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ANPRM Comment

June 26, 2018

TO: Blane A. Workie
Office of Aviation Enforcement and Proceedings
Office of the General Counsel
US Department of Transportation
(202) 366-9342

RE: DOT-OST-2018-0068; Comment on Traveling by Air with Service Animals Advance Notice of Proposed Rulemaking (ANPRM)

Ms. Workie:

This comment draws on many of our prior works.¹ Here we present a mix of old and new—arguments and ideas with staying power, and fresh additions

¹ The titles, *aliases* used herein (if any), author(s) and organization, date, and public locations of some of these works are as follows.

- “Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders”, Brad Morris (PSDP), amended in early March 2016. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

- “Service Animal Advocate Positions and Reasoning”, Brad Morris et al. (DOT’s ACCESS Committee Service Animal Working Group), from September 15th, 2016. <https://www.transportation.gov/office-general-counsel/negotiated-regulations/service-animals—advocate-position-and-reasoning>

- “Pre-NPRM Comment: DOT’s ACAA Service Animal Regulations”, *USAUSA’s 2016 compromise comment*, Brad Morris and Jenine Stanley (USAUSA with multiple sign-ons), November 24, 2016. <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0290>

- “ACAA Third-Party Documentation Requirements: Survey of Psychiatric-Disability-Mitigating Animal Users”, *USAUSA’s 2016 survey report*, Brad Morris and Jenine Stanley (USAUSA), December 11, 2016. <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0296>

- “Flight Access Survey Report”, *USAUSA’s 2018 survey report*, Brad Morris and Jenine Stanley (USAUSA), May 22, 2018. <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0020>

- “Enforcement Priorities Comment”, *2018 enforcement priorities comment*, Brad Morris (PSDP), June 3, 2018. <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0048>

in response to both the rapidly changing air travel climate and DOT's inquiries.

Our comment is an attempt to exhaustively cover the issues DOT raised, so far as we are able. We hope this will serve DOT well in crafting regulations that: are well-reasoned, respect properly analyzed data, and embody human rights in a way that not only makes us proud of our country, but keeps the promise of the ACAA.²

We added an introduction and conclusion, but otherwise follow DOT's ten-section organization in the ANPRM. We elaborate the content guide below so it may serve as an executive summary.

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² The Air Carrier Access Act (ACAA) is codified at 9 USC §41705.
<https://www.gpo.gov/fdsys/pkg/USCODE-2011-title49/html/USCODE-2011-title49-subtitleVII-partA-subpartii-chap417-subchapl-sec41705.htm>

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Introduction

DOT must adopt some guiding principles to avoid being buffeted about in a storm of omnidirectional comments.³ This rulemaking should not be a rush

³ Respectfully, the spinning weathervane approach in the ANPRM makes us believe this discussion of

of wild sailings between Scylla and Charybdis, but a looking upward to calmly chart a long-term passage based on lodestars that will keep the journey steadily on course.

Working from such lodestar principles enables consistent, justified, and transparent reasoning.⁴ Making them explicit here allows us to make our reasoning clear, whether for outside critique or agreement. The initial axioms are simple:

AXIOM I—Disability access

The prime directive of the ACAA is to prevent disability-based discrimination and enable access for people with disabilities.⁵

AXIOM II—Safety

Airline employees, passengers, and animals must be kept safe.

AXIOM III—Practicality

We are beholden to practical limitations and opportunities revealed by consideration of actual and realistically possible travel logistics, human psychology, and animal behavior.

Evidence, experience, and expertise matter.

Some helpful theorems fall out of these axioms and the evidence at hand.

THEOREM A—Disability-type discrimination

A party can't discriminate on the basis of disability type without violating the prime directive.⁶

guiding principles is necessary for facilitating a rulemaking that has staying power. We do realize DOT has a difficult task in non-judgmentally presenting complicated issues.

⁴ We originated the foundation of this principle-based analysis in Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

⁵ This derives from 9 USC §41705 (linked first below). See §§1., 3.a., and 3.b. of USAUSA's 2018 survey report for details.

<https://www.gpo.gov/fdsys/pkg/USCODE-2011-title49/html/USCODE-2011-title49-subtitleVII-partA-subpartii-chap417-subchapl-sec41705.htm>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

⁶ The current regulations clearly do violate the prime directive of AXIOM I—Disability access. See §§1 and A3 of Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016, as well as §§1.c., 2., 3.a., 3.b., and 5.a. of USAUSA's 2018 survey report.

<https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

THEOREM B—Insufficiency of anecdotes

A party can't use sensationalized anecdotes of safety failures to systematically violate the prime directive.⁷

THEOREM C—New access system needed

Some system of reducing ignorance and increasing responsibility is in order.⁸

THEOREM D—Third-party paperwork undue

Third-party documentation requirements induce undue burdens that violate human rights and reduce access.⁹

Many more theorems may be derived from these axioms and theorems. However, these set the stage for us to proceed to the specifics of DOT's ANPRM inquiries, following DOT's tracking of the issues.

§1. Whether psychiatric service animals should be treated similar to other service animals

[Report-May-2018.pdf](#)

⁷ The old and new third-party paperwork burdens DOT is allowing from airlines are not backed by significant evidence, yet violate the prime directive. See §§1. and 6. of our enforcement priorities comment and the footnote at the end of §9.d. below. <https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

⁸ See any of the documents from the airlines during the Reg Neg, USAUSA's 2016 compromise comment, and USAUSA's 2018 survey report, wherein USAUSA uncovered an extremely high level of worry about the safety of their disability-mitigating animals.

<https://www.transportation.gov/access-advisory-committee>

<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

⁹ See §§1 and A3 of Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016. See especially USAUSA's 2016 survey report and 2018 survey report, but also §6 of our 2018 enforcement priorities comment.

<https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

§1.a. *Disability profiling is just as wrong as racial profiling*

DOT asks: "Should the DOT amend its service animal regulation so psychiatric service animals are treated the same as other service animals?"¹⁰

We understand this question as: 'Should DOT continue to encourage discrimination on the basis of disability type?'

We could never fully convey the force with which our community says "No".¹¹ We were puzzled toward the end of the Reg Neg,¹² when all stakeholder representatives had agreed we could do away with this point of discrimination, that DOT still appeared to treat it as a contentious issue.¹³

The discrimination was not originally justified, nor could it now be justified.¹⁴ This falls out of the axioms in our Introduction as the first theorem:¹⁵

THEOREM A—Disability-type discrimination

A party can't discriminate on the basis of disability type without violating the prime directive.

DOT's justification for specifically burdening users of psychiatric service animals (and ESAs)¹⁶ is that it's the overall category in which people committed the most fraud.¹⁷ Airlines gave no hard data that supports this claim, but prejudice and anecdotes were enough to begin a whack-a-mole attack with more civilian casualties than combatant.

Disability rights are supposed to be civil rights. If this were about race instead of disability, we could more clearly see how wrong the discrimination is. If TSA were more suspicious of darker-skinned people of color, that could not justify policies that put more burdens on all darker-

¹⁰ From the ANPRM. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹¹ Over 95% say this discrimination is flatly unacceptable. See §5.a. of our 2018 survey report. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

¹² "Reg Neg" refers to the Negotiated Rulemaking process conducted by DOT among stakeholder representatives known as the Advisory Committee on Accessible Air Transportation (ACCESS Advisory Committee), concluding in 2016. Our Director of Government Relations, Brad Morris, served on that committee and as a co-chair of its Service Animal Working Group. <https://www.transportation.gov/access-advisory-committee>

¹³ This was actually the clearest point of agreement among the multiple Reg Neg service animal issues on which there was widespread agreement.

¹⁴ See §§1. and 3. of our 2018 survey report. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

¹⁵ As a reminder: AXIOM I—Disability access. The prime directive of the ACAA is to prevent disability-based discrimination and enable access for people with disabilities.

¹⁶ ESA stands for "emotional support animal".

¹⁷ "This provision was adopted to address the problem of passengers attempting to pass their pets as ESAs or PSAs so they can travel for free in the aircraft cabin." ANPRM.

skinned people of color.¹⁸ Yet if airlines were more suspicious of people with mental health disabilities, it was deemed okay to treat them worse than people with other types of disabilities.

§1.b. *Anecdotes do not and may not justify disability pro filing*

Psychiatric service animal users should not be made to suffer, singled out because of anecdotes of suspected fraud reinforced by stigma. An individual from a marginalized class of people should not be punished by nominally anti-discrimination laws as a result of others' purported fraud or sensationalized antics. Regulations must draw lines only based on relevant characteristics in a manner that does not promote substantial discrimination.¹⁹

DOT's next question in the ANPRM indicates that perhaps DOT still thinks more data (anecdotal or otherwise) could justify discrimination on the basis of disability type.²⁰

*What, if any, experience do airlines have with people attempting to bring pets on board aircraft based on claims that the animals are service animals for disabilities that are not readily apparent other than mental health-related conditions, such as seizure disorders or diabetes?*²¹

We will be perfectly clear: **No** amount of data can justify DOT encouraging airlines to discriminate on the basis of disability type.²² That would constitute a basic failure in carrying out the ACAA. ***Disability pro filing is just as unacceptable as racial pro filing.***

DOT next inquires as follows:

Should DOT harmonize its service animal regulation under the ACAA with DOJ's ADA service animal regulation and prohibit airlines from requiring PSA users to provide a letter from a licensed mental health professional as a condition for travel? If airlines are no longer allowed to require medical documentation from PSA users, what effective alternative methods are there to prevent fraud? For example, if there is no medical

¹⁸ See Brad Morris's February 2018 article, "Potential PR nightmare: how airlines choose to discriminate". <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/pr-nightmare-airlines-choose>

¹⁹ Note that ESAs' lack of training and exposure/experience is a relevant factor.

²⁰ Readers using screenreader software should note that longer quotations in this document are indented and italicized, but do not have external quotation marks.

²¹ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

²² THEOREM B Insufficiency of anecdotes. A party can't use sensationalized anecdotes of safety failures to systematically violate the prime directive.

*documentation requirement for PSAs but such a requirement remains for ESAs, what would prevent individuals from asserting that their ESA is a PSA? How would airline personnel be able to distinguish between a PSA and an ESA? We invite the public, particularly service animal users, to propose methods of detecting and preventing fraud that they believe are feasible alternatives to the current medical documentation requirements for PSAs. The Department notes that the ACAA is a specialized statute that applies to an environment where many people are confined within a limited space for what may be a prolonged time. Is that sufficient reason for DOT's treatment of PSAs under its ACAA regulation to differ from that of DOJ under its ADA regulation? What are the practical implications of no longer allowing airlines to require medical documentation from PSA users?*²³

In manifesting the ACAA, DOT should first be concerned with access for people with disabilities. Preventing fraud is **not** the ACAA's prime directive, and our community agrees.²⁴

DOT has scant evidence of actual fraud, yet seems consumed with rhino-stamping such hearsay fires²⁵—even at great cost to people with disabilities.²⁶ We are inclined to think that what is at least as problematic is ignorance of the expectations of the rights and responsibilities that attach to claiming one's animal is a service animal or ESA.

§1.c. A decision tree should be used instead of third-party documentation

We agree with DOT that the flight environment is peculiarly challenging for animals.²⁷ We believe the ignorance and safety issues alone justify an access system that differs from DOJ's Title II and Title III ADA regulations,

²³ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

²⁴ Over 4 out of 5 community members agree. See §5.a. of our 2018 survey report. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

²⁵ Rhino-stamping fires is another example of an activity some people believe is pervasive, yet the claim does not have the weight of evidence behind it.

²⁶ See our 2016 and 2018 survey reports.

<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

²⁷ See §1 of Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/acaa-design-challenges-solutions>

but not with respect to those regulations' respect for human rights.

We continue to advocate for our position expressed in USAUSA's 2016 compromise comment. No third-party documentation should be required,²⁸ but a decision tree (not DOT's attestation)²⁹ should be in place.³⁰ Such a system should not inquire about the nature of the person's disability, nor should it use mere labels, as opposed to options of applicable descriptions users may select.

§1.d. Third-party documentation requirements don't even do their job but do cause big problems, creating an untenable access inequality

DOT next asks about USAUSA's 2016 survey report:

*Do you agree with the data in this report? Explain the basis of your agreement or disagreement. Do the costs to users of PSAs of providing medical documentation outweigh the benefits to airlines of requiring such documentation?*³¹

DOT, through Econometrica, requested the information in the report with a turnaround of five days. If DOT believes the data we and our USAUSA partners procured via 56 responses in that time are questionable, we reiterate our offer to provide DOT with access to the original format of the survey responses.³² All of the data is replicated in the survey report itself.³³

As to whether the costs to psychiatric service animal users outweigh benefits to airlines, the 2016 survey report makes these costs clear.³⁴ Most perspicuously, the result is that "Over three out of four people surveyed have either not flown or have flown less because of these factors."

When the purpose of the ACAA is to enable flight access for people with

²⁸ THEOREM D Third-party paperwork undue. Third-party documentation requirements induce undue burdens that violate human rights and reduce access.

²⁹ The distinction is important. In USAUSA's 2016 compromise comment, see §5. Decision tree vs. attestation, which explains why "DOT, advocates, and airlines each have independently sufficient reasons to prefer a decision tree over an attestation." <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

³⁰ THEOREM C New access system needed. Some system of reducing ignorance and increasing responsibility is in order.

³¹ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

³² See §5. of the 2016 survey report: "At the request of DOT or Econometrica, we are happy to set up direct access to the raw data separately from this report." <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

³³ We do realize that DOT may be requesting that individuals explain whether their personal experiences line up with the data, which would be more data points, rather than "agreement or disagreement" with the existing data. We caution against cherry-picking personal comments, rather than systematic analysis.

³⁴ USAUSA's 2018 survey report hits this home even harder. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

disabilities, how can a system that so grossly disables access even be offset?³⁵

Further, we ask what benefits do airlines actually credit to the current system? It seems airlines have been complaining for years about how the third-party documentation requirements do not work. Our experience from the Reg Neg is that practically all stakeholders think the current system is broken.³⁶

So it seems the answer is clear from both perspectives. The current burdens are ineffectual at their purpose, so any benefit is easily offset by their costs. The costs are both massive and contrary to the ACAA's prime directive, and so cannot reasonably be offset by any benefit.³⁷

§1.e. A little advance notice serves a purpose under the shade of a decision tree

Finally for this topic, DOT inquires:

*If the Department were no longer to allow airlines to require medical documentation from a PSA user, should the 48 hours' advance notice requirement be eliminated? We solicit comment on whether there is any reason to retain the advance notice requirement for PSAs if there is no longer a documentation requirement for PSAs. Also, what has been the impact of the 48 hours' notice requirement on individuals with psychiatric service animals?*³⁸

DOT adds: "To enable airlines sufficient time to assess the passenger's documentation, DOT permits airlines to require 48 hours' advance notice of a passenger's wish to travel with an ESA or PSA."³⁹

We surmise that if there were *no* documentation required (not even through a decision tree), requiring 48 hours' advance notice would be a vestige of discrimination. It would serve little useful purpose to justify itself.

However, there is reason for encouraging individuals to meet a reasonably

³⁵ See our 2018 enforcement priorities comment, §6.a. (Burdens must first meet the burden of proof). <https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

³⁶ THEOREM C New access system needed. Some system of reducing ignorance and increasing responsibility is in order.

³⁷ AXIOM I Disability access. The prime directive of the ACAA is to prevent disability-based discrimination and enable access for people with disabilities.

³⁸ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

³⁹ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

loose requirement of advance notice through a decision tree.⁴⁰

§2. Whether there should be a distinction between emotional support animals and other service animals

§2.a. Training, experience, and more justify separating the "ESA" category from "service animal"

DOT inquires about separating ESAs from service animals:

*The Department seeks comment on whether the amended definition of a service animal should include emotional support animals. Alternatively, the Department seeks comment on whether emotional support animals should be regulated separately and distinctly from service animals?*⁴¹

ESAs should not be included in the amended "service animal" definition, but should be defined and treated differently.⁴²

DOT is the only federal regulatory agency to include ESAs under a "service animal" definition.⁴³ This is a significant cause of confusion.

Adding to the confusion is that in the past⁴⁴ and the present⁴⁵ DOT has expected ESAs to be trained to behave in public. We do not think this expectation can be based on anything more than wishful thinking. It usually takes 1–3 years of purposeful training and exposures for (DOJ) service

⁴⁰ See USAUSA's 2016 compromise comment, §4. (Decision tree/attestation timing and method of delivery) and §6. (Decision tree profile retention).

⁴¹ From the ANPRM. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

⁴² We advise that the ESA definition (and possibly the name itself) not restrict ESAs to those with mental health disabilities. As HUD recognizes, ESAs may be used for other types of disabilities, such as for lowering blood pressure in someone with severe hypertension. See §4 below for a non-restrictive ESA definition. We use the term "ESA" merely for convenience (rather than "support animal", for instance). See the paragraph linked after this sentence in HUD's 2008 "Pet Ownership for the Elderly and Persons With Disabilities" for pain relief as an example of disability mitigation an ESA can provide (the scope of the guidance—HUD-assisted housing—is irrelevant to the point).
<https://www.federalregister.gov/d/E8-25474/p-25>

⁴³ HUD-ESAs are included with service animals under the umbrella of "assistance animals", a different term that thereby makes the situation less confusing. See p. 2 of HUD's 2013 guidance.
https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF

⁴⁴ See DOT's 2008 guidance, "Nondiscrimination on the Basis of Disability in Air Travel". The following links to the paragraph therein that expresses DOT's expectation.
<https://www.federalregister.gov/documents/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#p-208>

⁴⁵ "ESAs and PSAs differ from one another in that PSAs, like other traditional service animals, are trained to perform a specific task for a passenger with a disability. In contrast, ESAs provide emotional support for a passenger with a mental/emotional disability but are not trained to perform specific tasks. However, DOT expects that all service animals are trained to behave properly in a public setting." From the ANPRM. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

animals to reach the level of being able to behave in stressful, no-pets places with extremely high reliability. ESA users are not likely to be aware of DOT's expectation, to be familiar with public access training protocols, to understand the need for or intent of this training, or to be motivated to engage in such intense training.⁴⁶

While DOT should certainly not discriminate based on disability type (such as by treating psychiatric service animal users differently from other service animal users), a difference in the type/training of the assistive device does warrant different treatment (such as by treating service animal users differently from ESA users).⁴⁷ This is analogous to having different requirements for power wheelchair users based on whether their chairs' batteries are spillable or non-spillable.

