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Emotional Support Animals Are More Than Just Pets: It Is Time for the Department of Justice to Align Its Emotional Support Animal Policies with Other Anti-Discrimination Laws

Jake Butwin

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EMOTIONAL SUPPORT ANIMALS ARE MORE THAN JUST PETS: IT IS TIME FOR THE DEPARTMENT OF JUSTICE TO ALIGN ITS EMOTIONAL SUPPORT ANIMAL POLICIES WITH OTHER ANTI-DISCRIMINATION LAWS

*Jake Butwin**

ABSTRACT

Animals have long been trained to assist persons with “physical” disabilities, but recently, medical professionals have discovered the profound effects that ordinary animals, or “emotional support animals,” can have on persons with non-visible, mental, and emotional disabilities. For the most part, federal anti-discrimination laws have adjusted to offer protection to persons relying on emotional support animals to cope with their mental and emotional disabilities. But Title III of the Americans with Disabilities Act has not followed suit. Pursuant to the Act, the Department of Justice has maintained that places of public accommodation are never required to accommodate animals whose sole function is to provide emotional support to persons with mental and emotional disabilities.

This Note examines the rise of emotional support animals and describes the legal regimes that have developed in response. Ultimately, this Note argues that the Department of Justice’s inconsistent approach is not only unreasonable but undermines other major federal anti-discrimination laws and leads to even greater discrimination against persons with mental and emotional disabilities.

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INTRODUCTION

Rebecca began experiencing symptoms of anxiety and depression when she was fourteen years old.¹ At first, her symptoms would “come and go.”² But eventually, anxiety and depression became a “constant presence in her life.”³ It hit her like a “ton of bricks,” and as time passed, more and more of her days were spent “paralyzed by endless thoughts of regrets of the past and worries for the future.”⁴ Her life depended upon a solution.⁵

Rebecca attempted everything.⁶ She tried anti-depressants, special teas, yoga, vitamins, and medical advice.⁷ She even moved eight hours away from her home in “hopes of having a new beginning.”⁸ Nothing worked.⁹ For over ten years, Rebecca woke up with “weight on [her] shoulders” and “nausea in [her] stomach.”¹⁰ Even getting out of bed felt impossible.¹¹ But Buddy, a Pembroke Welsh Corgi, changed her life.¹²

Buddy was Rebecca’s “new beginning.”¹³ Since Rebecca met Buddy, she has never spent another day unable to get out of bed.¹⁴

1. Kathryn Oda, *How a Dog Helped Me Manage My Anxiety and Depression*, HUFFINGTON POST: BLOG (Feb. 26, 2016, 6:29 PM), https://www.huffpost.com/entry/how-a-dog-helped-me-manag_b_9301622 [<https://perma.cc/R8TW-8LYE>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

She has not cried herself to sleep or spent days paralyzed by fear and regret.¹⁵ Instead, Rebecca has learned how to manage her emotions.¹⁶ Buddy was the “missing piece” in Rebecca’s life.¹⁷

Rebecca’s struggles are not unusual. Each year, about 47 million Americans suffer from mental illness,¹⁸ and research shows that mood disorders — like depression — are the third most common cause of hospitalization in the United States.¹⁹

Traditionally, there has been a general recognition that specially trained animals can be used to assist persons with disabilities.²⁰ For instance, many are familiar with the “guide dog” for the blind or the “hearing dog” for the deaf.²¹ But increasingly, medical professionals have discovered the profound effects that ordinary animals can have on persons with mental or emotional disabilities.²² And, for the most part, the law has adjusted.²³

For example, the Department of Housing and Urban Development’s regulations pursuant to the Fair Housing Act generally require housing providers to make “reasonable accommodations” for animals that provide emotional support to persons with disabilities.²⁴ The Department of Transportation

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. See *Mental Health by the Numbers*, NAT’L ALLIANCE ON MENTAL ILLNESS (Sept. 2019), <https://www.nami.org/learn-more/mental-health-by-the-numbers> [<https://perma.cc/36MK-4HJV>]; *Mental Health Information*, NAT’L INST. OF MENTAL HEALTH (Feb. 2019), <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/42TZ-3L4Z>].

19. See *Mental Health by the Numbers*, *supra* note 18.

20. See Rebecca J. Huss, *Why Context Matters: Defining Service Animals Under Federal Law*, 37 PEPP. L. REV. 1163, 1166 (2010).

21. See *id.* at 1167; see also *Types of Assistance Dogs*, ASSISTANCE DOGS INT’L, <https://assistancedogsinternational.org/about-us/types-of-assistance-dogs/> [<https://perma.cc/XYG5-ZWUA>] (last visited Apr. 12, 2019).

22. See Kathleen Doheny, *Do You Need an Emotional Support Animal?*, SENIOR PLANET (Sept. 5, 2018), <https://seniorplanet.org/emotional-support-animal/> [<https://perma.cc/Y9T2-QG3J>].

23. See *infra* Part II.

24. See Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834-01 (Oct. 27, 2008) (“[E]motional support animals by their very nature . . . relieve depression and anxiety, [and] help reduce stress-induced pain in persons with certain medical conditions affected by stress.”); U.S. DEP’T OF HOUSING & URB. DEV., SERVICE ANIMALS & ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING & HUD-FUNDED PROGRAMS (2013) (“Persons with disabilities may request a reasonable accommodation for any assistance animal, including an emotional support animal . . .”); *infra* Part II.

considers a “service animal” to be “any animal . . . necessary for the emotional well-being of a passenger,” and the Air Carrier Access Act requires airlines to accept emotional support animals for transportation in aircraft cabins.²⁵ And while the Equal Employment Opportunity Commission has long been silent on this topic, it recently signaled that its position is no different.²⁶

Nevertheless, the Department of Justice has consistently declined to adjust its policies,²⁷ maintaining that, under Title III of the Americans with Disabilities Act, “places of public accommodation”²⁸ are *never* required to accommodate animals “whose sole function is to provide emotional support” to persons with mental or emotional disabilities.²⁹

While the Department of Justice is justifiably 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

25. See 14 C.F.R. § 382.117 (2018) (describing when air carriers are required to accommodate emotional support animals on aircraft cabins); Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 90,24874, 90,24875 (May 9, 2003) (“This document refines [the Department of Transportation’s] previous definition of service animal by making it clear that animals that assist persons with disabilities by providing emotional support qualify as service animals”); *infra* Part II.

26. “In what may be the first lawsuit of its kind,” the Equal Employment Opportunity Commission filed a complaint against a trucking company claiming that the employer wrongfully failed to accommodate a truck driver’s request to have his emotional support dog with him as he drives his trucking routes. Equal Emp’t Opportunity Comm’n v. CRST Int’l, Inc., No. 3:17-CV-241-J-32JBT, 2017 WL 4959219 (M.D. Fla. Nov. 1, 2017); James M. Paul, *Can Fido Come to Work? EEOC Files Suit to Require Emotional Support Dog on Truck Route*, OGLETREE DEAKINS: INSIGHTS (Mar. 15, 2017), <https://ogletree.com/insights/2017-03-15/can-fido-come-to-work-eeoc-files-suit-to-require-emotional-support-dog-on-truck-route/> [<https://perma.cc/Y74N-G9LD>]; *infra* Part III.

27. See U.S. DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT SERVICE ANIMALS AND THE ADA (2015) (“Because [emotional support animals] have not been trained to perform a specific job or task, they do not qualify as service animals under the ADA.”); Kristin M. Bourland, *Advocating Change Within the ADA: The Struggle to Recognize Emotional-Support Animals as Service Animals*, 48 U. LOUISVILLE L. REV. 197 (2009); *infra* Part II.

28. See *infra* Part II.C.

29. U.S. DEP’T OF JUSTICE, ADA REVISED REQUIREMENTS: SERVICE ANIMALS (2011) (“Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.”). Most state laws designed to protect the rights of disabled persons in public places similarly do not protect emotional support animals. For a summary of all 50 states’ assistance animal laws, see Rebecca F. Wisch, *Table of Assistance Animals Laws*, ANIMAL LEGAL & HIST. CTR. (2016), <https://www.animallaw.info/topic/table-state-assistance-animal-laws> [<https://perma.cc/J947-93UJ>]; see also Huss, *supra* note 20, at 1177.

mistakenly), to gain access” to public accommodations,³⁰ this Note argues that, on balance, a categorical ban on emotional support animals is unreasonable. This Note further posits that the Department of Justice’s inconsistent policies not only undermine other major federal anti-discrimination laws, they also lead to even greater discrimination against persons with non-visible, mental, and emotional disabilities.³¹

Part I provides background on emotional support animals, their development, and the benefits they offer to persons with mental and emotional disabilities. Part II examines federal anti-discrimination laws and the different legal regimes that have developed to regulate the use of emotional support animals. Part III explains why the Department of Justice’s distinct approach is unreasonable and discusses how it undermines other major federal anti-discrimination laws and leads to greater discrimination against persons with mental and emotional disabilities. Part III also describes how the Department of Justice can align its policies with those of other major federal anti-discrimination laws without compromising fraud, public health, and public safety concerns.

