

PREVENTING THE ABUSE OF SERVICE ANIMAL REGULATIONS

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INTRODUCTION

Although no reliable data exists, recent news reports suggest widespread abuse of federal service animal rules designed to protect people with disabilities as follows: “Fake Service Dogs Create Real Problems”;¹ “Woman Lied About Emotional Support Animal So She Could Fly with Dog”;² “Pets Posing as Service Dogs Make Life Tough for People Who Really Need Animals’ Help”;³ “National Epidemic of Horrible People Pretending to be Disabled”;⁴ “Fake Service Dog Gear Creates Problems for Americans with Disabilities”;⁵ “New Yorkers Use Bogus ‘Therapy Dog’ Tags to Take Fido Everywhere.”⁶

Abuse of service animal regulations has created a backlash against people with disabilities who really need such animals: “Get

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1. Monica Robins, *Fake Service Dogs Create Real Problems*, WKYC (Feb. 14, 2014), <http://legacy.wkyc.com/story/news/health/2014/02/14/fake-service-dogs/5254085>.

2. *Woman Lied About Having Emotional Illness So She Could Fly with Dog*, ABC NEWS (Apr. 4, 2015), <http://abcnews.go.com/2020/video/woman-lied-emotional-illness-fly-dog-30097006>.

3. Carter Evans, *Pets Posing as Service Dogs Make Life Rough for People Who Really Need Animals’ Help*, CBS NEWS (Nov. 17, 2013), <http://www.cbsnews.com/news/pets-posing-as-service-dogs-make-life-tough-for-people-who-really-need-animals-help>.

4. Brad Tuttle, *National Epidemic of Horrible People Pretending to be Disabled*, TIME (Oct. 12, 2013), <http://business.time.com/2013/10/12/national-epidemic-of-horrible-people-pretending-to-be-disabled>.

5. Kate Santich, *Fake Service-Dog Gear Creates Problems for Americans with Disabilities*, ORLANDO SENTINEL (Aug. 16, 2013), http://articles.orlandosentinel.com/2013-08-07/features/os-fake-service-dogs-20130807_1_service-dog-dog-walk-service-animal.

6. Tara Palmeri, *New Yorkers Use Bogus “Therapy Dog” Tags to Take Fido Everywhere*, N.Y. POST (Aug. 5, 2013), <http://nypost.com/2013/08/05/new-yorkers-use-bogus-therapy-dog-tags-to-take-fido-everywhere>.

That F**king Fake Service Dog Out’; Restaurant Owner Turns Away Disabled Vet and His Dog”;⁷ “Removal of Blind Man, Service Dog From Flight Sparks Outrage”;⁸ “Hotels Say No to Blind Resident”;⁹ “Veteran and Service Dog Told to Leave N.J. Boardwalk”;¹⁰ “Vet with Service Dog Denied Entrance to Myrtle Beach Gentleman’s Club”;¹¹ “Restaurant Owner Cited in Refusal to Serve Customer with Service Dog”;¹² “Disabled War Vet Gets Rude Treatment.”¹³

Part of the problem is that federal rules governing service animals, ostensibly for the protection of people with disabilities, are confusing, uncoordinated, and often lack anti-abuse mechanisms. Federal laws each regulate only one aspect of using service animals, including admitting service animals to places of public accommodation, accommodating service animals in housing, flying with service animals, and using service animals at school.¹⁴ For example, the federal Americans with Disabilities Act (“ADA”) only protects the use of “service animals” (defined as dogs or miniature horses that have been “individually trained to do work or perform tasks for the benefit of the individual with a disability”) but does not require registration or certification of such animals.¹⁵ It allows places of public accommodation to ask only two questions of someone seeking to enter with such a dog or horse: whether an animal is required because of a disability and what task(s) the animal has been trained to perform, and only when

7. Billy Hallowell, ‘Get That F**king Fake Service Dog Out’: Restaurant Owner Turns Away Disabled Vet and His Dog, *THE BLAZE* (Aug. 27, 2013), <http://www.theblaze.com/stories/2013/08/27/get-that-fking-fake-service-dog-out-restaurant-owner-turns-away-disabled-vet-and-his-dog>.

8. Scott Neuman, *Removal of Blind Man, Service Dog from Flight Sparks Outrage*, NPR (Nov. 14, 2013), <http://www.npr.org/sections/thetwo-way/2013/11/14/245276540/removal-of-blind-man-service-dog-from-flight-sparks-outrage>.

9. Derek Catron, *Hotels Say No to Blind Resident*, *ORLANDO SENTINEL* (Nov. 2, 1999), http://articles.orlandosentinel.com/1999-11-02/news/9911020066_1_tim-steward-guide-dogs-daytona-beach.

10. Bill Chappell, *Veteran and Service Dog Told to Leave N.J. Boardwalk*, NPR (Aug. 12, 2013), <http://www.npr.org/sections/thetwo-way/2013/08/12/211452638/veteran-and-service-dog-told-to-leave-n-j-boardwalk>.

11. *Vet with Service Dog Denied Entrance to Myrtle Beach Gentlemen’s Club*, WACH (July 19, 2011), <http://wach.com/news/local/vet-with-service-dog-denied-entrance-to-myrtle-beach-gentlemens-club?id=642115>.

12. *Restaurant Owner Cited in Refusal to Serve Customer with Service Dog*, WFMZ-TV (July 24, 2012), <http://www.wfmz.com/News/Restaurant-owner-cited-in-refusal-to-serve-customer-with-service-dog/15664922>.

13. David Lee, *Disabled War Vet Gets Rude Treatment*, *COURTHOUSE NEWS SERV.* (Oct. 22, 2012), <http://www.courthousenews.com/2012/10/22/51497.htm>.

14. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2012); Individuals with Disabilities Education Act of 1990, 20 U.S.C. § 1400 (2012); Air Carriers Access Act of 1986, 49 U.S.C. § 41705 (2012).

15. 28 C.F.R. 36.104 (2016).

the answers to those questions are not “readily apparent.”¹⁶ No registration or documentation is required, nor may suppliers of public accommodation request documentation of any sort. In effect, the ADA places animal owners on the honor system. Notwithstanding the lack of any ADA registration system, Amazon.com sells a “Holographic Service Dog ID Card,” which includes a purported “Service Animal Registry Number”¹⁷ and states that “the ADA mandates that this dog and handler have full access to all public places. It is the law.” An online organization calling itself “Official Service Dog Registry” similarly allows dog owners to “register” dogs as service dogs.¹⁸

By contrast, the federal Fair Housing Act (“FHA”) requires accommodation of all “assistance animals,” which includes animals that are not specially trained but provide emotional support (“emotional support animals”).¹⁹ This requirement is not limited to any particular species. People invoking its provisions are required to provide reliable documentation of their disability-related need for an assistance animal.²⁰

In schools, the ADA protects students’ use of dogs or miniature horses trained to perform specific tasks for an individual with a disability, without documentation. The Individuals with Disabilities Improvement Act (“IDEA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”) extend federal protection to any animal—including emotional support animals—necessary for a student to receive a “free and appropriate education,” as determined by the student’s individualized educational plan or a Section 504 team.²¹

16. 28 C.F.R. § 36.302(c)(6).

