The Department of Transportation’s Failures in Regulating Emotional Support Animals

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THE DEPARTMENT OF TRANSPORTATION’S FAILURES IN REGULATING EMOTIONAL SUPPORT ANIMALS

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ABSTRACT

In the past decade, the number of emotional support animals being used to treat a wide array of mental and emotional disorders has multiplied exponentially. This increase has been met with mixed reactions in the context of air travel. While some passengers are thrilled to sit next to a dog on their flight, others are frustrated due to the belief passengers with emotional support animals are exploiting a loophole to travel with their pet for free. Regardless of the differing perceptions, emotional support animals are a valid, affordable way to treat mental health illnesses without incurring negative side effects associated with medication.

The Department of Transportation (DOT) recently amended the regulations on emotional support animals to reflect grievances related to potential abuses of the system. These amendments unfairly discriminate against individuals with mental health illnesses while doing little to prevent exploitation and misrepresentation of service and emotional support animals. DOT should revert to the previous system of recognizing emotional support animals in a category distinct from service animals. Furthermore, implementing stricter regulations for the registration of emotional support animals, reducing pet fees, and keeping records of such in a robust database would allow those with mental disorders to rightfully obtain emotional support animals while curbing abuse of the system.

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I. INTRODUCTION

ALTHOUGH FLYING IN AN AIRPLANE is one of the safest methods of travel, many feel uneasy about sitting in an enclosed metal tube rocketing across the earth at 35,000 feet above its surface.¹ For individuals with diagnosed mental illnesses, flying can be an especially debilitating obstacle in reaching necessary destinations. In the past two decades, mental health providers have begun to prescribe a new, furry type of treatment for mental and emotional disabilities—the emotional support animal. Prior to 2020, U.S. regulations required airlines to recognize emotional support animals as service animals; therefore, airlines made reasonable accommodations for them aboard aircraft to avoid violating federal discrimination laws.² The regulations required only minimum documentation for passengers flying with emotional support animals. Such a relaxed guideline led to countless bizarre stories of passengers attempting to travel with unusual animals such as peacocks, pigs, turkeys, and ducks.³ Even the more common emotional support dog began making headlines because of unruly and disruptive behavior aboard aircraft.

Due to the increasing frequency of animal-related incidents, the Department of Transportation (DOT) amended the regulations by excluding emotional support animals from the protections of service animals—forcing emotional support animals into the same category as an ordinary pet. This Comment argues that this exclusion counteracts the entire purpose of disability laws enacted by Congress because it discriminates against individuals with certain diagnosed mental health disorders, leaving them with very few options when it comes to traveling with their emotional support animal. Furthermore, this Comment proposes solutions to strike the right balance between preventing both fraud and discrimination by resuming the recognition of emotional support animals (albeit with more stringent guide-

¹ Steve Deane, Fear of Flying Statistics, Trends & Facts (2022 Data), STRATOS JETS (Jan. 4, 2022), https://www.stratosjets.com/blog/fear-of-flying-statistics-trends-facts [https://perma.cc/754-E8X5] (33-40% of all people experience anxiety when it comes to flying; 2.5-5% experience crippling anxiety, a genuine fear of flying that is classified as a clinical phobia).
² 14 C.F.R. § 382.117(a) (2016).
lines) and going after the issuers of fraudulent emotional support animal certifications.

Part II of this Comment examines the background and benefits of service and emotional support animals and how their popularity has grown during the last decade. Part III provides context to the federal laws prohibiting discrimination of individuals with disabilities in the United States and introduces the Air Carrier Access Act (ACAA), which specifically prohibits discrimination on airlines. Part IV discusses the legislative intent behind amending the ACAA regulations and describes the impact these changes have on passengers with disabilities. Part V details the necessity of allowing passengers to travel with their emotional support animals and how a restriction as such is discriminatory. Finally, Part IV explores proposed regulations that could address issues prompting the ban without discriminating against passengers with disabilities.

II. WHAT IS AN EMOTIONAL SUPPORT ANIMAL?

A. THE ORIGIN OF EMOTIONAL SUPPORT ANIMALS

The earliest evidence of animals serving people with disabilities comes from a first-century A.D. mural that depicts a dog leading a blind man.4 Other records from Asia and Europe tracing back to the Middle Ages depict similar images.5 In 1916, the world’s first guide dog school opened in Germany, and the phenomena quickly spread amongst European countries.6 The first American guide dog school, and the oldest in the world still in existence to this day, was opened in 1929 by Morris Frank, a man who became frustrated about his own lack of mobility due to his blindness.7 In 1975, Bonnie Bergin was the first to introduce service animals assisting with disabilities beyond blindness.8 From there, the use of animal assistance spread into many fields beyond physical disabilities. In the late 1900s, psychothera-

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5 Id.
7 Id.
pists across the world began noticing the benefits of animal assistance and integrating animals into the treatment of patients.9 In 1989, a well-known animal education group, Pet Partners, developed a certification program to ensure that animals are proficient in providing animal-assisted therapy.10

While there is a well-documented history of animals being used to assist individuals with physical and mental disabilities, it is unclear exactly when the emotional support animal, in the context it is recognized in today, originated and what prompted the new phenomenon.11 In 2014, there were merely 2,400 emotional support animals in the United States12—rapidly increasing to 200,000 by 2019.13 This astronomical growth may be attributable to media attention bringing increased awareness to the new treatment method.14 Individuals with disabilities are better equipped to learn about alternative and relatively non-traditional methods of treatment and are able to decide, with the help of their physician, if an emotional support animal may be beneficial.15

B. The Distinction Between Emotional Support and Service Animals

While “emotional support animal” and “service animal” are often considered interchangeable, there are important distinctions between the two that avail them to different protections

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10 Id.

11 Kathleen Doheny, Do You Need an Emotional Support Animal?, SENIOR PLANET (Sep. 5, 2018), https://seniorplanet.org/emotional-support-animal [https://perma.cc/EA26-EVJK] (“ESAs are fairly new. . .increasing in popularity in the past 10 years and even more now.”).


13 Id.


under the law. In general, an emotional support animal is defined as a companion animal that provides therapeutic benefits to individuals with mental or psychiatric disability. The benefits provided by an emotional support animal derive from the nature of the animal itself and the companionship it provides, as opposed to any specific trained acts.