I. BACKGROUND ON EMOTIONAL SUPPORT ANIMALS

Part I provides background on emotional support animals. Part I.A describes the evolution and rise of emotional support animals. Part I.B defines “emotional support animals” and distinguishes them from “service animals” and other “assistance animals.” Part I.C highlights some of the benefits emotional support animals offer to persons with mental or emotional disabilities. Part I.D discusses some of the major issues surrounding the use of emotional support animals.

30. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508, 34,515–16 (June 17, 2008).

31. Unlike existing scholarship, however, this Note does not posit that emotional support animals should receive the same protection as service animals under Title III of the Americans with Disabilities Act. See, e.g., Chelsea Hernandez-Silk, *They Say Emotional Support Dog, We Say Service Dog: Why the Americans with Disabilities Act Should Recognize Emotional Support Dogs as Service Animals?*, 21 RICH. PUB. INT. L. REV. 313, 338 (2018). Rather, this Note recognizes the legitimate differences between animals individually trained to do work or perform tasks and animals offering only emotional support. Accordingly, this Note urges the Department of Justice to develop standards that *distinguish* between service animals and emotional support animals. See *infra* Part III.

A. The Development of Emotional Support Animals

Humans began domesticating animals roughly 12,000 years ago.³² Since then, domesticated animals have served a variety of functions, such as hunting, herding, and guarding.³³ Humans have also valued animals for their companionship.³⁴ Systematic attempts to train animals to help persons with disabilities, however, were not recorded until after World War I, when millions of veterans returned home from the front with permanent disabilities.³⁵ Blindness, in particular, was one of the more “corporeal consequences of the war.”³⁶ As a result, countries began experiments to train dogs to serve as “guides” for the blind.³⁷

That “transnational experiment” had far-reaching consequences for successive generations of blind veterans and other civilians with disabilities.³⁸ Since World War I, medical professionals have continued to discover the “vast potential” of properly trained animals.³⁹ For example, animals have since been trained to alert deaf persons to specific sounds, provide balance to persons with mobility disabilities, and alert persons with epilepsy of imminent seizure onset.⁴⁰ Animals have also been certified to visit and interact with patients suffering from a range of medical conditions.⁴¹ Nevertheless, the use of ordinary animals, or “emotional support animals,” to treat

32. See Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 188–92 (2003).

33. See *id.* at 189.

34. See *id.* at 181; Huss, *supra* note 20, at 1169.

35. See Aparna Nair, “*The Joy of My Life*”: *Seeing-Eye Dogs, Disabled Veterans/Civilians and WWI*, NURSING CLIO (Nov. 15, 2018), <https://nursingclio.org/2018/11/15/the-joy-of-my-life-seeing-eye-dogs-disabled-veterans-civilians-and-wwi/> [<https://perma.cc/M39N-NF82>].

36. *Id.*

37. See *id.*

38. See *id.* (“By the mid 20th century, that idea had ‘spread across western and southern Europe and even to North America [and] moved from the domain of disabled veteran[s] into the world of the civilian blind.’”).

39. See *id.*

40. See Heather Marcoux, *10 Types of Service Dogs and What They Do*, DOGSTER (Oct. 25, 2018), <https://www.dogster.com/lifestyle/10-types-of-service-dogs-and-what-they-do> [<https://perma.cc/6FVJ-6QGC>].

41. See Loraine Ernst, *Animal-Assisted Therapy: An Exploration of Its History, Healing Benefits, and How Skilled Nursing Facilities Can Set Up Programs*, ANNALS OF LONG-TERM CARE: CLINICAL CARE & AGING (Oct. 2014), <https://www.managedhealthcareconnect.com/article/animal-assisted-therapy-exploration-its-history-healing-benefits-and-how-skilled-nursing> [<https://perma.cc/E5QH-MLA8>].

persons with mental and emotional disabilities originated only recently.⁴²

B. The Definition of “Emotional Support Animal”

There is no single, prevailing definition of an “emotional support animal.” Generally, an emotional support animal is any companion animal that provides therapeutic benefits to individuals with mental or psychiatric disabilities.⁴³ Importantly, emotional support animals are not pets.⁴⁴ Rather, licensed medical health professionals prescribe them to offer companionship, relieve loneliness, and help persons with verifiable disabilities such as depression, anxiety, and phobias.⁴⁵

i. The Types of Emotional Support Animals

While laws differ laws in restrictions,⁴⁶ all domesticated animals may generally qualify as emotional support animals for medical purposes.⁴⁷ That includes cats, dogs, mice, rabbits, birds, hedgehogs, rats, pigs, horses, and ferrets.⁴⁸ This is in part because the animal’s “very presence” is supposed to mitigate a person’s disability symptoms.⁴⁹ Thus, while the type or size of an animal might bear on a medical professional’s treatment decision, the relevant inquiry is

42. See Kate Brewer, *Brief Summary of Emotional Support Animals*, ANIMAL LEGAL & HIST. CTR. (2005), <https://www.animallaw.info/article/brief-summary-emotional-support-animals> [<https://perma.cc/3QP4-UFXJ>] (“Recently, medical professionals have discovered the profound effects that animals can provide for persons with mental and emotional disabilities.”); Doheny, *supra* note 22 (“ESAs are fairly new, . . . increasing in popularity in the past 10 years and even more now.”).

43. See Rebecca F. Wisch, *FAQs on Emotional Support Animals*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/faqs-emotional-support-animals> [<https://perma.cc/26Q6-Z6H3>].

44. See *id.*

45. See Jacquie Brennan & Vinh Nguyen, *Service Animals and Emotional Support Animals: Where Are They Allowed and Under What Conditions?*, ADA NAT’L NETWORK: RESOURCES (2014), <https://adata.org/publication/service-animals-booklet> [<https://perma.cc/K7FS-QTT4>].

46. See *infra* Part II.

47. See *What Type of Animals Can Be ESAs?*, EMOTIONAL PET SUPPORT (2017), <https://www.emotionalpetsupport.com/2017/02/type-animals-can-esas/> [<https://perma.cc/D6QE-RM23>].

48. See *id.*

49. See *id.*

often limited to whether the animal is indeed able to “alleviate one or more identified symptoms or effects of a person’s disability.”⁵⁰

ii. Emotional Support Animals Distinguished from Service Animals and Other Assistance Animals

By most standards, emotional support animals are distinct from “service animals.”⁵¹ Unlike emotional support animals, service animals are trained to do work or perform specific tasks — pulling a wheelchair, guiding a person who is visually impaired, alerting a person who is having a seizure, or calming a person who suffers from post-traumatic stress disorder.⁵² By contrast, emotional support animals offer benefits by their very nature and without training.⁵³

Emotional support animals are also distinct from animals used for “Animal Assisted Activities” (AAA) and “Animal-Assisted Therapy” (AAT).⁵⁴ While emotional support animals and animals used for AAA and AAT can all be used to treat persons with mental or emotional disabilities, animals used for AAA and AAT are typically certified and trained to interact with people in formal environments.⁵⁵ AAA, for example, might include meet-and-greet sessions with patients in hospitals, or “read to pet programs” in libraries or schools.⁵⁶ AAT is even more structured and might involve elderly patients brushing a dog’s fur to retain basic motor skills.⁵⁷ Emotional support animals, on the other hand, are assigned to stay with only one owner, do not need to be certified, and offer benefits in more informal environments.⁵⁸

50. See Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 208,63834, 208,63835 (Oct. 27, 2008).

51. See *id.*; Brennan & Nguyen, *supra* note 45; Wisch, *supra* note 43.

52. See Marcoux, *supra* note 40.

53. See *What Type of Animals Can Be ESAs?*, *supra* note 47.

54. See Grace Cummings, *The Difference between Animal Assisted Therapy (AAT) and Activities (AAA): Part 1 of 2*, 1 FUR 1 FOUND. (2015), <https://www.1fur1.org/difference-animal-assisted-therapy-aat-activities-aaa-part-1-2/> [<https://perma.cc/H2MG-37S8>]; Ernst, *supra* note 41.

55. See generally Cummings, *supra* note 54; Ernst, *supra* note 41.

56. See Grace Cummings, *The Difference between Animal Assisted Therapy (AAT) and Activities (AAA): Part 2 of 2*, 1 FUR 1 FOUND.: BLOG (2015), <https://www.1fur1.org/difference-animal-assisted-therapy-aat-activities-aaa-part-2-2/> [<https://perma.cc/U32R-DF8F>]; Ernst, *supra* note 41.

57. See Cummings, *supra* note 54.

58. *What’s the Difference Between a Therapy Animal and an Emotional Support Animal*, MOOSHME (last visited Apr. 12, 2019), <https://mooshme.com/whats-difference-therapy-dog-emotional-support-animal/> [<https://perma.cc/LA9Y-YR9Q>].

C. The Benefits of Emotional Support Animals

Studies show that emotional support animals offer considerable psychological, social, and physiological benefits to persons with mental or emotional disabilities.⁵⁹ For example, emotional support animals help persons diagnosed with depression⁶⁰ by helping depressed persons perform tasks as basic as getting out of bed in the morning.⁶¹ This is in part because emotional support animals offer love and acceptance,⁶² but it is also because they alter behavior, offer distraction, and promote a sense of responsibility.⁶³

Studies also demonstrate that emotional support animals can help persons diagnosed with psychotic, mood, and anxiety disorders.⁶⁴ In fact, it is well settled that interactions with emotional support animals can help reduce blood pressure.⁶⁵ One study found that the reduction in blood pressure could equal the reduction achieved by changing to a low-salt diet or cutting down on alcohol.⁶⁶ Another study found just *gazing* at a dog could elevate oxytocin and dopamine, chemicals that create positive feelings for humans.⁶⁷

Emotional support animals can also benefit persons who have Alzheimer's, dementia, and autism.⁶⁸ Studies show that Alzheimer's patients living with animals had fewer mood disorders and episodes of aggression than did Alzheimer's patients who did not.⁶⁹ Other

59. In fact, surveys of psychiatrists and psychologists indicate that almost 50% of those questioned have prescribed a pet for their patients. Ernst, *supra* note 41.