It is noteworthy that DOT (along with DOJ) already recognizes that there is a significant difference between ESAs and service animals in terms of whether they are trained or not to do disability-mitigating work or tasks.⁴⁸ DOT even recognizes there are practical implications for the differences in training, allowing airlines to create interim restrictions on ESA use.⁴⁹ For DOJ, this training difference is sufficient not to grant ESAs access to the places of public accommodation under its purview, though DOJ indifferently notes that housing and transportation contexts may warrant different treatment.⁵⁰

⁴⁶ We must write in generalities. Of course, many psychiatric service animals were first ESAs (before their training). The ESA users would have to familiarize themselves with the distinct and rigorous training associated with service animals to make the transition. The great majority of ESA users would not have this crossover understanding. For more information on this (noting that our position on allowing ESAs was later modified through Reg Neg discussions), see §§6 and 7 of Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

⁴⁷ See Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

⁴⁸ Again, "ESAs and PSAs differ from one another in that PSAs, like other traditional service animals, are trained to perform a specific task for a passenger with a disability. In contrast, ESAs provide emotional support for a passenger with a mental/emotional disability but are not trained to perform specific tasks." From the ANPRM. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

⁴⁹ "We recognize the possibility that ESAs may pose greater in-cabin safety risks because they may not have undergone the same level of training as other service animals (including PSAs). Accordingly, at this time, the Enforcement Office will not take action against carriers that impose reasonable restrictions on the movement of ESAs in the cabin so long as the reason for the restriction is concern for the safety of other passengers and crew. Such restrictions may include requiring, where appropriate for the animal's size, that the animal be placed in a pet carrier, the animal stay on the floor at the passenger's feet, or requiring the animal to be on a leash or tether." From DOT's 2018 "Statement of Interim Enforcement Priorities Regarding Service Animals". <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0019>

⁵⁰ See "Recognition of psychiatric service animals, but not "emotional support animals." within DOJ's 2010 "Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities". <https://www.ecfr.gov/cgi->

§2.b. Trying to burden-stack with third-party documentation misses the point of the ACAA

DOT nexts inquires about a cluster of related ESA subjects:

If yes, should DOT allow airlines to require ESA users to provide a letter from a licensed mental health professional stating that the passenger is under his or her care for the condition requiring the ESA and specifying that the passenger needs the animal for an accommodation in air travel or at the passenger's destination? Would such a documentation requirement be stringent enough to prevent individuals who do not have disabilities from skirting the rules by falsely claiming that their pets are ESAs? Suggestions are welcome on approaches to minimize the use of letters from licensed mental health professionals that enable passengers without disabilities to evade airline policies on pets. Are there other types of documents or proof that could be required for carriage of ESAs in the passenger cabin that would be just as effective? Is advance notice of a passenger's intent to travel with an ESA needed to provide the airline time to review documents or other proof? If the documentation needed to fly with an ESA is rigid, would ESA users be less likely to fly and choose other modes of transportation? The Department seeks comment on the practical implications of these options.⁵¹

If we are to be perfectly frank, DOT's perspective is askew in this line of questioning. We believe that requiring people with disabilities to take much time and burdensome expense to acquire third-party documentation to travel, when non-disabled folks do not have to do so, is unacceptably discriminatory.^{52,53,54}

[bin/retrieveECFR?
gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#ap28.1.3
6.0000_0nbspnbspnbsp.a](#)

51 <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

⁵² See USAUSA's 2016 and 2018 survey reports for details on the burdens, etc.

<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

⁵³ For more on how it is inappropriate to use the medical model of disability to create civil rights laws, see §7 of USAUSA's 2016 compromise comment. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

54 To understand when an airline might be justified in asking for third-party documentation, see §9 of USAUSA's 2016 compromise comment. <https://www.psychdogpartners.org/wp->

In particular, this question from DOT haunts us: "Would such a documentation requirement be stringent enough to prevent individuals who do not have disabilities from skirting the rules by falsely claiming that their pets are ESAs?"

The point of the ACAA is not to crush all parties—including people with disabilities—under the weight of "stringent" requirements. The ACAA is supposed to enable access for people with disabilities.⁵⁵

DOT must face reality and accept that there will be some level of fraud no matter what. Is DOT's goal to completely eliminate fraud? This would be pure fantasy. Instead, is DOT's goal to facilitate access for people with disabilities in a safe way, while secondarily reducing fraud in ways that do not significantly impede access? This would not only be more reasonable, but would follow the ACAA that DOT is charged to implement.⁵⁶

Instead of burden-stacking to chase the intractable problem of fraud, we advise DOT to hone in on the amenable problem of ignorance by facilitating the use of a decision tree.⁵⁷

§3. Whether emotional support animals should be required to travel in pet carriers for the duration of the flight

§3.a. Pet carriers are appropriate by default for ESAs, but implementation is key

Our overall position is that ESAs should be required to travel in pet carriers,⁵⁸ yet they must be allowed to be tethered and removed from those

[content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf](https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf)

⁵⁵ AXIOM I Disability access. The prime directive of the ACAA is to prevent disability-based discrimination and enable access for people with disabilities.

⁵⁶ We have explained this in more detail elsewhere. See especially §§1. and 3. of USAUSA's 2018 survey report and §§1. and 6. of our 2018 enforcement priorities comment.

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

⁵⁷ See §§4–6 and especially §8 of USAUSA's 2016 compromise comment.

<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

⁵⁸ We assume this entire discussion is only about FAA-approved pet carriers that—at least in the past—normally would fit under a seat. FAA guidance regarding pet carriers is at Vol. 3, Ch. 33, §6, 3-3547, G.7 about carry-on baggage, available through the following link. Guidance is on the same webpage, at 3-3576, on "LOCATION AND PLACEMENT OF SERVICE ANIMALS ON AIRCRAFT".
http://fsims.faa.gov/WDocs/8900.1/V03%20Tech%20Admin/Chapter%2033/03_033_006.htm

carriers during the flight for disability mitigation—the point of having an ESA. If there is a behavior issue, ESA users may be required to replace the animal in the pet carrier for the remainder of the flight or journey.

We address the main points of the ESA containment issue in §7 of our 2018 enforcement priorities comment.⁵⁹ We excerpt that section here for ease of reference and to help DOT understand the angles to consider. Note that comments about the interim not providing enough time for a major change are null for future regulations that would offer a 2–4 year adjustment period for restrictions.

In order to maintain ESA access in some form,⁶⁰ we originated the idea during the Reg Neg of allowing airlines to require that ESAs be contained in pet carriers by default.⁶¹ We remain supportive of this overall idea for a regulation update.⁶² However, the practical difficulties of actually implementing this under the current regulations would be too severe to make this a responsible allowance for the interim.

We are grateful DOT now recognizes there is a significant difference between ESAs and psychiatric service animals, as well as understanding some of the nature and consequences of that difference.⁶³ On the other hand, airline personnel at all ranks still tend not to distinguish ESAs from psychiatric service animals, as most airlines' treatment of the two groups has followed current regulations and been the same.⁶⁴ Airlines have therefore had no impetus to disentangle the two concepts and it would require extensive training to expect accurately different handling.

⁵⁹ <https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

⁶⁰ Much of our community would just as soon see ESA access eliminated, but we pursued and continue to pursue the most reasonable compromise we could.

⁶¹ We *very highly recommend* DOT revisit §2, ESA 1 in "Service Animal Advocate Positions and Reasoning" from September 15, 2016. We took pains there to lay out what would work, what wouldn't, and why. <https://www.transportation.gov/office-general-counsel/negotiated-regulations/service-animals---advocate-position-and-reasoning>

⁶² See §3.d. in our 2018 survey report. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

⁶³ "We recognize the possibility that ESAs may pose greater in-cabin safety risks because they may not have undergone the same level of training as other service animals (including PSAs)." <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0019> We elaborate that service animals undergo work or task training, public access training, and are generally quite accustomed to working in a variety of public environments and so have accrued substantial psychological shock absorbers. Any one of these characteristics would be unexpected in the average ESA.

⁶⁴ Southwest is a notable exception. See their "Assistance Animal" entry, which does not currently distinguish psychiatric service animals from any other type of service animal: <https://www.southwest.com/html/customer-service/unique-travel-needs/customers-with-disabilities-pol.html>

Suddenly allowing more restrictive policies for ESA users will lead to trouble not just for the fact that airline employees likely will continue to conflate ESAs and psychiatric service animals, nor only for ESA users needing to adjust to even more restrictions. Similar to how airline employees now try to subject service animal users of the non-psychiatric sort to ESA-user treatment, we would also expect any new, harsher ESA barriers to bleed through to affect all service animal users.⁶⁵ This especially applies to any service animal user without a disability apparent to the employee or without an animal or breed that matches the employee's prototypical concept of a service animal. The patchwork of airline variations the planned enforcement would open up would further confuse matters on the larger scale.

Since it is clear the sudden ban of larger ESAs would not be appropriate without the usual rulemaking process,⁶⁶ an interim change in whether airlines may require pet carriers for smaller ESAs must be a half-measure. We worry that allowing such a half-hearted set of new restrictions would cloud everyone's thinking and the restrictions' execution.

There is not a clear reason why smaller ESAs must be contained, yet larger ESAs need not be. In fact, if training and safety are the reasons to allow ESA containment requirements, one might easily think larger ESAs would present the larger threat. Since the reasoning is not consistent, we would expect airline employees to (justifiably) become confused, thinking that if an ESA does not come with a carrier or can't fit in one, then the person can't fly with the ESA.⁶⁷ Connecting with the theme above, some employees might even extend this confusion broadly to all service animals.⁶⁸

⁶⁵ We have already received anecdotal reports of the new burdens for ESA and psychiatric service animal users being pushed on guide dog users, just as the old requirements have been. The system cannot handle complexity well.

⁶⁶ If DOT were to allow an indirect restriction on ESA size by allowing a requirement that ESAs be transported in pet carriers, the larger-ESA users would deserve a warning period on the order of 2–4 years. This would allow time to either train the ESA to become a service animal and have access, get a smaller ESA, or decide not to use an ESA. ESA users could not be expected to suddenly acquire a new animal as an ESA, as if they were commodities rather than living creatures with personal bonds.

⁶⁷ As we originally quipped during the Reg Neg, "can't fit, can't fly". See §2, ESA 1, p. 8: https://www.transportation.gov/sites/dot.gov/files/docs/P5.SA_1.Advocate%20Positions%20and%20Reasoning%20091516%20%28003%29.pdf

⁶⁸ Anyone who doubts the depth of confusion or breadth of ignorance possible should read SIEP comments such as one posted May 22, 2018: "Service Animals shall be permitted exclusively for Blind and Deaf Airline travelers.[...]Service Animals shall be restricted to dogs of eight pounds or less." <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0017>

We must finally return to another point we made during the Reg Neg. It is not likely that the point of an ESA—one that is needed for disability mitigation on a flight—is going to be served if that ESA must remain in a pet carrier.⁶⁹ If there were a wholesale restriction to pet carriers for ESAs, as we have proposed, it would be fine for the default to be that ESAs are in pet carriers. However, the user must have access to the ESA on the flight for disability mitigation. This, of course, may give way to being required to replace the ESA in the carrier if there were a behavior issue.

A requirement that ESAs be persistently imprisoned is tantamount to giving small-ESA users mere pet fee exemptions for having disabilities, rather than access to the means to cope with their disabilities. This is quite disparate treatment from that of larger-ESA users. DOT should reconsider the wisdom of allowing ESA containment restrictions in a way such that they will unjustifiably favor some ESA users over others. Regarding the whole ESA containment issue, the meal must be fully cooked to be both safe and palatable; half-measures or half-baking won't do, but that's all the interim leaves time for.⁷⁰

§3.b. Airports' current ESA pet carrier restrictions would be especially reasonable under a similar ACAA restriction

DOT further writes:

[...]because the ADA does not require airports to recognize or allow ESAs as service animals, some airports are requiring that emotional support animals be contained in a pet carrier when traversing through areas of the airport not owned, leased, or controlled by airlines. Considering these concerns, the Department seeks comment on when, if at all, should emotional support animals be contained in a pet carrier.⁷¹

Since Title III ADA regulations⁷² (and often Section 504 of the Rehabilitation

⁶⁹ Again, DOT should revisit §2, ESA 1 in "Service Animal Advocate Positions and Reasoning" from September 15, 2016. <https://www.transportation.gov/office-general-counsel/negotiated-regulations/service-animals---advocate-position-and-reasoning>

⁷⁰ <https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

⁷¹ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

⁷² See 28 CFR §36.102. https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#se28.1.36_1102

Act)⁷³ apply to the places DOT describes above, yet ACAA regulations do not, the most DOT could do is recommend a *be reasonable* approach.⁷⁴ DOJ had reasons for not offering public access to ESAs under normal circumstances (in or out of pet carriers).⁷⁵

While the facilities DOT mentions are jumping the gun somewhat, their ESA containment policies would seem perfectly reasonable—and even preferable—in a new context wherein DOT's ACAA regulations require ESA containment by default. Under such new regulations, it would be easier to produce harmony between DOJ and DOT rules at their on-the-ground nexus. It would be easier for airports to *be reasonable* through ESA containment policies if they were syncopated with DOT regulations.

§3.c. In light of shrinking classes of service, DOT needs a new strategy when it comes to foot space accommodations

DOT advises that:

Commenters should also consider that recent changes to aircraft configuration and seating, e.g., economy seating vs. seating with extra leg room, means that there may be limitations with respect to containment requirements given the availability of passenger foot space.⁷⁶

DOT's existing ACAA regulations appear to have been developed under assumptions that (1) airplane passenger seat and under-seat areas would remain roughly the same size as they were in the past, and (2) airlines would not significantly alter the "class of service" structure in ways that would make traveling with a disability require a more expensive class of

⁷³ Airports tend to receive federal funding, making them subject to the general nondiscrimination provision of the Rehab Act. One might argue that this general nondiscrimination provision renders ESA pet carrier restrictions in airports unreasonable when DOT does not have such a restriction. For the law's applicability, see the act codified at 29 USC §794. <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title29/html/USCODE-2010-title29-chap16-subchapV-sec794.htm>

⁷⁴ In DOT's 2008 guidance, DOT has a paragraph on this very issue, advising that approach. The paragraph's direct link is: <https://www.federalregister.gov/d/08-1228/p-209>

⁷⁵ See “*Recognition of psychiatric service animals, but not “emotional support animals.”*” within DOJ’s 2010 “Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities”. [https://www.ecfr.gov/cgi-bin/retrieveECFR?
gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#ap28.1.3
6.0000_0nbspnbspnbsp.a](https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#ap28.1.36.0000_0nbspnbspnbsp.a)

76 <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

service.^{77,78} These were not unreasonable assumptions, but as DOT now notes (just above), times are changing and many accommodations are shrinking.

DOT must prioritize at this historical fork. Airlines no longer just divide the cabin into first-class, economy, and sometimes business class. They are chopping classes of service more finely and perhaps idiosyncratically.⁷⁹ In executing the ACAA in this climate, DOT has to determine whether airlines need to make disability accommodation the priority, or whether they can rig the system in a way that makes people with disabilities pay more to have the basic, necessary accommodations that were the baseline of yesteryear.

Canada adopted a different model that prioritizes disability accommodation when it comes to seating space. If a single seat in the passenger's class of service does not have the floor space to accommodate the passenger's service animal, a second, adjacent seat and its space are provided at no charge.⁸⁰

This approach may be extreme. In our experience, there are always willing

⁷⁷ The assumption of 14 CFR §382.87(f) seems to be that there is sufficient space to accommodate the great majority of individuals with disabilities in a single seat within any class of service: "You are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased in order to provide an accommodation required by this part." https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_187

⁷⁸ Similarly, 14 CFR §382.81(c) and (d) (combined with 14 CFR §382.87(f)) assume that a variety of seat types will be available to accommodate passengers with disabilities within any given class of service:

"(c) For a passenger with a disability traveling with a service animal, you must provide, as the passenger requests, either a bulkhead seat or a seat other than a bulkhead seat.

"(d) For a passenger with a fused or immobilized leg, you must provide a bulkhead seat or other seat that provides greater legroom than other seats, on the side of an aisle that better accommodates the individual's disability."

https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_181

⁷⁹ For one of many examples, see Frontier's "Standard Seating" vs. "Stretch Seating". <https://www.flyfrontier.com/travel-information/seating-options>

⁸⁰ See §1.5 of the Canadian Transportation Agency's "Aircraft Accessibility for Persons with Disabilities: Code of Practice for Fixed-Wing Aircraft with 30 or More Passenger Seats", but especially the "Implementation Guide Regarding Space for Service Dogs Onboard Large Aircraft" that accompanies it, respectively linked below. At the Reg Neg, we were told by a Canadian airline representative that as a practical matter they must prioritize carriage of the passenger with the service animal, such that another individual may be forced to take a later flight if they discover after fully booking that the service animal user needs the extra seat space.

<https://otc-cta.gc.ca/eng/publication/aircraft-accessibility-persons-disabilities-code-practice-fixed-wing-aircraft-30-or-more>

<https://otc-cta.gc.ca/eng/publication/implementation-guide-regarding-space-service-dogs-onboard-large-aircraft>

volunteers to share foot space with a service animal, if only the flight crew asks. However, the spirit of the Canadian approach is apposite.

