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## Policy Concern for Disabled Individuals with Service Dogs

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POLICY CONCERN FOR DISABLED INDIVIDUALS WITH SERVICE  
DOGS

*Beth Carmain*

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Service dogs working to ameliorate limitations for disabled individuals provide equality of access, a mandate firmly established by the United States Department of Justice. Unfortunately, imprecision in the law and policy regarding administration of service dogs as a valued public utility for disabled individuals has invited excessively broad, confusing, and problematic interpretations of how service dogs are regulated. The result has been a profound diminishment in public respect for service dogs in public spaces, which has the discriminatory effect of weakening equal access for disabled individuals. Narrower language would substantively regulate service dogs and reinforce the validity of their presence among the public and in public spaces.

## I. INTRODUCING WORKING DOGS, SERVICE DOGS, ET AL.

Dogs hold an important place in human history as our long-time complements in the evolutionary chain, working alongside humans by supplying security, companionship, and task-specific functions. The term “working dogs” refers to our canine counterparts who perform a wide variety of tasks, including herding, hunting, tracking, search and rescue, service, and many related designations.<sup>1</sup> However prolific, dogs performing work functions for humans have been assigned distinctions that are, by definition and understanding, varied, complicated, and hindered by the ambiguities and lack of policies around them.

Key intervening qualities among different types of working dog identifications lies in the type of specialized training each receives.<sup>2</sup> Service dogs are defined generally as dogs who perform beneficial functions for disabled individuals relating directly to ameliorating a person’s physical or psychiatric limitation.<sup>3</sup> Typically, service dogs are distinguished from emotional support

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<sup>1</sup> *Working Group*, AMERICAN KENNEL CLUB, <https://www.akc.org/dog-breeds/working/> (last visited Dec. 14, 2022).

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

<sup>3</sup> *Service Animals*, ADA.GOV (2020), <https://www.ada.gov/topics/service-animals/>.

dogs, which are commonly associated with comforting qualities.<sup>4</sup> However, emotional support dogs can perform tasks identical to those provided by service dogs when their supportive task alleviates a physical manifestation of a disability triggered by an emotional event.<sup>5</sup> When a physical disability presents secondary to an emotional cause, the dog is considered, under legal identification, to be an emotional support animal.<sup>6</sup>

Working dogs are a part of the public domain and landscape, recognized by state and federal government divisions.<sup>7</sup> However, no clear standard exists for certification, licensure, proof, training curriculum, or identification of working dogs.<sup>8</sup> Online non-profit and for-profit marketplaces sell vests emblazoned with “certified” language along with coordinating “official” certificates and other forms of identification for service dogs, but these ostensible certifications lack any real regulating structure. In fact, they are only as official as they are perceived to be.

The increasing popularity of websites such as Support Pets, which attempts to entice visitors with “three easy steps” that allow people to take their pets with them anywhere “even if they have a ‘no pets’ policy,” confirms the escalating need for clear standards and definitions for service dogs.<sup>9</sup> Websites like Support Pets target social media accounts of people who have indicated they have interest in pets to appeal to those who have interest in traveling with them more freely in the way service dogs are able.<sup>10</sup> Stark absence of firm regulatory policy for service dogs, and language expressly employed by the Americans with Disabilities Act (ADA) effects a

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<sup>4</sup> Jacquie Brennan & Vinh Nguyen, *Service Animals and Emotional Support Animals*, ADA NAT'L NETWORK, at 2 (2014), [https://adata.org/sites/adata.org/files/files/Service\\_Animal\\_Booklet\\_2014%20LP.pdf](https://adata.org/sites/adata.org/files/files/Service_Animal_Booklet_2014%20LP.pdf).

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

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

<sup>7</sup> *Frequently Asked Questions about Service Animals and the ADA: Certification and Registration*, ADA.GOV (July 20, 2015), <https://www.ada.gov/resources/service-animals-faqs/>.

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

<sup>9</sup> SUPPORT PETS, <https://www.supportpets.com> (last visited Dec. 19, 2020).

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

regulatory climate where there are no official or legal certifications for service dogs, and no certified trainers for them. Plenary effects of this purposefully generalized and imprecise language lends credibility to public suspicion when dogs are brought into spaces where animals are generally prohibited. This suspicion casts doubt on all service dogs in public spaces which can lead to bad feeling and disrespect for genuine working service dogs and the individuals who rely on them.

Diminishment in credibility of service dogs is most problematic for individuals who rely upon their service animals to navigate spaces normally barring animals. Conflicts arising over whether a dog brought into a public space is a service animal, have severely limited avenues available to parties for registering complaints and seeking redress for harms. Absent a guiding legal standard, the parties to these disputes are forced to seek relief from already over-burdened court systems. Vague statutes concerning service dogs means courts themselves must grapple with statutory language and purpose to discern whether and when a service dog claim falls within regulations not written to address such claims.

However, in hearing litigation arising from claims of emotional distress related to conflicts involving service dogs in public places and discrimination against them, courts consistently rule in favor of the disabled individual when regulatory elements appear to be met.<sup>11</sup> Lack of touch-stone legal authority means the courts are required to discern policy from the clear intention of the ADA, that service animals be unfailingly allowed into public spaces, on a case-by-case basis.<sup>12</sup>

Burdensome ramifications of policy vagaries for service animals suggests the need for diligent investigation into existing policies and procedures in substantive law. Implementation and interpretation of these laws leads to further testing of the ways they are actually applied through case law when courts are tasked to settle conflicts surrounding them. Where the United States

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<sup>11</sup> Sharan Brown, *Legal Brief: Service Animals and Individuals with Disabilities Under the Americans with Disabilities Act (ADA)*, ADA NAT'L NETWORK (2019), [https://adata.org/legal\\_brief/legal-brief-service-animals-and-individuals-disabilities-under-americans-disabilities](https://adata.org/legal_brief/legal-brief-service-animals-and-individuals-disabilities-under-americans-disabilities).

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

Government, through the Department of Justice (DOJ), and subsequently through the ADA, has stumbled to exert regulatory foothold, there is little wonder that widespread uncertainty surrounds the legal status of service dogs.<sup>13</sup>

## II. SERVICE DOGS BRIDGED AN AMELIORATIVE GAP TO INITIATE (GREATER AND MORE ACCESSIBLE) FREEDOM FOR DISABLED INDIVIDUALS.

Human and dog relationships reach so far back in time that tracing the origins of these partnerships is impossible. At some distant point in time, humans began training and leaning upon dogs to perform specific tasks that became more specialized over time. Service dogs appeared for the first time in the United States as “seeing eye dogs” in 1928.<sup>14</sup>

Young Morris Frank was frustrated by the way his blindness severely limited his mobility and personal freedoms.<sup>15</sup> Frank learned about the efforts of Dorothy Harrison Eustis, an American working in Switzerland training German Shepherd dogs to act as sight dogs for the blind.<sup>16</sup> Inspired by stories of Eustis’ successful efforts to train dogs to guide veterans blinded during World War I, Frank sent her a letter requesting her aid.<sup>17</sup> Eustis agreed to help him, and Frank travelled to Switzerland to learn about sight dogs.<sup>18</sup> He eventually learned how to work with a dog named Buddy, who became his eyes.<sup>19</sup>

Returning home, news reporters covered Frank and Buddy independently traversing New York City.<sup>20</sup> Frank demonstrated how dogs like Buddy could give blind people newfound personal

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

<sup>14</sup> Access Press Staff, *HISTORY NOTE: The History Service Dogs and the Protections They Have*, MINN. GOVERNOR’S COUNCIL ON DEVELOPMENTAL DISABILITIES (Jan. 9, 2019),

[https://mn.gov/mnddc/past/access\\_press/Access\\_Press\\_01-19.pdf](https://mn.gov/mnddc/past/access_press/Access_Press_01-19.pdf).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

freedom by enabling them to move about in the world without human assistance.<sup>21</sup> Frank’s single word telegram to Eustis after returning to New York was, “Success.”<sup>22</sup>

Encouraged by their accomplishment and growing public interest, Frank and Eustis founded The Seeing Eye in 1929.<sup>23</sup> They hoped to reach more people limited by blindness and help them to realize freedoms similar to what Frank had experienced with Buddy.<sup>24</sup> The Seeing Eye has worked to train and match dogs with blind people ever since.<sup>25</sup>

In the years since, organizations and individuals have trained approximately 500,000 service dogs and raised awareness about the value service dogs can bring to people whose mobility is otherwise lost or limited by low or no vision.<sup>26</sup> Additionally, the suite of functions service dogs perform has grown over time. Currently, the ADA officially recognizes Seeing Dogs, Hearing Dogs, Psychiatric Service Dogs, Sensory Signal Dogs, and Seizure Response Dogs, among others.<sup>27</sup> Though the value of service dogs for the assistive services they are trained to provide is well-recognized, the policies and regulations surrounding them are not. Inconsistent policies written and administered by the Fair Housing Act (FHA), Air Carrier Access Act (ACAA), ADA, and other agencies as assigned by the Department of Justice are intended to ensure equal access to disabled individuals.<sup>28</sup> These policy efforts admittedly address the importance of service animal function in public places but fail to do so meaningfully and uniformly. Independent and multi-dimensional attempts made by these agencies in their respective areas of oversight to fill-in policy gaps regarding service dogs have resulted in ambiguities, uncertainties,

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<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.*

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

<sup>25</sup> *History*, THE SEEING EYE, <https://www.seeingeye.org/about-us/history.html> (last visited Jan. 5, 2023).

