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CIVIL RIGHTS LAW—INCLUSION OF EMOTIONAL SUPPORT ANIMALS AS SERVICE ANIMALS UNDER THE ADA: CREATING THE RIGHT TO USE DOGS TO ASSIST PEOPLE LIVING WITH MENTAL HEALTH ISSUES

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CIVIL RIGHTS LAW—INCLUSION OF EMOTIONAL SUPPORT ANIMALS AS SERVICE ANIMALS UNDER THE ADA: CREATING THE RIGHT TO USE DOGS TO ASSIST PEOPLE LIVING WITH MENTAL HEALTH ISSUES

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The use of emotional support animals to alleviate or mitigate symptoms associated with mental health issues has been a topic of debate since its inception. On one hand, there is the community of people who have expressed a need to use support animals to help them to participate in society, including while traveling by airplane. On the other hand, the Department of Transportation has had to assess whether allowing support animals on airplanes would pose a direct threat to the safety or health of others.

In most contexts, support animals are not treated as service animals, so therein lies substantial confusion. Broadening the Americans with Disabilities Act's definition of service animal to include emotional support animals will have both positive and negative consequences. By expanding and clarifying the language, our society will benefit by breaking the stigma of mental illness. Nonetheless, there are risks that come with this positive change that will be worth it in the end. These disability regulations need to be updated in a way to provide clarity for all Americans. By carefully crafting the definition of an emotional

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support animal around the robust fraud mechanisms outlined in this article, people with mental health disabilities can have the ADA's promises fulfilled and be fully integrated into society while still protecting the interests of businesses and others.

INTRODUCTION

Millions of Americans are living with a mental health issue.¹ One in five adults, or 47.6 million people, in the United States “experienced mental illness in 2018.”² One in twenty-five adults, or 11.4 million people, in the United States “experienced serious mental illness in 2018.”³ Among American youth, aged six to seventeen, 7.7 million people “experienced a mental health disorder in 2016.”⁴ When delving further into the numbers, it is clear that mental illness spans across demographic groups:

- Non-Hispanic Asian: 14.7%
- Non-Hispanic white: 20.4%
- Non-Hispanic black or African-American: 16.2%
- Non-Hispanic American Indian or Alaska Native: 22.1%
- Non-Hispanic mixed/multiracial: 26.8%
- Hispanic or Latino: 16.9%
- Lesbian, Gay or Bisexual: 37.4%⁵

Many people who experience mental illness are helped by the use of emotional support animals that “provide companionship, relieve loneliness, and sometimes help with depression, anxiety, and certain phobias.”⁶ Emotional support animals, however, “do not have special training to perform tasks that assist people with disabilities.”⁷ As a result, emotional support animals are not considered service animals under the

1. *Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS, www.nami.org/learn-more/mental-health-by-the-numbers (last updated Sept. 2019).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* The American Psychiatric Association has reported that lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ) “individuals are more than twice as likely as heterosexual men and women to have a mental health disorder in their lifetime.” *Mental Health Disparities: Diverse Populations*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/psychiatrists/cultural-competency/education/mental-health-facts> [<https://perma.cc/R78D-GGG9>].

6. Amanda M. Foster, *Don't Be Distracted by the Peacock Trying to Board an Airplane: Why Emotional Support Animals Are Service Animals and Should Be Regulated in the Same Manner*, 82 ALB. L. REV. 237, 237–38 (2018).

7. *Id.* (quoting JACQUIE BRENNAN, SERVICE ANIMALS AND EMOTIONAL SUPPORT ANIMALS 3 (Vinh Nguyen ed. 2014), [https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014\(2\).pdf](https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014(2).pdf)).

Americans with Disabilities Act (ADA),⁸ which defines service animals as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.”⁹

The use of emotional support animals to alleviate or mitigate symptoms associated with mental health issues has been a topic of debate since its inception.¹⁰ On one hand, there is a community of people who have expressed a need to use emotional support animals to help them participate in society, including while traveling by airplane. On the other hand, a person’s need to use an emotional support animal in places where service animals have been traditionally allowed must be balanced against whether allowing emotional support animals in such places would pose a direct threat to the safety or health of others. In the air travel context, emotional support animals have been treated as service animals and special rules have been created to manage the situation.¹¹ Nonetheless, in most other contexts, emotional support animals are not treated as service animals.¹² This is just one example of the confusion.¹³

Further, the ADA’s integration mandate, to “eliminat[e] . . . discrimination against individuals with disabilities,”¹⁴ would support a person’s ability to use an emotional support animal to assist with mental health issues in everyday life situations—including in public settings. By creating the ADA, Congress recognized that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.”¹⁵

Between the ongoing debate, the need for clarification under the laws, and people’s desire to use emotional support animals to facilitate their

8. See Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2018).

9. 28 C.F.R. § 36.104 (2018); Foster, *supra* note 6, at 238.

10. See Billy Witz, *Emotional Support, With Fur, Draws Complaints on Planes*, N.Y. TIMES (Nov. 15, 2013), https://www.nytimes.com/2013/11/16/business/emotional-support-with-fur-draws-complaints-on-planes.html?_r=0 [<https://perma.cc/G5PJ-26FX>]; see also Laura Rothstein, *Puppies, Ponies, Pigs, and Parrots: Policies, Practices, and Procedures in Pubs, Pads, Planes, and Professions: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL L. 13, 14 (2018) (stating that while “the United States is a pet loving country[,]” Americans, unlike Europeans, historically do not support animals in public places, with the exception of the seeing eye dog).

11. See *infra* Section II.A.4.

12. See *infra* Section II.A.

13. See *infra* Section II.A.

14. 42 U.S.C. § 12101(b)(1) (2018).

15. § 12101(a)(2).

participation in society daily, this Article asserts that Congress should amend the ADA to clarify and provide a workable standard that will address the need to recognize emotional support animals as service animals. This Article analyzes laws and policies from other arenas, such as transportation and higher education, to demonstrate the need for, and potential structure of, such change and proposes specific amendment language based upon this analysis. By providing clarity for all Americans, this expanded language furthers our societal goals for inclusion and works towards breaking the stigma of mental illness.

Part I of this Article provides the legal background on this issue and describes the current controversy over how to treat service animals and emotional support animals under federal law. For years, the Fair Housing Act (FHA) and Air Carrier Access Act (ACAA) have enforced broader definitions of service animal than the ADA.¹⁶ Nonetheless, until the ADA's definition of service animal is expanded to include emotional support animal, these other laws will not be enough to protect people with mental health issues.

Part II is an overview of the alternative approaches to defining service animal. Specifically, this Part looks at the broader definitions of service animal in the contexts of transportation, higher education, and cities and states. Over the last few years, the Department of Transportation (DOT)'s rulemaking process has proposed amendments to the ACAA's definition of service animal—broadening the ADA's definition and then considering whether to align itself with the ADA's definition.¹⁷ Further, colleges and universities across the United States have become more inclusive of the use of emotional support animals in dormitories and in other on-campus settings, following the guidance of the FHA. States and cities have begun to craft laws that assist in providing clarity and consequences associated with falsification of information or other fraudulent misrepresentation regarding the use of emotional support animals.

These examples provide further guidance for how to redraft the ADA's definition of service animal to include emotional support animals

16. See U.S. DEP'T OF HOUS. & URBAN DEV., FHEO-2013-01, SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 2 (2013); *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> [<https://perma.cc/Q35W-7QTS>].

17. *Traveling by Air with Service Animals*, 85 Fed. Reg. 6,448 (proposed Feb. 5, 2020) (to be codified 14 C.F.R. pt. 382); *Guidance on Nondiscrimination on the Basis of Disability in Air Travel*, 84 Fed. Reg. 43,480 (Aug. 21, 2019) (to be codified at 14 C.F.R. pt. 382); *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832 (May 23, 2018) (to be codified at 14 C.F.R. pt. 382).

and demonstrate that it is possible to do so effectively. Moreover, the creation of avenues to allow users of emotional support animals to have their animals in these varying contexts bolsters the arguments for why the ADA's definition of service animal should be expanded to create uniformity and clarity for users of these animals and the public at large.

Part III proposes language that can be used to redraft the ADA's definition of service animal to include emotional support animal by looking through the lens of the alternative approaches discussed in this Article. This Part explores how the redrafted definition of service animal would provide parity among people in the disability community in the context of using a dog to assist with physical disabilities, mental health issues, or both.

Part IV provides predictions for the future and how the inclusion of emotional support animals as service animals under the ADA may affect society at large.

I. LEGAL BACKGROUND ON SERVICE AND EMOTIONAL SUPPORT ANIMALS: THE AMERICANS WITH DISABILITIES ACT

Thirty years ago, Congress enacted the ADA.¹⁸ At its core, the ADA was meant to eliminate discrimination against individuals with disabilities and facilitate their full integration into society.¹⁹ Specifically,

[t]he ADA prohibits the discrimination of individuals on the basis of disability in regard to “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”²⁰

Places of public accommodation include, for example, malls, grocery stores, movie theaters, restaurants, and terminals for public transportation.²¹

There are restrictions regarding the questioning of users of service animals in public accommodations.²² If employees of places of public accommodations see a patron with an animal in its facility, and it is not readily apparent as to whether the service animal is assisting with a task or performing work associated with a disability as required under the ADA, then they are permitted to make two specific inquiries regarding

18. 42 U.S.C § 12101(b)(1).

19. *Id.*

20. Foster, *supra* note 6, at 251 (quoting 42 U.S.C. § 12182(a) (2018)).

21. 42 U.S.C. § 12181(7) (2018).

22. 28 C.F.R. § 36.302(c)(6) (2016).

whether an animal qualifies as a service animal.²³ The first inquiry is “if the animal is required because of a disability.”²⁴ The second inquiry is “what work or task the animal has been trained to perform.”²⁵

Neither the term service animal nor the term emotional support animal appear in the text of the ADA itself.²⁶ Instead, “‘service animal’ is defined in the regulations that implement the ADA.”²⁷ Specifically, a service animal is: “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.”²⁸ In addition to dogs, the Department of Justice (DOJ) has published guidance that includes “miniature horses that have been individually trained to do work or perform tasks for people with disabilities” as service animals.²⁹ “Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of” the ADA’s definition of service animal.³⁰

Further, emotional support animals have been specifically excluded from the ADA’s definition of service animal.³¹ Specifically, in its definition of service animal, the Code of Federal Regulation (CFR) states: “emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.”³² Further, in its Frequently Asked Questions about Service Animals and the ADA, the DOJ stated that emotional support, therapy, comfort, or companion animals are not considered service animals under the ADA.³³ The DOJ reasoned that these animals “have not been trained to perform a specific job or task.”³⁴ Nonetheless, in that same guidance, psychiatric service animals are treated as distinct from emotional support animals. Under the

23. *Id.*; *Cordoves v. Miami-Dade County*, 104 F. Supp. 3d 1350, 1356 (S.D. Fla. 2015).