§3.d. *The US Access Board models a wise approach that would suit modern foot space variations*

Space for an ESA pet carrier is unlike space for an uncontained service animal, since service animals can conform to different spaces and a pet carrier is less malleable. The approach we recommend is one that applies equally to service animals and ESA pet carriers. We recommend an approach analogous to that of the US Access Board with respect to accessible hotel rooms (bold emphasis added):

*Accessible sleeping rooms and suites must be dispersed among the various classes of sleeping accommodations available according to factors such as room size, cost, amenities provided, and the number of beds provided. The objective of dispersion is to give people with disabilities the same range of options that others have in staying at a place of lodging. However, where the different classes or types of sleeping accommodations is greater than the minimum number of rooms required to be accessible by the table, this does not mandate an increase in the number of accessible rooms that must be provided. In this case, **operational practices may compensate. For example, if a person requests an accessible room with one bed, but the only accessible room is one with two beds (usually let at a higher rate), leasing the larger room at the lower rate can satisfy the requirement for a choice of room prices.***⁸¹

The Access Board guidance is intended to allow hotels to satisfy the requirement of having a certain number of accessible rooms while preventing such hotels from simply pricing out people with disabilities by only having accessible rooms at the higher prices.

This is analogous to our situation because we are not asking that DOT force airlines specifically to provide whole extra seats (like an extra hotel room). Instead, we advise DOT to require airlines to reasonably provide room of a size needed for disability accommodation at the price of whatever class of service the person books.⁸² This provides a needed

⁸¹ "Classes of Sleeping Accommodations [9.1.4]", from "A GUIDE TO ADAAG PROVISIONS". <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/113-ada-standards/background/adaag/422-a-guide-to-adaag-provisions#Accessible>

⁸² An airline may, for example, elect to create a bottom-of-the-barrel service class that contains no seats that can accommodate a normal-sized service dog (at an extreme, perhaps it only has

buffer for people with disabilities against the fickle and varied class-of-service structures across airlines.⁸³

§3.e. Basic Economy fares avoidably discriminate

We are surprised that DOT failed to inquire about "Basic Economy" fares in the ANPRM, since we have been pushing DOT officials through email since August 7, 2017 to offer guidance on the topic. Since this dovetails with the discussion above and DOT needs to address the de facto discrimination produced by the presentation of these fares, we reiterate our 2018 survey report findings on that topic below.⁸⁴

The initial impetus for this survey was our interaction with DOT about American's new "Basic Economy" fare.⁸⁵ Other airlines, such as Delta⁸⁶ and United⁸⁷, have also implemented this cheaper type of fare. Basic Economy has various restrictions, such as having to board last, not having access to the overhead luggage space, and not being able to choose one's own seat without a fee.

Each of the restrictions mentioned can run somewhat contrary to ACAA regulations that accommodate service animal users.⁸⁸

"standing"/saddle seats; see CNN Travel's "Will new standing-up airplane seat design take off?" <https://www.cnn.com/travel/article/standing-up-airplane-seat/index.html>). In any such case, a service dog user would simply be bumped up to whatever seat/class could reasonably accommodate the person and dog. This would require that 14 CFR §382.87(f) be modified so that classes of service may be transcended for reasonable disability accommodations. https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_187

⁸³ We realize this may require advance notice for airline planning (see "AXIOM III—Practicality" in our Introduction). This is one reason we endorse the use of a (semi-)mandatory decision tree. The version suggested in USAUSA's 2016 compromise comment would give airlines notification that an animal is an ESA and would be expected to be in a pet carrier by default. It should be a relatively simple matter either (1) to add a question for service animal users about whether they think they have a service animal that should be given a seat with more foot space (with bulkhead or non-bulkhead preferences offered), or (2) for airlines to simply ensure that service animal users are always given seats with more foot space, as long as any move is confirmed as okay with them beforehand. See Appendices C. and D. in USAUSA's 2016 compromise comment. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

⁸⁴ From §3.c., "Basic Economy" de facto discriminates, avoidably. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

⁸⁵ <https://www.aa.com/i18n/travel-info/experience/seats/basic-economy.jsp>

⁸⁶ https://www.delta.com/content/www/en_US/traveling-with-us/onboard-experience/basic-economy.html

⁸⁷ <https://www.united.com/web/en-US/content/travel/inflight/basic-economy.aspx>

⁸⁸ As we put it to DOT on August 7, 2017, the boarding and bulkhead issues are more straightforward. The issue of whether or how to accommodate service animal users in light of the overhead space restriction is a little more complicated. These tickets do not (normally) allow a passenger to use the overhead bin space. Yet the person would have the under-seat footspace for carryon luggage in non-bulkhead seats. (Service animal users are historically supposed to have the option of bulkhead or non-bulkhead seats; see 14 CFR §382.81(c), while (d) is also conceptually relevant to allowing extra space as needed, other than a whole extra seat: https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=081e6fdb88efba024ce66cc2df66709&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_187

Since all fare types are supposed to be open to people with disabilities,⁸⁹ we felt that airlines should clarify any disability-related exceptions to their basic economy policies. Otherwise, the lack of clarity about whether their needs will be met has the practical effect of keeping people with disabilities from accessing the same spectrum of fares available to others, constituting de facto discrimination.⁹⁰

None of the airlines' Basic Economy pages we footnoted

[382 181](#))

The question is whether a total overhead storage prohibition for this ticket would apply to a service dog user whose dog occupies the footspace, since the dog is a disability-mitigation device. Would that person be entitled to any overhead luggage space to substitute for the footspace the dog occupies?

Presumably, assistive devices and associated disability accoutrements in a bag would be exempt from the fare restrictions and be allowed in the overhead, per 2009 DOT guidance, Q&A #44 under §382.121: https://www.transportation.gov/sites/dot.gov/files/docs/FAQ_5_13_09_1.pdf So the question is about carry-on luggage that is not exclusively disability-related.

American, for example, puts the carry-on allowance for Basic Economy roughly in terms of the footspace measurements. Perhaps if the overhead space for service animal users were limited to the footspace equivalent, that would be a reasonable accommodation. This would give Basic Economy service animal users the equivalent carry-on luggage space in the same class of service as non-service animal users. The restriction to a footspace-equivalent overhead space would still be a class-of-service restriction that passengers with normal tickets do not have. (The regulation regarding class of service is 14 CFR §382.87(f): https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=081e6fdbc88efba024ce66cc2df66709&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_187)

PSYCHIATRIC

This discussion is theoretical, but one of our authors has found the enforcement to be more passively practical. An airline representative told him not to worry about the Basic Economy overhead restriction, since his party would be pre-boarding and would have plenty of space. The implication was that the airline merely does not guarantee Basic Economy ticket-holders overhead space because they are (normally) boarding last, rather than the airline actively taking any measures to prevent such passengers from using the luggage space if it's available. This laissez-faire approach is an elegant solution to what may be a merely theoretical problem, but airlines still must make it clear that there is a possible exception for people with disability-related needs so they don't opt out based on a misunderstanding.

Additional regulations relevant to making a study of this might include 14 CFR:

§382.31—prohibits disability-related charges, yet allows charges regardless if more than one *seat* is occupied https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=081e6fdbc88efba024ce66cc2df66709&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_131

§382.93—passengers with disabilities must be allowed to pre-board if extra time is needed https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=081e6fdbc88efba024ce66cc2df66709&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_193

§382.121(b)—airlines can't count assistive devices as carry-on https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=081e6fdbc88efba024ce66cc2df66709&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_1121

⁸⁹ See 14 CFR §382.11(a)(1) and (3): https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=081e6fdbc88efba024ce66cc2df66709&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_1121

currently mention disability-related exceptions. We urged DOT to provide guidance or regulations to airlines to compel clarification, since we presume a simple asterisk and explanation about specific disability-related policy exceptions would adequately address the problem of de facto discrimination.⁹¹ The April 4th, 2018 DOT response in our email exchange was (in part) as follows:

With respect to whether the Department will be issuing guidance on basic economy seating programs, we traditionally decide whether or not to issue a guidance document when we receive a significant number of complaints about an issue or we have received data indicating that there is significant concern in the disability community about an airline policy or practice.

Since the initial problem is a simple one of ignorance-based fare avoidance, this is not the sort of issue we would expect to inspire formal complaints. Consequently, we're providing the data. A full 64% our community indicated they would be totally discouraged from purchasing Basic Economy fares due to their disability-related needs, while 91% were at least moderately discouraged. This data from 919 responses clearly indicates DOT needs to take action if this de facto discrimination is to stop.

We are reminded by this that access for people with disabilities isn't only about whether those who surmount the barriers get along okay. We must also consider how people are pushed to opt out altogether because the barriers are too much for them. Barriers include the perceptions and confusion that policies and their presentation create in reasonable people.

Fortunately, a ready solution is at hand and DOT has the power

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⁹⁰ Even experts on the regulations such as us have either hesitated or refrained from saving money on a Basic Economy fare. However, this is mostly due to a worry that the airline employees would not be versed in the regulatory exceptions and would use the Basic Economy policies as justification not to accommodate our disability-related needs. See §3.e.

⁹¹ We would expect the asterisk (or any functionally equivalent symbol) to appear next to any policy provision for *any* fare type, regardless of its name, where the policy provision may conflict with disability-related regulations or DOT guidance. At the minimum, the airline needs to note that there are disability-related exceptions. Either in the same location, or (if there's a space issue on a physical document) in another accessible document clearly specified in the original location, airlines should clarify exactly the manner in which they would make a disability-related exception (e.g., "A service animal user may choose to sit in either a bulkhead section or a non-bulkhead section without an extra fee; reserving a particular seat within either section may incur a fee.").

*to put it into effect.*⁹²

§4. *Whether the species of service animals and emotional support animals that airlines are required to transport should be limited*

§4.a. *Our compromise is that service animals should only be dogs, with limited access for miniature horses and capuchin monkeys, while ESAs should only be dogs, cats, and rabbits*

We are pleased DOT asks about ESA and service animal species separately in the ANPRM. We believe different considerations apply, resulting in a difference in the species that should be allowed under each category.

We articulated our positions during the Reg Neg⁹³ and in USAUSA's 2016 compromise comment.⁹⁴ Below, we excerpt the portions from the compromise comment that are relevant (in overview) to answering DOT's inquiries under this heading, including portions that provide some context in which to understand the positions.

Position:

Service animals must be trained for disability mitigation and public access and are limited to dogs, with exceptional access for capuchin monkeys in pet carriers and for miniature horses.

Rationale and details:

The category of "service animal" does not include (emotional)

⁹² <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

⁹³ See the positions we authored and supported in §§1. and 2. of the September 15th, 2016 "Service Animal Advocate Positions and Reasoning". <https://www.transportation.gov/office-general-counsel/negotiated-regulations/service-animals---advocate-position-and-reasoning>

⁹⁴ See §§1. and 2. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

support animals.⁹⁵ A **service animal** is.⁹⁶

- a dog
- trained to do work or perform at least one task to assist with a person's disability on the flight or at the destination⁹⁷
- trained to behave properly in public settings

*A service animal that is trained to behave properly in public settings is expected through that training to follow the **behavior standard**, which includes:*⁹⁸

⁹⁵ We provisionally use the term "support animal" hereafter. This was the term last used by DOT during the Reg Neg, but is not meant to bias whatever name might be used for the category in future regulations. The distinction between service animals and support animals, as last defined in the Reg Neg and in this comment, is based on whether the animal is trained to do its job, not on the type of disability mitigated ("emotional" or otherwise).

Some airlines indicated a preference for maintaining the ESA name simply due to ease of historical continuity. Some advocates indicated a worry that no matter how the category of "support animal" is defined, if "emotional" is in the name, it could be misinterpreted in an overly restrictive way. We welcome DOT to choose whatever term it deems best, with the following caveats.

"Support animal" is easily confused with "service animal" and "assistance animal" would be contrary to the way HUD's FFA term is defined. A term that is easily distinguished from "service animal" but is consistent with other agencies' terms is highly preferred. "Helper animal" was an early such suggestion, which may be the least of the evils, though some advocates worried it might sound denigrating. The term "comfort animal" is definitely to be avoided for that reason.

⁹⁶ Much of this section is taken from §2 of the 7/21/16 "Advocates' Service Animal Proposal". This document later had an 8/26/16 addendum; the unaddended proposal is available through the following link. <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0180>

Note that we reject the definitions hastily thrown together for the straw polls at the September Reg Neg meeting. That service animal definition was roughly as follows: Service animal is a dog, miniature horse, or capuchin monkey that is individually trained to do work or perform a task for an individual with a disability to assist with his or her disability. *An essential piece of this comment's "service animal" characterization the straw poll definition lacks is the public access training requirement—that the animal is "trained to behave properly in public settings".*

The straw poll definition of "service animal" also did not distinguish dogs from the exceptional species, which we do for clarity and inter-agency consistency. We presume voters did not distinguish the straw poll definition from the one in this comment, which had been used throughout the Reg Neg in the months before the poll. The straw poll results on this were: 13 Yes, 5 No, and 1 Abstain. At least the majority of the five advocates voting "No" later informally indicated they would vote "Yes" as long as disability-mitigating cats had some manner of access (as support animals).

<https://www.regulations.gov/document?D=DOT-OST-2015-0246-0279>

⁹⁷ DOJ is usefully detailed in giving work or task examples in its "service animal" definition at 28 CFR §36.104: "Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition." http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#se28.1.36_1104

⁹⁸ At the Reg Neg meeting on 6/14/16, Blane Workie (of DOT) expressed the worry that if we focus on a training requirement, the behavior will get overlooked. We find this puzzling, as these are two distinct issues. The training occurs before one travels. The behavior is what occurs during travel. The

- *being housetrained*
- *generally being connected to the handler by a leash, harness, or other tether (a disability or disability assistance may justify not using a harness, leash, or other tether at a given time)⁹⁹*
- *not being disruptive or destructive*
- *not acting aggressively or otherwise creating a threat to health or safety*
- *not being placed on a seat (on the user's lap is acceptable for assisting with a disability)*
- *not taking up another passenger's space without permission*
- *always remaining under control of the handler*

A "qualified individual with a disability"¹⁰⁰ would have the same access with such a service animal (used for disability mitigation during the flight or at the destination) as service animal users have under current regulations. However, there is no distinction among service animal users on the basis of their type of disability—psychiatric service animal users are not treated differently from other service animal users.

Miniature horses and capuchin monkeys that provide disability mitigation during the flight or at the destination are not called "service animals" so as to avoid confusion.¹⁰¹ However,

relationship between these is that the training is intended to ensure that the animal will reliably behave in a safe manner in stressful and unpredictable environments, rather than just hoping the animal will behave without having developed the appropriate psychological shock absorbers. From the service animal user perspective, we are confused that one would think these intertwined elements would somehow be mutually exclusive. Also note here that a training requirement is distinct from the much thornier issues of either setting up or verifying more specific training criteria. For many reasons that become apparent when one tries to construct a one-size-fits-all system, these criteria are best left to the various service animal user communities, rather than to regulations.

⁹⁹ Compare DOJ's tethering requirement at 28 CFR §36.302(c)(4): "*Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have 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, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)." Note that this does not strictly require the active use of the tether as the default, though this is arguably intended. http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#se28.1.36_1104

¹⁰⁰ See 14 CFR §382.3, but note that only the first prong of the "individual with a disability" definition applies to service animal users (actually having a disability, rather than merely a record of a disability or perception by others of having a disability). The other two prongs are relevant only to other situations, such as denial of service on their basis. http://www.ecfr.gov/cgi-bin/text-idx?SID=07c80383ddc4c31cf7a10f3f62f7ae62&mc=true&node=se14.4.382_13&rgn=div8

¹⁰¹ In addition to avoiding confusion about distinct treatments of different species under the same heading, this allows for greater inter-agency consistency between DOT and DOJ. Even though DOJ

their users may have similar access as service animal users or support animal users. This exceptional access would practically function the same as it already does, as follows.

The airline must determine whether any factors preclude the animal traveling in the cabin (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, or whether it would be prohibited from entering a foreign country that is the flight's destination). If no such factors preclude the animal from traveling in the cabin, an airline must permit it to do so with the person with a disability.¹⁰²

Miniature horses must be trained to do work or perform a task to mitigate a person's disability, and trained to behave properly in public settings. Miniature horses are also expected to comport to the behavior standard.

Capuchin monkeys must be trained for disability mitigation. They are exclusively used for residential disability mitigation and are not intended to assist their users in public settings. Capuchin monkeys are thus restricted to pet carriers while traveling, and may not be removed.

An essential piece to winning the support of many advocates on the ACCESS Advisory Committee was that DOT would, at some specified period, conduct a review of the species allowed as service animals. This would allow DOT to determine whether there is sufficient evidence at that time to add additional species as service animals, such as cats. Airline representatives did not object to this in the September straw poll, and we include it as a requirement here.¹⁰³

See Position SAS 1 in "Service Animal Advocate Positions and Reasoning" for the rationale behind our species restriction for

allows exceptional access for miniature horses under Titles II and III, DOJ's "service animal" definition only labels dogs as "service animals", noting: "Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition." Id. See 28 CFR §36.302(c)(9) for Title III-covered entities' obligations regarding miniature horses.

http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=PART#se28.1.36_1104

¹⁰² This paragraph follows 14 CFR §382.117(f). http://www.ecfr.gov/cgi-bin/text-idx?SID=07c80383ddc4c31cf7a10f3f62f7ae62&mc=true&node=se14.4.382_1117&rgn=div8

¹⁰³ We suggest a period on the order of five years from the effective rule date, with six months to make a determination. However, we leave it to DOT to decide whether an alternative timeframe makes sense.

*service animals.*¹⁰⁴

[...]

*Support animals*¹⁰⁵ *assist with disabilities, but generally lack the training that characterizes service animals and should be limited to dogs, cats, and rabbits.*

Rationale and details:

*A **support animal** is an animal that:*

- is a dog, cat, or rabbit*
- is used to assist with a person's disability on the flight or at the destination (for example, its presence reduces the likelihood or effects of a panic attack)*
- need not be trained to do work or perform a task to assist with a person's disability*
- need not be trained to behave properly in public settings*

The bulk of the reasoning for the species limitation is available in an earlier document.¹⁰⁶ The gist is that support animals typically start as pets, dogs and cats are common pets but many people are not "dog people", and rabbits provide textures dogs and cats don't, which can be especially helpful in mitigating sensory-related disabilities like autism. Beyond this, DOJ's reasoning on greater species limitations applies.