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

<sup>27</sup> UDS Foundation, *Types of Service Dogs and How They Benefit People with Disabilities*, UNITED DISABILITIES SERVICES (Feb. 15, 2020), <https://udservices.org/types-of-service-dogs/>.

<sup>28</sup> *Id.*

and conflict surrounding the requirement to accommodate service dogs in the public sphere.

### III. FEDERAL AGENCIES GRAPPLE WITH INSUFFICIENT POLICY TO ADDRESS SERVICE DOGS WHILE SUPPLYING PUBLIC SERVICES.

Authorities controlling disability-related law mandating and regulating accommodations for disabled individuals have failed to develop regulatory policy regarding service dogs. Instead, they default to a widely held understanding that disabled individuals, and other interests, are permitted to self-regulate in regard to service dogs.<sup>29</sup> Effectively, this means anyone is able to designate by their own means when a dog is a service dog for the purpose of securing entry into places of public accommodation.<sup>30</sup> Attempting to discourage service animal misrepresentation in public spaces where the public eye has been particularly skeptical, the ADA, under its Titles I, II, and III, the Fair Housing Act (FHA), the Air Carrier Access Act (ACAA), and the Department of Transportation (DOT), have made further, more expansive and supportive, though still conflicting, and usually confusing discernments.<sup>31</sup>

The DOJ affirms through the ADA that “State and local government agencies, businesses, and non-profit organizations that provide goods or services to the public make ‘reasonable modifications’ in their policies, practices, or procedures when necessary to accommodate people with disabilities.”<sup>32</sup> Thus, when a facility’s “no pets” policy must generally be modified to allow service animals, significant room for suspicion and abuse aptly follow.<sup>33</sup>

The rising numbers of service dogs in public spaces, most likely a result of the increased visibility of the “certification” services described above, has increased the number of cases brought

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

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

<sup>31</sup> *Id.*

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

<sup>33</sup> *Id.*

before courts.<sup>34</sup> These claims arise from discriminatory incidents against individuals accompanied by service dogs in spaces with unclear and conflicting policy assertions.<sup>35</sup> Agencies like the Department of Transportation (DOT), and corresponding Transportation Network Companies (TNC), observe self-crafted policy statements addressing service dogs that only tangentially relate to ADA policy.<sup>36</sup> Adding complexity, the ADA itself offers different standards for service dogs in public spaces identified for public primary, secondary, and post-secondary education, state or local government spaces, and places of employment.<sup>37</sup>

In 2010, voicing the narrowest view of service animals and recognizing dogs only, the DOJ stressed the need for clear regulation for service dogs but has declined to offer anything substantive along these lines.<sup>38</sup> In a brief presented by the ADA, the author discusses recent discrimination claims involving service dogs. The cases illustrate the judicial labor required to delineate legal structure surrounding these claims despite obvious, problematic holes in policy.<sup>39</sup> Through the brief, the author outlines myriad complexities and vast nuances that must be addressed in confronting the scope of issues surrounding service-dog-related scrutiny and discrimination.<sup>40</sup>

Differentiating practices between Title I and Title II of the ADA, each has come to observe a different standard for recognizing service dogs. The ADA, by way of Title I, which concerns employment of disabled individuals, follows a highly subjective policy for service dogs. Specifically, Title I empowers an employer to permit or deny a service animals based on the employer's assessment of the employee's needs.<sup>41</sup> Title II addresses state and local government facilities, including primary and secondary schools.<sup>42</sup> Generally, schools act to overcome discrimination

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.*

<sup>38</sup> Brown, *supra* note 11.

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

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

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

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

against individuals with disabilities. However, when asked to permit service dogs, primary and secondary schools have conflicted with students and families consequently facing discrimination lawsuits.

Title III of the ADA provides service-dog-related language for places of public accommodation purposed to provide the broadest access possible to disabled individuals. The breadth of spaces defined as public accommodations, which includes privately owned shopping malls, stores, restaurants, theme parks, and infinite others, makes them fertile ground for conflict between individuals over government regulation and policy vagaries. When not immediately resolvable these disputes result in diminished access for disabled individuals. Whether these disputes make their way to the courts is another matter often left unpursued by disabled individuals because of barriers related to cost or process.

Controlling adherence to the ADA, the Department of Justice tasks named Federal Agencies with administering the ADA's various components that fall within each department's purview, and that they do so in a matter that is consistent and effectively serves the public. These agencies are the separate and independent Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Justice, Labor, and Transportation.<sup>43</sup> Each department is autonomously charged with assuring access to individuals with disabilities, including but not limited to accommodating the needs of any supportive or ameliorative measures relied upon by individuals, including service animals employed in those spaces.<sup>44</sup>

The FHA states, “[a]n assistance animal is an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or that provides emotional support that alleviates one or more identified effects of a person’s disability.”<sup>45</sup> Following this definition, the FHA lists obligations of housing providers when they receive a request from a disabled person or

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<sup>43</sup> Brennan & Nguyen, *supra* note 4.

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

<sup>45</sup> *Assistance Animals*, U.S. DEP'T OF HOUS. & URBAN DEV., [https://www.hud.gov/program\\_offices/fair\\_housing\\_equal\\_opp/assistance\\_animals](https://www.hud.gov/program_offices/fair_housing_equal_opp/assistance_animals) (last visited Dec. 19, 2022).

their family to accommodate that person’s service animal.<sup>46</sup> When the person making the request is able to demonstrate a disability-related need for the service animal, the housing provider must make an exception to any rules prohibiting animals on the premises, but only when doing so is not exceedingly costly, does not alter the provider’s operation, causes no significant damages to the property, and does not pose a health or safety threat to others when reasonable accommodations are made.<sup>47</sup>

Taking a different approach, the ACAA recognizes dogs “regardless of breed or type, that [are] 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.”<sup>48</sup> The ACAA textually excludes emotional support dogs and makes no other distinction as to required training or certification.<sup>49</sup> As a result, individuals accompanied by serviced dogs face increasing scrutiny which often results in conflict.<sup>50</sup> Fellow passengers may complain about circumstances, such as being seated close to exceptionally large animals or having to endure repeated contact with an animal’s wagging tail.<sup>51</sup> Increasing numbers of instances of public discomfort caused by an increasing numbers of “service” dogs on planes, exacerbate disrespect for real service dogs providing vital services.

Further adding to public confusion, the DOT has adopted a narrower approach to the acknowledgment and regulation of service

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Aviation Consumer Protection: Service Animals*, U.S. DEP’T OF TRANSP. (June 9, 2021), <https://www.transportation.gov/individuals/aviation-consumer-protection/service-animals>.

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

<sup>50</sup> Christopher Elliott, *Emotional-Support Animals? Vague Rules Fuel Conflict*, USA TODAY (Oct. 9, 2016), <https://www.usatoday.com/story/travel/advice/2016/10/09/emotional-support-animals/91725338/>.

<sup>51</sup> *Id.*

dogs.<sup>52</sup> This specificity from the DOT is an effort to fill a void left by ambiguous federal policy regarding this important issue.<sup>53</sup> Language from these regulations requires that individuals traveling with service dogs submit a DOT form attesting that the dog's training includes behavior appropriate to an airplane setting and that the dog would not need to relieve itself in route.<sup>54</sup> Service dogs are also required to be leashed, harnessed, or tethered in some way during the flight to ensure safe transport of the dog and all passengers.<sup>55</sup> Specifically, the documents state that only dogs, as opposed to all other animals, can board planes and then only when tasked with ameliorating a physical, intellectual, or other mental disability.<sup>56</sup>

These confusing terms and conditions are demonstrated in *Miller v. Fortune Commercial Corp.* where the court held that “[w]hen interpreting a statute, the court must harmonize its various parts if possible, reconciling them in the manner that best carries out the overriding purpose of the legislation.”<sup>57</sup> In *Miller* the court exerted a harmonizing effort to explore the standard for when a dog can be considered a trained service dog.<sup>58</sup> Miller alleged that Seafood City markets inflicted intentional emotional distress upon him when they denied entry of his service dog, Roxy. The court found that Seafood City was within its rights to do so despite Miller's protestations that Roxy was a service dog in training. The court reasoned that Miller did not possess the requisite training and experience to ensure the health and safety of others, relating to his dog, in a food market.<sup>59</sup> Despite Miller's assertion that the ADA permits individuals to train their own service dogs, the court in *Miller* held that this action “is entirely inconsistent with the manifest

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<sup>52</sup> U.S. DEP'T OF TRANSP., FINAL RULE ON TRAVELLING BY AIR WITH SERVICE ANIMALS, RIN NO. 2105-AE63 at 4 (Nov. 30, 2020) (to be codified at 14 C.F.R. pt. 382) <https://www.transportation.gov/sites/dot.gov/files/2020-12/Service%20Animal%20Final%20Rule.pdf>.

