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**LIONS AND TIGERS AND BEARS, OH MY!:  
THE NECESSITY FOR UNIFORM REGULATIONS AND  
TRAINING OF ASSISTANCE ANIMALS TO CURTAIL  
DISCRIMINATORY AND FRAUDULENT BEHAVIORS  
REGARDING SUCH ANIMALS**

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## I. INTRODUCTION

The most comprehensive legislation to ensure the civil rights of disabled persons was enacted in 1990. The Americans with Disabilities Act of 1990 (“ADA”) was introduced to Congress as House Resolution 4498 on April 28, 1988. The bill “provide[d] that no person shall be subjected to discrimination on the basis of handicap in: employment practices and training, and public accommodations covered by titles VII and VIII of the Civil Rights act of 1968; transportation services; State and local government actions operations, and practices; and services provided by telecommunication, broadcasts, and communications.”<sup>1</sup> The ADA bolstered previous nondiscrimination efforts found in section 504 of the Rehabilitation Act of 1973 (“section 504”). Under section 504, “[n]o otherwise qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>2</sup> Until the passage of the ADA and the amendments found in the ADA Amendments Act of 2008, the only protections afforded individuals with a disability were couched within the narrow area of law in section 504 of the Rehabilitation Act and the Architectural Barriers Act of 1968.<sup>3</sup>

For the ADA to protect an individual, that person must have a disability that, as defined by the ADA, is a “physical or mental impairment that substantially limits one or more major life activities . . . , has a history or record of such an impairment, or . . . [is perceived by others] as having such an impairment.”<sup>4</sup>

Discrimination prohibited by the Act includes:  
denying any person the opportunity to participate in or benefit from a service, program, job, or other opportunity...; establishing (or failing to remove) any architectural, transportation, or communication barriers that

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<sup>1</sup> Americans with Disabilities Act of 1988, H.R. 4498, 100th Cong. (1988).

<sup>2</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 1973 (codified at 29 U.S.C. § 794 (2014)).

<sup>3</sup> Abilities Amendments Act of 2008, 42 U.S.C.S. § 12102 (2020).

prevent the access or limit the participation...; failing or refusing to make a reasonable accommodation to permit a handicapped individual to have access to a program, activity, job, or opportunity; imposing any unnecessary standard or criteria that screens out or places the handicapped at a disadvantage; and denying services, programs, jobs, or other opportunities to any person because of that person's relationship to, or association with, a handicapped person.<sup>5</sup>

Any "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities," violates the central tenants of the ADA, unless "the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations."<sup>6</sup>

One such reasonable accommodation is admitting service animals where pets would otherwise be prohibited. Costco, a private membership retail store, adopted a written policy to ensure compliance with the ADA. The adopted policy provides that a store should grant admission to an animal if it can be determined that the animal is in fact a service animal. If the animal is visually identifiable, "by the presence of an apparel item, apparatus or other visual evidence that the animal is a service animal" then the animal may enter the warehouse.<sup>7</sup> If the animal is not readily identifiable visually, the "member or guest must be prepared to reasonably establish that the animal does, in fact, perform a function or task that the member or guest cannot otherwise perform."<sup>8</sup> The policy also states that Costco personnel are required to make an inquiry into the "task or function" the animal is trained to provide that the owner cannot perform on their own. Susan Grill was one such member that Costco did not allow to enter with her service

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<sup>5</sup> *Supra* note 1.

<sup>6</sup> Grill v. Costco Wholesale Corp., 312 F. Supp. 2d 1349, 1351 (W.D. Wash. 2004).

<sup>7</sup> *Id.* at 1350.

<sup>8</sup> *Id.*

animal. Her dog was not visually identifiable, and she refused to answer the questions pertaining to the task or function her dog performed. Grill sued claiming that an inquiry into the task or function of a service animal violated the ADA and was contrary to guidance released in the “ADA Business Brief” (“Brief”) that stated that an entity may ask of the owner if the animal is a service animal. Costco argued that the Brief and the Department of Justice’s “Commonly Asked Questions About Service Animals in Places of Business” (“CAQ”), which states “if you are not certain that an animal is a service animal, you may ask the person who has the animal if it is a service animal required because of a disability,” were not mutually exclusive because the CAQ did not contradict the Brief.<sup>9</sup>

The Court agreed that Brief and the CAQ were not mutually exclusive and they provided entities with more than one option when inquiring about the status of an animal in such situations. Costco also argued that the Court should take into consideration other agency guidance relating to nondiscrimination regulations, such as the Department of Transportation’s (“DOT”) guidance concerning service animals. The guidance permits airline personnel to receive “‘credible verbal assurances’ from the passenger to determine whether an animal is a service animal.”<sup>10</sup> The guidance further allows airline personnel to inquire into the “tasks or functions” of the animal.