We note that several advocates would not agree to eliminating cats as service animals unless they were included as support animals. We also highlight that currently, there are very few species prohibited as support animals.¹⁰⁷ So we are proposing going from a virtually unlimited number of species to only three.¹⁰⁸ This represents a good-faith compromise in the face of

¹⁰⁴ <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208>

¹⁰⁵ See the earlier footnote regarding the provisional "support animal" terminology.

¹⁰⁶ See Position ESA 1 in §2 of "Service Animal Advocate Positions and Reasoning".

<https://www.regulations.gov/document?D=DOT-OST-2015-0246-0208>

¹⁰⁷ According to 14 CFR §382.117(f), airlines "are never required to accommodate certain unusual service animals (e.g., snakes, other reptiles, ferrets, rodents, and spiders) as service animals in the cabin." http://www.ecfr.gov/cgi-bin/text-idx?SID=07c80383ddc4c31cf7a10f3f62f7ae62&mc=true&node=se14.4.382_1117&rgn=div8

¹⁰⁸ Straw polls at the September Reg Neg indicate (1) there was support among all voters for support animals in principle, but also (2) that there was much airline interest in placing strict limitations on them. (1) <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0282> (2) <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0280>

more extreme initial views among some on both sides.^{109,110}

§4.b. Household birds should be excluded as ESAs

In response to a call from others for household birds to be included, we freshly note that the animals we include can either easily be housetrained (in the cases of dogs and cats) or would remain in a carrier or on a lap and its waste is neither messy nor a significant zoonotic disease vector (in the case of rabbits).¹¹¹ By contrast, it would be unusual for a bird to be on a lap if out of a carrier,¹¹² many birds are difficult to housetrain (worse, it can be harmful to their health),¹¹³ they need to eliminate often (15–50 times a day),¹¹⁴ and their waste is a more significant zoonotic disease vector.¹¹⁵

An animal may merely be transported and be kept in a pet carrier the entire journey—as a capuchin monkey would be.¹¹⁶ In that case, the animal could wear a diaper. However, ESAs cannot fulfill their purpose if they are kept in pet carriers the whole time.¹¹⁷ We do not believe an animal should have public access outside a carrier if members of its species would generally need to wear diapers, as this is an example of the spectacle that denigrates the public perception of service animals and makes access more difficult for others. We therefore advise against allowing household birds as ESAs

¹⁰⁹ We reject DOT's "symmetry" argument: that the symmetry of allowing dogs, miniature horses, an capuchin monkeys as the exclusive species for both service and support animals is some kind of sufficient benefit to make sense of this. Miniature horses and capuchin monkeys are generally not used as support animals, so the presumed symmetry is effectively nonexistent on this approach. A better approach is to understand which species practically make sense for each category and to base the system on that understanding, tailored to each category. (Theoretical) simplicity does not override all other virtues.

¹¹⁰ <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹¹¹ See the July 1, 2010 article "Just Ask the Expert: The zoonotic threat of rabbits and other wild animals", by Kevin R. Kazacos, DVM, PhD. <http://veterinarymedicine.dvm360.com/just-ask-expert-zoonotic-threat-rabbits-and-other-wild-animals>

¹¹² "If you are looking for a lap pet, a companion bird may not be the best pet for you." From the American Veterinary Medical Association's "Selecting a Pet Bird". <https://www.avma.org/public/PetCare/Pages/Selecting-a-Pet-Bird.aspx>

¹¹³ For a discussion among bird fanciers with real-world experience of these dangers—including cloacal prolapse and kidney damage—see the thread "Potty Training is dangerous" on the "Avian Avenue" discussion forum. <http://forums.avianavenue.com/index.php?threads/potty-training-is-dangerous.20749/>

¹¹⁴ This varies by species, with smaller birds needing to eliminate more often. The 15–50 range (macaw minimum to budgie maximum) is reported by various online articles and discussion fora; one of many examples is "DO BIRDS CONTROL THEIR BOWEL MOVEMENTS?" by Tom Ryan. <http://animals.mom.me/birds-control-bowel-movements-7172.html>

¹¹⁵ See the CDC's "Birds Kept as Pets". <https://www.cdc.gov/healthypets/pets/birds.html>

¹¹⁶ Capuchin monkeys aren't used on aircraft. Helping Hands representatives told us during the Reg Neg that the monkeys almost never actually fly with the person with a disability, and when that (paralyzed) person does fly, they have a human assistant. The monkeys are almost always flown by a (non-disabled) employee or trained volunteer for delivery, additional training, or veterinary work. This means that they normally fly by special agreement with the airline, since non-disabled passengers are not covered by the ACAA.

¹¹⁷ See §3 above.

under ACAA regulations.

§5. Whether the number of service animals/emotional support animals should be limited per passenger

§5.a. A principled approach guides our reasoning about limiting the number of service animals and ESAs per passenger

Whether or how to limit the number of animals per passenger was a peripheral issue at the Reg Neg, since (1) few passengers seek to travel with multiple animals and (2) practically all stakeholder representatives agreed it was reasonable to set at least moderate limits. We take a principled approach to arrive at recommending no more than three service animals be allowed per passenger,¹¹⁸ no more than two ESAs per passenger, and no more than two from a combination of the categories.

First, we do not presume to know everyone's circumstances or needs, nor can we predict future treatment modalities. Thus we are motivated from the top down to allow a little room for reasonable animal uses beyond our current imaginings. This wiggle room amounts to an " $n + 1$ " approach, where n is the number arrived at from bottom-up reasoning for how many animals to allow. This number may differ between service animals and ESAs. We call this $n + 1$ approach the *limited imaginings* principle.

§5.b. Per passenger, no more than three service animals, two ESAs, or two total of a combination should be allowed

We imagine that for the great majority even of cases where more than one service animal is used, an individual would not use more than two animals. Although it is unusual, there are multiple reasons someone might use more than one service animal. The animals may be:

- trained to mitigate a single disability in two different ways
- trained to mitigate multiple disabilities, each in different ways
- simultaneously required for the same type of mitigation (such as for mobility assistance on each side)
- switched out upon the first becoming tired and unable to assist¹¹⁹

¹¹⁸ This limitation coincides with DOT's current enforcement scheme, as described during the Reg Neg and then in the ANPRM: "the Department's Office of Aviation Enforcement and Proceedings, as a matter of prosecutorial discretion, has chosen not to pursue action against carriers that refuse to accept more than three service animals per person." <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹¹⁹ DOT provides examples on some of these points in the ANPRM: "A single passenger legitimately may have more than one service animal. For example, a person who is deaf and has panic attacks may

It is difficult for us to imagine how it would be reasonable for someone to require more than two service animals. Using the *limited imaginings* principle, we recommend capping the number of service animals allowed per person at three.

When it comes to ESAs, there is no specific training by which multiple animals would differ. Surely, a person may connect with any number of animals that each have any number of differences, yet this does not obligate an airline to transport any number of ESAs for an individual. We believe one ESA should be sufficient per person, as the bulleted points above that justify the use of multiple service animals do not pertain to ESAs.

There is a further practical consideration if we presume ESAs would be restricted to pet carriers.¹²⁰ The principle of *limited imaginings* results in our recommending a maximum of two ESAs per person, but the physical possibilities wherein someone might have two ESAs are themselves limited. In the first instance, an individual has two ESAs small enough and friendly enough to be jointly contained in one pet carrier.¹²¹ The second scenario involves a traveling companion willing to give up their under-seat space, such that the ESA user may have each of their two ESAs in separate carriers.

We imagine practically any service animal may be equally used as an ESA, since the mere presence of the animal as a pet is what's important for ESA use. So even with the principle of *limited imaginings*, we advise no more than two animals be allowed if the individual wishes to bring a combination of service animal(s) and ESA(s).

§5.c. It is reasonable for airlines to require special notification from

use one service animal to alert him or her to sounds and another to calm him or her. A person may also need more than one animal for the same task, such as assisting with stability when walking." <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹²⁰ See §3 above.

¹²¹ All the discussion of pet carrier use is predicated on humane considerations present in the background. An animal in a carrier must be able to stand, turn around, sit, and lie down in the container. If there were two pets in the carrier, they would each need to have this room. We believe this is consistent with USDA's Animal Welfare Act regulations, assuming the animals get along and are monitored. First, regarding dogs and cats, see 9 CFR §3.14(e)(1): "Primary enclosures used to transport live dogs and cats must be large enough to ensure that each animal contained in the primary enclosure has enough space to turn about normally while standing, to stand and sit erect, and to lie in a natural position." http://www.ecfr.gov/cgi-bin/text-idx?SID=cbb6600299055098232f55316f6d8a16&mc=true&node=se9.1.3_114&rgn=div8

Regarding rabbits, see 9 CFR §3.61(c): "Primary enclosures used to transport live rabbits shall be large enough to ensure that each rabbit contained therein has sufficient space to turn about freely and to make normal postural adjustments." http://www.ecfr.gov/cgi-bin/text-idx?SID=cbb6600299055098232f55316f6d8a16&mc=true&node=se9.1.3_161&rgn=div8

those traveling with multiple disability-mitigating animals

In addition to limiting the number of disability-mitigating animals per passenger in the above ways, in the USAUSA 2016 compromise comments we recommended a graduated notification protocol beyond the use of a decision tree when it comes to multiple animals.¹²² Our present recommendations fall along very similar lines, with nuanced but justified enhancements.

We advise that passengers seeking to travel with two service animals would need to merely alert the airline via phone/TTY,¹²³ as we find the slight additional burden justified for the greater accommodation request. There would be a higher burden for those seeking to travel with three service animals, two ESAs, or a service animal and an ESA. In one of those cases, the passenger could be required to minimally explain/justify to the airline that the animals are separately and jointly needed for the passenger's disability mitigation.

The point of this goes beyond merely discouraging fraud and ignorance, as it is not intended to provide airlines an easy means to deny all comers. The step of actively communicating with the airline affords the passenger and airline an appropriate opportunity to ensure that each party's needs will be met.

§6. Whether an attestation should be required from all service animal and emotional support animal users that their animal has been trained to behave in a public setting

§6.a. A decision tree should be required, not an attestation

To the basic question of whether an *attestation* should be required, we must be clear that our answer is no. However, we do believe a *decision tree* should be used.^{124,125}

¹²² See §10., which collects miscellany. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹²³ USAUSA's decision tree refers customers seeking to travel with more than one disability-mitigating animal to the airline, under the heading of "special assistance". See Appendices C. and D. of USAUSA's 2016 compromise comment <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹²⁴ We defined these terms in §5 of USAUSA's 2016 compromise comment as follows: "[...]a **decision tree** branches into option paths with forced choices in a stepwise process and can yield different outputs, given different inputs. An **attestation**, as put forth by DOT just before the fifth Reg Neg meeting, is a single block of text with one possible selection or output." <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹²⁵ In the ANPRM's "ACCESS Advisory Committee" section, under the "Documentation/Attestation" heading DOT writes: "The advocates and the airlines appeared to support the attestation model as a

Our decision tree idea from the Reg Neg¹²⁶ is a solution targeted to meet design challenges by avoiding many of the problems with an attestation.¹²⁷ We reply to one of DOT's questions by noting that one of those challenges is that "the need for assurance that the service animal can behave properly [is] greater in air travel, as air travel involves people being in a limited space for a prolonged period without the ability to freely leave once onboard the aircraft".¹²⁸ In our 2016 design challenges document, we identified two further challenges as points of difference from the usual ADA Title III environments: some pets are allowed on board when people pay fees, and gatekeepers (employees) are more in the position of actively verifying an animal's status.¹²⁹

More specifically in the present context, we seek to address fraud- and ignorance-based issues.¹³⁰ This means that individuals must be actively engaged in a way such that they are likely to read and understand their rights and responsibilities—and specifically, what it means to claim one will be traveling with a service animal or ESA.

Standard blocks of legalese are entirely ineffective for these purposes. People agree to them in order to proceed, while not understanding them or

deterrent to individuals who might seek to falsely claim that their pets are service animals." This is wrong. DOT cites a vote tally as evidence, but DOT authored the tally document and as we recall it, DOT is the only party that specifically preferred its attestation suggestion over the decision tree. Most other parties were undecided between the two. We recall that our Brad Morris noted during the vote that "attestation" was a stand-in for *either* an attestation or decision tree approach, to be determined, and that he strongly preferred the decision tree. The committee never reached a point at which members could vote between an attestation and a decision tree. With respect, it seems that DOT's memory in the ANPRM about the attestation discussion paints DOT as a savior, but conflicts with our own memory and strongly expressed stance. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹²⁶ The decision tree in this context has its roots in PSDP's early 2016 ACAA Proposal, which contains a tick-box access form and guidance document. This proposal combined with our familiarity with Amtrak's use of a limited decision tree for disability accommodations, leading us to the idea of a decision tree for ACAA service animal access. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-proposal>

¹²⁷ We will not replicate here everything we've said about the decision tree and its implementation. For more details, see §§4.–6., 8., and 10. and Appendices A.–D. of USAUSA's 2016 compromise comment. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹²⁸ To be perfectly clear, DOT asked whether this was the case in the ANPRM. We modified the question to answer in the affirmative. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹²⁹ See §1 of Brad Morris's "Design Challenges and Solutions for Service Animal Access under the ACAA: A Justificatory Guide for Regulators and Stakeholders", as amended in early March 2016. <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/aca-a-design-challenges-solutions>

¹³⁰ In the ANPRM, DOT asks: "Would a provision allowing airlines to require service animal users attest that their animal has been successfully trained to function as a service animal in a public setting reduce the safety risk that passengers, airline staff, and other service animals face from untrained service animals?". Safety is one of the major ignorance-based issues the training confirmation is meant to address in the decision tree. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

even reading them. The iTunes user agreement and people clicking without reading has been an example of this as the butt of jokes in popular culture for some time.¹³¹

We explain more about the importance of DOT not assuming an attestation could hope to serve the same functions as a decision tree in §5. of USAUSA's 2016 compromise comment. The heading of that section is "Decision tree vs. attestation", with the description: "DOT, advocates, and airlines each have independently sufficient reasons to prefer a decision tree over an attestation."¹³²

§6.b. There should be reasoned differences between service animal and ESA decision tree confirmations regarding training and its consequents

Among other items, the decision tree would have service animal users confirm that their service animals have been trained to adhere to the behavior standard in situations similar to air travel.¹³³ Along a different branch of the tree, an ESA user would confirm understanding that their ESA must adhere to the behavior standard if out of the pet carrier and in a lap for disability mitigation.¹³⁴

The difference in training requirements between the categories is based on (1) a difference in practical expectations and (2) a difference in the degree of access. Service animals would not have to be contained in pet carriers, yet ESAs would, unless in a lap for disability mitigation.

§6.c. A decision tree is the right shared cost to increase safety

¹³¹ We hesitate to elaborate on a South Park episode from 2011. We can reference recent jokes deriving from Gizmodo's James O'Malley tweeting that iTunes' user agreement contains a clause prohibiting its use in aid of constructing nuclear weapons. The agreement is therefore said to be stricter than the agreement from the recent Trump-Kim summit in Singapore. For one of many reports on this, see IFLScience's "Turns Out iTunes Has A Stricter Nuclear Weapon Clause Than Trump And Kim". <http://www.iflscience.com/technology/turns-out-itunes-has-a-stricter-nuclear-weapon-clause-than-trump-and-kim/>

¹³² <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹³³ Our decision tree exhibition in Appendix D. of USAUSA's 2016 compromise comment has separate confirmations for service animal behavior, disability mitigation training, and service animal public access training. The last of these is phrased as follows: "Has your animal been trained to behave properly in unpredictable situations that can happen during air travel? This includes being safe around: other animals, a variety of passengers, and busy and cramped environments." It's important for the decision tree to use plain language and minimize/explain any special phrases. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹³⁴ The behavior standard is reproduced in §4. above. Reasoning for the decision tree content is in §8. of USAUSA's 2016 compromise comment; Appendices C. and D. exhibit §8.'s recommendations. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

DOT asks several related questions:

*What is the impact on individuals with disabilities of allowing airlines to require attestation as a condition for permitting an individual to travel with his or her service animal?*¹³⁵

We will answer as if this and subsequent questions are about a decision tree, rather than an attestation. Attestations—in the form of paperwork one must print, complete, submit, and carry—are an entirely different beast that presents various opportunities for unwanted difficulties on all sides.¹³⁶

A decision tree would ensure—as much as is reasonable—that people attempting to fly with animals purported to be for disability assistance are educated about what that means and take an active role in directly assuming responsibility. It is easy for a reasonable person not to have read federal regulations or relatively obscure guidance, laboring under various misconceptions based either on thinking "the ADA" applies everywhere or on the latest poor reporting that conflates service animals with therapy animals.

Any such new requirement would be more of a burden (upfront) for those currently enjoying fairly burden-free access with a non-psychiatric service animal.¹³⁷ However, a decision tree is *much* less burdensome than third-party documentation requirements.¹³⁸ It is also a shared cost the community bears to impart basic levels of responsibility and safety.

Solutions are not without some cost, nor may some community members magically reap the benefits without chipping in for their part. This may require effortful change for some, who may understandably grumble about facing new burdens where they had none before. However, all types of service animal groups during the Reg Neg had significant concerns about the risks for the community under the current system. Everyone equally must be willing to pay an ounce toward prevention if they want to avoid situations needing a pound of cure.

Of course, the community of psychiatric service animal users would much

¹³⁵ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹³⁶ Here we have in mind the patchwork of attestations that have recently hit the market from various airlines.

¹³⁷ As far as the regulations go.

¹³⁸ See USAUSA's 2016 survey report and 2018 survey report for details on such burdens.

<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

rather share the lighter burden of a decision tree with their fellow service animal users, which is orders of magnitude less than the requirements DOT currently allows airlines to impose on them. The difference is that the decision tree is designed to educate and get confirmation of understanding, whereas the third-party documentation requirements assume individuals with (mental health) disabilities cannot be trusted and must prove they're not "guilty".¹³⁹

§6.d. *A decision tree should be completed before flying*

DOT further asks a few related questions:

*If such a provision is allowed, should airlines be able to require the attestation in advance of travel? How long in advance of travel? What options exist for preventing any advance documentation requirement from being a barrier to travel for people with disabilities?*¹⁴⁰

We cannot answer these questions with the necessary details better than we did in USAUSA's 2016 compromise comment and during Reg Neg negotiations, so it bears excerpting a portion of §4.(b) from the former and then a portion of the latter below. The gist is that decision tree completion could be required in advance of travel—no more than 12 hours in advance, as airlines suggested.¹⁴¹ However, there must be reasonable allowances both for extreme situations and for deployment based on whether the airline or a travel agent handles the booking.

