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The Tenant Who Cried Wolf: How Fake Emotional Support Animals Unfairly Prejudice Landlords While Stigmatizing Mental Health

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The Tenant Who Cried Wolf: How Fake Emotional Support Animals Unfairly Prejudice Landlords While Stigmatizing Mental Health

Christy Grellas*

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I. INTRODUCTION

One day, Chris Slavin and her service dog, Earle, were in an elevator when a woman entered carrying a teacup poodle in her purse.¹ When the poodle spotted Earle, the poodle instantly attacked; the poodle’s bites caused Earle to bleed profusely on the elevator floor.² Earle did not respond when the poodle attacked him.³ As a service dog, Earle will never move, retaliate, or bark without his handler’s permission.⁴ When Slavin questioned the woman following the attack, the woman first identified the poodle as a service dog.⁵ Then, she said he was an emotional support animal (“ESA”).⁶ Finally, she confessed that “he was a pet she just wanted to bring in the building with her.”⁷

Despite recent news of service animal fraud, many use ESAs as a legitimate way to cope with mental health issues stemming from traumatic experiences.⁸ Tiffany Thayne’s ESA helps her with post-traumatic stress disorder, depression, and anxiety she developed after a serious car accident.⁹ The accident left many of her friends gravely injured and, unfortunately, also killed one.¹⁰ Thayne’s conditions worsened after her sister died in 2018.¹¹ Her border collie helps give her the will to get out of bed in the morning.¹² Thayne disapproves of people who abuse the ESA system because that abuse “makes it harder for people who actually need the dogs.”¹³

The Fair Housing Act (“FHA”) provides a framework of laws about permitting support animals in residential dwellings.¹⁴ The FHA is a federal law that prevents landlords from discriminating against certain classes of tenants and potential

1. Michael Ollove, *Tightening the Leash on Fake Service Dogs*, STATELINE (Oct. 16, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/10/16/tightening-the-leash-on-fake-service-dogs> (on file with the *University of the Pacific Law Review*).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Ollove, *supra* note 1.

8. *See generally Landlords Grapple with Rise in Emotional Support Animals*, AP NEWS (Mar. 23, 2019), <https://www.apnews.com/0af058f586d74229b92f838c219e95a8> (on file with the *University of the Pacific Law Review*) (recounting the stories of survivors of traumatic experiences who have ESAs to cope with the trauma).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. 42 U.S.C.A. § 3604(a)–(f) (West 2020).

tenants.¹⁵ The FHA lists disability as a protected class.¹⁶ Further, the FHA defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”¹⁷ Therefore, even if landlords have a “no pets” policy, they must provide reasonable accommodations to tenants requiring a service animal or ESA on the rented property.¹⁸

Currently, the FHA does not clearly define to what extent a landlord must provide an accommodation for those with mental and emotional disabilities—other than the accommodation must be reasonable.¹⁹ Establishing a working definition is necessary to prevent litigation while also respecting tenants’ rights under the FHA.²⁰ To provide a meaningful definition of reasonable accommodation, the FHA should consider loopholes that allow tenants to fraudulently register their pets as ESAs.²¹ Congress must enact legislation that recognizes landlords’ rights while also protecting the interests of people with legitimate mental and emotional needs.²² Such legislation is necessary to reduce falsified ESA registration and remove the stigma surrounding mental health.²³

To protect both landlords and people with legitimate mental and emotional needs, federal legislation should address the ESA handler’s qualification and the animal’s socialization and training.²⁴ By giving landlords more legal protection through liability limitations while also providing greater protection to tenants with actual needs, these proposed changes will motivate landlords to provide housing to tenants with ESAs.²⁵ To close the loopholes, this Comment proposes two additions to federal law: (1) Congress should require that ESA documentation comes from a mental health care provider who had substantial professional opportunity to observe the patient requesting an ESA prescription; and (2) Congress should include adequate household and socialization training

15. *Id.*

16. 42 U.S.C.A. § 3604(f).

17. 42 U.S.C.A. § 12102(1)(A) (West 2020).

18. 42 U.S.C.A. § 3604(a)–(f).

19. *See generally* 42 U.S.C. § 3604(f)(3)(C) (failing to include examples of accommodations for persons with mental and emotional health conditions).

20. *See* 42 U.S.C.A. § 3604(f)(3)(C) (West 2020) (lacking a clear definition of reasonable accommodation).

21. *Compare id.* (failing to include examples of accommodations for persons with mental and emotional health conditions), *with infra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).

22. *See generally* 42 U.S.C.A. § 3604(f)(3)(C) (failing to include examples of accommodations for persons with mental and emotional health conditions).

23. *Compare id.* (failing to include examples of accommodations for persons with mental and emotional health conditions), *with infra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).

24. *See generally* 42 U.S.C.A. § 3604(f)(3)(C) (failing to include examples of accommodations for persons with mental and emotional health conditions).

25. *See generally id.* (failing to include substantive parameters for what constitutes as a reasonable accommodation); *infra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).

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qualifications for ESAs.²⁶

This Comment begins by providing background on service animals, ESAs, and the standards that exist today regarding their qualification.²⁷ Part III discusses the FHA and local laws that conflict with the FHA.²⁸ Part IV proposes federal legislation to address the FHA's loopholes that unfairly prejudice landlords and raise doubt about the legitimacy of individuals with mental and emotional health needs.²⁹ Part V notes potential issues with the proposed regulation of ESAs but ultimately concludes that those issues do not outweigh the benefits to both landlords and the individuals the FHA seeks to protect.³⁰

II. SUPPORT ANIMALS AND THE EMERGENCE OF ESAS

Society often neglects the unique experiences of individuals with mental and physical disabilities.³¹ It was not until after World War I that the United States developed rehabilitation and accommodation legislation for disabled persons.³² Section A provides an overview of the Americans with Disabilities Act ("ADA") to present relevant law that precedes the emergence of ESAs.³³ Section B reviews the ADA's guidelines for handling service animals to use as a framework to draft recommended amendments to the FHA.³⁴ To provide context to the existing loopholes, Section C discusses the emergence of ESAs and how the certification differs from the ADA.³⁵

A. Emergence of the ADA

When injured veterans returned home from World War I, society had to reassess its treatment of disabled persons.³⁶ Federal legislation addressing soldiers' return to the workplace became the framework for current legislation regarding mental and emotional disabilities.³⁷ After back-to-back world wars and the age of industrialization, many workers sustained disabilities.³⁸ To address this growing

26. *Infra* Part IV.

27. *Infra* Part II.

28. *Infra* Part III.

29. *Infra* Part IV.

30. *Infra* Part V.

31. ADA – *Findings, Purpose, and History*, ADA NAT'L NETWORK, https://www.adaanniversary.org/findings_purpose (last visited Oct. 26, 2019) (on file with the *University of the Pacific Law Review*).

32. *Id.*

33. *Infra* Section II.A.

34. *Infra* Section II.B.

35. *Infra* Section II.C.

36. ADA – *Findings, Purpose, and History*, *supra* note 31.

37. *Id.*

38. *Id.*

issue, various rehabilitation organizations advocated for legislative reform of services for disabled persons.³⁹ As a result, policies concerning disabled persons progressed from segregation to “humanization . . . based on qualities of deservedness, normalcy and employability.”⁴⁰

With the civil rights movement as a model, the disability rights movement of the 1970s sought realization of the capabilities of disabled persons.⁴¹ The National Council on Disability—a federal agency—recommended civil rights legislation that became the ADA.⁴² At the ADA’s signing, President George H. W. Bush avowed that “every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”⁴³ Along these same lines, in 2008, Congress overturned the Supreme Court’s narrow interpretation of “disability” to favor broad coverage of disabled persons.⁴⁴ In addition, Congress warned against an exhausting analysis of whether a person has a disability.⁴⁵ Whether defined broadly or not, a disability is still a prerequisite to receive protection under the ADA.⁴⁶

B. Service Animals are Not Pets

Under the ADA, a service animal is a dog trained to perform tasks or work for a disabled person.⁴⁷ Dogs—and miniature horses under specific circumstances—are the only animals the ADA permits.⁴⁸ The rationale for this restriction is that dogs and miniature horses are capable of complying with the ADA’s strict training and socialization requirements.⁴⁹ From a legal standpoint, “service animals are working animals, not pets.”⁵⁰ The handler’s disability must directly relate to the dog’s task or work training.⁵¹ Handlers can train their service dogs to do various tasks, including guiding blind persons, alerting and protecting those who are deaf or who have seizures, and reminding their handlers to take medication.⁵²

The ADA requires service animals to have the requisite training before the

39. *Id.*

40. *Id.*

41. *Id.*

42. ADA – Findings, Purpose, and History, *supra* note 31.

43. *Id.*

44. *Id.*

45. *Id.*

46. See 42 U.S.C.A. § 3604(f) (West 2020) (limiting the protection against discrimination in the rental of a dwelling to disabled tenants and those associated with the tenant).

47. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS (2011), https://www.ada.gov/service_animals_2010.htm (on file with the *University of the Pacific Law Review*).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

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handler can bring the dog to public places that prohibit pets.⁵³ Then, the property owner or staff may ask the handler if the animal assists with the handler's disability and what task or work the dog performs for the handler.⁵⁴ The ADA prohibits staff from asking about the particular disability, requiring documentation or proof, or requesting the handler to demonstrate the animal's training.⁵⁵

Although the ADA restricts questioning to the service animal's purpose and requisite training, the handler must have constant control over the service animal.⁵⁶ Proper harnessing or leashing must sufficiently tether the service animal to the handler, unless the harness or leash interferes with the task or disability.⁵⁷ If a harness or leash does not work, the handler must control the service animal through voice commands or training devices.⁵⁸ Handlers must house-train their service animals, meaning the animals should not accidentally relieve themselves indoors.⁵⁹ If the animal becomes uncontrollable or inappropriately relieves itself, only after a warning may staff ask the handler to remove the service animal.⁶⁰ Overall, the ADA's parameters regarding specialized training are effective because they make it easy for others to distinguish service dogs from ordinary pets.⁶¹ Instituting similar regulations for ESAs is necessary to differentiate this subcategory of support animals from conventional pets.⁶²

C. *Emergence of ESAs*

Approximately 20% of Americans experience mental and emotional health issues every year.⁶³ Suicide is the tenth leading cause of death for all Americans

53. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA (2015), https://www.ada.gov/regs2010/service_animal_qa.html (on file with the *University of the Pacific Law Review*).

54. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47.

55. *Id.*

56. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA, *supra* note 53.

57. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See generally id.* (listing several specific training and socialization requirements that distinguish service animals from ordinary pets and ESAs).

62. *Compare id.* (outlining ADA service dog requirements), with Stephanie Gibeault, *Everything You Need to Know About Emotional Support Animals*, AM. KENNEL CLUB (Oct. 3, 2019), <https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals/> (on file with the *University of the Pacific Law Review*) (acknowledging that ESAs have a significantly lower training requirement threshold).

63. *Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/learn-more/mental-health-by-the-numbers> (last visited Sept. 7, 2019) (on file with the *University of the Pacific Law Review*); *Mental Illness*, NAT'L INST. OF MENTAL HEALTH, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#part_154785 (last updated Feb. 2019) (on file with the *University of the Pacific Law Review*).

and second for persons aged between ten and thirty-four.⁶⁴ An average of twenty-two veterans commit suicide every day.⁶⁵ More than 90% of suicide victims show signs of mental and emotional health conditions.⁶⁶ In a survey conducted by The Human Animal Bond Research Institute and Cohen Research Group, a substantial majority of pet owners reported improvements in mental health after acquiring a pet.⁶⁷ Further, virtually all pet owners agreed their pets are essential to their family dynamic.⁶⁸

Currently, the ADA does not recognize ESAs under its umbrella because ESAs do not have the requisite verifiable training to assist with a specific disability.⁶⁹ Handlers with the same or comparable mental and physical disabilities have both ADA service animals and ESAs; the animal's classification depends on its training and qualifications.⁷⁰ If a dog can detect a seizure and lessen the seizure's impact, it is an ADA service animal.⁷¹ However, if the dog simply offers comfort while the handler is seizing, it is an ESA.⁷²

To qualify for an ESA, a licensed mental health professional must diagnose a patient with a disabling mental or emotional condition.⁷³ Licensed mental health professionals include psychologists, social workers, and mental health counselors.⁷⁴ After diagnosis, the licensed mental health professional may opt to prescribe an ESA to the patient via a letter.⁷⁵ The major distinction between ESAs and ADA service dogs is the training requirement.⁷⁶ ESAs do not perform specific tasks or work for their handler; rather, they provide general emotional support.⁷⁷ Due to the absence of training or species requirements, any animal is potentially eligible to be an ESA.⁷⁸

64. *Suicide*, NAT'L ALLIANCE ON MENTAL ILLNESS, <https://www.nimh.nih.gov/health/statistics/suicide.shtml> (last visited May 23, 2020) (on file with the *University of the Pacific Law Review*).

65. JANET KEMP & ROBERT BOSSARTE, U.S. DEP'T OF VETERANS AFFAIRS, MENTAL HEALTH SERVS., SUICIDE DATA REPORT, 2012, at 15 (2012), <http://www.va.gov/opa/docs/Suicide-Data-Report-2012-final.pdf> (on file with the *University of the Pacific Law Review*).

66. E.T. Isometsä, *Psychological Autopsy Studies – A Review*, 16 EUR. PSYCHIATRY 379, 379 (2001) (on file with the *University of the Pacific Law Review*).

67. *Survey: Pet Owners and the Human-Animal Bond*, HUM. ANIMAL BOND RES. INST. (2016), <https://habri.org/2016-pet-owners-survey> (on file with the *University of the Pacific Law Review*).

68. *Id.*

69. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA, *supra* note 53.

70. *See id.* (providing an example of a dog's response to an anxiety attack to distinguish between an ADA service dog and an ESA).

71. *Id.*

72. *Id.*

73. Gibeault, *supra* note 62.

74. 42 U.S.C.A. § 254c-19(b)(2) (West 2020).

75. Gibeault, *supra* note 62.

76. *Id.*

77. *Id.*

78. *See id.* (distinguishing service dog training requirements from ESA training requirements).

III. REASONABLE ACCOMMODATION UNDER THE FHA

The FHA prohibits landlords and other housing providers from discriminating against persons because of race, color, religion, sex, national origin, familial status, or disability.⁷⁹ Section A summarizes the FHA's regulations.⁸⁰ Section B examines case law pertaining to reasonable accommodation to support the notion that loopholes in the law exist.⁸¹

A. Disability as a Protected Class

The protected class of "disability" includes individuals with a physical, mental, or emotional condition that "substantially limits one or more major life activities."⁸² It also includes people who have records of the condition or whom others regard as having the condition.⁸³ The phrase "major life activities" includes performing manual tasks, caring for oneself, sleeping, thinking, working, and communicating.⁸⁴ The phrase also includes "major bodily functions," such as neurological and brain functions.⁸⁵ Direct providers of housing cannot discriminate in the sale or rental of a dwelling because of the buyer's or renter's disability or due to the disability of any person intending to reside in the dwelling.⁸⁶ Further, landlords cannot discriminate by altering the terms, conditions, or privileges of the agreement because of a disability.⁸⁷ Landlords may only request the tenant provide a letter prescribing the companion animal from the tenant's therapist, physician, psychiatrist, or other health care provider.⁸⁸

Under the FHA, "discrimination" includes refusing to make reasonable accommodations and modifications to the premises.⁸⁹ Amendments to the rules, practices, services, or policies that prohibit disabled persons from equal opportunity to fully enjoy the dwelling fall below the standard of reasonable accommodation.⁹⁰ Therefore, increased pet deposits and rent would constitute

79. 42 U.S.C.A. § 3604(a)–(f) (West 2020).

80. *Infra* Section III.A.

81. *Infra* Section III.B.

82. 42 U.S.C.A. § 12102(1)(A) (West 2020).

83. 42 U.S.C.A. § 12102(1)(B)–(C).

84. 42 U.S.C.A. § 12102(2)(A).

85. 42 U.S.C.A. § 12102(2)(B).

86. 42 U.S.C.A. § 3604(f)(1)(A)–(B) (West 2020).

87. 42 U.S.C.A. § 3604(b).

88. *See Sample Letter for Companion Animal*, HUD, https://www.hud.gov/sites/documents/DOC_7399.doc (last visited Jan. 12, 2020) (on file with the *University of the Pacific Law Review*) (supplying a sample letter to provide to a landlord and advising that therapists, physicians, psychiatrists, and health care providers generally should draft the prescription).

89. 42 U.S.C.A. § 3604(f)(3)(A).

90. 42 U.S.C.A. § 3604(f)(3)(B).

discrimination.⁹¹ If the tenancy would result in a direct threat to the safety or health of others or substantial property damage, property owners may rely upon an undue burden exception that allows them to terminate the lease without violating the FHA.⁹²

B. Case Law Specifying a Landlord's Obligations

The FHA is clear when defining reasonable accommodation as it relates to physical disabilities, but it is not clear regarding mental and emotional health accommodations.⁹³ Some states have partially addressed this lack of clarity by granting landlords immunity from civil liability when the ESA resides on the property due to a reasonable accommodation.⁹⁴ Landlords have greater exposure to premises liability because the FHA lacks a comprehensive definition of reasonable accommodation.⁹⁵ Premises liability may include personal injury—such as a dog bite.⁹⁶

Another consequence is the potential accountability to pay repair costs that do not quite measure up to the high standard of “substantial physical property damage.”⁹⁷ Subsection 1 examines cases that explain how a landlord must reasonably accommodate a tenant requesting an ESA.⁹⁸ Subsection 2 analyzes premises liability in the context of animal bite case law.⁹⁹ Together, Subsections 1 and 2 demonstrate the significant liability risk landlords incur when renting to an ESA owner.¹⁰⁰

1. How Case Law Defines Reasonable Accommodation

A plaintiff claiming discrimination based on a landlord's failure to reasonably accommodate her disability must show that (1) she qualifies as disabled under the FHA; (2) the defendant knew or should have known the plaintiff was disabled; (3) reasonable accommodation “may be necessary” for the plaintiff's equal opportunity to use and enjoy the dwelling; and (4) the defendant denied the

91. Compare *id.* (generalizing prohibited conduct when renting to a disabled person), with Gibeault, *supra* note 62 (delineating that a landlord cannot charge a pet deposit to a person with an ESA).

92. 42 U.S.C.A. § 3604(f)(9).

93. See 42 U.S.C.A. § 3604(f)(3)(C) (describing design and construction specifications pertaining to wheelchair accessibility).

94. IND. CODE ANN. § 34-30-2-87.7 (West 2019) (granting a landlord immunity from civil liability if the landlord provided a reasonable accommodation).

95. *Premises Liability*, JUSTIA, <https://www.justia.com/injury/premises-liability/> (last updated Apr. 2018) (on file with the *University of the Pacific Law Review*) (explaining a landlord's risk of liability for actions by third parties on their property).

96. *Id.*; *infra* Section IV.B.

97. 42 U.S.C.A. § 3604(f)(9).

98. *Infra* Subsection III.B.1.

99. *Infra* Subsection III.B.2.

100. *Infra* Subsections III.B.1–2.

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plaintiff's accommodation request.¹⁰¹ Courts have held that landlords must reasonably accommodate ESAs, even without the tenant presenting evidence of the dog's training.¹⁰² Moreover, one court reasoned that the "innate qualities of a dog, in particular a dog's friendliness and ability to interact with humans" verifies a dog's therapeutic benefit.¹⁰³

In one case, the court held that denying a resident's ESA without first opening up a dialogue to gather information violates a disabled resident's rights to a reasonable accommodation.¹⁰⁴ In another case, the court held that a reasonable jury could find the request to keep a miniature horse in the backyard was necessary for a disabled girl to equally use and enjoy her dwelling.¹⁰⁵ The court disregarded the fact that the girl lived comfortably in her house without the horse because the accommodation was necessary for her to equally enjoy backyard recreation.¹⁰⁶ Based on the cases above, reasonable accommodation is broad because the courts ultimately value flexibility in allowing ESAs and service animals.¹⁰⁷ However, an ostensibly reasonable accommodation could retrospectively be a substantial incurrence of personal injury and/or property damage liability and thus unreasonable.¹⁰⁸ This flexibility—coupled with the restrictions on landlords verifying ESA animals' socialization and training—can potentially harm landlords.¹⁰⁹

2. Dog Bite Case Law

In all fifty states, property owners and occupants must make a reasonable effort to keep a safe environment for visitors and other occupants.¹¹⁰ If an owner fails to warn visitors of a dangerous condition, the owner may be liable for resulting

101. *Giebeler v. M & B Assocs.*, 343 F.3d 1143, 1147 (9th Cir. 2002) (citing *U.S. v. Cal. Mobile Home Park Mgmt. Co.*, 29 F.3d 1413, 1416 (9th Cir. 1994)).