60. See Bourland, *supra* note 27.

61. See *id.*

62. Therese Borchard, *6 Ways Dogs Help Ease Depression Symptoms*, EVERYDAY HEALTH (2014), <https://www.everydayhealth.com/columns/therese-borchard-sanity-break/ways-dogs-help-ease-depression-symptoms/> [https://perma.cc/HF8R-5N85].

63. See Greer Grenley, *How Dogs Can Help With Depression*, NAT'L ALLIANCE ON MENTAL ILLNESS (2018), <https://www.nami.org/Blogs/NAMI-Blog/February-2018/How-Dogs-Can-Help-with-Depression> [https://perma.cc/K8SF-V2WH].

64. See Bourland, *supra* note 27 and accompanying text.

65. See generally Karen Allen, *Pet Ownership, But Not ACE Inhibitor Therapy, Blunts Home Blood Pressure Response*, 38 HYPERTENSION 815 (2001).

66. See *id.*

67. See Miho Nagasawa et al., *Dog's Gaze at Its Owner Increases Owner's Urinary Oxytocin During Social Interaction*, HORMONES & BEHAV. (2009); see also Grenley, *supra* note 63.

68. See Bourland, *supra* note 27.

69. 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).

evidence shows that schoolchildren with autism exhibit improved social skills after interacting with animals for only a few months.⁷⁰

In short, emotional support animals can keep people “afloat and stabilized . . . [both] functionally and emotionally.”⁷¹ As one doctor explained, “[w]ithout the [animal], [his patient] would probably spend most of her life in bed,” and would have gone into a “depressive tail spin and [gotten] worse.”⁷²

D. The Controversy Surrounding Emotional Support Animals

Although emotional support animals offer considerable benefits to persons with mental or emotional disabilities, public health concerns “cannot be overlooked.”⁷³ Organizations and scholars opposing emotional support animal protections “are rightfully concerned that allowing an emotional support [animal] in places of public accommodation would increase the risk of . . . bites or other injuries related to the interaction between [animals] and humans.”⁷⁴ In March 2019, for example, an Alaska Airlines passenger filed a \$1,100,000 lawsuit against another passenger after an emotional support dog bit the passenger’s five-year-old daughter in the face.⁷⁵ And in early 2018, a child boarding a Southwest Airlines flight was forced to receive medical treatment after an emotional support dog bit and “scraped the child’s forehead.”⁷⁶

In addition to public safety concerns, emotional support animals pose risks to public health.⁷⁷ In November 2018, for example, Delta was forced to apologize to a passenger who “realized there was dog

70. See Marguerite E. O’Haire et al., *Effects of Classroom Animal-Assisted Activities on Social Functioning in Children with Autism Spectrum Disorder*, 20 J. ALTERNATIVE & COMPLEMENTARY MED. 162, 166 (2014).

71. See Bourland, *supra* note 27.

72. See *id.*

73. See Hernandez-Silk, *supra* note 31; *infra* Part III.

74. See Hernandez-Silk, *supra* note 31, at 337.

75. See Meagan Flynn, *An ‘Emotional Support’ Pit Bull Mauled a 5-Year-Old Girl in an Airport Terminal, Lawsuit Says*, WASH. POST (Feb. 28, 2019), <https://www.washingtonpost.com/nation/2019/02/28/an-emotional-support-pit-bull-mauled-year-old-girl-an-airport-terminal-lawsuit-says/> [https://perma.cc/NPH4-Z9AL].

76. See Dawn Gilbertson, *Emotional Support Dog Bites Child on Southwest Flight*, USA TODAY (Feb. 22, 2018), <https://www.usatoday.com/story/travel/flights/todayinthesky/2018/02/22/emotional-support-dog-bites-child-southwest-flight-debate-animals-airlines/362759002/> [https://perma.cc/6SCU-7EQU].

77. See Hernandez-Silk, *supra* note 31.

poop all over his seat and the surrounding floor.”⁷⁸ In addition, “many people are allergic to animal dander,” and commentators opposing emotional support animal protections contend it would be “impossible” for some people “to eat or work next” to an emotional support animal.⁷⁹

Exacerbating public health and safety concerns, the use of emotional support animals is uniquely susceptible to fraud.⁸⁰ Some individuals, for instance, “are cheating by introducing ordinary pets as doctor-prescribed ‘emotional support’ animals in order to bring them into [places] where pets are banned.”⁸¹ Making matters worse, “with absolutely no proof of an animal’s training or abilities,” websites are selling “vests, leashes, collars, and dog tags indicating” that a dog is a service dog or an emotional support animal.⁸² Most strikingly, individuals can “go online and buy a letter that ‘prescribes’ an emotional support animal” for just a small fee.⁸³

In sum, although emotional support animals offer considerable benefits to persons with mental or emotional disabilities, emotional support animals present legitimate fraud, public health, and public safety concerns that cannot be ignored.

II. THE DIFFERENT LEGAL REGIMES REGULATING EMOTIONAL SUPPORT ANIMALS

Part II analyzes federal anti-discrimination laws and describes the legal regimes that have developed in response to growing use of

78. *Most Shocking Stories of Animals at Airports*, USA TODAY, <https://www.usatoday.com/picture-gallery/travel/news/2019/04/02/airport-critters-emotional-support-animals-smuggled-pets-and-more/3107435002/> [<https://perma.cc/5UR4-E2G3>] (last visited Apr. 20, 2019).

79. Hernandez-Silk, *supra* note 31.

80. See Hal Herzog, *Service Animal Scams: A Growing Problem*, PSYCH. TODAY (Jun. 11, 2014), <https://www.psychologytoday.com/us/blog/animals-and-us/201406/service-animal-scams-growing-problem> [<https://perma.cc/9GJQ-ERQ3>].

81. See Erica Evans & Lois M. Collins, *Is It Too Easy to Obtain an Emotional Support Animal Prescription?*, DESERET NEWS (Mar. 18, 2019), <https://www.deseretnews.com/article/900061068/emotional-support-animal-claims-pets-airplane-animals-peacock-pig-hamster-ptsd-byu-therapy-dogs-service-animals.html> [<https://perma.cc/E9XS-3UHX>].

82. Herzog, *supra* note 80.

83. Evans & Collins, *supra* note 81; see also Hugo Martin, *So You Want a Letter Saying You Need a Support Dog on That Flight? Here’s Why a Therapist Might Balk*, L.A. TIMES (June 3, 2018), <https://www.latimes.com/business/la-fi-emotional-support-animals-20180603-story.html> [<https://perma.cc/3Z8X-3HHB>] (“Some websites say they can provide a written diagnosis within 24 hours, via email, after only a five- to 10-minute phone conversation with a ‘mental health professional’ plus a fee of as little as \$80.”); Herzog, *supra* note 80.

emotional support animals. First, this Part describes the Fair Housing Act and the Department of Housing and Urban Development's regulations, which generally require housing providers to make reasonable accommodations for emotional support animals.⁸⁴ Second, Part II.B discusses the Air Carrier Access Act and the Department of Transportation's regulations, which require airlines to accommodate emotional support animals in aircraft cabins.⁸⁵ Third, Part II.C provides an overview of Title I of the Americans with Disabilities Act and the Equal Employment Opportunity Commission's unsettled enforcement approach.⁸⁶ Part II concludes by describing Title III of the Americans with Disabilities Act, and the Department of Justice's regulations, which categorically exclude emotional support animals from its protections.⁸⁷

A. The Fair Housing Act

i. History of the Fair Housing Act

The Fair Housing Act⁸⁸ and the Fair Housing Amendments Act⁸⁹ are the two most important federal statutes regarding housing discrimination.⁹⁰ The Fair Housing Act was enacted in 1968 and was the first federal law to ban discrimination in housing.⁹¹ It prohibits discrimination based on national origin, religion, and color.⁹² The Fair Housing Amendments Act was enacted twenty years later and

84. *See infra* Part II.A.

85. *See infra* Part II.B.

86. *See infra* Part II.C.ii.

87. *See infra* Part II.C.iii.

88. 42 U.S.C. § 3604(a–e) (2019).

89. 42 U.S.C. §§ 3604–06 (2019).

90. Christopher C. Ligatti, *No Training Required: The Availability of Emotional Support Animals As A Component of Equal Access for the Psychiatrically Disabled Under the Fair Housing Act*, 35 T. MARSHALL L. REV. 139, 144 (2010). *See generally* Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 AM. U. L. REV. 925 (1994) (“The FHAA represents the Federal Government’s most important step forward in removing barriers faced by people with disabilities in their effort to live as equal members of society.”)

