

Ruff Go: Identifying a Workable Solution to the Rights Clash Caused by Iowa’s Emotional Support Animal Laws

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Abstract: In Cohen v. Clark, the Iowa Supreme Court identified that Iowa’s Emotional Support Animal (“ESA”) laws create a clash of rights between individuals entitled to an ESA accommodation under Iowa Code Section 216.8A and those individuals who have uncontrollable allergy attacks when an animal is present. As more and more legislatures seek to grant health-related rights to allow ESAs, it appears this clash between individuals’ respective rights may only be beginning. Thus, this Note seeks to determine whether Iowa’s ESA laws created a clash of rights under the pre-Cohen understanding of the law, identify the ramifications of Iowa’s ESA laws in a post-Cohen world, and offer suggestions for how Iowa’s legislature can justly alleviate these concerns for all stakeholders.

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I. INTRODUCTION

Animals bring joy to millions of American households.¹ For some people, this joy may serve a functional purpose; both federal and state law recognize that, even without any specialized training, an animal's presence may alleviate a person's symptoms stemming from an emotional disability.² These animals

1. *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS'N, <https://www.avma.org/resources-tools/reports-statistics/us-pet-ownership-statistics> [<https://perma.cc/3YHK-NUFB>] (reporting that 38.4 percent of American households, which amounts to 48,255,413 households, own a dog and noting that there are 76,811,305 dogs in the United States).

2. See JOHN TRASVIÑA, U.S. DEP'T OF HOUS. & URB. DEV., FHEO-2013-01: SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 2, 4 (2013), https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf [<https://perma.cc/TBH6-UAPV>]; see also Appellee 2800-1 LLC's Final

are commonly referred to as Emotional Support Animals (“ESAs”), and disabled individuals that have an ESA are generally permitted privileges like having their ESA in non-pet-friendly housing and bringing their ESA with them on a flight.³ Although the motives are admirable, state legislative recognition of ESAs has outpaced the medical community, which still cannot say “whether they work or how much they work” to improve mental health.⁴ Therefore, the law’s widespread adoption of ESAs is not grounded in any form of reliable evidence from empirical studies.⁵ Rather, it rests on the unfounded, personal instincts of legislators.⁶

In practice, both the Iowa and federal legislatures’ haste to recognize ESAs has led to a variety of problems. Most evidently, many businesses are confused over when they must grant an ESA, which has created an environment where businesses will grant an ESA without much inquiry.⁷ Due to the convenience of having a pet designated as an ESA, ESA requests have boomed.⁸ This has created a market for online ESA certifications, so many ESAs have never been prescribed by a psychologist.⁹ As a result, many individuals with an ESA are not disabled, which contrasts with legislatures’ narrow, intended scope for ESAs.¹⁰ Sometimes, these unintended ESA owners

Brief at 15, *Cohen v. Clark*, 945 N.W.2d 792 (Iowa 2020) (No. 18-2173) [hereinafter Brief for 2800-1 LLC] (“The benefit of an emotional support animal is its mere presence, which purportedly allows a person with a mental health disability to function better in society or in some area of their life.”).

3. Stephanie Gibeault, *Everything You Need to Know About Emotional Support Animals*, AM. KENNEL CLUB (Feb. 24, 2021), <https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals> [https://perma.cc/gV5E-APFR].

4. Kate Thayer, *Despite the Popularity of Emotional Support Animals, Experts Say There’s Little Evidence They Work*, CHI. TRIB. (May 30, 2018, 5:00 AM), <https://www.chicagotribune.com/lif-estyles/ct-life-emotional-support-animals-evidence-20180521-story.html> [https://perma.cc/SN6R-ME3L] (quoting Yale University researcher Molly Crossman, who specializes in the interactions between people and animals).

5. *See id.* (noting that “[t]here are few studies that examine emotional support animals, and the conclusions . . . are mixed” at best).

6. *Id.* As Crossman observes, ESAs “proliferated so quickly and so widely because we all have these [positive] experiences (with pets).” *Id.* This reasoning was quickly rejected by the American Psychological Association’s associate executive director for practice and research policy, Lynn Bufka, who points out that one’s personal, positive experiences with an animal “doesn’t mean [that] there’s a measurable mental health benefit” for people with a mental health disability. *Id.*

7. Brief for 2800-1 LLC, *supra* note 2, at 24–25.

8. Cynthia K. Chandler, *Is There an Epidemic of Emotional Support Animals?*, COUNSELING TODAY (Feb. 6, 2019), <https://ct.counseling.org/2019/02/is-there-an-epidemic-of-emotional-support-animals> [https://perma.cc/65YH-M8VL].

9. *See* Thayer, *supra* note 4; *see also* Appellant/Cross Appellee’s Final Brief at 32 n.10, *Cohen v. Clark*, 945 N.W.2d 792 (Iowa 2020) (No. 18–2173) [hereinafter Brief for Cohen] (quoting an online ESA certification company’s pitch to consumers).

10. ESA requests were only intended for individuals with a disability. *See* IOWA CODE ANN. § 216.8A(3)(c)(2) (West 2022) (using “the person” to describe who may require reasonable accommodations, which refers to “the person with a disability” as mentioned in Iowa Code section

have specious motives, as tenants have used ESA certifications to circumvent a landlord's pet policy *after* being caught with a pet on the premises.¹¹

People's distortion of ESAs has generally been overlooked because ESAs appear harmless, which would render any—even hypothetical—benefit to be a net gain; however, ESAs' impacts are neither clear-cut nor settled.¹² For instance, ESAs may harm those they come into contact with, as there are a multitude of incidents where an unruly ESA attacked strangers.¹³ Additionally, an estimated 15 million Americans have pet allergies, which can have large adverse effects on an individual's health and comfort level.¹⁴ Further, ESAs may pose cleanliness risks and increase costs for businesses.¹⁵ Thus, an ESA owner's mental well-being may often come into conflict with the physical well-being of others they come into contact with as a direct result of the ESA's presence.

Recently, the Iowa Supreme Court faced these often-ignored concerns when it decided *Cohen v. Clark*.¹⁶ In doing so, the Court chose to debunk the myth that ESAs are harmless.¹⁷ Accordingly, this Note will analyze the Court's

216.8A(3)(c)(1)). Disability is defined as a substantial disability. *Id.* § 216.2(5). Thus, ESA requests were meant for a narrow scope of individuals who struggle with “one or more major life activities.” *Cohen v. Clark*, 945 N.W.2d 792, 801 (Iowa 2020). Typically, “[m]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *ADA Amendments Act of 2008 Frequently Asked Questions*, U.S. DEP'T OF LAB.: OFF. OF FED. CONT. COMPLIANCE PROGRAMS, <https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments> [<https://perma.cc/Z69W-4DND>] (answering “[w]hat is the expanded definition of ‘major life activities’ under the ADAAA?”).

11. See Brief for Cohen, *supra* note 9, at 31 (noting that 2800-1 LLC's leasing manager testified that every time he caught a tenant with a pet, which amounted to about ten times a year, each tenant then sought ESA certification).

12. See Thayer, *supra* note 4.

13. Chandler, *supra* note 8 (citing an ABC News report of a man who was attacked by an ESA on a flight and a Washington Post report of an ESA biting a child in the face while boarding a flight).

14. See *Pet Allergy: Are You Allergic to Dogs or Cats?*, ASTHMA & ALLERGY FOUND. OF AM. (Oct. 2015), <https://www.aafa.org/pet-dog-cat-allergies> [<https://perma.cc/L6QD-5B64>] (“[A]s many as three in 10 people with allergies have allergic reactions to cats and dogs.”); *Allergy Facts and Figures*, ASTHMA & ALLERGY FOUND. OF AM. (Apr. 2021), <https://www.aafa.org/allergy-facts> [<https://perma.cc/9XN6-MMY3>] (“More than 50 million Americans have experienced various types of allergies each year.”). Additionally, allergic reactions to cats and dogs were both listed as being among the most common indoor/outdoor “allergy triggers.” *Allergy Facts and Figures*, *supra*.

15. Thayer, *supra* note 4; Brief for 2800-1 LLC, *supra* note 2, at 24–25 (noting expert testimony that animal units are in identifiably worse conditions than non-pet units, even partial restoration from pet damage nears \$2,000, later tenants still may have allergic reactions due to lingering effects from the pet's dander, and increased pest costs due to flea infestations that correlated with the explosion of ESAs).

16. See generally *Cohen v. Clark*, 945 N.W.2d 792 (Iowa 2020) (illustrating the concerns and burdens on others that arise from ESAs).

17. *Id.* at 794–95.

decision in *Cohen*, comment on the effectiveness of Iowa's ESA laws in the wake of *Cohen*, and suggest the next steps.

II. COHEN'S BACKGROUND

This Part will outline the circumstances that led to *Cohen*, generally describe the elements of the Plaintiff's subsequent claims for breach of contract and quiet enjoyment, and summarize the Iowa judiciary's various approaches to the problems *Cohen* presented.

A. COHEN'S FACTS

Cohen was a case of first impression in Iowa where the Iowa Supreme Court was asked to determine how landlords should consider ESA requests.¹⁸ Plaintiff Karen Cohen ("Cohen") signed a written lease agreement with 2800-1 LLC on November 11, 2015.¹⁹ Cohen had a long medical history of severe allergic reactions to pet dander.²⁰ Although Cohen's reaction to dog dander was less severe than her potentially deadly reaction to cat dander,²¹ dog dander still rendered her miserable.²² Alarming, Cohen feared repeated exposure to dog dander could result in a potentially deadly reaction because Cohen's symptoms to cat dander consistently "progressed through repeated exposure."²³ Due to these concerns, Cohen purposefully selected an apartment in Iowa City that barred pets from the premises.²⁴ Cohen thought her lease with 2800-1 LLC met her personal health needs as Section 53 of the lease agreement noted, in part, that "[n]o pets are allowed in the building or on the Premises at any time. . . . Reasonable accommodations accepted."²⁵

After Cohen signed her lease, a different tenant, David Clark ("Clark"), also signed a lease agreement with 2800-1 LLC.²⁶ Clark's lease spanned the same term as Cohen's lease,²⁷ provided Clark with an apartment down the hall from Cohen, and included an identical "no-pets provision."²⁸ In August 2016, Clark contacted 2800-1 LLC to request an ESA.²⁹ In doing so, Clark provided

18. *Id.* at 799.

19. *Id.* at 795.