24. *Cordoves*, 104 F. Supp. 3d at 1356 (quoting § 36.302(c)(6)).

25. *Id.*

26. *See id.* at 1355; *see also* 42 U.S.C. § 12101 (2008).

27. Foster, *supra* note 6, at 252 (citing 28 C.F.R. § 36.104 (2016)).

28. § 36.104.

29. *See* U.S. Dep’t of Just., C.R. Div., Disability Rts. Section, ADA Requirements: Service Animals (July 12, 2011, updated Feb. 24, 2020), https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/9N2T-T7MP>].

30. § 36.104.

31. U.S. Dep’t of Just., C.R. Div., Disability Rts. Section, Frequently Asked Questions About Service Animals and the ADA 2 (2015), https://www.ada.gov/regs2010/service_animal_qa.pdf [hereinafter Frequently Asked Questions].

32. § 36.104.

33. Frequently Asked Questions, *supra* note 31.

34. *Id.*

ADA, psychiatric service animals are considered service animals because, unlike emotional support animals, they have been trained to assist with specific health issues, e.g., anxiety attacks.³⁵

The concepts of work and tasks associated with the ADA's definition of service animal are at the center of the debate as to whether emotional support animals should be considered service animals. The ADA requires that "[t]he work or tasks performed by a service animal must be directly related to the individual's disability."³⁶ Specifically, the CFR provides examples of work or tasks,³⁷ including: "assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds . . . pulling a wheelchair, assisting an individual during a seizure."³⁸ Because animals are not trained to provide support, comfort, or companionship, these types of occurrences are not seen as tasks or work.³⁹ Therefore, emotional support animals have not been recognized as service animals under the ADA.⁴⁰

Although the ADA has not recognized emotional support animals as service animals, under the ADA employees have the ability, without the threat of discrimination, to request reasonable accommodations in the workplace that include the use of an emotional support animal. Title I of the ADA provides that covered entities may not "discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."⁴¹ Discrimination against qualified individuals on the basis of disability includes, but is not limited to, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity."⁴² A reasonable accommodation could include allowing "an individual with a disability to have a service animal

35. *Id.*

36. § 36.104.

37. *Id.*

38. *Id.*

39. See Kimberly Alt, *Service Dog vs Therapy Dog vs Emotional Support Dogs*, CANINE J., <https://www.caninejournal.com/service-dog-vs-therapy-dog-vs-emotional-support-dogs/> [<https://perma.cc/QSH8-N6G8>].

40. § 36.104.

41. 42 U.S.C. § 12112(a) (2018).

42. § 12112(b)(5)(A).

or an emotional support animal accompany [the employee] to work.”⁴³ Even if a person’s request to use an emotional support animal in the workplace is denied, having the ability to make the request and have the accommodation considered is more inclusive of the needs of people with mental health issues than the ADA’s outright denial of a person’s ability to use an emotional support animal in public places.

Unlike the protections afforded under the ADA to a person with a disability in the areas of employment, state and local government activities, and public accommodations, the ADA “does not cover discrimination against a person with a disability in air transportation.”⁴⁴ Prior to the enactment of the ADA in 1990, in 1986, the Air Carrier Access Act was enacted to prohibit discrimination by air carriers against “any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation.”⁴⁵ As set forth below, this statutory difference has led to a different approach to treating emotional support animals.

II. BROADENING THE DEFINITION: ALTERNATIVE APPROACHES TO DEFINING SERVICE ANIMAL TO INCLUDE EMOTIONAL SUPPORT ANIMAL

There are many other contexts in which the definition of service animal is broader than the ADA’s definition. This Part will explore the Department of Transportation’s ACAA, the Puppies Assisting Wounded Servicemembers for Veterans Therapy Act, higher education policies, and state and local regulations to demonstrate alternative approaches to defining service animal. Overall, these examples provide insight into options for including emotional support animals and the problems that might arise from doing so.

For instance, the ACAA, which is a federal law that applies to all U.S. airlines and foreign airlines that touches down at or takes off from any U.S. airport, includes emotional support animal in its definition of service animal.⁴⁶ Recently, the DOT has asserted a need for rulemaking associated with this definition as it continues to assist users of emotional

43. JACQUIE BRENNAN, SERVICE ANIMALS AND EMOTIONAL SUPPORT ANIMALS 5 (Vinh Nguyen ed. 2014),

[https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014\(2\).pdf](https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014(2).pdf)). See also 42 U.S.C. § 12111(9)(B) (2009); *Maubach v. City of Fairfax*, No. 1:17-cv-921, 2018 WL 2018552 (E.D. Va. Apr. 30, 2018).

44. *Traveling by Air With Service Animals*, 85 Fed. Reg. 6448, 6449 (proposed Feb. 5, 2020) (to be codified at 14 C.F.R. pt. 382). See *Air Carrier Access Act of 1986*, Pub. L. No. 99-435, 100 Stat 1080.

45. *Id.*

46. 14 C.F.R. § 382.7(a)–(b) (2010).

support animals while balancing “the health, safety, and mental and physical well-being of the other passengers and crew.”⁴⁷ In addition, the Puppies Assisting Wounded Servicemembers for Veterans Therapy Act is a proposed federal law that would create a pilot program for providing veterans with service animals to alleviate symptoms associated with post-deployment mental health issues, e.g. post-traumatic stress disorder (PTSD).⁴⁸ Since the wars in Iraq and Afghanistan, there has been a sharp increase in the number of U.S. veterans suffering from PTSD which, in turn, has caused the suicide rate to climb at alarmingly.⁴⁹ This Act recognizes the benefits of using service animals to assist veterans with mental health issues while providing “grants to non-government entities that are accredited in the training of therapy dogs and can provide service dogs to veterans with PTSD.”⁵⁰

Further, colleges and universities have been faced with the challenge of addressing requests by users of emotional support animals to have their animals on campus and in student housing.⁵¹ These requests have led to policies on whether to treat emotional support animals as service animals with the same rights.⁵² Moreover, states and cities have instituted laws regulating the use of emotional support animals in accordance with the FHA.⁵³ This Article analyzes each for strengths and drawbacks to inform Part III’s proposed language that includes emotional support animal as service animals in accordance with the needs of people with mental health issues.

A. *The Department of Transportation’s Definition of Service Animal*

As recently as February 2020, the DOT sought comment in a Notice of Proposed Rulemaking (NPRM) regarding proposed amendments to the

47. Traveling by Air with Service Animals, 85 Fed. Reg. 6448, 6449 (proposed Feb. 5, 2020) (to be codified 14 C.F.R. pt. 382).

48. H.R. 4305, 116th Cong. (2020).

49. Olympia Duhart, *Soldier Suicides and Outcrit Jurisprudence: An Anti-Subordination Analysis*, 44 CREIGHTON L. REV. 883, 883–84 (2011).

50. *House Passes Legislation to Help Connect Army Veterans to Service Dogs*, WKBW BUFFALO (Feb. 5, 2020), <https://www.wkbw.com/news/local-news/house-passes-legislation-to-help-connect-army-veterans-to-service-dogs> [<https://perma.cc/U42G-9TZ6>].

51. David Levine, *What’s Behind the Rise in Support Animals on College Campuses?*, U.S. NEWS (Oct. 5, 2018), <https://health.usnews.com/health-care/patient-advice/articles/2018-10-05/whats-behind-the-rise-in-support-animals-on-college-campuses> [<https://perma.cc/D98Y-3VGR>].

52. Dr. Kim Grieve, *Reasonable Accommodations? The Debate Over Service and Emotional Support Animals on College Campuses*, NASPA (Jan. 8, 2014), <https://www.naspa.org/blog/reasonable-accommodations-the-debate-over-service-and-emotional-support-animals-on-college-campuses> [<https://perma.cc/4N6G-WAEE>].

53. 42 U.S.C. § 3604 (2012).

ACAA.⁵⁴ Specifically, these proposed amendments dealt with the “transportation of service animals by air.”⁵⁵ As the DOT proposes to amend its definition of service animal under the ACAA and redefine the use of service animals on airplanes, the struggle to find clarity in the law remains. This Part provides an in-depth discussion of the DOT’s May 2018 Advanced Notice of Proposed Rulemaking and Interim Statement (ANPRM), August 2019 Final Statement of Enforcement Priorities Regarding Service Animals (Final Statement), and February 2020 NPRM regarding proposed amendments to the ACAA regulation on the transportation of service animals by air.⁵⁶ Analyzing the DOT’s proposed amendments and reviewing the associated comments with these proposed amendments indicates that the DOT is incorrectly moving away from its earlier stance of allowing passengers with emotional support animals to be treated in the same manner as users of service animals to the detriment of users of emotional support animals. Redrafting the ADA’s definition of service animal to include emotional support animal is the only way to provide the kind of inclusion necessary for people with mental health issues who use emotional support animals to have parity under the law with people with physical disabilities who use service animals.

In the May 2018 ANPRM, the DOT stated that consumer complaints, the use of unusual species, inaccurately labeling pets as service or emotional support animals, and misbehavior of animals during air travel created a need for additional rulemaking regarding service animals on airplanes.⁵⁷ Further, the ANPRM originates from the FAA Extension,

54. *Traveling by Air with Service Animals*, 85 Fed. Reg. 6448 (proposed Feb. 5, 2020) (to be codified 14 C.F.R. pt. 382). After completion of this article, on December 2, 2020, the DOT’s final rule was announced. *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742 (Dec. 10, 2020) (to be codified at 14 C.F.R. pt. 382). This final rule went into effect on January 11, 2021. *Id.* at 79,771. Under the final rule amending the ACAA’s definition of service animal, a service animal is “a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.” *Id.* at 79,774. The final rule gives airlines the ability to treat emotional support animals as pets and to limit each passenger to no more than two service animals. *Id.* The DOT’s decision to allow airlines to treat emotional support animals as pets validates the proposition that amending the ADA to include emotional support animal as service animal is the only way to provide users of emotional support animals with protection under the law. Without the protection of the ADA, alternative broad definitions in other contexts can change, similar to the ACAA, and any hope at parity between people with physical disabilities and those with mental health conditions, when it comes to use of service or emotional support animals, will not be achieved.

55. *Traveling by Air With Service Animals*, 85 Fed. Reg. at 6448.

56. *Id.*; *Guidance on Nondiscrimination on the Basis of Disability in Air Travel*, 84 Fed. Reg. 43,480 (Aug. 21, 2019) (to be codified at 14 C.F.R. pt. 382); *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832 (May 23, 2018) (to be codified at 14 C.F.R. pt. 382).

57. *See* 83 Fed. Reg. at 23,832.