91. While the Fair Housing Act was the first federal law to target housing discrimination, President Kennedy’s Executive Order 11,063 was the first federal initiative to combat housing discrimination. It directed “all departments and agencies in the executive branch of the Federal Government . . . to take all action necessary and appropriate to prevent discrimination” on the basis of race in federally assisted or operated housing. *See* Exec. Order No. 11,063, 3 C.F.R. § 652 (1959–1963), *reprinted in* 42 U.S.C. § 1982 app. at 6–8 (1982); Ligatti, *supra* note 90, at 144–46.

92. *See* Kanter, *supra* note 90, at 935; Ligatti, *supra* note 90, at 145.

extended the Fair Housing Act's protections to cover people with disabilities.⁹³ Today, both the Fair Housing Act and the Fair Housing Amendments Act represent the federal government's stated commitment to provide "fair housing throughout the United States."⁹⁴ The Fair Housing Amendments Act, in particular, embodies the federal government's pledge to reject "generalized perceptions about disabilities and unfounded speculations about threats to safety" in housing.⁹⁵

ii. Restrictions

The Fair Housing Amendments Act makes unlawful all practices that deny housing to a person with a handicap.⁹⁶ That includes discrimination in the sale or rental of a dwelling, discrimination in the terms, conditions, and privileges of a sale or rental of a dwelling, and discrimination in the provision of services or facilities in connection with a dwelling.⁹⁷ It also makes unlawful all other attempts to "otherwise make unavailable" a dwelling.⁹⁸

The Fair Housing Act's definition of "handicap[ped]" is broad and generally captures mental health disorders like depression, anxiety, and other phobias.⁹⁹ Specifically, "handicapped" is defined as any person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.¹⁰⁰ This is intended to cover not only the "widest range of disabilities that limit

93. Before Congress enacted the Fair Housing Amendments Act, however, Congress had enacted the Rehabilitation Act of 1973, which prohibited discrimination against persons with disabilities in a variety of contexts, including housing. But the Rehabilitation Act's scope was limited to persons or entities receiving federal funds, which meant that discrimination against the disabled remained conceivable in all other forms of housing. *See* Kanter, *supra* note 90; Ligatti, *supra* note 90.

94. *See* 42 U.S.C. § 3601 (2019).

95. *See* Ligatti, *supra* note 90, at 147 (quoting Susan B. Eisner, *No Place Like Home: Housing Discrimination Against Disabled Persons and the Concept of Reasonable Accommodation Under the Fair Housing Amendments Act of 1988*, 14 N.Y.L. SCH. J. HUM. RTS. 435, 436–38 (1998)).

96. *See* 42 U.S.C. § 3604(f) (2019).

97. *See id.*

98. *See id.*

99. *See* Kanter, *supra* note 90, at 946; Ligatti, *supra* note 90, at 150 ("The impairment prong of this test is quite broad and has been interpreted to include psychiatric disorders such as depression, anxiety disorders, post-traumatic stress disorder, and bipolar disorder.").

100. 42 U.S.C. § 3602 (2019).

activities such as walking, seeking, hearing, speaking, breathing, learning, and working,” but it is also intended to cover “as many impairments as possible, including a range of physiological disorders and conditions such as mental retardation, organic brain syndrome, [and] emotional and mental illness.”¹⁰¹

Like its “handicap” definition, the Fair Housing Act’s definition of “discrimination” is also broad.¹⁰² It does not merely require that housing providers rent to handicapped persons,¹⁰³ it also requires housing providers to make “reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling.”¹⁰⁴ While the term “reasonable accommodation” has been “used primarily in the context of removing architectural barriers for people with physical disabilities,” the reasonable accommodation requirement has also served as a statutory basis for service and emotional support animal accommodations.¹⁰⁵

iii. The Department of Housing and Urban Development

The Department of Housing and Urban Development defines a “reasonable accommodation” as “a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling.”¹⁰⁶ To request an accommodation, the Department of Housing and Urban Development requires handicapped persons to demonstrate that the accommodation is both “reasonable” and “necessary.”¹⁰⁷ An accommodation is reasonable when it does not (1) impose an “undue financial and administrative burden on the housing provider,”¹⁰⁸ or (2) constitute a “fundamental alteration”¹⁰⁹ of the

101. See Kanter, *supra* note 90, at 946 n.143.

102. See Ligatti, *supra* note 90, at 145–47.

103. 42 U.S.C. § 3604(f)(3)(B) (2019); 42 U.S.C. § 3604(f)(3)(A) (2019).

104. See *id.* (describing the Fair Housing Act’s “reasonable modification” requirement, which requires housing providers to make structural changes to existing premises in order to afford handicapped persons full enjoyment of the premises).

105. See Kanter, *supra* note 90, at 951.

106. See U.S. DEP’T OF HOUS. & URB. DEV. & U.S. DEP’T OF JUSTICE, REASONABLE ACCOMMODATIONS UNDER THE FAIR HOUSING ACT (2004).

107. See *id.*

108. The determination of undue financial and administrative burden is made on a case-by-case basis, and warrants an assessment of many factors, such as the cost of the requested accommodation, the financial resources of the provider, the benefits that the accommodation would provide to the requester, and the availability of alternative accommodations that would effectively meet the requester’s disability-related needs. See *id.*

housing program. An accommodation is necessary when there is “an identifiable relationship, or nexus, between the requested accommodation and the individual’s disability.”¹¹⁰

Ultimately, whether an accommodation is reasonable or necessary involves a highly fact-specific inquiry that requires a case-by-case determination beyond the scope of this Note.¹¹¹ Nevertheless, it is well settled that waiver of a “no-pet rule” to allow for a service animal may be considered a reasonable accommodation.¹¹² It is likewise well settled that “animals necessary as a reasonable accommodation[s] do not necessarily need to have specialized training.”¹¹³ Rather, the Department of Housing and Urban Development has consistently explained that emotional support animals “by their very nature, and without training, may relieve depression and anxiety, and/or help reduce stress-induced pain in persons with certain medical conditions affected by stress.”¹¹⁴ Therefore, at least as a threshold matter, emotional support animals are protected under the Fair Housing Act.

B. The Air Carrier Access Act

i. History of the Air Carrier Access Act

The Air Carrier Access Act was enacted in 1986 to “combat discrimination against persons with disabilities in air travel.”¹¹⁵ However, the federal government’s commitment to regulate “the way in which airlines accommodate the needs of handicapped and

109. A “fundamental alteration” is considered to be “a modification that alters the essential nature of a provider’s operations.” *Id.* For example, a tenant with a mobility disability cannot reasonably ask his housing provider to transport him to the grocery store and assist him with grocery shopping if the provider does not otherwise provide any transportation or shopping services for its tenants. *Id.*

110. The accommodation must typically enhance a disabled person’s quality of life by ameliorating the effects of the disability. For example, a housing provider who has a policy of providing unassigned parking spaces to residents must make an exception to that policy if a resident with a mobility impairment — who is substantially limited in her ability to walk — requests an assigned accessible parking space close to the entrance to her unit because there is a clear “nexus” between the parking accommodation and the mobility disability. *See id.*

111. *See id.*

112. *See* Huss, *supra* note 20.

113. Pet Ownership for the Elderly and Persons with Disabilities, 73 Fed. Reg. 63834-01 (Oct. 27, 2008) (“[E]motional support animals do not need training to ameliorate the effects of a person’s mental and emotional disabilities.”).

114. *Id.*

115. Curtis D. Edmonds, *When Pigs Fly: Litigation Under the Air Carrier Access Act*, 78 N.D. L. REV. 687, 688 (2002).

disabled passengers” dates back to at least the mid-1900s.¹¹⁶ In 1958, Congress enacted the Federal Aviation Act to prohibit air carriers from subjecting persons to “any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever,”¹¹⁷ and the Rehabilitation Act of 1973 had similar protections applying to air carriers receiving federal funds.¹¹⁸

About twenty years after its passage, however, Congress repealed the Federal Aviation Act because flying had become “absurdly expensive.”¹¹⁹ In effect, Congress had eliminated the main basis upon which handicapped persons could bring private causes of action for discrimination against air carriers.¹²⁰ After advocates failed to convince the Supreme Court that the federal government could continue regulating air carriers under the Rehabilitation Act notwithstanding the Federal Aviation Act’s repeal,¹²¹ Congress promptly enacted the Air Carrier Access Act to allow disabled passengers “to take full opportunity of the mobility afforded by air transportation.”¹²²

ii. Restrictions

The Air Carrier Access Act’s text is “little more than a simple requirement of nondiscrimination.”¹²³ The law prohibits air carriers

116. *See id.*

117. Federal Aviation Act of 1958, 49 U.S.C. App. § 1301 (1958), *repealed by* Pub. L. No. 103-272, 108 Stat. 1141 (1994). Courts had also found a private cause of action within this provision in favor of handicapped individuals against air carriers. *See* Hingson v. Pac. Sw. Airlines, 743 F.2d 1408, 1411–12 (9th Cir. 1984); James S. Strawinski, *Where Is the ACAA Today? Tracing the Law Developing from the Air Carrier Access Act of 1986*, 68 J. AIR L. & COM. 385 (2003).

118. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2018) (stating in relevant part, “[n]o otherwise qualified individual with [a] handicap . . . shall . . . be excluded from the participation in, be denied the benefits, or be subjected to discrimination”).