20. *Id.*

21. *Id.* (noting Cohen "carr[ies] an EpiPen to protect against anaphylactic shock if she is exposed to cat dander").

22. *Id.* (observing Cohen's reaction to dogs generally consists of "nasal congestion, swollen sinuses, [and] excess coughing").

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (noting Clark signed his lease on January 18, 2016, which is about two months after Cohen did so).

27. *Id.* (observing Cohen and Clark each signed a term of years lease agreement that spanned from July 21, 2016, to July 12, 2017).

28. *Id.*

29. *Id.*

a letter from his psychiatrist, who stated, “[i]n my professional opinion, owning and caring for a dog would benefit [Clark’s] health and well-being. Please allow [Clark] to include a pet on his lease.”³⁰ Additionally, the psychiatrist stated Clark had “chronic mental illness,” which “impair[ed] . . . his ability to function.”³¹

In response to Clark’s request, Jeffrey Clark (“Jeffrey”),³² 2800-1 LLC’s leasing and property manager, reached out to the apartment’s tenants to determine if any tenant had a dog allergy.³³ Cohen informed Jeffrey of her medical history and described her pet allergies.³⁴ As a result, Jeffrey reached out to the Iowa Civil Rights Commission (“ICRC”).³⁵ An ICRC staffer advised Jeffrey that his proposed compromise to transfer Clark to a pet friendly 2800-1 LLC complex would not be a reasonable accommodation.³⁶ Instead, the ICRC informed Jeffrey he must attempt to “accommodate both Cohen’s allergies and Clark’s ESA.”³⁷ Due to this advice, 2800-1 LLC allowed Clark to have an ESA; however, Clark and Cohen were assigned separate stairwells.³⁸ 2800-1 LLC also “purchased an air purifier for Cohen’s apartment to minimize her exposure to pet dander inside the apartment.”³⁹

Despite these efforts and a year of trying to identify workable solutions,⁴⁰ nothing mitigated Cohen’s constant cough or prevented her from having excess mucus in her throat, a stuffy nose, and swollen sinuses.⁴¹ Cohen then brought suit against 2800-1 LLC and Clark in small claims court.⁴²

B. THE LAWS INVOLVED IN COHEN’S CLAIMS

In her complaint, Cohen asserted “2800-1 LLC breached the express covenant of her lease that provided for no pets and the implied warranty of

30. *Id.*

31. *Id.* (internal quotation marks omitted).

32. Jeffrey is not related to David Clark. *Id.* at 796.

33. *Id.*

34. *Id.*

35. *Id.* (highlighting Jeffrey “requested the ICRC’s review or a formal agency determination even though no party ever filed a complaint”).

36. *Id.*

37. *Id.* Despite informing Jeffrey in this manner, “[t]here was no finding by the ICRC that allowing Clark’s ESA in the building despite Cohen’s allergic reactions would be a reasonable accommodation.” *Id.*

38. *Id.*

39. *Id.* Cohen’s personal efforts to try to mitigate her allergic reaction consisted of “taking multiple allergy medicines in addition to her daily allergy medication, including Benadryl every night, nasal sprays, and twice-a-day nasal rinses.” *Id.*

40. *Id.* One rejected opportunity considered “air lock” doors to reduce air infiltration; however, this would have cost 2800-1 LLC \$81,715.92. *Id.* Thus, the doors were not considered “financially feasible.” *Id.*

41. *Id.*

42. *Id.*

quiet enjoyment.”⁴³ The following sections explain the elements of: (1) breach of an express covenant of a lease; and (2) breach of the implied warranty of quiet enjoyment.

1. The Elements Needed to Prove Breach of an Express Covenant of a Lease

When a plaintiff alleges a breach of an express covenant of a lease, he or she alleges a breach of contract.⁴⁴ In Iowa, to prove a breach of contract, a plaintiff must show:

(1) the existence of a contract, (2) the terms and conditions of the contract, (3) that [plaintiff] has performed all the terms and conditions required under the contract, (4) the defendant’s breach of the contract in some particular way, and (5) that plaintiff has suffered damages as a result of defendant’s breach.⁴⁵

In *Cohen*, the parties undoubtedly had a contract with clear terms and conditions. Furthermore, Cohen performed her obligations, namely paying rent. As a result, the main issues centered on the fourth and fifth elements. Most notably, the lease term in question invokes nondiscriminatory housing law by explicitly asserting that 2800-1 LLC would provide reasonable accommodations.⁴⁶ Thus, to determine if 2800-1 LLC breached the contract in a particular way, it is important to understand what constitutes a reasonable accommodation under nondiscriminatory housing laws. If 2800-1 provided Clark with a reasonable accommodation, then it followed precisely what it promised Cohen in the lease.

2. Nondiscriminatory Housing Laws

The laws surrounding nondiscriminatory housing and reasonable accommodations are reflected in similar provisions of federal, state, and local laws.

i. The Federal Fair Housing Act and Its Amendments

Title VIII of the Civil Rights Act, often referred to as the Fair Housing Act (“FHA”), “prohibit[s] discrimination on the basis of race, color, religion, or national origin in certain housing related transactions.”⁴⁷ The Fair Housing Amendments Act was passed in 1988, which modified the FHA to prohibit

43. *Id.*

44. *See* RESTATEMENT (FIRST) OF CONTS. § 290 (AM. L. INST. 1932).

45. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010) (citing *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998)).

46. *See Cohen*, 945 N.W.2d at 795 (noting the lease states “reasonable accommodations [will be] accepted,” which necessarily requires looking to the nondiscriminatory housing laws to determine what constitutes a “reasonable accommodation”).

47. *Id.* at 818 (McDonald, J., dissenting); *see* 42 U.S.C. § 3604(b) (2018).

discrimination against handicapped persons.⁴⁸ “Handicap” is defined as: “(1) a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment.”⁴⁹ Specifically, the amended FHA states it is discrimination to “refus[e] to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.”⁵⁰ However, a landlord is not required to do so if the “tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.”⁵¹

To assist in enforcement, the amended FHA contains a private cause of action for “any person who[:] (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.”⁵² If discrimination occurred, the liability is potentially extensive, as “the court may award to the plaintiff actual and punitive damages” and “a reasonable attorney’s fee and costs.”⁵³ Although these protections are limited to federally subsidized housing, the amended FHA is relevant because of its similarity to the Iowa Code.⁵⁴

ii. Discriminatory Housing Under Iowa’s Civil Rights Act

The Iowa Civil Rights Act (“ICRA”) contains provisions against discriminatory housing that are substantially similar to the aforementioned amended FHA.⁵⁵ Much like the amended FHA, the ICRA states, “[a] person shall not discriminate against another person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection with the dwelling because of a disability.”⁵⁶ While the ICRA uses “disability” instead of “handicap,” its definition of “disability” includes “the physical or mental condition of a person” and must be substantial.⁵⁷

48. *Cohen*, 945 N.W.2d at 818 (McDonald, J., dissenting); see Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619, 42 U.S.C. § 3604(f).

49. 42 U.S.C. § 3602(h).

50. *Id.* § 3604(f)(3)(B).

51. *Id.* § 3604(f)(9).

52. *Id.* § 3602(i); see also 42 U.S.C. § 3613(a)(1)(A) (providing two years to commence a civil action).

53. 42 U.S.C. § 3613(c)(1)–(2).

54. See *Cohen v. Clark*, 945 N.W.2d 792, 800 n.4 (Iowa 2020). For a description of the similarities, see *infra* Section II.B.2.ii.

55. See *supra* text accompanying note 54.

56. IOWA CODE ANN. § 216.8A(3)(b) (West 2022).

57. Compare *id.* § 216.2(5) (using “disability”), with 42 U.S.C. § 3602(h) (using “handicap”).

Therefore, the difference is likely immaterial.⁵⁸ However, the ICRA does not explicitly state that a condition must affect a major life activity to qualify as a disability.⁵⁹

Next, section 216.8A(3)(c)(2) of the Iowa Code is essentially identical to section 3604(f)(3)(B) of the amended FHA; thus, it requires the landlord to make reasonable accommodations.⁶⁰ The ICRA also contains a provision that carves out an exception to this rule when a “tenancy would constitute a direct threat to the health or safety of other persons or . . . result in substantial physical damage to the property of others,” which parallels the amended FHA.⁶¹ Additionally, like the amended FHA, the ICRA creates a civil action for “an aggrieved person”⁶² that allows for “[a]ctual and punitive damages,” “[r]easonable attorney’s fees,” and “[c]ourt costs” if the landlord discriminated against the plaintiff.⁶³

While the ICRA sections discussed thus far closely mirror the amended FHA, the ICRA does not completely track the amended FHA. Instead, the ICRA explicitly addresses a no-pet provision by stating, “[a] landlord shall waive lease restrictions and additional payments normally required for pets on the keeping of animals for the assistance animal or service animal of a person with a disability.”⁶⁴ An “assistance animal” is defined as “an animal that qualifies as a reasonable accommodation under the federal Fair Housing Act . . . or section 504 of the federal Rehabilitation Act of 1973.”⁶⁵ In contrast, a “service animal” is “a dog or miniature horse as set forth in the implementing regulations of Tit. II and Tit. III of the federal Americans with Disabilities Act

58. Both “disability” in the Iowa Code and “handicap” in the U.S. Code are defined as being substantial and referring to either “physical or mental” effects. *Compare* IOWA CODE ANN. § 216.2(5), with 42 U.S.C. § 3602(h). However, Iowa refers to a condition, while the amended FHA refers to an impairment. *Compare* IOWA CODE ANN. § 216.2(5), with 42 U.S.C. § 3602(h). A condition is “[a] disease or physical ailment” or “[a] state of health or physical fitness.” *Condition*, DICTIONARY.COM, <https://www.dictionary.com/browse/condition?s=t> [<https://perma.cc/9YG4-5MWX>]. An impairment is “[w]eakening, damage, or deterioration, especially as a result of injury or disease.” *Impairment*, DICTIONARY.COM, <https://www.dictionary.com/browse/impairment?s=t> [<https://perma.cc/XBR2-JT32>]. Thus, the difference is likely immaterial.

59. *See* IOWA CODE ANN. § 216.2(5).

60. *Compare id.* § 216.8A(3)(c)(2), with 42 U.S.C. § 3604(f)(3)(B) (substituting “such person” for “the person”).

61. *Compare* IOWA CODE ANN. § 216.8A(3)(e), with 42 U.S.C. § 3604(f)(g) (providing an identical affirmative defense to landlords).