102. *Auburn Woods I Homeowners Ass'n v. Fair Emp't & Hous. Comm'n*, 121 Cal. App. 4th 1578, 1596 (2004).

103. *Id.*

104. *Id.* at 1596–1600.

105. *See Anderson v. City of Blue Ash*, 798 F.3d 338, 362 (6th Cir. 2015) (highlighting the importance of the evidence that the child could only independently play outside when the horse was present).

106. *Id.*

107. *Compare Auburn Woods*, 121 Cal. App. 4th at 1598 (stating that the landlord has an obligation to open a dialogue with the disabled tenant), *with Anderson*, 798 F.3d at 362 (finding that an accommodation necessary to have an equal opportunity for the disabled person "to enjoy a particular use of her house" satisfies the third element of the prima facie case).

108. *See Premises Liability*, *supra* note 95 (explaining a landlord's potential liability for injuries occurring on the landlord's property).

109. *Compare id.* (explaining a landlord's potential liability for injuries occurring on the landlord's property), *with Auburn Woods*, 121 Cal. App. 4th at 1596 (noting that tenants do not need to prove the existence of adequate ESA training to landlords).

110. *See Premises Liability*, *supra* note 95.

damages.¹¹¹ A common situation that leads to premises liability is animal—namely dog—bites.¹¹²

Under California law, when a tenant’s dog bites a third person, a landlord may have a duty of reasonable care to the injured party if the plaintiff satisfies a two-part test.¹¹³ The plaintiff must prove that (1) “the dog’s vicious behavior was reasonably foreseeable” by the landlord, and (2) the injury would not have occurred had the landlord taken reasonable steps to prevent the foreseeable harm.¹¹⁴ Therefore, the landlord must have knowledge of the dog’s vicious tendencies.¹¹⁵ The plaintiff can prove the landlord’s knowledge by direct evidence if the landlord actually knew of the dog’s dangerous nature, such as through correspondence with a disgruntled neighbor.¹¹⁶ Circumstantial evidence is also sufficient to show the landlord must have known the dog was dangerous.¹¹⁷ The court then reviews the landlord’s rights to request that the tenant remove the dog or properly secure the property so the dog cannot escape.¹¹⁸

Although ESAs do not have breed restrictions or require socialization training, a California court may still find a landlord liable due to a dog breed’s stereotypical disposition or evidence of the dog’s aversion to humans or other dogs.¹¹⁹ In *Donchin v. Guerrero*, the plaintiff provided witness testimony to prove actual knowledge through circumstantial evidence.¹²⁰ The tenant’s neighbor stated he feared the dogs because of prior encounters with them.¹²¹ The mail carrier declared he was also afraid.¹²² During his weekly visit to the property, “[the dogs] would ‘growl and show their teeth, ram the wood fence, attempt to jump the fence and appeared extremely ferocious.’”¹²³

Lastly, an animal behaviorist opined that it was unlikely the landlord did not know of the dogs’ dangerous nature.¹²⁴ The animal behaviorist reasoned that dogs of the same breed are commonly aggressive towards strangers.¹²⁵ Because the “[landlord was] a relative stranger, he had undoubtedly witnessed displays of

111. *Id.*

112. *Id.*

113. *Donchin v. Guerrero*, 34 Cal. App. 4th 1832, 1838 (1995).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 1839.

119. Compare Gibeault, *supra* note 62 (asserting that ESAs are not required to be socialized or trained, and breed restrictions do not apply), with *Donchin v. Guerrero*, 34 Cal. App. 4th 1832, 1843–48 (1995) (reversing summary judgment because the plaintiff’s witness testimony was sufficient to create a triable issue of fact as to the defendant landlord’s knowledge of the dogs’ vicious tendencies).

120. *Donchin*, 34 Cal. App. 4th at 1843–44.

121. *Id.* at 1843.

122. *Id.*

123. *Id.*

124. *Id.* at 1844.

125. *Donchin*, 34 Cal. App. 4th at 1844.

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territorial aggressive behavior in these dogs.”¹²⁶ The *Donchin* court ultimately held the declarations by the neighbor, mail carrier, and dog expert were sufficient to create a triable issue of fact regarding the landlord’s knowledge.¹²⁷ Further, the month-to-month lease and defects in the fencing created a triable issue of fact as to whether the landlord caused the plaintiff’s injuries because he failed to reasonably exercise control over the premises.¹²⁸

Other courts have used similar evidence to hold there was a triable issue of fact whether a landlord knew of a dog’s vicious tendencies even though the landlord denied it.¹²⁹ Landlords are a potential target for injured parties seeking compensation because the court can attach a judgment lien against the rental property if the plaintiff wins the lawsuit.¹³⁰ If the defendant landlord fails to satisfy his debt to a prevailing plaintiff, the plaintiff can foreclose on the property and receive payment from the sale’s proceeds.¹³¹ However, a landlord who appreciates this risk cannot mitigate potential liability arising from a dog bite by requiring a pet deposit or increased rent from a tenant with an ESA.¹³²

IV. LEGISLATION TO CLOSE THE LOOPHOLE

For federal law to simultaneously limit landlords’ liability while protecting the rights of those with disabilities, Congress should consider the loopholes in the FHA that allow tenants to fraudulently register their pets as ESAs.¹³³ Congress must enact legislation that recognizes the rights of landlords while also protecting the interests of people with legitimate mental and emotional needs.¹³⁴ Passing legislation to close the loopholes is necessary to reduce ESA fraud and mitigate

126. *Id.*

127. *See id.* at 1843–45, 1848 (reasoning that because the neighbor was a disinterested third party having no connection to the plaintiff, he was a reliable witness).

128. *Id.* at 1846–47.

129. *See Sen v. Tsiongas*, 192 Conn. App. 188, 195–98 (2019) (holding that common territorial behaviors such as barking, growling, and lunging are sufficient to create a triable issue of fact).

130. Cara O’Neill, *What is a Judgment Lien?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-is-judgment-lien.html> (last visited Nov. 16, 2019) (on file with the *University of the Pacific Law Review*).

131. *See* Cara O’Neill, *What is a Lien?*, NOLO, <https://www.nolo.com/legal-encyclopedia/lien.html> (last visited Nov. 16, 2019) (on file with the *University of the Pacific Law Review*) (suggesting that landlords who fail to pay their debts to prevailing plaintiffs may be forced to foreclose their property through a lien).

132. *Compare* 42 U.S.C.A. § 3604(f)(3)(B) (West 2020) (generalizing prohibited conduct when renting to a disabled person), *and* Gibeault, *supra* note 62 (delineating that a landlord cannot charge a pet deposit to a person with an ESA), *with* *Donchin v. Guerrero*, 34 Cal. App. 4th 1832, 1843–45, 1848 (1995) (reversing summary judgment because sufficient circumstantial evidence by witness testimony created a triable issue of fact).

133. *Compare* 42 U.S.C.A. § 3604(f)(3)(C) (failing to include examples of accommodations for persons with mental and emotional health conditions), *with* *infra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).

134. *See generally* 42 U.S.C.A. § 3604(f)(3)(C) (failing to include examples of accommodations for persons with mental and emotional health conditions).

the stigma surrounding mental health.¹³⁵ Section A proposes legislation to minimize the negative impact that online certification processes have on ESAs' legitimacy.¹³⁶ Section B recommends heightened training and socialization qualifications for ESAs.¹³⁷

A. Eliminate ESA Fraud: Face-to-Face Diagnosis

A licensed mental health professional must diagnose a patient with a disabling mental or emotional condition for the patient to qualify for an ESA.¹³⁸ Then, the licensed mental health professional may prescribe an ESA to the patient via a letter.¹³⁹ As society progresses in the digital age, patients and health care providers have increasingly utilized the Internet to seek and provide health care information.¹⁴⁰ Subsection 1 examines the effects online health care information has on ESA prescriptions.¹⁴¹ Subsection 2 compares the online ESA prescription process to the medical marijuana industry.¹⁴² Subsection 3 proposes legislation to minimize fraudulent ESA prescriptions due to online prescription providers.¹⁴³ Subsection 4 additionally recommends that Congress enact laws using similar language to existing state law.¹⁴⁴ Subsection 5 discusses the societal consequences of maintaining ambiguities in ESA regulation.¹⁴⁵

1. One-Stop-Shop ESA Prescriptions

A cursory search of the Internet proves just how readily accessible information regarding the ease of ESA qualification is to the public.¹⁴⁶ Waggy promotes online

135. Compare *id.* (failing to include examples of accommodations for persons with mental and emotional health conditions), with *infra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).

136. *Infra* Section IV.A.

137. *Infra* Section IV.B.

138. Gibeault, *supra* note 62.

139. *Emotional Support Animal Doctor Prescription Guide*, SERV. DOG CERTIFICATION, <https://www.servicedogcertifications.org/emotional-support-animal-doctor-prescription-guide/> (last visited Mar. 3, 2021) (on file with the *University of the Pacific Law Review*).

140. See generally Lu Xinyi, Zhang Runtong, Wu Wen, Shang Xiaopu & Liu Manlu, *Relationship Between Internet Health Information and Patient Compliance Based on Trust: Empirical Study*, 20 J. MED. INTERNET RES. 253 (2018) (on file with the *University of the Pacific Law Review*) (prefacing that the internet is a significant source of health information).

141. *Infra* Subsection IV.A.1.

142. *Infra* Subsection IV.A.2.

143. *Infra* Subsection IV.A.3.

144. *Infra* Subsection IV.A.4.

145. *Infra* Subsection IV.A.5.

146. See generally <https://www.google.com/> (search for "Online ESA Letter") (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*) (populating several online ESA letter providers advertising quick, easy, and cheap services).

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ESA travel and housing letters from a licensed therapist for as low as \$49.¹⁴⁷ TherapyPet boasts that users can complete their online questionnaire assessment in five minutes.¹⁴⁸ Likewise, PetCertify Express offers a five-minute assessment and guarantees an ESA doctor will provide a letter on the same day.¹⁴⁹

Despite the multitude of self-proclaimed mental health care providers willing to prescribe ESAs, there is considerable debate amongst researchers on whether ESAs actually alleviate mental and emotional health problems.¹⁵⁰ It is doubtful that online ESA prescribers can thoroughly, objectively, and appropriately prescribe ESAs to all of their patients without any face-to-face interaction.¹⁵¹ Any psychologist who prescribes an ESA to a patient must justify in litigation that the ESA was necessary for the patient.¹⁵² Thus, online ESA letter mills present an ethical dilemma for mental health care providers that directly affects the merits of ESA certification.¹⁵³

2. Medical Marijuana Cards: Yesterday's ESA Certification

Before legalization, the medical marijuana industry experienced the same vulnerability to fraud that online ESA prescriptions spur amongst mental health care providers and patients.¹⁵⁴ Similar to one-stop-shop ESA certification websites, the medical marijuana industry structured doctors' recommendation cards through online processes.¹⁵⁵ NuggMD advertises an easy, fifteen minute

147. *Online ESA Approval with a Licensed Therapist*, WAGGY, <https://waggy.pet/> (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*).

