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(Emotional Support) Peacocks on a Plane: Revising Federal Reasonable Accommodations Laws for Emotional Support Animals

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**(Emotional Support) Peacocks on a Plane:
Revising Federal Reasonable Accommodations Laws for Emotional
Support Animals**

Tallulah Lanier*

In an era of increased healthcare and medication costs, using the comfort of an emotional support animal for disability mitigation presents a valuable alternative to an overtaxed healthcare system. The rise in use of emotional support animals has outpaced the regulation of them, however. Four key federal statutes affect the legal rights and obligations of assistive animals under federal law—the Americans with Disabilities Act, the Rehabilitation Act, the Fair Housing Act, and the Air Carrier Access Act. While all four require accommodations for service animals, only the latter two require the same for emotional support animals. Even so, there is no consensus on how to define emotional support animals—the Americans with Disabilities defines them by exclusion, while the Air Carrier Access Act, until recently, defined them by inclusion into a broader “service” animal category, and the rest merely defer to the former. The resulting gap and confusion in federal regulation produce rather absurd results: peacocks on planes, alligators in apartments, and plenty of confusion regarding whether anyone can do anything about either.

This Article argues for eliminating this gap in federal regulations with clear, prescriptive revisions to key disability laws and their reasonable accommodation requirements as applied to emotional support animals. Namely, it proposes that Congress should amend select reasonable accommodations laws so that the definition of “emotional support animal” mirrors the definition for “service animal.” These proposed revisions address three main problems plaguing the emotional support animal landscape: (1) fraudulent misrepresentation of pets as emotional support animals, (2) misrepresentation of absurdly untenable, wild, or exotic pets as emotional support animals, and (3) lack of accessibility to emotional support animals for disabled individuals who could greatly benefit from them. An emotional support animal under the proposed framework would be a dog, cat, or miniature horse whose presence, or a task it performs, provides comfort or emotional support to a disabled individual. Moreover, this Article calls for eliminating the statement of need, which would further align the emotional support animal framework with that of the service animal framework. In doing so, it clarifies accommodation provider responsibilities with regard to these animals and fair use of a valuable accommodation option for those disabled individuals seeking to benefit legitimately from it.

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INTRODUCTION

On January 28, 2018, an Indian peacock¹ named Dexter patiently sat on a luggage cart handle at Newark International Airport.² His green, blue, and brown plumage was on full display as his owner, Brooklyn-based performance artist Ventiko, attempted to negotiate the animal's passage on a United Airlines flight to Los Angeles.³ United Airlines denied the peacock passage on the plane because he did not meet a myriad of guidelines, including size and weight descriptions.⁴ According to a company spokesperson, United Airlines notified Ventiko that Dexter

¹ A peacock is a male peafowl. See *Peacock*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/animal/peacock> (last visited Feb. 11, 2020).

² Lindsey Bever & Eli Rosenberg, *United Changed Its Policy for Emotional Support Animals. That Peacock Still Can't Board*, WASH. POST (Feb. 1, 2018, 3:35 PM), <https://www.washingtonpost.com/news/animalia/wp/2018/01/30/a-woman-tried-to-board-a-plane-with-her-emotional-support-peacock-united-wouldnt-let-it-fly/>.

³ *Id.*

⁴ *Id.*

could not board three times before she arrived to board the flight.⁵ Ultimately, Dexter and Ventiko made their journey to Los Angeles by car.⁶

This story on its own would be a delightful foray into the world of animal travel. However, the curious case of Dexter has another, more legal, twist: Dexter's owner describes the animal as an "emotional support" peacock.⁷ What is an emotional support peacock? A peacock that provides emotional support. How does one know that Dexter truly provides Ventiko emotional support? Because Ventiko says so.⁸ The circular nature of the Dexter debate is exemplary of a larger national conversation—what is an emotional support animal, what qualifies as one, and how does an interested party recognize one?

All of these questions would be easy to answer if the words "emotional support" were replaced with "service." Federal law defines a service animal as a specifically trained dog used by a disabled individual to perform a task that directly relates to one or more of the individual's disabilities.⁹ Federal law prescribes similar regulations for the use of miniature horses but does not strictly classify them as service animals.¹⁰ In a classic depiction of a service animal, one might envision a guide dog.¹¹ Not so classically, one might imagine (or search the internet for) Fancy Dancer, Chunky Monkey, Glitter Bug, and Patty Cake, the quasi-service miniature horses¹² who help their owner maintain stability during his trips to town.¹³

Unlike service animals, emotional support animals lack a consistent definition within federal law.¹⁴ In fact, many applicable federal laws do not define

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 28 C.F.R. § 35.104 (2020); *see also ADA Requirements: Service Animals*, U.S. DEP'T. JUST., https://www.ada.gov/service_animals_2010.htm (last updated Feb. 24, 2020) (defining service animals as "dogs that are individually trained to do work or perform tasks for people with disabilities.").

¹⁰ *See* 28 C.F.R. § 35.136(i)(3) ("Paragraphs 35.136(c) through (h) of this section, which apply to service animals [that are dogs], shall also apply to miniature horses."). By regulatory construction, miniature horses will be accommodated in the same manner as service animals where logistical and safety concerns do not dictate otherwise. *Id.*

¹¹ *See Dog Guides for People with Vision Loss*, VISIONAWARE, <https://www.visionaware.org/info/everyday-living/essential-skills/an-introduction-to-orientation-and-mobility-skills/dog-guides-for-people-with-vision-loss/1234> (last visited Sept. 29, 2019).

¹² *See* 28 C.F.R. § 35.136(i)(3).

¹³ Next 9NEWS, *Mini-Horses are This Man's Service Animal of Choice*, YOUTUBE (Feb. 13, 2017), <https://youtu.be/kd5ZTWakUPk>. While the video refers to miniature horses as service animals, they are more accurately labeled quasi-service animals. *See supra* note 10 discussion.

¹⁴ *Compare, e.g.*, U.S. DEP'T HOUS. & URB. DEV., FHEO-2013-01, SERVICE ANIMALS AND ASSISTANCE ANIMALS FOR PEOPLE WITH DISABILITIES IN HOUSING & HUD-FUNDED PROGRAMS, at 1 (2013), https://archives.hud.gov/news/2013/servanimals_ntcfheo2013-01.pdf (limiting the ADA definition of service animal to "include only dogs" and excluding emotional support animals), *with* *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742, 79,743 (Dec. 2, 2020) (to be codified at 14 C.F.R. pt. 382) (noting that "[c]arriers are not required to recognize emotional support animals as services animals and may treat them as pets" but not mandating such treatment).

emotional support animal.¹⁵ These laws instead define service animal and exclude any other animal.¹⁶ For instance, the Americans with Disabilities Act (ADA) provides a thorough definition of service animal, noting for what purposes one can and cannot be used.¹⁷ In contrast, the Rehabilitation Act of 1973 (“Rehab Act”), the Fair Housing Act (FHA) and its subsequent relevant amendments, and the Air Carrier Access Act (ACAA) do not take as thorough of an approach.¹⁸

Such an inconsistency creates an exploitable gap in federal law, especially with respect to disability and reasonable accommodations.¹⁹ Up until January 2021, if an airline was not sure whether the peacock in the ticket line was an emotional support animal or simply a pet, it could not properly assess its responsibilities under the ACAA.²⁰ Similarly, if a renter shows up on move-in day with a ball python that she claims offers her comfort when the ball python “hugs” her, must the apartment complex allow the ball python to reside in a unit free of charge in accordance with the FHA?²¹ Or can management assess a pet fee?

This Article argues for eliminating this gap in federal regulations with clear, prescriptive revisions to key disability laws and their reasonable accommodation requirements as applied to emotional support animals. Namely, I propose that Congress amend select reasonable accommodation laws so that the definition of

¹⁵ Compare 28 C.F.R. § 35.104 (2020) (defining service animals under the ADA), with 29 U.S.C. § 794 (2018) (neither defining nor referencing service or emotional support animals under the Rehab Act).

¹⁶ See 28 C.F.R. § 35.104 (“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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.”); 14 C.F.R. § 382.3 (2020) (“Service animal means a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Animal species other than dogs, emotional support animals, comfort animals, companionship animals, and service animals in training are not service animals for the purposes of this part.”); 28 C.F.R. § 36.104 (2020) (“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. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.”); 24 C.F.R. § 5.306(1) (2020) (“A domesticated animal, such as a dog, cat, bird, rodent (including a rabbit), fish, or turtle, that is traditionally kept in the home for pleasure rather than for commercial purposes. . . . This definition shall not include animals that are used to assist persons with disabilities.”).

¹⁷ See discussion *infra* Part II.A.i; see also 28 C.F.R. § 35.104. The ADA itself does not define service animal, but the regulations passed pursuant to the ADA do. For the sake of clarity, this Article will simply refer to the ADA and its regulations as the ADA (other statutes will be referred to likewise).

¹⁸ See *infra* Part II.A.i.

¹⁹ See Jason Nark, *The Emotional Support Alligator That Helps a York County Man Deal with Depression*, PHILA. INQUIRER, <https://www.inquirer.com/news/alligator-esa-peacock-dogs-animals-crocodiles-support-depression-20190124.html> (last updated Jan. 24, 2019) (detailing exploitation of emotional support animal provisions in housing); Denise Crosby, *Disabled Marine, Neighbors at Odds over His 20 Support Chickens*, BEACON-NEWS (June 3, 2018, 8:50 AM), <https://www.chicagotribune.com/suburbs/aurora-beacon-news/opinion/ct-abn-crosby-chickens-st-0603-story.html> (same); Adam Boulton, *Passenger Takes Turkey on Flight as ‘Emotional Support Animal’*, TELEGRAPH (Jan. 12, 2016, 8:05 PM), <https://www.telegraph.co.uk/news/newstopics/howaboutthat/12096210/Passenger-takes-turkey-on-flight-as-emotional-support-animal.html> (same for air travel).

²⁰ See 14 C.F.R. § 382.117 (2020) (outlining an airline’s responsibilities with respect to service and emotional support animals under the ACAA).

²¹ See U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 14, at 3.

“emotional support animal” mirrors the definition for “service animal” but with an expanded list of qualified species. An emotional support animal under the proposed framework would be a dog, cat, or miniature horse whose presence, or task it performs, provides comfort or emotional support to a disabled individual. Moreover, this Article calls for the elimination of the statement of need, which would further align the emotional support animal framework with that of the service animal. These proposed revisions address three main problems plaguing the emotional support animal landscape, including (1) fraudulent misrepresentation of pets as assistive animals, (2) misrepresentation of exotic and untenable animals as assistive more broadly,²² and (3) lack of accessibility.²³

To better understand the regulations underlying the emotional support animal debate, Part I provides an overview of how applicable federal laws define disability and reasonable accommodations. Part II parses through the definitions for service and emotional support animals, collectively known as “assistive animals,” to properly lay the foundation for a discussion of how two particular laws are exploited. Part II closes with select examples on how individuals take advantage of the gaps in federal law to represent absurdly untenable, wild, or exotic species as “emotional support animals.” This further emphasizes the need for revisions to the four federal statutes addressed here. Part III(A) then suggests the solution: the ADA,²⁴ the Rehab Act,²⁵ the FHA,²⁶ and the ACAA²⁷ should be collectively revised to align their definitions of emotional support animals in accordance with this Article’s proposed revisions. Then, Part III(B) outlines how the revisions achieve the previously stated justifications and the value of each. Finally, Part III(C) reflects upon the potential results and implications of these revisions and why the scales balance in favor of the proposed revisions.

I. FEDERAL DISABILITY RIGHTS LAWS: AN OVERVIEW

This Article will focus on the assistive animals debate under *federal law*—specifically, it will analyze the four main federal laws addressing reasonable accommodations. This self-imposed limitation does not mean, however, that disabled individuals have no protections for the use of assistive animals under *state*

²² See *infra* Part III.B.ii (discussing, as an example, tigers bred by Joseph “Joe Exotic” Maldonado-Passage, whose owners successfully argued that they were “emotional support” tigers).

²³ See *infra* Part III.B.iii.

²⁴ Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101–12213 (2018)).

²⁵ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701–796 (2018)).

²⁶ Fair Housing Act of 1968, Pub. L. No. 90-284, §§ 801–819, 82 Stat. 73, 81–89 (1968); see also Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619 (2018)).

²⁷ Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (2018).

law. Most states also protect assistive animals under disability, public accommodations, or human rights laws.²⁸ This Article will not address those laws.

First, Section A will outline the definition of disability that will be used throughout the remainder of this Article. Section B will then discuss the foundations of federal disability laws—their origin and their current forms. Next, Section C will explain the method by which disability laws protect individuals: reasonable accommodations.

A. Definition of Disability

Various federal laws covering disability rights contain a definition of disability.²⁹ While Section B will delve into the history of disability protection laws, this section will focus more specifically on the definition that will be used for the remainder of this Article. How federal law defines disability is critical to the premise of this discussion—a service animal must be used in connection with the owner’s disability.³⁰ The same is currently not true for emotional support animals.³¹ Therefore, if an individual does not meet the requisite criteria to be considered *disabled*, any animal they use in connection with a condition (whether perceived as disabling or otherwise) would not in turn meet the definition of a “service animal.”³² This is ultimately a threshold question to the discussion underlying the assistive animal discussion.