119. *See* David Morris, *Airline Deregulation: A Triumph of Ideology Over Evidence*, HUFFINGTON POST (Apr. 19, 2017), https://www.huffingtonpost.com/david-morris/airline-deregulation-ideology-over-evidence_b_4399150.html [<https://perma.cc/AUD7-VJGW>].

120. Handicapped passengers were then able to rely only on Section 504 of the Rehabilitation Act, which, as noted, applied only to air carriers receiving federal subsidies. *See* Strawinski, *supra* note 117.

121. *See generally* U.S. Dep’t of Transp. v. Paralyzed Veterans of America, 477 U.S. 597 (1986) (holding § 504 is not applicable to commercial airlines).

122. 132 CONG. REC. H7193 (daily ed. Oct. 3, 1986) (statements of Rep. Mineta) (“I strongly believe that handicapped passengers are entitled to take full advantage of the mobility afforded by air transportation and that handicapped persons are entitled to be treated with dignity when they travel.”).

123. Edmonds, *supra* note 115.

from discriminating against an otherwise qualified individual because the individual has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.¹²⁴ Otherwise, the Air Carrier Access Act's text is "brief."¹²⁵ Therefore, air carriers must refer to the Department of Transportation's regulations to determine their responsibilities.¹²⁶

iii. The Department of Transportation

The Department of Transportation's regulations provide detailed guidance on service and emotional support animal accommodations.¹²⁷ But unlike the Department of Housing and Urban Development's regulations pursuant to the Fair Housing Act, the Department of Transportation's regulations do not mention a reasonable accommodation requirement of any kind.¹²⁸ Rather, the regulations state in unambiguous terms that air carriers must permit "a service animal to accompany a passenger with a disability" on an aircraft,¹²⁹ and clarify that a "service animal" includes "any animal that is individually trained, or able to provide assistance to a qualified person with a disability; or any animal that is shown by documentation to be necessary for the emotional well-being of a passenger."¹³⁰

There are, however, limitations to those general rules.¹³¹ First, air carriers are never required to accommodate snakes, other reptiles,

124. 49 U.S.C. § 41705 (2018).

125. NANCY LEE JONES, CONG. RES. SERV., OVERVIEW OF THE AIR CARRIER ACCESS ACT 2 (2008) ("The ACAA's statutory language is brief, leaving implementation to the Department of Transportation (DOT).").

126. As one scholar explained, "because the text of the law does not set forth any specific standards that air carriers must meet in serving passengers with disabilities, air carriers must look to the regulations established by the United States Department of Transportation (DOT)." See Edmonds, *supra* note 115.

127. See 14 C.F.R. §§ 382.1–382.65 (1990); see also Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 90 (May 9, 2003).

128. See 14 C.F.R. § 382.117 (2008).

129. Air carriers must not only permit the service animal to accompany a passenger with a disability on an aircraft but must also "permit the service animal to accompany the passenger . . . at any seat in which the passenger sits." *Id.* And if an air carrier cannot accommodate a service animal at a passenger's assigned seat location, the air carrier must "offer the passenger the opportunity to move with the animal to another seat location." See *id.*

130. See Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 90, 24878 (May 9, 2003).

131. See 14 C.F.R. § 382.117.

ferrets, rodents, or spiders.¹³² Second, air carriers can otherwise exclude animals if there are other “factors” that preclude their travel in the cabin.¹³³ Finally, while airlines must generally accept a passenger’s “credible verbal assurances” as evidence that an animal is a service animal,¹³⁴ airlines may separately require written medical documentation as evidence that an animal is an emotional support animal.¹³⁵

Notably, the Department of Transportation is now considering amending its regulations to “ensure that the fraudulent use of . . . animals not qualified as service animals is deterred.”¹³⁶ This might impact the Department of Transportation’s “service animal” definition or otherwise create more stringent standards for passengers traveling with emotional support animals.¹³⁷ Nevertheless, the Department of Transportation has made clear that it “recognizes the integral role” that service and emotional support animals play in the lives of individuals with disabilities and has reiterated that it wants to “ensure seamless access to air transportation” for those individuals.¹³⁸

132. *See id.* § 382.117(f).

133. For example, air carriers may exclude an emotional support animal if it determines that the animal poses a direct threat to the health or safety of others, or would otherwise cause a significant disruption of cabin service. *See id.*

134. Although the Department of Transportation’s regulations require air carriers to accept “identification cards, other written documentation, presence of harnesses, tags, or the credible verbal assurances,” it urges air carriers not to require formal documentation unless a passenger’s verbal assurance is not credible. *See* Guidance Concerning Service Animals in Air Transportation, 68 Fed. Reg. 24876 (May 9, 2003).

135. A passenger traveling with an emotional support animal must provide:

[C]urrent documentation (i.e., no older than one year from the date of the passenger’s scheduled initial flight) on the letterhead of a licensed mental health professional (e.g., psychiatrist, psychologist, licensed clinical social worker, including a medical doctor specifically treating the passenger’s mental or emotional disability) stating the following: (1) The passenger has a mental or emotional disability recognized in the Diagnostic and Statistical Manual of Mental Disorders - Fourth Edition (DSM IV); (2) The passenger needs the emotional support or psychiatric service animal as an accommodation for air travel and/or for activity at the passenger’s destination; (3) The individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and (4) The date and type of the mental health professional’s license and the state or other jurisdiction in which it was issued.

14 C.F.R. § 382.117(e).

136. *See* Traveling by Air with Service Animals, 68 Fed. Reg. 24878 (proposed May 16, 2018), <https://www.transportation.gov/briefing-room/dot3618> [<https://perma.cc/RR98-7NYZ>].

137. *See id.*

138. *See id.*

Therefore, like the Fair Housing Act, the Air Carrier Access Act also offers protection to disabled passengers traveling with emotional support animals.

C. The Americans with Disabilities Act

i. History of the Americans with Disabilities Act

The Americans with Disabilities Act is one of America's most comprehensive pieces of civil rights legislation.¹³⁹ Its history, however, did not begin in 1988 when it was first introduced in Congress.¹⁴⁰ Rather, the Americans with Disabilities Act dates back decades, and began when "people with disabilities [started] to challenge societal barriers that excluded them from their communities."¹⁴¹

From a legal perspective, the Rehabilitation Act of 1973 set the stage for the Americans with Disabilities Act because it represented a historic shift in societal attitudes towards the disabled.¹⁴² After the Rehabilitation Act's enactment, for example, the disability community was able to continue advancing their reputation and the reputation of their advocates in Congress in an effort to expand the Rehabilitation Act's protections to all areas of public life.¹⁴³ Ultimately, the disability community was successful.¹⁴⁴

Today, the Americans with Disabilities Act ensures that "disabled persons have the same rights and opportunities as everyone else."¹⁴⁵ It is divided into three main titles:¹⁴⁶ Title I applies to employers,¹⁴⁷ Title II applies to state and local governments,¹⁴⁸ and Title III applies to "places of public accommodation."¹⁴⁹

139. See 42 U.S.C. § 12101 (2006); Bourland, *supra* note 27.

140. See Arlene Mayerson, *The History of the Americans with Disabilities Act*, DISABILITY RTS. EDUC. & DEFENSE FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/> [<https://perma.cc/ZG7X-2QXD>].

141. The Americans with Disabilities Act began with the establishment of local groups to advocate for the rights of the disabled, and when parents started to fight against the exclusion and segregation of their children. See *id.*

142. The Rehabilitation Act was the United States' first federal disability law. See *id.*

143. See *id.*

144. See 42 U.S.C. § 12101.

145. See *id.*; Hernandez-Silk, *supra* note 31, at 321.

146. See Hernandez-Silk, *supra* note 31, at 321.

147. 42 U.S.C. §§ 12111–12117 (2018).

148. *Id.* §§ 12131–12134, 12141–12150, 12161–12165.

149. *Id.* §§ 12181–12189.

ii. Title I's Restrictions on Employers

Title I of the Americans with Disabilities Act protects persons with disabilities from discrimination in the workplace.¹⁵⁰ It generally applies to employers with 15 or more employees and forbids discrimination “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.”¹⁵¹

Title I uses the same definition of “disability” as the Fair Housing Act and the Air Carrier Access Act. A “disabled” individual has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.¹⁵²

Further, “discrimination” under Title I includes more than merely requiring employers to hire disabled applicants, or prohibiting employers from denying benefits to qualified employees.¹⁵³ Rather, discrimination under Title I also includes an employer’s refusal to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual.”¹⁵⁴ Like the Fair Housing Act, that “reasonable accommodation” requirement serves as a statutory basis for service and emotional support animal accommodations.¹⁵⁵

iii. The Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission defines a “reasonable accommodation” as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”¹⁵⁶ Among other things, this requires employers to

150. See Paul A. Race & Seth M. Dornier, *ADA Amendments Act of 2008: The Effect on Employers and Educators*, 46 WILLAMETTE L. REV. 357, 358 (2009).

151. See *id.* at 359.

152. See *id.* at 358.

153. 42 U.S.C. § 12112 (2006).

