In the last Humane Law Forum (“After the Adoption,” July/August 2011), the primary subject was the post-adoption liability of shelters. The column also touched on the legal possibility of holding landlords liable for tenants’ pets.

To limit their liability, many landlords have incorporated breed-specific bans into rental agreements. These typically target perceived “bully breeds” (dogs who appear to be mostly pit bull), along with rottweilers, Dobermans, and German shepherds. Breed discrimination has also been utilized by homeowners’ and condo associations and insurance companies as a means to control the types of dogs present in shared living spaces.

Recently, one of the authors was contacted by the head of a local shelter who had become frustrated by breed discrimination, specifically in relation to pit bull-type dogs. Like shelters in most cities, Chicago-area shelters are frequently filled with pit bulls, but at the same time, pit bulls are a common target of breed discrimination. It can be difficult to find responsible potential owners who want to adopt a pit bull—but even more difficult is finding one of those adopters and having to tell her she can’t take that animal because her landlord forbids it.

In a society that prides itself on social equality, why is there such a willingness to categorize and discriminate against our pets?

More practically, how do you keep breed discrimination from hindering your ability to advocate for animals?

Legality of Canine Profiling

Various governments, often responding to the (arguably irrational) fears of their constituents, have voted to enact varied breed-specific laws. For example, in Ohio, all pit bulls are included in the city’s definition of a “vicious dog.”

That’s right: In all of Ohio, your dog is legally vicious if it (1) has killed a human, (2) has injured a person, (3) has killed a dog, or (4) happens to be a pit bull. Any pit bull! A puppy. A friendly, well-trained adult with no
signs of aggression. Under the law, pits are all considered to be vicious, all of the time. Until recently, the City of Toledo had an ordinance preventing residents from owning more than one pit bull and requiring that all pit bulls be muzzled 100 percent of the time when out of the owner’s home.

If that ordinance offends you, you’re not alone. In City of Toledo v. Tellings, an Ohio citizen challenged the law as being unconstitutional and took his argument to the highest court in Ohio … and lost. In 2007, the Ohio Supreme Court found the state law and the Toledo city ordinance to be perfectly valid. The court reasoned that the government had a right to enact laws dealing with private property, which included animals, and that the government had a “legitimate interest in protecting citizens against unsafe conditions caused by pit bulls.” This decision was based on testimony that pit bulls cause more damage when they attack and cause more fatalities than other dogs. (These “facts” are highly debatable, but were nonetheless part of admitted testimony in the case). Breed neutralists may be pleased to know that in October 2010, the Toledo City Council unanimously passed an ordinance that bases the dangerousness of the dog on the animal’s actual behavior, not breed. Further, the Ohio state Senate is currently considering a bill that will remove pit bulls as a breed from the state’s “vicious dog” definition.

Reacting to local breed discrimination laws, several state legislatures have enacted statutes preventing local governments from passing breed-specific ordinances. For example, the California Health and Safety Code states that no specific dog breed, or mixed-breed dog, shall be declared potentially dangerous or vicious, and that breed-specific ordinances may only be enacted relating to mandatory spay/neuter programs. Florida, Illinois, Maine, Michigan, Minnesota, New York, Oklahoma, Pennsylvania, and Texas all have statewide bans on local government breed discrimination.

The important thing to remember is that these states only limit the government’s right to discriminate by breed. Discrimination by private entities—including landlords, home and condo associations, and insurance companies—is not covered by these state laws.

The bottom line is that you should know your state and local laws so that you can better inform adopters and their landlords, neighbors, and insurers, should the issue come up during the adoption screening. If your shelter is in Texas, for example, a landlord who discriminates against pit bulls in a lease agreement may want to know that there is a state law preventing the government from engaging in that same behavior. Calling attention to that law may convince the landlord to make an exception for your adopter. If your shelter is located in a city where the government itself actively engages in breed discrimination, then you probably won’t want to waste your breath arguing with a condo association that is just following the city’s lead. As a shelter, you have to weigh whether you want to place a dog in an area where its breed is targeted, or decide to adopt or transfer the animal to a different location.

Private-Sector Discrimination

The breed discriminators who most directly affect your ability to adopt out so-called “bully breeds” are generally private citizens and entities. Landlords, residential property owner associations, and insurance companies are not government entities, so the laws preventing breed-specific bans do not apply to them.

So beyond demonstrating that they’re out of step with state law, is there any way to prevent these private parties from discriminating against certain breeds?

Enterprising and tenacious animal advocates have posed a variety of legal arguments to try and stop breed discrimination. While there are too many potential theories to discuss in this article, we will mention a couple that might apply to your shelter. The theme to remember is that none of the following arguments have been overwhelmingly effective.

Vague or Ambiguous Contract Language

If a potential adopter is faced with private-sector breed discrimination, it will most likely be found in a legal document, such as a contract or an agreement. Under the law, if any part of the agreement is unclear or ambiguous, the judge may choose not to enforce that provision. So, if your landlord or condo association tries to restrict you as a pet owner, and the restriction is either not in writing, or the writing is not clear, you may have a legal argument that the restriction is too vague to be enforced.