Safety and Security Act of 2016, which required the DOT to issue supplemental notice of proposed rulemaking on issues including the need to “address, at a minimum, species limitations and the documentation requirement for users of emotional support and psychiatric service animals” during air travel.⁵⁸

1. The Department of Transportation: A Look at Air Travel with Service and Emotional Support Animals

In May of 2018, the DOT published an Advance Notice of Proposed Rulemaking seeking comment on proposed amendments to the ACAA’s regulation of service animal transportation.⁵⁹ The DOT wanted to improve the ACAA’s regulation to ensure nondiscriminatory access for individuals with disabilities to use their service animals onboard airlines while attempting to deter “fraudulent use of other animals not qualified as service animals” and prevent the use of “animals that are not trained to behave properly in the public.”⁶⁰

The ANPRM noted that the DOT has received complaints over the years from individuals with service animals.⁶¹ “Over 60 percent of the service animal complaints received by the [DOT] concern [emotional support animals] and [psychiatric service animals].”⁶² The majority of these complaints are from “passengers with disabilities who are upset that the airline is not accepting their animals for transport.”⁶³ The ANPRM sought comment about a variety of issues including: whether there should be a distinction between emotional support animals and other service animals; whether emotional support animals, if allowed on board a flight, should be required to travel in pet carriers for the duration of the flight; whether the species of service animals and emotional support animals should be limited; and the type of information that should be required of passengers using service or emotional support animals.⁶⁴ Over a forty-five-day period, the DOT received approximately 4,500 comments “from disability advocacy organizations, airlines, human and animal health organizations, consumer groups, and other interested parties.”⁶⁵

58. *Id.* at 23,835.

59. *See* *Traveling by Air With Service Animals*, 83 Fed. Reg. at 23,832; *see also* Foster, *supra* note 6, at 240.

60. *See* 83 Fed. Reg. at 23,832; *see also* Foster, *supra* note 6, at 240.

61. 83 Fed. Reg. at 23,834.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Traveling by Air with Service Animals*, 85 Fed. Reg. 6448, 6452 (proposed Feb. 5, 2020) (to be codified 14 C.F.R. pt. 382)

2. DOT: Final Statement of Enforcement Priorities Regarding Service Animals⁶⁶

In August 2019, the DOT issued a Final Statement of Enforcement Priorities Regarding Service Animals.⁶⁷ The statement “provides greater clarity to passengers, airlines, and other stakeholders about the DOT’s interpretation and enforcement of the existing service animal rules.”⁶⁸ In this statement, the DOT made it clear that it was in the public interest and “within [its] discretionary authority to prioritize ensuring that the most commonly recognized service animals (*i.e.*, dogs, cats, and miniature horses) are accepted for transport.”⁶⁹ Further, airlines “will not be subject to enforcement action if they continue to deny transport to snakes, other reptiles, ferrets, rodents, and spiders.”⁷⁰ “[C]onsistent with existing law, an airline may refuse transport to an individual animal regardless of species if the airline determines that specific factors preclude the animal from being transported as a service animal.”⁷¹ The specific “factors include a determination that the animal is too large or too heavy, poses a direct threat to the health or safety of others, or would cause a significant disruption in cabin service.”⁷²

The DOT further analyzed the direct threat issue by considering comments from airlines, the United Service Animal Users, Supporters, and Advocates (USAUSA), Psychiatric Service Dog Partners (PSDP), Operation Freedom Paws, the International Association of Canine Professionals, and the American Veterinary Association, and other disability rights organizations.⁷³ The USAUSA surveyed 919 users of psychiatric service animals and emotional support animals.⁷⁴ Ninety percent of the responses indicated that respondents “were [most] concerned about untrained or stressed animals interfering with or harming their animal when they fly.”⁷⁵ Although the behavior of these animals is a major concern, advocacy groups have argued that requiring users to

66. Guidance on Nondiscrimination on the Basis of Disability in Air Travel, 84 Fed. Reg. 43,480 (Aug. 21, 2019) (to be codified at 14 C.F.R. pt. 382).

67. *Id.*

68. *U.S. Department of Transportation Issues Final Statement of Enforcement Priorities Regarding Service Animals on Flights*, U.S. DEP’T OF TRANSP. (Aug. 8, 2019), <http://www.transportation.gov/briefing-room/us-department-transportation-issues-final-statement-enforcement-priorities-regarding> [<https://perma.cc/S56G-UXXS>].

69. 84 Fed. Reg. at 43,481.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See id.* at 43,483–84.

74. *Id.* at 43,483.

75. *Id.*

provide documentation regarding behavior is “unduly burdensome and represents a deterrent to travel without providing real benefits to airlines.”⁷⁶ The International Association of Canine Professionals and the American Veterinary Association both “expressed the view that any attestations about an animal’s behavior should come from the passenger and not from the professional, because professionals are not able to make such attestations.”⁷⁷

In the Final Statement, the DOT recognized the heavy burden on passengers flying with service, emotional support, and psychiatric support animals associated with the mandate to submit third-party documentation.⁷⁸ Under this regulation, airlines are allowed to “require additional documentation to determine whether a service animal poses a direct threat.”⁷⁹ The Final Statement provided that “mandates for third-party documentation do not improve safety and serve only to increase burdens to passengers with disabilities.”⁸⁰ Nonetheless, it is unclear “how airlines would determine whether an animal poses a direct threat to the health or safety of others.”⁸¹ The DOT noted that there is a greater likelihood that an emotional support animal could pose an in-cabin safety risk than a service animal because it “may not have undergone the same level of training.”⁸² Yet, the DOT will “not take action against carriers that impose reasonable restrictions on movement of [emotional support animals] in the cabin so long as the reason for the restriction is concern for the safety of other passengers and crew.”⁸³ Finally, the DOT notes it will address containment issues on a “case-by-case basis” with the key inquiry being reasonableness.⁸⁴

3. The DOT’s Proposed Amendments to the ACAA: Moving Away from Its Earlier Inclusion of Emotional Support Animals as Service Animals

In January 2020, the DOT released its preliminary regulatory evaluation in support of the February 5, 2020 Notice of Proposed Rulemaking (NPRM).⁸⁵ In its evaluation, the DOT stated “existing

76. *Id.* at 43,484.

77. *Id.*

78. *Id.* at 43,483–84.

79. *Id.* at 43,484.

80. *Id.* at 43,483.

81. *Id.* at 43,484.

82. *Id.*

83. *Id.*

84. *Id.*

85. Traveling by Air With Service Animals, 85 Fed. Reg. 6448 (proposed Feb. 5, 2020)

regulations require airlines to transport all emotional support animals at no cost to the passenger.”⁸⁶ The DOT claimed that “passengers . . . have an incentive to claim pets as emotional support animals.”⁸⁷ Moreover, “[t]he primary economic impact of this proposed rulemaking is that it eliminates a market inefficiency.”⁸⁸ According to the DOT, airlines are losing a potential “revenue source” by requiring them to accommodate passengers traveling with ESAs.⁸⁹

On February 5, 2020, the DOT published an NPRM on proposed amendments to the ACAA “to ensure that our air transportation system is safe for the traveling public and accessible to individuals with disabilities.”⁹⁰ Specifically, the DOT’s proposal defined a service animal “as a dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”⁹¹ The DOT’s updated definition for service animals will be comparable to the definition found in the DOJ regulations that implement the ADA.⁹² The DOT amendments contain a number of service animal provisions that differ from the DOJ’s ADA service animal requirements.⁹³ In addition, the DOT proposes to permit “airlines to recognize emotional support animals as pets rather than service animals.”⁹⁴ The DOT “recognizes that the ACAA’s nondiscrimination mandate is not absolute.”⁹⁵ The DOT noted that the DOJ does not recognize emotional support animals as service animals because “they are not individually trained to do work or perform tasks for the benefit of an individual with a disability.”⁹⁶

The intent of the ACAA is to “help ensure that individuals with disabilities enjoy equal access to the air transportation system.”⁹⁷ Nonetheless, the DOT decided to issue this NPRM because of “compelling factors” it believes justify narrowing its regulations regarding

(to be codified 14 C.F.R. pt. 382).

86. *Id.* at 6452.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 6448.

91. *Id.*

91. *Id.*

92. *Id.* at note 1.

93. *Id.*

94. *Id.* at 6448.

95. *Id.* at 6449.

96. *Id.*

97. *Id.*

“traveling by air with service animals.”⁹⁸ Specifically, the DOT notes service animal complaints and the inconsistent federal definition of service animal as two reasons to revisit these regulations.⁹⁹

First, there has been an increase in service animal related complaints to airlines and the DOT’s Aviation Consumer Protection Division.¹⁰⁰ The following chart provides data from the DOT regarding the number of service animal complaints against airlines that it received from 2014 to 2018:

Number of service animal complaints received by the DOT against airlines ¹⁰¹	
Complaint Count	Year
115	2018
70	2017
110	2016
100	2015
48	2014
45	2013

In addition, airlines have reported an increase in service animal complaints from 2013 to 2018:

Number of service animal complaints from passengers to airlines ¹⁰²	
Complaint Count	Year
3,065	2018
2,473	2017
2,433	2016
1,629	2015
1,010	2014
719	2013

Second, the NPRM addresses the inconsistencies between the definition of a service animal under the DOT’s ACAA and the DOJ’s

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 6449.

102. *Id.*

ADA.¹⁰³ These inconsistencies continue to be concerns “raised by airlines, airports, and disability advocates.”¹⁰⁴ The NPRM provides the following example to illustrate the inconsistency: “a restaurant in an airport could, without violating DOJ rules, deny entry to an emotional support animal that an airline, under the ACAA, would have to accept.”¹⁰⁵ Such a scenario causes confusion and challenges for everyone—airlines, airports, individuals with disabilities, and the traveling public.¹⁰⁶

The NPRM provides the following summary¹⁰⁷ of proposed regulatory and deregulatory provisions:

Subject	Proposal
Definition of Service Animal	A service animal would be defined as a dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including physical, sensory, psychiatric, intellectual, or other mental disability. ¹⁰⁸
Emotional Support Animals	Carriers would not be required to recognize emotional support animals and may treat them as pets.
Treatment of Psychiatric Service Animals	Psychiatric service animals would be treated the same as other service animals that are individually trained to do work or perform a task for the benefit of a qualified individual with a disability.
Species	Carriers would be permitted to limit service animals to dogs.
Health Form	Carriers would be permitted to require passengers to remit a completed U.S. Department of Transportation Service Animal Air Transportation Health Form as a condition of transportation.
Behavior and Training Attestation	Carriers would be permitted to require passengers to remit a completed U.S. Department of Transportation Behavior and Training Attestation

103. *Id.*

104. *Id.* at 6449.