154. See *id.*

155. See *id.*

156. See U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002), https://www.eeoc.gov/policy/docs/accommodation.html#N_3_ [<https://perma.cc/9YDF-X4UR>] (“The duty to provide reasonable accommodation is a fundamental statutory requirement because of the nature of discrimination faced by individuals with disabilities.”).

make existing facilities usable by individuals with disabilities, modify work schedules, and provide qualified readers or interpreters when appropriate.¹⁵⁷ But unlike the Department of Housing and Urban Development and the Department of Transportation, which have offered meaningful guidance on service and emotional support animal accommodations, the Equal Employment Opportunity Commission has made only a few references to service or emotional support animals in its regulations and guidance interpreting Title I.¹⁵⁸

However, sparse case law provides a glimpse into the Equal Employment Opportunity Commission's position on emotional support animals.¹⁵⁹ Specifically, "in what may be the first lawsuit of its kind," the Equal Employment Opportunity Commission filed a complaint against a trucking company claiming that the company wrongfully failed to accommodate a truck driver's request to have his emotional support dog with him as he drives his trucking routes.¹⁶⁰ Although the case was dismissed for improper venue, it is evident from the court's opinion and the Equal Employment Opportunity Commission's complaint that a psychiatrist prescribed the driver his "emotional support dog to help him cope with his post-traumatic stress and mood disorders."¹⁶¹ While less explicit, therefore, it seems reasonable to posit that employers must — at a minimum — entertain reasonable accommodations requests involving emotional support animals.¹⁶²

157. *See id.*

158. Even an Equal Employment Opportunity Commission resource document released in December 2016 as guidance for workplace accommodation of employees' mental health conditions does not mention the use or need for emotional support or service animals. *See id.*; *see also* 29 C.F.R. § 1630 (1991) (failing to mention service or emotional support animals even though the appendix was designed to "help ensure that individuals with disabilities understand their rights, and to facilitate and encourage compliance" with Title I); *see also* Paul, *supra* note 26.

159. *See* Equal Emp't Opportunity Comm'n v. CRST Int'l, Inc., No. 3:17 Civ. 241, 2017 WL 4959219, at *1 (M.D. Fla. Nov. 1, 2017).

160. *See* CRST Int'l, 2017 WL 4959219, at *1.

161. Importantly, neither the court's opinion nor the Equal Employment Opportunity Commission's complaint explicitly clarifies whether the driver's dog was a service animal or an emotional support animal. Rather, both the complaint and the court's opinion use the terms interchangeably, and do not describe the dog's level of training. *See id.*; Complaint for Plaintiff, CRST Int'l, No. 3:17 Civ. 241, 2017 WL 4959219, at *1.

162. *See* Paul, *supra* note 26.

iv. Title III's Restrictions

Title III has arguably the most expansive reach among the Americans with Disabilities Act's titles. It applies to places of public accommodation, or businesses that are generally open to the public and that also fall into one of twelve categories listed in the Americans with Disabilities Act.¹⁶³ Among other places, it applies to public transportation terminals, hotels, motels, inns, restaurants, bakeries, grocery stores, clothing stores, shopping centers, gas stations, and museums.¹⁶⁴

Title III uses the same "disability" definition as Title I, the Fair Housing Act, and the Air Carrier Access Act. A person is "disabled" if the person has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment.¹⁶⁵

Further, under Title III, the general rule is that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation."¹⁶⁶ Like the Fair Housing Act and Title I, that general rule extends beyond a straightforward "application of eligibility criteria that screens out disabled individuals."¹⁶⁷ Rather, Title III's discrimination requirement also requires places of public accommodation to "make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities."¹⁶⁸ Although Title III's text does not mention animals of any kind, its "reasonable modification" serves as a similar statutory basis for service and emotional support animal accommodations.¹⁶⁹

v. The Department of Justice

Under Title III, places of public accommodations must "modify policies, practices, or procedures to permit the use of a service animal

163. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,508 (June 17, 2008).

164. See *id.*; Hernandez-Silk, *supra* note 31, at 4.

165. See 42 U.S.C. § 12102 (2006).

166. Americans with Disabilities Act, 42 U.S.C. § 12182(a) (2018).

167. See *id.*; § 12182(b)(2)(A)(i).

168. *Id.* § 12182(b)(2)(A)(ii).

169. See *infra* Part II.C.v.

by an individual with a disability.”¹⁷⁰ This permits individuals with disabilities to “be accompanied by their service animals in all areas of a place of public accommodation,”¹⁷¹ and prohibits places of public accommodation from requiring documentation, or proof that an animal has been certified, trained, or licensed as a service animal.¹⁷²

But, like other major federal anti-discrimination laws, there are limitations. First, the Department of Justice permits a public accommodation to ask an individual with a disability to remove a service animal from its premises if the animal is out of control and the handler does not take effective action to control it, or if the animal is not housebroken.¹⁷³ Second, the Department of Justice generally requires that service animals be under the control of their handlers.¹⁷⁴ Third, and most controversially, the Department of Justice has limited its service animal definition to a “dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.”¹⁷⁵ In effect, the Department of Justice has not only excluded all other animals,¹⁷⁶ it has categorically excluded emotional support animals from Title III’s protections because the “provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for purposes of this definition.”¹⁷⁷

Apparently, the Department of Justice is reluctant to recognize emotional support animals as service animals because the Department believes that “some individuals with impairments — who would not be covered as individuals with disabilities — are claiming that their animals are legitimate service animals, whether fraudulently or sincerely (albeit mistakenly), to gain access” to public accommodations.¹⁷⁸ Moreover, the Department of Justice believes

170. See 28 C.F.R. § 36.302(c) (2016); see also U.S. DEP’T OF JUSTICE, ADA REVISED REQUIREMENTS: SERVICE ANIMALS (2011).

171. See 28 C.F.R. § 36.302(c)(7).

172. “A public accommodation shall not ask about the nature or extent of a person’s disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform.” See 28 C.F.R. § 36.302(c)(6).

173. See 28 C.F.R. § 36.302(c)(2).

174. See 28 C.F.R. § 36.302(c)(4).

175. 28 C.F.R. § 36.104 (2016).

176. See 28 C.F.R. § 36.104. *But see* 28 C.F.R. § 36.302(c)(9) (setting forth rules that apply exclusively to miniature horses).

177. 28 C.F.R. § 36.104. “Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals.” See U.S. DEP’T OF JUSTICE, *supra* note 29.

178. See Bourland, *supra* note 27, at 204 (internal quotes omitted).

that it does not need to offer protection to emotional support animals because certain service animals — such as those that perform safety checks — happen to offer benefits to persons with mental and emotional disabilities.¹⁷⁹ Finally, the Department of Justice justifies its position by explaining that its definition does not otherwise “affect or limit the broader definition of ‘assistance animal’ under” other major federal laws.¹⁸⁰ Whatever the reasons may be, the Department of Justice has nonetheless taken a position that makes it an anomaly among other major federal anti-discrimination laws.

III. RETHINKING THE DEPARTMENT OF JUSTICE’S APPROACH

As discussed in Part II, most major federal anti-discrimination laws, but not Title III of the Americans with Disabilities Act, offer protection to disabled persons relying on emotional support animals. Consequently, persons with mental and emotional disabilities and their emotional support animals receive some — but not full — protection under federal anti-discrimination law. The Department of Justice maintains that its distinct “service animal” definition is appropriate given fraud, public health, and public safety concerns and because its meaning does not “affect or limit” broader definitions under other federal anti-discrimination laws.¹⁸¹ This Part, however, argues that the Department of Justice’s reasoning is misguided.

While the Department of Justice’s fraud, public health, and public safety concerns are legitimate, Part III.A posits that, on balance, the Department of Justice’s blanket ban on emotional support animals is unreasonable. Part III.B then explains how the Department of Justice’s inconsistent approach indeed undermines, “affects,” and “limits” other major federal anti-discrimination laws. Next, Part III.C argues that the Department of Justice’s approach leads to even greater discrimination against persons with non-visible, mental and emotional disabilities. Finally, Part III.D describes how the

179. In other words, the Department of Justice believes that it does not need to offer protection to emotional support animals because some service animals, namely psychiatric service animals, happen to offer benefits to persons with non-visible mental and emotional disabilities. Those benefits may include turning on lights for persons with post-traumatic stress disorder, interrupting self-mutilation by persons with dissociative identity disorders, and keeping disoriented individuals from danger, but as this Note points out, those benefits are considerably different than the benefits emotional support animals offer to persons with mental and emotional disabilities. See *Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities*, 73 Fed. Reg. 34,508 (June 17, 2008); see also *infra* Part III.

180. U.S. DEP’T OF JUSTICE, *supra* note 29.

181. *See id.*

Department of Justice can align its policies with those of other major federal anti-discrimination laws without compromising its genuine fraud, public health, and public safety concerns.

A. The Department of Justice's Categorical Exclusion Is Unreasonable

The Department of Justice's blanket exclusion of emotional support animals is unreasonable and excessive. Currently, the Department of Justice believes that some individuals not covered by the Americans with Disabilities Act would fraudulently claim that their emotional support animals are legitimate service animals to gain access to public accommodations.¹⁸² Based on that premise, and without any regard for emotional support animals' benefits, the Department of Justice has concluded that animals "whose sole function is to provide comfort or emotional support" can never qualify as service animals under the Americans with Disabilities Act.¹⁸³ But whether or not places of public accommodation should be required to accommodate emotional support animals should not rest on an abstract concern about fraud.