We start with a first principle: If passengers are to be responsible for completing a decision tree/attestation in order to secure an accommodation or service regarding a disability-mitigating animal, they must have clear notice of their possible decision tree/attestation responsibilities within a reasonable timeframe that allows them to readily fulfill those responsibilities.

There are two distinct types of booking parties: airlines and third-party ticket agents¹⁴². The ideal process is the same for these parties, yet there are currently significant practical

¹³⁹ Respectfully, attestations seem designed more to satisfy attorneys' liability concerns than to reach through to individuals in a meaningful way.

¹⁴⁰ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁴¹ *Carrier Response to Revised Service Animal Proposal*, revised September 8th, 2016 (p. 4, item 5).
<https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209>

¹⁴² A third-party ticket agent is simply a "ticket agent", as defined in 49 USC §40102(a)(45).
<https://www.gpo.gov/fdsys/pkg/USCODE-2011-title49/html/USCODE-2011-title49-subtitleVII-partA-subparti-chap401-sec40102.htm>

barriers to implementing this process across many ticket agent platforms. We'll run through the ideal process and structure first, which is one that would have the highest expected compliance. This ideal is a tool to segue into what would be required of airlines vs. ticket agents.

Ideally, customers are prompted to complete the decision tree/attestation at the point of ticket purchase, toward the end of the booking flow.¹⁴³ Next, right after booking, the passenger receives electronic notice of their possible responsibilities, most likely through email.¹⁴⁴ The decision tree/attestation remains available for completion after booking.¹⁴⁵ Airlines and ticket agents provide clear and conspicuous information on their websites about the decision tree/attestation and all that is expected of those who use disability-mitigating animals. Airlines are highly encouraged to remind passengers of their possible decision tree/attestation responsibilities in any early check-in email.

Airlines are in a much better position than ticket agents to implement the ideal process just described, and that is what we propose would be required of each airline that chooses to require use of the decision tree/attestation. Airlines are currently required to provide an accommodation request form ("ARF") on their websites,¹⁴⁶ which provides a perfect piggybacking opportunity. Some airlines have chosen to provide this ARF on the tail end of the booking flow, rather than just on a non-booking part of their website. It is feasible for airlines to incorporate a decision tree/attestation into an ARF, and to incorporate such an ARF into the tail end of an airline's booking flow.¹⁴⁷

¹⁴³ This would be immediately after the passenger name record ("PNR") is generated. This special service request ("SSR") information would not be part of the PNR, but would be attached to the PNR. This avoids various difficulties associated with adjusting an airline's critical system.

¹⁴⁴ We only require this electronic notification to be through some common means of communication that passengers individually make clear they can receive. However, we leave it open-ended as to what that method might be since methods of electronic communication arise and become common on a pace faster than regulations are updated. For instance, some variation of texting, an internet chat message (such as through Skype or Facebook), or a notification through a mobile app all might make sense for this notification, if a passenger prefers. Email is the floor of notification options, not the ceiling.

¹⁴⁵ This post-purchase email notice is still needed for various reasons: the need for an accommodation may change before travel, the person booking the flight is not the passenger who will be responsible for the disability-mitigating animal, etc.

¹⁴⁶ Per 14 CFR §382.43(d). Note in (c) of this section that the web accessibility rule does not apply to certain small airlines. We expect such airlines to act in reasonable ways consistent with the decision tree/attestation content and design, as general nondiscrimination regulations would apply regardless. Clearly, third-party documentation requirements would be out. http://www.ecfr.gov/cgi-bin/text-idx?SID=2924d7d0b28226bcc03f608e7cd86b81&mc=true&node=se14.4.382_143&rgn=div8

¹⁴⁷ See Appendix A: *Report on Technical Feasibility*, which indicates these may be easier through a third

There are non-technological hurdles with many ticket agents that currently stand in the way of regulating that ticket agents implement the ideal system.¹⁴⁸ For those ticket agents that do not choose to implement the ideal system, the next best thing—as indicated by airlines during the Reg Neg—is to have airlines ensure that right after someone books a flight with a ticket agent, the passenger is alerted either by the ticket agent or the airline of the passenger's possible decision tree/attestation responsibility.¹⁴⁹ Airlines also indicated they have a strong incentive to make sure passengers with disability-mitigating animals are aware of their responsibilities so all parties can avoid difficulties at the airport.¹⁵⁰ We thus follow the airlines' recommendation with respect to ticket agents and require this "next best" system for bookings through them, as ensured through airlines.

These systems hold promise for the common booking scenario in which tickets are purchased well in advance of travel. There are other ways to account for less common booking scenarios.

On the extreme, a passenger may show up at the airport in an emergency and purchase a ticket at the ticket counter. A passenger with a disability-mitigating animal must be allowed to do this if any otherwise similar passenger can, but the airline may still require that the passenger complete the decision tree/attestation before flying. As airlines indicated during the Reg Neg, if an airline is going to require that such a passenger complete the decision tree/attestation, the airline must find a way to have that readily available to the passenger in a way accessible to the passenger. Similarly and as proposed by

party.

¹⁴⁸ These barriers are not insurmountable, but in order to honor all stakeholders' meaningful considerations, we accept the reasonable compromise offered by the airlines with respect to ticket agents. This is notwithstanding 14 CFR §382.15, "Do carriers have to make sure that contractors comply with the requirements of this Part?" http://www.ecfr.gov/cgi-bin/text-idx?SID=88b33264318ef220957c7a77629a9d5e&mc=true&node=se14.4.382_115&rgn=div8

¹⁴⁹ The ACAA (49 USC §41705) enables DOT to regulate airlines, not ticket agents. 49 USC §41712 (regarding unfair and deceptive practices) gives DOT some mildly relevant authority over ticket agents, but applying it here may be a stretch. We do not propose that airlines must duplicate notifications (or even decision trees/attestations) implemented by ticket agents, only that airlines are ultimately responsible for ensuring that passengers are afforded the necessary opportunities to fulfill their possible obligations.

¹⁵⁰ "The airlines have every interest and incentive to make passengers planning to travel with service animals aware of the requirement to submit the required documentation no later than 12 hours before flight. In addition to including that service animal documentation submission information on carrier websites, carriers would also include a reminder on ticket receipts and check in reminders." *Carrier Response to Revised Service Animal Proposal*, revised September 8th, 2016 (p. 4, item 5). <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209>

airlines, a passenger who books within 12 hours of the flight must be allowed to complete any required decision tree/attestation within that timeframe,¹⁵¹ which may well have to occur at the airport and be facilitated by the airline.

Another type of less common scenario involves those who either don't book online or are not able to complete the decision tree/attestation online. As airlines have suggested, they (or a ticket agent, where relevant) would be responsible for the individual receiving the notification at and/or after the point of purchase, roughly in accordance with the timeline and applicable system above. Those who receive paper tickets through the mail would receive notification with the ticket. All notifications refer passengers both to the online method for getting to the decision tree/attestation, and to the offline method for receiving a decision tree/attestation equivalent that could be faxed in (See Appendix B. Notification language). In the latter case, a passenger would call to request such a form.¹⁵²

The decision tree may be mandatory, but we elaborated during the Reg Neg that exceptions must be made for those who reasonably do not complete the decision tree in advance of travel (e.g., someone else made the booking and didn't relay the decision tree notification to the passenger).

It is not acceptable that a person with a disability would not be able to fly with their assistive device due to the refusal of an airline to make a reasonable exception on a case-by-case basis. If such a person has a good reason for not having completed the decision tree ahead of time, they should be given the opportunity of doing so at the airport via some method accessible to that person.

Willfully not completing the decision tree in advance of travel carries the deterring risk of then being at the mercy of the subjective judgment of airport personnel as to what constitutes good reason. Those who willfully do not complete the decision tree chance having their animals turned away at the airport, with particular scrutiny at the gate if they bypass the ticket counter by checking in online. Additionally, if given the green light to do so, they must take extra time to complete the

¹⁵¹ "The only circumstances in which the required documentation would be allowed to be provided closer than 12 hour before time of travel would be when ticketing occurs fewer than 12 hours prior to the time of travel." Sic, id. (p. 3, item 5).

¹⁵² Excerpted from USAUSA's 2016 compromise comment. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

decision tree at the airport (if the airline desires), risking a missed flight.

[...]The level of compliance we should expect with this decision tree default varies based on whether the decision tree can be built into the ticket purchase flow, or whether there is an email alert system after the purchase. Backups to the default should only burden passengers in reasonable proportion to the level of compliance we should expect. If airlines can only implement a system wherein passengers are expected to track down the fine print of an email at which many passengers will only glance, airlines should expect a very low level of compliance.¹⁵³ Consequently, airlines would need to have a very low bar at the airport for granting access to those who earlier failed to complete the decision tree.¹⁵⁴

Appendix B. in USAUSA's 2016 compromise comment contains a breakdown of what decision tree notification language should be used, how, and why.¹⁵⁵

§6.e. Decision tree profile retention can ease the burden

Having the option to save one's decision tree answers in a profile is a means to ease the burden for frequent flyers. Here we excerpt the short §6. from USAUSA's 2016 compromise comment to explain:

Airlines must allow passengers to store their decision tree submission information as part of their profile in either a frequent flier program or through the carrier's required accommodation request form ("ARF").¹⁵⁶ Airlines would allow passengers to pre-populate the same attestation information for future travel and re-attest that the information is accurate. Airlines indicated at the Reg Neg they would commit to exploring whether this is feasible;¹⁵⁷ a third-party report

¹⁵³ This is not to say that any iteration of an email-based notification system would have very low compliance. However, this is a significant worry if the decision tree can truly not be made part of the ticket purchasing process. Advocates look forward to hearing from airline representatives about the details of implementations that might garner more compliance.

¹⁵⁴ Excerpted from "Service Animal Advocate Positions and Reasoning", from September 15th, 2016. <https://www.transportation.gov/office-general-counsel/negotiated-regulations/service-animals-advocate-position-and-reasoning>

¹⁵⁵ <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹⁵⁶ See 14 CFR §382.43(d). http://www.ecfr.gov/cgi-bin/text-idx?SID=2924d7d0b28226bcc03f608e7cd86b81&mc=true&node=se14.4.382_143&rgn=div8

¹⁵⁷ "The carriers commit to exploring reasonable means to minimize the burden of re-submission (including but not limited to storing of information already submitted) once the exact details of the initial submission process are determined." *Carrier Response to Revised Service Animal Proposal*, revised

*indicates this profile retention is feasible.*¹⁵⁸

*This profile retention solution was suggested and supported by advocates at the Reg Neg as a way to make the decision tree palatable to the service animal user community. To allay privacy concerns, profile retention must be voluntary (one must actively opt in), and airlines would be prohibited from using decision tree information for commercial purposes. Many service animal users have been amenable to this process as long as it is flexible regarding the retention and use of their data.*¹⁵⁹

§6.f. The decision tree should apply to all users of disability-mitigating animals

Finally for this section, DOT asks:

*If DOT allows airlines to require attestation that an animal has received public access training, should the attestation be limited to certain types of service animals? Why or why not?*¹⁶⁰

There are two ways to understand "types of service animals": (1) service animals for different types of disabilities and (2) service animals vs. ESAs.

Regarding (1), disability profiling is not okay. Further, discriminating on the basis of disability type is contrary to the ACAA's prime directive.¹⁶¹

Regarding (2), we believe it is not reasonable to expect ESAs to have received public access training, so it would not make much sense to ask whether they have received such training.¹⁶² Instead, we believe ESAs should be in pet carriers by default.¹⁶³ However, we do believe everyone who wishes to bring a purported service animal or ESA should complete the decision tree, with tailored questions based on the responses.

§7. Whether service animals and emotional support animals should be

September 8th, 2016 (p. 4, item 6). <https://www.regulations.gov/document?D=DOT-OST-2015-0246-0209>

¹⁵⁸ See Appendix A: *Report on Technical Feasibility*, which indicates that some airlines may find it easier to contract a third party for this purpose. Note that the particular (potential) stumbling block raised in the report, that of segmenting information for HIPAA purposes, is not raised by the decision tree data.

¹⁵⁹ <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹⁶⁰ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁶¹ See THEOREM A Disability-type discrimination from the *Introduction*, plus §1. above.

¹⁶² See §2. above.

¹⁶³ See §3. above.

harnessed, leashed, or otherwise tethered

§7.a. A tethering policy is appropriate

We have been confused as to why DOT has *not* had a reasonable tethering requirement from the beginning. We welcome such a requirement to facilitate better control of animals, if it is formulated well and with appropriate exceptions.

For this section, we'll assume ESAs will be contained in pet carriers by default, but that they would be subject to a tethering requirement if out on a lap for disability mitigation.¹⁶⁴

§7.b. We have a specific recommendation based on a study of DOJ's requirement plus context

DOJ's longstanding tethering requirement works adequately well.¹⁶⁵ We executed a more rigorous study of that requirement for the national park context in 2014.¹⁶⁶ Applying the considerations we illuminated there to the flight context, we suggest the following as a **tethering requirement**.¹⁶⁷

A service animal must be under control at all times. This includes the use of a harness, leash, or other tether, unless the restraint device would interfere with the service animal's safe,

¹⁶⁴ See §3 above.

¹⁶⁵ The requirement can be found at 28 CFR §36.302(c)(4): "*Animal under handler's control*. A service animal shall be under the control of its handler. A service animal shall have 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, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)." We believe this does not strictly require the active use of the tether as the default, though this is arguably intended. The flight context may reasonably vary in this regard, since both the service animal and the handler must settle in for long periods. https://www.ecfr.gov/cgi-bin/retrieveECFR?%20gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&n=28y1.0.1.1.37&r=P%20ART#se28.1.36_1302

¹⁶⁶ PSDP's 2014 "National Park Comment" analysis resulted in the following requirement recommendation: "A service animal must be controlled at all times with a harness, leash, or other tether, unless the restraint device would interfere with the service animal's safe, effective performance of work or tasks or the individual's disability prevents using these devices. In those cases, the service animal handler must be able to recall the service animal to the individual's side promptly using voice, signals, or other effective means of control. When not immediately performing work or tasks directly related to the individual's disability, the service animal must not wander from the individual, but must remain within a distance and location that easily allows handler supervision of the service animal." <https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/national-park-comment>

¹⁶⁷ This is intended to be regulation language. For an example of simplified version for a decision tree, see Appendix D. in USAUSA's 2016 compromise comment, which contains the following in an elaboration of the behavior standard: "• generally being connected to the handler by a leash, harness, or other tether (a disability or disability assistance may justify not using a harness, leash, or other tether at a given time)". <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

effective performance of work or tasks or the individual's disability prevents using these devices. In those cases, the service animal handler must be able to recall the service animal to the individual's side promptly using voice, signal, or other effective means of control. Regardless of the means of control, any service animal must not wander from the individual, but must remain next to the handler when not immediately performing work or tasks directly related to the individual's disability.

This requirement unfurls its simpler counterpart, which may be found in a broader behavior standard (such as presented in §1. and explained in Appendix E. of USAUSA's 2016 compromise comment).¹⁶⁸

*§8. Whether there are safety concerns with transporting large service animals and if so, how to address them*¹⁶⁹

§8.a. A pet carrier restriction would limit ESA size

DOT relays a concern from airlines and then a proposed solution from some:

*Airlines have also expressed safety concerns about large service animals in the cabin, particularly large emotional support animals that have not received disability-mitigation training. Some airlines have urged the Department to consider instituting size and weight restrictions for emotional support animals.*¹⁷⁰

If DOT were to allow a restriction of ESAs to pet carriers by default, as we recommend,¹⁷¹ the *can't fight, can't fly* principle¹⁷² means ESA size and weight would be limited.

§8.b. Occasional passenger grumbling doesn't warrant access reduction for service animal users based on animal size

¹⁶⁸ <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹⁶⁹ Quite a bit of what we write in §3 above about classes of service pertains to the discussion in this section.

¹⁷⁰ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁷¹ See §3 above.

¹⁷² See "ESA containment" under "Position/Explanation ESA 1" of "§2. ESA Species and Containment" in "Service Animal Advocate Positions and Reasoning" from September 15th, 2016.

<https://www.transportation.gov/office-general-counsel/negotiated-regulations/service-animals---advocate-position-and-reasoning>

DOT discusses current guidance and airlines' feedback on how its execution is working:

The Department provides guidance in the current rule that if the passenger and animal cannot be moved, carriers should first talk with other passengers to find a seat location where the service animal and its user can be agreeably accommodated (e.g., by finding a passenger who is willing to share foot space with the animal).

While the Department previously concluded that a service animal's reasonable use of a portion of an adjacent seat's foot space does not deny another passenger effective use of the space for his or her feet and is not an adequate reason for the carrier to refuse to permit the animal to accompany its user at his or her seat, some airlines have indicated that passengers feel pressured to agree to such an arrangement and have later expressed to airline personnel their dissatisfaction at having to share their foot space.¹⁷³

Perhaps it goes without saying that airline personnel should not actually pressure passengers to share an unreasonable amount of foot space, versus politely asking.¹⁷⁴ We imagine this pressuring would be rare, but training may be in order to reduce its likelihood if passengers report feeling pressured.

¹⁷³ We excised the portion referring to ESAs. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁷⁴ A good guideline for how much foot space is reasonable to share (unless the passenger welcomes more) is how much side panels, the fuselage curvature, etc. cut into the foot space of the seat with the least foot space in the same class of service. Sometimes this can even amount to one-third of the foot space. We assume that DOT is not now considering that zero shared foot space is reasonable; even human passengers share such spaces to some degree. DOT's 2008 "Nondiscrimination on the Basis of Disability in Air Travel" guidance speaks to the general notion (boldface added for emphasis):

"WHAT DO I DO IF I BELIEVE THAT CARRIAGE OF THE ANIMAL IN THE CABIN OF THE AIRCRAFT WOULD INCONVENIENCE NON-DISABLED PASSENGERS?"