In contrast, service animals, which are typically dogs, are specifically trained to do work or perform tasks related to their owner’s disability. For example, service dogs are trained for tasks such as alerting a hearing-impaired person to an alarm or guiding a visually-impaired person around an obstacle. The process of obtaining a service animal is much lengthier and more expensive than obtaining an emotional support animal because of the extensive training needed to teach an animal to perform specific tasks. Furthermore, all animals are not capable of being trained to be service animals. For example, more than half (50-70%) of service dog candidates fail to complete their training. A good candidate to become a service dog is “confident and social” because it must be comfortable going into public places and interacting with a variety of people in stressful environments. While any dog can theoretically be trained to be a service dog, some commonly-seen breeds are Golden Retrievers, Labrador Retrievers, and German Shepherds—due to their innate characteristics of being sociable and intelligent.

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17 Id.; see also Jacque Brennan & Vinn Nguyen, *Service Animals and Emotional Support Animals*, ADA National Network (2014), https://adata.org/guide/service-animals-and-emotional-support-animals [https://perma.cc/W73A-K7GM] (“These support animals provide companionship, relieve loneliness, and sometimes help with depression, anxiety, and certain phobias, but do not have special training to perform tasks that assist people with disabilities.”).

18 Gibeault, *supra* note 16.

19 Id.


Compared with service animals, emotional support animals do not have to be as rigorously trained, and therefore, a wider variety of animals and specific dog breeds are able to become emotional support animals.23

C. THE BENEFITS OF AN EMOTIONAL SUPPORT ANIMAL

Although they are not trained to perform specific tasks, emotional support animals provide considerable benefits to their owners. These benefits go beyond the positive impact of the ordinary pet, as an emotional support animal offers personalized companionship and individualized support to their owner that can alleviate symptoms stemming from behavioral, physical, or psychological disorders.24 Emotional support animals can assist in the treatment of individuals suffering from a variety of mental or psychiatric impairments, such as anxiety, depression, post-traumatic stress disorder, certain phobias, and other mood disorders.25 Emotional support animals provide the psychological benefits of calming and relaxing their owner, alleviating loneliness, lowering anxiety, and reducing pain, stress, and depression.26 Furthermore, they can alleviate symptoms of mental disorders by “calming the handler and reducing physical and mental effects such as anxiety, fear, flashbacks, hypervigilance, hallucinations, intrusive imagery, nightmares, muscle tension, trembling, nausea, and memory loss.”27 Emotional support animals provide routine and structure to their owner’s life, give them a sense of purpose and responsibility, and help them complete daily tasks that may have initially seemed overwhelming.28

23 Emotional Support Animals: A Trendy Mental Health Treatment, ADVANTAGE CARE HEALTH CENTERS (July 11, 2019), https://advantagecaredtc.org/emotional-support-animals [https://perma.cc/6E8E-K4Z8] (“Most types of domesticated animals, including cats, dogs, rabbits and more, may be used to provide emotional support.”).


25 Brennan & Nguyen, supra note 17.


28 Id.
In addition to the psychological benefits, medical experts have testified to the physical health benefits of emotional support animals. These physical benefits include lowering blood pressure, normalizing heart rate, and decreasing the risk of heart problems.29 Because of the relatively new nature of emotional support animals, most of the evidence supporting their benefits is anecdotal. However, the growing popularity of the emotional support animals has led to an increase in scientific studies confirming their benefits. For example, a recent study found the first empirical evidence that emotional support animals can “provide quantifiable benefits” to individuals with mental illnesses who experience depression, anxiety, and loneliness.30 The study found a consistent pattern of higher amounts of the hormone oxytocin and lower amounts of the stress hormone cortisol when patients engaged in focused interactions with their emotional support animals.31

Emotional support animals have also been especially beneficial in recent years because of the COVID-19 pandemic.32 The pandemic triggered lockdowns that isolated many from interacting with their friends and families for an extended period of time and during times when many are more prone to higher rates of anxiety and depression already, such as the holidays.33 This isolation resulted in a 25% increase in the global prevalence of anxiety and depression.34 Such anxiety and depression can deregulate the immune system, leaving individuals more

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29 Ernst, supra note 9.
31 Linkhorn, supra note 30.
32 See Unnati G. Hunjan & Jayasankara Redly, Why Companion Animals are Beneficial During COVID-19 Pandemic, 7(4) J. PATIENT EXPERIENCE 430, 430–32 (2020) (Many of these animals may not specifically be labeled emotional support animals, but nevertheless perform the same functions and provide the aforementioned benefits.).
prone to infectious diseases, cancer, and other conditions that immunity would have resisted otherwise.\textsuperscript{35} Thus, emotional support animals provided imperative support for their owners’ mental and physical health during the pandemic.\textsuperscript{36} Having an emotional support animal during the pandemic helped owners “recalibrate their emotions and feel more reassured.”\textsuperscript{37} Moreover, emotional support animals’ effects on the immune system lessened the chance of the virus having severe effects on the infected. In sum, the recent pandemic is just one illustration of the necessity of emotional support animals for their owners’ health and well-being.

III. LEGAL PROTECTIONS FOR INDIVIDUALS WITH SERVICE ANIMALS AND EMOTIONAL SUPPORT ANIMALS

Until the late 1900s, individuals with disabilities had no federal protections from discrimination, despite the existence of disability groups advocating for the rights of disabled people dating back nearly a century.\textsuperscript{38} As recently as the enactment of the Civil Rights Act in 1964, disabled individuals were excluded from the classes of groups protected.\textsuperscript{39} Public policy regarding individuals with disabilities shifted in 1973 with the passage of the Rehabilitation Act.\textsuperscript{40} The Rehabilitation Act was met with resistance, indicating the public’s reluctance to recognize individuals with disabilities as a protected class.\textsuperscript{41} The Rehabilitation