17. *Holographic Service Dog ID Card*, AMAZON, https://www.amazon.com/Holographic-Service-Registration-National-Registry/dp/B00H6DBRZ6/ref=sr_1_fkmr0_1?s=pets-supplies&ie=UTF8&qid=1478489961&sr=1-1-fkmr0&keywords=Holographic+Service+Dog+ID+Card+%28Custom%29+Includes+Registration+to+National+Dog+Registry (last visited Nov. 6, 2016).

18. OFFICIAL SERVICE DOG REGISTRY, <https://www.officialservicedogregistry.com> (last visited Oct. 22, 2016).

19. Fair Housing Act of 1968, 42 U.S.C. § 3604(f)(3)(B) (2012); 24 C.F.R. § 100.204(b) (2016); see *Service Animals and Emotional Support Animals*, ADA NAT’L NETWORK (2014), <https://adata.org/publication/service-animals-booklet> (last visited Oct. 22, 2016) [hereinafter ADA NAT’L NETWORK] (explaining how the statute and rule function practically).

20. U.S. Dep’t of Hous. and Urban Dev., Notice on Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs (Apr. 25, 2013), http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

21. Individuals with Disabilities Improvement Act of 1997, 20 U.S.C. § 1400(c)(5) (2012); Rehabilitation Act of 1973, 29 U.S.C. § 701 (2012); ADA NAT’L NETWORK, *supra* note 19.

The federal Air Carrier Access Act (“ACAA”) requires air carriers to allow both service and emotional support animals in aircraft passenger cabins, subject to documentation requirements.²² A Delta passenger was recently permitted to bring her turkey with her into the airplane cabin; the airline chose not to challenge her claim that the turkey was her “emotional support animal.”²³

State rules are similarly all over the map. The requirements for access vary in many different ways. Some track the ADA, some are less protective of people with disabilities or at least less explicit about such protection. Some require use of identifying harnesses, collars, or leashes. Some require training of protected animals. Some require proof of training. Some require registration. Some criminalize fraudulent claims that an animal is protected. Furthermore, state laws in this area suffer from the possibility that they may be preempted by federal law.²⁴

The net effect of this confusion creates a problematic legal climate. Rules on service animals are easily abused, with lots of products available on the Internet. Many of the federal rules are not enforced by any federal agency. Furthermore, when untrained service animals interact badly with the public, a backlash against people with disabilities is inevitable. Examples of such backlash are discussed towards the end of this article.

This article reviews the relevant laws and their problems. Part I outlines the existing federal laws, while Part II discusses state laws. Part III explores the extent to which federal laws may preempt inconsistent state rules. Part IV, finally, suggests possible solutions to problems the article has identified.

PART I FEDERAL LAW

At least five different sets of federal laws or administrative rules apply to the use of service, emotional support, or assistance animals. The first and the most generally applicable is the Americans with Disabilities Act,²⁵ which applies to employment (Title I), state and local government programs (Title II), and places of public accommodation (Title III). Second, the Equal Employment Opportunity Commission provides administrative guidance under Title I for the accommodation

22. 49 U.S.C. § 41705 (2012); ADA NAT’L NETWORK, *supra* note 19.

23. *Flying Turkey Ruffles Feathers on Airplane*, DISH NATION (Jan. 15, 2016), <http://dishnation.com/womans-turkey-ruffles-feathers-on-plane>.

24. See *infra* Part II.

25. 42 U.S.C. § 12101 (2012).

of people with disabilities who use service dogs in the employment context.²⁶ Third, the Fair Housing Act governs accommodation of service animals in housing.²⁷ Fourth, the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973 provide additional protections for students with disabilities who need to use animals in the course of their educations.²⁸ Finally, the Air Carrier Access Act governs flying with service animals.²⁹

A. *The Americans with Disabilities Act (“ADA”)*

The ADA defines disability as “(1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.”³⁰ Major life activities include caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.³¹ Under the ADA, a service animal means “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.”³² With the exception of miniature horses,³³ other species of animals, whether wild or domestic, trained or untrained, are not service animals under this definition.³⁴ Protected miniature horses usually range in height from twenty-four to thirty-four inches and weigh between seventy and 100 pounds.³⁵ Entities covered by the ADA must modify their policies to permit miniature horses where reasonable.³⁶ Factors taken into account in assessing whether accommodation of miniature horses is reasonable include (1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner’s control; (3) whether the facility can accommodate the miniature horse’s type, size, and weight; and (4) whether the mini-

26. 29 C.F.R. § 1630 (2016).

27. 42 U.S.C. § 3604 (2012); ADA NAT’L NETWORK, *supra* note 19.

28. 20 U.S.C. § 1400(c)(5) (2012); 29 U.S.C. § 701 (2012); ADA NAT’L NETWORK, *supra* note 19.

29. 14 C.F.R. § 382.117(a).

30. 42 U.S.C. § 12102 (2012).

31. *Id.*

32. 28 C.F.R. § 36.104 (2016).

33. 28 C.F.R. § 35.136(i) (2016).

34. *See id.*; 28 C.F.R. § 36.104.

35. ADA Requirements: Service Animals, U.S. DEP’T OF JUSTICE, (July 12, 2011), http://www.ada.gov/service_animals_2010.htm.

36. 28 C.F.R. § 35.136(i)(1).

ature horse's presence will compromise legitimate safety requirements for safe operation of the facility.³⁷

Under the ADA, the work or tasks performed by a protected service animal "must be directly related [to] the individual's disability."³⁸ The types of tasks or work a service animal would perform 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 people with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors."³⁹ Animals whose sole function is to provide emotional support, well-being, comfort, or companionship do not qualify as service animals under the ADA.⁴⁰

Title II of the ADA protects qualified individuals with disabilities from discrimination by state and local government entities on the basis of disability in services programs and activities provided by such entities.⁴¹ Title III prohibits such discrimination by places of public accommodation, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices.⁴² All such entities must make reasonable accommodations to their "policies, practices, or procedures to permit the use of a service animal by an individual with a disability."⁴³ Thus, places of public accommodation must allow service animals to accompany people with disabilities in all areas of the facility where the public is normally allowed to go.⁴⁴

Exceptions exist. For example, a place of public accommodation may ask an individual with a disability to remove a service animal from the premises if "(1) [t]he animal is out of control and the animal's handler does not take effective action to control it; or (2) [t]he animal is not housebroken."⁴⁵ A service animal may be excluded from the premises if it is disruptive to a particular type of establish-

37. 28 C.F.R. § 35.136(i)(2).

38. 28 C.F.R. § 36.104.

39. *Id.*

40. *See id.*

41. *See* 42 U.S.C. § 12132 (2012).

42. 42 U.S.C. § 12182(a) (2012); 42 U.S.C. § 12181(7) (2012).

43. 28 C.F.R. § 36.302 (2016).

44. 28 C.F.R. § 36.302(c)(7).