105. *Id.* at 6450.

106. *Id.*

107. *Id.* at 6452. This is an excerpt from the chart provided in the NPRM. See *id.*, for the chart in its entirety.

108. *Words Matter: Reporting on Mental Health Conditions*, A.P.A., <https://www.psychiatry.org/newsroom/reporting-on-mental-health-conditions> [https://perma.cc/42VK-Y32A] (last visited Aug. 2, 2020).

Form as a condition of transportation.

The DOT listed the following as impacts due to proposed rulemaking: (1) “[d]iscomfort to passengers who no longer will travel with ESAs[,]” (2) “[r]eduction in negative externalities caused by ESAs[,]” and (3) “[s]econdary market impacts due to reduced demand for ESA documentation Service.”¹⁰⁹ The DOT was unable to quantify any of these impacts.¹¹⁰ The deadline to send comments to this NPRM was April 6, 2020.¹¹¹

4. The Comments: Both Support and Opposition for the Use of Emotional Support Animals While In-Flight

This Part provides example comments that support and oppose the use of emotional support animals during air travel. These comments are important because they offer insight into societal views on this topic and further illustrate the need for clarity in the laws surrounding emotional support animals that can only be provided by redrafting the ADA’s definition of service animal to include them.

Going back to July 2018, over 32,000 comments were made to the DOT related to rulemaking associated with traveling by air with service animals.¹¹² Nearly 19,500 comments were filed specifically about the February 5, 2020 NPRM.¹¹³ These comments were made by emotional support animal users, service animal users, mental health professionals, air carrier employees, air travelers, and veterans diagnosed with post-traumatic stress disorder.¹¹⁴

On March 17, 2020, Miles Moten, a military veteran, posted a comment about the NPRM.¹¹⁵ Mr. Moten stated that he is being treated for PTSD, anxiety, and depression.¹¹⁶ For the past three years, he has used an emotional support dog as prescribed by his licensed physician who he

109. *Id.* at 6453.

110. *Id.*

111. *Id.* at 6448.

112. Rulemaking Docket, RIN 2105-AE63, Traveling by Air with Service Animals Advance Notice of Proposed Rulemaking (ANPRM), REGULATIONS.GOV (May 23, 2018), <https://www.regulations.gov/docket?D=DOT-OST-2018-0068>.

113. Document Details, Traveling by Air with Service Animals, REGULATIONS.GOV (Feb. 5, 2020), <https://www.regulations.gov/document?D=DOT-OST-2018-0068-12959> [<https://perma.cc/9YR3-9B8Q>].

114. *Id.*

115. Miles Moten, Comment Letter on Proposed Rule Traveling by Air with Service Animals (Mar. 17, 2020), <https://www.regulations.gov/document?D=DOT-OST-2018-0068-16322> [<https://perma.cc/3EMB-KZXP>].

116. *Id.*

“continue[s] to see regularly for care.”¹¹⁷ Mr. Moten wrote:

I use my ESA Letter to fly and without the letter, and my ESA by my side, I wouldn't fly ever again. The cargo hold is simply not an option. Speaking of the airlines and their treatment of animals, didn't a United Airlines attendant force a dog into the overhead bin? Didn't it die because of this? My ESA letter has helped me immensely in life and I look forward to having it help me in the future but this rule change is insane to me. It truly hurts me to my core to think that the DOT and airline industry favors money over the rights of the disabled and those with mental illness. We need to start educating ourselves about mental illness more in this country. Especially with veterans.¹¹⁸

On February 25, 2020, Maria Diez, a gate agent for a major air carrier, posted her comment wherein she stated that she sees “both sides of the problem.”¹¹⁹ Ms. Diez is an individual with a “severe anxiety disorder” and has had issues with flying.¹²⁰ She wrote: “[a]lthough I have free travel privileges, I did not fly for a long time due to this condition.”¹²¹ Subsequently, her psychologist suggested that she use an emotional support animal, which helped her with her anxiety when she needed to fly.¹²² Specifically, for two years she had to frequently fly to see her sister who was battling stage four cancer.¹²³ Ms. Diez stated that her emotional support animal (ESA), a small fifteen-pound dog, was able to help her by preventing panic attacks while in-flight.¹²⁴ Ms. Diez believes that the DOT “[n]eeds to start investigating some of these online sites that just handout certificates to anyone for the right price.”¹²⁵ Nonetheless, she supports the continued use of ESAs on flights.¹²⁶

On January 27, 2020, Suze Gilbert wrote that she had been flying with her emotional support dog for over five years.¹²⁷ Further, she stated:

117. *Id.*

118. *Id.*

119. Maria Diez, Comment Letter on Proposed Rule Traveling by Air with Service Animals (Feb. 25, 2020), <https://www.regulations.gov/document?D=DOT-OST-2018-0068-15259> [<https://perma.cc/9W7B-3AJU>].

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Suze Gilbert, Comment Letter on Proposed Rule Traveling by Air with Service Animals Notice of Proposed Rulemaking (NPRM) (Jan. 27, 2020), <https://www.regulations.gov/document?D=DOT-OST-2018-0068-8756> [<https://perma.cc/R656-S8MH>].

For those of us that are not abusing the guidelines and have made sure we have the proper paperwork and have a dog that is quiet, well-behaved, and has never caused or had a negative issue during any flight we have brought her on, these seem like very harsh regulations. For those of us that have severe anxiety or other psychological issues that are disabling but people I that can't see them, it also feels discriminatory. I have worked hard to train my dog to travel well. . . . I'm well aware there are people that have selfishly abused the guidelines and put other passengers, service animals, and flight staff at risk. Please weed them out but don't make it impossible for those of us that have invisible disabilities, like severe migraines, PTSD, crippling anxiety, to have to bear the weight that selfish people bringing untrained or ridiculous animals to disrupt a flight.¹²⁸

On July 10, 2018, Delta Airlines commented on the May 18, 2018 ANPRM.¹²⁹ In its comment, Delta Airlines supported allowing airlines to follow the ADA's definition of service animal that does not include emotional support animals.¹³⁰ Further, Delta Airlines provided examples of the challenges it faced by allowing emotional support animals to be treated as service animals on aircrafts.¹³¹ Specifically, the airline stated its employees had been dealing with issues such as "animals running freely about the cabin, urinating and defecating, and engaging in aggressive behavior such as barking, growling, or biting."¹³² In addition, Delta Airlines cited to the rising numbers of these animals on aircrafts as part of the larger problem.¹³³

In 2017, Delta 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. Along with this dramatic growth in ESAs, the number of incidents increased about 53 percent during this same time period. There were a total of 136 incidents in 2017, or one every 2-3 days. These trends are consistent with those of the

128. *Id.*

129. Delta Airlines, Comment Letter on Proposed Rule Traveling by Air with Service Animals Notice of Proposed Rulemaking (ANPRM) (Jul. 10, 2018), <https://www.regulations.gov/document?D=DOT-OST-2018-0068-4141> [<https://perma.cc/766A-CAMA>].

130. *Id.*

131. *Id.*

132. *Id.* at 2.

133. *Id.* at 2-3.

broader industry. Airlines for America reported that the number of ESAs that U.S. airlines accommodated increased by 56 percent from 2016 to 2017, with service animals (excluding ESAs) increasing by nearly 24 percent during that same period.¹³⁴

5. The ACAA: Predicting What Will Happen Next

Based upon an analysis of all the information contained in the May 2018 ANPRM, August 2019 Final Statement, and February 2020 NPRM, the DOT has moved away from its earlier stance that passengers who use emotional support animals during air travel should be able to do so in the same manner as passengers who use service animals. Further, “disability advocates have commented that the [DOT’s] current rule, which classifies emotional support animals as service animals, causes significant confusion in the disability community.”¹³⁵ A reading of the ANPRM comments indicated that “disability advocates, airlines, and the majority of commenters agree[d] that emotional support animals should be removed from the definition of service animal,” but “they disagree[d] on whether the [DOT] should recognize emotional support animals as an accommodation for individuals with disabilities that would be regulated separately and distinctly from service animals.”¹³⁶

Specifically, the “National Federation of the Blind . . . commented that emotional support animals, which are untrained to mitigate a disability, should be permitted as an accommodation subject to ‘specific and more restrictive conditions’ of carriage.”¹³⁷ Nonetheless, “[t]he majority of individual commenters provided general statements of support for the [DOT’s] continued recognition of emotional support animals, and did not opine on whether emotional support animals should be regulated separately from service animals.”¹³⁸

Subsequent to the ANPRM, and in line with the opposition to the ACAA’s broad definition of service animal that included emotional support animal, the NPRM proposes to follow the ADA’s narrow definition and defines a service animal under the ACAA “as a dog that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability.”¹³⁹ The NPRM, however, proposes

134. *Id.* at 3.

135. *Traveling by Air with Service Animals*, 85 Fed. Reg. 6448, 6456 (proposed Feb. 5, 2020) (to be codified at 14 C.F.R. pt. 382).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 6448.

to treat psychiatric service animals the same as other service animals.¹⁴⁰ A psychiatric service animal is “a special type of [service animal] that has been trained to perform tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects.”¹⁴¹ Specific “[t]asks performed by these types of [service animals] may include: reminding the companion to take medications, providing safety checks or room searches, turning on lights for persons with anxiety or disorders, interrupting self-mutilation behaviors, anticipating epileptic seizures, and preventing impaired individuals from endangering themselves.”¹⁴² Although protection would continue for passengers with psychiatric service animals, this is not enough because an emotional support animal is not trained to perform specific tasks or work because providing comfort is not considered a task or work.¹⁴³

Additionally, there is no training associated with providing comfort, so it is not viewed as a task.¹⁴⁴ This means that a person with anxiety or PTSD whose emotional support animal provides comfort and companionship, as opposed to having special training,¹⁴⁵ would no longer be able to fly with the emotional support animal on his or her lap.¹⁴⁶ Instead, the emotional support animal would be considered a pet and be required to be in a pet carrier under the seat in front of said passenger.¹⁴⁷ Therefore, by drafting the ACAA’s definition of service animal to be more narrow, similar to the definition in the ADA, an entire population of people with disabilities using emotional support animals to assist them with managing their mental health issues will be left without protection under the law.

Moreover, based upon the DOT’s preliminary regulatory evaluation of the February 5, 2020 NPRM, lost revenue is a major concern of the airlines.¹⁴⁸ In its Executive Summary, the DOT states that there is an

140. *Id.* at 6452.

141. Jeffrey N. Younggren et al., *Examining Emotional Support Animals and Role Conflicts in Professional Psychology*, 47 *PROF. PSYCHOL.: RES. & PRAC.* 255 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127627/> [<https://perma.cc/XCN6-2N73>].

142. *Id.*

143. *See Alt, supra* note 39.