Under the ADA, a disability is defined “with respect to an individual” as: (1) “a physical or mental impairment that substantially limits one or more major life activities of such individual;” (2) “a record of such an impairment;” or (3) “being regarded as having such an impairment.”³³ The other relevant federal laws also adopt this definition.³⁴ When in the next section, and the rest of this Article, I refer to a disabled individual, I adopt the definition outlined above.³⁵

²⁸ See, e.g., N.M. STAT. ANN. §§ 28-7-3, 28-11-3 (West 2020); N.Y. AGRIC. & MKTS. LAW § 123-b (McKinney 2020); N.Y. CIV. RIGHTS LAW § 47-b (McKinney 2020).

²⁹ See 29 U.S.C. § 705(20) (2018) (adopting the ADA’s definition of disability for 29 U.S.C. § 794); Fair Housing Act, 42 U.S.C. § 3602 (2018); Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 (2018); 49 U.S.C. § 41705(a) (2018) (adopting ADA’s definition of disability for ACAA).

³⁰ 28 C.F.R. §§ 35.104, 35.136(a) (2020); see also *ADA Requirements: Service Animals*, *supra* note 9.

³¹ See 28 C.F.R. § 35.104 (“The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of [the service animal] definition.”). This Article’s proposed revisions would mandate that the emotional support animal be used in connection with a disability. See *infra* Part III.A.

³² 28 C.F.R. §§ 35.104, 35.136(a); see also *ADA Requirements: Service Animals*, *supra* note 9.

³³ 42 U.S.C. § 12102(1); see also 42 U.S.C. § 12102(2) (defining “major life activities”); 42 U.S.C. § 12102(3) (defining “regarded as having such impairment”).

³⁴ See 29 U.S.C. § 705 (adopting the ADA’s definition of disability for the Rehab Act Section 504); 42 U.S.C. § 3602 (defining “handicap” under FHA identically to disability under ADA); 42 U.S.C. § 12102(1); 49 U.S.C. § 41705(a) (adopting the ADA’s definition of disability for ACAA).

³⁵ While the FHA terms this definition as “handicap,” this Article will refer to this in context as a “disability.” See 42 U.S.C. § 3602. This Article avoids use of the latter, while a legally operative term, given that it does not accurately and respectfully describe individuals with disabilities.

B. The Foundations of Disability Law

Laws protecting disabled individuals are relatively new to the United States. Prior to the Social Security Act of 1935,³⁶ most laws governing disabilities were detrimental to disabled persons.³⁷ Public opinion on disabilities inhibited the earlier adoption of beneficial regulation—disabilities were originally categorized as medical problems or “defects,” with a focus on solving and eliminating disabilities.³⁸ This reflected a long-held theological notion that a disability was punishment from God for noncompliance with God’s teachings.³⁹ The Supreme Court did nothing to change this notion for many years—if anything, the Court reinforced it.⁴⁰

In the years following the civil rights movement of the 1960s, disability advocates lobbied for similar access and protections as those won by racial equality advocates.⁴¹ Ultimately, a paradigm shift occurred.⁴² Beginning in the 1970s, policymakers began treating individuals as members of a minority group rather than merely as functionally limited people.⁴³ This paradigm shift opened the door for policymakers to consider “architectural, institutional, and attitudinal barriers” that prevented individuals with disabilities from full access and integration.⁴⁴ Leading the way in the efforts for integration was the federal government with the Rehab Act.⁴⁵ While most of the Act simply incorporated or rephrased provisions

³⁶ Social Security Act of 1935, Pub. L. No. 74–271, 49 Stat. 620 (1935).

³⁷ See *infra* text accompanying notes 38–41.

³⁸ JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 13 (2003); cf. Phil Pangrazio, *A Brief History of Disability Rights and the Americans with Disabilities Act (ADA)*, LIVABILITY MAG. (July 14, 2015), <https://ability360.org/livability/advocacy-livability/history-disability-rights-ada/> (“In Christian theology, disability was characterized as something that could be cast upon you for not following the teachings of God.”).

³⁹ Pangrazio, *supra* note 38.

⁴⁰ See *Buck v. Bell*, 274 U.S. 200, 207 (1927) (noting that “[t]hree generations of imbeciles are enough” in deciding to uphold Virginia’s involuntary sterilization of “mental defectives”); see also Virginia Sterilization Act of 1924, 1924 VA. ACTS 569. This became a model decision for the later American eugenics movement. See Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, U. VT., <http://www.uvm.edu/~lkaelber/eugenics/> (last visited Feb. 11, 2020).

⁴¹ *A Brief History of the Disability Rights Movement*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/disability-rights-movement> (last visited Feb. 11, 2020).

⁴² See Harlan Hahn, *The Political Implications of Disability Definitions and Data*, 4 J. DISABILITY POL’Y STUD. 41, 42–43 (1993).

⁴³ See *id.*; VAUGHN SWITZER, *supra* note 38, at 14. *Contra* 42 U.S.C. § 1382c (2018) (defining various disabilities in terms of functional limitations for Social Security purposes).

⁴⁴ VAUGHN SWITZER, *supra* note 38, at 14; see also The Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151–4156 (2018) (requiring federal agencies and programs to design and construct new facilities, as well as alter existing facilities, to promote accessibility for disabled individuals).

⁴⁵ 29 U.S.C. § 701(b)(3) (2018) (“[T]o ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with significant disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.”).

previously codified elsewhere, buried in the Rehab Act was a provision initially ignored by many—Section 504.⁴⁶

The original language of Section 504 was relatively short but immensely powerful.⁴⁷ Modeled after the 1964 Civil Rights Act, Section 504 prohibited discrimination against “handicapped”⁴⁸ individuals solely because of their disability.⁴⁹ However, the text of Section 504 was not self-enacting; rather, agencies needed to adopt specific guidelines to implement the law.⁵⁰ It took nationwide action, like sit-ins, to lobby for Section 504 guidelines with Departments of Health, Education, and Welfare regulations.⁵¹ Ultimately, Section 504 failed to define disability.⁵²

Section 504 and the later sit-ins did not end the disability rights movement, however. The law’s scope was limited to only federal agencies and entities that receive federal financial assistance or grants.⁵³ The disability rights movement then shifted focus, pushing for a more comprehensive and far-reaching statute that would better mirror the broad-reaching protections of the Civil Rights Act of 1964.⁵⁴ The ultimate result was the ADA.⁵⁵

⁴⁶ *Id.* § 794; see also Britta Shoot, *The 1977 Disability Rights Protest That Broke Records and Changed Laws*, ATLAS OBSCURA (Nov. 9, 2017), <https://www.atlasobscura.com/articles/504-sit-in-san-francisco-1977-disability-rights-advocacy>.

⁴⁷ Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (“No otherwise qualified handicapped individual in the United States, as defined in section 7 (6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”) (current version at 29 U.S.C. § 794).

⁴⁸ Current revisions use “disabled” since “handicap” is generally construed to align with the functional limitation mindset. See 29 U.S.C. § 794; see also Dana S. Dunn & Erin E. Andrews, *Choosing Words for Talking About Disability*, AM. PSYCHOL. ASS’N (Oct. 2015), <https://www.apa.org/pi/disability/resources/choosing-words>.

⁴⁹ Susan Schweik, *Lomax's Matrix: Disability, Solidarity, and the Black Power of 504*, 31 DISABILITY STUD. Q., ¶ 3 (2011).

⁵⁰ While not included in the initial language of Section 504, later revisions clarified this. 29 U.S.C. § 794(a) (“The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.”); see Shoot, *supra* note 46.

⁵¹ Department of Health, Education, and Welfare (DHEW) was the precursor to the Department of Health and Human Services, which also included the Social Security Administration until their bifurcation in 1995. See *Organizational History*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/orghist.html> (last visited Feb. 11, 2020). The most famous of these sit-ins occurred in 1977 at a San Francisco DHEW field office. Shoot, *supra* note 46. The San Francisco sit-in also holds the record for the “longest non-violent occupation of a U.S. federal building in history.” *Id.*

⁵² As amended, Section 504 now adopts the ADA’s definition. See 29 U.S.C. § 705(9) (adopting the ADA’s definition of disability for 29 U.S.C. § 794).

⁵³ *Id.* § 794(a).

⁵⁴ *A Brief History of the Disability Rights Movement*, *supra* note 41.

⁵⁵ *Id.*

The ADA prohibits discrimination in a wide variety of settings, including employment,⁵⁶ services provided by state and local governments,⁵⁷ public accommodations,⁵⁸ transportation,⁵⁹ and telecommunications.⁶⁰ These protections are available to any “qualified individual,” which the law defines as an individual with a “physical or mental impairment that substantially limits one or more major life activities,” a person who has a history or “record of such an impairment,” or a person who is perceived by others as “having such an impairment.”⁶¹ Under the ADA, covered entities are required to make reasonable accommodations to allow qualified (disabled) individuals to access services or employment opportunities equally.⁶² Reasonable accommodations are discussed in more detail in the following section.

In addition to the ADA and the Rehab Act, several other federal laws currently protect disabled individuals from discrimination.⁶³ While there are many of these laws,⁶⁴ this discussion will focus on two laws in addition to those already discussed: the FHA⁶⁵ and the ACAA.⁶⁶ Because these four laws address most entities and facilities in which a conversation on the admissibility of an assistive animal would occur, and because many other disability discrimination laws mirror the ADA’s classifications on disability and reasonable accommodations, limiting the analysis and revisions to these four laws presents no challenge to the efficacy of the solution proposed in Part III.⁶⁷

The FHA was originally passed in 1968 in response to the civil rights movement.⁶⁸ The original language protected against discrimination based on race, color, religion, and national origin in the sale, rental, or advertisement of housing.⁶⁹

⁵⁶ 42 U.S.C. § 12112 (2018).

⁵⁷ See U.S. DEP’T OF JUSTICE, ADA UPDATE: A PRIMER FOR STATE AND LOCAL GOVERNMENTS 1, (2015), https://www.ada.gov/regs2010/titleII_2010/titleII_primer.pdf (“Title II of the ADA applies to all State and local governments and all departments, agencies, special purpose districts, and other instrumentalities of State or local government . . .”). See generally 42 U.S.C. §§ 12101–12213.

⁵⁸ *Id.* § 12182.

⁵⁹ *Id.* §§ 12141–12165.

⁶⁰ 47 U.S.C. § 225 (2018).

⁶¹ 42 U.S.C. § 12102(1).

⁶² See, e.g., *Id.* § 12112(b)(5)(A).

⁶³ See *A Guide to Disability Rights Laws*, U.S. DEP’T JUST. (Feb. 2020), <https://www.ada.gov/cguide.htm>, for a complete list of federal laws codifying disability rights.

⁶⁴ See *id.* Note, however, that the guide does not include the relevant 2010 ADA revisions, which will be discussed in greater detail later. See *infra* Part II.

⁶⁵ The FHA protects disabled individuals from discrimination in housing rentals and sales and in the terms and conditions of those transactions, and mandates reasonable modifications for the disabled individuals, where needed. 42 U.S.C. § 3604.

⁶⁶ The ACAA prohibits airlines from discriminating against passengers solely based on their disabilities in a variety of ways, including in the construction of a plane’s cabin and the allowance of assistive animals on flights. See generally 49 U.S.C. § 41705 (2018).

⁶⁷ See *infra* Part III.A.

⁶⁸ See *Fair Housing: History*, FAIR HOUSING ACCESSIBILITY FIRST, <https://www.fairhousingfirst.org/fairhousing/history.html> (last visited Feb. 11, 2020).

⁶⁹ *Id.*; 42 U.S.C. § 3604.

In 1974, Congress added sex as a class; disability and familial status followed in 1988.⁷⁰ Within the FHA, the term “handicap” is used in place of “disability,” but the Act’s operating definition is identical to that of a disability under the ADA.⁷¹ The disability protections outlined in the 1988 revisions (The Fair Housing Amendments Act) are the basis for this discussion’s inclusion of the FHA.⁷² As amended, the FHA protects disabled individuals from discrimination in the sale or rental of housing and provides that requests for reasonable modifications to housing arrangements may be required to meet the disability-related needs of the buyer, renter, or any person associated with the buyer or renter.⁷³

Disabled individuals also have protections when traveling by air in the United States, regardless of the carrier’s country of incorporation.⁷⁴ The ACAA was first enacted by Congress in 1986 to address the unique difficulties travelers with disabilities face on commercial airline flights.⁷⁵ The ACAA, as amended, mirrors the definition of disability in the ADA.⁷⁶ Similar to the acts previously discussed, the ACAA also requires carriers to make modifications to their policies, practices, and facilities to provide service to disabled individuals.⁷⁷

The existence of these laws alone is a great milestone in disability rights law. However, they do not inherently guarantee protections to disabled individuals seeking to participate in all aspects of society. Rather, these four federal statutes rely upon reasonable accommodations provisions to outline and implement the ways in which disabled individuals are guaranteed an “opportunity to participate.”⁷⁸

⁷⁰ *Fair Housing: History*, *supra* note 71; Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (1988).

⁷¹ Compare 42 U.S.C. § 3602(h), with *id.* § 12102(1).

⁷² See generally Fair Housing Amendments Act, Pub. L. No. 100-430.

⁷³ 42 U.S.C. § 3604(f).