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

<sup>54</sup> *Id.* at 2-4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Miller v. Fortune Com. Corp.*, 223 Cal. Rptr. 3d 133, 141 (2017).

<sup>58</sup> *Id.*

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

intent of the statute.”<sup>60</sup> Ultimately, the court found that Miller lacked evidence that Roxy was a trained serviced dog and that his disability made him unable to train Roxy to alleviate access needs related to his disability.<sup>61</sup> Because Miller could not meet the standard identified by the court, but the court found no evidence that Seafood City markets intended to cause him emotional distress.<sup>62</sup>

In respect to Miller’s experience from which his claim of intentional infliction of emotional distress arose, his disability included autism and intellectual disability.<sup>63</sup> At the time of the incident Miller was 20-years-old with function between that of a 9-to-12-year-old child. Whether Seafood City markets intended to cause Miller emotional distress, the record is clear that he experienced upset from the incident resulting from conflict with store employees.<sup>64</sup>

Undeniably, there is no separating humankind from their dog companions, but when dogs are tasked with providing specific adaptive support for individuals with disabilities, genuine need supersedes that companionship. Dogs who meet vital needs for their humans make it possible for disabled people to live more independent, full lives. For this reason, despite a growing compendium of animals being proffered as service animals in the media, disability-related law has increasingly recognized only dogs as service animals.<sup>65</sup>

#### IV. IMPRECISE LANGUAGE, DISPARATE INTERPRETATION AND RESULTING CONFLICT POINT TO THE NEED FOR CLEAR AND SPECIFIC LAW AND POLICY SURROUNDING SERVICE DOGS

Existing law is ambiguous and inconsistent on the question of service dogs. Therefore, firmer policy is urgently needed to regulate their status and preserve the functions they provide. The Code of Federal Regulations (C.F.R.) § 36.302 outlines

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

<sup>61</sup> *Id.* at 143.

<sup>62</sup> *Id.* at 143.

<sup>63</sup> *Id.* at 135.

<sup>64</sup> *Id.* at 136.

<sup>65</sup> Katrina Tilbury, *Fake Service Dogs, Real Problems*, AP NEWS (May 16, 2018), <https://apnews.com/article/1a28f8e528424fdca2040ea8139e3014>.

“[m]odifications in policies, practices, and procedures” that specifically addresses service animals.<sup>66</sup> Sandwiching service animals between language regarding specialized accommodations for disabilities in public places and specifications for check-out aisles, the C.F.R. expresses its entire regulation of service animals in only 661 words.<sup>67</sup>

Interpreting definitional and policy application variances utilized by the ADA in 2019, one source offered some dipositive guidance stating, “[t]he applicable rules regarding the rights of individuals with disabilities and their assistance animals under various federal laws are not complicated.”<sup>68</sup> Despite affirming that guidelines have been established, “application of the appropriate rules to a particular scenario is often very confusing [...] due in part to the difference in the definition of an assistance animal among the laws and within the ADA itself.”<sup>69</sup> The ADA went further to explain that in many instances the ADA and other laws are engaged simultaneously and “determining the rules to apply becomes particularly difficult because the definitions and standards may not be the same.”<sup>70</sup>

Notwithstanding the ADA’s 2019 effort to establish law for service dogs, its Title II provisions concerning service dogs in state and local government buildings, including schools, and Title III provision concerning places of public accommodation stand in contrast to each other. These two areas of ADA law themselves differ from Title I provisions concerning service dogs in places of employment.<sup>71</sup> In 961 words, the ADA provides the entirety of its guidance under Titles I and II related to service dog regulation,

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<sup>66</sup> 28 C.F.R. § 36.302(c) (2022).

<sup>67</sup> *Id.*

<sup>68</sup> Sharan Brown, *Legal Brief: Assistance Animals and Individuals with Disabilities Under Federal Laws: Matrix and Practice Considerations*, ADA NAT’L NETWORK (2019), [https://adata.org/legal\\_brief/assistance-animals-and-individuals-disabilities-under-federal-laws-matrix-and-practice](https://adata.org/legal_brief/assistance-animals-and-individuals-disabilities-under-federal-laws-matrix-and-practice).

<sup>69</sup> *Id.*

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

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

avoiding any direct reference to Title I and its applicability to the role of service dogs in places of employment.<sup>72</sup>

In 2011, the DOJ clarified its definition of service dog to be “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.”<sup>73</sup> Indeterminate language used by the DOJ in this action enabled loosely and broadly construed applications of what is meant by the term “service dog.” In 2020, the Department of Transportation (DOT) reacted to a surge of individuals exploiting policy loopholes to demand they be allowed to shop, stay, and travel with a variety of “service” animals.<sup>74</sup> However, patent ambiguity in DOT language led to individuals attempting to bring turkeys, pigs, monkeys, and a seemingly inexhaustible number of species, aboard airplanes and into restaurants.<sup>75</sup> These disputes regarding matters of public accommodation and a growing sense of mockery regarding “service” animals in public discourse moved the DOT to assert more conclusive guidance.<sup>76</sup>

Even though the DOJ and ADA have tightened their specifications on service animals, the DOT, acting alongside other transportation entities such as the ACAA, and other entities, have been moved to act similarly only when publicly motivated to do so.<sup>77</sup> Despite these efforts toward some complementary policy, each rule seems to act in isolation from the others and none offers any absolute regulation.

## V. VAGUE POLICY STRUCTURE BURDENS DISABLED INDIVIDUALS AND PUBLIC SPACES

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<sup>72</sup> *ADA Requirements: Service Animals*, ADA.GOV (Feb. 28, 2020), <https://www.ada.gov/resources/service-animals-2010-requirements/>.

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

<sup>74</sup> David Schaper, *No More Emotional Support Peacocks as Feds Crack Down on Service Animals on Planes*, NPR (Dec. 8, 2020), <https://www.npr.org/2020/12/08/944128033/no-more-emotional-support-peacocks-as-feds-crack-down-on-service-animals-on-plan>.

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

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

<sup>77</sup> *Id.*

The Code of Federal Regulations, under Title 28 § 36.302, states some advisory language referring to service animals in general, as well as when they are and are not properly excluded from places of public accommodation.<sup>78</sup> In accordance, this law requires places of public accommodation to make reasonable modifications when necessary for individuals with disabilities to obtain goods, services, facilities, privileges, and advantages. Places of public accommodation are defined as spaces where members of the public are allowed to enter freely, by invitation, as patrons, clients, customers, and by all other standards.<sup>79</sup> Individuals accompanied by service dogs cannot be required to pay a fee normally collected for pets, unless the service dog damages property, in which case its handler would be liable.<sup>80</sup>

Modifications to places of public accommodations to include service dogs are mandatory unless doing so would fundamentally disturb the intended purpose of the service being offered.<sup>81</sup> Instances where Title 28 accommodations may be contrary to the intended purpose of the service may include zoos where the presence of a service dog would be disruptive and prohibit the intended purpose of the exhibit experience to participants. When this is the case, the service dog is properly excluded, and the public entity must offer the individual an opportunity to participate, without their service dog, equal to that provided to non-disabled individuals.<sup>82</sup> Accordingly, a person cannot be asked to remove their service animal from a public space on the grounds that other people may object, be allergic, or have other concerns.<sup>83</sup> Instead, when this is the case, the public accommodation itself must accommodate both individuals, if necessary, in different locations.<sup>84</sup>

Title 28 exempts businesses from offering modification to public accommodations when the animal is uncontrollable or not

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<sup>78</sup> 28 C.F.R. § 36.302(c) (2022).

<sup>79</sup> 28 C.F.R. § 36.302(c)(7) (2022).

<sup>80</sup> 28 C.F.R. § 36.302(c)(8) (2022).

<sup>81</sup> 28 C.F.R. § 36.302(a) (2022).

<sup>82</sup> 28 C.F.R. § 36.302(c)(3) (2022).

<sup>83</sup> Brennan & Nguyen, *supra* note 4, at 21.

<sup>84</sup> Brennan & Nguyen, *supra* note 4, at 22.

housebroken.<sup>85</sup> When a service dog is running, jumping, barking, or otherwise deemed to be outside of its handler's ability to control, a business, or other place of public accommodation, may act responsively to exclude the animal.<sup>86</sup> Inevitably, disputes between parties arise over what counts as evidence of uncontrollable behavior. Instances in which an individual feels inconvenienced or unfairly affected by a service dog, the dog's behavior may be under elevated scrutiny. When disputes arise, businesses and other places of public accommodation may be uninformed of their duties to the parties in discord, consequently becoming entangled in discrimination claims by the individuals with service animals. In these cases, parties may seek relief through the complaint processes of the DOJ, the ADA, or other agency, or by bringing a private suit in court.<sup>87</sup> These actions are limited in their abilities to yield satisfactory results for either party because they are slow, laborious, and can be incredibly costly to both parties.<sup>88</sup> Additionally, these cases inevitably bring further problematic scrutiny and suspicion regarding the validity of service dogs and diminish public regard for them.<sup>89</sup>

Existing regulation provides that service dogs brought into the public realm, when not specifically and reasonably excluded, must be leashed or otherwise effectively controlled at all times.<sup>90</sup> Further, the public service provider, and public at large, cannot be held responsible for the dog's needs or actions.<sup>91</sup> When confusion or questions arise about the status of the service dog, the only lawfully permitted questions are whether the dog alleviates the disability of an individual and what tasks the animal has been trained to perform.<sup>92</sup>

The ADA has acted specifically to state substantive, identifiable policy surrounding service dogs, while maintaining that an individual accompanied by a service dog cannot be asked to

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<sup>85</sup> 28 C.F.R. § 36.302(c)(2) (2022).

