-Yin Chen, et al., *Follow-Up Visits by Provider Specialty for Patients With Major Depressive Disorder Initiating Antidepressant Treatment*, 61 PSYCHIATRIC SERVS. 81, 81-85 (2010), <https://ps.psychiatryonline.org/doi/full/10.1176/ps.2010.61.1.81> [<https://perma.cc/88C4-TFRB>] (suggesting that even for those diagnosed with major depressive disorder “only

managed mental health condition (especially long-standing or lifelong) has contact with their health professional infrequently, but still has a need for an emotional support animal. It would also be reasonable for such a person to see a new doctor for the sole purpose of getting an emotional support animal letter. A person may use an emotional support animal for their disability for years without actually being under medical care—the important point under the law is that the animal assists them in managing their disability.¹⁵⁷ Put simply, an emotional support animal can help a person regardless of whether it has ever been discussed with *any* health professional.

Despite this, many of these laws treat a healthcare appointment primarily to get documentation regarding a person's need for an emotional support animal as presumptively fraudulent.¹⁵⁸ This attitude goes beyond local legislatures. A co-author of a recent medical article reports that 60% of emotional support animal requests were “from potential clients who report they wish to get around landlord restrictions.”¹⁵⁹ The description by the authors makes it sound nefarious and as presumptive evidence of fraud. However, getting around a landlord's restriction is the very basis of a reasonable accommodation request if an emotional support animal accommodation to the landlord's policy is necessary to give the tenant equal opportunity to housing.

Requirements such as those imposed by many of these state laws show little awareness of the day-to-day existence of persons with disabilities. A requirement that any doctor must treat a tenant for at least thirty days before providing documentation of need in support of an emotional support animal rules out those disabled members of society that do not have reliable access to healthcare or psychiatric services, or whose very mental health condition prevents them from obtaining consistent healthcare.¹⁶⁰ Laws requiring that health care appointments be “in person” ignore the reality that telemedicine and video visits with health care

a small proportion of patients initiating antidepressant treatment . . . received guidance-concordant follow-up visits.”)

157. *Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, *supra* note 79, at 3, 11.

158. *See* Tobia, *supra* note 113; CAL. HEALTH & SAFETY CODE § 122318(a)(5), IND. CODE § 22-9-7-10(b); IND. CODE § 22-9-7-4 113115.

159. Brian Carnahan, et al., *Emotional Support Animals- Some Considerations*, COUNSELOR AND SOCIAL WORKER BD. AND MARRIAGE AND FAMILY THERAPIST BD. OF OHIO NEWSLETTER (Fall 2020), <https://cswmft.ohio.gov/static/news-letter/2020-Fall.pdf> [<https://perma.cc/FA4Q-APJ9>].

160. Lisa B. Dixon, et al., *Treatment engagement of individuals experiencing mental illness: review and update*, 15 WORLD PSYCHIATRY 13, 13 (Feb. 2016) (“Individuals living with serious mental illness are often difficult to engage in ongoing treatment, with high dropout rates.”)

professionals are now common.¹⁶¹ Such visits allow lower-income and disabled individuals without access to reliable transportation and who have difficulties appearing in public or leaving their home to access healthcare.¹⁶²

Wisconsin and California's laws, requiring certification from health professionals within the state, do not seem to contemplate that a person may move into the state with their emotional support animal.¹⁶³ Presumably, these laws require that such persons travel to the state in advance of their move to establish a relationship with a healthcare provider sufficient to evaluate the need for an emotional support animal before even having a place to live within the state or locality. Further, it is uncertain what Indiana and Kentucky's laws mean by requiring a person maintain an "ongoing" relationship with a now-distant provider, as it would seem natural to change providers and go through a period without care when moving to a new state or locality.

Many of the state laws on emotional support animals disregard the challenges facing individuals with mental illness, misunderstand the nature of an emotional support animal, demonstrate confusion regarding the FHAA's requirements regarding reasonable accommodations, and fail to recognize the lack of mental health services in our nation. As a result, the laws serve to create intractable barriers to disabled, often low-income, persons using emotional support animals.

2. State Assistance Animal Fraud Laws Further Stigmatize, Stereotype, and Interfere with the Chosen Treatment of those with Psychiatric Illnesses

Most of the disabilities for which a person could benefit from an emotional support animal are mental health or psychiatric disabilities. Such persons with "invisible disabilities" already deal with stereotypes, and a wide belief in certain segments of society that they are lazy, malingering, dangerous, weak, or "emotionally brittle."¹⁶⁴ Individuals who abuse the system to claim true pets as emotional support animals do exist and exacerbate suspicion about disabled individuals. The media hysteria

161. See generally Bi-Partisan Policy Center, *The Future of TeleHealth After Covid-19: New Opportunities and Challenges* (Oct. 2022), <https://bipartisanpolicy.org/report/future-of-telehealth/> [https://perma.cc/Q8VC-RUWG].