⁷⁴ 14 C.F.R. §§ 382.1–.35 (2020); see also Air Carrier Access Act of 1986, 49 U.S.C. § 41705 (2018).

⁷⁵ Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (1986) (codified as amended at 49 U.S.C. § 41705). Prior to the ACAA, commercial airlines had little to no obligation to accommodate disabled individuals. See *U.S. Dep’t of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 597 (1986); see also Brief for Respondents, *Paralyzed Veterans of Am.*, 477 U.S. 597 (No. 85-289), 1985 WL 669459, at *3 (“As a result [of the lack of requirements for commercial airlines], handicapped persons may meet passengers at airports, but they have no protection from discriminatory treatment if they wish to use those airports for their primary purpose and fly on a commercial airline.”). Disabled individuals still face difficulties with airline travel today, including damage or loss of a wheelchair. Ace Ratcliff, *Air Travel is Often a Humiliating Nightmare for People with Disabilities*, HUFFPOST (July 18, 2018, 5:46 AM), https://www.huffpost.com/entry/opinion-ratcliff-travel-disability_n_5b4aa626e4b022fdec59f658.

⁷⁶ Compare 49 U.S.C. § 41705(a), with 42 U.S.C. § 12102(1).

⁷⁷ 14 C.F.R. § 382.13(a) (2020).

⁷⁸ 42 U.S.C. § 12182(b)(1)(C).

C. Reasonable Accommodations

Various federal laws protect disabled individuals against discrimination in a variety of circumstances, including employment,⁷⁹ housing,⁸⁰ public accommodations and services,⁸¹ and common carriers.⁸² Specifically, entities covered by these federal laws must allow disabled individuals access to their services, properties, or activities and provide any “reasonable accommodations” that will further this access.⁸³

Generally speaking, a reasonable accommodation under the ADA is an alteration to the service or transportation method that allows the “opportunity to participate.”⁸⁴ This is true unless such alteration would cause a direct threat to the health and safety of others⁸⁵ or where the accommodation “would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”⁸⁶ In those cases, no accommodation is required.⁸⁷ Also exempted are private clubs,⁸⁸ and religious organizations and their facilities.⁸⁹ The other federal laws discussed have similar provisions.

⁷⁹ The Rehab Act first prohibited employment discrimination based on disabilities in federal agencies or those entities that receive federal financial assistance and mandated federal agencies to develop specific affirmative action plans to hire disabled individuals. 29 U.S.C. § 794(a) (2018). The ADA now more broadly prohibits employment discrimination against disabled individuals solely because of their disabilities, whether they are employed by state and local governments, private entities, or places of public accommodation. 42 U.S.C. § 12112(a).

⁸⁰ The FHA protects disabled individuals from discrimination in housing rentals and sales and in the terms and conditions of those transactions and mandates reasonable modifications for the disabled individuals where needed. *Id.* § 3604(f)(1)–(3).

⁸¹ The Rehab Act, as amended, provides that no disabled individual

solely by reason of her or his disability, [can] be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a). The ADA also provides protections for disabled individuals in places of public accommodations, including those run by private entities, and on intercity and commuter rails. 42 U.S.C. §§ 12132, 12143(a), 12162(a)–(b), 12182(a).

⁸² For disabled individuals traveling by air, the ACAA prohibits airlines from discriminating against passengers solely based on their disabilities. 14 C.F.R. § 382.11 (2020).

⁸³ *See* 29 U.S.C. § 791(b) (2018) (mandating federal agencies to annually report and describe how the needs of disabled individuals are met); 42 U.S.C. § 3604(f)(3) (describing prohibitions on discrimination in housing); 14 C.F.R. § 382.13 (2020) (requiring air carriers to make modifications to their policies, practices, and facilities to provide “nondiscriminatory service” to disabled individuals).

⁸⁴ 42 U.S.C. § 12182(b)(1)(C).

⁸⁵ *See id.* § 12182(b)(3); *cf.* *U.S. Airways v. Barnett*, 535 U.S. 391, 402 (2002) (“The question in the present case focuses on . . . the plaintiff’s need to show that [a reasonable] ‘accommodation’ seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”).

⁸⁶ 42 U.S.C. § 12182(b)(2)(A)(iii).

⁸⁷ *See id.*

⁸⁸ *Id.* § 12187 (adopting 42 U.S.C. § 2000a(e) into the ADA). This is a holdover from Title II of the Civil Rights Act of 1964. *Id.* § 2000a(e).

⁸⁹ *Id.* § 12187.

The Rehab Act requires federal programs or entities receiving federal assistance to provide reasonable accommodations both for employees⁹⁰ and for those who might otherwise seek access to the entity's services,⁹¹ including its information technology resources.⁹² Section 504 requires individual agencies to promulgate methods by which their respective agencies will comply with the provisions and submit them before Congress.⁹³

For instance, the Social Security Administration (SSA), a federal program subject to the Rehab Act, outlines its reasonable accommodations policies for the public seeking to access agency programs on its website, both generally⁹⁴ and on specific pages for the deaf or hard of hearing⁹⁵ and the blind or visually impaired.⁹⁶ If a disabled individual requires a reasonable accommodation to access an SSA facility, they may call in advance, write to, or visit a local agency office.⁹⁷

The FHA requires covered entities to allow both (1) "reasonable modifications of the existing premises" and (2) "reasonable accommodations in rules, policies, practices, or services" to promote a disabled individual's equal opportunity to enjoy the premises.⁹⁸ The disabled individual seeking modifications to an individual unit or private space must cover the cost upfront or agree to restore the premises to its original condition.⁹⁹ Additionally, covered entities are required to design and construct public use and common spaces in an accessible manner.¹⁰⁰ Similar to the ADA, the FHA exempts religious organizations and private clubs that provide lodging for their members from complying with the provisions.¹⁰¹ These organizations may give preference to their members.¹⁰²

⁹⁰ See 29 U.S.C. § 791(b), (d) (2018) (requiring affirmative action in hiring disabled individuals and regular reporting on how "special needs" of disabled individuals are met); see also *id.* § 794a(a)(1) (requiring courts to consider the cost of workplace accommodations in suits for redress, indicating the requirement for such in appropriate settings).

⁹¹ This is an implied provision. Section 504 specifies that *small providers* need not make significant structural alterations "if alternative means of providing the service are available." *Id.* § 794a(c). No such exception exists for other providers. See *id.*; see also *Rose v. U.S. Postal Servs.*, 774 F.2d 1355, 1363 (9th Cir. 1984) ("Section 504 requires structural changes to provide access to federal programs if no less costly solution is possible.").

⁹² This provision applies to both resources for employees and those seeking to utilize the program's services. 29 U.S.C. § 794d(a)(1)(A).

⁹³ 29 U.S.C. § 794(a).

⁹⁴ *Accessibility Help*, SOC. SEC. ADMIN., <https://www.ssa.gov/accessibility/> (last visited Feb. 11, 2020).

⁹⁵ See *If You Are Deaf or Hard of Hearing*, SOC. SEC. ADMIN., <https://www.ssa.gov/people/deaf/> (last visited Feb. 11, 2020).

⁹⁶ See *Special Notice Option for the Blind or Visually Impaired*, SOC. SEC. ADMIN., <https://www.ssa.gov/people/blind/> (last visited Feb. 11, 2020).

⁹⁷ This applies to all forms of disabilities as prescribed by Section 504, but the agency only makes the information available under its page for the deaf and hard of hearing. See, e.g., *If You Are Deaf or Hard of Hearing*, *supra* note 95.

⁹⁸ 42 U.S.C. § 3604(f)(3)(A)–(B) (2018).

⁹⁹ *Id.* § 3604(f)(3)(A).

¹⁰⁰ *Id.* § 3604(f)(3)(C)(i).

¹⁰¹ *Id.* § 3607(a) (2018).

¹⁰² *Id.* However, religious organizations may not utilize this exemption where they restrict membership "on account of race, color, or national origin." *Id.*

Under the ACAA, carriers “must modify [their] policies, practices, and facilities . . . to provide nondiscriminatory service to a particular individual with a disability.”¹⁰³ Carriers are also prohibited from refusing transportation solely because of a disability¹⁰⁴ and limiting the number of individuals with a disability on a particular flight.¹⁰⁵ Further, airlines may not charge disabled passengers for the services or accommodations provided in relation to their disability.¹⁰⁶

The requirements under the four federal statutes outlined in this Part serve as the backdrop to Part II, which will discuss the role of assistive animals as a form of reasonable accommodation under these laws. How these four statutes define—or fail to define—both service and emotional support animals contributes to the regulatory confusion discussed next.

II. ASSISTIVE ANIMALS AS REASONABLE ACCOMMODATIONS

Generally speaking, assistive animals fall into one of two categories—they are either service animals or emotional support animals.¹⁰⁷ The distinction between the two, while often subtle, is key to determining the right to reasonable accommodation for these animals under existing federal law.¹⁰⁸ Section A will outline the definitions of both types of assistive animals under the ADA, the Rehab Act, the FHA, and the ACAA. Using the definitions as a foundation, Section B will then discuss how these definitions are utilized in each of the relevant reasonable accommodation requirements under the same federal laws. Finally, Section C will highlight several examples of absurdly untenable, wild, or exotic, alleged emotional support animals in housing and on planes. This will further emphasize the need for this Article’s proposed revisions, which will be discussed in Part III.¹⁰⁹

A. *Assistive Animals Defined*

The model definition for assistive animals—specifically service animals—originates from the ADA. The remainder of the federal laws that will be discussed, with the exception of the ACAA, followed suit by either adopting or modifying the ADA’s definition. The following two subsections underline the important effect of

¹⁰³ 14 C.F.R. § 382.13(a) (2020).

¹⁰⁴ *Id.* § 382.19(a)–(b). Air carriers may, however, refuse transportation due to safety concerns that may be related to an individual’s disability, such as the risks resulting from a communicable disease. *Id.* §§ 382.19(c), 382.21.

¹⁰⁵ *Id.* § 382.17.

¹⁰⁶ *Id.* § 382.31.

¹⁰⁷ JACQUIE BRENNAN & VINH NGUYEN, SW. ADA CTR., SERVICE ANIMALS AND EMOTIONAL SUPPORT ANIMALS iii (2014), [https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014\(2\).pdf](https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014(2).pdf).

¹⁰⁸ For instance, service and emotional support animals are treated equally under the FHA. *See* U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 14, at 1. In contrast, the ADA makes a clear distinction between the two. *See* 28 C.F.R. § 35.104 (2020).

¹⁰⁹ *See infra* Part III.A.

this Article's proposed revisions.¹¹⁰ Specifically, the degree of variation between these laws means that an individual seeking accommodation for an assistive animal (service or emotional support) must be knowledgeable about the differences when traveling through spaces governed by each law. The first subsection exemplifies that problem. Additionally, as Part II(A)(2) will show, federal law makes little attempt to robustly define emotional support animals—the gap the revisions proposed in Part III seek to address.¹¹¹ As such, those who genuinely benefit from one must understand their rights under each law, as do those who potentially seek to exploit the gap by claiming their absurdly untenable, wild, or exotic animals provide emotional support worthy of statutory legitimacy.

i. Service Animals Defined

The model definition for service animals comes from the ADA. Many agencies covered under the Rehab Act¹¹² and the statutory language of the FHA¹¹³ derive their definitions from the ADA, while the ACAA took a different approach up until January 2021.¹¹⁴ The ADA defines a service animal in great detail:

[a]ny 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. . . . The work or tasks performed by a service animal must be directly related to the individual's disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with

¹¹⁰ See *infra* Part III.A.

¹¹¹ See *infra* Part III.A.

¹¹² See, e.g., HALLEX I-2-0-8(A)(4) (Soc. Sec. Admin. 2014), https://www.ssa.gov/OP_Home/hallex/I-02/I-2-0-8.html (adopting the current service animal provisions of the ADA to the Social Security Administration's interpretation of Section 504); see also *Velzen v. Grand Valley State Univ.*, 902 F. Supp. 2d 1038, 1047 (W.D. Mich. 2012) (noting that HUD did not apply the ADA revision to their interpretation and implementation of the FHA and Section 504).

¹¹³ See U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 14, at 1.

¹¹⁴ Compare *Service Animals (Including Emotional Support Animals)*, U.S. DEPT TRANS., <https://www.transportation.gov/individuals/aviation-consumer-protection/service-animals-including-emotional-support-animals> [<https://web.archive.org/web/20210111060529/https://www.transportation.gov/individuals/aviation-consumer-protection/service-animals-including-emotional-support-animals>] (last updated Apr. 17, 2020), with American with Disabilities Act, 28 C.F.R. § 35.104 (2020). For the current regulations regarding assistive animals on planes, see *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742, 79,743, 79,774 (Dec. 2, 2020) (to be codified at 14 C.F.R. pt. 382).

psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. . . .*[T]he provision of emotional support, well-being, comfort, or companionship do not constitute work . . . for the purposes of this definition.*¹¹⁵

Essentially, a service animal under the ADA is a dog that is trained to perform tasks for a disabled individual; but emotional support is not considered a task under this regime.

