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# They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals

Chelsea Hernandez-Silk

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THEY SAY EMOTIONAL SUPPORT DOG, WE SAY SERVICE  
DOG: WHY THE AMERICANS WITH DISABILITIES ACT  
SHOULD RECOGNIZE EMOTIONAL SUPPORT DOGS AS  
SERVICE ANIMALS?

*Chelsea Hernandez-Silk* \*

\* J.D. candidate, Florida A&M University College of Law, May 2018. I would like to thank Professor Abate for his guidance and mentoring throughout my three years of law school. I would also like to thank my father and mother for supporting and encouraging me.

## ABSTRACT

*This article explores the laws surrounding emotional support animals. Specifically, the author analyzes the Americans with Disabilities Act, the Fair Housing Act, and the Air Carrier Access Act. This article proposes that emotional support animals should be recognized under federal legislation because they perform specific tasks. Further, the author contends that greater awareness of the benefits of emotional support animals will alleviate public health and safety concerns.*

## INTRODUCTION

Verdie Cook, a 78-year-old woman, was faced with eviction from her home after adopting Lucy, a Chihuahua and Boston Terrier mix.<sup>1</sup> Verdie and her husband, Kenny, brought Lucy home from a Sanford, Florida animal shelter after Verdie's neurologist suggested that an emotional support dog would help her cope with anxiety, depression, and the early stages of Alzheimer's. Prior to adopting Lucy, Verdie's doctor noted that during weekly counseling sessions she was unable to function effectively, had difficulty concentrating and maintaining focus, and reported suicidal thoughts. The mobile home park in which the Cooks live has a strict "no dogs" policy. After the Park Association informed them that they either had to remove the dog or be evicted, the Cooks' legal aid attorney successfully argued that the mobile home park is obligated to provide reasonable accommodations for Verdie under a provision of the federal Fair Housing Act and allow her and her emotional support dog to stay on the premises. Although Verdie may have overcome this challenge, hotels, restaurants, stores, and any other place of public accommodation or public service, as well as her workplace, may nonetheless reject Verdie's emotional support dog. Despite the fact that Verdie's emotional support dog has significantly helped her and improved her quality of life, the Americans with Disabilities Act (ADA)<sup>2</sup> does

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<sup>1</sup> Stephen Hudak, *Dog Prescribed by Doctor May Get Couple Evicted From Mobile Home*, ORLANDO SENTINEL (Feb. 18, 2010), [http://articles.orlandosentinel.com/2010-02-18/news/os-dog-violation-eviction-mobile-home-20100218\\_1\\_mobile-home-mobile-home-dog](http://articles.orlandosentinel.com/2010-02-18/news/os-dog-violation-eviction-mobile-home-20100218_1_mobile-home-mobile-home-dog).

<sup>2</sup> See generally Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2018) (this paper focuses on service animal regulations for public services under Title II and places of public accommodation under Title III).

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not provide protection for Verdie and her emotional support dog. Therefore, Lucy is excluded from assisting Verdie outside of her home.<sup>3</sup>

Verdie's story is not an uncommon occurrence; many people find that dogs can relieve anxiety merely by their presence or provide hope in life amidst feelings of deep depression.<sup>4</sup> Yet, the ADA does not recognize an emotional support dog as a "service animal," because the Department of Justice (DOJ) does not view emotional support as a "task" the dogs can perform.<sup>5</sup> While many may think of "service animals" as seeing-eye dogs or mobility assistance dogs, there are other common disabilities that are not readily apparent that an emotional support dog can help address. Persons with disabilities such as severe depression, or disabilities in connection with other serious conditions such as cancer or AIDS, can benefit from the presence of emotional support dogs.<sup>6</sup>

The ADA does not differentiate between physical and mental disabilities. The purpose of the ADA is to eliminate discrimination against individuals with disabilities, whether physical or psychiatric in nature.<sup>7</sup> While most are familiar with the use of seeing-eye dogs for those with vision impairments, wheelchair users, or those with hearing loss, emotional support animals can provide assistance in a variety of ways to those with medically diagnosed psychiatric disabilities.

Increasingly, emotional support dogs have been shown to be beneficial to persons with mental disabilities, such as depression or anxiety.<sup>8</sup> These disabilities, although unquestionably potentially disabling conditions in their own right, are also a major symptoms or side effects of other disabilities such as cancer, AIDS, Alzheimer's, or other chronic conditions.<sup>9</sup> The distinction between emotional support dogs and psychiatric service dogs is blurry. The question then becomes when is an emotional support dog also a service animal to an individual with a disability?

This article proposes that emotional support dogs should be recognized under the ADA as service dogs. Part I discusses the exclusion of emotional

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<sup>3</sup> See 28 C.F.R. § 35.104 (2017).

<sup>4</sup> Rebecca J. Huss, *No Pets Allowed: Housing Issues and Companion Animals*, 11 ANIMAL L. 69, 71 n.9 (2004).

<sup>5</sup> 28 C.F.R. § 36.104 (2017).

<sup>6</sup> Huss, *supra* note 4, at 71; Elizabeth Blandon, *Reasonable Accommodation or Nuisance? Service Animals for the Disabled*, 75 FLA. B.J. 12, 15 (2001).

<sup>7</sup> 42 U.S.C. § 12101.

<sup>8</sup> Huss, *supra* note 4, at 71, 81–82.

<sup>9</sup> *Id.* at 71; Blandon, *supra* note 6, at 15; Stanley Coren, *Assistance Dogs for Alzheimer's and Dementia Patients*, PSYCHOL. TODAY (Jan. 21, 2016), <https://www.psychologytoday.com/blog/canine-corner/201401/assistance-dogs-alzheimers-and-dementia-patients>.

support dogs under the ADA's definition of "service animal." It also describes the benefits of emotional support dogs. Part II provides a brief overview of the ADA and discusses its provisions that are relevant to this article. It also discusses the ADA's definition of disability and how service animals are considered "reasonable accommodations" under the ADA. Part III discusses the Fair Housing Act and Air Carrier Access Act and how both federal statutes expand the ADA's definition of service animal to include emotional support animals. Part IV proposes the ADA include emotional support dogs by including emotional support as "work" or a "task" and argues that excluding emotional support dogs increases discrimination and under the Act. Additionally, Part IV argues certification should be required to better protect disabled individuals and covered entities. Part IV concludes with a discussion of how expanding service dogs to include emotional support dogs may create public health and safety concerns and addresses those concerns.

#### I. EXCLUSION OF EMOTIONAL SUPPORT DOGS UNDER THE ADA

The Department of Justice, which promulgates regulation in relation to and enforces Titles II and III of the ADA, expressly states that a service animal "means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."<sup>10</sup> This definition expressly and intentionally excludes emotional support animals from ADA coverage.<sup>11</sup> The regulations provide that "the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks" that confer service animal status.<sup>12</sup> The DOJ is concerned that "some individuals with impairments who would not be covered as individuals with disabilities [would claim] that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access" to public accommodations.<sup>13</sup> Further, DOJ asserts there is no need to include emotional support dogs within its regulation because it includes psychiatric dogs within its definition of service animals.<sup>14</sup> Emotional support is not considered work or a task<sup>15</sup> and, therefore, an emotional support dog cannot

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<sup>10</sup> 28 C.F.R. § 35.104.

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

<sup>12</sup> *Id.*

<sup>13</sup> Nondiscrimination on the Basis of Disability in State and Local Government Services, 73 Fed. Reg. 34,465, 34,472 (June 17, 2008) (codified at 28 C.F.R. 35).

<sup>14</sup> *Id.* at 34,473.

<sup>15</sup> "The dog must be trained to take a specific action when needed to assist the person with a disability.

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be a service dog.<sup>16</sup> Many advocates strongly oppose DOJ's definition of service animal and its definition of work<sup>17</sup> especially in light of other federal laws such as the Fair Housing Act (FHA)<sup>18</sup> and the Air Carrier Access Act (ACAA)<sup>19</sup> recognizing the importance of providing access to those with emotional support animals.