45. 28 C.F.R. § 36.302(c)(2).

ment, or exhibits behavior that poses a direct threat to the health or safety of others. This may occur, for example, if a dog continuously barks during a movie. However,

[a]llergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.⁴⁶

When there is a legitimate reason to ask that a service animal be removed from the premises, the place of public accommodation must allow the individual with disability to obtain goods, services, and accommodations without having the service animal on the premises.⁴⁷ Under no circumstances is the place of public accommodation responsible for the care or supervision of the service animal.⁴⁸ Additionally, a service animal is required to be kept under the control of its handler by use of a harness, leash, or other tether “unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal’s safe, effective performance of work or tasks.”⁴⁹ In the latter instance, the service animal must be kept “under the handler’s control via voice controls, signals, or other effective means.”⁵⁰

The ADA prohibits a place of public accommodation from asking about the nature or extent of a person’s disability. Only two questions may be asked: (1) if the animal is required because of a disability, and (2) what work or task the animal has been trained to perform.⁵¹ Even these questions may not be asked if it is “readily apparent” that an animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person’s wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).⁵² In any event, the place of public accommodation may not require documentation of any kind, such as proof regarding the animal or its training, licensing or certification as a service

46. U.S. DEP’T OF JUSTICE, *supra* note 35.

47. 28 C.F.R. § 36.302(c)(3).

48. 28 C.F.R. § 36.302(c)(5).

49. 28 C.F.R. § 36.302(c)(4).

50. *Id.*

51. 28 C.F.R. § 36.302(c)(6).

52. *Id.*

animal.⁵³ Thus, if the owner represents that the animal is a service animal, even if there is no proof that it is (indeed, even if the owner is lying), the place of public accommodation must allow the owner to be accompanied by the animal.

Finally, a place of public accommodation may not ask or require an individual with a disability to pay a surcharge to be accompanied by his or her service animal, even if other people accompanied by animals are required to pay such a fee. If, however, the place of public accommodation normally charges individuals for the damage they cause, an individual with a disability may be charged for the damage caused by the service animal.⁵⁴ Thus, if the service animal causes damage, the place of public accommodation may require the owner of the service animal to make reimbursement, provided that such reimbursement would have been required from a non-disabled person under similar circumstances.

B. The EEOC Interpretive Guidance on Title I of the ADA

The Equal Employment Opportunity Commission (“EEOC”), which enforces the employment provisions of Title I of the ADA, has not issued regulations on service animals. However, its Interpretive Guidance defines “accommodation” broadly: “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.”⁵⁵ It further affirms that employers must permit an individual with disability to provide and utilize equipment, aids or services that an employer is not itself required to provide.⁵⁶ For example, it explicitly requires an employer to permit an individual who is blind to use a guide dog at work, even though the employer would not be required to provide a guide dog for the employee.⁵⁷

As a result, the Interpretive Guidance has been construed to require accommodation of emotional support animals in the employment context, notwithstanding the fact that the ADA limits its accommodation requirements to service animals in other contexts.⁵⁸ Documentation, however, may be required: “In the case of a service animal or an emotional support animal, if the disability is not obvious and/or the reason the animal is needed is not clear, an employer may

53. *Id.*

54. 28 C.F.R. § 36.302(c)(8).

55. 29 C.F.R. app. § 1630 (2016).

56. *Id.*

57. *Id.*

58. See ADA NAT’L NETWORK, *supra* note 19.

request documentation to establish the existence of a disability and how the animal helps the individual perform his or her job.”⁵⁹

C. *The Fair Housing Act (“FHA”)*

The Fair Housing Act provides that housing providers cannot “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of - (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or (C) any person associated with that buyer or renter.”⁶⁰ Discrimination includes “a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises . . . or a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.”⁶¹ This reasonable accommodation provision comes into play when someone with an assistance animal is denied housing because of a condition or restriction regarding pets.

The FHA uses the term “assistance animal” to distinguish its rules from the ADA rules regarding “service animals.” While the ADA governs public places, the FHA governs private dwellings—different rules are therefore warranted.⁶² The FHA defines an “assistance animal” as “an animal that works, provides assistance, or performs tasks for the benefit of a person with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of a person’s disability.”⁶³ Thus, while the ADA excludes emotional support animals from its definition of service animals, limiting the rights of people with disabilities in public places to service animals, the FHA groups service animals and emotional support animals into a single protected category. As a result, under the FHA, reasonable accommodation must be made for emotional support animals. Additionally, the FHA does not require the animal to be trained or certified.⁶⁴

59. *Id.*

60. 42 U.S.C. § 3604(f)(1) (2012).

61. 42 U.S.C. § 3604(f)(3) (2012).

62. *See Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.*, 778 F. Supp. 2d 1028, 1035 (D.N.D. 2011) (setting out parameters for service animals under a FHA claim).

63. U.S. Dep’t of Hous. and Urban Dev., *supra* note 20.

64. *Id.*

Landlords must carefully treat the request to have an animal in an apartment. "Housing providers are to evaluate a request for a reasonable accommodation to possess an assistance animal in a dwelling the same way they would evaluate any other reasonable accommodation request."⁶⁵ First, they look at whether the person seeking to use and live with the animal has a disability under the ADA definition. Second, they look to whether the person making the request has a disability-related need for an assistance animal. Specifically, they ask whether the animal works, assists, or performs tasks or services for the benefit of the person or provides emotional support that alleviates identified symptoms or effects of a disability.⁶⁶ If the answer to any of the foregoing questions is "no" then the FHA does not require a modification of any pet related policy and the reasonable accommodation request may be denied.⁶⁷ If the answers to both questions are "yes," then an exception or modification to any "no pets" rule or policy must be made to allow the person with the disability to live with his or her assistance animal and use the assistance animal in any area on the premises where people are normally allowed to go.⁶⁸ There can be no breed, weight, or size restrictions on assistance animals, even if such restrictions are imposed on other animals.⁶⁹ If allowing this accommodation would "place an undue financial and administrative burden on the owner or fundamentally alter the nature of the housing provider's services," however, the request may be denied.⁷⁰

Additionally, a request may be denied if "(1) the specific assistance animal in question poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal in question would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation."⁷¹ A finding of either of these reasons to deny a request must be based on an individualized assessment and "not mere speculation or fear and not on evidence about harm or damage that other animals have caused."⁷² In addition, "conditions and restrictions that housing providers apply to pets may not apply to assistance animals."⁷³

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

Under the ADA, a place of public accommodation may only ask two specific questions and may not request documentation. The FHA, by contrast, allows housing providers to “ask individuals who have disabilities that are not readily apparent or known to the provider to submit reliable documentation of a disability and of their disability-related need for an assistance animal.”⁷⁴ If the disability is known or apparent but the need for an assistance animal is not, the housing provider may ask the individual to provide proper documentation of the latter.⁷⁵ For example, a housing provider may ask a person seeking accommodation for an assistance animal that provides emotional support to provide documentation of his or her disability-related need for one from a physician or psychiatrist.⁷⁶ A landlord or homeowner’s association may “ask a person to certify, in writing, (1) that the tenant or a member of his or her family is a person with a disability; (2) the need for the animal to assist the person with that specific disability; and (3) that the animal actually assists the person with a disability.”⁷⁷ But a housing provider may not ask for documentation if the disability or disability-related need for an assistance animal is readily apparent or already known to the provider.⁷⁸ Thus, a person who is obviously blind may not be asked to provide documentation of their disability or their need for an assistance animal.⁷⁹

D. The Individuals with Disabilities Improvement Act (“IDEA”) and Section 504 of the Rehabilitation Act of 1973 (“Section 504”)

Title II of the ADA, discussed above, protects students’ use of service animals without regard to documentation. The IDEA and Section 504 then effectively expand such protection to include emotional support animals, although only in public schools.