62. IOWA CODE ANN. § 216.16A(2)(a).

63. *Compare id.* § 216.17A(6), with 42 U.S.C. § 3613(c)(1)–(2) (allowing the district court to issue identical categories of fees and costs in the event it finds discriminatory housing practices occurred).

64. IOWA CODE ANN. § 216.8B(2); *see also id.* §§ 216.8B–.8C (examining the scope of assistance and service animals as well as the requirements they impose on landlords).

65. *Id.* § 216.8B(1)(a). Since the federal provisions are substantially similar to the Iowa Code, this definition does not change the question at hand. *See supra* note 54 and accompanying text.

of 1990.”⁶⁶ Thus, even where the ICRA deviates from federal law, it still incorporates its definitions. Lastly, the ICRA makes it a simple misdemeanor to “knowingly den[*y*] or interfere[] with the right of a person with a disability under this section.”⁶⁷ However, if a landlord has a no-pet policy, it can deny the accommodation “if a person, who does not have a readily apparent disability, or a disability known to the landlord, fails to provide documentation indicating that the person has a disability and the person has a disability-related need for an assistance animal or service animal.”⁶⁸

iii. Discriminatory Housing Under Iowa City, Iowa’s Human Rights Code

Iowa City addresses ESA issues through discriminatory housing policies, contained in its Human Rights Code (“ICHRC”).⁶⁹ First, similar to the amended FHA and the ICRA, the ICHRC notes refusal to permit reasonable modifications for a disabled person is considered discrimination.⁷⁰ Next, in accord with the amended FHA, the ICHRC definition of “disability” clarifies that the condition must “substantially limit[] one or more of such person’s major life activities.”⁷¹ Once again, this rule does not apply to a “tenancy [that] would constitute a direct threat to the health or safety of other persons.”⁷²

The ICHRC also creates a cause of action for those who “claim[] to be aggrieved by a discriminatory or unfair practice.”⁷³ However, the ICHRC defines “aggrieved person” as “[a]ny person who: a) claims to have been injured by a discriminatory housing practice; or b) believes that such person will be injured by a discriminatory housing practice that is about to occur.”⁷⁴ Similar to the amended FHA and ICRA, the defendant’s potential liability “include[s] actual damages” as well as “court costs and reasonable attorney fees.”⁷⁵ Additionally, the ICHRC explicitly notes a plaintiff may potentially

66. *Id.* § 216.8B(1)(b); *see Revised ADA Regulations: Implementing Title II and Title III*, ADA.GOV (Oct. 10, 2012), <https://www.ada.gov/regs2010/ADAREgs2010.htm> [<https://perma.cc/g9MC-PZRG>]. The ADA provides, “[s]ervice animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities.” *Service Animals*, U.S. DEP’T OF JUST. (Feb. 24, 2020), https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/LW39-UE3Z>]. For example, a service dog may “guid[e] people who are blind” or “alert[] people who are deaf.” *Id.* The ADA specifically provides that “[d]ogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.” *Id.*

67. IOWA CODE ANN. § 216.8B(4).

68. *Id.* § 216.8C(5).

69. IOWA CITY, IOWA, CODE §§ 2-1-1 to -6-5 (2021).

70. *Id.* § 2-3-6(E)(1); *see also id.* § 2-3-6(E)(2) (providing that discrimination occurs upon “[a] refusal to make reasonable accommodations in rules, policies, practices or services, when the accommodations are necessary to afford the person equal opportunity to use and enjoy a dwelling”).

71. *Id.* § 2-1-1 (defining “disability”).

72. *Id.* § 2-3-6(E)(4).

73. *Id.* § 2-4-1(A).

74. *Id.* § 2-1-1 (defining “aggrieved person”).

75. *Id.* § 2-4-6(H).

recover “emotional distress damages” and “front pay.”⁷⁶ Therefore, while similar to the previously discussed provisions, the ICHRC adds another layer of complexity while elaborating on who qualifies for the cause of action.

3. The Elements Needed to Prove a Breach of the Warranty of Quiet Enjoyment

In Iowa, a warranty of quiet enjoyment is codified under section 562A.17(7) of the Iowa Code, which notes that a tenant must “[a]ct in a manner that will not disturb a neighbor’s peaceful enjoyment of the premises.”⁷⁷ This Note will focus on the *landlord’s* warranty of quiet enjoyment because Cohen waived the claim that Clark breached her quiet enjoyment in the district court.⁷⁸ Importantly, this highlights the precarious situation landlords are in—even when mediating a dispute in which neither tenant committed a wrong, a landlord still risks liability.

Under Iowa law, the landlord’s warranty of quiet enjoyment is defined as “a covenant and warranty by the lessor that the tenant shall have quiet and peaceful possession of the demised premises as against the lessor, any person claiming title through or under the lessor, or any person with a title superior to the lessor.”⁷⁹ Since the focus is on possession, a breach of the warranty of quiet enjoyment occurs if a tenant is evicted from the premises.⁸⁰ However, as the phrase “quiet and peaceful” implies, the warranty covers more than actual eviction. Instead, constructive eviction is enough to qualify as a breach of the warranty of quiet enjoyment.⁸¹ Constructive eviction occurs when the landlord’s actions prevent a tenant from “possessing the beneficial use of” the premises despite the tenant remaining entitled to possession.⁸² For example, if a landlord continually fails to make repairs to a no longer functioning toilet, the tenant faces an unbearable condition that likely constitutes constructive eviction.⁸³ This warranty exists in all tenant contracts, whether expressly written or implied.

C. SUMMARIZING THE IOWA JUDICIARY’S APPROACHES TO COHEN

When faced with applying the above law to *Cohen*, the small claims court, district court, and Iowa Supreme Court all utilized different approaches. Additionally, the Iowa Supreme Court was fractured between a majority and two dissents. This Note will summarize each approach; however, when

76. *Id.*

77. IOWA CODE ANN. § 562A.17(7) (2022).

78. *Cohen v. Clark*, 945 N.W.2d 792, 797 n.2 (Iowa 2020).

79. *Duck Creek Tire Serv., Inc. v. Goodyear Corners, L.C.*, 796 N.W.2d 886, 895 (Iowa 2011).

80. *Id.*

81. *Kendall v. Lowther*, 356 N.W.2d 181, 190 (Iowa 1984).

82. Note, *Constructive Eviction*, 19 HARV. L. REV. 50, 50–51 (1905).

83. *Smith v. Greenstone*, 208 S.W. 628, 629–30 (Mo. Ct. App. 1918).

discussing the Iowa Supreme Court, this Note will focus on Chief Justice Susan Christensen's majority opinion and Justice Christopher McDonald's dissent.

1. The Small Claims Court's Decision

In July 2018, the small claims court dismissed Cohen's claims entirely.⁸⁴ The court determined "there was no authority under Iowa law to allow a claim between cotenants for Cohen's claim against Clark for breach of quiet enjoyment."⁸⁵ Additionally, the court found that 2800-1 LLC struck the required balance between Cohen and Clark's needs by making reasonable accommodations for each.⁸⁶ In doing so, the small claims court mainly relied on its factual determination that Cohen had not indicated to 2800-1 LLC that she was experiencing continual allergic reactions despite the accommodation efforts.⁸⁷ Since the court believed the accommodation was reasonable, it followed that Cohen did not have a breach of contract claim.⁸⁸ Just three days after the small claims court dismissed her case, Cohen filed a notice of appeal.⁸⁹

2. The District Court's Decision

In the Iowa District Court for Johnson County, Judge Chad Kepros determined that 2800-1 LLC was aware that the company's accommodations did not relieve Cohen's allergic reactions.⁹⁰ Therefore, 2800-1 LLC could have denied Clark's ESA request.⁹¹ Further, Judge Kepros stated he thought 2800-1 LLC "should have denied Mr. Clark's request at [the] point" where it became clear that a workable solution for both Cohen and Clark did not exist despite "the good faith effort to make a reasonable accommodation."⁹² However, Judge Kepros still dismissed Cohen's claims.⁹³ He reasoned the lack of a clear test, 2800-1 LLC's honest belief that it could not decline the ESA due to the ICRC, and 2800-1 LLC's "significant steps" to mitigate Cohen's allergic reactions were enough to spare 2800-1 LLC from liability.⁹⁴

84. See *Cohen v. Clark*, 945 N.W.2d 792, 797 (Iowa 2020).

85. *Id.*

86. *Id.*

87. *Id.* at 797 n.1.

88. *Id.* at 797.

89. *Id.*

90. *Id.* at 797 n.1; see also *id.* at 793 (noting Judge Chad A. Kepros was the district court judge).

91. *Id.* at 797.

92. *Id.*

93. *Id.*

94. *Id.*

3. The Iowa Supreme Court's Decision

Following Judge Kepros' decision, Cohen applied for discretionary review by the Iowa Supreme Court.⁹⁵ 2800-1 LLC consented to the review, and Clark also applied to the Court for review.⁹⁶ Ultimately, the Iowa Supreme Court granted these requests.⁹⁷

i. The Majority Opinion

At the Iowa Supreme Court, the majority opinion, written by Chief Justice Susan Christensen, began by analyzing “whether 2800-1 LLC was reasonable in accommodating Clark’s ESA request by waiving its no-pets provision . . . even though doing so adversely affected Cohen’s health.”⁹⁸ In doing so, the majority noted both “[t]he ICRA and the FHA distinguish between service animals, which require specific training, and ESAs, while recognizing the validity of both.”⁹⁹ However, this was the only weight the majority gave to the ESA provisions of the Iowa Code, which otherwise “d[id] not apply to this case . . . [and] also would not have affected [the] analysis in this opinion.”¹⁰⁰ This was because, while the provisions state generally the request should be granted, there are still situations where the landlord does not have to grant the request.¹⁰¹ In the FHA, this includes when the animal “poses a direct threat that cannot be eliminated or reduced to an acceptable level,” which the majority interpreted to mean that the effects on third parties should be taken into consideration before granting a request.¹⁰²

As a result, the majority determined Cohen’s and Clark’s needs and rights should be analyzed through a balancing test, which is how federal courts typically determine the reasonability of an accommodation.¹⁰³ In doing so, the majority found both parties had a right to quiet enjoyment.¹⁰⁴ Since each tenant’s health turned on the presence of the ESA, the tenants’ rights to quiet enjoyment were incompatible.¹⁰⁵ However, the majority remarked Cohen’s

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 799.

99. *Id.* at 800.