<sup>86</sup> Brennan & Nguyen, *supra* note 4.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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

present any verification or certification of the dog’s qualifications.<sup>93</sup> A further limitation imposed by the ADA requires that any inquiry is not permitted when the task performed by the animal for the disabled individual is readily apparent.<sup>94</sup> The individual with a service dog may be asked two concise questions: (1) whether the animal is required because of a disability; and (2) what work or task the animal has been trained to do.<sup>95</sup>

In another case, *Davis v. Ma*, the court encountered an instance where Davis, a disabled individual with a service dog, brought a claim against Ma, the owner of a Burger King restaurant. Ma denied Davis entry to a Burger King restaurant with his puppy, which he was training to become a service dog, causing him to suffer intentional infliction of emotional distress.<sup>96</sup> Though the puppy was wearing a service dog label obtained through application to the City, the court determined that the ADA regulation for service dogs refers to their training only in the past tense, where the dog has been “trained,” not when the dog is “in training.”<sup>97</sup> The court held that Davis’s dog was not a trained service dog at that time, but also that he puppy was “not a trained service dog ... under any circumstances according to minimal industry standards and practices.”<sup>98</sup> Though Davis alleged that he had been himself training the puppy to be a service dog the court answered that “the plaintiff was ‘not a certified service dog trainer based on industry standards.’”<sup>99</sup> Amidst these assertions, the court settled the conflict for Ma, reasoning that Davis had failed to provide evidence that the puppy was a trained service dog at the time of the incident.<sup>100</sup> For these reasons, the court held that Ma did not intentionally inflict emotional distress upon Davis through the conflict.

Taking his dog into the restaurant, Davis clearly believed himself to be in compliance with ADA policy. The record contains evidence that Davis had obtained a license tag from the City, and a

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

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

<sup>96</sup> *Davis v. Ma*, 848 F. Supp. 2d 1105, 1114 (C.D. Cal. 2012).

<sup>97</sup> *Id.* at 1115.

<sup>98</sup> *Id.* at 1110.

<sup>99</sup> *Id.* at 1111.

<sup>100</sup> *Id.* at 1115.

letter from his physician certifying his disability and noting Davis’s reliance on his service dog to ameliorate limitations of his disability.<sup>101</sup> Current law does not allow physicians to officially prescribe service dogs.<sup>102</sup> Despite these efforts, Davis experienced emotional distress when he was denied admittance to the restaurant with his puppy and the ensuing conflict, court finding notwithstanding, caused him additional distress.<sup>103</sup>

This case, and others like it, represent instances where the courts did not find on behalf of the disabled individuals. Davis experienced emotional distress stemming from inconclusive substantive policy. Davis had followed ADA guidance to the best of his ability only to have the courts find against him. Promulgating its holding based on judicial effort to fairly harmonize statutory language and subjective interpretation of its purpose, the court did little to remedy emotional harms experienced by Davis, and others in similar situations, in seeking equal access to public accommodations.

Intended to spare disabled individuals the discomfort of discriminatory questioning, these limitations lay the groundwork for disputes that cannot help but grow from the “don’t ask, don’t tell” vagary of existing policy. The purpose of existing policies is to provide a broad lens for identifying service dogs, but the lack of clear regulation actually imperils public perception and erodes the welcome service dogs and their handlers would otherwise receive.

## VI. UNDERSTANDING DISABILITY AND SCOPE OF INSUFFICIENT POLICY

Title 42 § 12102 of the United States Code defines disability as a physical or mental impairment limiting an individual’s ability in one or more major life activities or bodily functions.<sup>104</sup> Major life activities include, but are not limited to, “caring for oneself, performing manual tasks, hearing, eating, sleeping, walking,

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<sup>101</sup> *Id.* at 1115.

<sup>102</sup> *Service Dog FAQs*, N.H. GOVERNOR’S COMM. ON DISABILITY (Mar. 9, 2021), <https://www.nh.gov/disability/mediaroom/documents/serdog-faq.pdf>.

<sup>103</sup> *Id.* at 1115.

<sup>104</sup> 42 U.S.C. § 12102(1) (2022).

standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.”<sup>105</sup> Major bodily functions include, but are not limited to, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain respiratory, circulatory, endocrine, and reproductive functions.”<sup>106</sup> Individuals substantially and permanently limited in ability by any of these, singly or in combination, shall be considered disabled consistent with the purposes of the ADA Amendments Act of 2008.<sup>107</sup> Whether any disability may be ameliorated by the use of any treatment or device shall not be seen to relieve an individual of their disability, nor diminish the individual’s rights to access public accommodations as supplied by the ADA.<sup>108</sup>

## VII. THE AMERICANS WITH DISABILITIES ACT POLICY FOR DISABLED INDIVIDUALS WITH SERVICE DOGS

Regarding service dogs, the ADA provides conflicting guidance across its Title I, Title II, and Title III protections. Each of these draws upon different defining and usage standards for determining where, when, and how service animals may be allowed. Title I, concerning employment-related regulations for disabled individuals, carries the broadest interpretation of what animal may be a service animal, but is also the narrowest in making accommodations for those animals.<sup>109</sup>

### A. *Title I: Employees with Service Dogs*

Title I and The Equal Employment Opportunity Commission (EEOC) do not define what a service animal is or include any regulations for employers to follow when employees request to bring service animals into the workplace.

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<sup>105</sup> 42 U.S.C. § 12102(2)(A) (2022).

<sup>106</sup> 42 U.S.C. § 12102(2)(B) (2022).

<sup>107</sup> 42 U.S.C. § 12102(4)(B) (2022).

<sup>108</sup> 42 U.S.C. § 12102(4)(E)(i) (2022).

<sup>109</sup> *ADA Requirements: Service Animals*, ADA.GOV (Feb. 28, 2020), <https://www.ada.gov/resources/service-animals-2010-requirements/>.

Contrasting with 28 C.F.R. § 36.302, where only limited inquiry is legally permissible regarding service animals, Title I permits employers to request reasonable documentation of an employee's need for disability-related accommodation. A disabled individual's accommodations can be judged by the employer on their reasonable relation to the employee's work tasks. Employers are also allowed to request additional documentation of disability-related-training and specific, ameliorative services the service dog provides.<sup>110</sup>

Documentation of the individual's disability can typically be provided by an individual's physician. However, physicians are not more than incidentally connected to dogs because their prescribing authority does not extend to the procurement of service dogs.<sup>111</sup> Even when an employee presents documentation of disability from a physician, and perhaps even a letter of awareness from the physician that the individual relies upon a service dog, employers are generally allowed to determine subjectively whether to allow the dog in the workplace.<sup>112</sup> In other words, employers, not physicians, are charged with discerning whether an individual truly needs a service dog in the course of that person's employment.<sup>113</sup>

Additionally, employers can require employees to demonstrate their service dog's purpose and may subject the individual and the service dog to a trial period, of unspecified terms, to gauge the dog's suitability in the employment setting.<sup>114</sup> Thus, an employer may legally allow or disallow an individual's service dog accommodation in the workplace based on a physician's statement, any certification the service dog may have, the dog's demonstration of ameliorative aid, the employer's own feeling about service animals, concerns among others in the workplace, and other factors.<sup>115</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Melissa Legault, *SPB In-Depth: Service Animals as Reasonable Workplace Disability Accommodations (US)*, 10 NAT'L L. REV. (Jan. 20, 2020) <https://www.natlawreview.com/article/spb-depth-service-animals-reasonable-workplace-disability-accommodations-us>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

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

When a service dog is necessary to aid an individual's personal function within the workplace, but not necessarily to aid an individual's work function, employees may struggle before courts to successfully plead workplace discrimination. Such cases present novel issues without guiding precedents, leaving courts to draw from inconclusive C.F.R. and ADA language.<sup>116</sup> For instance, in *McDonald v. Department of Environmental Quality* (DEQ), the Montana Supreme Court was asked to determine the employer, DEQ's, duty to accommodate McDonald by ensuring the safety of her service dog.<sup>117</sup>

Appellant Janelle McDonald was certified by the Montana Department of Public Health and Human Services in 2002 as a person with a disability.<sup>118</sup> McDonald's disabilities included depression that impaired her concentration and memory and hindered her ability to traverse hard surfaces, particularly stairs, for long distances.<sup>119</sup> McDonald relied upon her service dog, Bess, to maintain stability and focus in her workplace-related tasks.<sup>120</sup> The flooring in the building where McDonald was able to work because of Bess's assistance posed a slipping risk for Bess.<sup>121</sup> Despite numerous and consistent appeals over two years to DEQ for carpet or runners to prevent Bess from slipping, DEQ failed to act.<sup>122</sup> Eventually, Bess's numerous slips caused her to accumulate significant and permanent injury which forced McDonald to retire her from service.<sup>123</sup>

McDonald left DEQ, filing a complaint with the Department of Labor and Industry alleging that DEQ had unlawfully discriminated against her by egregiously failing to accommodate for the safety of Bess.<sup>124</sup> DEQ countered that its duty of care was owed to McDonald and not to Bess.<sup>125</sup> The Supreme Court of Montana

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<sup>116</sup> *McDonald v. Dep't of Env't Quality*, P.3d 749, 757 (Mont. 2009).