#### A. Existing Treatment of Service Dogs Under the ADA

Under the ADA, a service dog is defined as “[a]ny guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability.”<sup>20</sup> This is the only definition of a service animal found in the regulations promulgated to implement Title III of the ADA. The ADA does not address what is required to distinguish a service dog from an ordinary pet.<sup>21</sup> The specific task(s) performed by the dog can range from “alerting individuals who are deaf or hard of hearing to the presence of people or sounds,” reminding a person with depression to take their medication, or to “preventing impulsive or destructive behavior.”<sup>22</sup> The ADA does not require service dogs to be professionally trained.<sup>23</sup> In addition, proof that the animal has been trained, certified, or licensed is not required.<sup>24</sup>

Central to the dog's classification as a service animal is the work or tasks performed by the dog.<sup>25</sup> DOJ distinguishes between psychiatric service dogs and emotional support dogs by noting that a psychiatric service dog “do[es] [actual] work or perform[s] tasks,” whereas an emotional support dog does

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For example, a person with diabetes may have a dog that is trained to alert him when his blood sugar reaches high or low levels. A person with depression may have a dog that is trained to remind her to take her medication. Or, a person who has epilepsy may have a dog that is trained to detect the onset of a seizure and then help the person remain safe during the seizure.” DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS & THE ADA 1 (2015), [https://www.ada.gov/regs2010/service\\_animal\\_qa.pdf](https://www.ada.gov/regs2010/service_animal_qa.pdf) (referencing 28 C.F.R. § 35.104).

<sup>16</sup> See 28 C.F.R. § 35.104.

<sup>17</sup> See, e.g., Mary Faithfull, Advocacy, Inc., Comment Letter on Proposed Rule to ADA Title II & III (Aug. 18, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1579>.

<sup>18</sup> 42 U.S.C. § 3604 (2018).

<sup>19</sup> 49 U.S.C. § 41705 (2018); 14 C.F.R. § 382.117 (2017).

<sup>20</sup> 28 C.F.R. § 36.104; see also DISABILITY RIGHTS SECTION, *supra* note 15, at 1.

<sup>21</sup> See 28 C.F.R. § 36.104.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see also Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1176 (2010).

<sup>24</sup> 28 C.F.R. § 36.104.

<sup>25</sup> See DISABILITY RIGHTS SECTION, U.S. DEP'T OF JUSTICE, ADA BUSINESS BRIEF: SERVICE ANIMALS (2002), <https://www.ada.gov/svcabrpt.pdf>.

not.<sup>26</sup> For example, a psychiatric service dog can help those individuals who have to take psychiatric medicine balance or pick up things because the person feels dizzy due to her medication.<sup>27</sup> An emotional support dog, however, by its very presence, mitigates the emotional or psychological symptoms associated with a handler's condition or disorder.<sup>28</sup>

The ADA's distinguishing between emotional support dogs and service dogs is an ongoing issue for individuals with psychological support needs that do not rise to the level of requiring a psychiatric service dog. The lack of consistency in federal regulations makes it difficult for the public to easily determine an animal's role. For example, a study conducted in 2017 found that there is public misconception in identifying the difference between assistance animals, service animals, and emotional service animals.<sup>29</sup> In this study, despite the participants having a high level of confidence in being able to determine the difference between the three types of animals, the participants were not able to apply fully the definitions of these animals.<sup>30</sup> The majority of the participants had a negative perception of emotional support animals, yet the participants did not fully understand why a particular individual would need an emotional support animal.<sup>31</sup> This study illustrates how public perception can affect those who legitimately need emotional support animals to assist the individual in her day-to-day tasks.

### B. Benefits of Emotional Support Dogs

Numerous studies show that emotional support dogs are beneficial to individuals with mental or psychiatric impairments.<sup>32</sup> Erika Hagensen, Director of Disability Rights and Family & Technology Policy at The Arc and United Cerebral Palsy Disability Policy Collaboration, states that

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<sup>26</sup> See 28 C.F.R. § 36.104.

<sup>27</sup> Joan Froling, *Service Dog Tasks for Psychiatric Disabilities*, INT'L ASS'N ASSISTANCE DOG PARTNERS (July 30, 2009), [http://www.iaadp.org/psd\\_tasks.html](http://www.iaadp.org/psd_tasks.html).

<sup>28</sup> Zachary Duffly, *Psychiatric Service Dogs & Emotional Support Animals: Access to Public Places & Other Settings*, NOLO (2018), <https://www.nolo.com/legal-encyclopedia/psychiatric-service-dogs-emotional-support-animals-access-public-places-settings.html>.

<sup>29</sup> Regina Schoenfeld-Tacher, Peter Hellyer, Louana Cheung & Lori Kogan, *Public Perceptions of Service Dogs, Emotional Support Dogs, and Therapy Dogs*, 14 INT'L J. ENVTL. RES. & PUB. HEALTH 1 (2017).

<sup>30</sup> *Id.* at 9.

<sup>31</sup> See *id.* at 9–10.

<sup>32</sup> See J. M. Siegel, F. J. Angulo, R. Detels, J. Wesch & A. Mullen, *AIDS Diagnosis and Depression in the Multicenter AIDS Cohort Study: The Ameliorating Impact of Pet Ownership*, 11 AIDS CARE 157, 158, 166–67 (1999) (finding “the most significant impact of pet ownership was among men with high levels of attachment to their pets and low levels of confidant support.”).

[Emotional support] animals perform a variety of critical functions that accommodate the needs of many individuals with psychiatric disabilities, including alleviating symptoms of post-traumatic stress disorder, anxiety disorders and panic disorders by calming the handler and reducing physical and mental effects such as anxiety, fear, flashbacks, hyper vigilance, hallucinations, intrusive imagery, nightmares, muscle tension, trembling, nausea, and memory loss.<sup>33</sup>

The benefits of emotional support dogs are not in dispute. Emotional support dogs can help those diagnosed with depression get out of bed and interact with others by giving them a sense of purpose.<sup>34</sup> Emotional support dogs help persons with psychotic, mood, or anxiety disorders reduce stress.<sup>35</sup> Individuals who suffer from Alzheimer's or dementia also benefit from emotional support dogs.<sup>36</sup> One study found that patients in nursing homes decreased their dependence on psychotropic drugs by utilizing emotional support dogs.<sup>37</sup> Further, other studies have shown that children with autism and attention deficit disorder benefit from the presence of emotional support dogs.<sup>38</sup>

In addition to the studies mentioned above, medical experts have testified about the benefits of emotional support dogs in numerous cases. For example, in one case, a doctor testified that people with "Alzheimer's and/or dementia can experience reliable mitigation of their impairments upon exposure to and interaction with an emotional support dog."<sup>39</sup> In another case, a plaintiff was diagnosed with anxiety and chronic major depression that substantially limited her ability to sleep.<sup>40</sup> Her doctor recommended she get an

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<sup>33</sup> Erika Hagensen, *The Arc of the U.S. & United Cerebral Palsy*, Comment Letter on Proposed Rules to Promote Nondiscrimination on the Basis of Disability in State and Local Government Services and by Public Accommodations and in Commercial Facilities (Aug. 18, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1590> (stating that a blanket exclusion was "inconsistent with the basic tenets of the ADA.").

<sup>34</sup> Jacqueline Bennett, *Feeling Depressed? There's a Dog for That*, DAILY TREAT, <https://www.rover.com/blog/service-dogs-depression-anxiety/> (last visited Mar. 25, 2018).

<sup>35</sup> Sandra B. Barker & Kathryn S. Dawson, *The Effects of Animal-Assisted Therapy on Anxiety Ratings of Hospitalized Psychiatric Patients*, 49 PSYCHIATRIC SERVS. 797, 800 (1998).

<sup>36</sup> See Mara M. Baun & Barbara W. McCabe, *Companion Animals and Persons with Dementia of the Alzheimer's Type: Therapeutic Possibilities*, 47 AM. BEHAV. SCIENTIST 42, 44 (2003).

<sup>37</sup> Kristin M. Bourland, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals*, 48 U. LOUISVILLE L. REV. 197, 206 (2009).

<sup>38</sup> *Id.*

<sup>39</sup> *Falin v. Condo. Ass'n of La Mer Estates*, No. 11-61903-CV-COHN, 2012 U.S. Dist. LEXIS 46826, at \*7 (S.D. Fla. Apr. 3, 2012).