"Part 382 requires airlines to permit qualified individuals with a disability to be accompanied by their service animals in the cabin, as long as the animals do not (1) pose a direct threat to the health or safety of others (e.g., animal displays threatening behaviors by growling, snarling, lunging at, or attempting to bite other persons on the aircraft) or (2) cause a significant disruption in cabin service (i.e., a "fundamental alteration" to passenger service). Offense or inconvenience to other passengers (e.g., a cultural or personal discomfort with being in proximity to certain kinds of animals, allergies that do not rise to the level of a disability, **reasonable limitations on foot space**) **is not sufficient grounds to deny a service animal carriage in the cabin.** However, carriers should try to accommodate the wishes of other passengers in this situation, such as by relocating them to a different part of the aircraft."

<https://www.federalregister.gov/d/08-1228/p-460>

While it's possible some airline employees act in ways that would make a reasonable passenger feel unduly pressured to share a sizeable amount of foot space with a large service animal, it is also possible some passengers feel pressured *without* the request being unreasonable or inappropriately expressed.

We're generally talking about adults who can make their own decisions. Some post-agreement grumbling may be expected when there's a possibility of a minor inconvenience, just as some people complain about a bus taking longer to load and unload wheelchair users.¹⁷⁵ This does not mean we should take all pains possible to eliminate whatever minor discomfort some passengers may feel when people with disabilities need accommodations to travel.

To be frank, we would need a lot more data indicating this is a systematic problem significantly impacting these other customers' lives before we consider reducing access for people with disabilities, some of whom need larger service animals for their disabilities (e.g., for mobility work).¹⁷⁶

§8.c. The existing seating protocol provides access and is reasonable, if deployed properly

DOT wonders whether there should be access restrictions for some people with disabilities:

*The Department seeks comment on whether it should allow airlines to limit the size of [...] service animals that travel in the cabin and the implications of such a decision.*¹⁷⁷

DOT provides a seating protocol that airline personnel may follow once aware someone has a large service animal.¹⁷⁸ The protocol may be

¹⁷⁵ We do have direct experience of this and similar happenings that signal some individuals are occasionally either out of touch or simply callous.

¹⁷⁶ See THEOREM B Insufficiency of anecdotes in the *Introduction* above. Its content doesn't apply exactly to the present situation, but its spirit certainly does.

¹⁷⁷ We excised the portion referring to ESAs. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁷⁸ From DOT's 2008 "Nondiscrimination on the Basis of Disability in Air Travel" guidance (boldface added for emphasis):

The only situation in which the rule contemplates that a service animal would not be permitted to accompany its user at his or her seat is where the animal blocks a space that, per FAA or applicable foreign government safety regulations, must remain unobstructed (e.g., an aisle, access to an emergency exit) AND the passenger and animal cannot be moved to another location where such a blockage does not occur. In such a situation, the carrier should first **talk with other passengers to find a seat location where the service animal and its user can be agreeably accommodated (e.g., by finding a passenger who is willing to share foot space with the animal)**. The fact that a

deployed at the gate or onboard before takeoff.¹⁷⁹

Our take on this protocol is that the passenger or passengers with seat reservations next to the service animal user may be asked whether they prefer to share foot space or not with the service animal, in case the service animal takes up some of their foot space.¹⁸⁰ If they prefer not to, a volunteer may be sought who actively prefers to share foot space with the service animal. We find there is generally no shortage of such people.¹⁸¹ Otherwise, try to seat the service animal user next to an empty seat.

It is important that volunteer-seeking is not executed in a way that embarrasses people with disabilities. This includes not rewarding a volunteer for sitting next to the service animal user with something like a

service animal may need to use a reasonable portion of an adjacent seat's foot space—that does not deny another passenger effective use of the space for his or her feet—is not, however, an adequate reason for the carrier to refuse to permit the animal to accompany its user at his or her seat. Only if no other alternative is available should the carrier discuss less desirable options concerning the transportation of the service animal with the passenger traveling with the animal, such as traveling on a later flight with more room or carrying the animal in the cargo compartment. As indicated above, airlines may not charge passengers with disabilities for services required by Part 382, including transporting their oversized service animals in the cargo compartment.

In modifying this paragraph in the guidance, we deleted the phrase concerning the potential purchase of a second seat, since there are probably no circumstances under which this would happen. If a flight is totally filled, there would not be any seat available to buy. **If the flight had even one middle seat unoccupied, someone with a service animal could be seated next to the vacant seat**, and it is likely that even a large animal could use some of the floor space of the vacant seat, making any further purchase unnecessary. Of course, service animals generally sit on the floor, so it is unlikely that a service animal would ever actually occupy a separate seat.

<https://www.federalregister.gov/d/08-1228/p-197>

¹⁷⁹ We'll assume there is assigned seating. For airlines with no assigned seating, a volunteer adjacent-sitter may be procured at the gate, but it should not be a spectacle that embarrasses the person with a disability.

¹⁸⁰ Note that we recommend *not* assuming the service animal user would be fine being moved. Many service animal users put time into looking up airplane layouts and carefully pick a seat they believe would accommodate them.

¹⁸¹ If we're talking about an amount of foot space sharing that goes beyond what it is reasonable for practically anyone to share, DOT has given direction about this in its 2008 "Nondiscrimination on the Basis of Disability in Air Travel" guidance (boldface added for emphasis):

"Part 382 does not require carriers to make modifications that would constitute an undue burden or would fundamentally alter their programs (382.13(c)). Therefore, **the following are not required** in providing accommodations for users of service animals

" **Requiring another passenger to give up all or a [sic] most of the space in front of his or her seat to accommodate a service animal.** (There is nothing wrong with asking another passenger if the passenger would mind sharing foot space with a service animal, as distinct from telling the passenger that he or she must do so. Indeed, finding a passenger willing to share space is a common, and acceptable, method of finding an appropriate place for someone traveling with a service animal that may not be able to be seated in his or her original seat location.)

" Denying transportation to any individual on a flight in order to provide an accommodation to a passenger with a service animal;"

<https://www.federalregister.gov/d/08-1228/p-485>

drink voucher, as if it were something the other passenger must suffer through.¹⁸² For many passengers, sitting next to a service animal actually is a reward.

§9. Whether airlines should be prohibited from requiring a veterinary health form or immunization record from service animal users without an individualized assessment that the animal would pose a direct threat to the health or safety of others or would cause a significant disruption in the aircraft cabin

§9.a. Airlines should not have license to idiosyncratically create access system barriers in an open-ended way

DOT:

*[...] seeks comment on whether its service animal regulation should explicitly prohibit airlines from requiring veterinarian forms as a condition for permitting travel with a service animal beyond those specifically allowed by the Department in its regulation unless there is individualized assessment that such a documentation is necessary.*¹⁸³

Not only do we strongly believe DOT should explicitly prohibit airlines from requiring veterinary forms without an individualized assessment—we believe DOT should explicitly prohibit any other version of systematic access barriers for those seeking to travel with service animals, except any specified by DOT, without an individualized assessment.

The default should be a presumption of innocence—not having to prove one is not guilty in whatever way the airline peculiarly sees fit. Otherwise, airlines are apparently left to their own devices to smother passengers with the dreaded patchwork of barriers that has actually been created by airlines this year.¹⁸⁴

¹⁸² This has happened, and it did upset the service animal user.

¹⁸³ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁸⁴ As DOT notes in the ANPRM, "Airlines establishing their own policies for travel with a service animal could also mean a patchwork of service animal access requirements, making it difficult for persons with disabilities to know what to expect and how to prepare for travel." <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

It's not that this *could* happen, it's that DOT has already allowed this to happen. Our community members have been shocked and troubled. Airlines started pulling the trigger on various new access barriers as if it were the wild west and the sheriff were away, then DOT's 2018 "Statement of Interim Enforcement Priorities Regarding Service Animals" seems to condone their barrier-happy approach after the fact: "The Enforcement Office does not intend to use its limited resources to pursue enforcement action against airlines for requiring proof of a service animal's vaccination, training, or behavior so long as the documentation is not required for passengers seeking to travel with a service

§9.b. Third-party documentation requirements are wrong, even if not a large burden

As we detailed in §§1, 2, and 6 above,¹⁸⁵ third-party documentation requirements do not achieve their intended purpose, do create significant burdens for people with disabilities, and should be traded in for a decision tree approach.

Independent of burden levels, third-party documentation requirements are wrong. As we have discussed repeatedly and from different angles, government agencies should not follow the medical model of disability and force people with disabilities to get the okay from someone else before traveling.¹⁸⁶ The point of the ACAA is to enable access by eliminating disability-based discrimination, yet third-party documentation requirements do the opposite.¹⁸⁷

We excerpt part of §1.d. from USAUSA's 2018 survey report to explain:¹⁸⁸

The flight context differs significantly from those pondered by the Department of Justice's Title II and Title III Americans with Disabilities Act regulations.¹⁸⁹ That being said, this difference

animal that is not an ESA or PSA." <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0019>

This makes us wonder what else airlines may do without a clear barrier restriction from DOT. In fact, as we are drafting this comment, on June 20, 2018 Delta decided it could prejudicially stop service animal users with one type of dog from traveling. <https://news.delta.com/delta-updates-policy-limits-each-customer-one-support-animal-effective-july-10>

If enforced, 14 CFR §382.19(c)(1) should prohibit such a poorly considered policy. https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_119

DOT's 2008 guidance bears out this interpretation. Our point with this latest in an ongoing series of examples is to highlight that DOT *must* put its foot down, or airlines are going to continue walking all over service animal users in ways not yet imagined. <https://www.federalregister.gov/documents/2008/05/13/08-1228/nondiscrimination-on-the-basis-of-disability-in-air-travel#p-305>

¹⁸⁵ And in many other places referenced therein.

¹⁸⁶ For a start, see §7. of USAUSA's 2016 compromise comment, where the position is described as "The medical model of disability is an inaccurate and unjust basis for service animal regulations." <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-Pre-NPRM-Comment.pdf>

¹⁸⁷ From the *Introduction* above, see AXIOM I Disability access: "The prime directive of the ACAA is to prevent disability-based discrimination and enable access for people with disabilities." Also see THEOREM D Third-party paperwork undue: "Third-party documentation requirements induce undue burdens that violate human rights and reduce access."

¹⁸⁸ §1.a. from the report gives an excellent overview of this issue. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

¹⁸⁹ These differences are perspicuously detailed in a document drafted by Psychiatric Service Dog

does not justify a departure from the basic premise that in the United States, disability rights are civil rights—guaranteed not merely by nature or ethics, but by law.

The requirement to obtain a medical professional's letter to prove one's disability is a prime example of DOT regulations using an outdated medical model of disability that DOJ has eschewed and rebuked as "[...] burdensome, and contrary to the spirit, intent, and mandates of the ADA".^{190,191} Looking to present developments, we are given no reassurance that DOT intends to relegate such models to the past and turn instead to

Partners before the Reg Neg. See especially §1 of "ACAA Design Challenges & Solutions", which enumerates these considerations and details their fallout:

(1) some pets are allowed on board when people pay fees

(2) the environments of airports and cabins of airplanes in flight are more challenging than average for an animal (humans, too!)—including in terms of airport activity and stress, and airplane crowding and confinement

(3) gatekeepers (employees) are more in the position of actively verifying an animal's status

<https://www.psychdogpartners.org/board-of-directors/board-activities/advocacy/acaadesign-challenges-solutions>

¹⁹⁰ DOT's Congressional mandate through the ACAA does not differ significantly from DOJ's through the ADA. See 42 USC §12101(b)(1), where the simple ADA mandate is "the elimination of discrimination against individuals with disabilities". <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/html/USCODE-2010-title42-chap126.htm>

¹⁹¹ See DOJ's 2010 analysis from updating its service animal regulations ("Appendix A to Part 36—Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities", "Section-By-Section Analysis and Response to Public Comments"):

"Some commenters suggested that a title III entity be allowed to require current documentation, no more than one year old, on letterhead from a mental health professional stating the following: (1) That the individual seeking to use the animal has a mental health-related disability; (2) that having the animal accompany the individual is necessary to the individual's mental health or treatment or to assist the person otherwise; and (3) that the person providing the assessment of the individual is a licensed mental health professional and the individual seeking to use the animal is under that individual's professional care. These commenters asserted that this will prevent abuse and ensure that individuals with legitimate needs for psychiatric service animals may use them. **The Department believes that this proposal would treat persons with psychiatric, intellectual, and other mental disabilities less favorably than persons with physical or sensory disabilities.** The proposal would also require persons with disabilities to obtain medical documentation and carry it with them any time they seek to engage in ordinary activities of daily life in their communities—something individuals without disabilities have not been required to do. Accordingly, **the Department has concluded that a documentation requirement of this kind would be unnecessary, burdensome, and contrary to the spirit, intent, and mandates of the ADA.**" (bold emphasis added)

While DOT and DOJ are separate entities with separate purviews, it's hard to understand how the same basic mandate could be handled from such divergent perspectives when it comes to these core issues.

<https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=1&SID=1fcb95e0991fa49ff719bbe362cdddc1&ty=HTML&h=L&r=APPENDIX&n=28y1.0.1.1.37.6.3.2.8.13>

*a human rights-based approach.*¹⁹²

A human rights approach to disability could allow deterrent consequences to knowingly and willfully committing fraud to obtain goods or services. It could tolerate a system where individuals verify they understand the rights and responsibilities pertaining to travel with a service animal when they intend to fly —the system can assume traveler ignorance if the consequences are not overly burdensome.

What a human rights approach cannot abide is a system that assumes the guilt of people with disabilities.

*At this point, we cannot afford to mince words; too much hangs in the balance. Requiring people with disabilities to seek, obtain, present, or carry special paperwork from a third party, as if their innocence must be proven for them to exist as others do in society, is an authoritarian violation of human rights.*¹⁹³

[...]

We are not merely frustrated, but are at times distraught that DOT is considering whether to further push discriminatory, burdensome regulations that rely on outdated models of disability, masked in safety concerns for all passengers. While we write of models, this is not a matter of theory. As our survey results show, this is a matter of the very real and quite dire impacts this situation has in the lives of people with disabilities.

After these interloping years of rights reductions, DOT is faced with an historic decision. DOT officials need to decide whether to re-adopt a human rights perspective on disability access, as DOT originally adopted and as the ACAA crafters intended. The other option is to ignore the civil rights concerns and instead push for even more of a medical model of disability, continuing to violate the ACAA mandate. This is the option that incubates barriers by treating people with disabilities as guilty

¹⁹² See DOT's May 16, 2018 "Interim Statement of Enforcement Priorities Regarding Service Animals" and "Traveling by Air with Service Animals Advance Notice of Proposed Rulemaking (ANPRM)", respectively.

<https://www.regulations.gov/document?D=DOT-OST-2018-0067-0001>

<https://www.regulations.gov/document?D=DOT-OST-2018-0068-0001>

¹⁹³ Our 2016 survey report, performed at the request of DOT, clearly bears out the severe impacts of the current regulations' burdens. <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

until proven innocent.

*This is the unfortunate history and present context in which our community completed the flight access survey. We believe the results below bear this out and beg for a sea change in a way we hope DOT will hear and understand.*¹⁹⁴

§9.c. Third-party documentation requirements are a large burden

In §9.b., we explained why third-party documentation requirements are morally wrong in this context, even if they would not present a large practical burden. In this subsection, we use surveys and their analyses to show how third-party documentation requirements actually are a large practical burden.

DOT says: "We ask passengers with disabilities to provide information regarding what, if any, burdens may exist should they be required to submit veterinary forms related to the health or behavior of their service animal."¹⁹⁵ DOT also writes that airlines "[...] contend that producing animal health records would not be burdensome for service animal users as most, if not all, States require animals to be vaccinated."

To address DOT's inquiry and respond to airlines' reported contention, we excerpt part of §3.b. ("*Prime directive vs. extreme anti-misuse measures*") from USAUSA's 2018 survey report.

*What we find most bizarre is that we provided clear evidence of the unacceptable burdens already in play, yet DOT presently considers whether to permanently add more such burdens.*¹⁹⁶ *Respectfully, from the outside it looks like DOT's single-minded goal in this area is to chase total victory in a misguided crusade against an anecdotal "fraudster" enemy, without regard for how much this burden-stacks people with disabilities.*

DOT can no longer pretend the existing burdens and the new access barriers are due and just burdens. The present survey simply reinforces the manner in which these systems eliminate and reduce access for people with disabilities.

Two-thirds of our community members don't think their

¹⁹⁴ The subsection's heading is "*Outdated disability models incubate fresh barriers*".
<https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

¹⁹⁵ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

¹⁹⁶ See DOT's ANPRM: <https://www.regulations.gov/document?D=DOT-OST-2018-0068-0001>

veterinarians would be willing to sign the kind of form airlines like United would like to have,¹⁹⁷ and they seem to be right.¹⁹⁸ If service animal users had to get veterinary records or a health certificate before flying, they estimate it would cost \$115, take 8 days total, and take 6 hours of personal time.¹⁹⁹ Such burdens would radiate and multiply across hundreds of thousands of flyings by service animal- and ESA-using people with disabilities each year.²⁰⁰

While the population-level cost is disturbing, we remind DOT that for most people with disabilities, these burdens are enormous on the individual level. In our community, 79% of people are at least moderately discouraged from flying by being required to provide one piece of third-party documentation, with 22% being totally discouraged.²⁰¹ This data is reinforced by our 2016 survey, which found that 76% fly less or not at all due to the contemporary burdens.²⁰²

In the present survey, if individuals have to provide two pieces

¹⁹⁷ From United's February 1, 2018 release about their planned policy:

"The customer must also provide a health and vaccination form signed by the animal's veterinarian. The veterinarian must also affirm that there is no reason to believe that the animal will pose a direct threat to the health and safety of others on the aircraft or cause a significant disruption in service."