144. *Id.*

145. *See infra* Part II.B.; *see also* Puppies Assisting Wounded Servicemembers for Veterans Therapy Act, H.R. 4305, 116th Cong. (2020).

146. 85 Fed. Reg. at 6459.

147. *Id.* at 6460.

148. *See* Rulemaking Docket, RIN 2105-AE63, *Traveling by Air with Service Animals (NPRM) - Regulatory Evaluation* (January 2020), at 17 (Jan. 22, 2020), <https://www.regulations.gov/document?D=DOT-OST-2018-0068-4792> [<https://perma.cc/TY89-ZZEP>].

incentive for people to claim their pets are emotional support animals because, under the current regulation, airlines cannot charge a fee to passengers who travel with emotional support animals, similar to the treatment of passengers with traditional service animals.¹⁴⁹ The DOT claims that “[t]he primary economic impact of this proposed rulemaking is that it eliminates a market inefficiency.”¹⁵⁰ Nonetheless, there have always been costs associated with the ADA and compliance.¹⁵¹ These costs, however, should not deter lawmakers from providing protections for people with mental health issues who use emotional support animals just as they have not deterred them in the past from providing protections to people with disabilities in many aspects of life.

B. *Recognizing the Benefits of Using Dogs to Alleviate Symptoms Associated with PTSD: Proposed Federal Law to Assist Veterans*

Finding a way to better assist veterans with PTSD and other mental health issues is an important societal issue.¹⁵² Analyzing the link between the use of service animals and the alleviation of mental health issues of veterans can help inform and support the use of emotional support animals to alleviate mental health issues of non-veterans. In February 2020, the United States House of Representatives passed H.R. 4305, the Puppies Assisting Wounded Servicemembers for Veterans Therapy Act, or the “PAWS for Veterans Therapy Act.”¹⁵³ The bill was received in the Senate and read twice before being referred to the Committee on Veterans’ Affairs.¹⁵⁴ Unfortunately, this bill was not passed by the end of the 116th Congressional session and it died in the Senate.¹⁵⁵ Nonetheless, Congress made important findings that should be noted. In this Act, Congress made findings regarding the increasing number of veterans who died by suicide

149. *Id.* at i.

150. *Id.*

151. See Kristen Bachmeier, *How Much Does ADA Website Compliance Cost?*, ATILUS (May 1, 2019), <https://www.atilus.com/ada-website-compliance-cost/> [<https://perma.cc/2XW2-6RRN>] (discussing the internet as a public space and the cost of being ADA compliant); Hanns Kuttner, *The Price of the Americans with Disabilities Act*, NAT’L REV. (July 28, 2015 4:06 PM), <https://www.nationalreview.com/2015/07/americans-disabilities-act-disability-insurance-ada/> [<https://perma.cc/SH85-JLM5>].

152. Dr. Richard Stone, the executive in charge of the Veterans Health Administration, stated: “Suicide is a national public health problem that disproportionately affects those who served our Nation. Preventing suicide among Veterans is VA’s top clinical priority.” *Veterans’ Suicide Rate Still Increasing*, PSYCHOLOGY TIMES (Nov. 18, 2019), <https://thepsychologytimes.com/2019/11/18/veterans-suicide-rate-still-increasing/>.

153. H.R. 4305, 116th Cong. (2020).

154. *Id.*

155. *Id.*

since 2014.¹⁵⁶ The Act states:

The Department of Veterans['] Affairs must be more effective in its approach to reducing the burden of veteran suicide connected to mental health disorders, including post-traumatic stress disorder . . . and new, rigorous scientific research provides persuasive weight to the growing anecdotal evidence that service dogs ameliorate the symptoms associated with PTSD, and in particular, help prevent veteran suicide.¹⁵⁷

Through this Act a pilot program on dog training therapy would be created.¹⁵⁸ Providing service dogs to veterans with severe PTSD would dramatically “improv[e] those veterans’ quality of life, ability to re-enter society, and, most importantly, their chances of survival.”¹⁵⁹

This Act looks to use service dogs to “alleviate symptoms unique to veterans’ needs.”¹⁶⁰ This recognition of the use of service dogs to assist people with mental health issues is not unique to helping veterans. This pilot program speaks to the importance of adding support dogs as part of the therapeutic process. The American Humane, an organization founded in 1877 and “committed to ensuring the safety, welfare, and well-being of animals,” stated: “The process of obtaining a PTS service dog is lengthy and costly, a cost that is out of reach for many veterans.”¹⁶¹

Just like veterans, the average person most likely will not have the resources to obtain a trained service dog.¹⁶² Nonetheless, if a civilian is using an emotional support animal in the same manner that a veteran is using a service animal—to help mitigate or alleviate his or her mental health issues—then there needs to be problem solving associated with the cost-prohibitive training issue and a recognition about the benefits of being able to use emotional support animals in daily life activities.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *American Humane Applauds Congress for Passing the Puppies Assisting Wounded Servicemembers (PAWS) for Veterans Therapy Act*, AM. HUMANE (Feb. 5, 2020), <http://americanhumane.org/press-release/american-humane-applauds-congress-for-passing-the-puppies-assisting-wounded-servicemembers-paws-for-veterans-therapy-act/> [<https://perma.cc/KS4Q-P65Z>].

162. In 2019, the American Kennel Club estimated the cost of training a service animal to exceed \$25,000. 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/>.

C. Higher Education and the FHA

“The determination of whether campus housing is covered under the FHA is dependent on whether the housing is considered a ‘dwelling.’”¹⁶³ The FHA defines dwelling as “any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.”¹⁶⁴ Further, “family” can be a single individual.¹⁶⁵ Under the FHA, housing providers cannot refuse to make a reasonable accommodation to users of emotional support animals, even if there is a no pet policy, “when such accommodation[] may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”¹⁶⁶

Campuses across America have been faced with the issue of how to handle student requests to have emotional support animals on campus and in student housing. Thus, their more inclusive policy decisions, guided by the FHA, to allow emotional support animals in certain on-campus settings are an informative alternative approach to this issue compared to the ADA’s narrow definition of service animal. In the fall of 2018, the American College of Health Association (ACHA) organized a national research survey, the ACHA-National College Health Assessment II.¹⁶⁷ The survey was conducted “to assist college health service providers, health educators, counselors, and administrators in collecting data about their students’ habits, behaviors, and perceptions on the most prevalent health topics.”¹⁶⁸ In the survey, the ACHA reported that 62.3% of students surveyed “[f]elt overwhelming anxiety” and 41.4% “[f]elt so depressed that it was difficult to function” within the last twelve months.¹⁶⁹ Therefore, while colleges and universities may be reporting an increase in requests for accommodations regarding emotional support animals,¹⁷⁰

163. Rebecca J. Huss, *Canines on Campus: Companion Animals at Postsecondary Educational Institutions*, 77 MO. L. REV. 417, 428 (2012).

164. 42 U.S.C. § 3602(b) (2018).

165. *Id.* § 3602(c).

166. *See* 42 U.S.C. § 3604 (2018).

167. AM. COLL. HEALTH ASS’N, AMERICAN COLLEGE HEALTH ASSOCIATION-NATIONAL COLLEGE HEALTH ASSESSMENT II: FALL 2018 REFERENCE GROUP EXECUTIVE SUMMARY (2018), https://www.acha.org/documents/ncha/NCHA-II_Fall_2018_Reference_Group_Executive_Summary.pdf [<https://perma.cc/96KT-ASNX>].

168. *Id.* at 2.

169. *Id.* at 14.

170. Jeremy Bauer-Wolf, *Colleges See Rise in Popularity for Emotional Support Animals*, INSIDER HIGHER ED (May 21, 2019, 3:00 AM), <https://www.insidehighered.com/print/news/2019/05/21/colleges-see-rise-popularity->

data support that this increase in requests is driven by an increase in mental health issues in this college-aged population.

Today, many universities have crafted policies for use of emotional support animals as they have done for other accommodations requested by students. For example, Rutgers University (Rutgers) in New Jersey has defined “support animal” as “an animal in which its very nature and mere presence, and without specific training, may relieve and/or help reduce psychologically or emotionally induced pain in persons with certain medical or psychological conditions.”¹⁷¹ Recently, this definition was changed to “any animal that is legal to own in the state of New Jersey that is *not* trained to perform a task, but simply provides comfort to the individual with a disability with its presence within their living space.”¹⁷² Students must participate in an approval process through the Office of Disability Services at Rutgers, part of which includes having a form filled out by a health care practitioner regarding the student’s need for a support animal.¹⁷³

On its Student Support and Special Accommodations webpage, Rutgers provides links to its Seeing Eye Puppy Club¹⁷⁴ and Rutgers Companion Animal Club.¹⁷⁵ Rutgers states that it has “two organizations on campus that [it] partner[s] with to train and house service dogs-in-training.”¹⁷⁶ Members of these clubs live in on-campus housing, creating “a vibrant community of animals.”¹⁷⁷ Moreover, the Rutgers Companion Animal Club hopes “to bring together students interested in learning more about companion animals, including their care and keeping, their importance to people, current events based on companion animals[,] and careers focused on them.”¹⁷⁸

Another example, the University of the Arts in Philadelphia made an

emotional-support-animals.

171. *Student Support & Special Accommodations*, RUTGERS U., <https://web.archive.org/web/20190629083104/http://ruoncampus.rutgers.edu/support/accommodations/> (captured June 29, 2019).

172. *Student Support & Special Accommodations*, RUTGERS U., <http://ruoncampus.rutgers.edu/support/accommodations/> [https://perma.cc/95P8-YAGF] (captured Sept. 24, 2020).

173. *Id.*

174. *Seeing Eye Puppy Raising Club (Rutgers University)*, RUTGERS U., <https://rutgers.campuslabs.com/engage/organization/ruseprc> [https://perma.cc/TA5V-CYND].

175. *Companion Animal Club*, RUTGERS U., <https://rutgers.campuslabs.com/engage/organization/CompanionAnimalClub> [https://perma.cc/9TFK-6QJG].

176. *Student Support & Special Accommodations*, *supra* note 171.

177. *Id.*

178. *Companion Animal Club*, *supra* note 175.

exception to its animal policy to include not only service animals as described in the ADA, but emotional support animals for students with a documented disability.¹⁷⁹ The policy provides a structured plan for making requests for the use of an emotional support animal, requiring “clinical documentation on official letterhead signed by a qualified and credentialed practitioner, who is not a family member of the student” regarding the need for the animal.¹⁸⁰ In addition, the documentation must meet the following qualifications:

A statement from an appropriate treating medical professional regarding the individual’s disability or condition, and the impact of the condition upon a major life activity.