The IDEA requires public schools to provide special education and related services to every eligible student with a disability. Specifically, it requires public school systems to develop appropriate Individualized Education Programs (“IEPs”) for each student who needs one. The services outlined in the IEP must include such special education and related services as well as supplemental aids and services, modifications and accommodations, and supports for personnel as

74. *Id.*

75. *Id.*

76. *Id.*

77. ADA NAT’L NETWORK, *supra* note 19.

78. *Id.*

79. *Id.*

may be needed, including accommodation of emotional support animals.⁸⁰

Section 504 states that “no qualified individual with a disability in the United States shall be excluded from, denied the benefits of, or be subjected to discrimination under” any program or activity that either receives federal financial assistance or is conducted by any executive agency or the United States Postal Service.⁸¹ In other words, Section 504 protects students with disabilities from discrimination on the basis of their disabilities. Similarly, students covered under Section 504 are entitled to “free appropriate public education,” which may involve the use of supplementary aids and services.⁸²

As construed, the IDEA and Section 504 therefore expand the rights given to students under the ADA, allowing a student to use an animal that does not meet the ADA definition of a service animal if that student’s IEP or Section 504 team decides that the animal is necessary for the student to receive a free and appropriate education. Where the ADA applies, however, schools should be mindful that the use of a service animal is a right that is dependent upon the decision of an IEP or Section 504 team on a “case-by-case basis.”⁸³

E. The Air Carrier Access Act (“ACAA”)

Airline carriers are held to standards regarding service and emotional support animals similar to those imposed on housing providers under the FHA. Under the ACAA, people with disabilities cannot be discriminated against when flying on a public air carrier.⁸⁴ The ACAA requires carriers to allow both service animals and emotional support animals to accompany their handlers in the cabin of an aircraft.⁸⁵ Air carriers cannot deny transportation to a service animal on the ground that its carriage may offend or annoy carrier personnel or other passengers traveling on the aircraft.⁸⁶ On a flight segment scheduled to take eight hours or more, air carriers can require a passenger using a service animal to provide documentation that the animal will not need to relieve itself on the flight or that the animal can relieve itself in a way that does not create health or sanitation issues on the flight.⁸⁷ The

80. See 20 U.S.C. § 1400(d)(1)(A).

81. U.S. DEP’T OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS (July 2009), <https://www.ada.gov/cguide.htm>.

82. *Id.*

83. See ADA NAT’L NETWORK, *supra* note 19.

84. See 14 C.F.R. § 382.117 (2016).

85. 14 C.F.R. § 382.117(b).

86. 14 C.F.R. § 382.117(a)(1).

87. 14 C.F.R. § 382.117(a)(2).

service animal must also be able to sit in the seat with its owner; if a particular seat cannot accommodate both, the air carrier must provide the service animal owner an opportunity to move to another seat where the animal can be accommodated.⁸⁸ As evidence that an animal is a service animal, an air carrier may ask for identification cards, other written documentation, presence of harness, tags, or credible verbal assurances.⁸⁹

Air carriers are not required to accept animal transportation in the cabin for individuals who travel with emotional support or psychiatric service animals unless a passenger provides appropriate documentation. Examples of documentation that may be requested by an air carrier include current documentation on letterhead of a licensed mental health professional stating the following: that (1) the passenger has a mental or emotional disability; (2) the passenger needs emotional support or psychiatric service animal as an accommodation for air travel or for activity at the passenger's destination; (3) the individual providing the assessment is a licensed mental health professional, and the passenger is under his or her professional care; and (4) the date and type of the mental health professional's license and the state or other jurisdiction in which it was issued.

Under the ACAA, airlines are not required to accommodate specified species (e.g., snakes, other reptiles, ferrets, rodents, and spiders) as service or emotional support animals in the cabin. With respect to all other animals, including unusual or exotic animals that are presented as service animals (e.g., miniature horses, pigs, monkeys, turkeys), an air carrier must determine whether any factors preclude their traveling in the cabin as service animals (e.g., whether the animal is too large or heavy to be accommodated in the cabin, whether the animal would pose a direct threat to the health or safety of others, whether it would cause a significant disruption of cabin service, whether it would be prohibited from entering a foreign country as the flight's destination).⁹⁰ If no such factors preclude the animal from traveling in the cabin, an air carrier must permit it to do so.⁹¹ Foreign carriers, however, are not required to carry service animals other than dogs.⁹² Whenever an air carrier decides not to accept an animal as a service animal, it must explain the reason for its decision to the pas-

88. 14 C.F.R. § 382.117(b), (c).

89. 14 C.F.R. § 382.117(d).

90. 14 C.F.R. § 382.117(f).

91. *Id.*

92. *Id.*

senger and document that decision in writing.⁹³ A copy of the explanation must be provided to the passenger either at the airport, or within ten calendar days of the incident.⁹⁴

F. Problems in the Structure and Enforcement of Federal Law

Read individually, each of the foregoing statutes and administrative actions is defensible. Read collectively, however, they invite confusion and abuse, particularly in the case of places of public accommodation subject to the ADA.

First, under the ADA, the line between service animals and emotional support animals is less easy to draw than it might initially appear. The general public think of service dogs as those that help people physically, such as guide dogs for people with impaired sight, hearing dogs for the deaf, and mobility assistance dogs for people who use wheelchairs. Emotional support animals are generally considered less well-trained and more like regular pets. However, a dog is a “service animal” if it has been trained to detect anxiety of a person with a disability and lick this person’s face to calm him or her down, regardless of the fact that it also provides emotional support. In consequence, the ADA protects using such animal even in the absence of medical or other documentation. Indeed, if the ADA applies, it is unlawful to request such documentation.

Consider the plight of a restaurant maître d’ being approached by an individual with a dog in her purse. If he were allowed to ask to see the dog’s disability registration, his task would be relatively easy. After all, businesses often check their customers’ IDs. Instead, we insist that he ask: “Is your dog required because of a disability?” and then “What task or tasks has your dog has been trained to perform?” This is likely to be exceedingly awkward for both parties—it would not be surprising if many places of public accommodation simply forego the statutorily-permitted exchange and let the dog in. If the patron flashes her Holographic Service Dog ID Card with Service Animal Registry Number bought on Amazon.com, the maître d’ may well conclude that even asking those limited questions is prohibited, since the card may make the answers “readily apparent.”

Similarly, the line between pet and emotional support animal is substantively ambiguous. Most pets provide emotional support of some sort. (All of mine have.) The line drawn by the EEOC’s Interpretive Guidance, FHA, IDEA, Section 504, and ACAA is instead

93. 14 C.F.R. § 382.117(g).

94. *Id.*

procedural—the individual seeking use of the animal must provide documentation of a disability-related need. But no such documentary safeguards are permitted under Titles II or III of the ADA. The fact that no evidence of special training is required under any of these rules makes them particularly susceptible to abuse.

The combination of the different categories of animals under protection and the different ways that they must be accommodated makes federal regulation on service animals confusing. For example, owners of places of public accommodation and owners of emotional support animals can be confused when certain animals are admitted to an airplane based on the ACAA and to a public school based on the IDEA, but not admitted to a store or restaurant based on the ADA.