Instead, the Department of Justice should first acknowledge that "emotional support animals offer considerable psychological, social, and physiological benefits to persons with mental or emotional disabilities."¹⁸⁴ From there, the Department of Justice may acknowledge its genuine — and perhaps even more critical — concerns.¹⁸⁵ After weighing *both* of those considerations, the Department of Justice should determine its policies on emotional support animals. Only then will the Department of Justice realize that a categorical exclusion fails to account for the demonstrated benefits emotional support animals offer to persons with life-changing disabilities.

Significantly, the Department of Justice's concerns are not unique to places of public accommodation. Airlines, housing providers, and employers all face similar fraud, public health, and public safety risks and nonetheless offer protection to emotional support animals. In fact, airlines and employers are arguably even more vulnerable to

182. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,527 (June 17, 2008); Bourland, *supra* note 27, at 203–04.

183. U.S. DEP'T OF JUSTICE, *supra* note 29 ("Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.").

184. See *supra* Part I.C; see also Ernst, *supra* note 41.

185. See *supra* Part II.C.v.

public health and safety risks because aircrafts and workplaces are typically smaller and more confined than most places of public accommodation.¹⁸⁶ And certainly, housing providers covered by the Fair Housing Act seem no more exposed to those risks than hotels, motels, and inns covered by Title III of the Americans with Disabilities Act. Therefore, if the Department of Housing and Urban Development, the Department of Transportation, *and* the Equal Employment Opportunity Commission are able to offer protection to emotional support animals, the Department of Justice should be able to offer protection as well. At a minimum, a theoretical concern for fraud should not alone justify the Department of Justice's approach.

B. The Department of Justice's Categorical Exclusion Undermines Other Major Federal Anti-Discrimination Laws

Contrary to their assertions, the Department of Justice's distinct approach also "affects" and "limits" service animal definitions under at least three other federal anti-discrimination laws. As discussed in Part II, emotional support animals may generally assist their owners at home, at work, and on airplanes.¹⁸⁷ But under Title III of the Americans with Disabilities Act, emotional support animals may not assist their owners in many other areas of public life.¹⁸⁸ While, in theory, the Department of Justice's narrow definition of service animals should not "affect" or "limit" broader definitions under other federal anti-discrimination laws,¹⁸⁹ this Note posits that, as a practical matter, it does.

Air travel demonstrates how the Department of Justice's approach "affects" and "limits" other federal anti-discrimination laws because it requires that passengers access "public accommodations" as a condition to accessing aircrafts.¹⁹⁰ Put another way, airport and public transportation terminals, restaurants, and shops are all considered "public accommodations" covered by Title III of the Americans with Disabilities Act, even though the aircraft itself is covered by the Air Carrier Access Act.¹⁹¹ While the Department of Transportation's regulations would permit passengers and their emotional support animals to travel on aircrafts, it may be

186. *See Most Shocking Stories of Animals at Airports*, *supra* note 78.

187. *See supra* Part II.

188. *See supra* Part II.C.iv.

189. U.S. DEP'T OF JUSTICE, *supra* note 29.

190. *See Hernandez-Silk*, *supra* note 31, at 326–27.

191. *See id.*

challenging, as a practical matter, for those passengers to travel on aircrafts if those passengers cannot, for example, access airport terminals or other public transportation terminals.¹⁹²

Importantly, those challenges are not unique to air travel. As discussed in Part II, Title III of the Americans with Disabilities Act covers, among other places, public transportation terminals, hotels, motels, inns, restaurants, bakeries, grocery stores, clothing stores, shopping centers, gas stations, and museums.¹⁹³ If, under Title I, disabled persons are permitted to bring their emotional support animals to work, but cannot access a transportation terminal, a bakery that sells their morning cup of coffee, or a restaurant that serves their weekday lunch, it seems conceivable that many disabled persons would opt to leave their emotional support animals at home. Further, if disabled persons can travel by air with their emotional support animals, but cannot access the hotel, motel, or inn at their destination, it seems reasonable to posit that those persons would similarly decline to bring their emotional support animals along. In each of those realistic scenarios, the Department of Justice's inconsistent policies limit other major federal anti-discrimination laws designed to offer protection to emotional support animals.

The Department of Justice's policies also have the same effect on a broader level. Specifically, in light of the Department of Justice's distinct approach, persons relying on emotional support animals likely do not appreciate that *three* major federal regulatory bodies have revised their policies in support of emotional support animals. Rather, such persons are more likely to read the news and learn that "emotional support animals are not service animals."¹⁹⁴ Despite the Fair Housing Act, the Air Carrier Access Act, and Title I, therefore, disabled persons relying on emotional support animals are forced to grapple with a notion that their illnesses and their prescribed emotional support animals are illegitimate. And others, who have not yet sought help, but who might otherwise benefit from an emotional support animal, might be less likely to solicit help.

As such, until all major federal regulatory bodies express consistent support towards emotional support animals, the work of those that have expressed support will be undermined.

192. *See id.*

193. *See supra* Part II.C.iv.

194. *See* Joseph Darius Jaafari, *Emotional Support Animals Are Not Service Animals. Here's Why it Matters*, NATIONSWELL (Sept. 5, 2018), <http://nationswell.com/service-animal-fraud-esa/> [<https://perma.cc/P4JH-BFAM>].

C. The Department of Justice’s Categorical Exclusion Leads to Even Greater Discrimination Against Persons with Mental and Emotional Disabilities

The Department of Justice’s blanket exclusion also “causes more problems than it eliminates.”¹⁹⁵ Specifically, its attempt to distinguish emotional support animals from other services animals overcomplicates the process it has attempted to simplify.¹⁹⁶ In turn, persons with mental and emotional disabilities are often subject to even greater discrimination.

In situations where it is not obvious that a dog is a service animal, for example, the Department of Justice does not permit a public accommodation to ask about “the nature or extent of a person’s disability.”¹⁹⁷ Instead, the regulations permit a public accommodation to make only “two inquiries to determine whether an animal qualifies as a service animal.”¹⁹⁸ This simplified process is designed to limit confrontation¹⁹⁹ and avoid “unnecessary and burdensome invasion[s] of privacy.”²⁰⁰ But in practice, the process arguably creates even more problems for disabled persons with non-visible disabilities because public accommodations are forced to discern — through a limited inquiry — whether an animal is a service animal covered by Title III or an emotional support animal excluded from Title III.²⁰¹ Inevitably, public accommodations violate the

195. See Hernandez-Silk, *supra* note 31, at 327.

196. The Department of Justice has attempted to simplify the process by limiting the extent to which public accommodations may inquire about a person’s disability. See *id.* at 317–18, 330.

197. See Hernandez-Silk, *supra* note 31, at 330; see also Disability Policy Collaboration, 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> [<https://perma.cc/RQH3-97EU>] (stating that a blanket exclusion was “inconsistent with the basic tenets of the ADA”).

198. First, a public accommodation may ask if the animal is required because of a disability. Second, a public accommodation may ask what work or task the animal has been trained to perform. See 28 C.F.R. § 36.302(c)(6) (1991); Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,540 (Jun. 17, 2008).

199. See Hernandez-Silk, *supra* note 31 at 335.

200. See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34,527 (June 17, 2008).

201. In one case, for example, a plaintiff described 43 occasions on which the plaintiff’s right to ride public transportation with a service animal — which assists with the plaintiff’s post-traumatic stress disorder and hearing impairment — was questioned by conductors and drivers. See *e.g.*, Stamm v. N.Y.C. Transit Auth., No.

Department of Justice's instructions and make intrusive inquiries for no reason other than to distinguish between types of animals.²⁰²

Certainly, intrusive inquiries result in discrimination against persons with "legitimate" service animals at the time of the examination.²⁰³ But intrusive inquiries also inevitably result in discrimination later on when such persons are forced to decide whether to risk tolerating an improper inquiry, or whether to leave their service animals at home instead.²⁰⁴ Just as importantly, intrusive inquiries also result in discrimination against persons with emotional support animals because it forces persons with "legitimate" service animals to substantiate their needs for their service animals, and at the same time, undermine other persons' needs for their emotional support animals.

For all of these reasons, the Department of Justice should eliminate its distinction between service and emotional support animals and allow public accommodations to make consistent and proper inquiries regardless of the animal type. Separately, the Department of Justice can mitigate its emotional support animal concerns without compromising its current protections for persons with service animals.²⁰⁵

D. The Department of Justice Can Revise its Policies Without Compromising its Fraud, Public Health, and Public Safety Concerns

Sections III.A, III.B, and III.C highlighted problems with the Department of Justice's distinct approach to regulating emotional support animals. This Section describes how the Department of Justice can address those problems and align its policies with those of other major federal anti-discrimination laws without compromising its genuine fraud, public health, and public safety concerns. First, it can develop a certification process specific to emotional support animals.

04 Civ. 2163, 2006 WL 1027142, at *1 (E.D.N.Y. Feb. 7, 2006); *see also* Hernandez-Silk, *supra* note 31, at 339.

202. *See e.g.*, *Stamm*, 2006 WL 1027142; *see also* Hernandez-Silk, *supra* note 31, at 317–19.

203. *See e.g.*, *Stamm*, 2006 WL 1027142; *see also* Hernandez-Silk, *supra* note 31, at 317–19.