The DOT guidance is an interpretation of the Air Carrier Access Act (“ACAA”) and not the ADA; the Court did not rely on it to determine the outcome of the case but did acknowledge the analogous nature of the nondiscrimination provisions in the guidance from both governmental agencies. Ultimately, the Court agreed with Costco’s argument and provided that “task or function” questions are permitted under the ADA.<sup>11</sup>

With the proliferation of service and emotional support animals fulfilling multiple forms of assistance or comfort, “considerable confusion over the meaning of individual terms used to designate the function and role of service animals, assistance animals, therapy animals, and emotional support

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<sup>9</sup> *Id.* at 1352.

<sup>10</sup> *Id.* at 1353.

<sup>11</sup> *Id.* at 1355.

animals" is understandable.<sup>12</sup> This is further exacerbated by the terms used by differing agencies, organizations, and innumerable statutes that are meant to ensure the right and privilege of the use of these animals. It is no wonder that public perception would be affected. The affectation of public perception is most evident in the determination of the service animal over an emotional support animal or therapy animal in relation to psychiatric disorders.

Where a service animal is trained to provide specific support for conditions such as, but not limited to, panic attacks, post-traumatic stress disorder ("PTSD"), and obsessive-compulsive disorder ("OCD") by "carry[ing] out specific tasks to help an individual cope with his/her [sic] disability,"<sup>13</sup> an emotional support animal provides the same sort of assistance but is not required to have specific training. Is this a distinction without a true difference? Public perception would say yes, whereas to enjoy the protections afforded under the ADA the answer would be no. Thus, "[t]hese differences may make it difficult for landlords, business owners, and employers to distinguish between the types of assistance animals."<sup>14</sup>

The argument made by Costco, to look to other agencies for guidance, is fundamental to the argument of this paper. Due to the myriad of rules, policies, and guidelines relating to the identification and acceptance of service and emotional support animals, it is not surprising that places of public accommodation, private entities, and commercial facilities may run afoul of the ADA. To avoid situations of peacocks and potbelly pigs on airplanes or gerbils at the dinner table, Congress should amend the ADA and set forth a standardized training, registration, and identification process that is otherwise lacking.

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<sup>12</sup> Regina Schoenfeld-Tacher, *et al.*, *Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, INT'L J. OF ENVTL. RES. PUB. HEALTH, at 1 (June 15, 2017).

<sup>13</sup> *Id.* at 2.

<sup>14</sup> *Id.* at 3.

## II. DEFINITIONS, TYPES, AND TRAINING OF SERVICE AND SUPPORT ANIMALS

### a. DEFINITIONS OF SERVICE ANIMALS, EMOTIONAL SUPPORT ANIMALS, AND THERAPY ANIMALS, ACCORDING TO HUD AND ACAA

To understand the general confusion over service animals, the definitions of recognized animals by each statute/regulation or agency must be determined. An “assistance animal” as defined by the U.S. Department of Housing and Urban Development (HUD) is “any animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms of effects of a person’s disability,”<sup>15</sup> even if the animal is not otherwise individually trained as a service animal.<sup>16</sup>

Under the ACAA and guidance from the Code of Federal Regulations, any animal may be recognized as a “service animal” with limitations.<sup>17</sup> “Any animal that is individually trained or able to provide assistance to a qualified person with a disability; or any animal shown by documentation necessary for the emotional well-being of a passenger” has such consideration.<sup>18</sup> Furthermore, animals for psychiatric support are recognized but given the same status as an emotional support animal (“ESA”) and are still permitted with proper documentation of the need and a psychological diagnosis recognized in the Diagnostic and Statistical Manual of Mental Disorders.

HUD and the ACAA provide the definition of an ESA. An ESA is an animal of any species that does not require training to perform work or a task based on a disability but is supported

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<sup>15</sup> *Assistance Animals: Rights of Access and the Problem of Fraud*, AM. VETERINARY MED. ASS’N, 5 (April 21, 2017), <https://www.avma.org/sites/default/files/resources/Assistance-Animals-Rights-Access-Fraud-AVMA.pdf>.

<sup>16</sup> U.S. DEP’T OF HOUS. AND URB. DEV., FACT SHEET ON HUD’S ASSISTANCE ANIMALS NOTICE, <https://www.hud.gov/sites/dfiles/PA/documents/AsstAnimalsGuidFS1-24-20.pdf> (last visited Oct. 20, 2020).

<sup>17</sup> 14 C.F.R. § 382.117 (2019).