A statement from an appropriate treating medical professional regarding the necessity of the assistance animal for the individual to use campus housing; and

A statement from an appropriate treating medical professional regarding the relationship between the student’s disability and the assistance the animal provides. The assistance performed by the animal must be directly related to the student’s documented disability.¹⁸¹

The policy further reserves the right of the University of the Arts to take reasonable time to plan accordingly—taking into consideration “the needs of any students or staff who may have allergies or phobias.”¹⁸² Finally, once an emotional support animal has been approved to live in the residence hall, there are policies in place to handle day-to-day issues such as veterinary certification of vaccines, property damage caused by an animal, and the cleanup of pet hair and dander.¹⁸³ The emotional support animal does not have to be specially trained, but the owner must be able to keep control of the animal.¹⁸⁴

Similar to the policies at the University of the Arts, the University of Nebraska at Kearney (UNK)¹⁸⁵ instituted an “Assistance Animal Policy

179. *Exceptions to the Animal Policy*, U. OF THE ARTS, <https://www.uarts.edu/students/exceptions-animal-policy> [<https://perma.cc/J5B7-NLWS>].

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. The University of Nebraska at Kearney was sued after it denied a student’s request to keep her therapy dog in her university-owned, off campus apartment. The use of her therapy dog was associated with a psychological disability. At the time, there was no written policy addressing this scenario, a student with a disability requesting to live with a service animal. The court’s decision to look to the Fair Housing Act, which provides for reasonable accommodations for service and support dogs in buildings with no pet policies, indicates a turning point for how

and Agreement” that provides recognition of service animals as defined by the ADA, but also a broader category of “assistance animals” like the FHA.¹⁸⁶ Specifically, the policy states “UNK is committed to allowing individuals with disabilities the use of a Service Animal on campus to facilitate their full-participation and equal access to the University’s programs and activities.”¹⁸⁷ Moreover, “UNK is also committed to allowing Assistance Animals necessary to provide individuals with disabilities an equal opportunity to use and enjoy University housing.”¹⁸⁸ UNK allows students who use assistance animals to request a reasonable accommodation from the prohibition of animals in University housing.¹⁸⁹ UNK defines assistance animals as:

a category of animals that may work, provide assistance, or perform physical tasks, for an individual with a disability and/or provide necessary emotional support to an individual with a mental or psychiatric disability that alleviates one or more identified symptoms of an individual’s disability, but which are not considered Service Animals under the ADAAA and UNK’s Service Animal Policy.¹⁹⁰

The policy further delineates that “some Assistance Animals are professionally trained, but in other cases Assistance Animals provide the necessary support to individuals with disabilities without any formal training or certification.”¹⁹¹ Further, in addition to allowing dogs as assistance animals, UNK’s policy states that “any animal may serve a person with a disability as an Assistance Animal.”¹⁹²

In deciding whether to allow an assistance animal in University housing, UNK considers “whether or not the Assistance Animal is necessary because of the individual’s disability to afford the individual an equal opportunity to use and enjoy University housing and its presence in University housing is reasonable.”¹⁹³ Nonetheless, even if an Assistance

higher education institutes would need to draft policies in this arena. *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974 (D. Neb. 2013); *Justice Department and University of Nebraska at Kearney Lawsuit*, U.S. DEP’T OF JUST. (Sept. 3, 2015), <https://www.justice.gov/opa/pr/justice-department-and-university-nebraska-kearney-settle-lawsuit-over-rights-students> [<https://perma.cc/KBP2-25UZ>].

186. *Assistance Animal Policy and Agreement*, UNIV. OF NEB. KEARNEY, http://www.unk.edu/offices/academic_success/dss/assistance-animal-policy-and-agreement.php [<https://perma.cc/4XBQ-5GSD>].

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

Animal can be in University housing with an individual with a disability, this same Assistance Animal cannot enter other areas of the University, such as “dining facilities, libraries, academic buildings, athletic building[s] and facilities, classrooms, labs, [and] individual centers.”¹⁹⁴

The ACHA has found an increase in students reporting experiences of overwhelming anxiety and depression.¹⁹⁵ In turn, universities across the United States are reporting an increase in student requests for the use of emotional support animals in residence halls.¹⁹⁶ Further, the court system has seen an increase in cases filed by students against universities because of their desire to use emotional support animals in the university setting—and students have won.¹⁹⁷ There is a correlation between these three occurrences that makes analyzing university policies regarding the use of emotional support animals informative to the process of redrafting the ADA’s definition of service animal to include emotional support animal. In crafting policies that allow students to use emotional support animals in residence halls, universities have taken the path of broadening the definition of service animal, like the FHA.

D. *States and Cities*

Some states and cities have created laws to regulate the use of emotional support animals in accordance with the FHA, which is broader than the ADA.¹⁹⁸ In addition, states and cities have crafted laws that provide clarity and consequences associated with falsification of information or fraudulent misrepresentation regarding the use of emotional support animals.¹⁹⁹ By broadening the definition of service animal to include ESAs, these municipalities and states are strengthening the argument to update the ADA with similar definitions.

194. *Id.*

195. See AM. COLL. HEALTH ASS’N, *supra* note 167.

196. Bauer-Wolf, *supra* note 170; see Allie Grasgreen, *Lawsuit Over Therapy Dog Raises Questions About University Housing*, INSIDE HIGHER ED (Dec. 13, 2011, 3:00 AM), <https://www.insidehighered.com/print/news/2011/12/13/lawsuit-over-therapy-dog-raises-questions-about-university-housing> [<https://perma.cc/3TSH-HYFU>].

197. *E.g.*, United States v. Univ. of Neb. at Kearney, 940 F. Supp. 2d 974 (D. Neb. 2013); Velzen v. Grand Valley State Univ., 902 F. Supp. 2d 1038 (W.D. Mich. 2012).

198. See, *e.g.*, FLA. STAT. § 760.27 (2020); N.Y.C. COMM’N ON HUM. RTS., NYC COMM’N ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF DISABILITY 11 (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf [<https://perma.cc/8C4V-XDKM>].

199. See, *e.g.*, Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?*, 23 ANIMAL L. 325 (2017); Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS & PUB. POL’Y 771 (2016).

1. Florida

Recently, there have been bills introduced in Florida to try to regulate reasonable accommodation requests for the use of emotional support animals in the housing context.²⁰⁰ On March 3, 2020, the Florida Senate passed a bill related to emotional support animals and housing that took effect on July 1, 2020.²⁰¹ Republican State Senator Manny Diaz and Democratic State Senator Bill Montford co-introduced Florida Senate Bill 1084 on January 14, 2020.²⁰² The act applies to persons or entities “engaging in conduct covered by the federal Fair Housing Act or s. 504 of the Rehabilitation Act of 1973” and forbids these persons or entities from discriminating against people who require emotional support animals.²⁰³

As a result of Senate Bill 1084,²⁰⁴ Florida Statutes now define emotional support animals as “an animal that does not require training to do work, perform tasks, provide assistance, or provide therapeutic emotional support by virtue of its presence which alleviates one or more identified symptoms or effects of a person’s disability.”²⁰⁵ The Act allows landlords to request proof of a person’s disability, if the disability is invisible.²⁰⁶ Further, it sets out to eliminate the issues with scam, internet-based companies that write fraudulent letters for people seeking to pass off pets as emotional support animals.²⁰⁷ Specifically, the Act states “[s]uch information is reliable if the practitioner or provider has personal knowledge of the person’s disability and is acting within the scope of his or her practice to provide the supporting information.”²⁰⁸

Moreover, the Act outlines that “identification card[s], patch[es], certificate[s], or similar registration obtained from the Internet is not, by itself, sufficient information to reliably establish that a person has a disability or a disability-related need for an emotional support animal.”²⁰⁹ In balancing the needs of people who use emotional support animals with the rights of landlords, the Act gives landlords the ability to deny a reasonable accommodation request for an emotional support animal if the

200. Act Relating to Emotional Support Animals, S.B. 1084, 2020 Reg. Sess., 2020 Fla. Laws 76; S.B. 1128, 2019 Reg. Sess. (Fla. 2019).

201. Fla. S.B. 1084.

202. *See id.*

203. *Id.*

204. *Id.*

205. FLA. STAT. § 760.27(1)(a) (2020).

206. *Id.* § (2)(b).

207. *Id.* § (3)(c).

208. *Id.* § (2)(b)(4).

209. *Id.* § (3)(c).

animal “poses a direct threat of physical damage to the property of others, which threat cannot be reduced or eliminated by another reasonable accommodation.”²¹⁰ Finally, anyone who falsely claims to have a need for an emotional support animal or falsifies documentation associated with such a claim “commits a misdemeanor of the second degree.”²¹¹

Prior attempts in Florida to regulate the use of emotional support animals failed. In 2019, Senator Diaz introduced Florida Senate Bill 1128 to deal with fraudulent use of emotional support animals in the housing context.²¹² In an interview with the Miami Herald, Senator Diaz stated that he wanted “to crack down on people who claim their pet is an emotional support animal to get out of paying pet deposits—or get into buildings that don’t allow pets.”²¹³ Further, Democratic State Senator Kevin Rader stated, “People go on the internet, they find a psychologist or a therapist or whatever, never met the person, and for \$99 get to claim mental illness, and the next thing you know you have a mental support animal.”²¹⁴ Nonetheless, Florida lawmakers’ continued efforts to pass a law that assists people who use emotional support animals while creating penalties for people who abuse the system indicates that there is a societal need to provide greater protections for people who legitimately use emotional support animals.

2. San Francisco

Some cities have created policies that allow people to bring their emotional support animals into city-owned buildings and city-run events. For example, in San Francisco, the Mayor’s Office on Disability has a policy that states “[s]upport animals are animals of any species that are not trained to perform a specific task, but their presence provides assistance to people with psychological disabilities.”²¹⁵ Further, “[t]hey help by reducing symptoms of depression, anxiety, stress, and difficulties regarding social interactions.”²¹⁶ In addition, the Mayor’s Office on

210. *Id.* § (2)(a).

211. *Id.* § 817.265.

212. S.B. 1128, 2019 Reg. Sess. (Fla. 2019) (unenacted).

213. Lawrence Mower, *Legislature Tries to Rein in Dubious ‘Emotional Support’ Animals*, MIAMI HERALD (Mar. 11, 2019, 5:38 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article227428069.html>.

214. *Id.*

215. LONDON N. BREED, NICOLE BOHN, MAYOR’S OFFICE ON DISABILITY, SERVICE AND SUPPORT ANIMALS: A BRIEF OVERVIEW, <https://sfgov.org/mod/sites/default/files/Service%20animal%20client%20bulletin%20final%20-%20English%207.30.18%20docx.pdf> [https://perma.cc/C3JL-WNJT].