<sup>40</sup> W. Ann Warner & Anjali Vats, *Annual Survey of Michigan Law: Civil Rights*, 52 WAYNE L. REV. 391, 429-30 (2006).

emotional support dog.<sup>41</sup> The plaintiff filed an action for discrimination against her landlord, who prohibited the animal, and, at trial, called her doctor as an expert witness.<sup>42</sup> The doctor testified that “plaintiff’s prognosis was poor and that her relationship with her dog ‘kept her afloat and stabilized her functionally and emotionally . . . without the dog she would probably spend most of her life in bed.’”<sup>43</sup> The expert further testified that “caring for the dog ameliorated the plaintiff’s condition by providing her with structure and without the dog she would undoubtedly go into a ‘depressive tail spin and get worse.’”<sup>44</sup>

Although emotional support dogs are not specifically trained to perform work or a task, they can be trained to provide comfort and affection for individuals who suffer from emotional and cognitive disabilities.<sup>45</sup> Often in places such as hospice, long-term care, hospitals, mental health treatment facilities, and retirement homes, emotional support dogs provide relief and consolation to patients.<sup>46</sup> Furthermore, animal-facilitated therapy has been found to be an alternative to traditional talk therapy.<sup>47</sup> Dog therapy has been found to “help improve the social, mental, and physical conditions of patients.”<sup>48</sup> Indeed,

[a]nimals appear to help shift the focus off the patients’ symptoms of illness by distracting them from their current situation and helping them relax in order to improve their overall well-being. It has been known that the therapeutic touch of an animal develops a sense of serenity and tranquility and influences one’s mood.<sup>49</sup>

It is important to recognize the acceptance of dog therapy. By following the requirements of what it takes for a dog to qualify as a therapy dog, emotional support dogs can become widely accepted too.

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 429.

<sup>43</sup> *Id.* at 429–30.

<sup>44</sup> *Id.* at 430.

<sup>45</sup> Sarah Matuszek, *Animal-Facilitated Therapy in Various Patient Populations: Systematic Literature Review*, 24 *HOLISTIC NURSING PRAC.* 187, 188 (2010) (summarizing the benefits and uses of animal-facilitated therapy).

<sup>46</sup> *See id.* at 193.

<sup>47</sup> *See id.* at 188, 197.

<sup>48</sup> *Id.* at 188.

<sup>49</sup> *Id.* at 192.

## II. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act of 1990 was revised by the ADA Amendments Act of 2008, which became effective in 2009.<sup>50</sup> The ADA is a civil rights law and was created to eliminate discrimination against both physically and mentally disabled individuals in all areas of public life.<sup>51</sup> The ADA's purpose is to guarantee that disabled persons have the same rights and opportunities as everyone else.<sup>52</sup> The ADA seeks to ensure that persons with disabilities are provided with equal opportunity in employment, transportation, state and local government services, telecommunications, and public accommodations.<sup>53</sup>

The ADA is divided into five titles, two of which are relevant to this article. Title II prohibits discrimination on the basis of a disability in any public service, program, or activity of a public entity.<sup>54</sup> Title III prohibits discrimination in places of public accommodation and services operated by public entities.<sup>55</sup> The term "public accommodation" includes places such as hotels, motels, restaurants, theaters, stadiums, shopping centers, privately owned public transportation, museums, recreational places, and other similar places that serve the public.<sup>56</sup>

An individual must meet the ADA's definition of "disabled" to receive protection under the statute.<sup>57</sup> Under the ADA, a person is "disabled" if the person meets one of three requirements: the individual has "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;"<sup>58</sup> "(B) a record of such an impairment;"<sup>59</sup> or the individual is "(C) regarded as having such an impairment."<sup>60</sup> Part II discusses reasonable accommodations available to a person who meets the definition of disabled under the ADA.

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<sup>50</sup> Amendment of Americans With Disabilities Act Title II and Title III Regulations To Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204, 53,204 (Aug. 11, 2016) (to be codified at 28 C.F.R. pt. 35,36).

<sup>51</sup> 42 U.S.C. § 12101.

<sup>52</sup> *See id.*

<sup>53</sup> *Id.* § 12101(a)(3).

<sup>54</sup> *Id.* § 12131.

<sup>55</sup> *Id.* § 12181–89.

<sup>56</sup> Monica Murphy, *Americans with Disabilities Act: Title III - Public Accommodations*, WIS. COALITION FOR ADVOC. 326 (2008), <http://www.disabilityrightswi.org/wp-content/uploads/2008/09/ada-title-3.PDF>.

<sup>57</sup> 42 U.S.C. § 12111(8).

<sup>58</sup> *Id.* § 12102.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Under the ADA, a public accommodation, place of employment, or public service must modify its policies, practices, and procedures “when necessary to afford goods, services, facilities, privileges, advantages, or accommodations” for a person who meets the definition of disabled under the ADA, so long as it does not result in a fundamental alteration of the public accommodation’s business model.<sup>61</sup> This is known as a “reasonable accommodation.”<sup>62</sup> One example of a reasonable accommodation is the use of a service dog to assist persons with disabilities.<sup>63</sup> The ADA, itself, is silent on whether service animals are a reasonable accommodation; however, the DOJ interpreted the ADA to require covered entities to “modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.”<sup>64</sup> Federal law does not require the dog to be professionally trained, registered, or provide a specific degree of service.<sup>65</sup> The only requirement is that the dog must perform work that directly relates to the individual’s disability.<sup>66</sup> The ADA does not apply to housing or air transportation, because other federal statutes govern these areas.<sup>67</sup>

If a covered entity has a “no pets” policy, they must still allow service animals on the premises.<sup>68</sup> A covered entity may inquire whether the animal is a service animal by asking two questions: (1) is a service animal required because of a disability? and (2) what tasks has the service animal been trained to perform?<sup>69</sup> Discrimination under these Titles includes not making reasonable accommodations for known physical or mental limitations.<sup>70</sup> Establishing that the requested accommodation is necessary for a person with a disability to gain access to a place of public accommodation is a critical component in any disability discrimination claim. Courts have generally

<sup>61</sup> See 28 C.F.R. § 36.302(a) (2017).

<sup>62</sup> U.S. EQUAL EMP. OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), <https://www.eeoc.gov/policy/docs/accommodation.html#general>.

<sup>63</sup> ADAM P. KARP, UNDERSTANDING ANIMAL LAW 677 (2016).

<sup>64</sup> 28 C.F.R. § 36.302(c). In addition to dogs, miniature horses can also be a service animal, however, this Article will focus exclusively on dogs as service animals and emotional support animals.

<sup>65</sup> See *id.*

<sup>66</sup> *Id.* § 36.104.

<sup>67</sup> See generally DISABILITY RIGHTS SECTION, U.S. DEP’T OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS 9–11 (2009), <https://www.ada.gov/cguide.pdf> (discussing the Fair Housing Act and Air Carrier Access Act).

<sup>68</sup> See JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, RIGHT TO EMOTIONAL SUPPORT ANIMALS IN “NO PET” HOUSING 1 (2017), <http://www.bazelon.org/wp-content/uploads/2017/04/2017-06-16-Emotional-Support-Animal-Fact-Sheet-for-Website-final.pdf>.

<sup>69</sup> DISABILITY RIGHTS SECTION, *supra* note 15, at 2.

<sup>70</sup> See 42 U.S.C. § 3604(f)(3)(B) (establishing that discrimination in rental housing includes a “refusal to make reasonable accommodations”); 28 C.F.R. § 36.302(c) (providing further guidance on “reasonable accommodations”).

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held that the person requesting the accommodation must not only demonstrate a need for the accommodation but that the need is related to his or her disability.<sup>71</sup>

For example, the Seventh Circuit Court of Appeals in *Bronk v. Ineichen*,<sup>72</sup> required a showing of a “nexus” between the service the animal provided and the disability, where deaf tenants alleged that their landlord discriminated against them by refusing to allow them to keep their hearing assistance dog in their home.<sup>73</sup> Specifically, the court held that the “concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff’s life by ameliorating the effects of the disability.”<sup>74</sup> In other words, “[i]f the proposed accommodation provides no direct amelioration of a disability’s effect, it cannot be said to be ‘necessary.’”<sup>75</sup>

If allowing the service animal onto the premises would be an undue burden, meaning it would be significantly difficult or expensive, the ADA does not require the business to provide the requested reasonable accommodation.<sup>76</sup> The ADA also allows businesses to consider the health or safety of its patrons when deciding whether to provide reasonable accommodations.<sup>77</sup> A place of public accommodation may ask the handler to remove the service animal if “the animal is out of control and the animal’s handler does not take effective action to control it[.]”<sup>78</sup> The legislature makes clear that “[a] public accommodation is not responsible for caring for or supervising a service animal.”<sup>79</sup>

### III. FEDERAL LAWS THAT RECOGNIZE EMOTIONAL SUPPORT ANIMALS

Looking to other federal acts that regulate service animals helps demonstrate why it would be appropriate for the ADA to recognize emotional

<sup>71</sup> See, e.g., *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995).