<sup>18</sup> AM. VETERINARY MED. ASS’N, at 5.

by documentation from a qualified healthcare provider. Though ESAs are not recognized under the ADA, both housing and transportation are required to allow these animals as a reasonable accommodation.<sup>19</sup>

A final subset is the therapy animal. "A therapy animal is a type of animal-assisted intervention in which there is a 'goal directed intervention in which an animal meeting specific criteri[on] is an integral part of the treatment process.'"<sup>20</sup> This form of use is recognized by the American Veterinary Medical Association and is allowed to accompany passengers, if they are the handler, under the ACAA with documentation.<sup>21</sup> Otherwise, these animals are not afforded any federal protections even though they may be allowed to enter certain facilities that a pet would not be permitted, such as schools and nursing homes.<sup>22</sup>

#### b. SERVICE ANIMAL DEFINITION UNDER THE ADA AND ISSUES RELATED TO THIS DEFINITION

After examining the definitions from the HUD and the ACAA, the next definition comes from the ADA; a "service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."<sup>23</sup> This specific definition excludes any other species of animal regardless of the level of training that animal may have. For the dog to qualify as a service animal, the dog must have been trained to perform work or a task that is "directly related to the individual's disability."<sup>24</sup> Traditional work is easily ascertainable by the public such as aiding mobility for the blind, pulling a wheelchair, or alerting the deaf. Examples of not-so-readily understood forms of work are assisting during a seizure, alerting to the presence of allergens, or by "interrupting impulsive or destructive behaviors" or "helping persons with psychiatric and neurological disabilities."<sup>25</sup> Issues arise in this later group.

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<sup>19</sup> 42 U.S.C.S. § 3604(f)(3)(B) (2019); 14 C.F.R. § 382.117 (2019).

<sup>20</sup> AM. VETERINARY MED. ASS'N, 6.

<sup>21</sup> 14 C.F.R. § 382.117 (2019).

<sup>22</sup> AM. VETERINARY MED. ASS'N, 6.

<sup>23</sup> 28 C.F.R. § 36.104(3)(3)(iii)(1)(4)(12)(3)(5) (2019).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

The work provided to those with psychiatric and neurological disabilities may be of the same type that is not covered under the ADA found in the use of ESAs, that of “emotional support, well-being [or] comfort.”<sup>26</sup> This fine line distinction thus continues the confusion on the legitimacy of the animal in question. To address some of these issues, the United States Department of Justice (DOJ), Civil Rights Division, Disability Rights Section published a whitepaper with revised final regulations on September 15, 2010. In this guidance it was reaffirmed what animals are considered under the ADA.

Arguably, this guidance added to the confusion. Though the DOJ reaffirmed that “service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities,” the paper also added “the Department’s ADA regulations have separate provisions about miniature horses that have been individually trained” as well.<sup>27</sup>

Under Titles II and III of the ADA, “state and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go.”<sup>28</sup> The individual is not subject to additional fees for the use of the animal, whether this is in housing, transportation, or in public access. For the individual to be afforded this right of access, the animal must be under control by the use of a leash or harness unless the individual’s disability or the work the animal provides is prevented by the use of such a device. The animal is still required to adhere to local registration/licensing and vaccine requirements, but no other identification or registration is required to identify the animal as one of service. This allows the service animal to be in “public locations as long as they do not ‘fundamentally alter the nature of the business,’ do not pose an immediate threat to the public and are housetrained.”<sup>29</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Service Animals, ADA 2010 REVISED REQUIREMENTS: SERVICE ANIMALS*, U.S. DEP’T OF JUSTICE, (July 12, 2011, UPDATED February 24, 2020), [https://www.ada.gov/service\\_animals\\_2010.htm](https://www.ada.gov/service_animals_2010.htm); *Anderson v. City of Blue Ash*, 798 F.3d 338 (6th Cir. 2015).

<sup>28</sup> AM. VETERINARY MED. ASS’N, 7.

<sup>29</sup> *Id.*

### c. TRAINING

Issues arise between the differing types of recognized support animals and the public in the context of training.<sup>30</sup> Under the ADA, service animal training to perform work or a task directly related to one's disability can be completed formally or by the individual with the disability. The animals that are not service animals under the ADA but are otherwise recognized by HUD or the DOT are not required to have any training. This gives rise to issues of safety for the trained animals as well as the public. In the article, *Fake Service Dogs, Real Problems*, author Katrina Tilbury recounts an interaction between a trained service dog and an emotional support dog, where the ESA "jumped out of its owner's purse and chased" down the legitimate service animal.<sup>31</sup> Since service animals are quite costly to "raise, train, and socialize," this sort of encounter is unacceptable.<sup>32</sup> The lack of standardized training/registration and identification allows for such encounters to occur because establishments are unable to distinguish between the types of animals entering their facilities and litigation arising from barring entry of legitimate service animals is prevalent.