While the above does not make it readily apparent, the ADA's regulations allow for two species to be accommodated. First, the Act allows for individuals with disabilities to use dogs of any breed.¹¹⁶ An entity assessing whether to accommodate a dog that meets the requirements above may exclude the animal if it is not under the owner's control or the owner does not take "effective action to control it" or if the animal is not housebroken.¹¹⁷ If the entity excludes the animal for those reasons, it is required to allow the disabled individual the chance to utilize the entity's services without the animal present.¹¹⁸ Otherwise, the ADA prescribes no requirements for the animal's behavior.¹¹⁹

In addition to dogs, the ADA also makes specific provisions for the use of miniature horses in connection with a disability.¹²⁰ While the ADA does not term these as "service animals," the provisions are largely identical.¹²¹ In addition to the criteria for dogs outlined above, a miniature horse is subject to additional accommodations considerations.¹²² An entity from which the individual with the miniature horse seeks accommodation may consider the following factors before granting an accommodation: (1) whether the entity can accommodate the "type, size, and weight" of the animal; (2) whether the owner has "sufficient control" of the animal; and (3) "[w]hether the [animal's] presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation."¹²³ Should the entity deem any consideration an issue, it may exclude the miniature horse.¹²⁴ Like dogs, miniature horses may also be excluded for being ineffectively controlled or

¹¹⁵ 28 C.F.R. § 35.104 (emphasis added).

¹¹⁶ *See id.* (defining a service animal as "any dog"); *see also* U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 14, at 1 (noting that "[b]reed, size, and weight limitations may not be applied to an assistance animal" under the ADA).

¹¹⁷ 28 C.F.R. § 35.136(b). However, a leash or other tether is not necessarily required to maintain control; where such would inhibit the work of the service animal, the owner must maintain control via oral or other commands. *See id.* § 35.136(d).

¹¹⁸ *Id.* § 35.136(c).

¹¹⁹ *Id.* § 35.136.

¹²⁰ *See id.* § 35.136(i).

¹²¹ *See id.* § 35.136(i)(3). ("Paragraphs 35.136(c) through (h) of this section, which apply to service animals [that are dogs], shall also apply to miniature horses."). This Article ultimately proposes that individuals with disabilities be allowed to utilize miniature horses for either service or emotional support and would require entities to accommodate where health, safety, and logistical interests permit doing so.

¹²² *See id.* § 35.136(i).

¹²³ *Id.* § 35.136(i)(2)(i).

¹²⁴ *See id.* § 35.136(i)(1)–(2).

lacking housetraining.¹²⁵ Otherwise, the ADA prescribes no requirements for the animal's behavior.¹²⁶

An animal of either species must be accommodated only if the animal is both required for a disability and trained to perform a task relating to the owner's disability or disabilities.¹²⁷ Under the ADA, a representative of the place of public accommodation may ask an individual who presents with either a dog or a miniature horse only two questions to determine whether the animal qualifies for accommodations: whether the animal is "required because of a disability" and "what work or task," if any, "the animal [is] trained to perform."¹²⁸ If the individual does not require the animal for a disability or it is not trained to perform a specific task, then the animal likely does not qualify for accommodations.

However, if it is "readily apparent" the animal performs specific tasks, such as pulling a wheelchair or helping with an observable mobility or balance issue, the entity may not make any inquiries.¹²⁹ The entity from which an individual seeks accommodation may never ask for documentation of the animal's status, such as training, licensing, or certification records.¹³⁰ These documents are not required under the ADA.¹³¹ In fact, the Department of Justice (DOJ) does not recognize any private licensing as proof of an animal's service-related status and explicitly warns of their fraudulent nature.¹³² When it becomes apparent, either through inquiry or observation, that the animal qualifies as a service animal, the entity must permit the animal to accompany the disabled individual "in all areas of a public entity's facilities where members of the public, participants in services, programs or activities . . . are allowed to go."¹³³

Unlike the ADA, the Rehab Act provides no definition for service animals.¹³⁴ Rather, the Rehab Act instructs covered entities to propose regulations that comply with the nondiscrimination provisions of Section 504.¹³⁵ These regulations must then be submitted to the appropriate committee in Congress.¹³⁶ Some agencies

¹²⁵ Compare 28 C.F.R. § 35.136(i)(2)(ii)–(iii), with *id.* § 35.136(b).

¹²⁶ See *id.* § 35.136.

¹²⁷ See *id.* § 35.136(f).

¹²⁸ *Id.*

¹²⁹ *Id.* Miniature horses have been noted as particularly useful for balance issues. See, e.g., Melissa Breyer, *Why Miniature Horses Make Such Great Service Animals*, TREEHUGGER, <https://www.treehugger.com/animals/why-miniature-horses-make-such-great-service-animals.html> (last updated May 10, 2020).

¹³⁰ 28 C.F.R. § 35.136(f).

¹³¹ See *Frequently Asked Questions About Service Animals and the ADA*, U.S. DEP'T JUST. C.R. DIVISION (July 20, 2015), https://www.ada.gov/regs2010/service_animal_qa.html.

¹³² See *id.*

¹³³ 28 C.F.R. § 35.136(g).

¹³⁴ See 29 U.S.C. §§ 705, 794 (2018).

¹³⁵ 29 U.S.C. § 794 (2018) ("The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section . . .").

¹³⁶ *Id.* ("Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.").

subject to the Rehab Act, such as the SSA, have chosen to adopt the ADA's requirements.¹³⁷

The FHA defines service animals by referring to the ADA's definition.¹³⁸ The U.S. Department of Housing and Urban Development (HUD) also notes that entities, such as public housing or multi-unit housing, likely have to comply with some combination of the ADA, the Rehab Act, and the FHA.¹³⁹ As such, the agency's choice to defer to the ADA's definition of service animal is logical—those entities covered under the FHA and one or more other reasonable accommodations laws may streamline its process for providing such accommodations. HUD's choice exemplifies an early, albeit incomplete, attempt at a streamlined federal approach to emotional support animals.¹⁴⁰

Until early 2021, the ACAA's service animal definition was by far the greatest departure from the ADA.¹⁴¹ Specifically, the ACAA made no distinction between an animal *trained* to assist with a disability or disabilities and one that merely *assists* with a disability or disabilities by providing emotional support.¹⁴² Under the ACAA, both fell within the definition of a service animal.¹⁴³ Furthermore, the ACAA and the Department of Transportation's (DOT) interpretations of the ACAA made little attempt to clarify which animals could be considered service animals for airline travel purposes.¹⁴⁴ Instead, the DOT clarified that an airline is “never required to accept snakes, reptiles, ferrets, rodents, sugar gliders, and spiders”¹⁴⁵ and reserved the right to deny other animals for a prescribed list of reasons.¹⁴⁶ The DOT also dictated how airlines determined whether an animal qualifies as a service animal under the ACAA, including “credible verbal assurances,” identifying tags or tethering devices, documentation for animals

¹³⁷ HALLEX I-2-0-8(A)(4), *supra* note 112.

¹³⁸ See U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 14, at 1. However, HUD also notes that both types of assistance animals (service and emotional support) are eligible for reasonable accommodations under the FHA. *Id.* at 2 n.4 (clarifying that “[a]ssistance animals are sometimes referred to as ‘service animals,’ ‘assistive animals,’ [or] ‘support animals’ To avoid confusion with the revised ADA ‘service animal’ definition discussed in Section II of this notice, or any other standard, [the FHA] use[s] the term ‘assistance animal’ to ensure that housing providers have a clear understanding of their obligations under the [FHA] and Section 504.”).

¹³⁹ *Id.* at 1.

¹⁴⁰ See *infra* Part III.A.

¹⁴¹ Compare *Service Animals (Including Emotional Support Animals)*, *supra* note 114, with 28 C.F.R. § 35.104 (2020).

¹⁴² However, the ACAA did not prescribe accommodations for animals that assist, but are not trained to assist, with a physical disability. See *Service Animals (Including Emotional Support Animals)*, *supra* note 114 (“Under the Air Carrier Access Act (ACAA) a service animal is any animal that is individually trained or able to provide assistance to a person with a disability; or any animal that assists persons with disabilities by providing emotional support. Documentation may be required of passengers needing to travel with an emotional support or psychiatric service animal.”).

¹⁴³ *Id.*

¹⁴⁴ *Id.* (noting that *any* animal can be considered a service animal for airline travel).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (explaining that airlines may exclude animals because of size, weight, health and safety, disruption to “cabin service,” and foreign country prohibitions).

assisting with psychiatric disabilities, and observable behaviors.¹⁴⁷ This varied significantly from the ADA—the ADA makes no statements on behavior or identifying tethers and does not require documentation of the animal’s status.¹⁴⁸

The ACAA’s significant departure from the ADA changed very recently. On February 5, 2020, the DOT issued a notice of proposed rulemaking in which it asked for public comment on amendments to the ACAA’s definition of service animal.¹⁴⁹ This rule became final on December 2, 2020, and entered effect on January 11, 2021, to the chagrin of many pet-clad travelers and stakeholders across the country.¹⁵⁰ It made the ACAA definition of service animals functionally identical to that of the ADA.¹⁵¹ As justifications for its rulemaking, the DOT pointed to the inconsistent federal definition of service animals, unusual species allowed under the current rule, and safety risks posed by emotional support animals.¹⁵²

While on its face, the ACAA revisions align with the proposals of this Article, a deeper dive reveals a problematic effect that will likely lead to less clarity and trust, two considerations this Article considers paramount. Specifically, the ACAA revisions remove any accommodation opportunities for service animals that are not *dogs*.¹⁵³ As this Article will discuss later, animals other than dogs—mainly cats and, in rarer circumstances, miniature horses—can provide some of the same services as dogs without harming the delicate balance between legitimacy, efficacy, and legality.

When an animal does not meet the qualifications specified under each law, it may qualify as an emotional support animal.¹⁵⁴ However, most of these laws either have different frameworks or completely lack a framework for emotional support animals. The following section discusses each law’s approach to emotional support animals.

ii. Emotional Support Animals Defined

Like the definition of service animals under each federal law, there is much variation for how each law defines emotional support animals. The ADA’s definition

¹⁴⁷ *Id.*

¹⁴⁸ *See supra* text accompanying notes 132, 137.

¹⁴⁹ *Traveling by Air with Service Animals*, 85 Fed. Reg. 6,448, 6,448 (proposed Feb. 5, 2020) (to be codified at 14 C.F.R. pt. 382).

¹⁵⁰ *Id.*

¹⁵¹ *Compare* 28 C.F.R. § 35.104 (“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.”), *with* *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742, 79,774 (Dec. 2, 2020) (to be codified at 14 C.F.R. pt. 382) (“*Service animal* means a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”).

¹⁵² *Traveling by Air with Service Animals*, 85 Fed. Reg. at 6,449–50. The final rule also affects the ACAA’s policies on emotional support animals, which will be addressed in the following section. *See infra* Part II.A.ii.

¹⁵³ *Traveling by Air with Service Animals*, 85 Fed. Reg. at 79,743, 79,774.

¹⁵⁴ *See id.* at 79,743.

of service animal, or lack thereof, is the most straightforward.¹⁵⁵ The ADA's definition of service animal specifically excludes emotional support as a potential task for service animals.¹⁵⁶ The Rehab Act makes no attempt to define emotional support animals.¹⁵⁷

Like its definition of service animals, the FHA refers to the ADA's delineation between service and emotional support animals for guidance in defining the latter.¹⁵⁸ Conceivably, an individual with an emotional disability may have an animal trained to assist with that disability. That animal would be a service animal under the ADA and, as such, must be accommodated by a covered entity.¹⁵⁹ With respect to emotional support animals, HUD clarified that a housing provider may request documentation of need from a mental health professional as proof of the animal's emotional comfort to its owner.¹⁶⁰ However, as Section B will discuss, the FHA does not make the same reasonable accommodations foreclosures as the ADA with respect to emotional support animals.¹⁶¹

Until January 2021, the ACAA made no distinction between animals classically thought of as for service and those thought of as for emotional support. Instead, it made species-based restrictions that reflected public health, safety, and logistical considerations.¹⁶² As discussed in the previous section, however, the DOT's new rule changes the assistive animal definition.¹⁶³ The new rule and subsequent ACAA revision classifies emotional support animals as pets,¹⁶⁴ meaning airlines are no longer required to reasonably accommodate these animals. Now, any airline may exclude any non-canine animal for any reason, regardless of whether another federal legal framework would consider them to be a service animal. As discussed later in this Article, this revision does not serve the public good in a way that comports with a fair balance of stakeholder interests.¹⁶⁵

How these federal laws define both service and emotional support animals is key to understanding how owners may seek accommodations under each law. The

¹⁵⁵ See 28 C.F.R. § 35.104 (2020).

¹⁵⁶ *Id.* (“[T]he provision of emotional support, well-being, comfort, or companionship do[es] not constitute work . . . for the purposes of this definition.”).

¹⁵⁷ See 29 U.S.C. § 794 (2018).

¹⁵⁸ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 14, at 1.

¹⁵⁹ See 28 C.F.R. § 35.104 (defining service animal as “[a]ny 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*” (emphasis added)).

¹⁶⁰ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 14, at 3–4 (“For example, the housing provider may ask persons who are seeking a reasonable accommodation for an assistance animal that provides emotional support to provide documentation from a physician, psychiatrist, social worker, or other mental health professional that the animal provides emotional support that alleviates one or more of the identified symptoms or effects of an existing disability.”).

¹⁶¹ See *infra* Part II.B.