148. *Free ESA Assessment*, THERAPYPET, <https://therapypet.org/> (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*).

149. *How It Works*, PETCERTIFY EXPRESS, <https://expresspetcertify.com/howitworks> (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*).

150. Jeffrey N. Younggren, Jennifer A. Boisvert & Cassandra L. Boness, *Examining Emotional Support Animals and Role Conflicts in Professional Psychology*, 47 *PROF. PSYCHOL.: RES. AND PRAC.* 255, 258 (2016) (on file with the *University of the Pacific Law Review*).

151. *Compare How It Works*, PETCERTIFY EXPRESS, *supra* note 149 (advertising a quick and easy ESA prescription process), with *Ethical Principles of Psychologists and Code of Conduct*, AM. PSYCHOL. ASS'N (Mar. 2017), <https://www.apa.org/ethics/code/> (on file with the *University of the Pacific Law Review*) (“[P]sychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions. . . . Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques”).

152. Younggren, *supra* note 150.

153. *See id.* (discussing the ethical dilemma psychologists face when patients request ESA letters).

154. *Compare Jenn Karlman, Fox 5 Proves Medical Marijuana Card 'Easy' to Get*, FOX 5 (Apr. 25, 2013), <https://fox5sandiego.com/2013/04/25/fox-5-proves-medical-marijuana-card-easy-to-get/> (on file with the *University of the Pacific Law Review*) (concluding that quick and easy medical marijuana prescriptions reinforce the belief that medical marijuana breeds fraudulent behavior), with *How It Works*, PETCERTIFY EXPRESS, *supra* note 149 (advertising a quick and easy ESA prescription process).

155. *Compare Online ESA Approval with a Licensed Therapist*, WAGGY, *supra* note 147 (promoting a quick and cheap ESA certification process), with *Get Your Medical Marijuana Card Online*, NUGGMD, <https://www.nuggmd.com/> (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*).

online process with the guarantee that the card holder can buy marijuana on the same day.¹⁵⁶ Comparatively priced to ESA letters, a medical marijuana card from NuggMD costs \$39.¹⁵⁷ Likewise, MMJDoctor Online markets an annually renewable cannabis recommendation for \$49 per year.¹⁵⁸

Many journalists have investigated the ease in obtaining a cannabis prescription.¹⁵⁹ One reporter revealed that providing medical records to the doctor was not necessary to obtain a cannabis card.¹⁶⁰ Another investigator admitted he lied to two doctors at two separate clinics about his insomnia and still received medical marijuana cards.¹⁶¹ Ultimately, quick and easy prescription procedures reaffirm the notion that the medical marijuana industry was a facade for entrepreneurs to make money off of medicating patients rather than treating patients.¹⁶² The same seems to be true for tenant ESA letters.¹⁶³

3. Proposing Legislation to Address Fraudulent Procedures

To close the fraud loophole that online ESA certification causes, Congress should enact legislation limiting mental health care providers' ability to prescribe ESAs to patients with whom they only interacted momentarily.¹⁶⁴ Potential legislation could read as follows: To prescribe an ESA, a licensed mental health professional shall (1) have substantial and multiple opportunities to observe, test, or examine the patient; and (2) conclude that the patient suffers from a non-temporary health condition necessitating an ESA.¹⁶⁵ If mental health care providers truly treated ESAs as a prescription, they would take into account the average lifespan of a dog—i.e., eleven years—when considering whether an ESA is right

(advertising a fast and low-cost medical marijuana card).

156. *Get Your Medical Marijuana Card Online*, *supra* note 155.

157. *Compare Online ESA Approval with a Licensed Therapist*, WAGGY, *supra* note 147 (pricing Waggy's ESA letter at \$49), with *Get Your Medical Marijuana Card Online*, *supra* note 155 (pricing a cannabis card at \$39).

158. *Get California Medical Marijuana Card Online*, MMJDOCTOR ONLINE, <https://mmjdoctoronline.com/> (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*).

159. Karlman, *supra* note 154; Daniela Drake, *I Got a Weed License in Minutes*, DAILY BEAST (June 24, 2014), <https://www.thedailybeast.com/i-got-a-weed-license-in-minutes> (updated Apr. 14, 2017) (on file with the *University of the Pacific Law Review*).

160. Drake, *supra* note 159.

161. Karlman, *supra* note 154.

162. *See id.* (concluding that quick and easy medical marijuana prescriptions reinforce the belief that medical marijuana breeds fraudulent behavior).

163. *Compare id.* (concluding that online medical marijuana prescriptions reinforce the belief that medical marijuana is oftentimes fraudulent), with <https://www.google.com/> (search for "Online ESA Letter") (last visited Jan. 11, 2020) (on file with the *University of the Pacific Law Review*) (populating several online ESA letter providers advertising quick, easy, and cheap services).

164. *See* Drake, *supra* note 159 (detailing the ease in obtaining an ESA certification letter).

165. *Compare* Gibeault, *supra* note 62 (explaining that a licensed mental health professional must prescribe an ESA), with *Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 ("[P]sychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions").

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for a patient.¹⁶⁶ Moreover, most cats live between twelve to fifteen years, with many living into their twenties.¹⁶⁷ Due to animals' long life expectancies, physicians should generally limit ESA prescriptions for the time of the ailment.¹⁶⁸ A time limit will ensure patients do not abuse the ESA system but will not foreclose the possibility of patients receiving more provisional benefits from animals that could truly help them.¹⁶⁹ However, a patient may only desire an ESA prescription for as long as he lives in his current rental property because his landlord prohibits animals.¹⁷⁰ Some patients in scenarios like this are just trying to dodge the no-pets rule by using a prescription to exploit the loopholes in landlord-tenant law.¹⁷¹ Therefore, health care providers should be cautious when prescribing ESA prescriptions to treat temporary ailments.¹⁷²

It is not only unreasonable but also unprofessional and unethical for a psychologist to weigh instant payment for minimal services higher than thoroughly assessing a client's condition and treatment options.¹⁷³ Drawing a comparison to the medical marijuana industry pre-legalization, relaxed industry procedures resulted in increased accessibility to cannabis for minors who do not meet the legal age requirements for possession.¹⁷⁴ Similar to medical marijuana, a five-minute online questionnaire is not long enough to sufficiently determine whether current

166. Jennifer Coates, *How Long Do Dogs Live?*, PETMD, https://www.petmd.com/dog/wellness/evr_dg_how_long_do_dogs_live (last reviewed July 31, 2015) (on file with the *University of the Pacific Law Review*).

167. BEC Crew, *These Are the Signs That Your Cat Will Probably Live a Long Life*, SCI. ALERT (July 7, 2016), <https://www.sciencealert.com/these-are-the-signs-that-your-cat-will-probably-live-a-long-life> (on file with the *University of the Pacific Law Review*).

168. *Compare Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 (“[P]sychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions”), with Coates, *supra* note 166 (averaging the lifespan of a dog at approximately 11 years).

169. *Compare Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 (“[P]sychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions”), with Coates, *supra* note 166 (averaging the lifespan of a dog at approximately 11 years).

170. See Paul Votto, *A 50% Turnover Rate? It's Not High – It's the Average!*, NAT'L CTR. FOR HOUSING MGMT. (May 14, 2015), <https://www.nchm.org/a-50-turnover-rate-its-not-high-its-the-average/> (on file with the *University of the Pacific Law Review*) (stating the average turnover rate is 54%).

171. See Younggren, *supra* note 150 (discussing the ethical dilemma psychologists face when patients request ESA letters).

172. *Compare Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 (“[P]sychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions”), with Votto, *supra* note 170 (stating the average turnover rate is 54%).

173. *Compare* Karlman, *supra* note 154 (concluding that quick and easy medical marijuana prescriptions generally promote fraudulent practices by shady entrepreneurs), with *Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 (“[P]sychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to support their statements or conclusions”).

174. See Karlman, *supra* note 154 (expressing concern about teenagers having easy access to medical marijuana cards).

and fleeting life situations or a chronic predisposition triggers a patient's anxiety sufficiently to justify dispensing an ESA prescription.¹⁷⁵ Even more so, a short online form is surely not long enough to determine whether a patient is lying about suffering from a condition.¹⁷⁶

4. Adopting State-Enacted Language at the Federal Level

The prevalence of ESAs in recent times has resulted in critics questioning ESA legitimacy.¹⁷⁷ Several states have passed laws to address ESA fraud by making it a misdemeanor to falsely claim a pet is an ESA.¹⁷⁸ Indiana recently passed a similar law with language directly targeting health service providers.¹⁷⁹ It is a Class A infraction in Indiana if a health service provider:

- (A) verifies an individual's disability status and need for an emotional support animal without adequate professional knowledge of the individual's condition to provide a reliable verification; or
- (B) charges a fee for providing a written verification for an individual's disability status and need for an emotional support animal, and provides no other service to the individual.¹⁸⁰

Indiana's law virtually eliminates the ability for online one-stop-shop therapists to prescribe ESAs to patients because the websites solely advertise ESA certification letters.¹⁸¹ Other integral functions of therapists—absent on many ESA certification websites—are to analyze present issues, offer advice and suggestions, help clients change detrimental behaviors, teach clients how to resolve personal conflicts, and guide clients through personal crises.¹⁸² Implementing a federal law

175. Compare *How It Works*, PETCERTIFY EXPRESS, *supra* note 149 (advertising a quick and easy ESA prescription process), with Younggren, *supra* note 150 (analyzing conflicts of interest that arise when prescribing ESAs).

176. See Karlman, *supra* note 154 (admitting that he lied about his condition when posing as a client in need of a cannabis card).

177. See Farah Stockham, *People are Taking Emotional Support Animals Everywhere. States are Cracking Down.*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html> (on file with the *University of the Pacific Law Review*) (showing landlords, airlines, and businesses criticizing phony ESA certifications or letters).