## III. MIXED MESSAGES BETWEEN AGENCIES AND DISCRIMINATION REGARDING ASSISTANT ANIMALS

### a. MIXED MESSAGES BETWEEN AGENCIES

The numerous laws pertaining to the right of those with disabilities to use a service or assistance animal in public spaces results in a mixed message, depending on the agency providing the governing regulation. Titles II and III of the ADA cover some aspects of service animals and housing but the most

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<sup>30</sup> *Id.*; see *Service Animal Definition Matrix – Air Carrier Access Act vs. Americans with Disabilities Act*, [https://www.transportation.gov/sites/dot.gov/files/docs/P2.SA\\_Issue%20List.SA%20Matrix.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/P2.SA_Issue%20List.SA%20Matrix.pdf) (last visited Oct. 20, 2020).

<sup>31</sup> Katrina Tilbury, *Fake Service Dogs, Real Problems*, AP NEWS (May 16, 2018),

<https://apnews.com/article/1a28f8e528424fdca2040ea8139e3014>.

<sup>32</sup> *Id.*

relevant controlling statutes are the Fair Housing Act (“FHA”) and section 504 of the Rehabilitation Act of 1973.

b. DISCRIMINATION REGARDING ASSISTANCE ANIMALS

Under the FHA, which covers virtually all types of housing, discrimination is prohibited based upon, among other protected classes, familial status and disability in housing.<sup>33</sup> There are three exceptions to this rule: “1) rental dwellings of four units or less, if one unit is occupied by the owner; 2) single family homes sold or rented by the owner without a broker; and 3) housing owned by private clubs or religious organizations that restrict housing units to their members.”<sup>34</sup> Two agencies have authority to enforce the FHA: HUD and DOJ. If the housing provider has received federal financial assistance, section 504 of the Rehabilitation Act of 1973 would also apply, which prohibits discrimination based upon an individual’s “handicap.”<sup>35</sup> Violations of Section 504 are enforced by the DOJ.<sup>36</sup> The FHA and Section 504 both require housing providers to make reasonable accommodations for assistance animals if the individual has a disability that “substantially limits one or more major life activities,”<sup>37</sup> and request for the accommodation is for an animal that relates to the individual’s disability.<sup>38</sup>

The first question that needs to be answered when addressing the reasonable accommodation is what kind of animal the individual is requesting the accommodation for, since the FHA allows assistance animals and service dogs. If the disability is easily ascertainable, the housing provider cannot request or require any further documentation or

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<sup>33</sup> Fair Housing Act of 1968, 42 U.S.C.S. § 3604(b) (2020).

<sup>34</sup> Fair Housing Act of 1968, 42 U.S.C.S. §§3603(b), 3607 (2019); 24 C.F.R. § 5.303 (2020).

<sup>35</sup> Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 1973 (codified at 29 U.S.C. § 794 (2014)).

<sup>36</sup> *Id.*

<sup>37</sup> AMERICANS WITH DISABILITIES AMENDMENTS ACT OF 2008, 42 U.S.C.S. § 12102(1)(A) (2020).

<sup>38</sup> *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, U.S. DEP’T OF HOUS. AND URBAN DEV (April 25, 2013) [https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO\\_508.pdf](https://www.hud.gov/sites/dfiles/FHEO/documents/19ServiceAnimalNoticeFHEO_508.pdf).

information relating to the disability or the need of the animal.<sup>39</sup> In cases such as these, the provider is obligated to make reasonable accommodations under Section 504 and FHA unless the accommodation would create an undue financial burden, fundamentally alter the nature of the services, or if the animal poses a direct threat to the health and welfare of others that cannot be reduced or eliminated by another reasonable accommodation.<sup>40</sup> Unlike the prohibitions found in the ADA and *Grill v. Costco*, if the disability and the need for the assistance animal is not readily ascertainable, under HUD guidance and the FHA, the provider may ask for documentation of both the need and the disability.<sup>41</sup> Furthermore, the FHA also has carve-outs that require a reasonable accommodation to a no-pet policy for the use of companion/emotional support animals for the disabled individuals and the elderly.<sup>42</sup> This position is bolstered by the decision in *Overlook Mut. Homes, Inc. v. Spencer*.<sup>43</sup> The court acknowledged the purpose of the ADA and the requirement of a trained service animal it also differentiated the FHA guidance that included the need for reasonable accommodations to be made for emotional support animals.<sup>44</sup> The court noted the difference between an ADA and an FHA claim by using a movie theater as a reference. Where an individual with a disability cannot be barred from being accompanied by their service animal during a two-hour movie, the theater can bar an ESA.<sup>45</sup> Because the theater is an issue of public access, the ADA applies; whereas, housing would be governed by the FHA and Section 504 of the Rehabilitation Act.<sup>46</sup>

Under the Americans with Disabilities Act, an individual with a disability is protected from discriminatory actions, policies, and practices in public transportation. Issues relating to service or support animals most often arise in air transportation. To address disability issues in air travel,

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.*; *Costco Wholesale*, 312 F. Supp. 2d 1349.