¹⁶² See *supra* Part II.A.i; see also *Service Animals (Including Emotional Support Animals)*, *supra* note 114 (remarking that *any* animal can be considered a service animal for airline travel).

¹⁶³ *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742, 79,743, 79,774 (Dec. 2, 2020) (to be codified at 14 C.F.R. pt. 382).

¹⁶⁴ *Id.*

¹⁶⁵ See *infra* Part III.

following section will address the reasonable accommodations languages—the varying nature of which further exemplifies the need for greater uniformity of emotional support animal classifications under federal law.

B. Assistive Animals as Reasonable Accommodations

Disabled individuals use assistive animals for a variety of reasons, including as guide dogs,¹⁶⁶ stability aids,¹⁶⁷ and emotional support.¹⁶⁸ A disabled individual must be able to use their assistive animal where doing so is required as a method of reasonable accommodation. Many of these spaces, like federal offices, housing, and planes, are governed by the four relevant federal laws.¹⁶⁹ These laws—the ADA, the Rehab Act, the FHA, and the ACAA—then, have the power to make spaces accessible when used effectively and inaccessible when used ineffectively. The following two subsections will discuss how these laws set parameters for service and emotional support animals in the spaces they govern. This discussion provides critical support for this Article’s suggested revisions,¹⁷⁰ which would standardize the approach to emotional support animals and redress the situation.

i. Service Animals as Reasonable Accommodations

Each of the four laws mandate reasonable accommodations be provided to an individual’s service animal.¹⁷¹ The ADA, however, sets limits upon when the accommodations are no longer reasonable. Specifically, under applicable regulations, a service animal may be excluded where it is not under the control of the owner or handler or when it is not housebroken.¹⁷² The owner or handler must also care for and supervise the service animal while within the covered entity; to not do so implicitly allows the covered entity to exclude the service animal.¹⁷³ Where the service animal is properly excluded, the disabled individual may seek access to the entity in its absence.¹⁷⁴ Where the disabled individual feels that their service animal was improperly excluded, they may seek redress in a method prescribed by the relevant law.¹⁷⁵

¹⁶⁶ *Dog Guides for People with Vision Loss*, *supra* note 11.

¹⁶⁷ *See* Breyer, *supra* note 129.

¹⁶⁸ *See, e.g., Everything You Need to Know About Emotional Support Animals*, AM. KENNEL CLUB (Feb. 24, 2021), <https://www.akc.org/expert-advice/news/everything-about-emotional-support-animals/>.

¹⁶⁹ *See supra* Part I.C.

¹⁷⁰ *See infra* Part III.A.

¹⁷¹ *See* Rehabilitation Act, 29 U.S.C. § 791 (2018) (referring to ADA’s definition of service animal); 14 C.F.R. § 382.27 (2020); 28 C.F.R. § 35.136 (2020); *Service Animals (Including Emotional Support Animals)*, *supra* note 114, at 1.

¹⁷² *See* 28 C.F.R. § 35.136(b), (d).

¹⁷³ *See id.* § 35.136(e).

¹⁷⁴ *See id.* § 35.136(c).

¹⁷⁵ *See infra* Part II.B.ii.

While the Rehab Act does not specify that service animals require reasonable accommodation, many covered entities have chosen to adopt the ADA's approach to service animals for disabled individuals.¹⁷⁶ As such, these entities bear an obligation to reasonably accommodate service animals under Section 504—to not do so would be an exclusion of a qualified disabled individual under that Section.¹⁷⁷ This does not include significant structural alterations, which small providers are still not required to make where a suitable alternative exists.¹⁷⁸ Covered entities that adopt the ADA approach can exclude an otherwise qualified animal, such as for lack of control or housetraining.¹⁷⁹

Like the ADA, the FHA requires that covered entities provide reasonable accommodations for disabled individuals' service animals.¹⁸⁰ This is true even for housing providers who otherwise do not allow animals, such as via a “no pet” policy.¹⁸¹ However, if accommodating the animal would place an “undue financial or administrative burden” or “fundamentally alter the nature” upon the covered entity's services, the entity need not accommodate the service animal.¹⁸² The entity may not charge a fee or deposit in connection with the service animal but may require that the disabled individual pay for damages beyond normal wear and tear associated with keeping an animal in the space.¹⁸³ The housing provider may also exclude where there is a cognizable, objective determination that the animal poses a “direct threat of harm” or would cause “substantial physical damage to the property.”¹⁸⁴ Like the ADA and the Rehab Act, the FHA allows a disabled individual who believes they were wrongly denied reasonable accommodations to seek redress.¹⁸⁵

Like the other three relevant laws, the ACAA requires reasonable accommodations for service animals.¹⁸⁶ A service animal must be allowed to accompany a passenger in the seat where the passenger sits unless doing so blocks an aisle or emergency exit; in such cases, the passenger should be assigned a less obstructive seat.¹⁸⁷ Foreign air carriers under the ACAA's jurisdiction are only required to allow service dogs.¹⁸⁸ Passengers who will board a flight with a service

¹⁷⁶ See, e.g., HALLEX I-2-0-8(A)(4), *supra* note 112.

¹⁷⁷ See 29 U.S.C. § 794(a) (2018) (“No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination . . .”).

¹⁷⁸ See *id.* § 794(c).

¹⁷⁹ See 28 C.F.R. § 35.136(b), (i)(2)(ii)–(iii).

¹⁸⁰ See U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 14, at 2.

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See *infra* Part II.B.ii.

¹⁸⁶ See 14 C.F.R. § 382.27; see also U.S. DEP'T OF TRANSP., NEW HORIZONS: INFORMATION FOR THE AIR TRAVELER WITH A DISABILITY 11 (2009), https://www.transportation.gov/sites/dot.gov/files/docs/Horizons_2009_Final_0.pdf.

¹⁸⁷ U.S. DEP'T OF TRANSP., *supra* note 186.

¹⁸⁸ *Id.*

animal need not provide advance notice of their intent to do so.¹⁸⁹ Individuals who believe an airline did not follow the procedures prescribed by the ACAA may attempt to seek redress from the DOT or the airline, but no private right of action currently exists for these individuals.¹⁹⁰

All four of the federal statutes guarantee reasonable accommodations for disabled individuals' service animals. However, not all four guarantee the same for disabled individuals with emotional support animals. To fully understand the current landscape for these animals, the following section will address disabled individuals' rights under each statute and how each of these accommodation rules are utilized to bring absurd and untenable animals into public spaces, apartments, and airplanes.¹⁹¹

ii. Emotional Support Animals as Reasonable Accommodations

The ADA only requires reasonable accommodations for service animals, not emotional support animals.¹⁹² As such, individuals with an emotional support animal seeking to enter a space covered by the ADA may be turned away without repercussions to the entity.¹⁹³ Because the ADA would not require accommodations for anything other than a dog or miniature horse, dogs and miniature horses that fail the permissible inquiry required by the ADA¹⁹⁴ could also be excluded under the same rationale.¹⁹⁵ Because entities bear no obligation to accommodate individuals presenting with emotional support animals, an individual denied access because of such an animal has no redress available under the ADA.

The Rehab Act makes no mention of service animals or emotional support animals.¹⁹⁶ Whether an agency chooses to adopt the ADA or another framework for reasonable accommodations will determine an emotional support animal's access to spaces covered under the Rehab Act.¹⁹⁷ If the covered entity does not allow emotional support animals in its space, an individual who brings one cannot seek redress under the Rehab Act since no violation occurred. This inconsistency is exemplary of the need for a consistent standard—the variability between accommodations under various covered entities poses a problem for individuals who seek consistent, accessible standards under federal law.

Unlike the ADA, the FHA does require reasonable accommodation of emotional support animals.¹⁹⁸ However, the housing provider may request

¹⁸⁹ 14 C.F.R. § 382.27 (2020).

¹⁹⁰ *See id.* §§ 382.151–.159; *see also* U.S. DEPT OF TRANSP., *supra* note 186, at 12.

¹⁹¹ *See infra* Part II.C.

¹⁹² *See* 28 C.F.R. § 35.104 (2020); *see also id.* § 35.136.

¹⁹³ *See id.* §§ 35.104, 35.136.

¹⁹⁴ *See supra* Part II.A.i.

¹⁹⁵ *See* 28 C.F.R. §§ 35.104, 35.136.

¹⁹⁶ 29 U.S.C. § 701 *et seq.* (2018).

¹⁹⁷ *See supra* Part II.B.i.

¹⁹⁸ *See* U.S. DEPT OF HOUS. & URBAN DEV., *supra* note 14, at 1–2.

additional information from an individual seeking accommodation for their emotional support animal. HUD notes that such documentation is generally a statement of need from a mental health professional, and that this is sufficient to require a housing provider required to reasonably accommodate the animal.¹⁹⁹ Where an individual is denied for lack of documentation or otherwise insufficient proof of the animal's emotionally supportive qualities, no redress is available.²⁰⁰

Until January 2021, the ACAA was by far the most generous law with respect to accommodating emotional support animals.²⁰¹ Before then, the ACAA recognized animals that provide emotional support as true *service* animals.²⁰² Airlines could request documentation of need from a mental health professional to confirm the animal's status as an emotional support animal.²⁰³ Now, the DOT imposes no requirement upon airlines to accommodate emotional support animals of any breed in any manner—rather, they may simply treat them as pets.²⁰⁴ Unlike the ADA, Rehab Act, and FHA, however, the ACAA has no provision for a private right of action.²⁰⁵

In sum, the four statutes vary greatly in their treatment of service and emotional support animals. Since some statutes differentiate between the reasonable accommodation requirements (or lack thereof) for service and emotional support animals, an individual traveling from one covered entity to another may face different accessibility requirements at each covered entity. Likewise, the individual's redress for denial of access varies under each law. Because of these variations, especially the leniency in the FHA regulations, individuals can utilize these leniencies to introduce "emotional support" animals into spaces covered by these laws.²⁰⁶ The same is not true for the ADA, Rehab Act, and now the ACAA, none of which prescribe reasonable accommodation requirements for emotional support animals.²⁰⁷ These leniencies, or gaps, are exploited to gain fee-free access for particularly unique animals.

C. Examples of the Gaps Exploited in Housing and on Planes

While Dexter and Ventiko made national news, their story is not the only interesting example of a particularly unique emotional support animal on a flight or

¹⁹⁹ *Id.* at 3–4.

²⁰⁰ *Id.* at 4.

²⁰¹ This flexibility changed following the final rule discussed in Part II. *Traveling with Service Animals by Air*, 85 Fed. Reg. 79,742, 79,743 (Dec. 2, 2020) (to be codified at 14 C.F.R. pt. 382); *see supra* Part II.

²⁰² *See Service Animals (Including Emotional Support Animals)*, *supra* note 114 (noting that *any* animal can be considered a service animal for airline travel); *see also supra* Part II.A.ii;

²⁰³ *Service Animals (Including Emotional Support Animals)*, *supra* note 114.

²⁰⁴ *Traveling by Air with Service Animals*, 85 Fed. Reg. at 79,743.

²⁰⁵ Air Carrier Access Amendments Act of 2019, H.R. 1549, 116th Cong. § 2(b)(6) (2019) ("Unlike other civil rights statutes, the ACAA does not contain a private right of action, which is critical to the enforcement of civil rights statutes.").

²⁰⁶ *See infra* Part III.A, III.B.

²⁰⁷ *See supra* text accompanying notes 197–202.

in housing.²⁰⁸ Rather, their story exemplifies a larger national conversation surrounding emotional support animals—what are they and where can they go?

The FHA prescribes certain protections for both service and emotional support animals in the spaces it governs.²⁰⁹ Both service and emotional support animals have a right of reasonable accommodation under the FHA, and the covered entity must not charge fees for the presence of either.²¹⁰ Furthermore, neither law defines what can and cannot be considered a service animal.²¹¹

Until January 2021, the ACAA was the most lenient and nebulous law highlighted within this article. The DOT allowed all assistive animals—service and otherwise—to be treated as service animals, with breed and other restrictions in place.²¹² Now, the ACAA has gone in the opposite direction.²¹³ While the FHA's over-broad definition of assistive animals presents challenges for consistency, the ACAA's under-broad definition (only requiring airlines to permit service dogs) presents concerns regarding fairness and usefulness.²¹⁴

These leniencies, and now over-restrictions, create exploitable gaps in the federal reasonable accommodation laws: If a monkey can be an emotional support animal, and a mental health professional will sign a statement of need,²¹⁵ could an individual bring a monkey onto a plane or into their apartment without incurring a fee for the monkey's presence in either space? Potentially, the answer is yes, even if evidence suggests emotional support animals are not terribly effective.²¹⁶ The following sections explore the presence of unique animals in airlines (such as in ticket lines and on flights) and housing to fully depict the need for the proposed revisions. This section will lay the foundation for Part III's justifications for limiting these unique animals' entry into spaces covered by the four previously discussed federal laws.

²⁰⁸ See, e.g., Harriet Baskas, *More Trouble for the Man who Flies with a Monkey*, USA TODAY (Aug. 17, 2016, 1:49 PM), <https://www.usatoday.com/story/travel/flights/todayinthesky/2016/08/17/emotional-support-monkey-marmoset/88899586/> (emotional support monkey on a flight); see also Cynthia Zhou, *Miu the Emotional Support Pigeon*, PALOMACY PIGEON & DOVE ADOPTIONS (Mar. 6, 2017), <http://www.pigeonrescue.org/2017/03/06/miu-is-an-emotional-support-animal/> (emotional support pigeon in a college apartment).