162. *Id.* ("Telehealth may increase access to care for communities of color and other marginalized groups.")

163. CAL. HEALTH & SAFETY CODE § 122318(b); WIS. STAT. § 106.50(1mx).

164. See Jane Byeff Corn, *Crazy (Mental Illness under the ADA)*, 36 U. MICH. J. L. REFORM 585, 609 (2003) ("While physical disabilities may make others uncomfortable, mental disabilities often instill fear."); George Will, *supra* note 17; Brouwers, *supra* note 155.

and political grandstanding, however, around emotional support animals has contributed to the view of those with mental health issues as persons trying to take advantage of their “victimhood”¹⁶⁵ whether that is by collecting disability insurance benefits in *lieu* of working, or keeping their cat in a no-pets apartment building.¹⁶⁶ The reinforcement of such hostility is especially concerning regarding those with mental health disabilities, who are already marginalized even within the disability community.¹⁶⁷

Such poorly considered laws, such as the law in Oklahoma preventing a provider from accepting payment for providing written documentation of need or the one in California providing a warning of criminal charges with the provision of the written document, are a result of legislatures reacting to media sensationalism as opposed to making serious efforts to solve real problems.¹⁶⁸ In doing so, laws like those in Oklahoma and California further stigmatize both emotional support animal users and service animal users.¹⁶⁹ Under these laws, a person who may be praised for taking medication is instead made an object of suspicion for using an emotional support animal to deal with a similar mental illness.¹⁷⁰ Such stigmas may result in individuals not seeking treatment with an emotional support animal, housing providers not renting to clients with emotional

165. Cohen, *supra* note 19 (describing this narrative as “irresistible” to “media and lawmakers.”).

166. Hernandez-Silk, *supra* note 13, at 330 (“A perfectly healthy person could claim any number of invisible disabilities and that her dog is trained to perform work or tasks related to those disabilities. However, it is discriminatory to presume that only people who need emotional support dogs are more likely to misrepresent their need.”); Dorfman, *supra* note 1, at 1415 (“Common misconceptions, fueled by portrayal in the media, combined with ambiguous and complex rules lacking enforcement mechanisms have all led to stigmas regarding assistance dogs and their handlers.”).

167. Dorfman, *supra* note 1, at 14011. Dorfman also discusses the “emotional burden” of repeatedly “prov[ing] an individual’s disabilities to strangers.” *Id.* at 1412. Brooks, *supra* note 13 (describing how mental health conditions may be more stigmatizing than physical disabilities as they have “greater impact on one’s sense of ‘self’ than physical illnesses, since the surveillance of moral responsibility may be felt more intensely, and levels of isolation and stigma are likely to be greater.”).

168. Dorfman, *supra* note 1, at 1415.

169. *Id.*

170. Cohen, *supra* note 19 (quoting disability rights attorney Matthew Dietz saying, “As a society we treat medication, like Xanax or Prozac, as a more acceptable response to anxiety and depression, even though the costs are so much more and the efficacy may not be as much.”). One of the benefits of emotional support animals is for those wary of the side effects of pharmaceutical intervention. At least one study has found dog ownership to be “a safe and effective nonpharmaceutical approach to treating chronic and progressive neurological disorders.” Catherine M. Boldig & Nitin Butala, *Pet Therapy as a Nonpharmacological treatment option for neurological disorders: A review of the literature*, 13 CUREUS (2021); see Brooks, *supra* note 13 (citing a study finding that those with animal companionship reported needing less medication for symptoms of post-traumatic stress).

support animals, and a disabled person's mental health suffering a compounding negative effect.¹⁷¹

Further, vague or poorly written laws both exacerbate and rely on the suspicion with which the individuals with psychiatric disabilities are already viewed to justify intrusive measures against emotional support animal users for their choice of treatment. The state laws described above affect the intersection of two of the most private areas of a person's life—their health and their home. While it may be reasonable to question the presence of certain animals in certain public locations, such skepticism is inappropriate in the privacy of the home.¹⁷² The traditional stigma against those with psychiatric disabilities provides an explanation for the startling extent to which lawmakers find it appropriate to insert themselves into a healthcare conversation about the best, or most legitimate, treatment options. This level of intrusion is seen less often in the treatment of physical disabilities.¹⁷³