<sup>117</sup> *Id.* at 751.

<sup>118</sup> *Id.* at 351.

<sup>119</sup> *Id.* at 751.

<sup>120</sup> *Id.* at 752.

<sup>121</sup> *Id.* at 752.

<sup>122</sup> *Id.* at 756.

<sup>123</sup> *Id.* at 756.

<sup>124</sup> *Id.* at 757.

<sup>125</sup> *Id.* at 757.

was asked to determine whether: (1) McDonald needed an accommodation to perform her work; (2) being required to modify flooring to prevent Bess from slipping was within the scope of DEQ's employer duties; and (3) the accommodation requested for Bess was reasonable.<sup>126</sup>

The court held that use of a service animal as an assistive device to ameliorate disability is akin to the service provided by a wheelchair and a nonskid floor that would have accommodated Bess was appropriate and within the scope of DEQ's duty to McDonald.<sup>127</sup> During the hearing DEQ countered with an unpublished case, *Branson v. West*, relying on its limited authority to argue that Bess's struggle with slippery DEQ flooring was a matter of Bess's "care or behavior."<sup>128</sup> DEQ also relied upon this position in *Branson* to argue that it was not required to make modifications to its facility to accommodate Bess in order to facilitate McDonald's employment.

The Montana court allowed *Branson* for the purpose of any persuasive consideration it might render, but ultimately found that *Branson*'s "care or behavior" reference was to the way in which the service dog conducted itself toward staff, patients, and other visitors.<sup>129</sup> *Branson* was not called upon to determine whether a facility should be required to make reasonable modifications to promote an employee's ability to effectively utilize their service dog.<sup>130</sup> Ultimately, the court held that the accommodations sought by McDonald were for her benefit, because they were necessary for employment performance, and legally required of DEQ.<sup>131</sup>

DEQ further argued an employer should need to make accommodations only when the accommodation is necessary for the employee 100% of the time. Because McDonald was able to perform her job 50% of the time without Bess's assistance and did not entirely rely upon Bess to do her work, DEQ was not required

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<sup>126</sup> *Id.* at 758.

<sup>127</sup> *Id.* at 759.<sup>128</sup> *Id.* at 761 (citing to *Branson v. West*, No. 97 C 3538, 1999 WL 1186420 (N.D. Ill. Dec. 10, 1999)).

<sup>128</sup> *Id.* at 761 (citing to *Branson v. West*, No. 97 C 3538, 1999 WL 1186420 (N.D. Ill. Dec. 10, 1999)).

<sup>129</sup> *Id.* at 751.

<sup>130</sup> *Id.* at 753.

<sup>131</sup> *Id.* at 750.

to provide accommodation.<sup>132</sup> The court responded that among the intentions of the ADA and the Montana Human Rights Act (MHRA) is assurance for disabled individuals that employers be required to make reasonable accommodations when such accommodations could assist an individual with a disability or “alleviate barriers to her ability to enjoy equal benefits, privileges, and opportunities of employment.”<sup>133</sup>

DEQ contested the assertion that it was required to have modified its flooring to reasonably accommodate McDonald’s use of Bess within the workplace citing that 28 C.F.R. § 36.302(c) does not address policy for service dogs in the workplace.<sup>134</sup> DEQ was correct that C.F.R. does not mention employee service dogs and that Title I of the ADA, addressing disability in the workplace, is minimalist in its approach to policy.<sup>135</sup> DEQ attempted to persuade the court that being required to meet standards from Title III for places of public accommodation to the workplace would be excessively burdensome to employers. Where DEQ hoped to be persuasive in this argument, the court responded endorsing requirements for Title III-type modifications and accommodations in the workplace, favoring McDonald’s case.<sup>136</sup>

Adhering to the meaningfulness of ADA and MHRA policy, the court emphasized that “if an adjustment or modification is *job-related*, *e.g.*, specifically *assists* the individual in performing the duties of a particular job, it will be considered a type of reasonable accommodation.”<sup>137</sup> This duty, extending to employer maintained, non-employment use, break rooms and restrooms, confirmed DEQ’s obligation to McDonald as broader in scope than the narrowness of its assertion.<sup>138</sup> In its essence this means that any reasonable accommodation must be made, and the employer is obligated to not interfere by action or inaction, in a disabled employee’s pursuit of a normal life.<sup>139</sup>

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<sup>132</sup> *Id.* at 760.

<sup>133</sup> *Id.* at 760.

<sup>134</sup> *Id.* at 760.

<sup>135</sup> *Id.* at 760.

<sup>136</sup> *Id.* at 760.

<sup>137</sup> *Id.* at 759.

<sup>138</sup> *Id.* at 759.

<sup>139</sup> *Id.* at 759.

The court went further to state that DEQ's failure to remedy McDonald's on-going complaints, which remained unaddressed to the ultimate harm and detriment of Bess from having repeatedly slipped and fallen, were contrary to the purpose of the ADA and the MHRA.<sup>140</sup> Additionally, the court referred to 28 C.F.R. § 36.302(c) to assert "Congress's intent that 'the broadest feasible access' be provided to service animals and their users."<sup>141</sup> Where the court likened Bess to an assistive device in order to gain traction from existing policy, the court held that an employer's duty to an employee with a disability does not end with allowing the employee's assistive device into its facility.<sup>142</sup> The employer must continue to promote the usability of the device to its optimum usefulness to the employee-user, including making reasonable accommodation such as modifying a flooring surface.<sup>143</sup>

While McDonald was successful in her suit, she, and other employees reliant upon service dogs would have more direct recourse in their conflicts with employers if Title I contained language affirmatively providing for them. The purpose of guiding substantive language would be to alleviate these conflicts by regulating when, where, and how employer duties exist to avoid discrimination against disabled individuals who rely upon service animals. In these instances, it is not the service dog itself in need of care and accommodation, but the individual's disability which is ameliorated through the service dog. Allowing employer discretion to determine whether employees may use service dogs to support their essential functions is the equivalent of allowing employers to determine whether other assistive mechanisms, devices, or implements are necessary.

*B. Title II: Education and Government Spaces and Title III:  
Public Spaces*

Titles II and III, which regulate accommodations for disabled individuals in state and local government services and

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<sup>140</sup> *Id.* at 760.

<sup>141</sup> *Id.* at 763.

<sup>142</sup> *Id.* at 763.

<sup>143</sup> *Id.* at 763.

public commercial facilities, respectively, offer more conclusive language regarding the regulation of service dogs than Title I. Specifically, Titles II and III, as of March 15, 2011, recognize only dogs as service animals and only when they are individually and specifically trained to alleviate the direct physical needs created by a person's specific disability.<sup>144</sup> These regulations define a service dog as being individually trained to do work or perform tasks for a person with a disability.<sup>145</sup> Substantively, Titles II and III specify that people have equal access to public accommodations, regardless of ability.<sup>146</sup> When an individual's access is equalized by the presence of a service dog, places of public accommodation must generally not prohibit, discourage, or discriminate against the individual by barring admittance of the service animal.<sup>147</sup>

Whereas Title I reserves discretion for the employer to determine the usefulness and appropriateness of a dog accompanying an employee in the workplace, Titles II and III lean in favor of individuals with service dogs. Service providers in places of public accommodation may only make limited and specific inquiries into whether a dog is a service dog and what service the dog provides.<sup>148</sup> Under Titles II and III, service dogs are exempt from local, breed-specific regulations and need not bear proof of any certification.<sup>149</sup>

Though language in 28 C.F.R. § 36.302 affirms Titles II and III, the generally ambiguous guidance regarding service dogs creates a context in which conflicts arise between individuals with service dogs and places of public accommodation.<sup>150</sup> When such conflicts arise, resolution can be lengthy and frustrating for both disabled individuals with service dogs and places of public accommodation. This is especially clear in cases where children

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<sup>144</sup> *ADA Requirements: Service Animals*, ADA.GOV (Feb. 24, 2020), [https://www.ada.gov/service\\_animals\\_2010.htm](https://www.ada.gov/service_animals_2010.htm).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Brennan & Nguyen, *supra* note 4.