178. VA. CODE ANN. § 51.5-44.1 (West 2020); Stockham, *supra* note 177.

179. IND. CODE ANN. § 22-9-7-12 (West 2019).

180. IND. CODE ANN. § 22-9-7-12(5)(A)–(B).

181. Compare *id.* (making it a Class A infraction for a health care provider to prescribe an ESA without providing the patient with other services), with *Online ESA Approval with a Licensed Therapist*, WAGGY, *supra* note 147 (promoting a quick and cheap ESA certification process).

182. Compare Joseph Rauch, *What Is a Therapist [Psychotherapist]? – The Complete Definition*, TALKSPACE (Nov. 15, 2016), <https://www.talkspace.com/blog/therapist-psychotherapist-complete-definition/> (on file with the *University of the Pacific Law Review*) (describing primary functions of therapists), with *Online ESA Approval with a Licensed Therapist*, WAGGY, *supra* note 147 (promoting a quick and cheap ESA certification process).

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that mirrors Indiana’s ESA law addressing fraud would reduce much of the stigma surrounding ESA legitimacy that harms persons who actually need ESAs.¹⁸³

When fraud becomes ubiquitous regarding a particular program, the public may begin to categorically associate fraud with the program, rather than recognizing that abusers of the program are exceptions, not the rule.¹⁸⁴ Food stamp recipients can attest to the fraud and abuse stigmas surrounding food stamps.¹⁸⁵ Many food stamp recipients feel uncomfortable using food stamps in public, fearing judgment and scrutiny from others.¹⁸⁶ Comparatively, as a result of widespread fraud and media attention, the public—including landlords—may increasingly treat legitimate ESA handlers without the respect and dignity enumerated by the spirit of the FHA.¹⁸⁷

5. *The Consequences of Keeping ESA Regulations Ambiguous*

By knowingly exploiting the lack of ESA certification regulations, some mental health care providers disregard their ethical responsibility to objectively help their patients with responsible, valid treatment.¹⁸⁸ Experts in the field have concluded that online ESA letter questionnaires insufficiently diagnose patients.¹⁸⁹ Some courts have similarly held that these standard form ESA letters are ambiguous and therefore invalid.¹⁹⁰ Ultimately, health care providers ignore the

183. Compare IND. CODE ANN. § 22-9-7-12(5)(A)–(B) (restricting online ESA letter mills), with PETE WELLBORN III, THE FRAUDULENT SALE AND ISSUANCE OF “EMOTIONAL SUPPORT ANIMAL” LETTERS: OVERVIEW, LEGAL ANALYSIS & INVESTIGATIVE SUMMARY 12, 22 (2018) (concluding that online ESA letter providers unethically provide “bogus ESA Letter[s]” and that online ESA letter providers negatively affect consumer protection), and Grace McCormick, *States Move to Combat Widespread Use of Fraudulent Emotional Support Animals*, WASH. EXAMINER (June 18 2019), <https://www.washingtonexaminer.com/news/states-move-to-combat-widespread-use-of-fraudulent-emotional-support-animals> (on file with the *University of the Pacific Law Review*) (commenting on the nationwide ESA controversy and responding legislative action).

184. See *Food Stamps: Why Recipients are Haunted by Stigmas and Misconceptions*, FULFILL, <https://fulfillnj.org/food-stamps-why-recipients-are-haunted-by-stigmas-and-misconceptions/> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (debunking common misconceptions about fraud within the food stamp program).

185. See *id.* (recounting common misconceptions about food stamp users, including public stigmas that many food stamp users are committing fraud and abusing the system).

186. See *id.* (imparting the fears and insecurities food stamp users experience when using food stamps in public).

187. Compare 42 U.S.C.A. § 3604(a)–(f) (West 2020) (prohibiting discrimination against persons with disabilities regarding the sale or rental of housing), with *Food Stamps: Why Recipients are Haunted by Stigmas and Misconceptions*, FULFILL, *supra* note 184 (discussing that using food stamps in public makes some users feel uncomfortable due to misconceptions about the program).

188. Younggren, *supra* note 150 (analyzing conflicts of interest that arise when prescribing ESAs).

189. WELLBORN, *supra* note 183, at 12.

190. Compare *Hawn v. Shoreline Towers Phase 1 Condominium Ass’n, Inc.*, 347 Fed. Appx. 464, 468 (11th Cir. 2009) (finding that plaintiff’s ESA letter was unclear and therefore insufficient to create a genuine issue of material fact), with *Lucas v. Riverside Park Condominiums Unit Owners Ass’n*, 776 N.W.2d 801, 811 (N.D. 2009) (finding that plaintiff’s ESA letter was “conclusory and ambiguous [and therefore] insufficient to raise a genuine issue of material fact that an accommodation is necessary to afford [plaintiff] an equal opportunity to

profession's goal to destigmatize mental health and therapeutic treatment.¹⁹¹ Instead, these online ESA health care providers amplify the stigma surrounding mental health by appealing to every illegitimate patient's desire to get an illegitimate ESA.¹⁹² As a result, the public's skepticism regarding ESAs—and by extension the doubt about the benefits of animal companionship as a therapeutic treatment—grows with every incident of an emotional support falcon on a plane and an undocumented emotional support hamster flushed down the toilet.¹⁹³ Appeasing every patient to make a quick dollar in the short run rather than sensibly dispensing ESAs negatively affects legitimate ESA handlers in the long run.¹⁹⁴ Therefore, the proposed legislation above will adjust the balance between prompt and efficient care so that mental health providers offer patients accessible, yet thorough, care.¹⁹⁵

B. Distinguish ESAs: Household and Socialization Training

The biggest difference between ESAs and ADA service dogs is the training requirement.¹⁹⁶ ESAs provide general emotional support and do not perform specific tasks or work for their handlers.¹⁹⁷ Further, due to the absence of training or species requirements, any animal is potentially eligible to be an ESA.¹⁹⁸ This is problematic because some species are unadaptable to a domestic lifestyle and are likely to cause damage to property or personal injury.¹⁹⁹ Other species—like

enjoy his dwelling”).

191. See Rauch, *supra* note 182 (showing that therapists aim to reduce the stigma and shame of mental illness).

192. Younggren, *supra* note 150 (reminding readers that ESA assessments are “a disability determination not an assessment of a patient’s wants or preferences regarding their animal nor is it a process that is simply designed to make that patient happy or satisfied with one’s professional services”).

193. Compare McCormick, *supra* note 183 (commenting on the nationwide ESA controversy and responding legislative action), with Alexandra Deabler, *Passenger Claims Men Boarded Flight with ‘Emotional Support Falcons’ in Viral Tweet*, FOX NEWS (Apr. 1, 2019), <https://www.foxnews.com/travel/passenger-claims-men-boarded-flight-with-emotional-support-falcons-in-viral-tweet> (on file with the *University of the Pacific Law Review*) (reporting that a photo of two falcons on a commercial airplane generated over two million views), and Lisa Marie Segarra, *Spirit Airlines Slams Student Who Claims She Was Forced to Flush Emotional Support Hamster Down Toilet*, TIME (Feb. 8, 2018), <https://time.com/5140438/spirit-airlines-emotional-support-hamster/> (on file with the *University of the Pacific Law Review*) (reporting that Spirit airlines vehemently denied suggesting passenger flush her ESA hamster down the toilet).

194. See Younggren, *supra* note 150 (alluding to the negative impact conflicts of interest may have on their patient’s life).

195. Compare *Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 (“Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques”), with *Online ESA Approval with a Licensed Therapist*, WAGGY, *supra* note 147 (pricing Waggy’s ESA letter at \$49), and *Get Your Medical Marijuana Card Online*, *supra* note 155 (pricing a cannabis card at \$39).

196. Gibeault, *supra* note 62.

197. *Id.*

198. *Id.*

199. See Annie Roth, *Don’t Be Fooled by Social Media—Wild Animals Make Terrible Pets*, NAT.

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dogs—need considerable training to become socialized and housetrained.²⁰⁰ To limit property owners' liability, this Section provides support for federal legislation requiring sufficient socialization, adequate house training, and species restrictions.²⁰¹ The nonexistence of training requirements in the context of landlord–tenant situations presents a significant incurrence of potential liability on the part of the landlord.²⁰² Subsection 1 reviews the training and socialization requirements of ADA service dogs as a guide for proposed ESA regulations.²⁰³ Subsection 2 discusses the financial risk that inadequate training requirements impose on landlords.²⁰⁴ Subsection 3 considers the potential liability resulting from an unsocialized pet.²⁰⁵ Subsection 4 argues for species restrictions similar to the ADA.²⁰⁶

1. *How ADA Service Dogs Are Trained and Socialized*

Not all dogs qualify to be service dogs.²⁰⁷ To qualify, service dogs must possess certain qualities to be dependable working animals.²⁰⁸ A service dog must be calm, eager to please, friendly, socialized, alert, nonreactive, and a quick learner.²⁰⁹ Handlers and their service dogs have a duty to exercise control when the service dog is in its working capacity.²¹⁰ A service dog should successfully exist in public places with control by heeling, sitting, and lying down on command.²¹¹ Further, a dog must not relieve itself inside buildings or other inappropriate locations.²¹²

GEOGRAPHIC (Jan. 30, 2019), <https://www.nationalgeographic.com/animals/2019/01/cute-wild-animals-make-terrible-pets/> (on file with the *University of the Pacific Law Review*) (explaining that some animals, such as wild animals kept as pets, would not be suitable to be an ESA).

200. See Diane Herstine, *Dog/Puppy Socialization Chart*, BUCKS COUNTY SPCA, <http://www.bcpsca.org/wp-content/uploads/2015/04/Puppy-socialization-chart.pdf> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (detailing the extensive socialization regimen recommended for dogs).

201. *Infra* Section IV.B.

202. Compare *Premises Liability*, *supra* note 95 (explaining a landlord's potential liability for injuries occurring on the landlord's property), with Gibeault, *supra* note 62 (qualifying ESAs as animals that provide general emotional support rather than animals trained for specific tasks).

203. *Infra* Subsection IV.B.1.

204. *Infra* Subsection IV.B.2.

205. *Infra* Subsection IV.B.3.

206. *Infra* Subsection IV.B.4.

207. See Jen Karetnick, *Service Dogs 101 – Everything You Need to Know*, AM. KENNEL CLUB (Sept. 24, 2019), <https://www.akc.org/expert-advice/training/service-dog-training-101/> (on file with the *University of the Pacific Law Review*) (explaining that not all breed types are suitable for all types of service dog duties).