204. The solution to this problem cannot be a more intrusive inquiry. If the Americans with Disabilities Act is meant to do anything, it is to protect people with disabilities in public life. Therefore, any requirement that would require a disabled person to further substantiate their need for a service animal in public would seemingly contradict the Americans with Disabilities Act's objectives. *See* 42 U.S.C. § 12101 (2009).

205. *See infra* Part III.D.

Second, it can impose obedience-training requirements on emotional support animals. Third, it can implement rules designed to encourage medical professionals to exercise more care in their prescription decisions. Finally, the Department of Justice can include within its protections a limitation that affords public accommodations discretion to exclude emotional support animals in specific, well-defined circumstances.

i. The Department of Justice Can Mandate Certification for Emotional Support Animals

To mitigate its fraud, public health, and public safety risks, the Department of Justice can mandate a certification process that allows public accommodations to more easily determine whether an animal is indeed providing emotional support. That process can require documentation from a certified medical professional demonstrating that the animal was prescribed to assist with the person's qualified mental or emotional disability and can also evaluate whether the individual's impairment qualifies him or her for protection under Title III. Once certified, emotional support animals and their owners can receive certificates or identification cards that evidence their certification and impose ongoing renewal requirements to prevent subsequent abuse of the certification process.

Indeed, the concept of a certification process is not novel.²⁰⁶ Some commentators have urged the Department of Justice to "mandate a certification requirement for service animals,"²⁰⁷ explaining that the process should look similar to the process for obtaining handicapped parking permits.²⁰⁸ But other commentators opposed such proposals, arguing that it would "(1) place a[n] [undue] burden on individuals to obtain [a] certification, and (2) violate an individual's privacy."²⁰⁹

Certainly, scholars can debate whether a service animal certification would ease or inhibit a person's access to public accommodations or would otherwise violate an individual's privacy.²¹⁰ But those considerations manifestly do not apply to emotional

206. For a discussion about a service animal certification process, see Bourland, *supra* note 27, at 209; see also Hernandez-Silk, *supra* note 31 at 334–38.

207. See Bourland, *supra* note 27, at 217–19; Hernandez-Silk, *supra* note 31, at 334.

208. See Hernandez-Silk, *supra* note 73, at 334–35; see also Bourland, *supra* note 27, at 217–18.

209. See Bourland, *supra* note 27, at 214; see also Hernandez-Silk, *supra* note 31, at 334.

210. See Bourland, *supra* note 27, at 214; see also Hernandez-Silk, *supra* note 31, at 334.

support animals' certifications because certifications for emotional support animals cannot burden disabled persons more than the Department of Justice's current categorical exclusion of emotional support animals burdens them. Thus, while this Note does not challenge or otherwise oppose previous proposals for service animal certifications, it posits that a certification process specific to emotional support animals — one that leaves the current service animal processes in place — is more feasible, better balances competing concerns, and would more effectively mitigate fraud, public health, and public safety risks.

ii. The Department of Justice Can Require that Emotional Support Animals Receive Standard Obedience Training

Pursuant to, or separate from, that certification process, the Department of Justice can also impose an obedience-training requirement on emotional support animals. Currently, the Department of Justice's regulations permit public accommodations to remove service animals from premises if (1) the animal is out of control and the owner does not take effective action to control it, or (2) the animal is not housebroken.²¹¹ But those measures are generally reactive and typically do not permit removal of a service animal from its premises until after it has misbehaved. As such, an obedience-training requirement specific to emotional support animals could add a "proactive" measure to the Department of Justice's regulations. It would not only weed out illegitimate requests for emotional support animals by creating yet another bar to certification,²¹² but would also mitigate public health and safety risks by ensuring that animals are properly trained before being permitted to enter places of public accommodation.²¹³

Importantly, an obedience-training requirement would be different than the Department of Justice's existing training requirement²¹⁴ because it would not require that emotional support animals be "trained to do work or perform tasks."²¹⁵ Rather, this requirement would merely force emotional support animals to spend a set number of hours with a certified animal trainer learning basic and necessary

211. U.S. DEP'T OF JUSTICE, *supra* note 29.

212. Another bar to certification would help address the Department of Justice's genuine fraud concerns. *See supra* Part II.

213. For a discussion on the public health and safety risks, see *supra* Part I.D.

214. *See supra* Part II.C.v.

215. 28 C.F.R. § 36.104 (2016).

obedience skills. Similar to a certification requirement, few would challenge it as burdensome because the Department of Justice's current regulations offer no protection to emotional support animals.²¹⁶

iii. The Department of Justice Can Better Monitor Medical Professionals

The Department of Justice can also implement rules designed to urge medical professionals to exercise more care in their emotional support animal prescription decisions. Indeed, other scholars have urged the Department of Justice to develop processes that hold medical professionals more accountable in cases where they fraudulently certify as to an individual's need for an emotional support animal.²¹⁷ Other scholars, for example, have highlighted that "a few states have taken measures to correct [such] abuses."²¹⁸ But, as a practical matter, laws designed to "crack down" on service and emotional support animal fraud "are tough to enforce" in part because it is difficult to determine whether a medical professional's prescription for a person with a non-visible disability was indeed fraudulent.²¹⁹ Therefore, a process that raises the bar to obtain an emotional support animal certification might better address the Department of Justice's fraud concerns.

For instance, the Department of Justice could require that a certifying medical professional meet in person with the patient requesting the emotional support animal prescription. Or, similarly, the Department of Justice could require that medical professionals meet in person, more than once, with the patient requesting an emotional support animal prescription. In either case, the Department of Justice would be able to address instances where a medical professional's prescription decision was not technically "fraudulent," but was otherwise not reached with the utmost care.²²⁰ At a minimum, it would eliminate websites that "say they can provide a written diagnosis within 24 hours, via email, after only a five- to 10-

216. See Bourland, *supra* note 27, at 214; Hernandez-Silk, *supra* note 31.

217. See Bourland, *supra* note 27, at 218–19; Hernandez-Silk, *supra* note 31, at 336.

218. See Hernandez-Silk, *supra* note 31, at 336.

219. See Brenda Goodman, *Pets on Planes: Emotional Support or Sham?*, WEBMD HEALTH NEWS (Dec. 21, 2017), <https://www.webmd.com/mental-health/news/20171221/pets-on-planes-emotional-support-or-sham> [<https://perma.cc/K7RU-HJZS>].

220. See *supra* Part I.D.

minute phone conversation with a ‘mental health professional.’”²²¹ In turn, it would help mitigate the Department of Justice’s fraud, public health, and public safety concerns.

iv. The Department of Justice Can Impose Other Limitations on Emotional Support Animals

Finally, like the Department of Transportation’s regulations pursuant to the Air Carrier Access Act, the Department of Justice can also permit public accommodations to exclude emotional support animals from their premises if the public accommodations determine that there are other “factors” that preclude their admission to the accommodation.²²² Like a training requirement, this would provide places of public accommodation with meaningful flexibility to assess animals on a case-by-case basis.

Certainly, public accommodations would not have unlimited discretion to exclude emotional support animals for any reason. Rather, like the Department of Transportation, the Department of Justice can set forth detailed criteria that define the circumstances by which public accommodations may exclude emotional support animals.²²³ If the Department of Justice determines that the Department of Transportation’s “factors” are too lenient, it can impose more stringent standards.

For example, like the Department of Transportation, the Department of Justice can impose size and weight limitations, or limit emotional support animal protections to certain animal types or breeds. Moreover, also like the Department of Transportation, the Department of Justice can permit a public accommodation to exclude an emotional support animal from its premises if the accommodation determines that the animal will cause significant disruption to its business.²²⁴ Relatedly, the Department of Justice can vary its factors based on the twelve categories of public accommodations listed in the Americans with Disabilities Act.²²⁵ Establishments serving food and drink, for example, could have different guidelines than places of lodging. Ultimately, this would permit the Department of Justice to both lift its categorical exclusion of emotional support animals, and

221. See Martin, *supra* note 83.

222. See *supra* Part II.B.iii.

223. This would be similar to the Department of Transportation’s regulations, which provide examples of “factors” that airlines may consider. See *id.*

224. See *id.*

225. See *supra* Part II.C.iv.

still provide places of public accommodation with considerable discretion to protect their interests.

CONCLUSION

Medical professionals are increasingly prescribing emotional support animals to treat persons suffering from mental or emotional disabilities.²²⁶ And the Americans with Disabilities Act — and all other federal anti-discrimination laws — make no distinction between impairments that are “physical” or “mental.”²²⁷ Even if individuals are fraudulently “claiming that their animals are legitimate service animals” to gain access to public accommodations,²²⁸ it should not follow that places of public accommodation are *never* required to accommodate emotional support animals. Rather, the more logical conclusion is that the Department of Justice should design its policies in a way that best *balances* legitimate fraud concerns with genuine needs for accommodations.²²⁹ This would not only maximize emotional support animal protections under other major federal anti-discrimination laws,²³⁰ but it would also change the lives of millions of Americans battling serious and life-changing mental illnesses.²³¹

226. *See supra* Part I.A.

227. *See supra* Part II.

228. *See supra* Part II.C.v.

229. *See supra* Part III.

230. *See supra* Part III.B.

231. *See supra* Part I.