In dealing with this most private area, many of these laws seem to prioritize the wishes of the landlord lobby¹⁷⁴ over that of disabled persons simply trying to ameliorate their depression, anxiety, or post-traumatic stress with a recognized treatment in their own legal home. The specter of

171. COMM. ON THE SCIENCE OF CHANGING BEHAVIORAL HEALTH SOCIAL NORMS, ENDING DISCRIMINATION AGAINST PEOPLE WITH MENTAL AND SUBSTANCE USE DISORDERS: THE EVIDENCE FOR STIGMA CHANGE 49–51 (2016), https://www.ncbi.nlm.nih.gov/books/NBK384915/pdf/Bookshelf_NBK384915.pdf [<https://perma.cc/3XNQ-LVBK>]; Jillian Ferrell, Thesis: *Emotional Support Animal Partnerships: A Multimethod Investigation*, at 120 (2022), (Ph.D. dissertation, Utah State Univ.), <https://digitalcommons.usu.edu/cgi/viewcontent.cgi?article=9701&context=etd> [<https://perma.cc/YX6F-THC9>] (discussing emotional support animals and noting that “[a] defensive, ‘prove it’ approach within policy and the communication of same is detrimental to persons with disabilities who may already experience microaggressions related to their disability on a daily basis.”).

172. As DOJ's rulemaking on service animals made clear, housing is fundamentally different than places of public accommodation. See *Nondiscrimination on the Basis of Disability in State and Local Government Services*, 75 Fed. Reg. at 56,240 and accompanying text. HUD has echoed this position in its rulemaking. *Pet Ownership For the Elderly and People with Disabilities*, 73 Fed. Reg. 63,834, 63,836 (Oct. 27, 2008) (“There is a valid distinction between the functions animals provide to persons with disabilities in the public arena, i.e., performing tasks enabling individuals to use public services and public accommodations, as compared to how an assistance animal might be used in the home. For example, emotional support animals provide very private functions for persons with mental and emotional disabilities.”).

173. *Id.* at 621; see Corn, *supra* note 165, at 617–21 (explaining the legal system's division of physical and mental illnesses often to the disadvantage of those with mental disabilities). Part of this may be the widespread, but mistaken, belief that physical disability cannot be feigned.

174. The aversion of the industry to requirements to allow animals is well known. Rachel M. Cohen, *A Federal Civil Rights Office Wants to Limit Access to Emotional Support Animals that Can Help with Depression*, THE INTERCEPT (Mar. 18, 2019) (“Housing industry groups have been lobbying the Department of Housing and Urban Development to make it harder for tenants to have emotional-support animals.”), <https://theintercept.com/2019/03/18/hud-emotional-support-animal/> [<https://perma.cc/S8E4-4YMU>].

state legislatures interfering with mentally ill individuals' healthcare autonomy by disincentivizing one form of medical treatment is troubling.¹⁷⁵ While the commodification of housing is not a new phenomenon, it is revealing that lawmakers prioritize housing providers' assertion of their right to enforce "no animal" rules over the opinions of medical professionals on what is best for a disabled tenant. It may be more convenient to the housing provider for a tenant to rely on medication rather than the use of an emotional support animal. However, the choice of how to treat a mental health condition is highly personal and between doctor and patient. The stigma attached to mental illness is only exacerbated by laws that treat the need for a support animal to manage their care as a form of taking advantage of the system.¹⁷⁶

3. Unclear State Assistance Animal Misrepresentation Laws Threaten Disabled Individuals and Dissuade Legitimate Healthcare Treatment

While state legislatures may pass statutes criminalizing misrepresentations by doctors or individuals relating to emotional support animals, there are serious questions about how those statutes will be enforced. The establishment of tip lines and police enforcement of these provisions could be misused by well-meaning but suspicious housing providers, housing providers with the intent to dissuade disabled individuals from applying for tenancy or requesting an accommodation for their emotional support animal, and unfriendly neighbors. In addition, housing providers may believe themselves to be empowered by state law to undertake an investigation of a tenant's emotional support animal, when in fact that provider may be liable under federal fair housing law for retaliation or interference with the tenant's fair housing rights.¹⁷⁷

Of particular concern is the lack of detail on how an investigation would proceed and how a person would prove that their animal is an assistance animal. It is uncertain whether investigators of a person's stated disability status and need for an emotional support animal would speak directly to the health care professional or review the medical files of the individual. Similarly, it is unknown whether healthcare providers targeted

175. Shelter is at the most fundamental level of the hierarchy of needs popularized by A.H. Maslow. Sara K. Rankin, *Punishing Homelessness*, 22 CRIM L. REV. 99, 130 (2019).