<sup>72</sup> See *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).

<sup>73</sup> See *id.*

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

<sup>75</sup> *Bryant Woods Inn, Inc. v. Howard Cty.*, 124 F.3d 597, 604 (4th Cir. 1997) (citing *Bronk*, 54 F.3d 425).

<sup>76</sup> See 28 C.F.R. § 36.104 (defining “undue burden”).

<sup>77</sup> See *id.* (defining “direct threat”).

<sup>78</sup> 28 C.F.R. § 35.136 (2017).

<sup>79</sup> *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 73 Fed. Reg. 34,508, 34,553 (June 17, 2008) (codified at 28 C.F.R. pt. 36).

support dogs as service animals. The U.S. Department of Housing and Urban Development (HUD) and the U.S. Department of Transportation (DOT) recognize the benefits of emotional support dogs. DOJ argues that excluding emotional support dogs under the ADA is rational, in part, because the Fair Housing Act (FHA) and Air Carrier Access Act (ACAA) allow emotional support animals.<sup>80</sup> DOJ's argument can be equally applied for the inclusion of emotional support animals under the ADA. If federal laws such as the FHA and ACAA include emotional support animals, so too can the ADA.

### A. Fair Housing Act

As part of the Civil Rights Act of 1968, the FHA was passed to address discrimination on the basis of race, color, national origin, or gender in housing.<sup>81</sup> Then, in 1988, the FHA was expanded to include disabled persons.<sup>82</sup> By showing the failure to provide a reasonable accommodation, such as a service dog, plaintiffs may prove discrimination under the FHA.<sup>83</sup>

The FHA covers many forms of housing such as rental housing, assisted-living facilities, campus housing, and nursing homes.<sup>84</sup> DOJ and HUD are jointly responsible for enforcing the FHA.<sup>85</sup> HUD utilizes a broader definition of service animal beyond that of the ADA.<sup>86</sup> Under the FHA, an emotional support animal is viewed as a "reasonable accommodation."<sup>87</sup> In guidance, HUD defines an assistance animal as "an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person's disability."<sup>88</sup>

HUD's expansive definition of service animal is supported by its administrative decisions. There are numerous cases in which HUD filed charges

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<sup>80</sup> *Id.* at 34,522.

<sup>81</sup> U.S. DEP'T OF HOUS. & URBAN DEV., TITLE VIII: FAIR HOUSING AND EQUAL OPPORTUNITY (2007), [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/progdesc/title8](https://www.hud.gov/program_offices/fair_housing_equal_opp/progdesc/title8).

<sup>82</sup> *Id.*

<sup>83</sup> See JOHN TRASVIÑA, U.S. DEP'T OF HOUS. & URBAN DEV., SERVICE ANIMALS AND ASSISTANCE FOR PEOPLE WITH DISABILITIES IN HOUSING AND HUD-FUNDED PROGRAMS 2 (2013), [https://www.hud.gov/sites/documents/SERVANIMALS\\_NTCFHEO2013-01.PDF](https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF).

<sup>84</sup> *Id.*

<sup>85</sup> U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 81.

<sup>86</sup> TRASVIÑA, *supra* note 83, at 2.

<sup>87</sup> *See id.*

<sup>88</sup> *Id.* (emphasis added).

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against landlords for failing to accommodate tenant's emotional support dog.<sup>89</sup> Gustavo Velasquez, former HUD Assistant Secretary for Fair Housing and Equal Opportunity, stated, that "[f]or many people with disabilities, support animals are essential to their ability to perform everyday activities that others take for granted. The Fair Housing Act requires housing providers to grant reasonable accommodations, and HUD is committed to taking action if they fail to meet that obligation."<sup>90</sup>

In one case, HUD charged Condominium Association with violating the rights of a homeowner by discriminating against him when the association refused to reasonably accommodate his emotional support dog.<sup>91</sup> The Association appealed. HUD found the Association knew or should have known that the homeowner suffered from a cognizable disability and improvidently denied homeowner's reasonable accommodation request for housing his emotional support dog. The Association was found liable for discriminating against the homeowner.<sup>92</sup>

In another case, a Santa Fe, New Mexico landlord refused to allow a renter with disabilities keep her emotional support cat.<sup>93</sup> The landlord threatened to evict the woman if she did not remove the cat.<sup>94</sup> Based on HUD's investigations, they determined that there was sufficient cause to charge the landlord with discrimination.<sup>95</sup>

In another example, HUD charged Kent State University with housing discrimination for refusing to allow a student with disabilities keep her emotional support dog in her campus apartment.<sup>96</sup> Despite the fact that the University's psychologist, who treated the student, wrote a letter to the

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<sup>89</sup> HUD v. Gordon Jong, FHEO No. 09-14-0267-8 (HUD ALJ Sept. 30, 2014), [https://archives.hud.gov/news/2014/pr14-138-14\\_Gordon.pdf](https://archives.hud.gov/news/2014/pr14-138-14_Gordon.pdf) (charging landlord with housing discrimination after denying tenants reasonable request for accommodation for an emotional support animal and threatening to evict or have her examined by a psychiatrist); U.S. DEP'T OF HOUS. & URBAN DEV., HUD CHARGES BROOKLYN CO-OP WITH DISCRIMINATING AGAINST DISABLED VETERAN (2015), <https://archives.hud.gov/news/2015/pr15-002.cfm> (charging landlord with housing discrimination for refusing to allow a veteran with a psychiatric disability to keep an emotional support animal); U.S. DEP'T OF HOUS. & URBAN DEV., HUD FINDS THAT PUERTO RICO CONDO ASSOCIATION DISCRIMINATED AGAINST RESIDENT WITH DISABILITIES (2014), <https://archives.hud.gov/news/2014/pr14-142.cfm> (ordering condo association to pay \$20,000 in damages plus a \$16,000 civil penalty after finding that the association violated the FHA when it refused to allow a resident with disabilities to keep his emotional support animal).

<sup>90</sup> HUD Charges Brooklyn Co-Op with Discriminating Against Disabled Veteran, *supra* note 89.

<sup>91</sup> Castillo Condo. Ass'n v. HUD, 821 F.3d 92, 95 (1st Cir. 2016).

<sup>92</sup> *Id.* at 100.

<sup>93</sup> HUD v. Anderson, FHEO No. 06-14-0049-8, at 5 (HUD ALJ Apr. 22, 2015).

<sup>94</sup> *Id.* at 4-5.

<sup>95</sup> *Id.* at 6.

<sup>96</sup> HUD v. Kent State Univ., FHEO Nos. 05-10-0670-8 & 05-10-0669-8, at 1 (HUD ALJ Aug. 1, 2014).

University stating that having an emotional support dog was the best way for the student to cope with her disabilities, the student had been forced to move out of her apartment.<sup>97</sup>

### B. Air Carrier Access Act

The ACAA requires airlines to allow passengers to bring their service animals on board commercial flights.<sup>98</sup> The definition of service animal under the ACAA includes emotional support animals that carry proper documentation, excluding state and local government documentation.<sup>99</sup> The ACAA defines a service animal as “[a]ny animal that is individually trained or able to provide assistance to a qualified person with a disability; or any animal shown by documentation to be necessary for the emotional well-being of a passenger.”<sup>100</sup> No training is required but a reasonable explanation must be provided as to the animal’s functions.<sup>101</sup>

An air carrier may ask a passenger about the status of the animal as an emotional support animal.<sup>102</sup> However, “credible verbal assurances,” in addition to tags, ID cards, and other documentation, should be accepted as proper evidence of the animal status.<sup>103</sup> The emotional support animal may sit where the disabled person does so long as no aisles are obstructed and emergency evacuation remains possible.<sup>104</sup> Although formal training is not required to bring any emotional support animal on a plane,<sup>105</sup> they may be excluded if there is a direct threat to the health or safety of other passengers.<sup>106</sup> “[A]n air carrier may refuse to transport the passenger, delay the passenger’s transportation, impose conditions, restrictions or requirements not imposed on other passengers, or require the passenger to prove a medical certification if the passenger poses a direct threat.”<sup>107</sup> Unfortunately, in-

<sup>97</sup> *Id.* at 4, 8.

<sup>98</sup> 14 C.F.R. § 382.117(a).

<sup>99</sup> Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24,874, 24,875 (May 9, 2003) (to be codified at 14 C.F.R. pt. 382).