100. *Id.* at 800 n.5.

101. *Id.* at 800–01.

102. *Id.* at 801 (quoting U.S. DEP’T OF HOUS. & URB. DEV., FHEO-2020-01: ASSESSING A PERSON’S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 13 (2020)).

103. *See id.* at 802 (first citing *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 752 (7th Cir. 2006) (en banc); and then citing *Hollis v. Chestnut Bend Homeowners Ass’n*, 760 F.3d 531, 541–42 (6th Cir. 2014)).

104. *Id.* at 802.

105. *See id.* (noting that “it’s clear that Cohen and Clark cannot satisfactorily coexist in the same apartment building” because “one of the tenants would suffer negative health consequences if required to coexist in the same building with or without the ESA”).

physical health could not outweigh Clark's mental health, nor could Clark's mental health outweigh Cohen's physical health.¹⁰⁶

While not dispositive, the majority implemented Cohen's suggestion of "a priority-in-time test" as a consideration to break the tie.¹⁰⁷ It noted the consideration is similar to the Americans with Disabilities Act ("ADA"), which considers seniority.¹⁰⁸ In its application of the "priority-in-time test," the majority not only noted that Cohen signed her lease first but also pointed to the fact that Clark delayed requesting a waiver of the no-pets provision until after each party's lease had already started to run.¹⁰⁹ The majority expressed frustration that Clark did not inform 2800-1 LLC of his ESA request before moving in.¹¹⁰ If Clark issued the ESA request before signing the lease, the majority presumed the litigation would have been avoided because 2800-1 LLC could have asked Clark to move into a different building.¹¹¹ At least in this scenario, 2800-1 LLC's request would have been a reasonable accommodation.¹¹² Ultimately, due to Clark's delay, the majority determined the ESA request was not reasonable.¹¹³ After a month of pet-free living, in accordance with the lease agreement, Cohen could expect pets would continue to be barred from the premises.¹¹⁴ Thus, by granting the ESA request, 2800-1 LLC interfered with Cohen's right to quiet enjoyment and her expectation that there would continue to be no pets.¹¹⁵

Additionally, the majority rejected Clark's concerns that including a priority-in-time test would lead to abuses.¹¹⁶ It emphasized that an earlier signing third party could not simply object to an ESA, then block the request solely based on time.¹¹⁷ Rather, like Cohen, to even reach the priority-in-time test, the objecting tenant would need to have strong medical evidence supporting his or her objection to the ESA request.¹¹⁸ In doing so, the majority pointed to the high credibility of a long, documented medical history of severe allergies, which contrasted with the low bar needed to obtain ESA certification for a pet.¹¹⁹

106. *Id.*

107. *Id.* at 803.

108. *Id.* (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405-06 (2002)).

109. *See id.* at 803-04.

110. *Id.* at 805-06.

111. *Id.*

112. *Id.*

113. *See id.* at 803 (noting that "being first in time tip[ped] the balance in Cohen's favor").

114. *Id.*

115. *See id.* at 803-04 (noting that it is unreasonable if expectations are undermined, finding that Cohen had a reasonable expectation, and stating that the holding is in line with those who have rejected interferences with third-party rights).

116. *Id.* at 804.

117. *Id.* at 805.

118. *Id.*

119. *Id.*

Next, the majority drew a distinction between service animals and ESAs to stress the holding would not apply to service dogs.¹²⁰ Again, the majority analogized to the ADA, which is an example of a law that “treats ESAs differently from service animals.”¹²¹ For example, it recognized that a service dog is more burdened by a move to a new apartment complex than an ESA because a service dog would need to relearn the building.¹²² Thus, a service dog should often be considered differently than an ESA in the reasonable accommodation balancing test.¹²³ However, since the case did not involve a service dog, this discussion is only dicta. Further, the majority refrained from explicitly stating if this additional weight would have been enough to overcome Cohen’s allergy.¹²⁴

Lastly, in direct contrast to the District Court, the majority found 2800-1 LLC’s good faith defense was not enough.¹²⁵ Instead, it identified that a breach of contract places strict liability upon the defendant.¹²⁶ Additionally, Jeffrey’s phone call with ICRC staff could not relieve 2800-1 LLC from responsibility because he received informal and unstructured advice, which cannot be binding.¹²⁷ While the majority determined 2800-1 LLC might have a plausible defense under the Iowa Uniform Landlord Tenant Act (“IURLTA”), 2800-1 LLC did not raise that defense.¹²⁸ Thus, Cohen prevailed, and the Court reversed the District Court’s dismissal.¹²⁹

ii. *Justice McDonald’s Dissenting Opinion*

In his dissent, Justice Christopher McDonald first conducted a thorough overview of each jurisdiction’s housing law to formulate a public policy argument.¹³⁰ In doing so, Justice McDonald focused on the accommodation process.¹³¹ He gathered that upon the required request for accommodation, the landlord does not have to act immediately.¹³² Rather, the landlord is assured the opportunity to perform a meaningful review to determine if the accommodation would cause “an undue financial and administrative burden

120. *Id.*

121. *Id.* at 800.

122. *Id.* at 805.

123. *Id.*

124. *See id.*

125. *See id.* at 806.

126. *Id.*

127. *Id.*

128. *Id.* at 807 (providing relief where liability is “due to circumstances reasonably beyond the control of the landlord” (citing IOWA CODE § 562A.21 (2) (2020))).

129. *Id.*

130. *See id.* at 818–22 (McDonald, J., dissenting).

131. *See id.* at 819–21.

132. *Id.* at 819 (citing *Douglas v. Kriegsfeld Corp.*, 884 A.2d 1109, 1122–23 (D.C. 2005)).

... or it would fundamentally alter the nature of the provider's operations."¹³³ Additionally, Justice McDonald emphasized that the law places responsibility on the landlord.¹³⁴ If the landlord makes the wrong decision, then large consequences await, potentially in the form of extreme exposure to liability.¹³⁵ Thus, he determined the law places pressure on landlords to ensure they are incentivized to grant accommodations, while also ensuring landlords have time to take great care and caution in the few situations where the landlord considers denying a request.¹³⁶

Next, Justice McDonald explained the FHA does not provide a cause of action for a third party (in this case, Cohen, another tenant) who desires to force a landlord to deny an accommodation request or be awarded damages due to a landlord's decision to approve an accommodation request.¹³⁷ In concluding so, Justice McDonald focused on the requirement that a person must be "injured by a discriminatory housing practice."¹³⁸ Justice McDonald stated it is impossible for a challenging third party to meet this qualification because a landlord's grant of an accommodation could never constitute a discriminatory housing practice.¹³⁹ The cause of action in the Iowa Code contains a similar limitation.¹⁴⁰ However, Justice McDonald determined the Iowa Code went even further, as the ICRA criminalizes interference with the use of an ESA.¹⁴¹ Thus, Justice McDonald determined that the Iowa legislature stringently protected a disabled individual's right to an accommodation and only wanted disabled individuals to be able to challenge accommodation denials. Therefore, Justice McDonald saw the majority's decision to even hear the case as a circumvention of "the letter and spirit of the fair housing laws."¹⁴²

Following this discussion, Justice McDonald moved to the majority's distinction between ESAs and service animals.¹⁴³ Justice McDonald fervently rejected this distinction, as he determined the fair housing laws do not

133. *Id.* (citing *Reasonable Accommodations Under the Fair Housing Act*, U.S. DEP'T OF HOUS. & URB. DEV. & U.S. DEP'T OF JUST. 7 (May 17, 2004) [hereinafter Joint Statement], https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf [<https://perma.cc/7SCD-JGQD>]).

134. *Id.* at 820.

135. *Id.* at 821.

136. *See id.* at 818–20.

137. *Id.* at 821.

138. *Id.* (quoting 42 U.S.C. § 3602(i)(1)–(2) (2018)) (discussing the definitional requirements of 42 U.S.C. § 3613(a)(1)(A) as laid out in 42 U.S.C. § 3602).

139. *Id.* (asserting that "by definition" a grant cannot be discriminatory).

140. *Id.* at 821–22.

141. *Id.*

142. *See id.* at 818, 823–26 ("The majority accepts the parties' nonadversarial and joint invitation to rewrite federal, state, and municipal fair housing laws."). For additional discussion that questions the wisdom of issuing such a decision, see *id.* at 808–18 (Appel, J., dissenting).

143. *Id.* at 822 (McDonald, J., dissenting).

support it.¹⁴⁴ While the majority pointed to the ADA, Justice McDonald found that fair housing laws are not subject to this distinction nor developed to fully include both ESAs and service animals despite their differences.¹⁴⁵ However, Justice McDonald took this notion a step further by declaring it as *per se* reasonable to request an ESA.¹⁴⁶ In doing so, Justice McDonald pointed to the language of federal regulations, cases, and the Iowa Code.¹⁴⁷ While the language differs, Justice McDonald reasoned that an ESA is “generally considered a reasonable accommodation.”¹⁴⁸

With these concepts in mind, Justice McDonald then turned to Cohen’s breach of contract claim.¹⁴⁹ Justice McDonald stated the meaning of the lease provision could not be separated from the fair housing laws because “‘reasonable accommodation’ is a term of art.”¹⁵⁰ Thus, Cohen was put on notice that the fair housing laws could require 2800-1 LLC to make an exception.¹⁵¹ Since unilateral mistake is not an excuse, the true, unambiguous meaning of the language must stand even if Cohen misunderstood the lease.¹⁵² Therefore, allowing a *per se* reasonable accommodation could not be construed a breach of contract.¹⁵³ Justice McDonald concluded “the majority confuse[d] a claim arising under the fair housing laws with Cohen’s contract claim.”¹⁵⁴

Justice McDonald went on to further express a multitude of additional disagreements with the majority’s approach.¹⁵⁵ Many of his differences

144. *Id.* (“Under the fair housing laws, the duty to provide reasonable accommodation does not distinguish between service animals and assistance animals.”).

145. *See id.* at 822–23 (first citing U.S. DEP’T OF HOUS. & URB. DEV., FHEO-2020-01: ASSESSING A PERSON’S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 5 (2020); then citing IOWA CODE § 216.8B(1)(a) (2020); then citing Ass’n of Apartment Owners of Liliuokalani Gardens at Waikiki v. Taylor, 892 F. Supp. 2d 1268, 1285 (D. Haw. 2012); then citing Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt., Inc., 778 F. Supp. 2d 1028, 1036 (D.N.D. 2011); and then citing Wilkison v. City of Arapahoe, 926 N.W.2d 441, 449 (Neb. 2019)).