<sup>149</sup> *Id.*

<sup>150</sup> *See* 28 C.F.R § 36.302 (2011).

with disabilities are faced with prejudice and discrimination when using a service animal to seek equal access to education.<sup>151</sup>

### C. *Title II (More Specifically), IDEA, and the Rehabilitation Act*

The ADA and the Individuals with Disabilities Education Act (IDEA) require public schools to allow service dogs into schools and classrooms when the services the dog provides are needed for the student to access a rightful free and appropriate education.<sup>152</sup> The Office for Civil Rights (OCR), a component of the U.S. Department of Education, enforces Section 504 of the Rehabilitation Act, which prohibits discrimination against individuals with disabilities in any publicly-funded program or service.<sup>153</sup> While IDEA, OCR, and Section 504 meant to ensure access to public education regardless of ability, they were created at different times to address disparate issues. Bracketed together, they seek to illustrate provisions, not specifically enumerated within any policy, by abridging this gap in policy to administer guidance for schools and individuals with service dogs in educational settings. Unfortunately, because these laws were not specifically created to address the myriad issues related to service dogs, such as how inclusively service dogs must be accommodated in schools, inevitable confusion, and resulting harms, can only be untangled judicially. Courts have attempted to sort out ensuing legal claims parsing the laws' limited applicability to service dogs. While use of service dogs is implicitly included in IDEA protections for students in primary, secondary, and post-secondary schools, these protections are not clearly enforceable through ADA regulations.<sup>154</sup> Proper and crucial actions have been explicitly taken to ensure equality of education for disabled students, but while these programs have been gathered to ensure this right, more specific

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<sup>151</sup> *Taking a Service Animal to School*, ADA NAT'L NETWORK, <https://adata.org/service-animal-resource-hub/school> (last visited Oct. 17, 2022).

<sup>152</sup> Brennan & Nguyen, *supra* note 4.

<sup>153</sup> *Protecting Students with Disabilities*, U.S. DEP'T OF EDUC. <https://www2.ed.gov/about/offices/list/ocr/504faq.html#interrelationship> (last visited Dec. 17, 2022).

<sup>154</sup> *Taking a Service Animal to School*, ADA NAT'L NETWORK, <https://adata.org/service-animal-resource-hub/school> (last visited Oct. 17, 2022).

policies ensuring inclusion of service animals have fallen through a large hole in the middle where policies should exist. The greater the number of service dogs in public education settings, the more visible the need becomes for regulatory policy to alleviate conflict and promote rightful access.

#### D. *Title II in Schools for Students with Service Dog Accommodations*

Despite one interpretation that seems to allow service dog accommodations to students at all levels, recent case law has adopted variable positions on the question.<sup>155</sup> In *C.G. by and through P.G. v. Saucon School District*, the United States District Court of Pennsylvania granted a motion for injunctive relief brought against a school district in an effort to remedy inequities related to service dogs in schools.<sup>156</sup> The child student-plaintiff in this case suffered discrimination under Section 504 of the Rehabilitation Act (RA) and the ADA when the school district refused to permit the student to be accompanied by her service dog.<sup>157</sup> The student suffered from complex partial epilepsy, a development coordination disorder, and cerebral palsy, complicated by a type of eye impairment that was worsened by a fall she suffered in her gym class.<sup>158</sup> For these reasons, the student's doctor suggested she get a service dog to support her mobility and reduced cognitive ability, and to help her safely and independently cross streets.<sup>159</sup> The family saved money for several years and eventually the student was paired with George, a service dog who had undergone extensive and specific training to meet the student's needs.<sup>160</sup>

While the school district acknowledged the student's disability, it did not concede that George provided her with disability-mitigating support.<sup>161</sup> Fearful of attending school without

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<sup>155</sup> *Id.*

<sup>156</sup> *C.G. by and through P.G. v. Saucon School District*, 571 F.Supp.3d 430, 438 (E.D. Pa. 2021).

<sup>157</sup> *Id.* at 437.

<sup>158</sup> *Id.* at 434.

<sup>159</sup> *Id.* at 443.

<sup>160</sup> *Id.* at 435.

<sup>161</sup> *Id.* at 440.

George, the student elected to remain home, and the school responded by allocating the student a maximum of five hours per week of tutoring.<sup>162</sup> After repeated and rigorous efforts on the part of the student's parents to obtain relief in the form of permission for George to accompany the student to school, the family sought injunctive relief.<sup>163</sup>

In its holding, the school was required to grant the service animal access unless: "(i) granting access would fundamentally alter the nature of the program; (ii) the animal poses a direct threat to health or safety of others; (iii) the animal is out of control; or (iv) the animal is not housebroken."<sup>164</sup> The court further allowed that the school could request additional information to establish the student's need when appropriate.<sup>165</sup> However, the student was to be protected from harassment and the school was prevented from discouraging her from seeking accommodations.<sup>166</sup>

Relying upon broad designations of service animals in the RA and the ADA that "secure the rights of individuals with disabilities to independence and full inclusion in American society," the court applied its four-part test to determine whether the facts in the case could support an exception that would endorse the school district's position.<sup>167</sup> The school district did not contend that any of the exceptions applied to George were sufficient to deny him entry to the school, but instead argued that George did not qualify as a service dog.<sup>168</sup>

Drawing from 28 C.F.R. § 35.14, the court devised a two-part test to determine whether an animal qualified as a service animal.<sup>169</sup> The test asked first whether George was individually and specifically trained to meet the student's needs directly correlated with her disability, including physical, sensory, psychiatric, intellectual, or other mental limitation.<sup>170</sup> The school district argued

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<sup>162</sup> *Id.* at 438.

<sup>163</sup> *Id.* at 438.

<sup>164</sup> *Id.* at 440.

<sup>165</sup> *Id.* at 443.

<sup>166</sup> *Id.* at 443.

<sup>167</sup> *Id.* at 440.

<sup>168</sup> *Id.* at 441.

<sup>169</sup> *Id.* at 441.

<sup>170</sup> *Id.* at 441.

that George provided to the student only the comfort generally associated with a household pet.<sup>171</sup> However, the court found that George's specific training included the ability to sense the student's cortisol level, which is critical to predicting seizure danger, and to perform Deep Pressure Therapy (DPT) to alleviate anxiety, which directly mitigated her psychiatric and physical symptoms.<sup>172</sup>

The test next asked whether the service provided by George was directly and individually tailored to the student's specific disability needs. The court held that the student had provided ample evidence that a nexus existed between George's specific training and the student's specific disability. Cumulatively, the results of the test overcame the school district's claim that the student's access to her education was not promoted by George and that George was not a service dog. The court granted an injunction that observed the student's right to equal access to education via George's accompaniment.

This case is a clear example of a recognized authority determining that a student's access needs and the qualifications of a service animal were within its purview. The school district's ability to assert its position was anchored in the ambiguity surrounding service dogs and their functions in general, as well as the ameliorative services they perform for disabled individuals. This ambiguity provides ample ground for disputes to arise between disabled individuals seeking to participate in public life and the gatekeepers of public accommodations.

#### VIII. DISPARATE STATE REGULATORY STANCES FOR INDIVIDUALS WITH SERVICE DOGS

Faced with fielding litigation in disputes arising from claims of discrimination brought by, and on behalf of, disabled individuals with service dogs, states have recently moved to enact clarifying legislation. Nearly all states have made a restricted, regulatory effort to create some measure of substantive structural policy pertaining

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<sup>171</sup> *Id.* at 441.

<sup>172</sup> *Id.* at 442.

to service dogs.<sup>173</sup> California, for example, which maintains some of the strictest policies in the nation around the permissibility of service dogs, holds violations of an individual's right to be accompanied by a service dog in places of public accommodation to be violations of the ADA.<sup>174</sup> Such violations accrue fines of not less than \$1,000, plus attorney's fees.<sup>175</sup> Additionally, any fraud or misrepresentations regarding a service dog or training/certification of a service dog is punishable by a \$1,000 fine and/or time jail up to six months.<sup>176</sup>

Connecticut defines service dogs more narrowly by formally recognizing them as guide or assistance dogs and requires them to wear orange as an identifier.<sup>177</sup> When these dogs are so appareled, places of public accommodation in Connecticut must unreservedly admit service dogs or risk a Class C misdemeanor violation.<sup>178</sup> Adding an additional layer of regulation, Connecticut also requires guide or assistance dogs to be licensed and tagged by the local town clerk.<sup>179</sup>

Thus, California and Connecticut have made efforts to codify expectations for service dog use, but states' efforts can only go so far when the DOJ fails to issue clear guidance. Washington state law perhaps goes the furthest to make accommodation of a service dog a civil right, providing that:

The right to be free from discrimination because of race, creed, color, national origin, citizenship or immigration status, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service

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<sup>173</sup> Rebecca F. Wisch, *Table of State Service Animal Laws*, MICH. STATE UNIV.: ANIMAL LEGAL & HIST. CTR. (2022), <https://www.animallaw.info/topic/table-state-assistance-animal-laws>; CAL. CIV. CODE § 54.2 (West 2022).

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

<sup>175</sup> CAL. CIV. CODE § 54.3 (West 2022).

<sup>176</sup> CAL. PENAL CODE § 365.7 (West 1994).

<sup>177</sup> CONN. GEN. STAT. ANN. § 46a-44(a) (West 2017).