<sup>100</sup> *Id.* at 24,878.

<sup>101</sup> KARP, *supra* note 63, at 690.

<sup>102</sup> *See* 14 C.F.R. § 382.117(d).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* § 382.117(b).

<sup>105</sup> Jacquie Brennan & Vinh Nguyen, *Service Animals and Emotional Support Animals: Where Are They Allowed and Under What Conditions?*, ADA NAT’L NETWORK (2014), <https://adata.org/publication/service-animals-booklet>;

<sup>106</sup> *See* 14 C.F.R. § 382.19(c)(1).

<sup>107</sup> *Id.* § 382.21(a).

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stances have occurred where emotional support animals have attacked and injured other passengers.<sup>108</sup> The increase in these occurrences has caused airlines to make the requirements more stringent.<sup>109</sup>

#### IV. AMENDING THE ADA TO INCLUDE EMOTIONAL SUPPORT DOGS

The Department of Justice's blanket exclusion of emotional support dogs causes more problems than it eliminates. This section discusses one appropriate way to address the breadth of contexts for emotional support dogs through individualized inquiry into the facts and circumstances. Moreover, it argues therapeutic benefits provided by dogs to a person with a disability should be considered work or a task. Additionally, it suggests concerns about the misuse of emotional support animals can be overcome through the mandate of certification. Further, public health and safety concerns, although legitimate, are not enough to prevent a person with a valid disability from their right to integration into the community. Solutions provided in the ADA address the health and safety of others after a service animal has been allowed access to the premises. These solutions can be extended to emotional support animals.

##### A. Categorical Exclusion of Emotional Support Dogs Increases Discrimination

The purpose of the ADA is to protect people with disabilities.<sup>110</sup> Consequently, the focus of the potential coverage of emotional support dogs should not be on the type of work the animal performs, but instead should focus “on the nature of a person’s disability, the difficulties the disability may impose, and whether the requested accommodation would legitimately address those difficulties.”<sup>111</sup>

Comments on changes to the DOJ regulations on this topic identified the connection between the animal and the therapeutic effect on a disabled per-

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<sup>108</sup> See, e.g., Kelly Yamanouchi, *Delta Passenger Bitten by Emotional Support Dog Couldn't Escape, Says Attorney*, ATLANTA J. CONST. (June 8, 2017), <https://www.ajc.com/travel/delta-passenger-bitten-emotional-support-dog-couldn-escape-says-attorney/nYtlgO1rGbVMv68XekCWUL/>.

<sup>109</sup> Daniel Arkin, *Delta Sets New Guidelines on Service Animals Allowed on Board*, NBC NEWS (Jan. 19, 2018), <https://www.nbcnews.com/storyline/airplane-mode/delta-imposes-new-guidelines-service-animals-allowed-board-n839186>.

<sup>110</sup> 42 U.S.C. § 12101(b).

<sup>111</sup> Kevin Underhill, Shook, Hardy & Bacon, LLP., Comment Letter on Proposed Change to Service Animal Regulations (Aug. 18, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1546>.

son.<sup>112</sup> Kevin Underhill, a California attorney and advocate for persons with disabilities, reasoned that “[c]ourts interpreting other laws requiring reasonable accommodations have recognized that, under the right circumstances, whether an animal is 'specially trained' or has any 'special skills' may be irrelevant to the goal of preventing discrimination against its owner by protecting the ability to use and enjoy the dwelling.”<sup>113</sup> Underhill argues that although recognizing emotional support dogs under the ADA may undermine the right to more traditional service animals, emotional support dogs can certainly co-exist under the current standards.<sup>114</sup> He wrote, “Abuse of the right to reasonable accommodation should not be tolerated, but it is going too far to categorically exclude what might be called 'emotional support animals' under another law from ADA coverage as ‘service animals.’”<sup>115</sup>

Rather than imposing a categorical exclusion of emotional support dogs, an individualized inquiry into the particular circumstances should be made. Language that specifically excludes individually trained “comfort” or “emotional support” dogs from the definition of service animal increases discrimination to those persons who have disabilities that may not be readily visible. Erika Hagensen explains how exclusions of emotional support dogs may affect persons with cognitive or psychiatric disabilities:

The proposed exclusion includes animals that provide “therapeutic benefits” to a person with a disability. There is no principled distinction between work that provides “therapeutic benefits” to a person with a cognitive or psychiatric disability and work that otherwise accommodates the needs of a person with a cognitive or psychiatric disability. The proposed exclusion simply invites covered entities to disallow the use of legitimate service animals.<sup>116</sup>

The difficulty in distinguishing between psychiatric service dogs and emotional support dogs leads to increased discrimination by covered enti-

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<sup>112</sup> *Id.*; see also Michelle Krajewski, Jennifer Nugent & Bonnie Payberah, The Whole Person, Inc. Comment Letter on DOJ-CRT-2008-0015 (Aug. 18, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1532> (discussing the use of animals by people with psychiatric disorders such as severe anxiety “who can only access public goods and services or government programs because their service animal allows them to venture into public without debilitating panic attacks.”).

<sup>113</sup> Underhill, *supra* note 111 (citing to Auburn Woods Homeowners Ass’n v. Fair Emp’t Hous. Comm’n, 18 Cal. Rptr. 3d 669, 682 (Cal. Ct. App. 2004) (applying The Fair Employment and Housing Act holding that “it was the innate qualities of a dog, in particular, a dog’s friendliness and ability to interact with humans, that made it therapeutic here.”)).

<sup>114</sup> Underhill, *supra* note 111.

<sup>115</sup> *Id.*

<sup>116</sup> Hagensen, *supra* note 33 (stating that a blanket exclusion was “inconsistent with the basic tenets of the ADA.”).

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ties.<sup>117</sup>

There is only one subject area in the ADA regulations that mentions accommodations for persons with psychiatric disabilities.<sup>118</sup> In that portion, DOJ excludes from the definition of service animals those “whose sole function is to provide emotional support, comfort, therapy, companionship, therapeutic benefits, or to promote emotional well-being.”<sup>119</sup> The ADA does not address why disabled people are excluded from obtaining necessary and reasonable accommodations for their emotional support dogs.<sup>120</sup> Instead, DOJ alludes to someone who tries to claim the benefits of a disability he or she does not truly have.<sup>121</sup> DOJ claims that persons with mental impairments, “many of which do not rise to the level of disability,” are the ones that primarily use emotional support animals.<sup>122</sup> “It is an ongoing challenge and responsibility of the Department, people with disabilities, and their advocates to educate the public about the variety of disabilities and what accommodations are needed.”<sup>123</sup> Rather than categorically excluding emotional support dogs because of the possibility that someone may misrepresent himself, DOJ should educate covered entities of the reasons why emotional support dogs are a reasonable and necessary accommodation for those with psychiatric disabilities. For example, DOJ has established an ADA webpage to educate people and covered entities about the rights protected under the ADA.<sup>124</sup> DOJ can include information about emotional support animals and their vital importance to those individuals who need them on the webpage.

Dinah Luck, a senior staff attorney at Mobilization for Justice, argues that the effects of psychiatric disabilities can be ameliorated with the help of emotional support dogs.<sup>125</sup> For example, an individual who is diagnosed with major depression “may not even be able to get out of bed on some days. Having an emotional support dog that needs to go outside and be cared for can motivate a severely depressed person to leave her home and

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<sup>117</sup> *See id.*

<sup>118</sup> 73 Fed. Reg. 34,553.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 34,522.

<sup>121</sup> *See id.*

<sup>122</sup> *Id.*

<sup>123</sup> Maro Constantinou, Dinah Luck & Brian Sullivan, MYF Legal Services, Inc., Comment Letter on Proposed Rules on Nondiscrimination on the Basis of Disability in State and Local Government Services and by Public Accommodations and in Commercial Facilities (Aug. 18, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1556>.

<sup>124</sup> CIVIL RIGHTS DIV., DEP'T OF JUSTICE, INFORMATION AND TECHNICAL ASSISTANCE ON THE ADA, <https://www.ada.gov> (last visited Mar. 29, 2018).