\textsuperscript{35} Hunjan & Reddy, supra note 32, at 320.
\textsuperscript{39} Id.
\textsuperscript{40} 29 U.S.C. § 701 et seq. (Rehabilitation Act).
\textsuperscript{41} See Rehabilitation Act, supra note 40 (The Rehabilitation Act takes the longest sit-in in United States history for it to go into effect on May 4, 1977); see also Julia Carmel, Before the A.D.A, There Was Section 504, N.Y. Times (July 22, 2020), https://www.nytimes.com/2020/07/22/us/504-sit-in-disability-rights.html [https://perma.cc/2ULS-776L].
Act was the first legislation to recognize individuals with disabilities as a minority class and to afford the group fundamental civil rights protections.\footnote{Shirley Wilcher, \textit{The Rehabilitation Act of 1973: 45 Years of Activism and Progress}, \textit{Insight Into Diversity} (Sept. 17, 2018), \url{https://www.insightintodiversity.com/the-rehabilitation-act-of-1973-45-years-of-activism-and-progress} [https://perma.cc/Q56N-XM9A].}

Prior to the Rehabilitation Act, “it had been assumed that the problems faced by people with disabilities, such as unemployment and lack of education, were inevitable consequences of the physical or mental limitations imposed by the disability itself.”\footnote{Arlene Mayerson, \textit{The History of the Americans with Disabilities Act}, \textit{Disability RTS. Educ. & Def. Fund} (1992), \url{https://dredf.org/about-us/publications/the-history-of-the-ada} [https://perma.cc/6Y85-XG38].} Although it changed the public perception of individuals with disabilities, the Rehabilitation Act was limited in scope and did not provide broad protections to disabled individuals. Specifically, it only applied to programs that receive federal financial assistance, and it would be nearly two more decades until individuals with disabilities were widely protected at the federal level.\footnote{Id.}

\section{Americans with Disabilities Act (ADA)}

The Americans with Disabilities Act (ADA) was the legislature’s first comprehensive response to widespread discrimination against people with disabilities.\footnote{Robert L. Burgdorf Jr., \textit{Why I Wrote the Americans with Disabilities Act}, \textit{The Washington Post} (July 24, 2015, 6:00 AM), \url{https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered} [https://perma.cc/6HUYYS6B].} The ADA was enacted in 1990 to ensure that “disabled persons have the same rights and opportunities as everyone else.”\footnote{Passengers With Disabilities Challenge Metropolitan Transportation Authority, Long Island Rail Road’s Refusal to Build Station Elevators, Disability RTS. Advoc. (Apr. 23, 2019), \url{https://dralegal.org/press/passengers-with-disabilities-challenge-metropolitan-transpor-tation-authority-long-island-rail-roads-refusal-to-build-station-elevators} [https://perma.cc/G3AA-C4QT].} The ADA protects disabled persons and their service animals in covered entities, including state and local government agencies, businesses, and non-profit organizations that serve the public.\footnote{ADA Requirements: Service Animals, ADA (Feb. 24, 2020), \url{https://www.ada.gov/resources/service-animals-2010-requirements} [https://perma.cc/V8XX-LHQR].} It is important to note that the ADA narrowly defines service animals as “dogs that are indi-
vidually trained to do work or perform tasks for people with disabilities.” The ADA specifies that “emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.” Thus, emotional support animals, and animals of species other than dogs, are not covered by the protections of the ADA.

The ADA prohibits requiring documentation of a service dog’s status as a service animal and prohibits inquiry “about the nature or extent of a person’s disability.” Staff of covered facilities are only permitted to ask someone with a service animal two questions: “(1) is the dog a service animal required because of a disability[?], and (2) what work or task has the dog been trained to perform[?]” Furthermore, staff may not inquire “about the person’s disability, require medical documentation, special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.” Finally, to clarify, the ADA does not speak to protections afforded to persons with disability specifically in the air travel context.

B. Air Carrier Access Act of 1986

Prior to the ADA’s passage, Congress enacted the Air Carrier Access Act (ACAA) in 1986 with the purpose of “prohibit[ing] discrimination on the basis of disability in air travel.” Before the ACAA, passengers with disabilities struggled to travel given the inconsistency of airline policies and accommodations. In 1990, the Department of Transportation issued its rule implementing the ACAA, setting out specific requirements to ensure equal access to air transportation for all passengers. Until the

48 Id.
51 ADA Requirements: Service Animals, supra note 47.
52 Id.
55 Id.
2021 Amendment discussed below, the 2009 DOT Regulations governed service animals on aircraft. The regulations required air carriers to permit service animals to accompany passengers with disabilities, even if it “may offend or annoy carrier personnel or persons travelling on the aircraft.”\textsuperscript{56} DOT defined service animals as any animal that is individually trained to assist a qualified person with a disability or any animal necessary for the emotional well-being of a passenger.\textsuperscript{57} Therefore, airlines were required to transport service animals of any species, excluding only certain unusual animals such as snakes, reptiles, ferrets, rodents, and spiders.\textsuperscript{58} The DOT regulations mandated that airlines accept identification cards, other written documentation, the presence of harnesses, tags, or credible verbal assurances as sufficient evidence that an animal is a service animal.\textsuperscript{59}

Unlike the ADA, the DOT’s 2009 regulations extended protection to include emotional support animals.\textsuperscript{60} However, the requirements for emotional support animals were more stringent than the requirements for service animals. Passengers were permitted to fly with emotional support or psychiatric service animals if they provided current documentation from a licensed mental health professional, no older than a year, stating: (1) the passenger has a mental or emotional disability, (2) the passenger needs the support animal as an accommodation for air travel, (3) the passenger is under the mental health professional’s professional care, and (4) the date and type of the mental health professional’s license.\textsuperscript{61} Further, DOT permitted airlines to require forty-eight hours of advance notice of a passenger’s wish to travel with an emotional support or psychiatric service dog.\textsuperscript{62}

IV. REVISIONS TO DOT’S REGULATIONS

A. WHAT SPARKED THE CHANGE?

The prevalence of emotional support animals flying on airplanes has increased dramatically in the past two decades, prompting DOT to reconsider the regulations of emotional sup-