PART II STATE LAW

Unfortunately, the extraordinary variety of state statutes in this area compounds the problem. As has been noted, some track the ADA in their laws while others are quite different. State laws vary in their requirements for service animals; some requiring registration, others requiring training and still others requiring certain identifying cards or accessories. Justice Brandeis' metaphor of the states as "laboratories" is often invoked to defend disparities in the way states approach new problems.⁹⁵ For a business with outlets in multiple states, however, the resulting uncertainty is likely to be extremely burdensome. The simplest solution for such businesses is to allow animal owners to do as they will, all ostensibly to protect people with disabilities. If the result is a backlash against people with disabilities, at least the relevant businesses cannot be sued by people who are turned away.

A. *An Overview of State Law*

All states have some forms of law relating to the admission of animals that serve people with disabilities to places of public accommodation.⁹⁶ Most track, more or less, the federal ADA rules governing

95. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

96. *See, e.g.*, ALA. CODE § 3-1-7 (2016); ALASKA STAT. ANN. § 11.76.130 (West 2016); ARIZ. REV. STAT. ANN. § 11-1024 (2016); ARK. CODE ANN. § 20-14-308 (West 2016); CAL. CIV. CODE § 54.2(a) (West 2016); COLO. REV. STAT. ANN. § 24-34-803 (West 2016); CONN. GEN. STAT. § 46a-44 (2016); DEL. CODE ANN. tit.16 § 3056F (West 2016); FLA. STAT. § 413.08(3) (2016); GA. CODE ANN. § 30-4-2(b)(1) (West 2016); HAW. REV. STAT. ANN. § 347-13(b) (West 2016); IDAHO CODE ANN.

service animals, although many are limited to dogs assisting people with physical disabilities. None protect the admission of emotional support animals into places of public accommodation.

Many states reference the ADA definition of “service animal” in their code. Many others, however, use “service dog,” “guide dog,” “assistance dog,” or other similar terms, although they commonly impose ADA-like protections. California, for example, uses the term “service dog,” defined as “any dog individually trained to the requirements of the individual with a disability, including, but not limited to, minimal protection work, rescue work, pulling a wheelchair, or fetching dropped items.”⁹⁷ This definition is narrower than the ADA definition of “service animal.” Alabama and Oregon, by contrast, only protect “guide dogs,” which Oregon defines as “a dog that is wearing a dog guide harness and is trained to lead or guide a person who is blind.”⁹⁸

B. States that Require an Identifying Harness, Collar, or Leash

A majority of states do not require any proof of training, registration, or other proof relating to the purpose for using service animals. Some, however, require that protected animals wear harnesses or collars of specified colors. Mississippi, Oklahoma, and Virginia, for example, require dogs used by blind and hard-of-hearing individuals to

§ 56-704 (West 2016); 720 ILL. COMP. STAT. ANN. 5/48-8(a) (West 2016); IND. CODE ANN. § 16-32-3-2(b) (West 2016); IOWA CODE § 216C.5 (2016); KAN. STAT. ANN. § 39-1108 (West 2016); KY. REV. STAT. ANN. § 258.500(2) (West 2016); LA. STAT. ANN. § 21:52 (2016); ME. REV. STAT. ANN. tit. 17, § 1312 (2016); MD. CODE ANN., HUM. SERVS. § 7-705(a) (West 2016); MASS. GEN. LAWS ANN. ch. 129, § 39C (West 2016); MICH. COMP. LAWS ANN. § 750.502c (West 2016); MINN. STAT. ANN. § 256C.02 (West 2016); MINN. STAT. ANN. § 363A.19(a) (West 2016); MISS. CODE ANN. § 43-6-7 (West 2016); MO. ANN. STAT. § 209.150 (West 2016); NEB. REV. STAT. ANN. § 20-127(3) (West 2016); N.H. REV. STAT. ANN. § 167-D:8 (2016); N.J. STAT. ANN. § 10:5-29 (West 2016); N.M. STAT. ANN. § 28-11-3(1) (West 2016); N.Y. CIV. RIGHTS LAW § 47(1) (McKinney 2016); N.C. GEN. STAT. ANN. § 168-4.2(a) (West 2016); N.D. CENT. CODE ANN. § 25-13-02 (West 2016); OHIO REV. CODE ANN. § 955.43(A) (West 2016); OKLA. STAT. ANN. tit. 7, § 19.1(B) (West 2016); OR. REV. STAT. ANN. § 659A.143(6)(a) (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 7325 (West 2016); 39 R.I. GEN. LAWS ANN. § 39-2-13 (West 2016); S.C. CODE ANN. § 43-33-20(c) (2016); S.D. CODIFIED LAWS § 20-13-23.2 (2016); TENN. CODE ANN. § 62-7-112(a)(1) (West 2016); TEX. HUM. RES. CODE ANN. § 121.003(c) (West 2016); UTAH CODE ANN. § 62A-5b-104(1)(a) (West 2016); VT. STAT. ANN. tit. 9, § 4502(b) (West 2016); VA. CODE ANN. § 51.5-44(E) (West 2016); WASH. REV. CODE ANN. § 49.60.218(1) (West 2016); W. VA. CODE ANN. § 5-15-4(c) (West 2016); WIS. STAT. ANN. § 106.52(3) (West 2016); WYO. STAT. ANN. § 35-13-201(b) (West 2016).

97. CAL. CIV. CODE § 54.1(b)(6)(A)(iii) (West 2016).

98. OR. REV. STAT. ANN. § 814.110(1)(a) (West 2016).

wear orange harnesses, leashes, or collars when they appear in public. Mississippi law provides that “every totally or partially blind person and every deaf person shall have the right to be accompanied by a guide dog or hearing dog on a *blaze orange leash*.”⁹⁹ Oklahoma law states that a “dog used by a deaf or hard-of-hearing person shall be required to wear an *orange identifying collar*.”¹⁰⁰ Virginia law states that “every totally or partially blind person shall have the right to be accompanied by a dog in harness trained as a guide dog, every deaf or hearing-impaired person shall have the right to be accompanied by a dog trained as a hearing dog on a blaze orange leash.”¹⁰¹ In Virginia, no such harness, leash, or collar requirement is imposed on dogs used for other services.

Other states, however, impose harness, leash, or collar requirements on all service dogs no matter how they are used. The Connecticut law, for example, states that “any blind, deaf or mobility impaired person . . . may keep such dog with him at all times in any such public accommodation or facility thereof at no extra charge, provided such dog shall be in the direct custody of such person and shall be wearing a harness or an orange-colored leash and collar.”¹⁰² Rhode Island similarly prohibits discrimination against “any blind or deaf person, who uses the services of a seeing-eye guide dog, or personal assistance animal or a hearing-ear signal dog, clearly identified as such by a yellow harness.”¹⁰³

Rules identifying harness, lease, or collar limit the ability of people without disabilities to claim protected status for their pets. They may, however, be read merely to limit any additional protections provided by state law, not as imposing affirmative requirements on service animal users.