<sup>125</sup> Constantinou et al., *supra* note 123.

interact with people in the community.”<sup>126</sup> Luck further explains that emotional support dogs can benefit an individual who suffers from panic attacks because “knowing that the animal will stay with her during an attack can lessen the fearful anticipation of an attack, and . . . the presence of the animal during the attack can shorten its duration and severity.”<sup>127</sup> In addition, an emotional support dog can help a person with schizophrenia by grounding him, and he may “find himself better able to cope in public places with delusions that are not fully controlled by medications.”<sup>128</sup>

While DOJ is rightfully concerned about persons who may exploit the accommodation of an emotional support dog, this reasoning can prevent people with an invisible disability from receiving the accommodation they need. A perfectly healthy person could claim any number of invisible disabilities and that her dog is trained to perform work or tasks related to those disabilities.<sup>129</sup> However, it is discriminatory to presume that only people who need emotional support dogs are more likely to misrepresent their need. Although some individuals with readily apparent disabilities already have a difficult time gaining access to covered entities, it is sound public policy to expand the definition of service animals under the ADA. This reinforces the need for further education about the role of emotional support dogs as service animals in our society. Dogs who provide emotional support are no less important or necessary because they are not specially trained. Emotional support dogs increase disabled persons’ access to an integrated life in the community the same way trained animals do.

DOJ has also recognized that disabled people are trusted to self-certify to covered entities that their animal is required because of their disability. This is evidenced by the fact that the ADA does not require a disabled person to provide proof of training or certification and cannot be required to explain the nature or extent of her disability.<sup>130</sup> As stated previously, covered entities are limited to the two-question inquiry: (1) is the animal required because of a disability? and (2) what work or tasks has the animal been trained to perform?<sup>131</sup> If DOJ is correct and those who are disabled will be the only one using service animals, then the same reasoning should equally be applied to those who need emotional support dogs.

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., Shannon Adler & Joel Eisenbaum, *Channel 2 Investigates Fake Service Dog Industry*, CLICK 2 HOUSTON (Feb. 17, 2017), <https://www.click2houston.com/news/investigates/channel-2-investigates-fake-service-dog-industry>.

<sup>130</sup> 73 Fed. Reg. 34,524.

<sup>131</sup> *Id.*

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The above fact-specific inquiry can be satisfied by the use of an emotional support dog to determine a reasonable accommodation. If programs and services of state and local governments, commercial facilities, and public accommodations are not required to accommodate emotional support dogs, disabled individuals who need these animals will be denied equal access. This results in disabled persons, who rely on emotional support dogs, being further isolated and segregated from larger society.

DOJ justifies the exclusion of emotional support dogs based on the assumption that “title II and title III regulations govern a wider range of public settings than the settings that allow for emotional support animals.”<sup>132</sup> DOJ reasons that it makes sense for emotional support animals to be covered as accommodations in housing or employment, but not under Titles II and III due to the broad array of settings those titles reach.<sup>133</sup> This is not logical; an accommodation should not be considered per se unreasonable based on the wide array of possible accommodations. Those who benefit from emotional support dogs should have access to the services of state and local programs and public accommodations. DOJ further reasons that, under the FHA, people can still have emotional support animals in their homes. However, this does not serve the ADA goal of full integration of people with disabilities into society. When an individual needs her emotional support dog, the presence of that animal in her home does not help her alleviate her disabling symptoms or integrate her while in the community. A person who cannot bring their emotional support dog with them when they leave their home and enter the community is effectively excluded from participation in public accommodations, and, therefore, discriminated against for purposes of the ADA.

Moreover, in practice, covered entities may have difficulty distinguishing between psychiatric service animals, who are covered under the ADA, and emotional support animals. This confusion makes it difficult for covered entities to determine whether the owner’s dog is in fact a service dog or is an emotional support dog. This inability to make a determination creates tension and leads to improper inquiry into the individual’s disability thereby resulting in unlawful discriminatory treatment against individuals with non-visible or non-apparent disabilities. When other federal laws like FHA and ACAA recognize access for emotional support animals, the confusion grows. Ultimately, “it is inappropriate for the [DOJ,] with a mandate to enforce the ADA to solve a possible problem of abuse by simply removing its

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<sup>132</sup> *Id.* at 34,516.

<sup>133</sup> *Id.*

protections from one class of people with very real needs.”<sup>134</sup> The purpose of the ADA is to protect disabled persons and the exclusion of emotional support dogs is inconsistent with that purpose.

#### B. Providing Emotional Support Should Be Classified as 'Work' or a 'Task'

The distinction between emotional support animal and service animal fails to account for the fact that “[u]nlike traditional service animals that are used to perform a physical task, the interaction with and presence of emotional support animals alone is thought to have psychological benefits “that ameliorate an individual’s disability.”<sup>135</sup> If DOJ will not eliminate the requirement that a service dog be “individually trained to do work or perform tasks,”<sup>136</sup> it should classify the provision of emotional support and other therapeutic benefits as “doing work or performing a task.” DOJ intends to maintain a broad definition of “work.”<sup>137</sup> But by refusing to classify emotional support as “work,” DOJ deviates from its goal of maintaining broad discretion.<sup>138</sup>

Numerous organizations advocating for disabled persons support the idea that providing emotional support is a task or work. These organizations have encouraged DOJ to do the same:

The active provision of comfort, stress reduction and/or emotional support to a qualified individual with a disability whose disability results in an inability to self-soothe or de-escalate and control emotions, or whose disability is exacerbated by stress, is “work” that benefits the individual with the disability and should be recognized as such.<sup>139</sup>

<sup>134</sup> Constantinou et al., *supra* note 123.

<sup>135</sup> Huss, *supra* note 4, at 71.

<sup>136</sup> 73 Fed. Reg. 34,516.

<sup>137</sup> *See id.* at 34,521.

<sup>138</sup> *Id.* at 34,516. Members of the community, Psychiatric Service Dog Partners, shared their stories explaining what kind of tasks or work their dog performs. “Tanka recognizes when my anxiety level is rising, and gets silly, or playful, demanding my attention until my attention is refocused on him through play or walking, until my anxiety level reduces. This was not initially taught, rather it was an innate behavior that once recognized I simply continue to nurture.” PSYCHIATRIC SERV. DOG PARTNERS, WORK & TASK STORIES, <https://www.psychdogpartners.org/resources/work-tasks/work-task-stories> (last visited Feb. 24, 2018).

<sup>139</sup> Annaliese Dolph, Disability Rights North Carolina, Comment Letter on Proposed Rules on Nondiscrimination on the Basis of Disability in State and Local Government Services (Aug. 18, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1494>; Angela Ostrom, Epilepsy Foundation, Comment Letter on Proposed Rules on Nondiscrimination on the Basis of Disability in State and Local Government Services (Aug. 21, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0015-2508>; Kenneth Shiotani, National Disability Rights Network, Comment Letter on Proposed Rules on Nondiscrimination on the Basis of Disability in State and Local Government Services (Aug.

Emotional support as a task can hardly be differentiated from tasks performed by psychiatric dogs. One of the main seizure triggers in persons with epilepsy is psychological stress.<sup>140</sup> The presence of a familiar animal is known to reduce stress for persons with epilepsy and other disabilities, thereby mitigating one of the main triggers of seizures.<sup>141</sup> Moreover, after a seizure when a person is typically confused and disoriented, a dog can serve as a comforting presence, in addition to aiding the person as they re-orient to their surroundings.<sup>142</sup> Just like the functions of a psychiatric service dog, these functions constitute work within the meaning of the regulation.

Mary Faithfull, the Executive Director of Disability Rights Texas, argues that it is critically important to provide comfort or emotional support for many people with disabilities to integrate into the community.<sup>143</sup> Faithful further argues that,

the language of the proposed definition, focusing as it does on “trained” animals, may not only exclude animals that provide support to individuals with psychiatric impairments, but may also exclude certain seizure-alert animals. Some animals are actually trained to lick the face and provide minimal protection during seizures, and the Department of Justice's guidance acknowledges that fact. But our understanding is that there are other seizure-alert animals with an ability to warn of impending seizures that is innate and not learned. People fortunate enough to have an animal with this ability should also have their access protected.<sup>144</sup>

Indeed, if an animal's mere presence does in fact provide such benefits to a person who is disabled, and those benefits are necessary to provide equal opportunity given the particular circumstances of the disability, and if the accommodation would be reasonable, then such an animal should qualify as a service animal.<sup>145</sup>

Emotional support dogs also have been utilized in court proceedings to

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15, 2008), <https://www.regulations.gov/document?D=DOJ-CRT-2008-0016-1644>; *see also* Hagensen, *supra* note 33 (explaining the Arc's support for the Department's decision to leave the words “do work” in the definition of service animal and opposition to the categorical exclusion of animals that provide emotional support from the category of service animals covered under the ADA).