<sup>42</sup> Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63,833 (2008) (codified at 24 C.F.R. pt. 5).

<sup>43</sup> *Overlook Mut. Homes, Inc. v. Spencer*, 666 F. Supp. 2d 850 (S.D. Ohio 2009).

<sup>44</sup> *Id.* at 859-60.

<sup>45</sup> *Id.* at 859.

<sup>46</sup> *Id.* at 859-60.

Congress passed the Air Carrier Access Act which delegated authority to the DOT to promulgate specific rules to prevent public airlines from discriminating against individuals based on disabilities.<sup>47</sup> Furthermore, the ACAA requires air carriers to accommodate the needs of passengers with disabilities. These accommodations span from providing the services and benefits of air travel without discrimination to providing specific services, equipment, or assistance to those individuals needing such based on their disability.<sup>48</sup> DOT regulations follow the ADA definition of a service animal and enforces the accommodation of such animals. Where the DOT differs from the ADA is the acceptance of “emotional support or psychiatric service animals.”<sup>49</sup> The guidance provided to passengers on the official DOT website uses these contradicting terms, exacerbating the confusion between the actual types of animals and the ADA definition. Furthermore, since psychiatric service animals are lumped into the same category as emotional support animals, passengers that would otherwise be shielded from providing information relating to their disability under the ADA and *Grill v. Costco*, now may be required to provide documentation of their disabling psychological disorder for their legitimate service dog to accompany them on a flight.

#### IV. RULE CHANGES FOR DEFINITIONS OF SERVICE ANIMALS IN ORDER TO CURTAIL FRAUD AND LIBERAL APPLICATIONS OF AGENCY DEFINITIONS

Interestingly, Polish scholar, Justyna Włodarczyk tackles the expanded acceptance of emotional support animals in her article, *When Pigs Fly: Emotional Support Animals, Service Dogs and the Politics of Legitimacy Across the Species Boundaries*, and discusses that the terminology, emotional support animal, “is specific to the United States” and is an “absurdity of the political correctness that makes it possible for pigs to fly in the passenger cabin of airplanes and llamas to accompany their

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<sup>47</sup> Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080, (1986) (codified at 49 U.S.C.S. § 41705 (2020)).

<sup>48</sup> *Id.*

<sup>49</sup> *Service Animals (Including Emotional Support Animals)*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/service-animals-including-emotional-support-animals> (last visited Oct. 20, 2020).

owners on trips to the supermarket.”<sup>50</sup> The DOJ has acknowledged that anything other than the “service dog” definition in the ADA has “er[oded]... the public’s trust, which has resulted in reduced access for many individuals with disabilities who use trained service animals that adhere to high behavioral standards.”<sup>51</sup>

This is further illustrated by the current proposed rulemaking being undertaken by the DOT. Due to the issues surrounding “service animals,” DOT is proposing the adoption of the ADA definition “as a dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability.”<sup>52</sup> Though the ACAA will continue to recognize ESAs, they will have the designation as a pet and not a service animal. Where the proposed rules diverge from the ADA, they “propose to allow airlines to require all passengers with a disability travelling with a service animal to complete and submit . . . forms developed by DOT attesting to the animal’s training and good behavior.”<sup>53</sup> Also unlike the ADA, airlines have the ability to impose breed restrictions and require the animal to be “harnessed, leashed, or otherwise tethered,” regardless of whether it would otherwise restrict the service the animal provides.<sup>54</sup>

#### a. SERVICE ANIMAL COMPLAINTS

DOT’s justification of the need for rule changes is five-fold: service animal complaints, the inconsistent federal definition of service animal, unusual species of animals, pets on aircraft, and misbehavior of service animals. “Service animal-related complaints are increasingly a more significant portion of the disability-related complaints that the Department’s

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<sup>50</sup> Justyna Wlodarczyk, *When Pigs Fly: Emotional Support Animals, Service Dogs and the Politics of Legitimacy Across Species Boundaries*, 45 *MED. HUMANIT.* 82 (2019).

<sup>51</sup> Ann Zimmerman, *Leapin' Lizards! Service Animals are Multiplying Like Daggone Rabbits --- Skippy the Iguana Keeps His Owner Calm, but Therapy Dog Maxx is an Impostor*, W.S.J. (Feb 24, 2011).

<sup>52</sup> *Traveling by Air with Service Animals*, 85 *Fed. Reg.* 6,448 (2020) (Notice of Proposed Rulemaking to be codified at 14 C.F.R. pt. 382).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*; See *supra* note 49.

Aviation Consumer Protection Division and airlines receive.”<sup>55</sup> These complaints are often not specific to passengers with disabilities but directly from passengers without disabilities about the service animals they are subjected to traveling with.