C. States that Require the Animal to be Trained

Some states require protected animals to be specially trained by professional trainers. This is potentially a more stringent requirement than the ADA’s definition of a service animal as one “individually trained to do work or perform tasks,” regardless of who trains the animal. Texas law, for example, states that a “service animal means a canine that is specially trained or equipped to help a person with a

99. MISS. CODE ANN. § 43-6-7 (West 2016) (emphasis added).

100. OKLA. STAT. ANN. tit. 7, § 19.1(c) (West 2016) (emphasis added).

101. VA. CODE ANN. § 51.5-44(E) (West 2016).

102. CONN. GEN. STAT. § 461-44(a) (2016).

103. 39 R.I. GEN. LAWS § 39-2-13 (2016).

disability and that is used by a person with a disability.”¹⁰⁴ Although nothing in the statute defines what “specially trained or equipped” means, use of “a harness or leash of the type commonly used by people with disabilities who use trained animals, in order to represent that his or her animal is a specially trained service animal when training has not in fact been provided” is criminalized.¹⁰⁵ Missouri law similarly provides that a service dog is “a dog that is being or has been specially trained to do work or perform tasks which benefit a particular person with a disability.”¹⁰⁶ Nebraska law allows “a totally or partially blind person, deaf or hard of hearing person, or physically disabled person . . . to be accompanied by a service animal, especially trained for the purpose.”¹⁰⁷ Although California only requires that service dogs be “individually trained,”¹⁰⁸ it further provides that “every individual with a disability has the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for the purpose.”¹⁰⁹ Iowa imposes the “specially trained” requirement twice, once in its definition of a service dog as “a dog specially trained to assist a person with a disability”¹¹⁰ and the second time in its statement of the rights of the blind: “every blind or partially blind person shall have the right to be accompanied by a guide dog, under control and especially trained.”¹¹¹

Despite apparently limiting their state laws’ protections to specially trained dogs, these states fail to require proof that the animal is “specially trained.” Under the ADA, of course, a place of public accommodation is prohibited from asking for any such proof.

D. States that Require Proof of Training

A few states require an individual using a service animal to have proof that the animal was trained to perform work or a task. Georgia, for example, requires that “the guide dog or service dog must be identified as having been trained by a school for seeing eye, hearing, service, or guide dogs.”¹¹² This appears to mean that an owner must have some kind of proof of training. Minnesota similarly requires service dogs to be “capable of being properly identified as from a recognized

104. TEX. HUM. RES. CODE ANN. § 121.002 (West 2016).

105. *Id.* § 121.006.

106. MO. REV. STAT. § 209.200(2) (2016).

107. NEB. REV. STAT. § 20-127(3) (2016).

108. CAL. CIV. CODE § 54.1(b)(6)(C)(iii) (West 2016).

109. *Id.* § 54.2(a).

110. IOWA CODE ANN. § 216C.11(1) (West 2016).

111. *Id.* § 216C.5.

112. GA. CODE ANN. § 30-4-2(b)(1) (West 2016).

school for seeing eye, hearing ear, service, or guide dogs.”¹¹³ Kansas, which is even stricter, provides that a “person with a disability may produce, for the employee or person responsible for the [public accommodation], an identification card or letter conforming to certain requirements set by the state.”¹¹⁴ The identification card or letter is to be provided by the training facility, school or trainer that trained the dog and shall contain the following information:

(A) the legal name of the dog’s user; (B) the name, address and telephone number of the facility, school or trainer who trained the dog; (C) whether the dog is designated as a guide, hearing assistance or service dog; and (D) a picture or digital photographic likeness of the dog user and the dog. If a card is used, the picture or digital photographic likeness shall be on the card. If a letter is used, the picture or digital photographic likeness shall either be printed as a part of the letter or be affixed to the letter.¹¹⁵

The Kansas ID requirement makes it harder for individuals to pass their pets off as service animals. Unfortunately, under the ADA, the place of public accommodation is prohibited from asking to see any such ID. The Amazon.com-provided Holographic Service Dog ID Card with Service Animal Registry Number may also confuse places of public accommodation, particularly since they may find themselves on the wrong side of the federal laws if they ask someone with a disability to show such a card.

E. States that Require Registration of Service Animals

Three states—Connecticut, North Carolina, and New Hampshire—require registration of service animals. New York authorizes municipalities to issue licenses for service dogs without charge. Connecticut requires that “any blind, deaf or mobility impaired person who is the owner or keeper of a dog which has been trained and educated to guide and assist such person in traveling upon the public streets or highways or otherwise shall receive a license and tag for such dog from the town clerk of the town where such dog is owned or kept.”¹¹⁶ The section also states that to receive a license and a tag from the town clerk an individual must show the animal has been trained and educated to perform.¹¹⁷ North Carolina law states that a qualified person can register a service animal and receive a tag with a

113. MINN. STAT. ANN. § 256C.02 (West 2016).

114. KAN. STAT. ANN. § 39-1111 (West 2016).

115. *Id.*

116. CONN. GEN. STAT. ANN. § 22-345 (West 2016).

117. *Id.*

stamp indicating the dog is a registered service animal and a registration number once he or she shows that the animal has been trained or is in training.¹¹⁸

New Hampshire, finally, has the most stringent of all state service dog rules. It requires that all dogs are registered with the state¹¹⁹ and further provides that “in order to register and apply for a license the owner must present an identification card issued by a recognized dog-training agency.”¹²⁰ Additionally, “if the dog was trained by the owner then the dog must meet the minimum training standards for public access as set by the International Association of Assistance Dog Partners and the owner has to present a letter from a health care professional stating the individual requires the service animal.”¹²¹ New Hampshire thus appears to be the only state with a provision regarding individuals who train their own service animals and the only state requiring both registration and proof of professional-caliber training of all service animals.

Rules like those adopted in New Hampshire might inhibit fraudulent service animal claims. Two problems remain. First, the ADA still prohibits places of public accommodation from asking to see any such registration. Second, federal rules are likely to preempt New Hampshire law in any event.

F. States Where Misrepresenting a Pet as a Service Animal is Illegal

Fifteen states have criminalized making fraudulent claims that an animal is a service animal.¹²² In most of these states, the offense is categorized as a misdemeanor with relatively minor fines, ranging from \$100 to \$500. Texas, for example, imposes a fine of up to \$300 plus thirty hours of community service.¹²³ Other states classify the

118. N.C. GEN. STAT. ANN. § 168-4.2(a) (West 2016).

119. N.H. REV. STAT. ANN. § 466:8 (2016).

120. *Id.*

121. *Id.*

122. CAL. PENAL CODE § 365.7(a) (West 2016); IDAHO CODE ANN. § 18-5811A (West 2016); KAN. STAT. ANN. § 39-1112 (West 2016); ME. REV. STAT. ANN. tit. 17, § 1314-A (2016); MICH. COMP. LAWS ANN. § 752.62 (West 2016); MICH. COMP. LAWS ANN. § 752.63 (West 2016); MO. ANN. STAT. § 209.204 (West 2016); NEB. REV. STAT. ANN. § 28-1313 (West 2016); N.H. REV. STAT. ANN. § 167-D:8 (2016); N.J. STAT. ANN. § 10:5-29.9 (West 2016); N.M. STAT. ANN. § 28-11-6(A) (West 2016); N.Y. AGRIC. & MKTS. LAW § 118(1)(c), (2)(a) (McKinney 2016); N.C. GEN. STAT. ANN. § 168-4.5 (West 2016); TEX. HUM. RES. CODE ANN. § 121.006(a) (West 2016); UTAH CODE ANN. § 62A-5b-106(2)(a) (West 2016); WASH. REV. CODE ANN. § 70.84.060 (West 2016).