\textsuperscript{56} 14 C.F.R. § 382.117(a).
\textsuperscript{57} Id.
\textsuperscript{58} 14 C.F.R. § 382.117(e–f) (2016).
\textsuperscript{59} Id. at § 382.117(d).
\textsuperscript{60} See id. at § 382.117(e).
\textsuperscript{61} Id.
\textsuperscript{62} 14 C.F.R. § 382.27(c) (8).
port animals on aircraft. In 2017, the number of emotional support animals on aircraft increased nearly 60% from the preceding year, despite only a 3.1% increase in the number of passengers.\(^{63}\) In 2018, over a million passengers on U.S. airlines traveled with an emotional support animal in the cabin.\(^{64}\) Animals on aircraft gained national attention, as stories went viral of passengers attempting to fly with unusual species, such as a peacock or an eighty-pound support pig.\(^{65}\) This heightened attention resulted in legislation addressing the issue. Specifically, the FAA Reauthorization Act of 2018 required DOT to “develop minimum standards for what is required for service and emotional support animals carried in aircraft cabins.”\(^{66}\) The Reauthorization Act also required DOT to consider “reasonable measures to ensure pets are not claimed as service animals” and proposed solutions such as aligning DOT’s definition of service animal with the definition used by the ADA.\(^{67}\)

In compliance with the FAA Reauthorization Act, DOT began seeking comment on how to “amend the Department’s ACAA regulations to address concerns raised by individuals with disabilities, airlines, flight attendants, airports and other aviation stakeholders regarding service animals on aircraft.”\(^{68}\) The DOT cited several reasons to support the need for rulemaking, including:

1. the increasing number of service animal complaints received . . . ;
2. the inconsistent definitions among Federal agencies of what constitutes a ‘service animal’;
3. the disruptions caused by

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\(^{64}\) Id.; see generally AIRLINES FOR AMERICA JOINS COALITION IN LETTER TO SECRETARY OF TRANSPORTATION ON EMOTIONAL SUPPORT ANIMALS, AIRLINES FOR AMERICA (Aug. 9, 2019), https://www.airlines.org/news/airlines-for-america-joins-coalition-in-letter-to-secretary-of-transportation-on-emotional-support-animals [https://perma.cc/J455-GWP2].


\(^{67}\) Id. at 3344 (§ 437(b) (1–2)).

requests to transport unusual species of animals onboard aircraft . . . ; (4) the increasing frequency of incidents of travelers fraudulently representing their pets as service animals; and (5) the reported increase in the incidents of misbehavior by emotional support animals.69

In the Notice of Proposed Rulemaking, DOT specifically sought comment on, amongst other things: whether there should be a distinction between emotional support animals and other service animals, whether animals should have to provide more documentation when flying, what the requirements should be in terms of leashing and carriers for animals, and other modifications for the treatment of service animals.70 Following this Notice, DOT received over 15,000 comments from various groups representing a wide array of interests, including disability advocacy organizations, airlines, human and animal health organizations, consumer groups, and individual members of the public.71

1. Advocates for the Exclusion of Emotional Support Animals

Advocacy supporting the exclusion of emotional support animals stemmed primarily from airline employees and passengers who were forced to accommodate misbehaving pets. These advocates noted how the heightened prevalence of emotional support animals has resulted in a sharp increase in airline incidents caused by emotional support animals, creating a safety and health hazard for other passengers and aircraft personnel.72 Additionally, misbehaved animals present a safety issue for other people on board, as some animals are prone to aggressive behavior. In 2017, one incident resulted in a passenger being bitten so severely while boarding a flight that he needed twenty-eight

69 Id.
70 Advance Notice of Proposed Rulemaking, supra note 68.
stitches in his face.73 Two years later, an emotional support dog bit a flight attendant, resulting in five stitches on his hand.74

Other incidents, such as animals urinating, defecating, and barking in aircraft cabins—albeit less severe than the physical injuries—still constituted a nuisance to other passengers.75 A survey of 5,000 flight attendants across thirty airlines revealed that one in four flight attendants have dealt with emotional support animals urinating and defecating in the cabin.76 These behaviors pose a risk to safety because they force crew “to deviate from their primary duties to address these animals’ disruptive behavior.”77 Furthermore, these behaviors can jeopardize safety by disrupting other passengers from hearing cabin announcements and other safety information from crewmembers.78

Advocates also supported the exclusion because of a perceived increase in the amount of fraudulent emotional support and service animals. They claim that the Department’s new definition will “curb the pervasive abuse that currently exists whereby individuals who do not have a disability falsely claim that their animals . . . are ESAs.”79 To support the claim of increased misrepresentation of service animals, they recognized that while trained service animals and pets increased 2.8% and 5.97%, respectively, the number of emotional support animals

77 A4A Letter, supra note 75.
79 A4A letter, supra note 75, at 4.
increased by more than 10.7% in the one-year period.\textsuperscript{80} These advocates partially attribute these misrepresentations to the high pet fees on airlines, stating it is an “economical choice since it ends up being less costly to falsely ‘certify’ your pet.”\textsuperscript{81}

2. Advocates for the Inclusion of Emotional Support Animals

On the other hand, those in support of the continued recognition of emotional support animals focused on the vital role that emotional support animals play in mitigating mental and emotional disabilities during air transportation and at a passenger’s destination. They recognize that individuals with mental disabilities who utilize emotional support animals for treatment would be less likely to travel by air if the proposed rule goes into effect.\textsuperscript{82} Alternatives to air travel are potentially more dangerous and offer lengthier travel times; this rule, therefore, would deprive individuals with disabilities from traveling in the same manner as those without disabilities. It would effectively “mean that these individuals would be forced to choose between traveling without their needed mental health intervention[,] or missing” important events.\textsuperscript{83} Advocates also point out how the exclusion would burden disabled individuals, who typically have disproportionately lower incomes, with higher fees in order to travel.\textsuperscript{84}

Advocates also point out the weaknesses in the evidence cited by the opposing side; while their opponents claim “[t]he drastic increase in the number and severity” of emotional support animal incidents, the number of service animal-related complaints DOT received is remarkably low (.00007 complaints per animal transported).\textsuperscript{85} Another justification for the rising prevalence of emotional support animals is that mental health professionals are “increasingly using the therapeutic value of animals to treat disabilities in lieu of medication and other more invasive

\textsuperscript{80} Id.

\textsuperscript{81} APFA letter, supra note 78, at 1.


\textsuperscript{84} Id. at 9.