208. *Id.*

209. *Id.*

210. See *id.* (showing that handlers and their service dogs train extensively together).

211. See *id.* (portraying that handlers train their service dogs to ignore distractions and obey commands).

212. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47 (explaining that service animals can be excused from rooms where they compromise a sterile environment).

Obedying commands is essential to service dog training because a service dog must perform tasks specifically related to its handler's disabilities.²¹³ Common tasks that assist persons with physical disabilities may include guiding a blind person, alerting a deaf person to ringing phones or doorbells, and retrieving items.²¹⁴ Other less obvious tasks include calming a handler during a PTSD-induced anxiety attack, alerting a person suffering from a seizure disorder to an oncoming seizure, or alerting a person with diabetes to low glucose levels.²¹⁵ The expansive training and capabilities of service dogs prove that their value to society outweighs the potential liability of having a dog present in no-pet zones.²¹⁶ ESA regulations should strive to create the same value for those suffering from mental and emotional conditions while mitigating the risk to landlords.²¹⁷

2. Consequences of Minimal Training Requirements

If a pet owner fails to housetrain a pet, the pet can cause considerable damage to property.²¹⁸ Carpet stains, scratched doors and door frames, chewed carpet and baseboards, and partially eaten blinds are all examples of damage caused by untrained pets.²¹⁹ Carpet replacement for an average bedroom can cost \$980 to \$1,680.²²⁰ New blinds might cost \$554,²²¹ while wall paint can amount to \$2,000.²²²

Although a tenant is normally responsible for damage caused by her pets, a landlord is unlikely to fully receive compensation through a favorable court judgment.²²³ Regardless of the outcome, a landlord must immediately repair the

213. Karetnick, *supra* note 207.

214. *Id.*

215. *Id.*

216. See generally *Benefits of Service Dogs*, CANINE PARTNERS FOR LIFE, <https://k94life.org/programs/benefits-service-dogs/> (last visited Jan. 12, 2020) (on file with the *University of the Pacific Law Review*) (endorsing several benefits of service dogs).

217. Compare *id.* (reciting the benefits of service dogs), with *infra* Subsection IV.B.2 (detailing the potential damage an untrained dog can cause), and *infra* Subsection IV.B.3 (discussing dog bites in the context of premises liability).

218. See *Dealing with Pet Damage in Your Apartment*, APARTMENTS.COM (June 20, 2019), <https://www.apartments.com/blog/dealing-with-pet-damage-in-your-apartment> (on file with the *University of the Pacific Law Review*) (listing typical instances of pet damage and warning that many renters insurance policies do not cover pet damage).

219. *Id.*

220. *Carpet Installation Cost*, FIXR, <https://www.fixr.com/costs/carpet-installation> (last updated Aug. 20, 2018) (on file with the *University of the Pacific Law Review*).

221. *How Much Does It Cost to Install Window Treatments?*, HOMEADVISOR, <https://www.homeadvisor.com/cost/doors-and-windows/install-window-treatments/> (last visited Jan. 12, 2020) (on file with the *University of the Pacific Law Review*).

222. *How Much Does It Cost to Paint My Apartment?*, PAINTZEN (Mar. 12, 2018), <https://www.paintzen.com/blog/how-much-does-it-cost-to-paint-my-apartment> (on file with the *University of the Pacific Law Review*).

223. See *Landlords as Plaintiffs: Suing a Tenant for Damages*, HG.ORG, <https://www.hg.org/legal-articles/landlords-as-plaintiffs-suing-a-tenant-for-damages-46259> (last visited Jan. 12, 2020) (on file with the

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damages to continue to rent out the unit.²²⁴ With the average rent in the U.S. totaling more than \$1,000 per month²²⁵ and average tenant turnover at fewer than two years,²²⁶ pet damage repair costs can be disproportionately higher than the profits made from the tenant's lease term.²²⁷ If a pet inflicted all of this damage, almost 20% of the landlord's gross income from the entire lease would go towards repairs.²²⁸

This substantial disproportionality of cost would retrospectively create a "tenancy [that] would result in substantial physical damage to the property of others" exception for any landlord pursuant to the FHA.²²⁹ Stricter ESA housetraining requirements will help avoid a landlord's obligation to pay considerable money for repairs because there will be less damage to repair in the first place.²³⁰ Landlords will view ESAs as less of a liability risk, and ESA handlers will distinguish their service animals from ordinary pets without also requiring task-specific training.²³¹ Ultimately, stricter legislation including housetraining will support the FHA's undue burden exception by mitigating the risk of substantial physical property damage resulting from unruly animals.²³²

University of the Pacific Law Review) (conjecturing that it may be difficult to collect a court-ordered compensation award if the tenant does not have money).

224. See Tony Guerra, *Can a Landlord Make You Pay for Damages?*, SFGATE, <https://homeguides.sfgate.com/can-landlord-make-pay-damages-40868.html> (last updated Dec. 14, 2018) (on file with the *University of the Pacific Law Review*) (detailing that landlords will often first pay for repairs before attempting to collect from their tenants).

225. *US Residential Rent and Rental Statistics*, DEP'T OF NUMBERS, <https://www.deptofnumbers.com/rent/us/> (last visited Jan. 12, 2020) (on file with the *University of the Pacific Law Review*).

226. See Votto, *supra* note 170 (stating the average turnover rate for rental units is 54%).

227. Compare *How Much Does It Cost to Install Window Treatments?*, *supra* note 221 (averaging blinds at \$554), and *How Much Does It Cost to Paint My Apartment?*, *supra* note 222 (averaging wall paint at \$2,000), with *US Residential Rent and Rental Statistics*, *supra* note 225 (averaging rent at \$1,102 per month), and Votto, *supra* note 170 (stating the average turnover rate is 54%).

228. See *Carpet Installation Cost*, *supra* note 220 (estimating bids for carpeting a bedroom at \$980 to \$1,680); *Compare How Much Does It Cost to Install Window Treatments?*, *supra* note 221 (averaging the cost of blinds at \$554); *How Much Does It Cost to Paint My Apartment?*, *supra* note 222 (averaging interior paint bids at \$2,000); *US Residential Rent and Rental Statistics*, *supra* note 225 (averaging rent at \$1,102 per month); Votto, *supra* note 170 (stating the average turnover rate for rental units is 54%).

229. 42 U.S.C.A. § 3604(f)(9) (West 2020).

230. Compare U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47 (asserting that handlers must housetrain their ADA service dogs), with *Dealing with Pet Damage in Your Apartment*, *supra* note 218 (listing several possible ways a non-housetrained dog can damage an apartment).

231. Compare U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47 (asserting that handlers must housetrain their ADA service dogs), with *Dealing with Pet Damage in Your Apartment*, *supra* note 218 (listing common examples of pet damage within the home).

232. See 42 U.S.C.A. § 3604(f)(9) (West 2020) (failing to define "substantial physical damage to the property of others").

3. Consequences of a Lack of Socialization

Unsocialized animals are more likely to bite—especially when their living spaces are compact—because they are unable to escape during a confrontation.²³³ Jurisdictions vary on whether to impose premises liability on a landlord when a tenant’s dog bites a third party.²³⁴ For example, even though the landlord knew a tenant’s dog previously bit a person, a Montana court did not find the landlord liable for a dog bite to a utility company employee because the landlord did not exercise control over the dog.²³⁵ However, a Colorado court found a landlord liable because the landlord witnessed the dogs’ particularly threatening behavior before signing a lease agreement with prospective tenants.²³⁶ When the dogs subsequently attacked a child, the court reasoned that leasing to the tenants created a “clear potential for injury.”²³⁷ In New York, a court reached a similar result.²³⁸ The California court in *Donchin* ruled with similar logic to Colorado and New York.²³⁹

In 2019, the average successful dog bite claim was \$44,760 nationwide with California leading the states at \$51,265.²⁴⁰ In California, this equals about forty-four months of rent.²⁴¹ If a tenant leases the property for fewer than two years, landlords could lose substantial money by allowing an unchecked ESA—such as a falcon, a peacock, or an unsocialized dog—to live on the premises.²⁴² Under the ADA’s exception to renting to a tenant with a disability, this would also create a retrospective “direct threat to health or safety of other individuals” for any landlord.²⁴³ To avoid stereotyping ESAs as a potential and substantial liability while also minimizing landlords’ risk, handler and animal socialization

233. *Chaining Dogs*, PETA, <https://www.peta.org/issues/animal-companion-issues/cruel-practices/chaining-dogs/> (last visited Feb. 10, 2020) (on file with the *University of the Pacific Law Review*).

234. See *Criswell v. Brewer*, 741 P.2d 418, 420 (Mont. 1987) (holding the landlord not liable); *Vigil ex rel. Vigil v. Payne*, 725 P.2d 1155, 1157–58 (Colo. App. 1986) (finding the landlord liable); *Strunk v. Zoltanski*, 479 N.Y.2d 572, 578 (1984) (holding the landlord liable); *Donchin v. Guerrero*, 34 Cal. App. 4th 1832, 1843–44 (1995) (finding the landlord liable).

235. *Criswell*, 741 P.2d at 420.

236. *Vigil*, 725 P.2d at 1157–58.

237. *Id.* at 1157.

238. See *Strunk*, 479 N.Y.2d at 578 (finding a landlord who previously had knowledge of a dog’s vicious tendencies liable for an injury to a third party).

239. *Donchin*, 34 Cal. App. 4th at 1843–44 (appealing a summary judgement for the defendant landlord in a case where a third-party plaintiff sued the defendant landlord for his tenant’s dogs attack on plaintiff and her dog that occurred four houses down from the landlord’s property).

240. *Spotlight On: Dog Bite Liability*, INS.INFO.INST. (Mar. 29, 2019), <http://www.iii.org/article/spotlight-on-dog-bite-liability> (on file with the *University of the Pacific Law Review*).

241. Compare *id.* (averaging California’s payout for dog bite claims as \$51,265), with *US Residential Rent and Rental Statistics*, *supra* note 225 (averaging rent at \$1,102 per month).

242. See *Carpet Installation Cost*, *supra* note 220 (estimating bids for carpeting a bedroom at \$980 to \$1,680); *How Much Does It Cost to Install Window Treatments?*, *supra* note 221 (averaging the cost of blinds at \$554); *How Much Does It Cost to Paint My Apartment?*, *supra* note 222 (averaging interior paint bids at \$2,000); *US Residential Rent and Rental Statistics*, *supra* note 225 (averaging rent at \$1,102 per month); Votto, *supra* note 170 (stating the average turnover rate for rental units is 54%).

243. 42 U.S.C.A. § 3604(f)(9) (West 2020).