123. TEX. HUM. RES. CODE ANN. § 121.006 (West 2016).

offense as a misdemeanor without specifying the appropriate sentence. Maine characterizes it as a civil violation with a fine of not more than \$500.¹²⁴ Only California authorizes jail time, permitting sentences of up to six months in jail and a fine of \$1,000.¹²⁵

Since the ADA prohibits places of public accommodation from making any serious inquiry as to the truth of an offender's claim that his or her animal is a service animal, the chances of offenders being caught seem low. Criminal statutes that victims may not enforce are unlikely to prevent individuals from masquerading their pets as service animals.

G. Emotional Support Animals

As has been noted, no states appear to protect the admission of emotional support animals to places of public accommodation, although a few include definitions of "emotional support animals" in their statutory schemes. Arizona, New Hampshire, Virginia, and Washington specify that the provision of emotional support does not constitute the kind of work that would qualify an animal as a service animal.¹²⁶ New Mexico explicitly states that "qualified service animal" does not include a pet, an emotional support animal, a comfort animal or a therapy animal.¹²⁷ Utah similarly provides that the term "service animal" does not include "an animal used solely to provide . . . emotional support; well-being; comfort; or companionship."¹²⁸

PART III

FEDERAL PREEMPTION OF STATE LAW

As if this were not confusing enough, there exists a possibility that state regulation in this area is preempted by federal law, specifically the ADA, in whole or in part. Preemption is based on the Constitution's Supremacy Clause, which provides that whenever state and federal law conflict, federal law governs.¹²⁹ Preemption can be either express or implied.¹³⁰ None of the federal statutes outlined in Part I of

124. ME. REV. STAT. ANN. tit. 17, § 1314-A(4) (2016).

125. CAL. PENAL CODE § 365.7(a) (West 2016).

126. ARIZ. REV. STAT. ANN. § 11-1024(A) (2016); N.H. REV. STAT. ANN. § 167-D:2 (2016); VA. CODE ANN. § 51.5-40.1 (West 2016); WASH. REV. CODE ANN. § 49.60.218(3)(a) (West 2016).

127. N.M. STAT. ANN. § 28-11-2(B) (West 2016).

128. UTAH CODE ANN. § 62A-5b-102(3)(b) (West 2016).

129. See *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012) (discussing preemption law).

130. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

this article expressly preempt state law. Two kinds of implied preemption are recognized: field preemption and conflict preemption. Field preemption occurs when Congress intends to occupy a given field exclusively; it is demonstrated by a scheme so pervasive “as to make reasonable the inference that Congress left no room for the States.”¹³¹ Conflict preemption occurs when compliance with both state and federal laws would be impossible or when the state law would frustrate the purposes of Congress.¹³²

Far from explicitly preempting state rules regarding service animals, the ADA provides that “[n]othing in this Act shall be construed to invalidate or limit the remedies, rights or procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.”¹³³ Congress has the power to limit the application of federal preemption.¹³⁴ It is therefore clear that field preemption does not apply.

The legislative history of the ADA suggests that “a state law should qualify for protection from preemption whenever at a minimum some part of it is superior to the ADA in the protection it affords, such that an individual with a disability might choose to invoke it, even if the law may in other respects provide procedures or remedies that are arguably inferior.”¹³⁵ As a clear example of explicit non-preemption, the Department of Justice notes in its most recent ADA guidelines that “[s]ome State and local laws also define service animal more broadly than the ADA does. Information about such laws can be obtained from the State Attorney General’s office.”¹³⁶

Whether a state law requiring some kind of licensing or registration of service dogs is more protective of people with disabilities than the ADA is a difficult question. On the one hand, requiring such licensing imposes additional burdens on people with disabilities who need service dogs. On the other hand, such licensing regimes may reduce the backlash that people with disabilities face. In this regard, a requirement that service dogs be licensed is similar to handicapped parking license requirements. People with disabilities are subject to the additional burden of obtaining a handicapped parking license. But

131. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

132. *See Federal Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941).

133. 42 U.S.C. § 12201(b) (2012).

134. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871–72 (2000).

135. *Jankey v. Lee*, 290 P.3d 187, 200 (Cal. 2012) (noting that Congress preempted state fee shifting statutes but did not expressly preempt state laws complementary to the ADA).

136. U.S. DEP’T OF JUSTICE, *supra* note 35.

in return, they benefit from the fact that people without disabilities cannot take their space. Arguably, if a state law is designed to protect people with disabilities by limiting its special protections to people with real needs, it should qualify for the ADA's statutory protection from preemption.¹³⁷

If a state law qualifies for the ADA's statutory protection from preemption, it should not be subject to conflict preemption. If it does not qualify for the ADA's statutory protection from preemption, then we must ask whether compliance with both state and federal law would be impossible or state law would frustrate the purposes of Congress. Nothing in the ADA explicitly prohibits registration, licensing, or training certification. Nor does anything in, for example, New Hampshire's statute purport to authorize places of public accommodation to ask questions prohibited by the ADA. Although the question is not free from doubt, it seems possible for the two regulatory schemes to coexist without conflict. If New Hampshire's scheme is lawful, then the less stringent requirements of other states are probably lawful as well. In any event, no case has yet held any such state rules invalid under the ADA.

PART IV PROBLEMS AND PROPOSED SOLUTIONS

The problem appears to be growing. If a pet owner wants to pass his or her pet off as a service animal, retailers now make it easy. With \$20–\$300, he or she can order a service animal vest, certification of a trained service animal, and other materials that “prove” that a pet is a service animal.¹³⁸ Although none of these materials actually qualify as proof, they clearly embolden pet owners to take their pets into “no pet zones” and dissuade owners of relevant establishments from challenging them.

Even if it is obvious that the animal is not a service animal, the two questions businesses are allowed to ask are deliberately vague. This ambiguity is intended to ensure the privacy of the disabled, but it has the effect of creating a large loophole that pet owners can abuse.¹³⁹ If pet owners answer the permitted questions “correctly,” the

137. See *Geier*, 529 U.S. at 872.

138. Wayne K. Roustan, *Some Pet Owners Try to Skirt Rules with Fake Service Dogs*, SUN SENTINEL (Apr. 8, 2011), http://articles.sun-sentinel.com/2011-04-08/news/fl-hk-fake-service-dogs-20110405_1_service-dogs-service-animals-guide-dog.