\textsuperscript{85} USSA Letter, supra note 82, at 9.
therapies.”86 In addition, consumer complaints against airlines rose in the relevant years across the board, not just with respect to service animals.87 This indicates that the issue of unruly emotional support and service animals, while prominent and in need of addressing, is not as prominent as those pushing for the exclusion assert.

Supporters of emotional support animals are split on the best ways to regulate them, disagreeing over what documentation a passenger should be required to provide and how the animals must be accommodated once on board. For instance, one advocacy group feels “it may be fine for their emotional support animal to be in a carrier at [the passenger’s] feet.”88 However, the other “vehemently oppose requiring emotional support animals to be contained in pet carriers.”89 This illustrates the complexity of the challenge DOT faces in trying to construct a regulation that is satisfying and safe for all parties. People with disabilities require varying levels of treatment, with no one-size-fits-all option available. Therefore, regardless of the specific regulation the DOT promulgates, there will no doubt be some who are unhappy with it.

**B. A Final Rule on Traveling by Air with Service Animals**

After lengthy considerations, DOT issued its Final Rule on Traveling by Air with Service Animals in December 2020.90 The biggest change is that DOT no longer extends protections to emotional support animals.91 Furthermore, the rule defines a service animal as a “dog . . . that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability.”92 This modification aligns DOT’s definition of a service animal with that of the ADA to ensure psychiatric service dogs are protected. Thus, the final rule effectively excludes

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86 Id. at 12.
88 USSA Letter, *supra* note 82, at 33.
91 Id.
92 14 CFR § 382.3 (2022).
animals of other species from protection. Additionally, airlines are now permitted to require service animal users to provide a form “attesting to the dog’s health, behavior, and training to assist the airline in determining if the dog poses a direct threat to the health or safety of others.” If a flight is over eight hours in length, passengers will also have to provide a form either attesting to the fact that the animal will not need to relieve itself while on the aircraft, or describing how the animal can relieve itself on the aircraft without creating a health/sanitation issue.

Carriers can require individuals to provide these forms up to forty-eight hours in advance of the passenger’s travel. Carriers are also now permitted to limit the number of service animals traveling with a single passenger to two and can require that the service animal either fits on the passenger’s lap or foot space on the aircraft.

Following the final rule, airlines were quick to modify their service animal policies to reflect the changes made by DOT. Airlines varied in their approaches to implementing the new changes. However, by the end of 2021, most airlines no longer accommodated emotional support animals. Airlines for America, a lobbying group advocating on behalf of airlines, applauded DOT’s new rules, claiming that the rules will “facilitate a smooth and safer travel experience for qualified individuals with a disability . . . but will also prevent service-animal-related fraud and abuse.”

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93 Service Animal Final Rule FAQs, supra note 90.
94 14 C.F.R. § 382.75(b) (2022); see, e.g., United States Department of Transportation Service Animal Relief Attestation Form, Dep’t of Transp., https://www.transportation.gov/sites/dot.gov/files/2020-12/Service%20Animal%20Relief%20Form.pdf [https://perma.cc/MV4R-279H].
95 Service Animal Final Rule FAQs, supra note 90.
96 Id.
C. PRACTICAL EFFECTS OF THE CHANGED REGULATION

However, individuals with emotional support animals were not celebrating in the same regard. While the amended regulations were motivated by legitimate goals, the practical effect leaves passengers with little alternatives to traveling with their emotional support animal in a safe, affordable manner and the airlines with much more money in their pockets.

1. Alternatives to Flying with an Emotional Support Animal

Passengers who previously flew with their emotional support animal are left with few options for traveling with their animal. To bring an emotional support animal in the cabin, disabled individuals are now required to pay a fee. These fees may cost more than the passenger’s ticket itself and vary greatly between airlines. For instance, Delta charges $95 for domestic travel and $200 for travel outside of the United States.99 Furthermore, some airlines require pet travel to be booked over the phone and may charge additional fees for that service, further increasing the cost.100 In total, DOT estimates that the increased fees paid by passengers traveling with emotional support animals will result in an additional $54 to $59.6 million per year, in revenue, for airlines.101

Even if the financial cost is not an issue, additional constraints render traveling with a pet more difficult. For instance, airlines limit the number of pets allowed on a single aircraft at a time.102 This adds an additional stressor to traveling, as disabled persons must ensure they book their flight and make the accommodation early enough so that their animal will be allowed to board the cabin. Airlines also have various other specifications for pets that effectively exclude many animals from being able to fly in the cabin. For instance, airlines have size and weight requirements for the carrier the pet must travel in.103 Most airlines re-

101 Traveling by Air with Service Animals, supra note 71, at 79,745.
quire that the animal, in its carrier, fit and travel under the seat in front of the passenger for the duration of the flight. These specifications exclude many animals from being able to fly in the cabin of the plane unless the pets are toy size.

If a passenger’s animal is too large to meet the requirements for flying in the cabin, some airlines allow pets to be boarded in the cargo of the plane. This option is not reassuring to many animal owners due to the potential complications and unsafe conditions that their animal may be forced to endure. Animals in cargo may be exposed to extreme temperatures and poor ventilation, and the anxiety of the unfamiliar experience produces an exorbitant stressor to these animals. Misplacing or losing an animal in an accident could have heavy implications on someone who is already struggling with their mental health. Even if an owner is willing to take the risk, many popular airlines, such as Southwest Airlines, JetBlue, and Spirit Airlines, do not allow pets to fly as baggage or cargo at all. The airlines that do allow animals in cargo typically have breed restrictions in place that exclude many dog breeds from flying due to potential risk of respiratory distress.

Another option for people with disabilities to ensure they can fly with their emotional support animal would be training it as a service dog. This is by far the most expensive route for a disabled person to take. Purchasing a service dog that is already trained can range between $10,000 and $30,000, with some dogs costing up to $50,000. Training a dog to be a service dog can cost between $150 and $250 per hour, generally adding up to the $10,000 to $30,000 range, depending on the specific tasks that cannot exceed 17" L x 12.5" W x 8.5" H . . . and the combined weight of your pet and the carrier must not exceed 20 pounds.