#### b. INCONSISTENCIES IN DEFINITION

Concerns have also been raised about inconsistencies between the definition of a service animal under the DOT rules for domestic and foreign air carrier services versus the airport and the facilities held within, by the airlines, airports, and advocates for people with disabilities. DOJ’s ADA regulations, which apply to the facilities under Title III, “define a service animal as any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or mental disability,”<sup>56</sup> whereas the same regulations do not recognize emotional support animals.<sup>57</sup>

According to the regulations set forth under the ADA by the DOJ, service animal species are limited to dogs; however, public and/or private facilities and businesses must evaluate the need to allow miniature horses instead of dogs for specific individuals.<sup>58</sup> Unlike the DOJ, the ACAA regulations are less stringent when looking at which species are acceptable as service animals, whether those animals be defined as service

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<sup>55</sup> 85 Fed. Reg. 6,448 (2020) (Notice of Proposed Rulemaking to be codified at 14 C.F.R. pt. 382).

<sup>56</sup> *Id.* at 6,449; *See* 28 CFR 35.104 and 28 CFR 36.104.

<sup>57</sup> Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,269 (Sept. 15, 2010).

<sup>58</sup> *See* 28 CFR 35.136(i); 28 CFR 36.302(c)(9). DOJ, while not recognizing miniature horses as service animals, requires entities covered by the ADA to make reasonable modifications in their policies, practices, or procedures to permit an individual with a disability to use a miniature horse that has been individually trained to do work or perform tasks for the benefit of the individual with a disability, based on an assessment of factors, including the type, size, and weight of the miniature horse and whether the facility can accommodate these features; whether the handler has sufficient control of the miniature horse; whether the miniature horse is housebroken; and whether the miniature horse’s presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

animals or emotional support animals.<sup>59</sup> Because of these differing regulations between the DOJ and DOT, and the differing definitions of a service animal between the ADA and the ACAA, businesses that are housed within an airport, as well as the airport itself, are finding themselves navigating regulatory gray areas when it comes to allowances for service or emotional support animals. This lack of clarity in regulation can provide major stresses for travelers that are dependent upon these animals.

### c. UNUSUAL SERVICE ANIMALS AND BREED RESTRICTIONS

This is further exacerbated by passengers who attempt to fly with a verity of “unusual species of animals, such as a peacock, ducks, turkeys, pigs, iguanas, and various other types of animals as emotional support or service animals, causing confusion for airline employees and additional scrutiny for service animal users.”<sup>60</sup> Advocates for disability rights have raised concerns that individuals who use these exotic forms of service animals “erode[] the public’s trust and confidence in service animals” generally.<sup>61</sup> Airlines have also raised concerns that the “heightened attention” given to these animals and “the resources airlines expend each time an unusual or untrained animal is presented for transport on an aircraft.”<sup>62</sup>

### d. FRAUD AND FRAUD PREVENTION

The sudden abundance of animals being presented to the airlines as either service or emotional support animals has raised the question of whether passengers are “falsely claiming their pets are service animals so they can take their pet in the aircraft cabin or avoid paying pet fees charged by most airlines”<sup>63</sup> because the airlines are barred from charging those that use a service animal transport fees. “Airlines have reported increases in the number of service animals on aircraft and

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<sup>59</sup> See 14 C.F.R. § 382.117; see also Guidance Concerning Service Animals, 73 Fed. Reg. 27,614, 27,659 (May 13, 2008).

<sup>60</sup> 85 Fed. Reg. 6,448, 6,450 (2020) (Notice of Proposed Rulemaking to be codified at 14 C.F.R. pt. 382).

<sup>61</sup> *Id.* at 6,450 (Comment made on unusual species).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

expressed concern that the significant increase in the number of service animals traveling on aircraft may be the result of an increase in emotional support animals and/or passengers falsely claiming that their pets are emotional support animals.”<sup>64</sup> Complaints from the airlines concerning the safety of passengers and crew because the number of untrained animals now traveling in the cabin have increased.<sup>65</sup> This is believed to be because of the emergence of online outlets that will provide documentation in accordance with airline requirements to pass pets or other animals off as psychiatric, or emotional support animals when the individual is not in need and the animal would otherwise not qualify as such.

While the Department’s current service animal regulation permits airlines to require documentation from a licensed mental health professional for the carriage of emotional support animals, the advent of online entities that may be guaranteeing the required documentation for a fee has made it difficult for airlines to determine whether passengers traveling with animals are traveling with their pets or with legitimate emotional support animals.<sup>66</sup>

Reasonable accommodations required under the ADA and the ACAA provide that any animal recognized must behave and be trained to interact properly with the public.