²⁰⁹ See *supra* Part II.B.

²¹⁰ U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 14, at 4.

²¹¹ See *Service Animals (Including Emotional Support Animals)*, *supra* note 114 (noting what species airlines are never required to accommodate but excluding none outright); see also U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 14, at 1.

²¹² See *Service Animals (Including Emotional Support Animals)*, *supra* note 114.

²¹³ See *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742, 79,743, 79,774 (Dec. 2, 2020) (to be codified at 14 C.F.R. pt. 382).

²¹⁴ See *id.*

²¹⁵ See Baskas, *supra* note 208.

²¹⁶ See, e.g., Kate Thayer, *Despite the Popularity of Emotional Support Animals, Experts Say There's Little Evidence They Work*, CHI. TRIB. (May 30, 2018, 5:00 AM), <https://www.chicagotribune.com/lifestyles/ct-life-emotional-support-animals-evidence-20180521-story.html>.

i. In Housing

People across the country have brought strange “emotional support animals” into housing situations.²¹⁷ This section highlights three particular examples—an alligator, twenty chickens, and a pigeon—to exemplify the gaps in the FHA and how they are exploited in an attempt to permit wild and untenable animals into housing. Because the FHA left a gap in its definition of permissible emotional support animals and only requires an easily fakeable statement of need,²¹⁸ people will exploit it.

In Pennsylvania, one man has been prescribed an emotional support alligator in place of taking psychiatric medications to ease his depression.²¹⁹ The four-year-old alligator, who scampers around the house with his emotional support animal leash marked with an “ESA” tag, could eventually grow to weigh nearly half a ton and be sixteen feet long.²²⁰ Its owner, Joie Henney, says the alligator smacks his tail or starts to wrestle as a sign of its affection.²²¹ He says most of his children and grandchildren are fine with the alligator sharing a home with their patriarch.²²²

While Henney has only one alligator, one man in Illinois keeps twenty emotional support chickens on his land.²²³ The disabled Marine, Luke Villotti, received a note from the Veterans Administration documenting his need for the chickens, but only for six of them.²²⁴ Villotti also happens to live in a town that does not allow for any chickens on residential property, let alone the twenty (and sometimes more) that he maintains.²²⁵ While neighbors have complained, Villotti has yet to take any action to cull his flock down to the six that his statement of need prescribes.²²⁶

College students are also turning to unique species for emotional support.²²⁷ While some seek comfort from cats and dogs, others look to more urban critters.²²⁸ Take for instance Miu the pigeon, who lived with its owner—a University of California at Berkeley student—in a college apartment.²²⁹ Cynthia Zhou, its owner, has even traveled on a plane with the pigeon since gaining documentation of her

²¹⁷ See Nark, *supra* note 19; Crosby, *supra* note 19; Zhou, *supra* note 208.

²¹⁸ See Patricia Marx, *Pets Allowed*, NEW YORKER (Oct. 13, 2014), <https://www.newyorker.com/magazine/2014/10/20/pets-allowed>.

²¹⁹ Nark, *supra* note 19.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Crosby, *supra* note 19.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See, e.g., Zhou, *supra* note 208.

²²⁸ See *id.*

²²⁹ See *id.*

need.²³⁰ In addition to Miu, many other unique furry and feathered animals have been brought on flights.

ii. On Planes

This section highlights absurd examples that arose under prior iterations of the ACAA assistive animal regime. They are provided here because, given the massive fairness implications of the new DOT final rule, I consider it a distinct possibility that the DOT will have to backtrack or revise its rules in some way. Where Ventiko failed, others have succeeded, bringing birds, pigs, and even monkeys onto flights as emotional support animals.²³¹ In an online opinion in the Financial Times, one writer noted that he could never fly United Airlines with his emotional support snake because of the post-Ventiko backlash.²³² He then went on to provide, in detail, the consequences of anyone, including himself, getting too close to his emotional support animal—a bite on the thumb.²³³

The first of the interesting emotional support animal examples is Daniel the duck, who was spotted on a flight from Charlotte, North Carolina, to Asheville, North Carolina, in 2016.²³⁴ Daniel was accompanying his owner, Carla Fitzgerald, who suffers from Post-Traumatic Stress Disorder.²³⁵ Daniel could be seen walking the aisles throughout the short flight and even made a short appearance as a Twitter star.²³⁶ As of the time of the flight, Daniel was not a recognized emotional support animal but his owner indicated she was hoping to have him “formally registered.”²³⁷ It is unclear whether the owner paid a fee to bring Daniel onto the flight, or if the airline imposed any restrictions on Daniel’s movement throughout the flight, although there seem to have been none.²³⁸

A pig attempted to fly with its owner from Connecticut on a US Airways flight in 2014.²³⁹ The pig, tethered to a leash, could reportedly be smelled by

²³⁰ *Id.*

²³¹ See *Emotional Support Duck Daniel is Winning Over the Internet*, FOX NEWS (Oct. 19, 2016), <https://www.foxnews.com/travel/emotional-support-duck-daniel-is-winning-over-the-internet>; Rheana Murray, *Here’s Proof Pigs Actually Do Fly (Almost)*, ABC NEWS (Nov. 27, 2014, 6:43 PM), <https://abcnews.go.com/US/proof-pigs-fly/story?id=27222136>; Baskas, *supra* note 208.

²³² The airline also banned peacocks and hedgehogs on their flights. Jonathan Guthrie, *The Pet Snake? It’s My Emotional Support Animal*, FIN. TIMES (Feb. 23, 2018), <https://www.ft.com/content/b6c72122-1247-11e8-8cb6-b9ccc4c4dbbb>.

²³³ *Id.*

²³⁴ *Emotional Support Duck Daniel is Winning Over the Internet*, *supra* note 231; John Boyle, *Emotional Support Duck Owner Speaks out*, CITIZEN TIMES (Oct. 18, 2016, 11:31 AM), <https://www.citizen-times.com/story/news/local/2016/10/18/emotional-support-duck-owner-everybody-loved-him/92352986/>.

²³⁵ Boyle, *supra* note 254.

²³⁶ See *id.*

²³⁷ Fitzgerald is likely referring to a lack of documentation from a mental health professional regarding her need for Daniel. *Id.*

²³⁸ See *id.*

²³⁹ Murray, *supra* note 231.

passengers on the flight.²⁴⁰ One passenger recounted that they had reservations about being on the same flight as the creature.²⁴¹ Before the flight could depart, however, the owner and pig had to deboard after the pig became disruptive.²⁴² American Airlines, the parent company for US Airways at that time, confirmed the pig boarded the flight as an emotional support animal.²⁴³

In 2016, Jason Ellis made it onto Frontier Airlines' no-fly list for not declaring his emotional support marmoset, a species of monkey, on a flight to Las Vegas, Nevada, from Columbus, Ohio.²⁴⁴ A flight attendant spotted the marmoset, Gizmo, peeking out of Ellis's shirt.²⁴⁵ An airline spokesperson said Ellis earned his spot on the list for noncompliance with airline emotional support animal policies, including failing to provide documentation ahead of the flight.²⁴⁶ Ellis detailed varying accounts of the missing documentation.²⁴⁷ In either case, he and Gizmo had to take a Southwest flight for their return trip.²⁴⁸ It is unclear whether Ellis provided any documentation to Southwest ahead of boarding.²⁴⁹

In addition to the animals who famously succeeded in boarding flights, several others have been turned away. A hamster made news when it was flushed down a toilet at Baltimore/Washington International Airport in 2018.²⁵⁰ According to its owner, Belen Aldecosea, Spirit Airlines initially told her the animal would be permitted to board as an emotional support animal.²⁵¹ Upon arrival, attendants informed her otherwise.²⁵² Aldecosea alleged that a representative suggested she flush the animal since she would not be allowed to board with it.²⁵³ She acted in accordance with the alleged suggestion.²⁵⁴ While Spirit admitted its representatives gave incorrect information about the emotional support hamster's admissibility before Aldecosea arrived, the airline vehemently denied that any employee suggested she injure the animal.²⁵⁵

None of these examples would be possible, or nearly as easy, if the ACAA had not left the door open for them. By allowing passengers to claim any animal as an

²⁴⁰ *Id.*

²⁴¹ *See id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Baskas, *supra* note 208.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *See id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.*

²⁵⁰ Daniella Silva & Anthony Consumano, *Hamster Flushed Down Toilet after College Student's Pet Denied Flight on Spirit Airlines*, NBC NEWS (Feb. 8, 2018, 6:21 PM), <https://www.nbcnews.com/storyline/airplane-mode/hamster-flushed-down-toilet-after-college-student-s-pet-denied-n846116>.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

emotional support animal, subject to select airline-dependent restrictions,²⁵⁶ the ACAA-covered entities were ripe for exploitation of free animal flights. This limited variety of strange emotional support animals further exhibits the need for reform—where there is a gap, someone will take advantage of it.

Emotional support animals of every variety have claimed fame in the public eye. But the question remains: Are these animals truly providing emotional support? If they are, is their doing so in the best interest of the public? Given the safety concerns associated with unusual species (such as alligators and snakes), the answer is likely no in some cases. But that is not to say that no animals should qualify as emotional support animals. The following Part outlines and discusses the proposed revisions.

III. PARING DOWN THE PEACOCKS: PROPOSED REVISIONS TO THE EMOTIONAL SUPPORT ANIMAL REQUIREMENTS

Assistive animals play a key role in the lives of disabled individuals. However, when gaps in the four federal statutes and their accompanying regulations allow absurdly untenable, wild, and exotic pets to occupy the dialogue, the gaps delegitimize the true purpose of the reasonable accommodation requirements that the ADA originally intended. Further complicating the dialogue, as *New Yorker* writer Patricia Marx said, is that “people are baffled by the distinction between service animals and emotional-support animals.”²⁵⁷ This is an understandable confusion, given that so many sites offer forms, paraphernalia, and even telephone consultations to assist anyone in registering almost anything as an emotional support animal.²⁵⁸

When animals of nearly every species access spaces in which they do not belong under the guise of being emotional support animals, one must look to the laws allowing the existence of such emotional support animals for explanation. While Marx may have primarily relied on state statutes, her ability to bring a turtle into a Christian Louboutin store, a snake into a Chanel store, and an alpaca into her local drugstore²⁵⁹ is indicative of a national problem as well. This is the problem this Article ultimately seeks to address. Namely, this Part outlines proposed revisions designed to alleviate the confusion surrounding emotional support animals and their role for individuals with disabilities. First, Section A will detail the framework this Article proposes. Next, Section B will elaborate upon the justifications for the framework—decreased fraudulent misrepresentation of pets as emotional support animals; decreased misrepresentation of absurdly untenable,

²⁵⁶ See, e.g., Kate Gibson, *American Airlines Bans Insects, Hedgehogs, Goats, Ferrets as Inflight Service Animals*, CBS NEWS (May 15, 2018, 1:02 PM), <https://www.cbsnews.com/news/american-airlines-bans-service-animals-insects-goats-ferrets-hedgehogs/>.

²⁵⁷ Marx, *supra* note 218.

²⁵⁸ In her article, Marx recounts using one such service to register a snake as an emotional support animal. *Id.* She also purchased an “ESA” badge on Amazon.com for a turtle. *Id.* She then brought the turtle into a museum, high-end shoe store, nail salon, and funeral home. *Id.*

²⁵⁹ *Id.*

wild, or exotic pets as emotional support animals; and increased accessibility to qualified emotional support animals. Finally, Section C will reflect upon the results and implications that would follow these reforms.

A. Proposed Revisions

The four federal statutes addressed previously all require reasonable accommodations for disabled individuals using service animals.²⁶⁰ The allowance of service animals and the ensuing precedents, memos, and options for redress all make this a time-tested accommodation. The same is not true for emotional support animals because none of the statutes discussed creates a workable, consistent standard for these animals, as seen by the innovative misuse of the allowance.²⁶¹

The gaps left in the four federal statutes allowing for exploitative use of emotional support animal accommodations need to be filled. To do so, legislators should look to the existing regulations regarding service animals. Namely, the permissible inquiry that the ADA utilizes for service animals should be copied and implemented for emotional support animals. The ADA allows for staff at covered facilities to ask two questions to an individual presenting with a service animal (or miniature horse):²⁶² First, is this animal used in connection with a disability?²⁶³ Second, is the animal trained to perform a task that assists with that disability?²⁶⁴ Where the service animal is trained to perform a specific task that assists a disabled individual, the entity is required to accommodate the individual and animal.²⁶⁵

With respect to an emotional support animal, the proposed permissible inquiry must be slightly different—this Article does not propose emotional support animals be required to perform a task. Such a requirement would make any qualifying animal also a service animal.²⁶⁶ However, the animal very well could perform a task if that task provides emotional support.²⁶⁷ The first inquiry, however, remains the same, is this animal required in connection with a disability? Second, does the animal provide emotional support, by its presence or a task it performs,²⁶⁸ in connection with a disability?

Simply crafting a permissible inquiry does not, on its own, fill the gaps. Rather, Congress must in tandem implement a list of species that may qualify as emotional support animals, thereby excluding those species not enumerated. This

²⁶⁰ See *supra* Part II.B.