104 See Traveling with Pets, supra note 103.

105 US Airline Pet Policies, supra note 100.


the service dog is trained to perform. It can also take up to two years to train a service dog to perform certain tasks. Besides being financially unfeasible, this also differs from the purpose of the emotional support animal in the first place, which is to provide companionship and psychological benefits through the nature of the animal itself. In sum, this modification of the rule leaves individuals with virtually no affordable alternatives for traveling with their prescribed treatment for their mental or emotional disability. Even if passengers can afford the steep fees, many other barriers make the process challenging and overwhelming.

2. Counteracting Fraudulent Service and Emotional Support Animals

One of the most critical reasons that DOT cited for implementing the changes was the large influx of individuals feigning disabilities to allow their pets on aircrafts for no charge and less hassle.112 This is a legitimate concern because, as discussed above, fraudulent emotional support or service animals pose a great risk to other airline employees or passengers aboard. These fraudulent animals also pose a distraction and threat to legitimate service dogs that can provide lifesaving care to their owner.113 However, no longer requiring airlines to recognize emotional support animals did little to address the issue; instead, it merely modified the loophole individuals would use.

Under the new regulations, the only documentation required for a passenger traveling with a service animal is the U.S. DOT form attesting to the animal’s health, behavior, and training. This training does not need to be conducted by a third-party trainer, meaning that passengers are permitted to list themselves as the trainer. Airlines may establish if an animal is a pet or a service animal through:

[a]sking an individual with a disability if the animal is required to accompany the passenger because of a disability and what work or task the animal has been trained to perform; [l]ooking for physical indicators such as the presence of a harness or vests;

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111 Id.
112 See Traveling by Air with Service Animals, supra note 71.
looking to see if the animal is harnessed, leashed, or otherwise tethered; and observing the behavior of the animal.\textsuperscript{114}

In contrast to the previous requirements for traveling with an emotional support animal, the current requirements for service animals are much less burdensome. Therefore, passengers can easily claim that their dog is a service animal because airlines have essentially no way to verify the information.\textsuperscript{115}

Furthermore, the modification of regulations on psychiatric service animals allows passengers to easily get around the rule. Under the ACAA Amendment, psychiatric service dogs are to be treated the same as other service dogs.\textsuperscript{116} Therefore, psychiatric service animal users are no longer required to provide a letter from a licensed mental health professional detailing the passenger’s need for the animal or check in one hour before the check-in time for other passengers.\textsuperscript{117} The only difference between a psychiatric service animal and an emotional support animal is that the former is specially trained, though it can be trained by the owner. And with little documentation requirements, the most likely result is passengers claiming their emotional support animal is a psychiatric service animal. Advocates for the exclusion of emotional support animals recognized the potentiality of this issue prior to the final rule.\textsuperscript{118}

V. THE IMPORTANCE OF RECOGNIZING EMOTIONAL SUPPORT ANIMALS

The DOT and advocates for the exclusion of emotional support animals often fail to acknowledge the importance of emotional support animals to their owners. Half of all Americans are diagnosed with a mental illness or disorder at some point in


\textsuperscript{116} See Service Animal Final Rule FAQ, supra note 90.


\textsuperscript{118} See A4A Letter, supra note 75, at 25 (“We remain concerned, however, that fraud will migrate and individuals who previously claimed their pet was an ESA will claim that their pet is a service animal.”).
their lifetime.119 Anxiety disorders are the most common mental illness in the U.S., affecting 40 million adults aged 18 and older.120 Although anxiety disorders are quite “treatable,” only 36.9% of those suffering seek and receive treatment.121 This can partly be attributed to the negative stigma that surrounds seeking mental health treatment or therapy services. The DOT’s decision to exclude emotional support animals perpetuates this stigma, as it downplays the significance of mental disabilities for which emotional support animals can provide treatment.

The purpose of the ACAA is to prevent airlines from discriminating against those with physical or mental disabilities, even if accommodating a passenger with a disability “results in appearance or involuntary behavior that may offend, annoy, or inconvenience crewmembers or other passengers.”122 The ACAA explicitly places physical and mental disabilities on equal footing.123 However, DOT’s amended rule appears to differentiate between the two. It effectively prevents discrimination against someone with a physical disability, or certain mental disabilities like PTSD, while excluding other individuals who have been diagnosed by a clinician with a mental health disorder such as depression or anxiety. Not allowing an individual with a disability to be accompanied by their support animal “unjustly and unlawfully denies them the accommodation that will enable their equal opportunity to visit their families, travel for work, seek needed health care,” or otherwise freely experience the world.124

Many individuals with mental and emotional disabilities do not need an animal to perform specific tasks to effectively treat their disorder, but instead just need the presence of the animal itself. The new regulations imply that unless an individual needs the animal to perform specific tasks, their disability is not seri-

121 Id.
122 14 C.F.R. § 382.19(b) (2023).
123 14 C.F.R. § 382.3 (“Individual with a disability means any individual who has a physical or mental impairment, . . .”) (emphasis added).
ous or important enough to warrant protection covering this prescribed method of treatment. The DOT should not be allowed to decide which disabilities are severe enough to warrant federal protections. Furthermore, DOT should not be allowed to require that individuals with disabilities pick the accommodations that are most satisfactory to the airlines themselves, rather than the individual passengers.

The DOT’s decision to exclude emotional support animals altogether places an undue burden on passengers with disabilities. Air travel in and of itself is a stressful endeavor for many people, especially those with mental or emotional disabilities. Respondents to the DOT’s request for comment noted the “inconceivability of leaving their emotional support animals behind, as many are either unable to fly without their emotional support animal, or unable to function without their emotional support animal at their destination for long periods of time.”

VI. PROPOSED SOLUTIONS FOR DOT REGULATIONS

There is great difficulty in promulgating regulations for emotional support animals that provide adequate protections fairly and equally to all. Some of these difficulties include the costs associated with accommodating animals aboard aircraft, the logistics of implementing new regulations, and the backlash received due to the divisive nature of the issue.

As discussed above, DOT had legitimate and worthwhile goals in amending the regulations, but the outcome does not accomplish the goals DOT identified. The regulations, as they are now, fail to treat individuals with and without disabilities equally, as they deny people with disabilities access to affordable and comfortable air travel. The safety of airline personnel and passengers alike can be achieved without a blanket exclusion that unfairly discriminates against people with certain types of disabilities.