<sup>140</sup> Ostrom, *supra* note 139; *see also* Karl O. Nakken et al., *Which Seizure-Precipitating Factors Do Patients with Epilepsy Most Frequently Report?*, 6 *EPILEPSY & BEHAV.* 85, 87 (2004).

<sup>141</sup> Ostrom, *supra* note 139.

<sup>142</sup> *Id.*

<sup>143</sup> Faithfull, *supra* note 17.

<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

assist testifying witnesses who demonstrate a compelling need for emotional support.<sup>146</sup> Emotional support dogs have been utilized during forensic interviews in a child abuse case and for emotionally fragile witnesses during testimony in court.<sup>147</sup> The dog's function is to provide comfort and mitigate fear and anxiety.<sup>148</sup> DOJ agrees that physical tasks, like opening a door, are not required by including tasks such as reminding the owner to take medication, or grounding individuals with dissociative identity disorder in time and place.<sup>149</sup> There is no reason not to classify emotional support as a task when DOJ does not require all tasks to be physical in nature. If emotional support is not considered work or a task, then an emotional support dog can never be a service animal even when the dog is trained to provide comfort or emotional support after an anxiety attack or seizure, for example.

### C. Certification Requirement

Currently, DOJ does not require certification of any service animal.<sup>150</sup> This position is clarified by the regulation, which states, "a public accommodation must not . . . require proof of service animal certification or licensing."<sup>151</sup> Places of public accommodation are limited to the two-question inquiry.<sup>152</sup> DOJ reasons that certification is not necessary, because it "does not believe such a modification would serve the array of individuals with disabilities who use service animals."<sup>153</sup> This reasoning implies that access to public accommodations would be limited if certification were required. Numerous organizations oppose the requirement of certification on the belief that it will burden disabled individuals who would be required to obtain certification and that it would violate their privacy.<sup>154</sup> However, these concerns can easily be overcome.

Certification may provide greater access to public accommodations by making it easier for these places to determine the status of the individual's service animal. Indeed, certification significantly decreases the burden placed on those individuals who show no signs of a disability but still rely

<sup>146</sup> See Casey Holder, Comment, *All Dogs Go to Court: The Impact of Court Facility Dogs as Comfort for Child Witnesses on a Defendant's Right to a Fair Trial*, 50 HOUS. L. REV. 1155, 1179 (2013).

<sup>147</sup> See *id.* at 1180.

<sup>148</sup> *Id.*

<sup>149</sup> 28 C.F.R. § 36.104.

<sup>150</sup> 73 Fed. Reg. 34,524.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 34,516.

<sup>154</sup> See *id.* at 34,527, 34,539.

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on emotional support dogs. Further, it would be no less burdensome on a disabled individual to have to carry around a certification for their emotional support animal than it would be carrying around a driver's license or disabled parking permit.

Moreover, privacy would not be violated because the certification would only be required to be provided to those entities that are covered under the ADA.<sup>155</sup> Therefore, the number of people with access to information regarding an individual's disability would be limited. Further, the government already makes eligibility determinations when individuals apply for disability benefits and assistance.<sup>156</sup> This process could hardly be construed as unreasonable or burdensome for its applicants and could provide the framework for certification.

As discussed above, covered entities are allowed to ask, absent visible signs, about the work or tasks the service animal is trained to perform.<sup>157</sup> Under this current process, the answer to this question will undoubtedly provide private information regarding the type of disability an individual has. Requiring certification would be no more intrusive. In fact, the individual would simply be able to hand the covered entity a card that confirms that the dog is a certified service animal and the individual is protected under the ADA. This eliminates the need to require disabled persons to answer potentially invasive questions, and it eliminates the embarrassing resistance or denial of access. Also, certification may help those diagnosed with severe anxiety disorder who are apprehensive about confrontation.

DOJ should develop a process that certifies that an individual's disability meets the ADA requirements. For example, the handicapped parking permitting process could be followed.<sup>158</sup> The federal and state governments regulate handicapped-parking permits.<sup>159</sup> The state maintains control over the process of distributing the permits; however, federal law provides basic requirements for a person to obtain a handicapped-parking permit.<sup>160</sup> Federal law requires that states have a licensed physician certify that the individual meets the basic requirements.<sup>161</sup> This empowers states to determine the

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<sup>155</sup> See 73 Fed. Reg. 34,510, 34,538.

<sup>156</sup> See SOC. SECURITY ADMIN., DISABILITY PLANNER: WHAT WE MEAN BY DISABILITY, <https://www.ssa.gov/planners/disability/dqualify4.html> (last visited Mar. 29, 2018).

<sup>157</sup> DISABILITY RIGHTS SECTION, *supra* note 15, at 2.

<sup>158</sup> See generally 23 C.F.R. § 1235 (2017) (establishing guidelines for a uniform system for handicap parking for people with disabilities).

<sup>159</sup> See *id.* § 1235.1.

<sup>160</sup> See *id.* § 1235.1–1235.5.

<sup>161</sup> *Id.* § 1235.2–1235.3.

best method by which they can implement the handicap parking permit program.<sup>162</sup> While the implementation process varies by state, all states require certification by a health professional prior to issuing a handicapped-parking permit.<sup>163</sup>

Guidelines can be established by DOJ to establish the minimum requirements for an individual's disability to be covered by the ADA. States should be permitted to choose the best method of implementation as long as the federal regulations are followed. One such certification process could follow the ACAA's certification model for emotional support animals.<sup>164</sup> The ACAA deviates from the ADA in that it requires certification of animals that are classified as emotional support animals.<sup>165</sup> In addition, documentation such as a letter from a licensed physician disclosing that (1) the individual has a disability, and (2) having the animal accompany the owner is necessary to assist with the owner's disability.<sup>166</sup> This procedure can be modified and combined with other requirements to create a certification process for service animals.

Although people have become quite creative in taking advantage of the handicapped parking permit process,<sup>167</sup> DOJ could be more proactive to prevent such abuses from occurring in the certification process for service animals. A few states have taken measures to correct these abuses, and the DOJ should consider these policies.<sup>168</sup> First, doctors can be required to provide a notarized statement certifying the impairment.<sup>169</sup> An ordinance in Houston, Texas requires doctors to have a notarized statement certifying that the applicant is mobility-impaired.<sup>170</sup>

Second, penalties can be imposed on doctors who fraudulently certify an individual.<sup>171</sup> For example, doctors in Louisiana who falsely certify an indi-

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<sup>162</sup> See Bourland, *supra* note 37, at 218–19.

<sup>163</sup> *Id.* at 218.

<sup>164</sup> See 14 C.F.R. § 382.117(d).

<sup>165</sup> *Id.* § 382.117(e).

<sup>166</sup> *Id.* (explaining that the letter must also state that the physician is certified and the individual is currently under the physician's care.).

<sup>167</sup> See Geoffrey P. Miller & Lori S. Singer, *Handicapped Parking*, 29 HOFSTRA L. REV. 81, 105–109 (2000) (explaining how individuals take advantage of the handicapped parking permits).

<sup>168</sup> See *id.* at 111 (explaining how Texas, Florida, and California have tightened handicapped permit procedures).

<sup>169</sup> See *id.*; see also EDWARD JENNINGS ET AL., MARTIN SCH. OF PUB. POLICY & ADMIN., HANDICAP PARKING ABUSE: POLICY SOLUTIONS FOR KENTUCKY 16 (2003), <http://chfs.ky.gov/nr/rdonlyres/0b29a6db-200b-450b-8d06-97ba247452c1/150148/handicappedparkingabuse100803.pdf>.

<sup>170</sup> H.B. 580, 75th Leg. Reg. Sess. (Tex. 1997).

<sup>171</sup> See Miller & Singer, *supra* note 167, at 113.