216. *Id.*

Disability makes clear that “[a]ll service [and] support animals are welcomed at any building, program, or agency of the City and County of San Francisco and its contractors.”²¹⁷ Nonetheless, a person with an emotional support animal may be denied access to a private business or establishment that sells or prepares food because “the state law is unclear.”²¹⁸

3. New York City

Like San Francisco, New York City has recognized the importance of emotional support animals in the lives of people with disabilities. Nearly one million residents of New York City, or 11.2 percent of the City’s population, live with a disability.²¹⁹ The NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Disability (NYCHRL) states:

Our city is at its best when it draws on the abilities of all its residents. Providing reasonable accommodations and creating accessible spaces also benefits all New Yorkers, including business owners, residents, and employees, because providing equal access for people with disabilities is an investment that will yield long-lasting economic and societal gains. New York City is dedicated to advancing accessibility and giving all New Yorkers a chance to thrive. The New York City Commission on Human Rights is committed to ensuring that New Yorkers with disabilities are able to live, work, and enjoy all that New York City has to offer, without discrimination.²²⁰

The NYCHRL Guidance states, “[h]ousing providers are required to reasonably accommodate persons with disabilities who rely on service animals or emotional support animals by providing exceptions to ‘no pet’ or ‘no dog’ policies.”²²¹ Further, it defines emotional support animal as “an animal that provides emotional support or other assistance that ameliorates the symptoms of a disability.”²²²

Unlike under state law, under the NYCHRL a person need only show

217. *Id.* (emphasis omitted).

218. *Id.*

219. CITY OF N.Y. ET AL., ACCESSIBLENYC: AN ANNUAL REPORT ON THE STATE OF PEOPLE WITH DISABILITIES LIVING IN NEW YORK CITY (2017), http://www1.nyc.gov/assets/mopd/downloads/pdf/accessiblenyc_2017.pdf.

220. N.Y.C. COMM’N ON HUMAN RIGHTS, NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF DISABILITY 6–7 (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf [<https://perma.cc/8C4V-XDKM>].

221. *Id.* at 100.

222. *Id.*

that the presence of the emotional support animal in some way alleviates symptoms of their disability in order to justify their request for the accommodation. They need not show that the animal is ‘necessary’ to their use and enjoyment of the residential unit.²²³

Although housing providers may prohibit certain animals as provided by city, state, and federal laws, they must allow residents the ability to have service or emotional support animals even if the building has a “no pet policy.”²²⁴ The NYCHRL does not believe that the potential for incidental property damage is an undue hardship that would negate a person’s request for such an accommodation to a no pet policy.²²⁵

4. Kennett Square, Pennsylvania, Rockville, Maryland, and Minot, North Dakota

Many cities have defined the term emotional support animal in their municipal codes. These definitions are important because they highlight the fact that people with mental health issues are using these animals to assist them in daily life activities.

In Pennsylvania, the Borough of Kennett Square Municipal Code defines emotional support animal to mean “a companion animal that provides therapeutic benefit, such as alleviating or mitigating some symptoms of the disability, to an individual with a mental or psychiatric disability.”²²⁶ Further, the City of Rockville, Maryland Municipal Code defines emotional support animal to mean “a companion animal that provides therapeutic benefit, such as alleviating or mitigating some symptoms of a disability, to an individual with a mental or psychiatric disability.”²²⁷ Moreover, the Municipal Code provides that no fee may be charged to license an emotional support animal or service animal as defined by the Code.²²⁸

In the Code of Ordinances for the City of Minot in North Dakota, one can find further evidence that cities recognize the need for people with mental health issues to have access to emotional support animals in the

223. *Id.*

224. *Id.* at 101.

225. *Id.*

226. KENNETT SQUARE, PA., MUNICIPAL CODE ch. 3, art. 1, § 3-1 (2020), https://library.municode.com/pa/kennett_square/codes/code_of_ordinances?nodeId=PAI_CH3ANFO_ARTIINGE_3-1DE [<https://perma.cc/D63J-8LSU>].

227. ROCKVILLE, MD., CITY CODE ch. 3, art. 1, § 3-4 (2020), https://library.municode.com/md/rockville/codes/code_of_ordinances?nodeId=CICO_CH3ANCO_ARTIINGE_S3-4DE [<https://perma.cc/6FBV-G7PE>].

228. *Id.* art. 2, § 3-14(c).

housing context.²²⁹ The City of Minot allows a person with a disability to “keep or possess a service, assistance or emotional support animal to the extent mandated by the Fair Housing Act or other federal or state law.”²³⁰ In addition, the Code specifically delineates that “[s]ervice, assistance or emotional support animal means an animal that assists, supports or provides services to a person with a disability, or an animal that is necessary as a reasonable accommodation to assist, support or provide services to a person with a disability.”²³¹ Such an accommodation is only allowed “if the animal is domesticated, not inherently dangerous and not a threat to the health or safety of owners, family members, visitors, neighbors and other humans or to domestic pets or other animals, and not destructive, annoying or a nuisance as defined in section 7-25 or other city ordinance.”²³²

5. A Variety of Approaches Demonstrates the Need for Amending the ADA

In analyzing the laws in states and cities associated with emotional support animals, one can see a trend from following the broader guidance of the FHA in the housing context to allowing emotional support animals in certain public settings, e.g., government buildings and programs. People use emotional support animals to assist them in various ways, including alleviating or mitigating the symptoms associated with their mental health issues. Creating laws and regulations that assist people who use emotional support animals recognizes their place in society. Further, providing avenues for the protected use of emotional support animals builds on the concept that there should be equal treatment among people who use service animals and people who use emotional support animals. Recognizing the significance of emotional support animals in the lives of people with mental health issues and allowing users of emotional support animals to have protection under the FHA is a step in the direction of finding a way to provide these same protections for people who need to use their emotional support animals in public settings. Redrafting the ADA’s definition of service animal to include emotional support animal is the most clear and clean way to provide uniform and equal protection to people with disabilities using these animals to assist them.

229. MINOT, N.D., CODE OF ORDINANCES, ch. 7, art. 1, § 7-5(d)(1)-(4) (2020), https://library.municode.com/nd/minot/codes/code_of_ordinances?nodeId=COOR_CH7ANFO_ARTIINGE_S7-5KECEANPREX [<https://perma.cc/5TXT-TZQA>].

230. *Id.* § 7-5(d)(2).

231. *Id.* § 7-5(d)(4)(b) (emphasis omitted).

232. *Id.* § 7-5 (d)(3).

III. REDRAFTING THE ADA'S DEFINITION OF SERVICE ANIMAL THROUGH THE LENS OF ALTERNATIVE APPROACHES THAT INCLUDE EMOTIONAL SUPPORT ANIMALS

Alternative approaches to defining service animal to include emotional support animals have allowed people with mental health issues to stand on equal footing with people with physical disabilities. These alternative approaches occur in many contexts as discussed in Part II of this Article. The lessons of this extensive series of examples on how to deal with emotional support animals demonstrate the reasons to include them in the definition of service animal and why the ADA should be amended to do so. These alternative approaches show why and how emotional support animals should be included in the ADA.

Since March 15, 2011, dog has been the species of animal recognized as a service animal under the ADA.²³³ This Article proposes that the starting point to redrafting the ADA's definition of service animal is to continue to define the species of service animal under the ADA as a dog. Specifically, the beginning language of the ADA's definition of service animal reads:

Service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities. Examples of such work or tasks include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications, calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack, or performing other duties. Service animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person's disability.²³⁴

This historical language is important because redrafting the ADA's definition of service animal is about broadening the definition to include

233. U.S. Dep't of Just., C.R. Div., Disability Rts. Section, ADA Requirements: Service Animals (July 12, 2011, updated Feb. 24, 2020), https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/9N2T-T7MP>]; Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236 (Sept. 10, 2010) (codified at 28 C.F.R. pt. 36).

234. U.S. Dep't of Just., C.R. Div., Disability Rts. Section, ADA Requirements: Service Animals (July 12, 2011, updated Feb. 24, 2020), https://www.ada.gov/service_animals_2010.htm [<https://perma.cc/9N2T-T7MP>]; *see also* 28 C.F.R. § 36.104 (2016) (emphasis omitted).

emotional support animal, not eliminating the foundation of it. Further, dogs have been used as service animals due to their ability to be trained, attentive, and not easily distracted to assist a person with a disability.²³⁵ These characteristics are important for an emotional support animal who will need to have good behavior in public settings.²³⁶ By keeping with the historical use of dogs, it will end the confusion regarding the use of other types of animals as emotional support animals (e.g., exotic animals, rodents, etc.).²³⁷

Since 1968, the FHA has “prohibited discrimination concerning the sale, rental, and financing of housing based on . . . (as amended) handicap.”²³⁸ Housing discrimination can mean not providing a reasonable accommodation for a resident’s emotional support animal.²³⁹ The FHA’s inclusivity of emotional support animals in its protection under the law has guided the inclusion of emotional support animals in higher education policies.²⁴⁰ This Article proposes to take language from the Rutgers University policy²⁴¹ to enhance the ADA’s definition of service animal to include emotional support animal. The language in the Rutgers Policy illustrates the important aspects surrounding emotional support animals, e.g., what they are, what they do, and how that benefits users of emotional support animals.²⁴²

Specifically, as of June 29, 2019,²⁴³ the Rutgers policy stated that a support animal is “an animal in which its very nature and mere presence, and without specific training, may relieve and/or help reduce psychologically or emotionally induced pain in persons with certain medical or psychological conditions.”²⁴⁴ This language illustrated the difference between the current ADA language regarding tasks and work performed by a traditional service animal and the conduct associated with an emotional support animal. Additionally, it highlighted the benefits to psychological and emotional well-being associated with an emotional support animal’s conduct. These are all pieces to the puzzle of broadening

235. Karetnick, *supra* note 162.

236. 75 Fed. Reg. at 56,236.

237. Foster, *supra* note 6, at 240–48.

238. *History of Fair Housing*, HUD.GOV, https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history [<https://perma.cc/Y3DG-W5XA>].

239. See 42 U.S.C. § 3604(f)(3)(B) (2012).

240. *United States v. Univ. of Neb. at Kearney*, 940 F. Supp. 2d 974 (D. Neb. 2013) (holding university residence halls are “dwellings” and subject to the FHA).

241. *Student Support & Special Accommodations*, *supra* note 171.

242. See *id.*

243. *Id.*

244. *Id.*

the language of the ADA's definition of service animal.

Further evidence of the benefits associated with using dogs to assist people with mental health issues such as PTSD is captured in the Puppies Assisting Wounded Servicemembers for Veterans Therapy Act.²⁴⁵ This Act is based on the premise that "service dogs ameliorate the symptoms associated with PTSD, and in particular, help prevent veteran suicide."²⁴⁶ Although the program associated with this Act uses service animals, not emotional support animals, the concept of using dogs to improve the lives of people living with mental health issues remains the same. With the rise in mental health issues across all demographics,²⁴⁷ and the benefits associated with the use of emotional support animals and service animals to assist these people in managing and alleviating their symptoms, this Article asserts that these animals should be treated with equal protections under the ADA.