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<sup>64</sup> *Id.*; see Comment of Delta Air Lines, Inc., <https://www.regulations.gov/document?D=DOT-OST-2018-0068-4141>. In 2017, Delta Air Lines carried nearly 250,000 service and support animals, or almost 700 per day. The volume of service and support animals transported increased about 50 percent from 2016 to 2017 (along with an additional 240,000 pets), but the growth was not uniform over all categories of animals. ESAs led this growth with an increase of approximately 63 percent, while other service animal transport grew by only approximately 30 percent.

<sup>65</sup> See generally, Alison Sider, *U.S. Moves to Let Airlines Ban Emotional-Support Animals*, THE WALL STREET JOURNAL (Jan. 22, 2020), <https://www.wsj.com/articles/u-s-proposes-tighter-rules-for-emotional-support-animals-on-flights-11579720969>.

<sup>66</sup> 85 Fed. Reg. 6,448, 6,450 (2020) (Notice of Proposed Rulemaking to be codified at 14 C. F. R. pt. 382).

“Despite this guidance, some believe that emotional support animals pose a greater safety risk because they have not been trained to mitigate a disability and, therefore, are less likely to have received adequate behavioral training.”<sup>67</sup> Because behavior-related incidents increased, some carriers implemented policy changes requiring passengers to provide animal health information and documentation attesting to behavioral training of the animal as a condition to board an aircraft. Though these policies were aimed at emotional support and psychiatric service animals, “disability rights advocates expressed concern about the increased burdens that these policies have placed on legitimate service animal users. Disability advocates are also concerned about the increased stigma and negative perception of all service animals traveling on aircraft.”<sup>68</sup>

e. LACK OF CONCISE FEDERAL STANDARDS LEAD TO STATE LAWS REGARDING FRAUD

From the restrictive definition and application of the ADA, to the liberal applications of HUD and the DOT, the lack of concise standards has resulted in the rise of state fraud laws to address the concerns of public accommodations. Twenty-one states have enacted laws to address the fraudulent representation of pets as service or support animals.<sup>69</sup>

Animal and legal experts say that the explosion of reported problems is due to [the lack of a] uniform nationwide certification or registration process for legitimate service animals—which receive up to several years of specialized training—making it easy for people to scam a non-existent system, [meanwhile] the easy availability online of ‘service dog’ harnesses and

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<sup>67</sup> *Id.* at 6,450.

<sup>68</sup> *Id.* at 6,448, 6,450.

<sup>69</sup> See generally Adam Edelman, *Collared: New Laws Crack Down on Fake Service Dogs*, NBC NEWS (May 5, 2018), <https://www.nbcnews.com/politics/politics-news/collared-new-laws-crack-down-fake-service-dogs-n871541>.

vests is all too tempting for animal-owners who want company running errands and going out.<sup>70</sup>

Establishments required to make a reasonable accommodation and admit service animals have faced the issue of questioning the legitimacy of the animal weighed against the possibility of being sued.<sup>71</sup>

#### V. PROBLEMS WITH EXPANDED COVERAGE OF THE ADA AND ITS IMPACT ON INDIVIDUALS WITH DISABILITIES REQUIRING THE USE OF A SERVICE ANIMAL

The expanded coverage of the ADA to ensure maximum coverage for disabilities is oddly limiting to those with the need for a service animal; and in doing so, aids in the confusion when juxtaposed with the other federal accepted definitions. The regulations that include emotional support animals, that would otherwise not meet the definition under the ADA, "even if used to assist a person with a psychiatric disability,"<sup>72</sup> could result in entities not accommodating such an animal. Because of the conflicting federal standard of animals accepted, the guidance continue[s] to leave the proprietors of public accommodations with little guidance on how to deal with situations where an individual without an apparent disability purports to be accompanied by a service animal, given that there are still cases occurring where individuals with apparent disabilities using service animals are refused service.<sup>73</sup>

It can be argued that a bright-line rule of all agencies adopting the finite definition of a service animal as a dog, as set out in the ADA, would clarify the confusion. This not only would limit the scope of the type of animal, but also limit the individuals that would benefit from such an animal when a dog cannot be used to aid with their disability, thus placing limitations on what is a disability.<sup>74</sup> As Rebecca Huss says,

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Rebecca J. Huss, *Why Context Matters: Defining Service Animals under Federal Law*, 37 PEPP. L. REV. 4 (2010).

<sup>73</sup> *Id.* at 1212.

<sup>74</sup> *Id.* at 1213.

[t]here is some logic to using a restrictive definition of service animal under the ADA. Given that persons with apparent disabilities using guide dogs continue to have issues gaining access to public accommodations, perhaps our society is not ready to truly accept the premise of the ADA, that all types of disabilities should be accommodated.<sup>75</sup>

Prior to narrowing the definition, the impact of such an action on the lives of individuals with disabilities should be taken into consideration. Given that the recognized types of disabilities continue to grow as does the number of Americans that suffer from one form or another, “we should be working towards further accommodation of persons with disabilities rather than making it more difficult for them to navigate the world.”<sup>76</sup> One such way is a standardized training, registration and identification process being adopted by the ADA.