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requirements are necessary to qualify ESAs as desirable co-tenants.²⁴⁴ Further, guaranteed socialization will enhance the positive public sentiment concerning ESA dogs.²⁴⁵ Fewer instances of egregious fraud will receive widespread attention from the media, and ESA prescriptions will overcome their negative stereotypes.²⁴⁶

4. *Creating Sensible Species Restrictions*

In addition to service dogs, the ADA has a limited provision regarding miniature horses.²⁴⁷ Miniature horses trained to perform tasks for disabled persons may qualify for ADA status where reasonable.²⁴⁸ The ADA created four assessment factors to determine whether a miniature horse accommodation is reasonable:

(1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner's control; (3) whether the facility can accommodate the miniature horse's type, size, and weight; and (4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.²⁴⁹

Congress should create federal legislation to limit people's unreasonable attempts at claiming their peacocks, pigs, and lobsters are ESAs in the context of landlord-tenant law.²⁵⁰ In addition to lack of control over semi-domestic species, some of these animals require ample space that small apartments and condominiums cannot provide.²⁵¹ Stricter species restrictions focusing on control

244. See Herstine, *supra* note 200 (detailing the extensive socialization regimen recommended for dogs).

245. See generally Regina Schoenfeld-Tacher, et. al, *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 INT. J. ENVTL. RES. PUB. HEALTH 642 (2017) (on file with the *University of the Pacific Law Review*) (finding that ADA service dogs are viewed more favorably by the public than ESAs).

246. See generally *id.* (speculating that misconceptions, media bias, and lack of understanding about ESAs may be contributing to the discrepancy in support for ESAs compared to ADA service dogs).

247. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47.

248. *Id.*

249. *Id.*

250. See Sharelle Burt, *The Most Ridiculous 'Emotional Support' Animals People Brought on a Plane*, TRAVEL NOIRE (Dec. 13, 2018), <https://travelnoire.com/the-most-ridiculous-service-animals-people-brought-on-a-plane> (on file with the *University of the Pacific Law Review*) (reciting instances of airline passengers bringing animals unsuitable as ESAs on planes).

251. Compare Allie Layos, *5 Essential Tips for Keeping Peacocks as Pets*, WIDE OPEN PETS, <https://www.wideopenpets.com/5-essential-tips-for-keeping-peacocks-as-pets/> (last visited Jan. 12, 2020) (on file with the *University of the Pacific Law Review*) (educating peacock owners about the importance of vertical and horizontal spatial needs), with 35 *Inspiring Rescue Stories from 35 Years of PETA*, PETA, <https://www.peta.org/features/35-rescues/> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (detailing thirty-five harrowing stories of animal rescues, where many of these animals owners kept them in small cages, neglected, and abused them, including the rescue story of Harry and Houdini, two ducks who were kept in a plastic crate in their owners' living room because the owners did not know "how to care for [the ducks]").

and trainability will also prevent potential damage to dwellings owned by landlords who cannot otherwise mitigate the risk by charging an additional deposit or increased rent.²⁵²

V. POTENTIAL OPPOSITION TO PROPOSED LEGISLATION

Stricter ESA legislation at the federal level will inevitably result in opposition.²⁵³ Section A contemplates increased costs due to stricter ESA legislation.²⁵⁴ Section B acknowledges the potential increase in pet surrender due to eviction and inability to rent.²⁵⁵

A. Costs Due to Stricter ESA Qualification

An expected concern with stricter ESA legislation would be the increase in cost for medical services and animal training.²⁵⁶ Generally speaking, persons suffering from mental illness also have higher health care costs.²⁵⁷ Family income below the federal poverty line correlates with adults who experience mental health issues.²⁵⁸ Further, if a mother suffers from moderate to severe depression, her household has a 50% to 80% increase in experiencing food insecurity.²⁵⁹ Additional expenses—such as animal training and face-to-face therapy—could potentially be cost prohibitive for persons seeking ESA prescriptions.²⁶⁰ However, widespread misuse of ESA prescriptions may ultimately increase rent for all.²⁶¹ With California’s housing crisis at what seems like a never-ending peak, allocating

252. Compare U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47 (laying out four assessment factors for miniature horses), and Burt, *supra* note 250 (ranking the most peculiar species handlers claim are ESAs), with Gibeault, *supra* note 62 (delineating that a landlord cannot charge a pet deposit to a person with an ESA).

253. Patricia Liverpool, *Tightening Service and Emotional Support Animal Regulations*, REGULATORY REVIEW (Mar. 22, 2018), <https://www.theregreview.org/2018/03/22/liverpool-service-support-animal-regulations/> (on file with the *University of the Pacific Law Review*) (exploring scholars’ contentions that stricter support animal regulations will “inflict unfair costs on the disabled”).

254. *Infra* Section V.A.

255. *Infra* Section V.B.

256. Compare *How Much Does Therapy Cost?*, GOODTHERAPY, <https://www.goodtherapy.org/blog/faq/how-much-does-therapy-cost> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (estimating the cost of a therapy session at \$150), with Karetnick, *supra* note 207 (estimating service dog training at \$25,000).

257. *Mental Health and Poverty*, MCSILVER INST., https://mcsilver.nyu.edu/sites/default/files/reports/Mental_Health_and_Poverty_one-sheet.pdf (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*).

258. *Id.*

259. *Id.*

260. Compare *How Much Does Therapy Cost?*, *supra* note 256 (estimating the cost of a therapy session at \$150), with Karetnick, *supra* note 207 (estimating service dog training at \$25,000).

261. Kaycee Miller, *5 Ways to Avoid a Rent Increase*, RENT.COM (June 5, 2018), <https://www.rent.com/blog/5-ways-avoid-rent-increase/> (last updated Jan. 10, 2019) (on file with the *University of the Pacific Law Review*) (reasoning that landlords may increase rent based on increased property maintenance).

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costs onto all renters is not a viable option.²⁶² Subsection 1 examines the cost of health and therapeutic services.²⁶³ Subsection 2 considers the cost to train an animal.²⁶⁴

1. *Cost to Receive Face-to-Face Therapy*

Access to therapy is a concern for people seeking mental health services.²⁶⁵ Therapy can cost on average \$150 per session.²⁶⁶ Even with insurance, co-pays can exceed \$50 per visit for some patients.²⁶⁷ If stricter legislation shuts down opportunities for speedy, online ESA prescriptions, the cost of therapy to meet the heightened requirements of the patient–therapist relationship will increase for patients seeking ESAs.²⁶⁸

While this is a valid concern, there may be alternatives available for patients who need financial assistance.²⁶⁹ Teaching universities and large cities often have options for free or low-cost therapy.²⁷⁰ Also, some therapists will work with patients based on a payment structure that corresponds with the patients’ income.²⁷¹ Although free and low-cost options do not solve the rising cost problem, or the problem for those not in major cities or near universities, they are important options to communicate to seekers of ESA prescriptions.²⁷² Additionally, an implementation of federal subsidies for ESAs may provide a significant benefit to patients in need of financial assistance.²⁷³

262. See Jill Cowan & Robert Gebeloff, *As Rents Outrun Pay, California Families Live on a Knife’s Edge*, N.Y. TIMES (Nov. 21, 2019), <https://www.nytimes.com/2019/11/21/us/california-housing-crisis-rent.html> (on file with the *University of the Pacific Law Review*) (commenting on the housing crisis and increased rent as a result).

263. *Infra* Subsection V.A.1.

264. *Infra* Subsection V.A.2.

265. *How Much Does Therapy Cost?*, *supra* note 256.

266. *Id.*

267. *Id.*

268. Compare IND. CODE ANN. § 22-9-7-12(5)(A)–(B) (West 2019) (restricting online ESA letter providers), with *How Much Does Therapy Cost?*, *supra* note 256 (averaging the cost of therapy at \$150 per session).

269. *How Much Does Therapy Cost?*, *supra* note 256.

270. See *Community Counseling Clinic*, UNIVERSITY OF ALABAMA AT BIRMINGHAM, <https://www.uab.edu/education/counselingclinic/> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (offering affordable counseling); *PSU Community Counseling Clinic*, PORTLAND STATE UNIVERSITY, <https://www.pdx.edu/coun/clinic> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (offering low cost counseling services); *Community Psychology Counseling Clinics*, PEPPERDINE GRADUATE SCHOOL OF EDUCATION & PSYCHOLOGY, <https://gsep.pepperdine.edu/about/clinics/> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*) (offering counseling services on a sliding scale fee based on income).

271. *How Much Does Therapy Cost?*, *supra* note 256.

272. See *id.* (suggesting low cost options to receive counseling services).

273. CONG. BUDGET OFFICE, FEDERAL SUBSIDIES FOR HEALTH INSURANCE COVERAGE FOR PEOPLE UNDER AGE 65: 2019 TO 2029, at ii (2019) (explaining that “the federal government subsidizes health insurance for most Americans through a variety of programs and tax provisions”).

2. Cost to Train an Animal

Training a service dog is a sizable expense.²⁷⁴ For example, training a service dog with a professional organization can cost upwards of \$25,000.²⁷⁵ However, many organizations provide financial assistance for persons who are unable to afford but require a service dog.²⁷⁶ Even owner-trained service dogs incur similar costs when considering training assistance, dog food, veterinary costs, and equipment to assist the handler.²⁷⁷ Further, training experts recommend that both the handler and the service dog regularly receive follow up training for the dog's life to ensure optimal reliability.²⁷⁸

Although the proposed legislation would not require extensive training parallel to ADA service dogs, obedience training is costly and time consuming.²⁷⁹ On average, obedience training costs \$30 to \$80 per class.²⁸⁰ For support or therapy purposes, prices increase to about \$120 per hour.²⁸¹ Concerned citizens should create or push existing nonprofit organizations that already offer free service dog training to provide similar opportunities for ESAs.²⁸² Regardless of the cost or time commitment, people who have the financial means and time to train their ESAs should want an animal who is well behaved, housetrained, and socialized to provide optimal emotional support.²⁸³

274. Karetnick, *supra* note 207.

275. *See id.* (including two years of service dog training, dog food, and veterinary care).

276. *Compare Program*, WORKING DOGS FOR VETS, <https://www.workingdogsforvets.org/> (last visited May 27, 2020) (on file with the *University of the Pacific Law Review*) (providing training, shelter dogs, and information for veterans who need a service dog), and *What We Do*, LABS FOR LIBERTY, <https://www.labsforliberty.org/what-we-do> (last visited Mar. 8, 2020) (training puppies to be service dogs and gifting them to veterans), with AKC Staff, *Service Dog Training 101 – Everything You Need to Know*, AM. KENNEL CLUB (Mar. 14, 2017), <https://www.akc.org/expert-advice/training/service-dog-training-101/> (on file with the *University of the Pacific Law Review*) (explaining that organizations often offer financial relief to low income candidates).