176. See Cohen, *supra* note 19 (quoting disability rights attorney Matthew Dietz as stating, "The person with the disability should be the one in charge of their own health and the way they care for themselves.").

177. 42 U.S.C. § 3617. Objectively baseless lawsuits can be retaliation under the FHAA. See *Sabal Palm Condos. of Pine Island Ridge Ass'n v. Fischer*, No. 12-60691-Civ-SCOLA, 2014 U.S. Dist. LEXIS 32705, at *66-72 (S.D. Fla. Mar. 13, 2014).

under laws like Wisconsin's would need to share private medical information to defend letters questioned under the law. Doing so would require inquiry into sensitive mental health issues about the nature and severity of a disability, which is barred by the FHAA.¹⁷⁸

It is uncertain how a person would prove that their need for an assistance animal is not fraudulent. Poorly written laws may create an enforcement regime where any person unable to provide reasonably reliable documentation of their disability and need for the animal during the renting process is presumptively violating the law. By presuming that an individual would need to provide some sort of evidence of disability and need for the animal, these laws are likely to disproportionately target low-income populations who may legitimately need emotional support animals but do not have access to reliable, affordable, or accessible mental health services. Further, unique terminology used by different states in these laws will contribute to confusion in public. As one commentator stated in discussing the confusion among business owners and the public, "most of those laws have to do with trying to pass off an animal as a service dog, when there is no disability-related need, rather than [passing off pets as] emotional support animals, adding to the confusion."¹⁷⁹ Having the public file complaints with law enforcement, when many lawyers and lawmakers are confused about these terms,¹⁸⁰ is a recipe for the abuse of those individuals with disabilities who legitimately need their assistance animals.

Considering the lack of clarity on essential enforcement information, the uncertainty of how to even report a violation, and the fact that it is unlikely that states and localities seriously want to use police or administrative resources to investigate or litigate claims of support animal fraud, it seems apparent that these laws are not intended to create real consequences for those who allegedly violate them.¹⁸¹ Instead, the purpose of the laws appear two-fold: (1) performative, by legislatures showing constituents that they are doing something about this problem; and (2) deterrence, by making individuals think twice before passing their pets off

178. *Assessing a Person's Request to Have an Animal as a Reasonable Accommodation Under the Fair Housing Act*, *supra* note 79, at 14; 24 C.F.R. § 100.202(c).

179. Povich, *supra* note 94.

180. AVMA PUB. POL'Y/ANIMAL WELFARE DIV., *Assistance Animals: Right of Access and Problem of Fraud*, at 3 (Feb. 24, 2022) (describing the interplay of various laws as "a legal and regulatory framework that is complex and poorly understood by those who must implement it").

181. Cordova, *supra* note 56, at 259 (explaining that these laws will not be able to punish individuals "without running the risk of dragging legitimate handlers into court over and over again."); Laura Lawless, *Arizona Law Aimed at Curbing Service Dog Fraud May Be All Bark, No Bite*, NAT. LAW REV. (Apr. 23, 2018), <https://www.natlawreview.com/article/arizona-law-aimed-curbing-service-dog-fraud-may-be-all-bark-no-bite-us> [<https://perma.cc/QE9U-H7CK>].

as emotional support animals. However, states fail to consider that these laws will also have a chilling effect on those who truly need their animals as reasonable accommodations, who may already struggle with mental health issues, and who may now also think twice before asserting their fair housing rights.¹⁸² Further, such laws will also chill healthcare professionals who, instead of putting their patients' needs first, must now consider if and how law enforcement will second-guess their recommendations. As a result, providers may decide not to take patients who are assisted by an animal or may decide not to recommend the use of an animal even in situations where they believe it would help. The uncertainty created by these laws interfere with the doctor-patient relationship in a way that puts responding to media sensationalism over the needs of disabled citizens.

A more effective avenue for law enforcement is the regulation of those companies selling "service animal" or "emotional support animal" clothing or equipment and those businesses which fraudulently claim to certify and register animals as emotional support animals.¹⁸³ For example, a recent report described how there are "countless online sources that will, for the right price, 'certify' a pet as an assistance animal after a brief, online questionnaire. The organization will then send that person a certificate, harness, etc. so the pet will appear to be an assistance animal."¹⁸⁴ This report concluded the availability of fraudulent materials was a significant issue and that law and other efforts could eliminate them.¹⁸⁵ While some states have already passed laws to restrict access to these materials and emotional support animal cards or certificates, federal legislation preventing the sale of any certification or registration of emotional support animals or assistance animals other than service animals would be a significant step toward clarifying the law and limiting fraud that does exist.¹⁸⁶ This would not limit the use of telemedicine or video visits to legitimate healthcare providers, but would rather only

182. Cohen, *supra* note 19; RENTAL HOUS. J., *Lying About an Emotional Support Animal in Utah May Become a Misdemeanor* (Feb. 20, 2019), <https://rentalhousingjournal.com/lying-about-an-emotional-support-animal-in-utah-may-become-a-misdemeanor/> [<https://perma.cc/U84U-C2K2>].