Some breed advocates have used the vagueness argument in an attempt to invalidate breed-specific public laws and private regulations. For example, in Hearn v. City of Overland Park, the challenger of the breed-
specific law said that any breed-specific limitations are impermissibly vague, because it is inherently difficult to identify the “breed” of a given dog with absolute certainty. But the challenge was unsuccessful: The court acknowledged the guesswork that goes into breed identification, but ultimately found the law valid, and refused to find the ordinance unconstitutional. Interestingly, the appellate court in City of Toledo v. Tellings found Toledo’s breed-specific legislation to be unconstitutionally vague due to the difficulty of identifying a dog’s breed without DNA testing. Ultimately, the appellate court’s decision in Toledo was overruled by the Supreme Court of Ohio, but this is still an indication that the vagueness argument can work.

The Hearn and Toledo cases both involved a state “action”—the enacting of an ordinance—which is typically more susceptible to constitutionality arguments, including vagueness challenges. It didn’t work in those cases, and the bottom line is that if local or state courts are reluctant to find breed discrimination by the government to be unconstitutionally vague, then it is even less likely that the argument will work for a dog owner trying to challenge restrictions imposed by private entities.

**Statutes of Limitations and Waivers**

What if a pet owner is technically subject to breed discrimination by his landlord or condo association, but the landlord has not enforced the provision, even though he had noticed that the banned breed was on the premises?

The pet owner may be able to argue that the landlord or condo association has waived the right to enforce the breed ban against his pet. In Malmgren v. Inverness Forest Civic Club, Inc., a Texas court found that a property owner association could not prevent a long-term resident from owning a potbellied pig, even though the association had a clear restrictive covenant against livestock. The court reasoned that the property association knew that the animal was there and failed to file the lawsuit seeking a permanent injunction banning the animal in a timely manner.

This category of defense against private breed discrimination is most relevant where you are dealing with an owner who already owns a targeted breed and is in your shelter, either to give the animal up because of the private discrimination, or the owner is interested in getting another type of dog that is discriminated against by the landlord or insurance company. The first situation is more common than the second, but both hinder your ability as a shelter to manage your shelter population and find good animals great homes.

**Points to Take Home for Pits to Take Home**

While there are several state laws preventing the government from discriminating against “bully breeds,” there has not been a major trend or successful force to prevent private bodies such as landlords (who often have rules based on their insurance companies’ requirements), insurers, and property owner associations from discriminating. So as a responsible shelter or rescue group, you must try to determine whether an adopter has restrictions that will hinder his ability to properly care for a breed-banned dog.

During the adoption process, you should ask potential adopters about whether their lease agreements contain any pet restrictions, including size and breed limitations. If there is a breed restriction, inform the adopter that the adoption cannot be processed until the issue is resolved. Give the adopter an opportunity to discuss the issue with the landlord, insurance company (good luck!), or property owners’ association.

If the private entity will not budge on the issue, then you cannot in good faith allow that adopter to leave with a breed-targeted dog. Give him the opportunity to select another animal from your shelter.
To Label or Not to Label?
Some shelters intentionally refuse to identify any dog by breed because of the stigmas attached to particular breeds. Other shelters have been known to mislabel breeds in order to help get them adopted. This includes mislabeling a pit bull as a “boxer mix,” or labeling any bully breed as an “unknown mix.” While refusing to label your dogs by breed is well within the prerogative of each shelter, it is highly unadvisable to intentionally mislabel the breed of a dog. Honesty is always the best policy. While you do not have a duty to DNA test a dog, you do not want an animal returned to your shelter by an adopter who thinks he’s getting a boxer until he’s informed by his landlord that the dog is a pit, leaving the tenant in violation of his lease.

That said, there are all-too-common cases of dogs being identified as pit bulls when a DNA test would show otherwise. And if a client is being forced to surrender a beloved pet due to a discriminatory rule, you might consider advising the person to seek a DNA test. It’s impossible to overstate how greatly interbreeding has resulted in dogs who appear to be “pit bulls,” but in fact are a mix of multiple other breeds.

Sorting it all out can be tricky. Despite your personal feelings about breed discrimination, as a responsible shelter or rescue, you have to operate within your local reality, whether that reality is based on the law or just private discriminatory practices. When dealing with the adoption of a targeted dog, the best approach is to know your state and local laws relating to breed-targeting; determine whether an adopter is limited by private-party breed discrimination; and ask the potential adopter to obtain a written waiver to the restriction, or have the adopter consider another nontargeted breed in your shelter. At the end of the day, if the adopter just cannot be separated from his new pet, have her consider moving to a living situation where a dog is judged not by the color of his coat, or the muscularity of his physique, but by his behavior and suitability as a pet.

Cherie Travis is adjunct professor of animal law at DePaul University College of Law and Northwestern University School of Law, and was the associate director of the Center for Animal Law at DePaul before being appointed commissioner of Chicago Animal Care and Control. She is president and co-founder of PACT Humane Society.

Brad Powers is a licensed attorney in California who has focused his legal career on studying animal law and supporting animal welfare. He prosecuted dangerous-dog appeals for the City of Chicago Law Department before being appointed assistant to the director at Chicago’s Commission on Animal Care and Control.