<https://hub.united.com/united-emotional-support-animal-policy-2530539164.html>

¹⁹⁸ See the March 2, 2018 release from the American Veterinary Medical Association (AVMA), "AVMA, United Airlines reach agreement on veterinary health form"—and the comments from veterinarians attached thereto: "The AVMA, with support from AVMA PLIT, flew into action when United Airlines announced a new policy requiring a veterinary signature vouching for the health, behavior and training of psychiatric service and emotional support animals (ESA) flying with United passengers."

"The AVMA reviewed United's Veterinary Health Form, which the airline said would take effect March 1, and recognized that the information it requested might not position United to make good decisions that would appropriately support the health and welfare of their animal and human passengers. The statements on the form also created potential liability risks for veterinarians attesting to them."

https://atwork.avma.org/2018/03/02/avma-united-airlines-reach-agreement-on-veterinary-health-form/?utm_source=smartbrief&utm_medium=email&utm_campaign=smartbrief-assoc-news

¹⁹⁹ See §5.a. for our data and analyses.

²⁰⁰ We are extrapolating based on data from airlines and our 2016 survey report calculations, which pertained only to disability-assisting animals for mental health-related disabilities: "Based on unofficial self-reports from airlines during the Negotiated Rulemaking ("Reg Neg"), we estimate there are somewhere in the neighborhood of 100,000 flyings each year by psychiatric service animals and emotional support animals (ESAs)." (2) <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

²⁰¹ The integer scale in our survey is from 1 to 5, with only 1 and 5 explicitly defined as "not at all discouraged" and "totally discouraged", respectively, in response to "How much would it discourage you from flying if[...]" We consider a rating of 3 to be "moderately discouraged". The 3, 4, and 5 responses for the seventh question constitute 21.1%, 36%, and 21.8% of the answers, totaling 78.9%. Similarly for the eighth question, the numbers are 7.9%, 24.8%, and 55.2%, totaling 87.9%. See §5.a.

²⁰² <https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

*of third-party documentation, 88% are at least moderately discouraged and 55% are totally discouraged from flying. **We believe this means that over half of our population will not fly with such a system as DOT is considering—a system that is supposed to guarantee access for people with disabilities.***²⁰³

One sentence from §6.a. of our 2018 enforcement priorities comment sums up the situation: "The access reduction is so surprisingly large that it could not possibly be offset by any amount of fraud reduction."²⁰⁴²⁰⁵

DOT points out a further concern:

*Airlines establishing their own policies for travel with a service animal could also mean a patchwork of service animal access requirements, making it difficult for persons with disabilities to know what to expect and how to prepare for travel.*²⁰⁶

We, too, are significantly concerned about airlines that are requiring their idiosyncratic forms be filled out by third parties (as opposed to the same piece of third-party documentation being transferable between airlines), whether by clearly requiring their form be used or due to employee confusion since the form exists.²⁰⁷ This means that every time one wishes to travel on a different airline, one must pay the time and money needed to get new paperwork from one's doctor and/or veterinarian. A reasonable person may even infer from the wording of some of these forms that every new ticket purchase with the same airline will require a new vet and/or doctor visit.

The burdens are very real, and they are not merely adding up, but fractally multiplying in their chilling effects.

²⁰³ <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

²⁰⁴ At least 3 out of 4 don't fly or fly less due to the access burdens. See §4 and §5 in the 2016 survey report, plus the data in §5.a. of the 2018 survey report (ibid. above).
<https://www.psychdogpartners.org/wp-content/uploads/2016/12/USAUSA-ACAA-SA-DOT-Info-Request.pdf>

²⁰⁵ <https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

²⁰⁶ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

²⁰⁷ It seems pretty clear DOT did not intend that the medical letter described in 14 CFR 382.117(e) *not* be transferable among airlines. For frequent fliers, needing to obtain and keep track of multiple letters that convey essentially the same message would not just be an unnecessary, large barrier to access, but an extreme annoyance. Yet we have already received reports and had to help when airline employees demand individuals use their forms, even when the policies say independent paperwork will do.
https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_1117

§9.d. *There is insufficient evidence from airlines that veterinary documentation should be required*

DOT reports that:

[...] airlines state that there has been a significant increase in the number of service animal/emotional support animal transportation requests they receive as well as an increase in reported animal incidents of misbehavior, including urination, defecation, and biting.

[...]

*We ask airlines for available data on how many incidents of misbehavior, particularly incidents of biting, airlines have experienced, as well as any data demonstrating an increase in these incidents. What amount of increase in animal misbehavior, if any, is sufficient to warrant a general requirement for a veterinary form regarding the health and behavior of a service animal without an individualized assessment that a service animal or emotional support animal would pose a direct threat to the health or safety of others or would cause a significant disruption in the aircraft cabin?*²⁰⁸

We must review both the burden of proof and the nature of the numbers from airlines in order to understand whether we can accord much weight to airlines' claims. We do this primarily by excerpting parts of §1. from our 2018 enforcement priorities comment:

*A government agency that is tasked with enforcing civil rights should maintain those rights by default. If a party wishes to increase burdens on people with disabilities or otherwise reduce disability rights, the burden of proof for this rights-reduction should lie with that party, not on those trying to stem the egress of their rights.*²⁰⁹

We have seen no hard data justifying the rights-reductions DOT

²⁰⁸ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

²⁰⁹ This refereeing principle is even more important when the rights holders have very little power compared to the rights takers. DOT is the main body rights holders depend on to balance the power differential between individuals with disabilities and the airline corporations providing services upon which the individuals rely. Your office made it clear to us in an April 4th email that DOT prefers to adopt an evidence-based approach to crafting guidance. Here is an excerpt from that email: "With respect to whether the Department will be issuing guidance on basic economy seating programs, we traditionally decide whether or not to issue a guidance document when we receive a significant number of complaints about an issue or we have received data indicating that there is significant concern in the disability community about an airline policy or practice."

*is allowing.²¹⁰ There is clear evidence that the old and new burdens substantially and systematically limit flight access for people with disabilities.²¹¹ The situation would be backward and misadministered if those in power could defeat discrimination-revealing data with a pre-emptive strike of little more than sensational anecdotes of individuals' wrongdoings.
[...]*

§1.a. Behavior

The number of individual behavioral incidents related to service animals may be going up, but it is unclear whether the incidence (rate) of these occurrences is varying significantly. The number of flights in the US is on the rise,^{212,213} while statistics regarding animal-related incidents are both opaque²¹⁴ and in such low numbers that statistical significance is hard to come by. As a start, the relevant rate for DOT to consider is the incidence of negative service animal- or ESA-related events per service animal or ESA flying.²¹⁵ DOT must look beyond absolute numbers related to service animals and not miss the forest for the trees.

This relevant rate would be for events in which a purported service animal or ESA presented a significant behavioral problem, or in which the accompanying passenger presented a significant behavioral/control problem that was related to their animal. This should not include a prominent statistic from some

²¹⁰ In the SIEP Background section, after explaining how the ACAA requires access for service animal users, DOT notes "[...]the Department recognizes that airlines have a responsibility to ensure the health, safety, and welfare of all of its passengers and employees. In enforcing the requirements of Federal law, the Department is committed to ensuring that our air transportation system is safe and accessible for everyone." If DOT were to allow reduced access for service animal users, it seems this would have to be clearly justified on such bases as those mentioned—health and safety—so mere evidence of increased travel is not sufficient. Yet we await relevant evidence as access is nonetheless reduced.

²¹¹ See USAUSA's 2018 Flight Access Survey Report: <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

²¹² See the Bureau of Transportation Statistics (BTS) release BTS 16-18, "2017 Traffic Data for U.S Airlines and Foreign Airlines U.S. Flights": <https://www.bts.gov/newsroom/2017-traffic-data-us-airlines-and-foreign-airlines-us-flights>

²¹³ The current BTS "U.S Air Carrier Traffic Statistics" are searchable: <https://www.transtats.bts.gov/TRAFFIC/>

²¹⁴ Airlines' data collection methods are not always clear, but a prime example of the muddled use of airlines statistics is that airlines generally lump together psychiatric service animals (PSAs) and emotional support animals (ESAs). These are very different entities, since PSAs are supposed to have much more training and public exposure than ESAs. By collecting data on PSAs and ESAs in one indiscernible grouping, airlines lose the ability to claim they have data showing problems with PSAs and ESAs—as opposed to just with ESAs, for example.

²¹⁵ This is similar to how DOT should consider the rate of (pet) animal cargo deaths per animal trip, since some airlines carry many more animals per year than others, making their absolute losses higher even if their rate of loss were much lower.

airlines, which is incidents related to the paperwork burdens DOT currently allows. Such reports indicate more of a problem with the regulations than they do with the passengers or animals subjected to those regulations.

§1.b. Misuse

Airlines cannot claim the number of service animal and ESA flyings is dramatically on the rise, then assume this must mean fraud is on the rise. What is most relevant on this front is whether the rate of fraud (or general ACAA misuse) is on the rise.

An easy explanation for the rise in animal use for disability mitigation is the dramatic increase in public awareness in recent years, resulting in more people with disabilities taking action to use animals to help them live their lives. This awareness and resulting rise in use should be seen as a good thing overall.²¹⁶ We need not imagine a fraudster hiding behind every tree.

It is easy, with the current system, for a shadowy ignorance to follow the public's casual understandings of service animals and ESAs. Without an access system that bears an educational light, we would not be surprised were the well-intentioned misuse to continue. However, we have neither clear evidence of the rate of fraud nor the rate of other misuse. As far as we know, there is no airline that can keep track of this (or tries to).

Instead, during the Reg Neg we were shown numbers related to paperwork issues in general. Such numbers could represent anything from, for example, a non-disabled pet owner unquestionably forging paperwork, to a psychiatric service dog user's documentation being one day out of date. Anything beyond a catch-all number for this variety of issues was in anecdotal form.

Surely, airlines could provide better evidence for their case if this were such a large problem. This would involve devoting more resources to investigating claims or verifying paperwork. However, the weakness of airlines' evidence of misuse seems

²¹⁶ See the January 31, 2018 article by Brad Morris in USA Today, "More animals on airplanes are good" (the newspaper altered the author's title and its resultant meaning): <https://www.usatoday.com/story/opinion/2018/01/31/opposing-view-overall-animals-airplanes-good/109987262/>

to show us two things. First, if they haven't put their money where their mouths are (to create targeted evidence-gathering systems), it must not be an elephantine problem so much as it is a gadfly. Second, the whole idea of a paperwork-based access system might have us pointed down a muddled rabbit hole in its approach. Instead, we should think seriously of turning right round and considering how the system should value human rights as opposed to playing fraudster whack-a-mole with increasing mounds of third-party paperwork.

[...]DOT should [...] lean toward greater rights and access. DOT should not dispose of rights by allowing new barriers, unless there were an enormous and public body of evidence that clearly carries the burden of proof. In the absence of the public having the ability to examine and critique any such body of evidence, new access barriers simply cannot have sufficient justification.²¹⁷

We continue to see the same pseudo-informative, context-free claims from airlines, which are sorely inadequate on their own to justify more burdens for people with disabilities.²¹⁸ If we look at the small amount of informative numbers recently made available to us, the story they tell is actually

²¹⁷ Of course, THEOREM B Insufficiency of anecdotes (from the *Introduction* above) reverberates in this section of PSDP's 2018 enforcement priorities comment. <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0019>

²¹⁸ Take, for example, this set of claims from Delta in their June 20, 2018 press release "Delta updates policy, limits each customer to one support animal effective July 10":

"The changes follow an 84 percent increase in reported incidents involving service and support animals since 2016, including urination/defecation, biting and even a widely reported attack by a 70-pound dog. Delta carries approximately 700 service or support animals daily — nearly 250,000 annually. Putting this into perspective, Delta carries more than 180 million passengers annually." <https://news.delta.com/delta-updates-policy-limits-each-customer-one-support-animal-effective-july-10>

In light of the considerations we just elaborated, anyone with a keen eye will note that these claims do not provide the evidence trajectory DOT needs. Here, Delta provides neither the number of incidents in 2016 and 2017, nor the rate of incidents per service or support animal flying. Delta doesn't even specify whether the 84% figure is all misbehavior, or whether it also includes paperwork-based issues. The increase could simply come from a similar increase in their overall number of flyings (other stats we cite above indicate a very large such increase), or from Delta more strictly enforcing their internal reporting protocols.

One useful thing we learn is that Delta's rate of service or support animal flying is almost 0.14%—that's a little over 1 out of every 1,000, at 7 out of every 5,000. It's hard to see how this is the colossal problem that grips the public consciousness, though as DOT notes in 2008 guidance (in connection with unusual species), even the lilliputian problems, "Because they make for colorful stories, [...] have received publicity wholly disproportionate to their frequency or importance." <https://www.federalregister.gov/d/08-1228/p-210>

It looks to us like rather than going beyond pseudo-informative statistics, Delta is content to cash in the frequent flier miles from the airtime it's getting out of the single colorful story mentioned.

shockingly contrary to the story the airlines have been broadcasting!²¹⁹

§9.e. Veterinary documentation requirements would not solve any significant problem

In this section, we explain why veterinary documentation requirements are practically useless in addressing airlines' expressed concerns about rabies and behavior. Instead, we find that they are so ill-considered as to constitute barriers for the sake of barriers, which must be bleached out in light of the ACAAs' mandate.²²⁰

DOT inquires:

²¹⁹ While we appreciate an airline like American trying to gather data (see the "Survey" section in American's 2018 enforcement priorities comment), the preferences of a general public that doesn't understand service animals or disability rights are not enormously helpful for a rulemaking on the topic. Two sets of figures from American actually indicate a *decrease* in the rate of problems associated with service and support animals:

"In 2017, American carried 155,790 emotional support animals, as compared to 49,196 trained service animals. In the last three years, there were three times as many ESAs onboard our airplanes than trained service animals. There has been an almost 50 percent increase in emotional support animals flying on American Airlines in the last two years." (p. 3)

"Overall, the complaints made to Customer Relations related to animals in the cabin and service animal fraud are increasing—in 2016, there were 746 and in 2017, there were 792." (p. 6)

If there were an almost 50% increase in ESA flyings and this is making things worse (not specifically behavior issues), we would expect the number of complaints to go up by somewhere close to 50%. (Even then, the rate of incidents per flying—at the present, when flyings have been increasing—could remain the same, as could the rate of incidents per ESA flying.) However, **American's data here indicate that things are getting much better.**

The number of complaints only increased by about 6%. With overall flyings and service/support animal flyings on a steep rise (see references in footnotes above), the *rate* of complaints per (service animal/ESA) flying dropped dramatically. American's data on page 8 is consistent with this, since it is not clear the difference mentioned is even statistically significant with such a small sample size: "Airlines have seen increases in the number of incidents recorded by our flight attendants related to service and emotional support animals: in 2016, there were 103 recorded incidents and in 2017, there were 141 recorded incidents."

This means that in 2017, American had 204,986 individual service/support animal flyings (there may be multiple "flyings" on the same flight if there is more than one animal on the flight), but flight attendants only recorded incidents as occurring in 0.069% of service/support animal flyings. This is about 7 out of every 10,000 flyings, so report-worthy incidents do not occur in 9,993 out of every 10,000 service/support animal flyings. That's a 99.93% success rate. Granted, as discussed in §3.d. of USAUSA's 2018 survey report, risk analysis involves both the likelihood and the severity of negative outcomes. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

American's 2018 enforcement priorities comment: <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0079>

²²⁰ Airlines may not erect barriers for people with disabilities for no purpose more specific than trying to make service animal fraud harder (which the current barriers don't really seem to do anyway). While we subscribe to AXIOM II Safety and AXIOM III Practicality, there needs to be a demonstrable nexus between a real safety/practical issue and a requirement, or it's just plain discrimination. See the *Introduction* above, which includes AXIOM I Disability access.

*If veterinarian forms are not allowed to be required as a condition for travel, what about other types of documentation to ensure that the animal is not a public health risk to humans? Specifically, the Department seeks comment on whether airlines should be allowed to require that service animal users provide evidence that the animal is current on the rabies vaccine as that vaccine is required by all 50 states for dogs and by most states for cats. Finally, should airlines be permitted to require passengers to obtain signed statements from veterinarians regarding the animal's behavior. And if so, what recourse should be available for service animal users if the veterinarian refuses to fill out the behavior form.*²²¹

Partly by excerpting our 2018 enforcement priorities comment below, we will explain why: (1) veterinarians are not in a position to evaluate animals' behavior,²²² and (2) in spite of popular thinking, veterinarian forms and rabies paperwork don't significantly address safety issues. These points mean that the documentation types airlines want from veterinarians is not useful (functionally presenting barriers for the sake of barriers).

DOT reports what our airline contacts have told us: "[...]certain carriers have indicated that they need veterinary forms or behavioral attestations to determine whether a service animal, particularly a PSA and/or an ESA poses a direct threat."^{223,224}

²²¹ <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

²²² Relevantly, DOT notes: "The American Veterinary Medical Association (AVMA) has raised concerns with the Department about airlines' service animal forms, which require veterinarians to attest to the animal's behavior as well as the animal's health. The AVMA explained to the Department that veterinarians cannot guarantee the behavior of an animal particularly in a new environment like an aircraft but can provide information based on their observations of the animal during a physical examination and discussions with the animal's owner regarding whether the animal has been aggressive in the past. AVMA emphasized to the Department that expanding the scope of the veterinary form beyond health information of the animal and behavioral information of the animal based on the veterinarian's observations could lead to refusals by veterinarians to fill out these forms, which would result in more service animals being denied air transportation." AVMA doesn't want to broadcast it, but veterinarians are usually *not* trained in assessing animal behavior. That's the skillset of an animal behaviorist (which is a rare occupation) or a trainer (which requires a particular focus for service animal work). This means that veterinarians typically are not experts in that which airlines want them to assess. <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

²²³ <https://www.regulations.gov/document?D=DOT-OST-2018-0067-0019>

²²⁴ DOT gestures in its current ANPRM toward what we believe everyone had previously assumed about 14 CFR §382.117(f)—that the evaluation of direct threats to health or safety was intended to be based on individualized, in-person observations by airline personnel, rather than a license for airlines to lay down blanket burdens across classes of people with disabilities. See DOT's ANPRM, footnote 54: "An airline may refuse transportation of a service animal if the animal would pose a direct threat to the health or safety of others. However, the Department's regulation does not clearly specify whether airlines must make this direct threat assessment on an individualized case-by-case basis. The DOT guidance document referenced in the regulation does suggest that the direct threat should be individualized as it states that the analysis should be based on observable actions". <https://www.regulations.gov/document?D=DOT-OST-2018-0068-1157>

Veterinarians are not in a position to predict how an animal would behave in a flight environment, nor do they want to.^{225,226} Veterinarians can give information about vaccinations and the appearance of parasitic critters such as fleas. However, we have not once heard of fleas being a major problem—or a minor one—on airplanes. We have heard of rare, heavily sensationalized reports of dog bites, though with no statistics to aid us.