## VI. FEDERAL STANDARD EMERGES

A recognizable federal standard for training and certification appears to be forming through the U.S. Department of Veteran Affairs (“VA”). The VA proposed changes to regulations in 2012 that directly addressed service animals. “VA does not have the expertise, experience, or resources to develop independent training criteria, and VA will not adopt or initiate internal training programs, as this would effectively make VA act as a professional service dog certifying body.”<sup>77</sup> Because of the VA’s lack of expertise in this area, “Service dogs must be certified by Assistance Dogs International (“ADI”) or International Guide Dog Federation (“IGDF”) for veterans with visual, hearing, or substantial mobility impairments.”<sup>78</sup> Furthermore, for a VA beneficiary to “receive benefits under the rule, the service dog must continue

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<sup>75</sup> *Id.* at 1214.

<sup>76</sup> *Id.* at 1216.

<sup>77</sup> 77 Fed. Reg. 54,368, 54,373 (a proposed rule to amend VA regulations to broaden and clarify current benefits to veterans with guide dogs, and to establish new benefits related to service dogs) (2012).

<sup>78</sup> 77 Fed. Reg. 54,371.

to function as a service dog” and the “means of evaluating whether a service dog has maintained its ability to function as a service dog” will be provided by the same.<sup>79</sup> Under 38 U.S.C. § 1714(3), the VA “may provide service dogs trained for the aid of persons with mental illnesses, including post-traumatic stress disorder.”<sup>80</sup> The fact that the VA is recognizing service animals for mental health conditions further supports the need for amending the ADA to include these conditions as a recognizable area for the use of a service animal over an ESA type status.

a. PUPPIES ASSISTING WOUNDED SERVICEMEMBERS FOR VETERANS THERAPY ACT

Due to the rise of veteran suicides after lengthy war time postures in Afghanistan and Iraq, the House of Representatives has recently passed the Puppies Assisting Wounded Servicemembers for Veterans Therapy Act (“PAWS”). In this bill, the Secretary of Veterans Affairs is charged with carrying out a pilot program to provide grants to “one or more appropriate non-government entities for the purpose of assessing the effectiveness of addressing post-deployment mental health and post-traumatic stress disorder symptoms through a therapeutic medium of training service dogs for veterans with disabilities.”<sup>81</sup> The program requires that these non-government entities that provide the service dogs be “accredited by, or adheres to standards comparable to those of, an accrediting organization with demonstrated experience, national scope, and recognized leadership and expertise in the training of service dogs and education in the use of service dogs,”<sup>82</sup> like ADI or IGDF.

## VII. CONCLUSION

As this paper has discussed, the differing interpretations of the term, service animal, as well as the

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<sup>79</sup> 77 Fed. Reg. 54,397.

<sup>80</sup> 38 U.S.C.S. § 1714 (LexisAdvance through Pub. L. No. 116-91, approved Dec.19, 2019) (VA-fitting and training in use of prosthetic appliances; guide dogs; service dogs).

<sup>81</sup> Puppies Assisting Wounded Servicemembers for Veterans Therapy Act, H.R. 4305, 116th Cong. (2020).

<sup>82</sup> *Id.* at 3(B).

acceptance of other defined animals by governmental agencies, have caused confusion within the general public and places of public accommodation. From this confusion, there have been instances of discrimination toward individuals that validly use service animals to assist with their disabilities due to either the eroded public perception of service animals or the lack of education provided to the public to ensure this reasonable accommodation. The argument can also be made that there has been an increase in individuals obtaining documentation from online outlets to fraudulently pass their pets off as service animals. The resulting complaints, and subsequent proposed rule changes, seem counterintuitive to the inclusiveness the ADA attempted to ensure with the 2008 amendments.

With the ADA's expansion of conditions that are considered a disability, narrowing the definition or the acceptance of a service animal has essentially limited the persons that may benefit from the use of such an animal. Those with psychological disabilities that have found benefit from an emotional support animal have, up to this point, enjoyed the acceptance of their use through HUD and DOT. If these agencies were to narrow their definition of service animal to reflect the ADA's, and no longer accept emotional support or psychological support animals as such, then the inclusive nature of the ADA would be negated.

Thus, the standard of training and certification used by the Veterans Administration and emerging in the PAWS Act should be adopted, and an amendment of the ADA to reflect this form of training should be adopted with an added expansion to include protections for ESAs and curtailing of online distribution of fraudulent documentation. With this adoption, Congress should amend the ADA and set forth a standardized training, registration, and identification process, as well as providing an expansion of acceptance for ESAs to ensure a recognizable standard for those that provide public accommodations for persons with disabilities.