146. *Id.* at 823.

147. *Id.*

148. *Id.* (quoting Bone v. Vill. Club, Inc., 223 F. Supp. 3d 1203, 1218 (M.D. Fla. 2016)). McDonald’s citations range from strong language to much less committal terms. *Compare* U.S. DEP’T HOUS. & URB. DEV., FHEO-2020-01: ASSESSING A PERSON’S REQUEST TO HAVE AN ANIMAL AS A REASONABLE ACCOMMODATION UNDER THE FAIR HOUSING ACT 12 (2020) (asserting an ESA “should be granted” if the animal is common pet), *with* Revock v. Cowpet Bay W. Condo. Ass’n, 853 F.3d 96, 110 (3d Cir. 2017) (noting that an ESA “may” constitute a reasonable accommodation under the FHA).

149. *Cohen*, 945 N.W.2d at 826 (McDonald, J., dissenting).

150. *Id.*

151. *Id.* at 827.

152. *Id.* at 827–28. Justice McDonald found that “the terms of the lease agreement [were] not ambiguous.” *Id.* at 827.

153. *Id.* at 828.

154. *Id.*

155. *See id.* at 828–32.

centered on the majority's construction of the "direct-threat provision."¹⁵⁶ Since the provision is an affirmative defense, Justice McDonald determined "[i]t simply mean[t] 2800[-1 LLC] could have denied" the request, not that an ESA request no longer fit the requirements of a reasonable accommodation.¹⁵⁷ Further, he reasoned the provision possibly only referred to the ESA's conduct, which would not include allergies since allergies are caused regardless of an ESA's behavior.¹⁵⁸ Justice McDonald also expressed that the majority gave too much weight to Cohen's symptoms, which he did not believe rose to the level of being "a significant risk of *substantial harm*."¹⁵⁹

Lastly, Justice McDonald addressed Cohen's claim for a breach of quiet enjoyment. He determined quiet enjoyment was not applicable, as cold-like allergy symptoms are not analogous to being evicted from an apartment.¹⁶⁰ Even if it could constitute a breach, Justice McDonald surmised, 2800-1 LLC should be excused due to its good faith effort at compliance with a governmental command.¹⁶¹ Ultimately, Justice McDonald found the law harmed Cohen, not 2800-1 LLC.¹⁶²

III. ANALYZING THE COURT'S DECISION TO DETERMINE ITS CONSEQUENCES

Next, this Note will analyze Cohen's claims against 2800-1 LLC in order to determine whether the Court correctly applied the current law. Then, this Note will analyze the current law's consequences.

A. ANALYZING COHEN'S CLAIMS

Cohen's breach of contract claim should have failed because she could not show that her injuries cleared the high bar the Iowa Code requires. Secondly, Cohen's quiet enjoyment claim also should have failed because she could not satisfy the elements of constructive eviction.

1. *Cohen's* Breach of Contract Claim Should Have Failed

Cohen's breach of contract claim should have failed. There were no issues with the validity of the lease, Cohen's performance, or any doubt that Cohen was injured by the alleged breach. Therefore, Cohen's breach of contract claim turned on whether 2800-1 LLC breached section 53 of the lease, which explicitly stated that reasonable accommodations would be accepted.¹⁶³ Thus,

156. *See id.* at 829–32.

157. *Id.* at 829.

158. *Id.* at 830.

159. *Id.* at 831.

160. *Id.* at 832–33.

161. *Id.* at 833–34.

162. *Id.* at 834–35.

163. *Id.* at 795 (majority opinion).

to prevail, Cohen had to prove that Clark's accommodation was not reasonable as described in the ICRA.¹⁶⁴ However, she could not do so.

To show the unreasonableness of Clark's accommodation, Cohen pointed to the "direct threat" provision¹⁶⁵—its wording began with, "nothing . . . requires."¹⁶⁶ Therefore, when taken alone, Justice McDonald's explanation that the provision only serves as a defense for a landlord who denied an accommodation request because it would have "constitute[d] a direct threat to the health and safety of other tenants" seems sensible.¹⁶⁷ In isolation, a statute's silence on whether the landlord may perform an action is a far cry from stating that landlord may not undertake that action. However, the provision's context cannot be ignored.¹⁶⁸ The ICRA requires that a landlord must make a reasonable accommodation if one exists.¹⁶⁹ Thus, by excluding direct threats from the requirements, the legislature necessarily excluded direct threats to other people's health from being a reasonable accommodation. In the lease, 2800-1 LLC willfully bound itself to only accept "[r]easonable accommodations."¹⁷⁰ Therefore, Chief Justice Christensen's majority correctly concluded that it would be a breach of the lease if 2800-1 LLC accepted an accommodation that posed a direct threat to a tenant's health.

However, the direct threat provision's ordinary meaning should not have helped Cohen's quest to hold 2800-1 LLC liable for her injuries. Even if the provision were to consider threats outside the animal's overt acts, which was unclear,¹⁷¹ Clark's accommodation did not rise to the level of being a direct threat to Cohen's health. As Justice McDonald pointed out, as currently understood, "[a] 'direct threat' is 'a significant risk of substantial harm.'"¹⁷² While none of the housing discrimination laws elaborate on this definition, this phrase has a common usage, as the ADA uses the same phrasing to define

164. See *supra* Section II.B.1.

165. Brief for Cohen, *supra* note 9, at 35–38.

166. IOWA CODE ANN. § 216.8A(3)(e) (West 2022).

167. *Cohen*, 945 N.W.2d at 829 (McDonald, J., dissenting) (quoting 42 U.S.C. § 3604(f)(9) (2018), which mirrors IOWA CODE ANN. § 216.8A(3)(e)). Justice McDonald observed that the two statutes are mirrors of each other. See *id.* at 822, 829.

168. See *K Mart Corp. v. Cartier*, 486 U.S. 281, 319 (1988) (Scalia, J., concurring in part and dissenting in part) (noting common usage and context cannot be ignored in statutory construction).

169. See IOWA CODE ANN. § 216.8A(2).

170. See *Cohen*, 945 N.W.2d at 795 (majority opinion) (emphasis added) (quoting section 53 of the lease). This contractual obligation necessarily occurs by promising no pets will be allowed, then providing reasonable accommodations as the sole exception to this general rule. See *id.*

171. See *id.* at 830 (McDonald, J., dissenting) (noting that "a direct threat" may only refer to "the specific animal's actual conduct," which would not include "Cohen's physical reactions to [the ESA's] mere presence" (emphasis omitted) (quoting U.S. DEP'T OF HOUS. & URB. DEV., FHEO-2013-01: SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 3 (2013))).

172. *Id.* at 831 (quoting Joint Statement, *supra* note 133, at 4).

“direct threat.”¹⁷³ Its definition implores us to look at: “(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.”¹⁷⁴ While Justice McDonald did not explicitly list these four elements, the following analysis displays that doing so essentially follows his logic.¹⁷⁵

When applying these elements, the harm satisfied the likelihood element, but its duration was limited because Cohen’s symptoms dissipated when she was not around dog dander.¹⁷⁶ Therefore, the harm satisfies the likelihood element, but its duration is limited. Further, since the allergy only consisted of “cold-like symptoms,” the allergy’s severity was low.¹⁷⁷

Importantly, the imminence requirement prevented the test from including Cohen’s main concern about her allergy: that repeated exposure would cause her dog allergy to worsen, like her deadly cat allergy. FHA regulations confirm the risk of harm cannot be “speculative” and must have “reliable, objective evidence.”¹⁷⁸ Again as Justice McDonald found, neither Cohen’s brief nor the majority opinion provided any medical support that there was a significant risk that Cohen’s dog allergy would worsen like her cat allergy did.¹⁷⁹ Therefore, it was error for the majority to consider Cohen’s speculative, albeit understandable, concern that repeated exposure could cause her dog allergy to become deadly. Without being able to include this consideration, Cohen’s dog allergy could not reach the direct threat provision’s required severity. Thus, Cohen should have been foreclosed from utilizing the provision’s ordinary language to show the unreasonableness of Clark’s accommodation.

Chief Justice Christensen’s majority opinion tried to get around this result by using the direct threat provision for the proposition that the court may consider the impacts on third parties’ health in a balancing test devoid of the direct threat standard, instead of its ordinary language.¹⁸⁰ This finding created much of the void between the two approaches, as it struck at the statute’s entire structure. As described by the Fourth Circuit, the FHA’s identical direct threat provision is “a limited exception to [the FHA’s]

173. 29 C.F.R. § 1630.2(r) (2012).

174. *Id.* § 1630.2(r)(1)-(4).

175. *See Cohen*, 945 N.W.2d at 831-32 (McDonald, J., dissenting).

176. *See id.* at 831 (highlighting Cohen’s allergy persists “when exposed”).

177. *See id.* (“There is no evidence in the record showing Cohen’s exposure to dogs . . . caused Cohen to suffer anything other than cold-like symptoms.”).

178. *See id.* at 830-31 (first citing Pet Ownership for the Elderly and Persons With Disabilities, 73 Fed. Reg. 63,834, 63,837 (Oct. 27, 2008) (codified at 24 C.F.R. pt. 5); and then citing Joint Statement, *supra* note 133, at 5).

179. *See id.* at 831.

180. *See id.* at 801-02 (majority opinion).

prohibitions” against housing discrimination.¹⁸¹ Therefore, the direct threat provision is an intentional and specific exception, as Justice McDonald identified.¹⁸² This also corresponds with the U.S. Department of Housing and Urban Development’s (“HUD”) guidance, which uses the direct threat provision to provide two of only four permissible reasons to reject a request for an accommodation.¹⁸³ Here, neither of the additional exceptions apply, as granting an ESA does not “impose an undue . . . burden” on 2800-1 LLC nor does it change the nature of 2800-1 LLC’s operations.¹⁸⁴ As a result, Justice McDonald correctly concluded that Cohen’s breach of contract claim against 2800-1 LLC could not prevail because Clark’s ESA was a reasonable accommodation since none of the narrow exceptions applied. The majority’s assertion constituted a major deviation from the current understanding of the direct threat provision.