Clearly, a form from a veterinarian does not prevent a dog from biting. We have been told by DOT²²⁷ and airlines²²⁸ that airlines now want people with disabilities to acquire, submit, and carry these forms in case their animal bites someone (and breaks the skin, presumably). It's hard for us to see how such a rare occurrence could justify requiring hundreds of thousands of people with disabilities to each spend \$115 and 6 hours of

It is clear to us that DOT's direct threat analysis explanation in its 2008 guidance prohibits using a "direct threat" concern as a reason to prejudicially block access to groups of people with disabilities: "If the carrier's reason for excluding a passenger on the basis of safety is that the individual's disability creates a safety problem, the carrier's decision must be based on a "direct threat" analysis. This concept, grounded in the Americans with Disabilities Act, calls on carriers to make an individualized assessment (e.g., as opposed to a generalization or stereotype about what a person with a given disability can or can't do) of the safety threat the person is thought to pose. In doing so, the carrier must take into account the nature, duration and severity of the risk; the probability that the potential harm will actually occur; and whether reasonable mitigating measures can reduce the risk to the point where the individual no longer poses a direct threat. In using its authority to make a direct threat determination and exclude a passenger, a carrier must not act inconsistently with other provisions of Part 382. Direct threat determinations must not be used as a sort of de facto exception to specific requirements of this Part (e.g., the prohibition on number limits)." Even if this were somehow twisted into allowing veterinary forms, airlines have not engaged even in any half-hearted attempt to justify the forms based on a risk assessment and risk mitigation analysis. We believe these processes would quickly fail for the reasons elaborated in our present comment.

<https://www.federalregister.gov/d/08-1228/p-305>

²²⁵ The comments from veterinarians on the article "AVMA, United Airlines reach agreement on veterinary health form" indicate that many veterinarians (1) do not understand the world of service animals and ESAs and (2) are not willing to sign airline forms. The article's 3/8/18 revision itself hints at this reluctance: "The AVMA[...] flew into action when United Airlines announced a new policy requiring a veterinary signature vouching for the health, behavior and training of psychiatric service and emotional support animals (ESA) flying with United passengers."

"The AVMA reviewed United's Veterinary Health Form[...] and recognized that the information it requested might not position United to make good decisions that would appropriately support the health and welfare of their animal and human passengers. The statements on the form also created potential liability risks for veterinarians attesting to them."

https://atwork.avma.org/2018/03/02/avma-united-airlines-reach-agreement-on-veterinary-health-form/?utm_source=smartbrief&utm_medium=email&utm_campaign=smartbrief-assoc-news

²²⁶ See §3.b. of the 2018 survey report for detail on this topic. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

²²⁷ At a February 6, 2018 meeting in DOT's DC headquarters.

²²⁸ In phone calls between January and April, 2018.

personal time on average to surmount a new set of barriers.²²⁹

Let's strain credulity and pretend those barriers are not an overwhelming problem. We may now ask whether the forms would help in any way.

§6.c. Let's be rabid about the facts

The principle concern airlines offered in connection with veterinary forms seems to involve rabies. It is a zoonotic disease (transmissible to humans) and could increase the likelihood of aggressive behavior. Here we engage in a basic investigation of the matter that anyone else could have done before instituting new burdens.²³⁰

Each year between 2011 and 2015 (in the US) there were between 59 and 89 cases of rabies reported in dogs, averaging 74 per year.²³¹ In 2012, there were 69,926,000 dogs in the US.²³² This means the incidence of rabies over the course of the entire year was 0.0001%, or one in a million. Since an animal is only able to transmit rabies for a period of "several days" after an incubation period and before it is "obvious to even an untrained observer" that there's a problem,²³³ a generous estimate is that any given dog is likely to have rabies at a rate of 0.000002% for any given day out of the year (1 in 50 million).²³⁴ It is plain why domestic dogs are not even considered to be a significant source of rabies anymore.²³⁵

Rabies is transmitted through saliva via a bite into the muscle from a rabid animal. An animal cared for enough to be a service animal (or claimed to be one) is probably much less likely to have rabies than animals that are less cared for and left where

²²⁹ See §2.b. of the 2018 survey report. <https://www.psychdogpartners.org/wp-content/uploads/2018/05/USAUSA-Flight-Access-Survey-Report-May-2018.pdf>

²³⁰ At least as far as the citations go. We also consulted with an ER doctor at a prestigious university hospital, a local veterinarian, a PhD biologist, a former veterinary technician, a supervisor at a law enforcement agency with a major airport in its jurisdiction, an emergency dispatch supervisor, and PSDP board member Heather Walker, who has worked as an Emergency Services Dispatcher for a sheriff's department since 2002.

²³¹ From CDC's "The Burden of Rabies" article infographic. <https://www.cdc.gov/features/dsrabies/index.html>

²³² From AVMA's "U.S. Pet Ownership Statistics". <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx>

²³³ See CDC's "The Path of the Rabies Virus" <https://www.cdc.gov/rabies/transmission/body.html>

²³⁴ We interpret CDC's "several days" as 7 days, or 1 week, and so divide the earlier incidence by 52.

²³⁵ From the CDC's "Human Rabies": "[...]domestic dogs[...]are no longer considered a rabies reservoir in the United States." . https://www.cdc.gov/rabies/location/usa/surveillance/human_rabies.html

one could not know whether they've been bitten. They are also more likely to have standard veterinary care, including a rabies vaccine or titer test.²³⁶ When an animal is known to have been bitten by another and has not been vaccinated, it is standard for there to be monitoring or a quarantine.²³⁷

If the point of the vaccination form is to protect the public from rabies, that argument falls apart at the briefest glance at this data. Rabies is a fear-inducing disease since it involves animal bites and is fatal without treatment, yet only 1–3 people are reported to have rabies each year in the US.²³⁸

Since rabies is so rare, whether to treat a human bitten by a dog is not the foregone result of a conversation with a doctor.²³⁹ It's unlikely even that postexposure prophylaxis would be needed.²⁴⁰ If it were needed, we have been fortunate that since the 1980s, the prophylactic protocol has been much easier and less painful—this means that even if the biting animal's vaccination status can't be verified, it does not portend a torturous ordeal.²⁴¹

We belabor the facts to emphasize that people with disabilities deserve the courtesy of basic fact-checking and sufficient reasoning before burdens are forced on them. This applies beyond the specific example of rabies vaccination verification or any veterinary forms.

²³⁶ Some dogs have bad reactions to vaccines, so instead of needlessly re-injecting the vaccine, owners will choose to have a titer test performed to see whether the dog has retained sufficient antibodies.

²³⁷ "Cats, dogs, and ferrets that have not gotten their rabies shots and are bitten by an animal may have to be quarantined for six months or euthanized." <https://www.cdc.gov/features/dsrabies/index.html>

²³⁸ From the CDC's "Human Rabies".
https://www.cdc.gov/rabies/location/usa/surveillance/human_rabies.html

²³⁹ From the CDC's "When should I seek medical attention?": "See your doctor for attention for any trauma due to an animal attack before considering the need for rabies vaccination. Your doctor, possibly in consultation with your state or local health department, will decide if you need a rabies vaccination. Decisions to start vaccination, known as postexposure prophylaxis (PEP), will be based on your type of exposure and the animal you were exposed to, as well as laboratory and surveillance information for the geographic area where the exposure occurred."
<https://www.cdc.gov/rabies/exposure/index.html>

²⁴⁰ From CDC's "Domestic Animals" section on rabies exposure: "If you were bitten by a cat, dog, or ferret that appeared healthy at the time you were bitten, it can be confined by its owner for 10 days and observed. No anti-rabies prophylaxis is needed. No person in the United States has ever contracted rabies from a dog, cat or ferret held in quarantine for 10 days."
<https://www.cdc.gov/rabies/exposure/animals/domestic.html>

²⁴¹ "In the United States, postexposure prophylaxis consists of a regimen of one dose of immune globulin and four doses of rabies vaccine over a 14-day period. Rabies immune globulin and the first dose of rabies vaccine should be given by your health care provider as soon as possible after exposure. Additional doses of rabies vaccine should be given on days 3, 7, and 14 after the first vaccination. Current vaccines are relatively painless and are given in your arm, like a flu or tetanus vaccine." *ibid.* See also articles such as "What's it like: To get a rabies shot".
<https://newsok.com/article/3862071/whats-it-like-to-get-a-rabies-shot>

§6.d. Barriers as mere deterrents, not for health and safety

Airlines are resistant to sharing passenger information, so it does not seem like that is the point of the forms. Forms may be forged or an animal may acquire rabies after the form is completed, so it's not possible for the airline to use the forms to provide any guarantees to any passengers.

If there is a serious animal bite, we cannot see how the form would be of significant help. If airlines are concerned about passenger health or the need for law enforcement involvement, they can call ahead so the proper response is waiting at the airport.

We have heard the protest from some airlines that the baseline law enforcement response to airports is extreme, and too excessive for a dog bite. However, a person (or dog) bitten in the air deserves the same minimum level of law enforcement, medical care, and animal control involvement as a person bitten anywhere else. It is unjust to deny that level of basic response and care due to an airline not wanting to bother the authorities, or the authorities not wanting to be bothered.

Of course, a vaccination form—whether shared with the bitten party or not—in no way removes the obligation to provide the appropriate response. If the response has to be excessive because the incident was during a flight or at the airport, then so be it, because excessive is better than nothing when some response is required.

What, after all this, is the purpose of the form? It cannot ensure the animal is safe; getting a vaccine does not make an animal safe.

The main purpose of the new vaccination forms appears to be simply creating a new barrier for passengers with disabilities, in hopes that a barrier for the sake of barriers will have a deterrent effect on fraud. The ACAA is supposed to remove barriers to access, not oversee their gratuitous multiplication.

Ultimately, we must weigh the burdens to hundreds of thousands of passengers with disabilities vs. any supposed

*benefit to requiring these forms in the extremely rare cases of skin-breaking animal bites. It is difficult to see any specific benefit to the forms, while it is very easy to spot their quite significant and undue burdens.*²⁴²

To enunciate a point touched on above, most veterinarians aren't professionally trained to predict or even evaluate behavior,²⁴³ so the most they can do as an expert is pass along the prospective passenger's self-report. There is no good reason the passenger cannot provide the same behavioral report *directly* to the airline. Having a professional in the middle means the access cost for people with disabilities is higher than it is for others—and many veterinarians would likely act as a barrier to their air travel by not signing such documentation for anyone due to vague liability concerns.

When your only tool is a hammer, every problem can look like a nail. We caution DOT not to follow airlines' thinking that if only we can find the right third-party documentation, everything will be right with the world. Not only does every specific example of third-party documentation (the hammer) fail to solve the problems airlines think need solving, but the problems are not nails. A different kind of tool is needed.²⁴⁴

§10. *Whether U.S. airlines should continue to be held responsible if a passenger traveling under the U.S. carrier's code is only allowed to travel with a service dog on a flight operated by its foreign code share partner*

§10.a. *Code-share flights are a US-foreign partnership*

DOT's regulation makes a US airline responsible for a foreign airline's compliance with some of the ACAA regulations for foreign "code-share" flights. These are flights where the US airline sells the ticket for an entirely non-US flight, but a foreign airline operates the flight.²⁴⁵ This means that for the passenger, the flight is the product of a US-foreign partnership.

²⁴² This excerpt begins at §6.b., "*Gesturing absently at justification is unsatisfactory*".
<https://www.psychdogpartners.org/wp-content/uploads/2018/06/PSDP-Enforcement-Priorities-Comment-June-2018.pdf>

²⁴³ We also explained this in a footnote above. It's easier to realize this if you think of veterinarians as pet doctors, like (human) doctors. Most doctors for humans aren't trained to evaluate or predict human behavior, either; that's a specialty, as it is for veterinary/animal behaviorists.

²⁴⁴ We're referring to a decision tree. What applies here from our *Introduction* above is THEOREM C New access system needed: "Some system of reducing ignorance and increasing responsibility is in order."

²⁴⁵ See 14 CFR §382.7(c). https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_17

§10.b. Regulations should not vary wildly from the enforcement reality

DOT presents the current (non-)enforcement situation before making an inquiry:

While the Department's Office of Aviation Enforcement and Proceedings has not taken action against U.S. carriers under these circumstances, the Department seeks comment on whether the rule should explicitly state that U.S. carriers would not be held responsible for its foreign code-share partner's refusal to transport transportation [sic] service animals other than dogs.

It seems patently unfair to have neither enforced a regulation nor plan to, yet to keep the regulation on the books. This may grossly mislead people, since they may have expectations based on what's on the books. Practically speaking, DOT should dispose of any regulation it does not and will not actually enforce, or it should enforce the regulation (at least in some manner).²⁴⁶

So if DOT has already determined that "U.S. carriers would not be held responsible for its foreign code-share partner's refusal to transport [...] service animals other than dogs", then yes, this should be explicitly stated.

§10.c. Warnings should be in place if US airlines are not held responsible for a code-share partner not transporting non-canine service animals

If it's appropriate for US airlines to be held responsible for any partner's ACAA adherence in this situation, there must be a reason. One of the best reasons for this is that a reasonable person could expect that any flight booked through a US airline would adhere to ACAA regulations—even a flight that does not touch the US. Further, if the US airline is not held responsible, *no one is*, because the code-share flights in question do not trigger any foreign airline responsibility.²⁴⁷

This means that if there is a chance a flight booked through a US airline would *not* adhere to ACAA regulations, the passenger is owed practically

²⁴⁶ The question might then be pushed into terms of whether DOT should enforce the regulation in some way or not.

²⁴⁷ From 14 CFR §382.7(c): "As a foreign carrier, you are not subject to the requirements of this part with respect to flights between two foreign points, even with respect to flights involving code-sharing arrangements with U.S. carriers." https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_17

effective warning of the specifics before the booking is completed.

Such a warning may be accomplished by at least requiring US airlines' service animal policies to include a warning that foreign travel may not be able to accommodate the person's disability-related needs and that the airline should be contacted for further details about specific flights. It may also be appropriate for clear warnings to be in the booking flow for any such foreign code-share flights, if it is at all practical for the airline to provide such warnings.

No reasonable person should be able to book such a flight and then be unhappily surprised to find their disability can't be accommodated.

§10.d. Clarification of regulations would remove code-share responsibility ambiguity

Should US airlines not be held responsible for a foreign code-share partner's refusal to transport non-canine service animals? No, they should not be; we agree with the airlines' reasoning from the Reg Neg.²⁴⁸ We also believe this is simply the best interpretation of existing regulations, but that clarification would help remove a distinct ambiguity.

DOT's regulation says that "as a foreign carrier, you are not required to carry service animals other than dogs."²⁴⁹ Yet earlier, we find that:

As a U.S. carrier that participates in a code-sharing arrangement with a foreign carrier with respect to flights between two foreign points, you (as distinct from the foreign carrier) are responsible for ensuring compliance with the service [animal] provisions [...] with respect to passengers traveling under your code on such a flight.²⁵⁰

So even if a foreign airline is operating a flight into or out of the US, it only has to carry service *dogs*. But if a foreign airline operates a flight entirely outside of the US, but a US airline sold the ticket, the US airline *may* be on the hook if the foreign airline refuses to transport a service cat. As far as airlines are concerned, these are oddly contrary requirements.²⁵¹

²⁴⁸ As we recollect the gist from conversations. This was not a central topic of debate, but a peripheral issue.

²⁴⁹ From 14 CFR §382.117(f). https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_1117

²⁵⁰ From 14 CFR §382.7(c). https://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=16ca0a3ca83c9837961ced25b5f7e49f&mc=true&n=pt14.4.382&r=PART&ty=HTML#se14.4.382_17

²⁵¹ In line with what we wrote above, someone may reasonably try to book with a US airline *because* they

Setting aside practical questions of enforcement discretion, it isn't actually clear that the best interpretation of the regulations puts the US airline on the hook at all in this situation.

The service animal provisions require *US* airlines to transport non-canine service animals. However, that doesn't mean that because the US airline is the one ensuring compliance in the code-share situation that the service animal regulations must be interpreted as if the US airline is operating the flight. Rather, it seems that the US airline is in the position ensuring a *foreign* airline follows the regulations—and thus, follows them *as those regulations apply to a foreign airline*.

If a foreign airline carries service dogs, but not other types of service animals, it is following the applicable service animal regulation. There would be nothing on that front for which the US airline could be held responsible if the foreign code-share partner refuses other service animal types.

However, given that a possible interpretation of the regulations is that the US airline must ensure compliance by the foreign code-share partner *as if it were a US airline*,²⁵² clarifying this seems entirely appropriate.

Conclusion

We aimed in §§1.–10. to breathe life into the body of axioms and theorems in our *Introduction*, so that new regulations may exude reason, knowledge, and above all, justice. If we may be of any more assistance in animating these principles for the benefit of all stakeholders, please send word our way.

Sincerely,
Bradley W. Morris, MA, CPhil
Director of Government Relations
on behalf of the Board of Directors,
Psychiatric Service Dog Partners²⁵³

have a service cat need to take advantage of US rules. That is why warnings must be presented whenever this expectation would fail.

²⁵² We believe this is a less defensible strict interpretation.

²⁵³ This comment was drafted with assistance from Jenine Stanley of our Board of Advisors, who provided moral support and a welcome sounding board.