<sup>178</sup> CONN. GEN. STAT. ANN. § 46a-44(c) (West 2017).

<sup>179</sup> CONN. GEN. STAT. ANN. § 22-345 (West 2023).

animal by a person with a disability is recognized as and declared to be a civil right.<sup>180</sup>

These examples illustrate progressive state efforts to affirmatively protect individuals' use of service dogs.

Contrastingly, some states endorse alternative policies by creating less specific language addressing service dogs. Arkansas as an example broadly accepts service dogs as applied in Titles II and III of the ADA.<sup>181</sup> The state allows admittance of any service dog into places of public accommodation and strongly discourages efforts to misrepresent a pet as a service animal.<sup>182</sup> Any violation is subject to a fine not to exceed \$250.<sup>183</sup>

Georgia defines a "guide dog or service dog" as one that has been "trained by a school for seeing eye, hearing, service, or guide dogs."<sup>184</sup> The state of Kentucky recognizes a service dog as any dog presented for licensure when the person requesting the license is a person with a disability.<sup>185</sup> Massachusetts's law addressing "hearing dogs" requires them to be bred to be a service animal or complete a training course by an individual engaged in the "hearing dog" business within the commonwealth.<sup>186</sup>

Superficially, these efforts nominally acknowledge the need for accommodations related to service dogs and identify charges and fines for abuses but substantively fail to reach a sure regulatory bar. Where regulations exist, they seem to agree on accepting that service dogs perform physical tasks for disabled individuals but offer no specifications regarding what tasks service dogs must perform to be titled as service dogs, or describe how those tasks must ameliorate various disabilities. Effectively, one certification is legally equivalent to the next despite the high likelihood that each certification involves dramatically different training.

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<sup>180</sup> WASH. REV. CODE ANN. § 49.60.030 (2022).

<sup>181</sup> ARK. CODE ANN. §§ 20-14-301 to -310 (West 1979); ARK. CODE ANN. § 23-13-717 (West 2022).

<sup>182</sup> ARK. CODE ANN. § 20-14-303; ARK. CODE ANN. § 20-14-310

<sup>183</sup> ARK. CODE ANN. § 20-14-310

<sup>184</sup> GA. CODE ANN. § 30-4-2 (West 2022).

<sup>185</sup> KY. REV. STAT. ANN. § 258.500 (West 2022).

<sup>186</sup> MASS. GEN. LAWS ANN. ch. 129, § 1 (West 2004).

In this context, policy enacted by states may exist in a perilous zone that equates to legal shoulder shrugging. These complexities grow outward from the assertion provided by the ADA and the RA that a service animal must be trained to meet a specific, disability-related need of an individual. Because this vague requirement comprises the largest part of all policy surrounding service dogs, effective regulation would need to be applied in a case-by-case fashion that far exceeds any procedural scope.

## IX. CONFLICT EMANATING FROM “REGULATION” OF SERVICE DOGS

Even though some state regulations require training or certification of service dogs, no official, regulatory, controlling, or lawful policy has been instituted among federal or state government agencies to accredit or oversee training efforts. The DOJ, through the ADA, has avoided implementation of any policy that could be viewed as adding additional and unnecessary challenges that impinge upon already challenging circumstances for disabled individuals.

### A. “Certification” Fraud

In the absence of any clear accreditation standards or oversight, private individuals can acquire, train, and “certify” service dogs at their own discretion. In practice, this lack of policy is akin to allowing individuals to make and use their own disability parking permits. The American Kennel Club (AKC) provides some helpful recommendations about which breeds are most suitable for service dog training as well as what training service dogs should receive.<sup>187</sup> While certainly offering useful guidance, the AKC struggles without federal endorsement to do more on this issue than offer opinions.<sup>188</sup>

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<sup>187</sup> *Service, Therapy, and Working Dogs*, AMERICAN KENNEL CLUB, <https://www.akc.org/public-education/resources/general-tips-information/service-therapy-work-dogs/> (last visited Dec. 19, 2022).

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

As the ADA and DOJ hesitate to make policy, private enterprise and volunteer-centered organizations have stepped in to fill the void. Lacking federal directive, states and localities have instead accepted efforts by individuals and organizations to credential themselves and train service dogs as they see fit.<sup>189</sup> Privatization of these functions means that disabled individuals can only access the accommodation of service dogs through the benevolence of a charity or at the exorbitant cost of around \$30,000, regarding their training or compatibility with the individual acquiring them.<sup>190</sup>

The internet also offers options for enrolling a dog in training, obtaining an already trained dog, or training a dog to function as a service dog. As an example, Service Dog Training International purports to offer “Certified Online Training Courses” recognized by every state.<sup>191</sup> However, because no states have express standards for training or certification, sites like these prey upon public misinformation relating to ADA requirements for service dog accompaniment in public places.

### B. *Fraudulent “Training” of Service Dogs*

Confusion emanating from varied and loose policy encourages lackadaisical interpretations of what service dogs are, what training means, and how they must be included in spaces where animals are normally prohibited. Applying common interpretations indicate even broader variances depending upon whether the regulations being referred to conform to any of the Title areas within the ADA, FHA, DOT, or state and local governments. The one generally accepted requirement of a service dog seems to be that the dog is trained in a single, specialized skill that ameliorates the disability of a specific individual. Still, questions

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<sup>189</sup> *ADA Requirements: Service Animals*, ADA.GOV, <https://www.ada.gov/resources/service-animals-2010-requirements/> (last visited Dec. 19, 2022).

<sup>190</sup> *Service Dog Costs 101: How to Budget for a Canine Companion*, AMPLIFY, <https://www.goamplify.com/blog/moneymanagement/service-dog-costs/> (last visited Dec. 19, 2022).

<sup>191</sup> SERVICE DOG TRAINING SCHOOL INTERNATIONAL, [www.servicedogtrainingschool.org](http://www.servicedogtrainingschool.org) (last visited Oct. 18, 2022).

abound regarding the array of skills these dogs can be trained to perform and whether these skills ameliorate an individual's disability sufficiently to enforce the dog's admittance in public spaces. Opportunistic individuals, intending to deceive and profit, have unfortunately filled the gap between the need for service animals and federal government's inability to create complete and guiding policy to officially recognize and support service animals. Inevitably, the field has been prone to dishonesty and fraud.

In *Borg v. Warren*, plaintiff Borg brought suit against defendant Warren, and his accomplices, for fraudulently misrepresenting themselves as trainer-sellers of service dogs.<sup>192</sup> Warren started his business by targeting a select number of families whom he believed could afford to pay upfront the entire cost of a service dog.<sup>193</sup> When Warren received the payment, he delivered to these first families highly trained dogs in an effort to establish the legitimacy of his business.<sup>194</sup> Warren's corporation grew over the next decade following this promising start and was named Service Dogs by Warren Retrievers, Inc.<sup>195</sup> Warren promised to deliver "hundreds" of service dogs individually trained to ameliorate specific owner disabilities.<sup>196</sup>

Warren's corporation initially promoted a "Diabetic Alert Dog Program" promising dogs trained to alert their owners when a variance in blood sugar levels was detected.<sup>197</sup> A later scheme selling Autism Therapy Dogs boasted a "proprietary training and placement program that ensures that every family with an Autism Dog finds the independence and safety that they are looking for."<sup>198</sup> Warren collected \$25,000 in cash from each buyer for these services and dogs he never intended to deliver.<sup>199</sup>

In the suit, Borg alleged that Warren was engaged in a racketeering conspiracy to make money by selling nonexistent

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<sup>192</sup> *Borg v. Warren*, 545 F. Supp. 3d 291, 302 (E.D. Va. 2021).

<sup>193</sup> *Id.* at 304.

<sup>194</sup> *Id.* at 304.

<sup>195</sup> *Id.* at 303.

<sup>196</sup> *Id.* at 303.

<sup>197</sup> *Id.* at 304.

<sup>198</sup> *Id.* at 306.

<sup>199</sup> *Id.* at 306.

service dogs to disabled individuals.<sup>200</sup> When Warren's effort in Virginia began to unravel, he filed bankruptcy with the intent of reestablishing his efforts in Florida.<sup>201</sup> Warren planned to escape liability for the sale of undelivered service dogs, claims of breach of contract, and ensuing unjust enrichment.<sup>202</sup> Attempting to absolve himself from liability for harm to so many families, Warren claimed that the dogs belonged to his corporation which was under bankruptcy proceedings and that it was no longer viable or able to deliver.<sup>203</sup>

However, customers like Borg were able to establish that Warren had no intention of delivering the service dogs, and that Warren and others through the Corporation, had committed fraud.<sup>204</sup> Ultimately, the court held that Borg, and other families, clearly suffered harm from Warren's service dog scheme because they detrimentally relied upon promises of service dogs that Warren never intended to deliver. Among the claims Borg brought against Warren, the court found that Borg adequately alleged that Warren had committed a Racketeer Influenced and Corrupt Organizations Act violation and an Unfair Competition Law Claim.<sup>205</sup>

Hundreds of individuals and families were preyed upon by Warren and continue to be victimized by similar corporations and programs offering service dogs for sale. Disabled individuals value the independence they can access through the amelioration of their disabilities, and this makes them understandably susceptible to frauds like Warren's. Even when reputable charitable service dog organizations exist to train and match service dogs with individuals, the need is far greater than the supply. This being the case, individuals look elsewhere to find service dogs, but scarcity, the prohibitively high cost, and rampant fraud make obtaining service dogs impossible for many individuals.