2. *Cohen’s Claim for Breach of the Warranty of Quiet Enjoyment Should Have Failed*

Cohen’s claim that 2800-1 LLC breached her covenant of quiet enjoyment should have failed. Cohen was never evicted from the premises, nor did anyone claim superior title to possession of the leased premises. Therefore, Cohen’s only remaining option for a valid claim was for breach of the warranty of quiet enjoyment through constructive eviction.¹⁸⁵ However, Cohen still inhabited and used her apartment despite her symptoms. Thus, she never lost the “beneficial use” of her apartment. Had she abandoned the apartment due to her symptoms, Cohen would have had a stronger claim. However, by living in her apartment for the entire lease term, Cohen removed all doubt—her symptoms, although uncomfortable, were bearable. Therefore, Cohen should have been estopped from claiming that her symptoms were so unbearable that they could be considered akin to evicting her from the apartment.

Even if Cohen’s symptoms were shown to be unbearable, her quiet enjoyment claim still should have failed. To constitute constructive eviction,

181. *Corey v. Sec’y, U.S. Dep’t of Hous. & Urb. Dev. ex rel. Walker*, 719 F.3d 322, 327 (4th Cir. 2013).

182. On an even more fundamental level, “[n]o rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that ‘significance and effect shall, if possible, be accorded to every word.’” *In re Pub. Nat’l Bank*, 278 U.S. 101, 104 (1928) (quoting *Washington Market Co. v. Hoffman*, 101 U. S. 112, 115 (1879)). Therefore, the majority cannot ignore that the legislature used the phrase “direct threat.” *See id.* The legislature could have worded the provision to evenly balance the accommodation and third-party health; however, it did not.

183. *Assistance Animals*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals [<https://perma.cc/77BM-CXPS>].

184. *See id.* While the “air-lock” doors were prohibitively expensive, their purpose was to accommodate Cohen, not Clark.

185. *See supra* Section II.B.3.

the landlord's actions must have harmed Cohen; however, the law's requirements caused her injury, not her landlord.¹⁸⁶ Therefore, 2800-1 LLC could not be held liable for constructive eviction.

Justice McDonald's dissent called Cohen's quiet enjoyment claim what it was—an ill-fitting attempt at a cause of action where one did not exist.¹⁸⁷ The doctrine of quiet enjoyment was not created for, and could not be tailored to fit, Cohen's circumstances without stretching it into something unrecognizable. While the majority seemed to realize this as well, it erred by glossing over the claim's pitfalls by refusing to define quiet enjoyment or perform a separate analysis of the claim.

B. DETERMINING THE CONSEQUENCES OF IOWA'S ESA LAWS

Cohen points out a troubling issue in the pre-*Cohen* ESA laws. However, by choosing to disregard the plain language of the law, the Iowa Supreme Court left a multitude of issues in its wake. Thus, neither returning to the pre-*Cohen* understanding of ESA laws nor allowing *Cohen* to continue forward, unbothered, is satisfactory or tenable for the future.

1. The Flaws of Returning to a Pre-*Cohen* Understanding of Iowa's ESA Laws

Before *Cohen*, a person whose health was negatively affected by an ESA did not have any recourse against a landlord who granted an ESA request unless the impact on his or her health was extreme and lasting. This was an intense standard to reach. Under this rule, it would have been almost impossible for an injured third party to get recourse for their harm. Further, without a third-party cause of action, even if a claim was successful under this standard, it would have likely been the last successful claim of its kind because a carefully drafted lease agreement could have avoided promising to only accept objectively reasonable ESA accommodations.¹⁸⁸ Doing so would have foreclosed the backdoor breach of contract claim that Cohen utilized. As Cohen's counsel pointed out, providing no recourse for an injured third party is an inequitable result because “[n]o one's pain and suffering should be ignored.”¹⁸⁹ This sentiment is especially true here, as it is absurd to require a blameless party to suffer an avoidable, certain, and medically proven harm to her health in the name of a medically indeterminate, hypothetical health

186. *Cohen v. Clark*, 945 N.W.2d 792, 834 (Iowa 2020) (McDonald, J., dissenting).

187. *See id.* at 833–34 (noting the conditions must have made the “premises . . . unusable. That is not this case,” then stating, “the harm was without legal injury at common law.”).

188. For instance, 2800-1 LLC could have stated, “2800-1 LLC will permit accommodations it deems to be reasonable.” While this would not change the law or its liability exposure to ESA applicants, 2800-1 LLC is only promising third parties subjective reasonability. Thus, a third party would no longer have a claim for breach of contract unless 2800-1 LLC itself did not believe it was acting reasonably.

189. Brief for Cohen, *supra* note 9, at 14.

benefit for another. While Cohen’s harm could not be considered a “direct threat” under the statute or so unbearable to be considered akin to eviction, it does not mean that her harm was immaterial or trivial. Instead, Cohen’s allergies were severe and disruptive yet hit a hole in the law. It appears the legislature, in its haste to grant a potentially valuable right for a sympathetic class of constituents, failed to consider the impact doing so would have on another sympathetic class of constituents. Therefore, while the Court still should have done its duty by applying the law without invoking its own will,¹⁹⁰ the Court’s implicit conclusion that the law was inequitable and untenable for Cohen—and similarly situated individuals—is understandable.

2. The Consequences of Allowing *Cohen* to Continue Forward Unbothered

By impressing its own will from the bench, the Court reached a positive result for Cohen but left a mess in its wake. By noting that Cohen and Clark each had a “right to the enjoyment of their apartment premises” and that “Cohen and Clark [could not] satisfactorily coexist in the same apartment building,”¹⁹¹ the Court seemed to recognize Cohen’s contention that “[t]he right of Clark to his emotional support animal and right of Cohen to not suffer allergy attacks are in conflict.”¹⁹² 2800-1 LLC also mirrored this sentiment when it suggested “it couldn’t act without denying or interfering with the rights of one of the two tenants.”¹⁹³ However, neither Cohen nor 2800-1 LLC provided support for the idea of an individual’s right to be free from allergy attacks. As previously mentioned, the right of quiet enjoyment only involves actual or constructive eviction, which cannot include allergy attacks. Therefore, it appears the Court created a new right out of thin air. Yet, the Court’s apparent, and well-founded, reservations of creating such a right prevented it from elaborating on what doing so meant for the future. Thus, its noncommittal statements lead to confusion.

First, when the right to an ESA and the right to be free from allergy attacks clash, the balancing test utilized must include a priority-in-time consideration as one of its factors.¹⁹⁴ Here, the time consideration was dispositive; however, the Court warned that it will not always be the case, as

190. THE FEDERALIST NO. 78 (Alexander Hamilton) (“[I]n a government in which [the departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous . . . because . . . [t]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . .”). Here, the Iowa Supreme Court abandoned the fundamental principle that the court does not have force or will by taking an active resolution when it created a new right in order to assure Cohen could recover for her harm.

191. *Cohen*, 945 N.W.2d at 802 (majority opinion).

192. Brief for Cohen, *supra* note 9, at 13.

193. Brief for 2800-1 LLC, *supra* note 2, at 29.

194. *Cohen*, 945 N.W.2d at 803.

the inquiry is fact-specific.¹⁹⁵ Since the balancing test is new, there is no way of knowing how much weight a court will give either the allergy attacks or the time consideration in any given scenario. For instance, how would the Court have balanced the interests if Clark had signed after Cohen but before the lease began to run?¹⁹⁶ How might the Court have balanced the interests if Cohen's allergies could be mitigated with medicine, but she could neither afford nor buy a new medication without risking unknown side effects?¹⁹⁷ How would the Court have balanced the interests if Cohen's allergies could have been partially mitigated, to the point where she merely sneezed a few times a day, but was not miserable?¹⁹⁸ Because of this balancing test, landlords are placed in a precarious situation where they must properly predict how the court will develop this right in each scenario in real time with massive liability hanging in the balance.¹⁹⁹ These consequences occur whether the landlord grants or rejects the accommodation and despite how hard it tries to follow the law.²⁰⁰ 2800-1 LLC spent much of its brief begging the Court for predictability so it could dutifully follow the law and minimize its liability exposure;²⁰¹ instead, it received the opposite. To make matters worse, each court, and even the Iowa Supreme Court, as its composition of justices ebbs and flows, may have extremely different views as to how this right should be shaped or how much weight they personally give to each interest. Therefore, each decision will likely be appealed, which will increase every level's already packed caseload.

Next, the majority recognized that its opinion could be perceived as potentially affecting service dogs, not just ESAs, despite explicitly drawing a

195. *Id.* (noting “that priority in time is but one consideration of many in this balancing test rather than the dispositive factor,” however, “being first in time tips the balance in Cohen’s favor”).

196. This question gets to the root of the timing element. As the doctrine develops, the Court may have to answer even additional timing questions such as: Should timing be given some weight in all circumstances or only if the considerations are considered sufficiently close? What is considered a close enough factual clash for timing to become dispositive? Should timing be given the same weight when the individual disclosed their need for an ESA as soon as possible, or was timing only given additional and dispositive weight because the delay made Clark a less sympathetic defendant? While some of these questions could be answered, many would require a continuum to develop, which would likely take years and years to be robust enough for a landlord to rely upon.

197. Thus, the Court would have to answer what the scope of this new right is: Is it all encompassing? Is it limited to the treatments within an individual's means and comfort level? Does it reach further than ESA legislation? Additionally, if the right has a large scope, should a property owner begin to worry about liability exposure caused by a tree or flower that causes a neighbor to sneeze uncontrollably? While the last question seems absurd, it certainly fits the facial scope of a right to be free from allergy attacks.

198. Thus, the Court would have to identify the definition and scope of an “allergy attack.”

199. ICRA allows for “[a]ctual and punitive damages,” “[r]easonable attorney’s fees,” and “[c]ourt costs.” IOWA CODE ANN. § 216.17A(6) (West 2022).

200. The majority rejected 2800-1 LLC's good faith defense. *See Cohen*, 945 N.W.2d at 806–07.

201. *See* Brief for 2800-1 LLC, *supra* note 2, at 27–31 (advocating that requiring the landlord to use discretion is unworkable).

distinction between service dogs and ESAs.²⁰² Thus, to clarify, the majority included dicta noting that the holding was not to be interpreted to deny service dogs whenever someone living in the complex would potentially suffer allergy attacks.²⁰³ While this is important, the majority's approach "muddied the water" by including dicta that considered service dogs in the balancing test.²⁰⁴ As a result, the majority hinted that service dogs could be subject to the newly created right to be free from allergy attacks, but simply stated that these analyses would carry different considerations than an analysis for an ESA would.²⁰⁵ Thus, *Cohen* unnecessarily placed Iowa's service dog doctrine in question.