183. Cordova, *supra* note 56, at 276; See Foster, *supra* note 1, at 245.

184. AVMA PUB. POL'Y/ANIMAL WELFARE DIV., *Assistance Animals: Right of Access and Problem of Fraud* 1, 9 (Feb. 24, 2022).

185. *Id.* at 9–14.

186. *Id.* at 14; see also Younggren, et al., *Examining Emotional Support Animals and Role Conflicts in Professional Psychology*, 47 PROF. PSYCH. RSCH. & PRAC. 255, 255–260 (2016), https://www.researchgate.net/publication/303779365_Examining_Emotional_Support_Animal_s_and_Role_Conflicts_in_Professional_Psychology [<https://perma.cc/JL24-T58E>] (describing the multiple online services providing "certification").

address online businesses that allegedly “certify” an emotional support animal for a fee, without providing healthcare services, and would target the purveyors of the merchandise as opposed to disabled individuals who may not realize they are buying a meaningless certificate.¹⁸⁷ Further, to make sure that service animal vests and other identifying gear are not used by other assistance animal users, legislation could limit the sale of these to disabled individuals who have provided proper documentation to qualified service animal trainers. Such laws would directly address the issue of those businesses profiting off of and contributing to the confusion regarding emotional support animal certification, which would more effectively address the issue of fraudulent misrepresentation than performative and largely unenforceable laws targeting individuals who use emotional support animals.

4. Creating Confusion over the Relevant Standards for Emotional Support Animals Increases Housing Provider Liability

An unintended consequence of the promulgation of these state laws on emotional support animals is the false sense of security they provide for landlords. Housing providers hear about their state representatives passing laws to “solve” the problem of emotional support animal fraud and assume that they cannot incur liability by insisting documentation meet the heightened requirements of these state laws. However, the protection afforded to landlords by these state laws is illusory, protecting them from certain state law claims while leading to potential liability under the FHAA.¹⁸⁸

This confusion is exacerbated when the media seeks to explain the intersection of medical or legal issues. For instance, in 2021, a dramatic story entitled “Ohio cracks down on fraudulent behaviors surrounding emotional support animals” appeared on a local Ohio news website.¹⁸⁹ The article stated that people have claimed peacocks, pigs, and kangaroos as emotional support animals before explaining that now “only ESA letters written by an Ohio licensed practitioner are legal and valid.” It went on to explain that, “[t]he mental health professional must have met with patient/client face to face and have been treating them for a minimum of six months,” and quotes an Ohio doctor who states that a provider’s letter

187. See Cohen, *supra* note 19 (explaining that “plenty of people who turn to these sites have real needs and may not understand that what they’re doing is illegitimate.”).

188. See Basalla, *supra* note 131, at 153.

189. Suzanne Stratford, *Ohio cracks down on fraudulent behaviors surrounding emotional support animals*, FOX 8 CLEVELAND (Feb. 17, 2021), <https://fox8.com/news/ohio-cracks-down-on-fraudulent-behaviors-surrounding-emotional-support-animals/> [<https://perma.cc/5AYB-SC5F>].

for an emotional support animal will now “have the name of the provider, their license number, mental health diagnosis and the symptomatology that ESA is alleviating.”¹⁹⁰ However, despite the assertions in the article, none of these requirements are, or have ever been, requirements of Ohio law.¹⁹¹ Instead, without clearly explaining it and while still using language about what is “legal” in Ohio, these requirements are only suggested “best practice” guidelines that were proposed in the *Journal of Psychosocial Rehabilitation and Mental Health*.¹⁹² In other words, while a housing provider reading the article might feel confident that in rejecting out-of-state emotional support animal documentation and from providers who have seen the individual for less than six months, none of these are legal requirements even under state law, and actually may lead to liability under federal law.¹⁹³