A. EMOTIONAL SUPPORT ANIMALS: PROPOSED REGULATIONS

1. Redefining the Emotional Support Animal

Most importantly, DOT should revert to a system that recognizes emotional support animals because of the great benefits they provide their owners. Airlines should be required to rec-
Recognize emotional support animals in a category distinct from that of a service animal. The service animal definition should remain aligned with the ADA definition to limit confusion among federal agencies. A separate definition for emotional support animals should read:

Emotional support animal means a dog or cat that provides companionship and support that will help alleviate at least one symptom of a diagnosed mental or emotional disability that an emotional support handler may experience during a flight or at the handler’s destination.

An emotional support handler is a qualified individual diagnosed with a mental or emotional disability under the DSM-5 by a doctor or licensed mental health [professional] whose treatment plan includes the use of an emotional support animal to alleviate one or more symptoms of that disability.127

This definition clearly identifies the type of support that the animal provides and helps to clarify the distinction between an emotional support animal and service animal. In addition, limiting the species to dog or cat will prevent the outrageous species that garner national attention, drawing less criticism and skepticism to the concept. Less media attention on the subject will help shift public perception and destigmatize the use of emotional support animals.

2. Registration of Service and Emotional Support Animals

a. Necessary Documentation

The DOT should require that emotional support owners provide a letter from a mental health provider confirming the need for it, with modifications to the old regulations to ensure that these letters are legitimate. The letter should certify that the passenger has attended more than one session, either in person or through live teletherapy, with a mental health professional. Multiple sessions should be required to ensure that the mental health provider had adequate time to assess the patient and verify the need for the support animal. Additionally, one of these sessions should be of the type where the mental health provider witnesses the interactions between the patient and the support animal. This step is critical in confirming that the beneficial im-

127 USSA Letter, supra note 82.
pact of the support animal is relevant to the individual’s disability and disability-related impairment.\textsuperscript{128}

However, unlike the previous guidelines, the letter from the mental health provider should not have to be as recent as within one year of the date of travel. This one-year requirement places an unnecessary burden on those who are unable to afford consistent, yearly mental health treatment.\textsuperscript{129} Instead, the letters should only need to be redone every three to five years to ensure that the emotional support animal is still supported as a treatment method by the mental health provider.

In addition to the letter from the mental health provider, passengers traveling with an emotional support animal should also be required to complete the DOT Behavior and Training Attestation Form.\textsuperscript{130} The behavioral attestation form, already enforced for service animals, requires animal owners to check a box reading: “I understand that if [insert animal’s name] shows that it has not been properly trained to behave in public, then the airline may treat [insert animal’s name] as a pet by charging a pet fee and requiring [insert animal’s name] to be transported in a pet carrier.”\textsuperscript{131} This provides airlines with an option in the event that an emotional support animal is acting unruly and gives passengers notice that there will be repercussions to abusing the system.

b. National Registry

Under the current rules, most airlines require passengers to complete the required paperwork each time they fly. Instead, DOT should create and utilize a national registry in which individuals with emotional support animals upload the necessary documentation. This would ensure that once a passenger gets the proper documentation, they are not having to replicate it each time they travel. For someone traveling often, there is no

\textsuperscript{128} Younggren, supra note 15, at 161.

\textsuperscript{129} Reducing the Economic Burden of Unmet Mental Health Needs, THE WHITE HOUSE (May 31, 2022), https://www.whitehouse.gov/cea/written-materials/2022/05/31/reducing-the-economic-burden-of-unmet-mental-health-needs [https://perma.cc/8XVU-5ESM] (Almost half of individuals with mental illness did not seek treatment in 2020, and the rate was higher for the unemployed or uninsured.).


\textsuperscript{131} Id.
need to carry around the required paperwork when it could easily be stored digitally for widespread use.

Other federal agencies have long required proof of disability and registration into a national registry for disability benefits.\textsuperscript{132} DOT can easily follow this as an example and utilize a database to keep track of service and emotional support animals to streamline the process for passengers. Furthermore, the database can be used to keep track of instances of bad behavior from purported service and emotional support animals, thereby providing a paper trail for airlines if they do not allow certain animals to fly.

3. Airline Employee Training

Lastly, airline employees should be trained to identify inappropriate behavior from animals, as well as how to address them. One of the biggest issues is the inconsistency in application of the rules by individual airlines. On multiple occasions, passengers have been permitted to fly with their service animals on the way to a destination but have been prohibited when trying to return.\textsuperscript{133} Frontline employees must be familiar with the rules, documentation required, and accepted/unaccepted behaviors from emotional support and service animals to ensure an equal application of the regulations. Having a behavioral attestation form does little to promote compliance with the rules if the airlines themselves are not enforcing the provisions within them. This recommendation also applies to non-airline-specific employees, such as TSA agents and other airport personnel that assist airline passengers.

B. Preventing Fraudulent Service Animals

While it is essential that DOT recognizes emotional support animals, measures must be taken to reduce the potential for abuses of the system, as these abuses often result in unruly behavior by animals aboard aircraft. This behavior poses a risk to airline employees and passengers, specifically other passengers traveling with legitimate service or emotional support ani-


mals.\textsuperscript{134} Additionally, these misrepresentations negatively affect the public’s perception of service and emotional support animals, further burdening passengers who are rightfully using them.\textsuperscript{135} As the number of fraudulent service and emotional support animals increases, public entities are less likely to accommodate legitimate uses of animal assistance.\textsuperscript{136}

1. Increased Regulation of Mental Health Certifications

Disability rights groups and other proponents of the use of emotional support animals do concede that some emotional support animals are obtained in fraudulent ways. However, DOT’s solution misdirects their effort to reduce the fraud. It not only punishes the few that fraudulently obtain their animal certificates, but also punishes the many law-abiding disabled people who are prescribed their emotional service animal through legitimate means.