²⁶¹ See *supra* Part II.C.

²⁶² 28 C.F.R. §§ 35.104, 35.136(i) (2020); see also *ADA Requirements: Service Animals*, *supra* note 9.

²⁶³ §§ 35.104, 35.136(i); *ADA Requirements: Service Animals*, *supra* note 9.

²⁶⁴ §§ 35.104, 35.136(i); *ADA Requirements: Service Animals*, *supra* note 9.

²⁶⁵ §§ 35.104, 35.136(i); *ADA Requirements: Service Animals*, *supra* note 9.

²⁶⁶ §§ 35.104, 35.136(i); *ADA Requirements: Service Animals*, *supra* note 9.

²⁶⁷ This would still clearly demarcate emotional support animals from service animals, the latter of which may not be used solely to provide emotional support. § 35.104.

²⁶⁸ See *id.*

requirement also mirrors that of service animals, where only dogs are eligible to qualify.²⁶⁹ However, since emotional support animals—unlike service animals—need not be trained to perform a task, the list of qualified species can go beyond merely dogs without consequence to the merits of the revisions proposed.

Instead of only allowing dogs, the list should also include miniature horses and cats. Miniature horses are already eligible for accommodations under the ADA as quasi-service animals²⁷⁰ and are often used as therapy animals,²⁷¹ making them a naturally suited and time-tested species to be considered eligible for use as emotional support animals. Additionally, the DOT has already noted that miniature horses are ideal for those needing an assistance animal while maintaining “allergen avoidance.”²⁷² As with their classification as quasi-service animals,²⁷³ a miniature horse should still exist in parallel to that of the emotional support designation and be subjected to additional health, safety, and logistical considerations before being accommodated. While cats do not qualify as service animals,²⁷⁴ many offer emotional support to their owners.²⁷⁵ Additionally, many organizations use cats as therapy animals.²⁷⁶ Their long-standing presence as human companions makes them a normal species to accommodate in certain spaces.

Like the requirements for service animals, there should be no requirement to seek professional opinion regarding the necessity of an emotional support animal. First, the statement of need requirement has naturally created an industry of online and in person “prescription farms”—websites and organizations where interested pet owners may briefly discuss their mental health with a licensed professional with whom they likely have no previous or ongoing therapeutic relationship.²⁷⁷ As Marx recounts in her *New Yorker* article, she was able to obtain a “prescription” for a snake without any discussion of her elaborate, fabricated need for an emotional support animal.²⁷⁸ Second, requiring such a letter does nothing for

²⁶⁹ *Id.*

²⁷⁰ 28 C.F.R. § 35.136(i)(3) (“Paragraphs 35.136(c) through (h) of this section, which apply to service animals [that are dogs], shall also apply to miniature horses.”).

²⁷¹ William H. Anger Jr. & Sybil Akins, *Pet Therapy*, 18 J. CONSUMER HEALTH ON INTERNET 396, 396–97 (2014); see also *Gentle Carousel Mission Statement*, GENTLE CAROUSEL MINIATURE THERAPY HORSES, <https://gentlecarouseltherapyhorses.com/about/our-mission/> (last visited Jan. 9, 2020).

²⁷² The avoidable allergen appears to be dog or cat dander. See *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832, 23,837 (proposed May 23, 2018) (to be codified at 14 C.F.R. pt. 382).

²⁷³ See 28 C.F.R. § 35.136(i)(3) (“Paragraphs 35.136(c) through (h) of this section, which apply to service animals [that are dogs], shall also apply to miniature horses.”).

²⁷⁴ See 28 C.F.R. § 35.104 (defining a service animal as “any dog.”).

²⁷⁵ See *THE DOMESTIC CAT: THE BIOLOGY OF ITS BEHAVIOR* 200 (Dennis C. Turner & Patrick Bateson eds., 2d ed. 2000).

²⁷⁶ See Anger & Akins, *supra* note 271, at 396–97.

²⁷⁷ See *Get a Prescription Letter*, NAT’L SERV. ANIMAL REGISTRY, <https://www.nsarco.com/esa-letter-therapist-referral.html> (last visited Jan. 11, 2020); see also *CHILHOWEE PSYCHOL. SERVS.*, <https://www.cptas.com/> (last visited Jan. 11, 2020).

²⁷⁸ See Marx, *supra* note 218.

those who cannot afford a need analysis but have a mental health disorder which would be mitigated by the use of an emotional support animal.²⁷⁹

Finally, for the permissible inquiry and approved list of species to truly fill the federal regulatory gaps, they need to be identical across the four federal statutes. Federal law should not be an incomplete or inconsistent web of definitions and requirements that a disabled individual must somehow navigate. Rather, the ADA, the Rehab Act, the FHA, and the ACAA should bifurcate “service” and “emotional support” animals and implement the permissible inquiry and approved species list as described above.

Naturally, there are arguments to the contrary. For instance, some argue that the bifurcation between service and emotional support animals should be eliminated entirely.²⁸⁰ Professor Amanda M. Foster argues, for example, that the four federal statutes should be revised to implement the broader service animal classification, thereby requiring reasonable accommodations for animals only providing emotional support in all entities covered by these laws.²⁸¹ These revisions would mean that untrained emotional support animals would be elevated to the same level of legal protection as service animals.²⁸² Critically, however, Foster makes no attempts to enumerate a list of species which may qualify for protection under her proposed broader service animal category.²⁸³

Foster’s argument originates from a point of reason: the general public does not always take psychiatric disabilities as seriously as physical ones.²⁸⁴ However, the argument fails to adequately address the issue it identifies: the Foster revisions would allow an emotional support alligator to have the same level of legal protection and physical access as a guide dog. Beyond the facial absurdity of such a scene lies a deeper issue: eliminating the bifurcation between service and emotional support animals under the four federal statutes does nothing to legitimize the value of emotional support animals. Instead, the Foster revisions stay the course of current dialogue, in the best case, and further delegitimize the value of emotional support animals, in the worst case.²⁸⁵

²⁷⁹ 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, 141–43 (2010).

²⁸⁰ See, e.g., Amanda M. Foster, *Don’t Be Distracted by the Peacock Trying to Board an Airplane: Why Emotional Support Animals are Service Animals and Should be Regulated in the Same Manner*, 82 ALB. L. REV. 237, 238 (2019).

²⁸¹ *Id.* at 264–65.

²⁸² She does not state this explicitly, but it is the natural inference from her thesis that her argument fails to address. See *id.* at 238.

²⁸³ *Id.* at 264.

²⁸⁴ Although there seems to be a trend toward equality on this front. See *id.* at 238; see also Kaiser Permanente, *National Poll: Mental Health Myths and Facts*, FINDYOURWORDS, <https://findyourwords.org/mental-health-myths-facts-national-poll/> (last visited Feb. 11, 2020) (finding that seventy-three percent of respondents agreed that psychiatric and physical disabilities should be treated equally).

²⁸⁵ For instance, the DOT has already noted concerns from disability advocates about how allowing unusual species of support animals may erode public trust of assistance animals generally, thereby reducing

B. Justifications

Foster's thesis falls short in understanding what she terms the "fallout" from her proposed revisions.²⁸⁶ Her revisions—while soundly rooted in increasing the accessibility and legitimacy of emotional support animals—do not guarantee such results. However, the revisions proposed here do achieve three primary results, which ultimately justify the narrow brush with which these reforms paint emotional support animals. These proposed revisions address three main problems plaguing the emotional support animal landscape: (1) fraudulent misrepresentation of pets as emotional support animals, (2) misrepresentation of absurdly untenable, wild, or exotic pets as emotional support animals, and (3) lack of accessibility to emotional support animals for disabled individuals who could greatly benefit from them.

i. Decreased Fraudulent Misrepresentation of Pets as Emotional Support Animals

In the DOT's previously discussed, recent notice of proposed rulemaking,²⁸⁷ it succinctly summarizes the first justification of the revisions proposed in Part III(A):²⁸⁸

Passengers wishing to travel with their pets may be falsely claiming that their pets are service animals [and emotional support animals] so they can take their pet in the aircraft cabin or avoid paying pet fees charged by most airlines since airlines cannot charge service animal users a fee to transport service animals. . . . There have also been reports of some online entities that may, for a fee, provide individuals with pets a letter stating that the individual is a person with a mental or emotional disability and that the animal is an emotional support animal or psychiatric service animal, when in fact it is not.²⁸⁹

The DOT, through its recent rule change, has recognized the problem of fraudulent misrepresentation that this Article's proposed revisions seek to mitigate.

As of January 20, 2021, the National Service Animal Registry ("NSAR") has registered over 215,000 animals in its database.²⁹⁰ The NSAR is a for-profit enterprise that offers "certifications" for emotional support, service, and therapy

accessibility and protection for those who use assistance animals for legitimate purposes. *Traveling by Air with Service Animals*, 83 Fed. Reg. 23,832, 23,834 (proposed May 23, 2018) (to be codified at 14 C.F.R. pt. 382); *see also* *Traveling by Air with Service Animals*, 85 Fed. Reg. 6,448, 6,450 (proposed Feb. 5, 2018) (to be codified at 14 C.F.R. pt. 382).

²⁸⁶ Foster, *supra* note 280, at 265.

²⁸⁷ *See* text accompanying notes 149–150, 163–164.

²⁸⁸ *See supra* Part III.A.

²⁸⁹ *Traveling by Air with Service Animals*, 85 Fed. Reg. at 6,450.

²⁹⁰ The exact figure was 215,804. *See ESA and Service Dog Database*, NAT'L SERV. ANIMAL REGISTRY, <https://www.nsarco.com/database.html> (last visited Feb. 16, 2020).

animals in more than thirty countries.²⁹¹ The United States-based company offers referrals to an online psychological consultation service provider called Chilhowee Psychological Services.²⁹² The online service's about page, which includes a stock photo²⁹³ of four individuals in suits—further reducing their legitimacy—notes in its headline that it is “the Original Support Dog Letter Company.”²⁹⁴

For service animals, the DOJ does not recognize any certification services and notes do not convey any protections under the ADA.²⁹⁵ While the DOJ refuses to recognize any certifications for emotional support animals, that has not stopped the public from questioning the authenticity of such services and the certificates they provide.²⁹⁶ From the industry perspective, the National Apartment Association has noted that the lack of instructions from HUD, as well as the federal gaps generally, make implementation of consistent and fair policies difficult for housing rental companies.²⁹⁷

The role of mental health professionals in the current system presents not only a problem for regulators and accommodations providers (in the form of fraudulent statements of need), but also for the mental health professionals themselves.²⁹⁸ While a therapeutic psychologist may engage in ongoing treatment of a patient, a forensic psychologist applies their specialty “to assist in addressing legal, contractual, and administrative matters.”²⁹⁹ A practitioner who blends the two roles may develop a conflict of interest by implicating bias and partiality.³⁰⁰ Furthermore, such ethical dilemmas can lead to conflicts of interest between the mental health professional's original and collateral roles with an individual patient.³⁰¹

²⁹¹ *What We Do*, NAT'L SERV. ANIMAL REGISTRY, <https://www.nsarco.com/what-we-do.html> (last visited Jan. 11, 2020). See generally *Frequently Asked Questions About Service Animals and the ADA*, *supra* note 131 (noting that the DOJ does not recognize any certificates or registration for service animals).

²⁹² *Get a Prescription Letter*, *supra* note 277.

²⁹³ A reverse image search revealed that the same photo has been used for attorney directory sites in Vancouver, British Columbia, Canada. See *About Us*, CHILHOWEE PSYCHOLOGICAL SERVS., <https://www.cptas.com/about.html> (last visited Jan. 11, 2020).

²⁹⁴ *Id.*

²⁹⁵ *Frequently Asked Questions About Service Animals and the ADA*, *supra* note 131 (noting that the DOJ does not recognize any certificates or registration for service animals).

²⁹⁶ See *Throw Us a Bone: Clarity Needed on Emotional Support Animals*, NAT'L APARTMENT ASS'N (June 4, 2019), <https://www.naahq.org/news-publications/throw-bone-clarity-needed-emotional-support-animals>; Donna DiMaggio Berger, *Tackling Fraudulent Emotional Support Animals*, FLA. ASS'N OF COMMUNITY PROFS. (Sept. 2017), <https://www.fcapgroupp.com/flcaj/flcaj-articles/tackling-fraudulent-emotional-support-animals/>.

²⁹⁷ See *Throw Us a Bone: Clarity Needed on Emotional Support Animals*, *supra* note 296.

²⁹⁸ See Jeffrey N. Younggren, Jennifer A. Boisvert & Cassandra L. Boness, *Examining Emotional Support Animals and Role Conflicts in Professional Psychology*, 47 *PROF. PSYCHOL.* 255, 255 (2016).

²⁹⁹ See *id.* at 256 (quoting American Psychological Association, *Specialty Guidelines for Forensic Psychology*, 68 *AM. PSYCHOLOGIST* 1, 7–19 (2013)).

³⁰⁰ See *id.* Younggren et al. recommend that therapeutic practitioners include service disclaimers explaining that they will not offer any forensic psychological services. See *id.* at 259.

³⁰¹ Stuart A. Greenberg & Daniel W. Shuman, *Irreconcilable Conflict Between Therapeutic and Forensic Roles*, 28 *PROF. PSYCHOL.* 50, 50 (1997).