277. AKC Staff, *Service Dog Training 101 – Everything You Need to Know*, *supra* note 276.

278. Karetnick, *supra* note 207.

279. *See* AKC Staff, *Basic Obedience Training for Puppies: Where to Start*, AM. KENNEL CLUB (Mar. 02, 2020), <https://www.akc.org/expert-advice/training/basic-obedience-training-for-your-dog/> (on file with the *University of the Pacific Law Review*) (providing options for socialization and training, while recommending consistency).

280. *How Much Does It Cost to Train a Dog?*, HOMEGUIDE, <https://homeguide.com/costs/dog-training-cost> (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*).

281. *Id.*

282. *Compare* WORKING DOGS FOR VETS, *supra* note 276 (providing training, shelter dogs, and information for veterans who need a service dog), and *What We Do*, LABS FOR LIBERTY, *supra* note 276 (training puppies to be service dogs and gifting them to veterans), with Karetnick, *supra* note 207 (explaining that organizations often offer financial relief to low income candidates).

283. Kendra Cherry, *What Is an Emotional Support Animal?*, VERYWELL MIND, <https://www.verywellmind.com/what-is-an-emotional-support-animal-4171479> (last updated Oct. 17, 2019) (on file with the *University of the Pacific Law Review*) (providing examples of the support ESAs bring, such as emotional connectivity, relaxation, love, and purpose).

B. Animal Rights: Increased Pet Surrender

It is widely known that some landlords do not allow tenants to keep pets at rental properties.²⁸⁴ Eviction is a leading reason for animal surrender.²⁸⁵ In one instance, a dog owner surrendered more than a dozen dogs to a local shelter after the owner was evicted.²⁸⁶ Oftentimes, tenants abandon pets because their new landlords do not allow pets.²⁸⁷ In a relinquishment study, among the top ten reasons for relinquishment common to both cats and dogs were moving, the landlord not allowing pets, and too many animals in the household.²⁸⁸

A concern with stricter legislation is likely that more animals will be surrendered due to eviction or tenants' inability to find a suitable residence.²⁸⁹ Although this is an important point that must be acknowledged, situations like these do not excuse the irresponsible decision to surrender animals.²⁹⁰ The unavoidable reality is that common pets—such as dogs and cats—have long life expectancies.²⁹¹ If an animal is truly to provide emotional support, the animal should be treated by the owner as a quasi-member of the family.²⁹² Therefore, health care providers must also be cognizant of animal surrender when prescribing ESAs, and patients seeking ESAs should consider this extensive time commitment.²⁹³

284. *Common Surrender Reasons (Dogs)*, MSPCA-ANGELL, https://www.mspca.org/pet_resources/common-surrender-reasons-dogs/ (last visited Mar. 8, 2020) (on file with the *University of the Pacific Law Review*).

285. *Data on Evictions and How It Effects Pets*, DOWNTOWN DOG RESCUE, <https://downtowndogrescue.org/evictions/> (last visited Mar. 8, 2020).

286. Lindsay Kerr, *PACC Takes in More Than a Dozen Dogs After Owner Was Evicted*, ON YOUR SIDE TUCSON (Nov. 21, 2018), <https://www.kgun9.com/news/local-news/pacc-takes-in-more-than-a-dozen-dogs-after-owner-was-evicted> (on file with the *University of the Pacific Law Review*).

287. Laura Agadoni, *How to Handle Abandoned Pets at Your Rental Property*, LANDLORDODOLOGY (Dec. 9, 2016), <https://www.landlordology.com/abandoned-pets/> (on file with the *University of the Pacific Law Review*).

288. M.D. Salman, et al., *Human and Animal Factors Related to the Relinquishment of Dogs and Cats in 12 Selected Animal Shelters in the United States*, 1 J. APPLIED ANIMAL WELFARE SCI. 207, 212 (1998).

289. See Agadoni, *supra* note 287 (surmising that tenants abandon animals because they are moving to places that do not allow pets).

290. See *id.* (discussing reasons why tenants abandon pets at rental properties).

291. Compare Coates, *supra* note 166 (averaging dog lifespans at 11 years), with BEC Crew, *supra* note 167 (averaging cat lifespans at 12 to 15 years).

292. *JAVMA News Digest*, 80 AM. J. VETERINARY RES. 116, 117 (2019) (on file with the *University of the Pacific Law Review*) (finding that 80% of Americans believe their pet is a member of the family).

293. Compare *Common Surrender Reasons (Dogs)*, *supra* note 284 (noting that some landlords do not allow pets), with Coates, *supra* note 166 (averaging dog lifespans at 11 years), and BEC Crew, *supra* note 167 (averaging cat lifespans at 12 to 15 years).

VI. CONCLUSION

The FHA does not clearly provide a definition for reasonable accommodation regarding mental and emotional health issues.²⁹⁴ The ADA does not recognize ESAs under its umbrella; therefore, it does not provide context for training and socialization requirements.²⁹⁵ Due to the absence of ESA training or species requirements, it is problematic that any animal could potentially become an ESA.²⁹⁶ Two major consequences the lack of a definition for reasonable accommodation creates are a landlord's potential exposure to premises liability and property damage.²⁹⁷

Passing legislation to close the loopholes is necessary to reduce ESA fraud and mitigate the stigma surrounding mental health.²⁹⁸ Operators of online ESA letter mills disregard their ethical duties by providing blanket approvals to patients seeking ESAs.²⁹⁹ Stricter legislation requiring a more substantial patient–therapist relationship will compel health care professionals to balance accessible care with their duty to be objective and thorough.³⁰⁰

In landlord–tenant situations, the nonexistence of training requirements presents landlords with significant liability.³⁰¹ Property damage or an animal attack³⁰² can be disproportionately higher than rent paid over the course of a tenant's lease.³⁰³ If either scenario came to fruition, it would also create a retrospective

294. 42 U.S.C.A. § 3604(f)(3)(C) (West 2020) (describing design and construction specifications pertaining to wheelchair accessibility).

295. See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA, *supra* note 53 (distinguishing service animals from ESAs).

296. See Gibeault, *supra* note 62 (clarifying that a medical professional prescribes an ESA when they “determine that the presence of the animal is needed for the mental health of the patient”).

297. See *Premises Liability*, *supra* note 95 (listing common situations where landlords may be liable for accidents occurring on their property); 42 U.S.C. § 3604(f)(9) (West 2020) (lacking a definition for reasonable accommodation).

298. Compare 42 U.S.C.A. § 3604(f)(3)(C) (failing to include examples of accommodations for persons with mental and emotional health conditions), with *infra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).

299. See Younggren, *supra* note 150 (analyzing conflicts of interest that arise when prescribing ESAs).

300. Compare *Ethical Principles of Psychologists and Code of Conduct*, *supra* note 151 (“Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques”), with *Online ESA Approval with a Licensed Therapist*, WAGGY, *supra* note 147 (pricing Waggy's ESA letter at \$49), and *Get Your Medical Marijuana Card Online*, *supra* note 155 (pricing a cannabis card at \$39).

301. *Premises Liability*, *supra* note 95 (explaining a landlord's risk of liability for actions by third parties on their property, such as dog bites).

302. Compare *Spotlight On: Dog Bite Liability*, *supra* note 240 (averaging California's payout for dog bite claims as \$51,265), with *US Residential Rent and Rental Statistics*, *supra* note 225 (averaging rent at \$1,102 per month).

303. Compare *How Much Does It Cost to Install Window Treatments?*, *supra* note 221 (averaging blinds at \$554), and *How Much Does It Cost to Paint My Apartment?*, *supra* note 222 (averaging wall paint at \$2,000), with *US Residential Rent and Rental Statistics*, *supra* note 225 (averaging rent at \$1,102 per month), and Votto, *supra* note 170 (stating the average turnover rate is 54%).

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“tenancy [that] would result in substantial physical damage to the property of others” or “a direct threat to the health or safety of other individuals” for any landlord under the FHA’s exception to renting to a tenant with a disability.³⁰⁴ Further, stricter species restrictions focusing on control and trainability will also prevent potential property damage and injury.³⁰⁵

As a result of stricter legislation, the cost of therapy will likely increase for patients seeking ESAs.³⁰⁶ While this is a valid concern, patients who need financial assistance may have several alternatives in their local communities.³⁰⁷ Communities should also create and push for existing nonprofit organizations to donate free ESAs with the requisite training to patients in need of financial assistance, similar to nonprofits that provide fully trained service dogs.³⁰⁸ Although additional training may prove costly and time consuming, persons seeking ESAs—who have the ability to train their ESAs—should want an animal who is well behaved and friendly to provide optimal emotional support in the privacy of their homes as well as in public or shared spaces.³⁰⁹ Ultimately, adopting the aforementioned legislation will destigmatize mental health while providing landlords with clear regulations that mitigate their risk.³¹⁰

304. 42 U.S.C.A. § 3604(f)(9) (West 2020).

305. Compare U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., ADA REQUIREMENTS: SERVICE ANIMALS, *supra* note 47 (laying out four assessment factors for miniature horses), and Burt, *supra* note 250 (ranking the most peculiar species handlers claim are ESAs), with Gibeault, *supra* note 62 (delineating that a landlord cannot charge a pet deposit to a person with an ESA).

306. Compare IND. CODE ANN. § 22-9-7-12(5)(A)–(B) (West 2019) (restricting online ESA letter providers), with *How Much Does Therapy Cost?*, *supra* note 256 (averaging the cost of therapy at \$150 per session).

307. *How Much Does Therapy Cost?*, *supra* note 256.

308. Compare Program, WORKING DOGS FOR VETS, *supra* note 276 (providing training, shelter dogs, and information for veterans who need a service dog), and *What We Do*, LABS FOR LIBERTY, *supra* note 276 (training puppies to be service dogs and gifting them to veterans), with Karetnick, *supra* note 207 (explaining that organizations often offer financial relief to low income candidates).

309. Cherry, *supra* note 283 (providing examples of the support ESAs bring, such as emotional connectivity, relaxation, love, and purpose).

310. Compare 42 U.S.C.A. § 3604(f)(3)(C) (West 2020) (failing to include examples of accommodations for persons with mental and emotional health conditions), with *supra* Part IV (analyzing weaknesses in the current ESA process and recommending legislative reform).