Therefore, this Article proposes that the ADA's definition of service animal, in its redrafted form, could read:

Service animals are defined as dogs that are individually trained to do work or perform tasks for people with disabilities. Examples of such work or tasks include guiding people who are blind, alerting people who are deaf, pulling a wheelchair, alerting and protecting a person who is having a seizure, reminding a person with mental illness to take prescribed medications, calming a person with Post Traumatic Stress Disorder (PTSD) during an anxiety attack, or performing other duties. Service animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person's disability.²⁴⁸

Service animals also include dogs whose sole function is to provide comfort or emotional support to people with disabilities. These dogs by their very nature and mere presence, and without specific training, may relieve and/or help reduce psychologically or emotionally induced pain in persons with certain medical or psychological conditions.

The issue of behavior training is another piece of the service and emotional support animal definitional puzzle. Places of public accommodation such as grocery stores, malls, and movie theaters, have the right to request that a person with a disability using a service animal remove the animal from the premises if "[t]he animal is out of control and

245. H.R. 4305, 116th Cong. (2020).

246. *Id.*

247. *Mental Health by the Numbers*, *supra* note 1.

248. *C.f.* 28 C.F.R. § 36.104 (2016).

the animal's handler does not take effective action to control it[,] or the animal is not housebroken."²⁴⁹ Like traditional service animals, emotional support animals would be subject to this control and behavior requirement.²⁵⁰ Therefore, users of emotional support animals will need to ensure that their dogs have enough training to be well-behaved in public or risk removal from a setting.

Now is the time to be more inclusive of users of emotional support animals because relying on broader definitions in certain contexts is not enough. For example, the DOT's recent change in position, from requiring airlines to treat emotional support animals as service animals to proposing to treat them as pets, further alienates people with mental health issues from being fully integrated into society. Additionally, it illustrates the uncertainty of relying on laws other than the ADA to protect the rights of users of emotional support animals. Disability laws, on their face, are alienating people with mental health conditions by treating them differently than those with physical disabilities. Normatively, these groups should be treated equally furthering the ADA's purpose of inclusion. Therefore, legitimate users of emotional support animals must have the same rights as legitimate users of service animals—putting them on equal footing under the ADA. The proposed redrafted definition of service animal under the ADA will accomplish this goal.

IV. FUTURE IMPLICATIONS OF INCLUDING EMOTIONAL SUPPORT ANIMALS AS SERVICE ANIMALS UNDER THE ADA

Broadening the ADA's definition of service animal to include emotional support animal will have both positive and negative consequences. Nonetheless, the positives far outweigh the negatives. If the use of an emotional support animal becomes a protected right under the ADA, then issues such as the use of "fake" service animals²⁵¹ and direct threat²⁵² issues are the standout problems that will need to be

249. *Id.* § 36.302(c)(2)(i)–(ii).

250. *See id.* § 36.302(c)(4).

251. *The Hidden Complications of Fake Service Dogs*, ANYTHING PAWSABLE (Feb. 28, 2019), <https://www.anythingpawsable.com/fake-service-dog-complications/> [<https://perma.cc/T36C-695B>]; Amber King, *10 Signs That a "Service Dog" is Actually a Fake*, ANIMAL HEALTH FOUND. (Aug. 14, 2017), <https://www.animalhealthfoundation.net/blog/2017/08/10-signs-that-a-service-dog-is-actually-a-fake/> [<https://perma.cc/QZ7C-Y9CF>]. The use of "fake" service animals refers to people trying to pass their pets as service animals. Examples of direct threat issues include people who are allergic to dogs or have anxiety or fear associated with dogs.

252. *See, e.g.*, Whitney Akers, *8 Ways People Allergic to Dogs Can Make Their Flights Less Miserable*, HEALTHLINE (Aug. 16, 2018), <https://www.healthline.com/health-news/8->

addressed.

For years, scholars have been writing about the criminalization of fraudulent use of service animals.²⁵³ Subsequently, in regulating the use of emotional support animals in the housing context, the State of Florida has made it a misdemeanor of the second degree to falsely claim to need an emotional support animal or falsify documentation associated with such a claim.²⁵⁴ There will need to be a mechanism to deal with fraudulent use of service animals.²⁵⁵ Consequences such as monetary fines, community service hours, or a more severe alternative will need to be considered by legislators as part of the redrafting process.²⁵⁶ Users of emotional support animals should have the same rights as users of traditional service animals, even if that means there will be members of society who break the law.²⁵⁷

The American Veterinary Medical Association (AVMA) has recognized the important role of veterinarians in assisting clients with “correctly identifying their animals, and to provide care and advice consistent with the animal’s role.”²⁵⁸ AVMA has stated, “[s]ome people misrepresent their animals as assistance animals in order to bring them to places where pets are not allowed, to avoid fees, or out of a misunderstanding of the animal’s role.”²⁵⁹ Providing clarity in the ADA language will assist in working through the misrepresentation aspects of

ways-people-allergic-to-dogs-can-make-flights-less-miserable#1 [https://perma.cc/2YUH-PZ47].

253. See, e.g., Tiffany Lee, *Criminalizing Fake Service Dogs: Helping or Hurting Legitimate Handlers?*, 23 ANIMAL L. 325 (2017); Sande Buhai, *Preventing the Abuse of Service Animal Regulations*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 771 (2016).

254. FLA. STAT. § 817.265 (2020).

255. See generally Rebecca F. Wisch, *Table of State Service Animal Laws*, MICH. ST. U. ANIMAL LEGAL & HIST. CTR., (2019), <https://www.animallaw.info/topic/table-state-assistance-animal-laws> [https://perma.cc/CT8P-CPAG]; see also Rebecca J. Huss, *Pups, Paperwork, and Process: Confusion and Conflict Regarding Service and Assistance Animals Under Federal Law*, 20 NEV. L.J. 785, 837 (2020). “Michigan law already provides for the state’s department of civil rights telephone hotline to receive reports about persons falsely representing themselves as individuals in possession of service animals in training.” *Id.*

256. Huss, *supra* note 255, at 836; 68 PA. CONS. STAT. § 405.6 (2018) (misrepresenting an animal “as an assistance animal or service animal” for use in housing is punishable by a fine not exceeding \$1,000).

257. Jenni Bergal, *States Cracking Down on Accessible Parking Abuse*, DISABILITY SCOOP (Nov. 17, 2014), <https://www.disabilityscoop.com/2014/11/17/states-parking-abuse/19851/> [https://perma.cc/MV6F-6J2Q].

258. *Service, emotional support and therapy animals*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/resources-tools/animal-health-welfare/service-emotional-support-and-therapy-animals> [https://perma.cc/8T8M-JEF7].

259. *Id.*

emotional support animals.²⁶⁰ Studies have been conducted surrounding the legitimacy of service dogs, emotional support dogs, and therapy dogs.²⁶¹ In a survey of 284 individuals, a group of veterinarians concluded “[a]lthough there has been much negative press surrounding the issue of misrepresentation of assistance animals, the true prevalence of behavior is likely lower than portrayed by the media, or at the very least, members of the general public perceive it to be lower.”²⁶² Legislators need to find a way to remove internet sites that, for a fee, “certify” your animal as an emotional support animal. By taking a broad approach to defining emotional support animals, legislators will be able to effectively reduce the amount of illegitimate emotional support animals within their communities.²⁶³

Finally, the potential for an increase in the number of dogs—service and emotional support—in public settings may impact people with allergies. A reported fifty million Americans suffer from allergies,²⁶⁴ with three in ten people allergic to cats and dogs.²⁶⁵ In addition, twice as many people are allergic to cats than dogs.²⁶⁶ Many years ago, service dogs were welcomed into society, and people with allergies have had to learn to co-exist with them. A quick internet search provides many articles about strategies for travelers with allergies to animals and food.²⁶⁷ Balancing the use of service animals and exposure of these animals to people with allergies has always been part of the discussion. Nonetheless, it has not been enough to stop the integration of using service animals in public settings—and it should not stop the use of emotional support animals, if

260. Huss, *supra* note 255, at 840 (“Increasing education about coverage of the current laws, along with modifications of state laws so that such provisions use terminology consistent with the ADA, has been proposed. Another suggestion is to amend the ADA to allow for entities to check identification issued by states with certification and licensing programs.”).

261. Regina Schoenfeld-Tacher et al., *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 INT’L J. ENVTL. RES. PUB. HEALTH 642 (2017), <https://www.mdpi.com/1660-4601/14/6/642/htm> [<https://perma.cc/DX9Z-XXC2>].

262. *Id.*

263. SAPS LLC, *Want to Travel with an Emotional Support Animal? How to be sure your ESA letter is valid*, CHI. TRIBUNE (June 18, 2019, 5:00 AM), https://www.chicagotribune.com/paid-posts/?prx_t=7A4FAyPA4AeOgPA&utm_content=Gooogle4;Search;ECDCT;EmotionalSupportAnimalLetter1CT;%2Bemotional%20%2Bsupport%20%2Banimal%20%2Bletter;110&utm_source=Gooogle4&gclid=CjwKCAjw97P5BRBQEiwAGflV6YAAQ07fW6BQC0kmwze7Du7n0f3ME59kJIa3VoZ167_LcnbZ5XLG4VxoCi7gQAvD_BwE.

264. *Traveling with Asthma and Allergies*, ASTHMA ALLERGY FOUND. OF AM., <https://www.aafa.org/traveling-with-asthma-allergies/> [<https://perma.cc/7Y46-5ZQG>].

265. *Pet Allergy: Are You Allergic to Dogs or Cats?*, ASTHMA ALLERGY FOUND. OF AM., <https://www.aafa.org/pet-dog-cat-allergies/> [<https://perma.cc/M7WL-2SM6>].

266. *Id.*

267. *See, e.g., id.*; Akers, *supra* note 252.

properly regulated.

CONCLUSION

Service animals and emotional support animals should be equal players that provide users of either one equal protections under the ADA. Creating a protected right under the ADA for people with mental health issues to use emotional support animals in public places will further the integration mandate of the ADA. Moreover, staying with the traditional use of dogs as service animals and emotional support animals will clarify the broadened definition. Taking the lessons learned in other contexts regarding the regulation of emotional support animals will be beneficial to the transition process; however, with all change comes unintended consequences. Legislators will need to be vigilant to the impact new rules and regulations will have on their communities. Nonetheless, it is imperative as a society that we look out for the mental well-being of people with disabilities, just as we have done our best to help them with the physical barriers that once stood in their way.