139. See, e.g., Peter Bowes, *Advocates Fight Against Fake Service Dogs*, BBC NEWS (Mar. 26, 2015), <http://www.bbc.com/news/magazine-31646970>; Patricia Marx, *Pets Allowed*, NEW YORKER (Oct. 20, 2014), <http://www.newyorker.com/magazine/2014/10/20/pets-allowed>; Sue Manning, *Fake Service Dogs a Growing Prob-*

manager of a business cannot do anything for the fear of violating the ADA. Even if a “service animal” is not housebroken or is disturbing other patrons, the business will often do nothing lest its violation of the ADA leads to fines (\$55,000 for the first offense; \$100,000 for the second offense and beyond), civil penalty, and personal lawsuits brought by pet owners.¹⁴⁰

Abuse of the rules has triggered a serious backlash against those who truly need service animals for day-to-day tasks. Service dogs commonly require two or more years of behavioral training and intense socialization. Pets who do not have this kind of training often act out. Frightened pets can bite or urinate in a business or worse. They may attack other patrons or real service dogs, which can cost up to \$40,000 to train. In a recent incident, a Chihuahua attacked a service animal.¹⁴¹ The owner refused to control the Chihuahua. When the store asked the owner to remove her dog from the premises in accordance with state law, the woman refused and screamed that her dog was a service animal.¹⁴²

A service dog owner, Wallis Brozman, explained the problem: “Real service dogs can be the victims of unruly fakes.”¹⁴³ Brozman has dystonia, a movement disorder that has left her unable to walk and barely able to talk. She needs a wheelchair, voice amplifier and her service dog, Caspin, who responds to English and sign language. “When my dog is attacked by an aggressive dog, he is not sure what to do about it and looks to me. It becomes a safety issue, not only for my dog, the target of the attack, but for me if I am between the dogs.”¹⁴⁴ California Guide Dogs for the Blind spokesman Brian Skewis notes

lem, NBC NEWS (Oct. 10, 2013), <http://www.nbcnews.com/health/fake-service-dogs-growing-problem-8C11366537>; Ann Zimmerman, *Leapin' Lizards! Service Animals Are Multiplying Like Doggone Rabbits*, WALL ST. J. (Feb. 24, 2011), <http://www.wsj.com/articles/SB10001424052748703652104576122461180284204>; *Pigs Can't Fly: Swine Ordered Off Plane at Bradley Airport*, NBC CT (Nov. 29, 2014), <http://www.nbcconnecticut.com/news/local/Pigs-Cant-Fly-Swine-Ordered-Off-Plane-284189961.html>; Ben Rueter, *Woman with Kangaroo Asked to Leave McDonald's in Beaver Dam*, MADISON (Feb. 3, 2015), http://host.madison.com/news/local/woman-with-kangaroo-asked-to-leave-mcdonald-s-in-beaver/article_43b682a7-2aa2-5022-8159-cd8b42c58929.html.

140. See Robins, *supra* note 1.

141. *On the Consequences of Fake and Undertrained Service Dogs*, SERVICE DOG CENTRAL: HANDBOOK, <http://servicedogcentral.org/content/On-the-Consequences-of-Fake-and-Undertrained-Service-Dogs> (last visited Oct. 5, 2016).

142. *Id.*

143. Manning, *supra* note 139.

144. *Id.*

that there have been many cases in which actual service dogs have been the victim of attacks by other dogs.¹⁴⁵

In addition to endangering service dogs and the people who rely on their services, such instances give service animals a bad name. In another recent incident, Marv Tuttle, a disabled person, was denied entry to a furniture store. Previously, a fraudulent “service animal” had urinated on several expensive Indian carpets. When Tuttle, with a well-trained service animal, sought to enter, the saleswoman objected. Tuttle was effectively punished for a fraudulent “service dog’s” failure.¹⁴⁶

In another example, a Marine Corps veteran was not allowed to bring his service dog into a tourist attraction with his family. The employees publically humiliated him and refused to allow him and his dog to go on the tour. The incident triggered his PTSD; he ended up sitting in the car while his family went on the tour.¹⁴⁷

Prior misbehavior by fraudulent service dogs may arguably permit businesses to deny service to people with real disabilities and well-trained service animals. Businesses are allowed to refuse to admit service animals if doing so would constitute an undue burden.¹⁴⁸ Poorly behaved fraudulent “service animals” create an environment in which apartment complexes and other housing venues fight bitterly to refuse service animals even if the prospective tenant has a dramatic disability.

In an ongoing incident in Florida, a condo group refused to house a woman and her service animal, a chihuahua. Although the woman has severe PTSD and the chihuahua is recognized as a legitimate service animal, the apartment complex refuses to admit her. The county has agreed to represent the woman, but the lawsuit is expected to cost taxpayers between \$15,000 and \$50,000.¹⁴⁹ Although the woman is expected to win, the result is a twofold backlash: resentment by taxpayers for the money spent on prosecuting the lawsuit and increased resistance by condo groups and apartment complexes to admitting ser-

145. Bruce Maiman, *Frustrations of Service Dog Fraud*, SACRAMENTO BEE (Aug. 5, 2014), <http://www.sacbee.com/opinion/op-ed/article2605800.html>.

146. Manning, *supra* note 139.

147. Samantha Clark, *Two People with Service Dogs Say Mystery Spot Turned Them Away*, SANTA CRUZ SENTINEL (Jan. 28, 2016), <http://www.santacruzsentinel.com/article/NE/20160127/NEWS/160129696>.

148. See BAZELON CTR. FOR MENTAL HEALTH LAW, FAIR HOUSING INFORMATION SHEET # 6, <http://www.bazelon.org/LinkClick.aspx?fileticket=mHq8GV0FI4c%3D&tabid> (last visited Oct. 5, 2016).

149. See *County to Sue Condo Group over Chihuahua*, UPI (Apr. 2, 2011), http://www.upi.com/Odd_News/2011/04/02/County-to-sue-condo-group-over-chihuahua/UPI-89651301776200/?st_rec=31391302271240.

vice animals. In another case, a disabled veteran with PTSD and his service dog were refused entry into a local Starbucks because he was “not blind.”¹⁵⁰

If abuses continue and fraudulent “service animals” continue to misbehave, businesses will attempt to impose further restrictions on people with real disabilities. When Disneyland discovered that people were abusing the line-skipping privileges it had generously granted to the disabled, it was forced to eliminate those line-skipping privileges altogether.¹⁵¹ Interpretations of the ADA, FHA, and ACAA that fail to prevent fraudulent service animal hurt those who are truly dependent on their service animals.

The most promising solution at the state level, assuming no federal preemption, would be for states to move to a certification and licensing program like that in New Hampshire. The ADA regulations might also be amended to permit businesses to check service dog IDs in states enacting such programs. Checking IDs would be far less intrusive on the privacy of people with disabilities than the two awkward and ineffective questions now permitted to be asked. Businesses would not have to make difficult decisions and people with disabilities would not have to worry about being discriminated against. Like handicapped parking permits, the license would be dispositive.

States can certainly enact criminal penalties like fifteen states have already done. Even in the absence of actual enforcement, such penalties might have deterrent effects. Businesses often post signs that say “Only Service Dogs Allowed.” In states with criminal penalties, they could add: “Fraudulent use of a service dog is a crime.”

Finally, the Department of Justice might consider certification of service dogs at the federal level. This would have the benefit of national uniformity—an enormous benefit to businesses with outlets in multiple jurisdictions. As a practical matter, however, federal certification would almost certainly require Congressional action and funding—neither of which seems likely soon.

150. Heather Alexander, ‘Humiliating’ Houston Incidents Highlight Problem of Easily Faked Service Dogs, HOUS. CHRON. (Feb. 24, 2014), <http://www.chron.com/news/houston-texas/houston/article/Humiliating-Houston-incidents-highlight-problem-5262853.php>.

151. See Tuttle, *supra* note 4.