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<sup>200</sup> *Id.* at 308.

<sup>201</sup> *Id.* at 307.

<sup>202</sup> *Id.* at 307.

<sup>203</sup> *Id.* at 307.

<sup>204</sup> *Id.* at 307.

<sup>205</sup> *Id.* at 330.

X. THE CASE AND DEMAND FOR SUBSTANTIVE POLICY AND REGULATORY ACTION TO SUPPORT DISABLED INDIVIDUALS AND USE OF SERVICE DOGS, BEYOND REPROACH

Where getting a service dog is rife with complication and expense, disabled individuals must also bear the burden of whether their service dog will be accepted into places of public accommodation. In an article advocating for closer regulation surrounding service animal training and credentialing, the American Kennel Club (AKC) states that lack of policy “harms the truly disabled, confuses the public, and affects the reputation of legitimate service dog users. Even worse, a poorly-trained fake service animal can be a danger to the public and to real service dogs.”<sup>206</sup> The AKC further states:

Bringing untrained dogs into situations for which they are ill-equipped puts everyone at risk. . . . Perhaps the most disturbing effect of this trend is that it is those with legitimate service dogs are being denied access to public places where they have the right to go because of the poor behavior of pets and their owners who fraudulently attempt to pass them off as service dogs. It’s easy to understand how a business owner who has had bad experiences with ill-disciplined fake “service dogs” can become wary of all dogs and resist allowing legitimate service dogs into their place of business.<sup>207</sup>

Largely, confusion as to what federal policy for service dogs requires lies at the base of much conflict among the public, private entities, and government facilities, like schools. In 2019 the Department of Justice released an announcement concerning a

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<sup>206</sup> Jen Karetnick, *Service Dogs 101— Everything You Need to Know*, AMERICAN KENNEL CLUB (May 20, 2022), <https://www.akc.org/expert-advice/training/service-dog-training-101/>.

<sup>207</sup> *Canine Legislation Position: Misuse of Service Dogs*, AMERICAN KENNEL CLUB (Dec. 8, 2015), <https://www.akc.org/clubs-delegates/government-relations/government-relations-blogs/updated-misuse-service-dogs-hurts-disabled-responsible-dog-owners/>.

settlement with two hotel chains that had discriminated against veterans by refusing accommodations when accompanied by service dogs.<sup>208</sup> One hotel had denied a room to a veteran because the veteran lacked documents certifying the dog as a service dog.<sup>209</sup> The other hotel had flatly refused to admit the service dog, citing its policy prohibiting pets.<sup>210</sup> In both instances, the veterans demanded to speak to management, which confirmed the hotels' corporate policies.<sup>211</sup>

Following the DOJ investigation, the hotels agreed to adopt and implement service dog policies and provide employee training to prevent future occurrences.<sup>212</sup> The veterans had filed complaints with the ADA against the hotels for discrimination. These claims were based on refusal of service harms experienced by the claimants after being denied service because of their dogs. The claimants received direct settlements for themselves and future relief from this sort of discrimination for other veterans with service dogs seeking hotel accommodations.<sup>213</sup>

These cases point to a broader pattern of confusion concerning service dogs, enhanced by mixed news and social media information, that leads to public suspicion of the credibility of such dogs. The greatest harm results from how such acts severely diminish the liberties and freedoms of disabled individuals and discourage them from participating in public life. Individuals with disabilities should not be required to prove the usefulness or capabilities of their service dogs, and places of public accommodation should not be left to determine on their own whether to accept a dog as a service dog. Instead, the interests of equality and justice demand clear guidance, regulation, and enforcement of this matter.

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<sup>208</sup> OFF. OF PUB. AFF. PRESS RELEASE NO. 19-1201, *Justice Department Settles with Public Accommodations to Protect the Rights of Veterans Who Use Service Dogs*, U. S. DEP'T OF JUST. (Nov. 6, 2019), <https://www.justice.gov/opa/pr/justice-department-settles-public-accommodations-protect-rights-veterans-who-use-service-dogs>.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

In its mission statement, the DOJ asserts its commitment to disability rights, claiming that it seeks “[t]o advance the nation’s goal of equal opportunity, integration, full participation, inclusion, independent living, and economic self-sufficiency for people with disabilities through enforcement, regulation, and technical assistance.”<sup>214</sup> The operative vision of this mission is “[a]ccess, inclusion, and equal opportunity for people with disabilities through Justice.”<sup>215</sup> Through this language and more terms created by its agency, the ADA, the DOJ is empowered and responsible for acting affirmatively to regulate service dogs in its pursuit of justice for disabled people.

Where federal agencies, sub-agencies, state law, and private sector actors have been pushed to define their own policy for promoting equal access for disabled individuals who rely upon service animals, the DOJ has been remiss in its obligations. In this breach of action, the scope of needed policy continues to exponentially grow along-side rising public awareness of service dogs and in the absence of definitive regulations. Symptomatically, service dog identification has been flooded with fraud, misrepresentation, and suspicion, and disabled individuals are ultimately the ones who suffer.

Advertisements for private sector for-profit companies, like Support Pets, encourage pet owners to pay for a “license” or “certification” that would allow them to travel unimpeded with their pet. USA Service Dogs, through its .org platform, sells kits for “service” dogs, guaranteeing lifetime registration.<sup>216</sup> They include a certificate and identification card in its most basic package for \$69 (discounted from \$109) and its largest package for \$199 (discounted from \$279) includes vests and collars labeled “Service Dog.”<sup>217</sup> These offers would be fraudulent if there were any law or policy

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<sup>214</sup> *Disability Rights Section*, U. S. DEP’T OF JUST., <https://www.justice.gov/crt/disability-rights-section> (last visited Dec. 19, 2022).

<sup>215</sup> *Id.*

<sup>216</sup> *Start Service Dog Registration*, USA SERVICE DOGS, <https://usaservicedogs.org/register/service-dog-registration> (last visited Dec. 19, 2022).

<sup>217</sup> *Id.*

that provided determinative and fixed regulation surrounding service dogs.

When practically any dog can be termed a service dog and “certified” for a fee, confusion grows. The public suffers from this misrepresentation, which leads to service dogs, which were once widely respected and well-received, being viewed with suspicion. The presence of emotional support dogs as not “real” service dogs, even though they may perform the same services, has added fuel to this public skepticism and increased the likelihood of misunderstanding and conflict.

Public misinformation and confusion regarding service dogs have led to accidental, sometimes purposeful, misrepresentations by those who invoke the service dog status of their pets for non-disability-related reasons. These actions clearly and publicly diminish public regard for service dogs, collaterally diminishing equal access of disabled individuals when accompaniment of their service dog is prohibited.

Constructing laws and policies for service dogs, and other animals, is an insufficient means to meet the Department of Justice's obligation of equality for individuals with disabilities. To fully overcome obstacles for individuals whose disabilities could be ameliorated by service dogs, enabling them to utilize service dogs to their fullest potential, the law must contain the means to accomplish its objective. Harmonization of policy and regulatory actions must be imagined and implemented to administratively ensure ameliorative service dog use. Assertions of this kind would promote and preserve the integrity of service dog purpose and reduce conflict inherent to the current lack of policy which diminishes disabled individuals' confidence in just assurance of equal access.

Actively, the law must address the need to construct procedures for credentialing service dogs. The first step is determining whether the government should take steps to administer its own credentialing and licensing process or designate that task to nongovernmental agencies. A firmly constructed regulatory process for credentialing service dogs would introduce certainty, eliminate ambiguity, and establish consistency where previously none existed. Ultimately, the goal should be to forge a definite legal regulatory

process for credentialing and issuing licenses for service dogs. Commitment to active regulation would conclusively improve public awareness of service dogs' official status in public places and lend much-needed credibility to these dogs.

Substantively, lawmakers must act to make high-quality, affordable, and tangible access to service dogs for individuals with disabilities and to protect these individuals from fraudulent private interests. The law must not comprise an immense financial burden to those who would have greater access to equality with a service dog. Certainly, the effort would be complex and require extensive policy and procedural constructs in order to meaningfully regulate service dogs in a manner that restores public regard and respect. When done so effectively, the benefit to disabled individuals would likely be enormous and discharge negative public perceptions lending credibility to conflicts that ultimately diminish access to equal treatment for disabled individuals.

Observing current conflict and the diminishment of equal access for disabled individuals arising in the wake of service dog suspicion demands legal and public policy movement. Problematically, where current terms can be adopted to mean every dog can be named a service dog, no dog is rightly a service dog. When this is the case, disabled individuals can be faced with a sense of diminished equality that runs contrary to specific assurances of justice. Accordingly, affirmative action to prescribe law and policy for service dogs is immediately relevant and necessary.