While it could be assumed that in crafting their reasonable accommodation policies, housing providers will consult legal counsel who will research and understand the distinction between laws, most rental units are not owned by large companies with legal departments. 41% of rental units are owned by individuals.¹⁹⁴ In properties with 1-unit and 2-to-4 units, individual owners accounted for 72.5% of all owners.¹⁹⁵ Small landlords may not have a reasonable accommodation policy or any understanding of their requirements under the FHAA, nor have counsel to develop or review any existing policies. And even where counsel is involved, they have been shown not to be immune from confusion resulting from the difference between service and emotional support animals under the ADA and FHAA.¹⁹⁶ A review of publicly available documents posted by HUD about charges brought based on the failure to

190. *Id.*

191. OH. REV. STAT. § 2927.03.

192. Janet Hoy-Gerlach, et al., *Emotional Support Animals in the United States: Emergent Guidelines for Mental Health Clinicians*, 6 J. PSYCHOSOC. REHABIL. MENTAL HEALTH 199–208 (2019), https://www.researchgate.net/publication/335371862_Emotional_Support_Animals_in_the_United_States_Emergent_Guidelines_for_Mental_Health_Clinicians [<https://perma.cc/4XXG-S6H2>].

193. Dorfman, *supra* note 1, at 1369 (giving another example of media reporting that fails to correctly report “the actual legal regime that governs assistance animals – and emotional support animals in particular.”).

194. Scholastica Corp., *Landlord Statistics from the 2018 Rental Housing Finance Survey*, NATL. ASSOC. OF REALTORS (Sept. 15, 2020), <https://www.nar.realtor/blogs/economists-outlook/landlord-statistics-from-the-2018-rental-housing-finance-survey> [<https://perma.cc/D84F-2HYW>]. Corporate entities account for a majority of owners for properties with more than 25 units. Dorfman, *supra* note 1, at 1369.

195. *Id.*

196. *See* Complaint, U.S. v. Brooklyn Park Leased Housing Assoc., No. 0:15-cv-02489-PJS-HB, ¶ 30 (Minn. May 18, 2015).

make a reasonable accommodation for an emotional support animal demonstrates multiple instances where liability seems to have been based, at least partly, on the landlords' (or even their lawyers') misunderstanding of emotional support animal law.¹⁹⁷ The proliferation of state laws on this subject will only intensify this confusion.

This confusion is understandable, considering that medical publications are not immune from providing confusing and contradictory statements that could contribute to housing provider liability. A 2023 article in *Psychology Today* expressly stated that the American Psychiatric Association (“APA”) “does not recommend that psychiatrists write ESA letters for their patients.”¹⁹⁸ However, the APA Resource Document linked in the article does not say this.¹⁹⁹ Instead, after discussing local laws on emotional support animals that may apply to medical practitioners, the APA document only says that evidence is mixed, inferences of positive impacts can be taken from studies on pet ownership, and “it is ethically permissible to decline to write an ESA letter.”²⁰⁰ Stating that there is no requirement a provider write an ESA letter is a far cry from stating that no such letters should be written. But, as with much of the media attention on this issue, the *Psychology Today* article does not pretend to be objective. Instead, it begins with the author’s anecdote of meeting a woman claiming ADA protections for emotional support animals and ends with an anthrozoologist speculating that the scourge of emotional support animals will soon “spread[] to other countries.”²⁰¹ This article presents an example

197. Charge of Discrimination, *HUD v. Daneshgar*, ¶ 31 (Sept. 30, 2022), <https://www.hud.gov/sites/dfiles/FHEO/documents/Lily%20and%20Shahram%20Daneshgar%20et%20al%202-21-8145-8%20-%20Charge%20of%20Discrimination%20%28002%29.pdf> [<https://perma.cc/NFQ4-SPQE>] (charging Respondent with requiring that assistance animal be certified); Charge of Discrimination, *HUD v. Spring Creek Homeowners Assoc.*, ¶¶ 12–13 (July 12, 2022), https://www.hud.gov/sites/dfiles/FHEO/documents/Charge%20Spring%20Creek%20_7_12_22.pdf [<https://perma.cc/52VT-YGXP>] (charging Respondent with requiring paperwork substantially similar to commercial airlines); Charge of Discrimination, *HUD v. Dahms Inv.*, ¶ 21 (Jan. 21, 2021), <https://www.hud.gov/sites/dfiles/FHEO/documents/21CharDahmsInvestments.pdf> [<https://perma.cc/V6MY-HUME>] (charging Respondent with allowing accommodations for “blind and deaf people” and telling Complainant she did not look like a disabled person); Charge of Discrimination, *HUD v. Perry Homes, Inc* ¶¶ 12–15 (Feb. 10, 2021), <https://www.hud.gov/sites/dfiles/FHEO/documents/21charSWLSvPerryHomes.pdf> [<https://perma.cc/6NLK-5ABC>] (charging Respondents with only accommodating service animals).