Lastly, *Cohen* wreaked havoc on constructive eviction and the covenant of quiet enjoyment by using it as the basis for creating the right to be free from allergy attacks. If the standard for constructive eviction is now whether an individual can satisfactorily coexist with another person or condition—instead of requiring the landlord's conduct to cause a condition so unbearable that the tenant has no choice but to abandon the property—the entire doctrine has changed. The Court now must formulate a test for how to determine what constitutes "satisfactory." Moreover, by stretching the doctrine past its bounds, the Court invited litigators and adverse parties to ask what may have previously been absurd questions, to test just how far the Court will now go.²⁰⁶ Thus, once again, Iowa landlords are now subjected to constant and often frivolous litigation; however, this time it occurs while the Court struggles to hammer down an unnecessarily unsettled area of law.²⁰⁷

202. *Cohen*, 945 N.W.2d at 805.

203. *Id.*

204. *See id.* (noting the balancing test may have been different if a service animal was involved instead of an ESA, however, this necessarily signals service dogs are subject to the new test).

205. *Id.* (noting service animals must learn the apartment, so they may be given more weight than an ESA).

206. For instance, under a "satisfactorily coexist" standard, can a landlord be held liable for breach of the covenant of quiet enjoyment if it allowed a tenant's ex-girlfriend to move in down the hall from him despite informing the landlord of his objection if it then results in the former couple constantly interacting and arguing or causes persistent emotional pain? Under a traditional warranty of quiet enjoyment notions, this would be frivolous litigation, as simply allowing a tenant someone no longer gets along with cannot be considered akin to an eviction. However, when litigating what constitutes tenants "satisfactorily coexisting," the Court must address this question in order to define the extent of the standard even though it still would seem strange to hold the landlord liable. Thus, more and more time and judicial resources are used to likely arrive at the same result.

207. While the Court needed to create a rights clash in order to hold that 2800-1 LCC acted improperly, it remains to be seen why the Court additionally allowed *Cohen* to recover for her claim for breach of the covenant of quiet enjoyment. *See Cohen*, 945 N.W.2d at 794–95. Instead, it seems the Court could have only held Iowa Code section 216.8A created the rights clash by requiring the Court to consider the impact on a third party's health—as it held. *See id.* at 804, 807. While doing so would have still improperly stretched the ESA doctrine in pursuit of the Court's policy goal of allowing *Cohen* to recover, this course of action would not have disturbed a second doctrine.

IV. SOLVING COHEN'S RIGHTS CLASH

Due to the issues identified above, the Iowa legislature should amend Iowa's ESA laws. First, this would allow the legislature to take responsibility for previously failing to identify the parties who could potentially be harmed by an ESA.²⁰⁸ Second, doing so will allow the legislature to demonstrate to the Court that it is paying attention and is responsive to decisions that intrude on its lawmaking duties, even if the Court did so, in part, because of the legislature's failure initially.²⁰⁹ Thus, the Court would be notified that the legislature will not allow the Court to impose its own will without being held accountable.²¹⁰ Lastly, doing so would allow the legislature to solve the confusion surrounding Iowa's ESA laws in the quickest method possible.²¹¹ In order to address the above problems, the legislature should focus on creating a cause of action for third-party tenants, increasing the predictability of ESA laws, and reducing tenant's abilities to abuse the ESA laws.

208. A 2013 study concluded, "[i]ntegrity seems to be essential to trust in government." OECD, GOVERNMENT AT A GLANCE 2013, at 34 (2013), https://www.oecd-ilibrary.org/governance/government-at-a-glance-2013/trust-in-government-policy-effectiveness-and-the-governance-agenda_gov_glance-2013-6-en [<https://perma.cc/HJ9D-R8BS>]. The study defined "trust" as "holding a positive perception about the actions of an individual or an organisation" and stated "trust" "has been identified as one of the most important foundations upon which the legitimacy and sustainability of political systems are built." *Id.* at 21 (emphasis omitted). It defined "integrity" as "the alignment of government and public institutions with broader principles and standards of conduct that contribute to safeguarding the public interest while preventing corruption." *Id.* at 29. Therefore, in addition to being the moral choice, there is a strong "intergroup purpose" to admitting and correcting a past mistake in order to "repair relations" with the forgotten parties. See Barbara Kellerman, *When Should a Leader Apologize—and When Not?*, HARV. BUS. REV. (Apr. 2006), <https://hbr.org/2006/04/when-should-a-leader-apologize-and-when-not> [<https://perma.cc/WSSE-DPAN>].

209. Thus, this codification must perform a difficult balance—it must assure the Court is disincantized from legislating from the bench in the future, while still admitting that the Court's frustration was founded.

210. By avoiding its duty "to render a decision in the absence of political pressures and personal interests," the Court risked its judicial independence. See Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, AM. BAR ASS'N (Nov. 18, 2019), <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law> [<https://perma.cc/2PCU-88KB>] (quoting Chief Justice William Rehnquist in concluding that judicial independence requires accountability to the written "law regardless of popular sentiment"). Thus, the legislature should reestablish this independence and accountability by refusing to allow the Court's personal decision to stand without placing its own imprint on it. As Hamilton noted, the judiciary "can never attack with success either of the [political branches]." THE FEDERALIST No. 78 (Alexander Hamilton). The Iowa legislature should assure this remains the case by imprinting its will on the ESA laws.

211. In addition to being able to shape an area of law all at once by performing its intended law-making function, instead of being limited to a case-by-case basis, state legislation also "moves faster and is passed at higher frequencies" than the U.S. Congress. *State Legislatures vs. Congress: Which is More Productive?*, QUORUM (2022), <https://www.quorum.us/data-driven-insights/state-legislatures-versus-congress-which-is-more-productive> [<https://perma.cc/5RYQ-NUQ4>].

A. CREATING A CAUSE OF ACTION FOR THIRD-PARTY TENANTS

As previously described, *Cohen*'s manipulation of the law sprung out of inequities due to the legislature's inability to consider Cohen and similarly injured third-party tenants.²¹² Therefore, creating a cause of action for third-party tenants provides an avenue for an injured party to potentially recover without causing the Court to step out of its proper role and unsettle traditional doctrines to allow this to occur. The state legislature can do so with two short amendments to the Iowa Code.

First, the legislature should amend Iowa Code Section 216.2 to include the definition of an "aggrieved person," which is not currently defined.²¹³ In doing so, the state legislature should mirror the Iowa City Code, which defines an "aggrieved person" as "[a]ny person who: a) claims to have been injured by a discriminatory housing practice; or b) believes that such person will be injured by a discriminatory housing practice that is about to occur."²¹⁴ In addition, the legislature should add a "part c," which will include any person who "believes the approval of an ESA request has or will cause him or her to face a direct threat to his or her health or safety." As a result, third-party tenants will receive a cause of action, but the cause of action would be limited to individuals with health concerns. Therefore, a third-party tenant cannot abuse their cause of action by simply stating he or she is inconvenienced by the ESA.

Second, the legislature should amend Iowa Code Section 216.2 to include the definition of a "direct threat,"²¹⁵ which is not currently defined.²¹⁶ In doing so, the legislature should move away from the current understanding of the term by removing the word "substantial."²¹⁷ Thus, while the considerations would remain unchanged,²¹⁸ the scope required to prove an actionable injury would be reduced from what is almost an impossible bar, to a level that allows for the consideration of any medically verifiable harm to a third-party tenant.

212. See *supra* Section III.B.1.

213. See IOWA CODE ANN. § 216.16A(2)(a) (West 2022) ("An aggrieved person may file a civil action in district court . . .").

214. IOWA CITY, IOWA, CODE § 2-1-1 (2021) (defining "aggrieved person").

215. See IOWA CODE ANN. § 216.8A(3)(e) ("Nothing in this subsection requires that a dwelling be made available to a person whose tenancy would constitute a direct threat to the health or safety of other persons . . .").

216. Therefore, the change would affect its definition in Iowa Code Section 216.8A(3)(e) and the newly created "aggrieved person" definition.

217. See *Cohen v. Clark*, 945 N.W.2d 792, 831 (Iowa 2020) (McDonald, J., dissenting) (pointing out that "Cohen did not meet the high burden of establishing [the ESA] posed a significant risk of *substantial harm* to her health").

218. Courts would still consider: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) the imminence of the potential harm." See 29 C.F.R. § 1630.2 (2012).

Third, the legislature should change the requirement of a “significant risk” to require “a significantly likely risk” as a direct result of the ESAs presence.²¹⁹ The scope would only encompass certain and medically proven harms, like Cohen’s injuries. Therefore, medically verifiable injuries would be given consideration and allowed a remedy, while, once again, those that simply feel inconvenienced by the ESA, or are merely concerned by its presence, are not allowed to bring suit. Additionally, this removes the need for a general “right to be free from allergic reactions,” as the health considerations are limited to the subchapter at hand.²²⁰

Lastly, the legislature should amend Iowa Code Section 216.16A by adding a “part g,” which would state: “Nothing under this subsection shall be interpreted as impacting or allowing a cause of action under the landlord’s warranty of quiet enjoyment.” This amendment would make it clear that *Cohen’s* manipulation of the doctrine should not be relied upon in the future by other litigants. For example, if a tenant were trying to establish that his landlord breached the warranty of quiet enjoyment by allowing his ex-girlfriend to move into the apartment complex, 216.16A(g) would clarify the standard is not if the couple can “satisfactorily coexist,” which the Court utilized in *Cohen*. Instead, the landlord’s liability would only exist if the tenant could satisfy the much higher bar of actual or constructive eviction.²²¹

Making these proposed additions and amendments to the Iowa Code removes the Court’s urge to ignore or stretch the law, and it merely secures the clashing rights between those who may benefit from an ESA’s presence and those around them who face a direct threat to their health because of the ESA’s presence. Thus, there is still a need for guidance on how to weigh and apply the rights of each party when there is a clash between these opposing parties.

B. ESTABLISHING PREDICTABLE BUT FAIR GUIDELINES

As shown above, landlords need predictable standards that they can rely on in order to avoid being unduly trapped in liability despite their good faith efforts to comply with the law.²²² However, the Court properly identified that whether an ESA’s presence should outweigh a third-party tenant’s health concerns is highly fact dependent. Thus, to have the flexibility necessary to

219. Substantial means “material,” “not fictitious,” or “[c]onsiderable in extent, amount, or value.” *Substantial*, BLACK’S LAW DICTIONARY (11th ed. 2019). Thus, substantial harm can be interpreted to mean “[c]onsiderable in extent.” However, courts should interpret “substantial” to mean “not fictitious” in order to continue to avoid speculative harms. Thus, the word “likely” was included as a modifier for “substantially” in order to assure that this definitional change is clearly communicated.