When a psychologist interacts with a patient only in a forensic capacity, ethical dilemmas still arise.³⁰² These professionals may be called upon to justify their diagnosis in court or to an agency during a legal dispute.³⁰³ As such, their work should conform with the American Psychological Association's (APA) guidelines, including diagnosing only in light of existing scientific evidence and after thorough review.³⁰⁴ It is difficult to imagine how a quick phone call with a mental health professional contacted via any number of the prescription farms online would produce a diagnosis in light of either of the APA's requirements.³⁰⁵ In Patricia Marx's case, the mental health professional who ultimately "certified" her snake did not even inquire into the nature of Marx's disabilities that this emotional support snake would mitigate.³⁰⁶

By eliminating the role of mental health professionals in the emotional support animal framework under federal law, the proposed revisions prevent future abuse of therapeutic and forensic psychologists as a means of pet fee-free rental agreements or air travel, or as a means of obtaining a letter to confuse other places of public accommodation into granting access.³⁰⁷ Furthermore, it solidifies the illegitimacy of websites, like NSAR, that offer services exploiting the gaps in federal law. For emotional support animals to be a truly legitimate form of disability mitigation,³⁰⁸ there needs to be an understanding that, like service animals,³⁰⁹ a prescription or statement of need is unnecessary.

ii. Decreased Misrepresentation of Absurdly Untenable, Wild, or Exotic Pets as Emotional Support Animals

In addition to the decreased prevalence of general fraudulent use, this Article's proposed revisions would also decrease the misrepresentation of absurdly untenable, wild, or exotic pets as emotional support animals. This would in turn decrease the legitimacy of exotic animal owners like Karl and Kayla Mitchell of Pahrump, Nevada.³¹⁰ The Mitchells won a long-fought battle with county authorities over a permit to keep tigers on their property after Karl Mitchell insisted that the wild big cats were his "emotional support tigers."³¹¹ This approval

³⁰² See Younggren et al., *supra* note 298, at 259.

³⁰³ See *id.*

³⁰⁴ See *id.*

³⁰⁵ See *id.*; see also Marx, *supra* note 218.

³⁰⁶ See Marx, *supra* note 218.

³⁰⁷ See *id.*

³⁰⁸ See, e.g., 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> (summarizing research on the benefits of emotional support animals in disability mitigation).

³⁰⁹ See *Frequently Asked Questions About Service Animals and the ADA*, *supra* note 131 (noting that service animals do not require a statement of need).

³¹⁰ Karin Brulliard, *The Trouble with Tigers in America*, WASH. POST (July 12, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/captive-tigers-america/>.

³¹¹ *Id.*

occurred in spite of Mitchell's admission that he illegally purchased many of his animals³¹² from the now infamous tiger-breeder Joseph "Joe Exotic" Maldonado-Passage.³¹³ Maldonado-Passage made similar claims in less formal contexts, as well.³¹⁴ While the Big Cat Public Safety Act would certainly solve the misrepresentation of big cats as emotional support animals, it would not solve the broad misuse of the classification for exotic species entirely.³¹⁵

There are already some regulations that attempt to prevent this misuse. However, these regulations do not fully address the issue. By simply revising these restrictions whenever a problem may arise or the governing agency perceives a restriction should be made (as the DOT has done with the ACAA), the agency takes a retroactive approach. Furthermore, it perpetuates the possibility for piecemeal permissions and restrictions across the federal assistive animal landscape.

This is why the DOT's January 2021 final rule is so troubling—where Congressional inaction exists, federal inconsistencies arise. In the case of the ACAA revisions, the DOT has taken a vastly more restrictive approach than any other of the federal statutes. Instead of creating consistency, it sows doubt and illegitimacy in the service animal process by limiting the service animal category to only require dogs.³¹⁶

These revisions are proactive and standardize all four federal statutes. Creating an enumerated list of eligible species—cats, dogs, and miniature horses—efficiently eliminates all other species from consideration. Instead of having to decide whether to allow a questionable animal aboard a plane or in a rented apartment, the entity's personnel may simply refer to the enumerated list and the permissible inquiries. This revision, in turn, automatically excludes the pigs, chickens, alligators, and peacocks from consideration at all.

iii. Increased Access to Qualified Emotional Support Animals

The final justification is one of burden shifting—eliminating the mandate to obtain a statement of need and instead requiring covered entities to shift the burden from the individual to the entity. This tends to make emotional support

³¹² *Id.*

³¹³ The life of and controversies surrounding Joe "Exotic" Maldonado-Passage were recently featured in a Netflix docuseries. See Emily Yahr, *What to Know About 'Tiger King,' the Shocking Netflix Series That Has Captivated the Internet*, WASH. POST (Mar. 27, 2020, 6:00 AM), <https://www.washingtonpost.com/arts-entertainment/2020/03/27/tiger-king-netflix-joe-exotic/>.

³¹⁴ See *Not Your Average Joe, Tiger King: Murder, Mayhem and Madness*, NETFLIX (Mar. 20, 2020), <https://www.netflix.com/watch/81130220?trackId=14277283&tctx=0%2C0%2C8ab17d77-8646-4ae3-b44c-b46567e5591e-39762832%2C%2C>.

³¹⁵ Big Cat Public Safety Act, H.R. 1380, 116th Cong. (2019) (revising restrictions on possession of big cats to entirely prohibit private ownership for personal use); see also *Not Your Average Joe, Tiger King: Murder, Mayhem and Madness*, *supra* note 314.

³¹⁶ An airline may allow other animals to be considered service animals and some pets to be considered emotional support animals, but it is doubtful that any airline would go above and beyond the DOT regulations for fear of mistakes or inconsistent applications. *Traveling by Air with Service Animals*, 85 Fed. Reg. 79,742, 79,743 (Dec. 2, 2020) (to be codified at 14 CFR pt. 382).

animals more accessible for those who truly need them. Specifically, eliminating the statement of need requirement for emotional support animals means that disabled individuals who cannot afford or properly access mental health services will not be denied the benefit³¹⁷ of having an emotional support animal.

As the previous section discussed, mental health professionals may be reticent to provide emotional support statements because of the ethical conflicts arising from such an endeavor.³¹⁸ Moreover, eliminating the need for these statements will decrease the attractiveness and use of online emotional support prescription farms. Instead of asking for a document that someone can obtain with one hundred dollars and internet access,³¹⁹ the covered entity may ask two simple questions: First, is this animal required in connection with a disability? Second, does the animal provide emotional support, by its presence or a task that it performs,³²⁰ in connection with a disability?

By standardizing federal law on emotional support animals—specifically, using a permissible inquiry, enacting an enumerated list of qualified species, and eliminating the requirement for a statement of need—these proposed revisions³²¹ will close the federal gap on assistive animal regulations. Doing so achieves the three justifications outlined above, which tend to promote the legitimacy of emotional support animals and their use in disability mitigation.³²²

C. Results and Implications

A short reflection upon the select examples highlighted in Part II(C) emphasizes the value of the proposed revisions. Namely, the existing dialogue on emotional support animals is one of stories regarding the absurd misrepresentation of strange animals as emotional support animals.³²³ With the proposed revisions as a framework for assistive animal reasonable accommodation requirements, the dialogue changes.

While the proposed reforms inherently limit the ability to use certain species as emotional support animals, the benefits outweigh the costs of doing so. Without the proposed revisions, it is easy to imagine a service dog and an emotional support chicken boarding the same flight. While the dog is specifically trained to assist its handler with a disability, the benefits of the chicken may come at the cost of human health concerns.³²⁴ The exclusion of the latter is thus reasonably justified.

³¹⁷ See, e.g., BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 308.

³¹⁸ See *supra* Part III.B.ii.

³¹⁹ See *Get a Prescription Letter*, *supra* note 277.

³²⁰ See 28 C.F.R. § 35.104 (2020).

³²¹ See *supra* Part III.A.

³²² See, e.g., BAZELON CTR. FOR MENTAL HEALTH LAW, *supra* note 308.

³²³ See *supra* Part II.C.

³²⁴ See, e.g., *Human Health Concerns About Raising Poultry*, ILL. DEP'T PUB. HEALTH (Mar. 2012), <http://www.idph.state.il.us/health/infect/Poultry.htm> (noting that healthy chickens can expose humans to salmonella and other public health concerns).

In addition to public health issues, the existing framework presents challenges for entities that must comply with it. Furthermore, the general public's uncertainty regarding the application of multiple federal laws on the subject³²⁵ and misunderstanding regarding where emotional support animals may be allowed³²⁶ makes for a chaotic and challenging landscape. Where an emotional support animal is improperly excluded, the entity that excluded the animal may implicate itself in litigation or be mentioned in the individual's complaint to a federal agency.³²⁷ Conversely, where animals are improperly allowed, the entity may put others at risk, including people using other assistive animals. As such, the need for stricter guidelines is justifiable. The cost of doing so is not small, but it is necessary.

CONCLUSION

Dexter the peacock was never allowed to board the United Airlines flight.³²⁸ However, where the peacock failed to go, many others succeeded.³²⁹ Emotional support animals are becoming an increasingly popular choice for disability mitigation.³³⁰ With their rise comes public dialogue and concern regarding the use of certain emotional support animals in certain public spaces.³³¹ Many also wonder whether these animals have any legitimate reason to be used.³³²

The proposed revisions outlined in this Article are intended to ensure the legitimacy of these animals. Specifically, standardizing the federal emotional support animal definition decreases fraudulent misrepresentation of pets and absurd animals as emotional support animals, and promotes accessibility of emotional support animals to those who truly benefit from their use.³³³ To achieve these justifications, Congress should revise the four relevant federal statutes—the ADA, the Rehab Act, the FHA, and the ACAA—to explicitly define an emotional support animal as a dog, cat, or miniature horse that is trained to perform a task or whose presence provides emotional support to a person with a disability. By allowing the existing method of agency-specific regulatory promulgation, the gaps in

³²⁵ Such as the ADA and FHA for housing providers. *See, e.g.*, U.S. DEP'T HOUS. & URBAN DEV., *supra* note 14, at 5–6.

³²⁶ *See Marx, supra* note 218 (noting the use of a statement of need to allow an “emotional support” turtle access to an art museum).

³²⁷ *See supra* Part II.B.

³²⁸ Bever & Rosenberg, *supra* note 2.

³²⁹ *See Emotional Support Duck Daniel is Winning Over the Internet, supra* note 231; Murray, *supra* note 231; Baskas, *supra* note 208.

³³⁰ *See Hal Herzog, Emotional Support Animals: The Therapist's Dilemma, PSYCHOL. TODAY* (July 19, 2016), <https://www.psychologytoday.com/us/blog/animals-and-us/201607/emotional-support-animals-the-therapists-dilemma>; *see also* Jeffrey N. Younggren, Cassandra L. Boness, Leisl M. Bryant & Gerald P. Koocher, *Emotional Support Animal Assessments: Toward a Standard and Comprehensive Model for Mental Health Professionals*, 51 *PROF. PSYCHOL.* 156, 156 (2019).

³³¹ *See Herzog, supra* note 330; *see also supra* Part II.C.

³³² *See Marx, supra* note 218.

³³³ *See supra* Part III.B.

applicability, efficacy, and legitimacy will only continue. This is why *Congress*, and not the individual agencies, must act.

This Article's proposed new definition for emotional support animals would mirror the ADA's definition for a service animal.³³⁴ Like the ADA service animal framework,³³⁵ an entity's staff should be permitted to ask a series of questions³³⁶ of an individual who brings an emotional support animal to a place that is required to comply with one or more of the four laws. This, too, should mirror the service animal permissible inquiry.³³⁷ Is this animal required because of a disability? Is it trained to perform a task, or does its presence provide emotional support relating to that disability? Finally, the four relevant statutes should explicitly prohibit requiring a statement of need from a mental health professional. The DOJ³³⁸ and DOT³³⁹ already recognize the abuse of such documents; removing this requirement from the framework promotes fair, accessible use and limits fraudulent misrepresentation of absurd animals with the façade of an online certificate.³⁴⁰

Assistive animals positively affect the lives of many disabled individuals, but the confusion regarding whether an animal may be an assistive animal (service or emotional support) may confer a benefit to a savvy pet owner at society's expense. If emotional support animals are going to continue inhabiting apartments, traveling on planes, and occupying public places, the ability to use them must be reformed. The proposed revisions do just that—they keep the peacock off the plane.

³³⁴ 28 C.F.R. § 35.104 (2020).

³³⁵ *See id.* § 35.136.

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ *See Frequently Asked Questions About Service Animals and the ADA, supra* note 131.

³³⁹ *See* Traveling by Air with Service Animals, 85 Fed. Reg. 6,448, 6,450 (Feb. 5, 2020) (to be codified at 14 C.F.R. pt. 382) ("While the Department's current service animal regulation permits airlines to require documentation from a licensed mental health professional for the carriage of emotional support animals, the advent of online entities that may be guaranteeing the required documentation for a fee has made it difficult for airlines to determine whether passengers traveling with animals are traveling with their pets or with legitimate emotional support animals."); *see also* Traveling by Air with Service Animals, 83 Fed. Reg. 23,832, 23,832 (proposed May 23, 2018) (codified at 14 C.F.R. pt. 382).

³⁴⁰ *See supra* Part III.B.