198. Hal Herzog, *The Use and Misuse of Emotional Support Animals*, *PSYCH. TODAY* (Feb. 13, 2023), <https://www.psychologytoday.com/us/blog/animals-and-us/202302/the-use-and-misuse-of-emotional-support-animals> [<https://perma.cc/SR7H-CANG>].

199. APA Resource Document, *Resource Document on Emotional Support Animals*, 5–7 (June 2022), <https://www.psychiatry.org/getattachment/3d42da2a-9a4d-4479-869f-4dd1718f1815/Resource-Document-Emotional-Support-Animals.pdf> [<https://perma.cc/5NWZ-PPG5>].

200. *Id.* at 7.

201. Herzog, *supra* note 199.

of a responsible healthcare association providing a helpful resource document that is then exaggerated and misrepresented in the media and from which housing providers, their lawyers, and local legislatures may take the wrong message.

In this way, state laws that have been passed to protect landlords from fraudulent emotional support animal accommodations have instead exposed these housing providers to a risk of federal liability. In attempting to show constituent housing providers they are cracking down on emotional support animals, these state legislatures have all but guaranteed that some of their housing providers will be liable for discrimination under the federal FHAA.

D. Many States Emotional Support Animal Laws Substitute Lawmaker and Landlord's Judgment for Provider and their Patient's Judgment

Like these state laws, there are many proposals to address the problem of vague federal guidelines for emotional support animals. However, rather than focusing on the issue of reasonable accommodations in housing under the FHAA, many of these proposals seek to address the issue of emotional support animals at restaurants, hotels, movie theaters and other places of public accommodation regulated by the ADA. Some proposals assert that emotional support animals should be treated as service animals, with the limited inquiry allowed by the ADA being varied slightly and, in essence, removing the requirement for documentation from a health care provider.²⁰² Others suggest that this would only exacerbate the allegedly massive fraud problem and would instead keep service animals as their own category and narrow the definition of emotional support animals in housing to only cats, dogs, and miniature horses with limits on weight or breed based on size and type of housing.²⁰³ Many proposals suggest a national certification program and registry,²⁰⁴ despite the privacy concerns, stigma, time-delays, and gatekeeping that would come with such "registration" as a disabled person.²⁰⁵

202. Hernandez-Silk, *supra* note 13, at 328; See Foster, *supra* note 1, at 241–43.

203. Tallulah Lanier, *(Emotional Support) Peacocks on a Plane: Revising Federal Reasonable Accommodations Laws for Emotional Support Animals*, 9 IND. J. L. & SOC. EQUALITY 201, 232–37 (2021).

204. Jake Butwin, *Emotional Support Animals Are More Than Just Pets: It Is Time for the Department of Justice to Align Its Emotional Support Animal Policies with Other Anti-Discrimination Laws*, 47 FORDHAM URB. L.J. 195, 225 (2020); Fantaski, *supra* note 1, at 963–65 (suggesting a possible team within the Department of Justice to enforce registration requirements); Hernandez-Silk, *supra* note, at 13, at 318–19; Bourland, *supra* note 13, at 211–15.

205. Dorfman, *supra* note 1, at 1410–12 (describing the privacy issue and possibility of "hyper gatekeeping"); see also Bourland, *supra* note 13, at 214–17 (describing optimistically

Many of these proposals still interfere with the patient's relationship with providers and substitute the judgment of legislatures or government employees for that of the individual and their healthcare provider. Instead, health care professionals should determine whether an emotional support animal provides a resident with disability support that helps them use and enjoy their dwelling. And health care professionals who violate their profession or medical association's rules on this matter should face consequences from that body. As illustrated by the Ohio example above, the difficulty is crafting rules for the profession that take account of the concerns set forth above and that do not exclude individual with a valid need for emotional support animals among the disabled or disabled low-income population.