220. Accordingly, there would be no reason to worry about whether the “right to be free from allergy attacks” applies to other contexts.

221. Thus, this provision solves the problems associated with the majority’s use of the warranty of quiet enjoyment. *See supra* note 206 and accompanying text.

222. *See supra* Section III.B.2.

accomplish these competing goals of predictability and flexibility, the legislature should codify the distinction between ESAs and service dogs and then codify guidelines that explore a few hypothetical applications.

To codify the distinction between ESAs and service dogs, the legislature should amend Iowa Code Section 216.8A. To do so, the legislature should first amend Section 216.8A(3)(e) by replacing the phrase “direct threat” with “a significant risk of substantial harm” to avoid changing its meaning. Further, the legislature should add Section 216.8A(3)(f), which would state: “A landlord shall grant a request for a *service animal* that follows the process described in Section 216.8C unless the service animal creates a *significant risk of substantial harm* for a third-party tenant.” Also, the legislature should add Section 216.8A(3)(g), which would state: “A landlord shall grant a request for an *emotional support animal* that follows the process described in Section 216.8C unless the service dog poses a *significantly likely risk of harm* for a third-party tenant.” Thus, there will be two different standards for service dogs and ESAs that reflect the differences in their functions.²²³ By avoiding the introductory phrase “nothing in this subsection requires,” Sections 216.8A(3)(f) and 216.8A(3)(g) will clearly serve as general exceptions to Section 216.8A(3)(c)(2). However, even with these changes, the state code will still not offer the desired predictability for application of the standards. Therefore, these new sections should also include commentary that feature hypotheticals that can be relied upon by landlords.

Section 216.8A(3)(f)’s commentary should have two hypotheticals. The first comment would note:

If A meets the qualifications set forth in Section 216.8C and requests a service dog, the landlord shall inform previously signing tenants. If tenant B, who signed before A, objects due to a medically verifiable, potentially deadly allergy, then the landlord shall ask A to seek alternate housing. However, if B merely has cold-like symptoms, then A’s request shall be granted.

Thus, landlords will be on notice that a previously signing tenant needs to meet an extraordinary bar in order to block a service dog request. The second comment will provide:

If A meets the qualifications set forth in Section 216.8C and requests a service dog, the landlord shall inform previously signing tenants. If no tenants object, then the landlord shall grant A’s request. If after the request is granted, tenant B, who signed after A or did not provide

223. ESAs’ impact is still unknown. See Thayer, *supra* note 4. However, service dogs are highly specialized animals that allow the dog’s owner to “lead a more independent life [by] perform[ing] tasks for a person with a disability.” 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> [<https://perma.cc/35GG-4YDZ>]. For instance, “[h]earing dogs help alert deaf and hard-of-hearing individuals to important sounds.” *Id.*

a timely objection to the claim, then objects due to a medically verifiable, potentially deadly allergy, the landlord shall release B from the lease and ask B to seek alternate housing.

From this, it will be clear that once it is granted, a landlord cannot unsettle a service dog—even under extreme circumstances. Additionally, due to the commentary, the landlord now has clarity on how to utilize the timing aspect.

Similarly, Section 216.8A(3)(g)'s commentary should include two hypotheticals. The first comment should state:

If A meets the qualifications set forth in Section 216.8C and requests an emotional support dog, the landlord shall inform previously signing tenants. If tenant B, who signed before A, objects due to a medically verifiable, constant, and disruptive allergy that he or she cannot mitigate, then the landlord shall ask A to seek alternate housing. However, if B can mitigate the allergy to the point where it is no longer disruptive, then A's request shall be granted.

From this comment, landlords will be able to determine that while an allergy can be enough to reject an ESA request, the allergy must be constant and unable to be solved by attainable solutions. While terms like "constant," "disruptive," and "mitigate" all require the landlord to utilize judgment, the landlord now has a standard to apply. Plus, the amount of judgment necessary is reduced to determining the middle ground between a disruptive and mitigated allergy.²²⁴ The second comment should state:

If A meets the qualifications set forth in Section 216.8C and requests an emotional support dog, the landlord shall inform previously signing tenants. If no tenants object, then the landlord shall grant A's request. If after the request is granted, tenant B, who signed after A, or did not provide a timely objection to the claim, then objects due to medically verifiable, constant, and disruptive allergy that he or she cannot mitigate, the landlord shall release B from the lease and ask B to seek alternate housing.

Once again, the commentary is clear that if a tenant objects after the request is granted, the landlord will not be able to disturb the request.²²⁵

By providing commentary, the Iowa legislature would provide the landlord with guidance to advise its decision-making. Even if the examples do

224. For instance, if a tenant would sneeze constantly, the landlord will know it should reject the request for an ESA because the sneezes would be disruptive. However, if a tenant is only going to sneeze a few times a day, the landlord knows it should accept the ESA request. Thus, the only judgment needed involves the middle ground where it is necessary to determine if the tenant would truly be disrupted by his or her allergies.

225. Although the Court pointed out in dicta that disrupting an ESA may not carry the same impact as disrupting a service dog, the ESA's owner will still be disrupted and had relied on the grant. Further, this assumes that the lease included a portion putting the objecting tenant on notice of reasonable accommodations. Therefore, the ESA owner's reliance interest wins out.

not perfectly line up with the landlord's circumstances, the landlord still has a window into the legislative thought process and certain judicial considerations in order to inform its decision-making.

C. *REDUCING TENANTS' OPPORTUNITY TO ABUSE THE ESA LAWS FOR THEIR PERSONAL CONVENIENCE*

The above changes impact medically approved requests, such as Clark's ESA requests.²²⁶ However, in practice, many ESA requests are not prescribed by a psychologist, but instead are obtained through an online source for a fee.²²⁷ This abuse of the legitimate ESA system has resulted in a boom of ESA requests.²²⁸ By foreclosing illegitimate ESA requests, the legislature would help to give legitimate ESA applicants the time and consideration they deserve.²²⁹

To reduce the risk of abuse, the legislature should first define "sufficiently familiar" in Iowa Code Section 216.2.²³⁰ In doing so, it should define "sufficiently familiar" as "a medical licensee that meets with an individual who seeks or has a service animal at least quarterly or meets with an individual who seeks or has an emotional support dog monthly."²³¹ Therefore, an individual who is truly in need of an ESA will not be additionally burdened, as he or she would have already expected to see a doctor at the frequency reflected in the code "at an absolute minimum."²³² However, an individual who is seeking the convenience of being able to take their dog anywhere with minimum effort will now have their cost-benefit analysis skewed by the effort and expense that comes with a monthly visit to a doctor. For many, this alone will make an ESA not worth the extra effort. However, those that still find the classification worthwhile will likely find their efforts to

226. While 2800-1 LLC's decision to grant Clark's ESA request was questioned, Clark's medical condition was never questioned. *See* *Cohen v. Clark*, 945 N.W.2d 792, 801 (Iowa 2020) ("Here, all parties agree that Clark has a psychological disability that substantially limits one or more major life activities and that a landlord must generally make reasonable accommodations for persons like Clark with disabilities under state and federal law.").

227. *See* Chandler, *supra* note 8; *see also supra* note 9 and accompanying text (discussing an increase in online ESA certifications).

228. *See supra* note 8 and accompanying text.

229. If someone's major life activities are affected by a disability, the ESA request is legitimate because he or she is in the class of constituents that the legislature intended the ESA laws for. *See supra* note 10 and accompanying text.

230. This term is contained in IOWA CODE ANN. § 216.8C(2)(b) (West 2022).

231. These numbers were rooted in the determination that "[w]ith a physical disability you should be seeing your doctor at an absolute minimum of once every three months" and "[i]f you have a psychiatric disabling condition, you should be seeing your doctor at least once a month or once a week, but at an absolute minimum of once a month." Dell & Schaefer, *How Often Is a Disability Claimant Expected to Treat with a Doctor*, DISABLED WORLD (Mar. 20, 2016), <https://www.disabled-world.com/disability/insurance/claims/visit-doctor.php> [<https://perma.cc/H3BX-DHKH>].

232. *See id.*

be ineffective, as this standard will make online ESA companies' current business models insufficient.²³³

Lastly, the legislature should amend Iowa Code Section 216.8C by adding a seventh part, which would be placed between what is currently the fifth and sixth parts. This new part would state: "A landlord may revoke its grant of an ESA request if the person fails to provide monthly documentation indicating he or she has a disability that could benefit from an ESA." This addition would require the medical licensee to provide a simple update stating the ESA remains relevant for the individual's disability need. This would further incentivize online, mass ESA companies to become legitimate or go out of business, as they would be held accountable if they did not shift their business models to include tracking and providing monthly updates to the landlord. While this would constitute additional paperwork for the landlord to keep track of, it would likely be less intrusive than dealing with a continual boom of improper ESA request attempts or complicated and costly attempts at litigation.

V. CONCLUSION

As more state legislatures seek to provide medical rights to their constituents, *Cohen* provides a reminder that the utmost care and consideration of potential consequences must be taken into account before doing so. As *Cohen* displays, even something as facially foolproof as creating a right to an ESA can harm third parties and clash with societal expectations. Additionally, *Cohen* displays the virtues of judicial independence and the issues that come when a court wades into lawmaking, even for an equitable reason. However, if the Iowa Legislature institutes this Note's suggestions, it can resolve these problems by affirming that the law is looking out for both those who could benefit from an ESA and those who are harmed by the animals, without prioritizing one at the expense of the other.

233. Currently online ESA certification companies collect a one-time, \$100 fee to take care of getting an "authorized health care provider" to provide "a medical ESA letter." See Brief for Cohen, *supra* note 9, at 32 n.10. The touted benefit relies on the convenience of having an ESA and the reduced cost that come with not being charged "pet security deposits . . . [or] higher rent for living with a pet." *Id.* Requiring a monthly visit targets both of these benefits, as the fee would rise drastically due to no longer being able to have no contact between the health care provider and the ESA applicant. The company would have to create a network to put the two parties in contact once a month, which could exponentially increase costs. Thus, getting an ESA is no longer the lower cost option, or paying the rent and security deposit is at least now a more competitive option. Additionally, as previously stated, the convenience benefit is now reduced by needing to spend time with a medical professional once a month.