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vidual face fines of up to \$1000 and imprisonment for 90 days.<sup>172</sup> Stricter penalties can also be imposed on those individuals who misuse or fraudulently obtain the certification. For instance, the County Commission in St. Petersburg, Florida increased the mandated minimum fine from \$105 to \$250 for illegally parking in handicap spaces.<sup>173</sup> Second offenders are also required to complete forty hours of community service.<sup>174</sup>

Lastly, states and DOJ can harness public education to promote valid use of the permits. In Massachusetts, a public advertisement ran on local television stations in which a war hero, Charles MacGillivray, who lost an arm in battle said that he “would trade [his Medal of Honor] for a parking space.”<sup>175</sup> In Onandaga County, New York, the County declared June “Disabled Parking Awareness Month” in an effort to dissuade able-bodied citizens from parking in disabled spots.<sup>176</sup>

#### D. Public Health and Safety Concerns

Public health and safety concerns are issues that cannot be overlooked. Many people are rightfully concerned that allowing emotional support dogs in places of public accommodation would increase the risk of dog bites or other injuries related to the interaction between dogs and humans. More than 4.5 million people per year reportedly suffer a dog bite.<sup>177</sup> In addition, many people are allergic to animal dander and would find it impossible to eat or work next to a service dog. Numerous blogs, news stories, and articles discuss the concern that fake service animals pose a public health risk.<sup>178</sup> One article in particular mentions that service dogs and non-service dogs could easily be identified by their behavior.<sup>179</sup> For example, the article mentions that true service animals are well behaved and do not inconven-

<sup>172</sup> James Varney, *Handicapped License Plates Abound - Scofflaws Are Tough to Prove*, TIMES-PICAYUNE, Feb. 9, 1998, at B1.

<sup>173</sup> Mathew Horridge, *Parking Law Gets 2nd Look*, TAMPA TRIB., July 28, 1997, at 1.

<sup>174</sup> *Id.*

<sup>175</sup> *New Placards to Aid in Identifying Cars of the Handicapped*, BOS. GLOBE, Dec. 17, 1997, at B5.

<sup>176</sup> *June Named Disabled Parking Awareness Month by City, County*, POST-STANDARD, June 17, 1994, at C1.

<sup>177</sup> Centers for Disease Control & Prevention, Dep't of Health & Human Serv., Preventing Dog Bites, <https://www.cdc.gov/healthypets/pets/dogs.html#dog-bites> (last visited Mar. 29, 2018).

<sup>178</sup> See, e.g., Carter Evans, *Pets Posing as Service Dogs Make Life Rough for People Who Really Need Animals' Help*, CBS NEWS (Nov. 17, 2013), <https://www.cbsnews.com/news/pets-posing-as-service-dogs-make-life-tough-for-people-who-really-need-animals-help/>; Kate Santich, *Fake Service-Dog Gear Creates Problems for Americans with Disabilities*, ORLANDO SENTINEL (Aug. 7, 2013), <http://articles.orlandosentinel.com/2013-08-07/features/os-fake-service-dogs-20130807>.

<sup>179</sup> Melissa Morrith Coble, *You Aren't Fooling Anyone with your Service Dog*, BLUNT MOMS, <http://www.bluntmoms.com/you-arent-fooling-anyone-2/> (last visited Mar. 13, 2018).

ience other patrons.<sup>180</sup>

Individuals who qualify for emotional support dogs should not ignore the requirement that the care and supervision of their emotional support dog is their responsibility and not the covered entities.<sup>181</sup> The ADA already provides covered entities with a solution for unruly or dangerous service animals, and the same rule should apply to emotional support dogs.<sup>182</sup> The covered entity may exclude service animals when the “animal’s behavior poses a direct threat to the health or safety of others.”<sup>183</sup> The animal must be under control, meaning harnessed, leashed, or tethered while in public places.<sup>184</sup> “Under control also means that a service animal should not be allowed to bark repeatedly in a lecture hall, theater, library, or other quiet place.”<sup>185</sup> To avoid unfortunate accidents, like the Delta Airline incident mentioned above, DOJ could require emotional support dogs to wear muzzles as an alternative to training certification. There are many different types and brands of muzzles most of which are non-bothersome to the animal when fitted properly. A muzzle is an alternative to ensure the safety of others while providing the benefit of having an emotional support animal.

The certification requirement recommended in this article or requiring handlers to use muzzles may provide a solution to the health and safety concerns that people are simply posing their dogs as fake service dogs.

## CONCLUSION

In sum, the Department of Justice should amend the ADA’s definition of service animal to include emotional support dogs.<sup>186</sup> If the goal of the ADA is truly to end the “unnecessary exclusion of persons” with disabilities and to provide the “broadest feasible access . . . to service animals in all places of public accommodations . . . ,” then allowing emotional support dogs should be a desirable and reasonable next step.<sup>187</sup> Individuals with non-

<sup>180</sup> *Id.*

<sup>181</sup> DISABILITY RIGHTS SECTION, *supra* note 15, at 2.

<sup>182</sup> *Id.* at 5.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 6.

<sup>185</sup> *Id.*

<sup>186</sup> What about Peacocks? See Daniella Silva, *Emotional Support Peacock Denied Flight by United Airlines*, NBC News (Jan. 30, 2018), <https://www.nbcnews.com/storyline/airplane-mode/emotional-support-peacock-denied-flight-united-airlines-n842971>. Or snakes? See Assenberg v. Anacortes Hous. Auth., C05-1836RSL, 2006 WL 1515603, at \*3 (W.D. Wash. May 25, 2006) (discussing a tenant’s use of snakes as service animals).

<sup>187</sup> 28 C.F.R. § 36.302; *see also* 42 U.S.C. § 12101.

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apparent psychiatric disabilities should not be subject to a heightened level of scrutiny simply because their service dog does not perform obvious work or task such as aiding an individual with visual impairments. An emotional support dog can be the difference between life and death for an individual with a psychiatric disability, and training should not be the dispositive factor.

The benefits that emotional support dogs provide to persons with mental or psychiatric disabilities provide reason enough for these policy changes. Due to the difficulty in distinguishing between psychiatric service dogs and emotional support dogs, disabled persons may be more likely to be discriminated against. Rather than the type of work the animal does, applicability of a service animal should focus on the nature of a person's disability and the difficulties imposed by the disability. How an animal is specially trained is irrelevant. This standard would prevent discrimination to those individuals with disabilities that are not readily apparent. Although abuse of the right to a service animal is a valid concern, categorically excluding protection to those who need emotional support dogs tramples on disabled individuals' right to feel integrated into the community. DOJ should continue its method of allowing disabled individuals to self-certify their need for a service animal by limiting covered entities to a fact-specific inquiry.

Furthermore, providing emotional support should be classified as work or a task. The act of providing comfort or stress relief for an individual with a disability should be recognized as work. It is critically important to provide comfort or emotional support for many people with disabilities so that they are able to fully integrate into the community. Classifying emotional support as work or a task would better achieve the goals of the ADA by allowing persons with psychiatric or mental disabilities greater access to public accommodations. An emotional support dog is performing the critical task of providing the disabled individual with independence and inclusion she would not otherwise enjoy.

If DOJ mandates a certification requirement, states can create an implementation process. This would make it easier for covered entities to determine whether an individual has a permissible service animal. It would also provide harassment-free access to the handler of the service animal and would avoid invasive and embarrassing inquiries. Due to the difficulty of distinguishing emotional support dogs from other types of service dogs, those individuals who meet the ADA's definition of disabled should be required to obtain valid certification. The process for obtaining this certification suggested here could be similar to obtaining a handicapped-parking permit.

Federal laws such as the Fair Housing Act and Air Carrier Access Act recognizing the need for emotional support dogs is a positive development in our society. Moreover, businesses and institutions recognizing the benefits of an emotional support dog accompanying an individual with a disability outside of the home reflects enhanced sensitivity to human welfare. Education about the benefits of emotional support dogs and the need for them is an important step in obtaining the overall goal of the ADA. Recognizing the need for emotional support dogs and supporting their presence is a good start to educating others, as well. The exclusion of emotional support dogs fails to advance the goal of the ADA to provide equal protection to both physically and mentally disabled individuals.

If the recommendations in this article were followed, Verdie's story would be significantly different. If DOJ implemented the suggestions in this article, Verdie may be able to get out of her house and run errands with her husband. She could pursue the certification process and receive photo identification certifying Lucy as her service animal. The process would be fairly straightforward, requiring little paper work, particularly when compared to the benefit Verdie receives from being able to get out of her house and do the things she used to do. By showing Lucy's certification, Verdie would not be asked intrusive questions about Lucy's training and whether the training relates to Verdie's disability. The ability to bring Lucy with her would help her integrate into the community and would allow her to feel confident that her anxiety and depression will not stop her from enjoying these tasks that others take for granted. Verdie could decide to go outside more often, which may improve her health and decrease her dependence on psychotropic drugs. By modifying the ADA regulations to allow emotional support animals in places of public accommodation, Verdie could devote more time to her recovery.