The state laws set forth above—and even some proposals in legal and medical journals—start from a presumption that a massive fraud is being perpetrated on society by those seeking emotional support animals.²⁰⁶ For example, the Ohio proposal requires a person be in therapy for six months with the same provider before they can get documentation supporting the need for an emotional support animal. These types of barriers completely ignore the difficult reality of establishing and maintaining such a relationship, as well as the reality of seeking housing or living in rental housing while awaiting a needed accommodation.²⁰⁷ A person moving to a new state would need to establish housing with approval for their assistance animal immediately and cannot wait to establish housing until they have established a medical relationship of six months. Such a person may be confronted with rehoming, even temporarily, their animal, to comply with lease provisions, having a reasonable accommodation denied at move-in because no documentation can be provided, or sneaking their animal in with the hope of being able to provide documentation after six months. The stress from such requirements—and the deception they naturally encourage—can further burden individuals already with psychiatric issues and may counteract some of the positive psychological benefits of the emotional support animal.²⁰⁸

the number of people with access to such a federally mandated, but state-based disability certification program like that for handicapped parking as “very limited,” while also proposing a possible task force to investigate alleged fraud).

206. See Tobia, *supra* note 113; CAL. HEALTH & SAFETY CODE § 122318(a)(5); IND. CODE § 22-9-7-10(b); IND. CODE § 22-9-7-4; see also Fantaski, *supra* note 1, at 959 (2020) (“Misrepresenting pets as service animals has become an epidemic in today’s society”).

207. See Basalla, *supra* note 131, at 153; Stratford, *supra* note 190.

208. Cohen, *supra* note 19; Boldig, *supra* note 171; see Brooks, *supra* note 13.

A less dogmatic approach was suggested in a 2020 article in *Professional Psychology: Research and Practice*.²⁰⁹ This article suggests that health care professionals consider four main points when considering whether to write an accommodation letter: (1) their understanding of laws regulating emotional support animals, (2) a thorough assessment of the individual requesting the documentation, (3) an assessment of the animal itself, and (4) an assessment of how the animal helps the individual.²¹⁰ While this framework also has issues, particularly the professional's consideration about how the animal behaves in unfamiliar situations,²¹¹ and the suggestion that the health care professional meet the client both with and without the animal,²¹² it at least succeeds in creating a flexible, legally-based framework for health care professionals to work without establishing hard and fast rules for when a letter can be written, and ensures that practitioners understand that the request is one that requires serious thought and evaluation, rather than just doing a favor for a client.²¹³ While the proposals discussed above are well intentioned, such medical proposals for evaluating emotional support animal requests should focus on establishing factors, not requirements, for the mental health professional to consider when writing an accommodations letter, as hard and fast rules as to the type of provider-patient relationship or requirements of the medical evaluation could serve as deterrents for individuals with disabilities who legitimately need an emotional support animal.

By leaving the issue of emotional support animals and their benefits to disabled individuals and their healthcare providers, we can best provide access to what may be the most effective treatment. While there is an interest in preventing disreputable persons from passing off pets as emotional support (or service) animals, the healthcare community can address this concern by creating flexible guidelines and factors for discussing the need for an animal as a type of treatment with patients. But these guidelines should be developed with the understanding that barriers to care exist for low-income or other underrepresented individuals. In addition, the healthcare community should be willing to police their own and establish real penalties for providers who issue unsupported

209. Younggren, *supra* note 186, at 156–162.

210. *Id.*; Ferrell, *supra* note 172, at 36, 49 (providing a decision tree with factors to be considered by mental health professionals, including the animal's welfare as a possible factor to be considered).

211. Younggren, *supra* note 186, at 156–162; *see* Herzog, *supra* note 199 (breaking with the APA Resource Document's recommendation).

212. *Id.*

213. *Id.*

documentation as a favor or without seriously considering the issue in a professional manner. Healthcare professionals and their associations taking a greater role in developing guidelines and advice on this issue, combined with federal legislation to combat meaningless certifications and inappropriate gear, can make a meaningful difference to reduce inappropriate requests, educate the public, and assure individuals have the support they need. At the same time, stronger guidelines can prevent state legislatures, inflamed by the media, from stepping in with ill-considered laws that intrude on and interfere with the doctor-patient relationship.

CONCLUSION

State legislative solutions to the “problem” of emotional support animal fraud have done very little to fix the perceived problem and have actually increased the risk of federal liability for local landlords. Further, a federal legislative solution would create many of the problems seen in the relevant state laws, where it is difficult to set strict requirements for health relationships considering that underserved disabled populations may have difficulty obtaining consistent behavioral health services. Instead, the most appropriate solution is one in which the medical profession regulates itself. Healthcare professionals who are well-versed in the diagnostic process should create the guidelines for best issuing accommodation letters for those who would best be treated with emotional support animals. The decision to allow use of emotional support animals should not be dictated by state legislatures influenced by public misperceptions of disabilities. Where neither landlords nor lawyers have the experience or training necessary to evaluate an individual’s health or need for an animal, it falls to the healthcare community itself to both guide and regulate its own without state or local government inserting themselves into these private doctor-patient decisions.