A common source of this fraud are websites that purportedly provide letters from licensed mental health professionals prescribing emotional support animals without any direct contact with the patient.\textsuperscript{137} Many websites do not require patients to actually speak with the mental health provider, instead allowing them to acquire an emotional support animal certification by filling out a questionnaire.\textsuperscript{138} These for-profit websites, known among some psychologists as “ESA mills” also will sell miscellaneous items like vests and tags to make the animal look more official, although no federal regulations require these items for legitimate service dogs.\textsuperscript{139} These websites rely on the naivety of passengers who are unaware of the exact protocol required for emotional support animals and public accommodations.

\textsuperscript{134} Canine Companions Grassroots Advocacy Initiative, CANINE COMPANIONS, https://canine.org/advocacy [https://perma.cc/2ENM-Y65H] (Seventy-eight percent of service dog users “report that poorly-trained or out-of-control service or emotional support dogs have had a negative impact on independence and quality of life.”).


\textsuperscript{136} Id.


\textsuperscript{138} Id.

\textsuperscript{139} Matei, supra note 113.
preying on naïve but well-meaning people, they legitimate themselves in the eyes of the public and cause a proliferation in the use of their services. These websites have caused passengers with emotional support animals to show up to the airport without the required paperwork, thinking they had already paid for the proper documentation and complied with the necessary regulations. Even if a passenger is intentionally and fraudulently misrepresenting their animal, it is the availability and accessibility of these websites that enable those bad actors while duping well-meaning individuals. These websites (the sources of the fraudulent letters) should be punished, and not the naïve individuals who do not properly understand how to travel with their emotional support animal.

DOT can rely on pre-existing mechanisms to regulate and reduce the number of these websites and fraudulent emotional support animal letters. States have statutes in place regulating the practice of mental health treatment. Further, there is “no mental health professional licensing board in the United States that would consider a mental or emotional disability diagnosed solely on the basis of review of answers to a short questionnaire to be a valid method for diagnosing a mental or emotional disability . . . “ Thus, DOT should redirect efforts into reporting these “ESA mill” services to the appropriate state licensing boards who will discipline the mental health providers that provide these letters without direct patient examination.

Furthermore, DOT can support causes and bring awareness to organizations who are already working to resolve this issue, such as the nonprofit organization, Prevent ESA Fraud. Prevent ESA Fraud utilizes existing state regulatory mechanisms to assure that prescriptions for emotional support animals meet the requirements of state law. For example, the organization has been able to catch fraudulent administrations of emotional support animal letters by using an alias to confirm that the mental health provider has no direct contact with the individual.

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141 USSA Letter, supra note 82.


143 Id.
before administering the letter.\footnote{See In re Traci McCarthy, State of New Hampshire Board of Mental Health Practice, https://www.oplc.nh.gov/sites/g/files/ehbemt441/files/in-line-documents/sonh/mental-health-mccarthy-traci-settlement-agreement-20211119.pdf [https://perma.cc/U6D9-TPZ7].} After being reported to the appropriate state board, the mental health provider was disciplined with twelve hours of continuing education and a $2,000 fine, even though they had no prior history of discipline in over twenty years of working as a mental health provider.\footnote{See id.} With threats of ethical violations and hefty fines, mental health providers will be disincentivized to work for the shady companies that provide these letters. Airlines can also assist in these efforts by reporting suspected fraudulent emotional service animal forms to the proper state agency so that an investigation can be conducted into the letter’s legitimacy.

Stopping the larger websites would be more easily attainable in conjunction with some type of widespread database, such as the one mentioned above. If an airline discovers that a mental health provider is writing fraudulent letters without the required patient interactions, a digitalized system will make it easy to find all emotional support animals prescribed by that professional and airlines could alert those passengers so they can remedy the situation.

2. Reducing the Expense of Traveling with a Pet

In the alternative, the DOT could help to curb the fraudulent use of both emotional support and service animals by simply reducing the costs associated with flying with a pet. One of the biggest incentives for a passenger to misrepresent their pet as an emotional support animal are the astronomical fees attached to traveling with a pet. The fee to fly with a pet round trip regularly exceeds the cost of the passengers’ tickets themselves.\footnote{See discussion infra Section IV.C.1 (regarding pet fees); see also Claire Trageser, Airlines’ Pet Fees Can Be More Expensive Than Flights, Travel + Leisure (Mar. 15, 2018), https://www.travelandleisure.com/travel-news/airlines-pet-fees [https://perma.cc/B2DA-ETYK].} Furthermore, pets are required to be in a specific carrier and placed underneath the seat in front of their owners, taking up the same amount of room aboard an aircraft as a normal carry-on item. Therefore, many do not understand why they must pay such an exorbitant amount to bring their pet.\footnote{See id.} Although air-
lines argue that the added cost is attributed to the increased liability and protocol that must take place with pets aboard, it appears to most as yet another way for airlines to maximize their profits.148

The DOT should mandate that airlines may not charge pet fees that exceed a stipulated amount and must ensure that their pet fees are in congruence with the carry-on fees. Lowering this financial burden would greatly reduce the amount of misrepresented service and emotional support animals without taking any other measures, as there would be a realistic and affordable way to travel with an animal. If no other measures were taken, even those with legitimate emotional support animals would benefit by utilizing this mechanism of travel. Although the practical effects would benefit those with mental or emotional disabilities, lowering pet fees by itself does little to help with the stigma against emotional support animals by not recognizing them in a category distinct from pets.

VII. CONCLUSION

In conclusion, emotional support animals are a vital part of the therapeutic treatment of individuals with mental illnesses. The companionship and support they provide replaces more invasive methods of treatment that can have damaging side effects. Restricting emotional support animals from flying leaves those suffering from these ailments with poor alternatives for traveling.

The purpose of the ACAA is to prohibit discrimination against people with disabilities, whether they are physical or mental. However, DOT’s restriction on flying with emotional support animals accomplishes the opposite of the ACAA’s intended purpose. It forces individuals with disabilities to choose between traveling without their needed mental health intervention, or missing family events, work opportunities, and other experiences. Regulations recognizing emotional support animals with a more systematic certification process and uniformity across airlines would help to reduce the number of fraudulent emotional support animals, while still allowing individuals with

mental disabilities a comfortable option for travel. In the alternative, lowering the cost to travel with a pet would be an easier method to make air travel with emotional support animals available and reduce instances of fraudulent service animals on aircraft.