BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS

ALLERGY & ASTHMA NETWORK, ASTHMA AND ALLERGY FOUNDATION OF AMERICA, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM, NO NUT TRAVELER,	)	
Complainants,	)	
v.	)	Docket DOT-OST-2022-0134
SOUTHWEST AIRLINES, CO.	)	
Respondent.	)	

COMPLAINANTS' REPLY AND MOTION FOR LEAVE TO FILE

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Now come Complainants[1] in the above-entitled action and respectfully submit this Reply to the late-filed Response of Southwest Airlines Co. ("Southwest").

Complainants respectfully seek leave pursuant to 14 C.F.R. § 302.408(c) to file this reply to Southwest's Response. Southwest raised new arguments not previously submitted in its Answer. Southwest's late asserted arguments were raised after the Answer was filed and more than fifteen days beyond the deadline for an answer in noncompliance with 14 C.F.R. § 302.408(a). For the reasons described below, Southwest's belated arguments are wholly without merit.

[1] Food Allergy Research and Education ("FARE") is not a party to this proceeding.

I. THE ACAA AND ITS IMPLEMENTING REGULATIONS BROADLY PROHIBIT DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES, INCLUDING INDIVIDUALS WITH FOOD ALLERGIES

Southwest claims without any basis in the ACAA or its implementing regulations that the ACAA does not apply to individuals who have allergies to foods other than nuts. To the contrary, the ACAA and its implementing regulations are worded broadly to cover *all* individuals with disabilities.

The Air Carrier Access Act provides that no air carrier may discriminate against any otherwise qualified individual with a disability, by reason of such disability, in the provision of air transportation. 49 U.S.C. § 41705. ACAA regulations prohibit discrimination against "any qualified individual with a disability." 14 C.F.R. § 382.11.

The ACAA broadly prohibits discrimination based on (1) "a physical or mental impairment that substantially limits one or more major life activities"; (2) "a record of such impairment"; or (3) "regard[ing an individual] as having such an impairment". 49 U.S.C. § 41705(a); *see also* 14 C.F.R. § 382.3 (defining individual with disability). ACAA regulations further make clear that "physical or mental impairment" includes "[a]ny physiological disorder or condition" affecting "body systems" including the "respiratory", "cardio-vascular", and "digestive", and "endocrine" systems. 14 C.F.R. § 382.3.

The ACAA's definition of disability tracks that of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* and section 504 of the Rehabilitation Act, 29 U.S.C. § 794. *Compare, e.g.*, 14 C.F.R. § 382.3 (ACAA regulation defining "physical or mental impairment), *with* 28 C.F.R. § 36.105(b)(1) (ADA regulation employing identical language). ACAA regulations also make clear that the ACAA is construed in manner similar to that of section 504 and

therefore the ADA. *See, e.g.*, 14 C.F.R. § 382.13(a) (applying section 504 standards to airline carriers).[2]

Courts have explained that in considering whether an impairment substantially limits an individual in a major life activity, the definition of disability is construed "'broadly in favor of expansive coverage,' keeping in mind that the language 'is not meant to be a demanding standard.'" *E.g.*, *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 670 (4th Cir. 2019) (quoting 28 C.F.R. § 36.105(d)(1)(i)). The ADA as amended also makes clear that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D).

Individuals with food allergies are individuals with disabilities since allergies substantially limit one's ability to breathe and eat as well as the workings of numerous bodily systems including the immune, respiratory, and circulatory systems. 42 U.S.C. § 12102(2)(A)(B). Notably, the mechanism involved in an allergic reaction is the same regardless of the allergen. Therefore, it makes no difference for coverage purposes whether a person is allergic to nuts or to a food other than nuts.

Accordingly, courts have held that individuals with food allergies or celiac sensitivity are individuals with disabilities. *See, e.g.*, *J.D.*, 925 F.3d at 670-71 (gluten sensitivity is a disability); *Mills v. St. Louis City Gov't*, Case No. 4:17cv0257 PLC, 2017 U.S. Dist. LEXIS 114800, at *11-15 (E.D. Mo. July 24, 2017) (shellfish allergy is a disability); *cf. also Farmer v. HCA Health Servs. of Va.*, Civ. A. No. 3:17CV342-HEH, 2017 U.S. Dist. LEXIS 204564, at *13-16 (E.D. Va.

[2] Section 504 and the ADA have nearly identical standards and are regularly analyzed together. *See, e.g.*, *Disabled in Action v. Bd. of Elections*, 752 F.3d 189, 196 (2d Cir. 2014).

Dec. 12, 2017) (latex allergy is a disability); *O'Reilly v. Gov't of the V.I.*, Civ. No. 11-0081, 2015 U.S. Dist. LEXIS 84407, at *16-17 (D.V.I. June 30, 2015) (mold allergy is a disability).

Southwest does not discuss the on-point guidance from the statute, regulations, and case law. Instead, Southwest relies on the EAD dated November 5, 2019. However, the footnote on page 4 of that document reads as follows:

> Although the Department's decision in FARE specifically referenced passengers with severe nut allergies, the Department interpreted section 382.93 as requiring airlines to permit passengers with *severe allergies to other type of allergens* to preboard to wipe down surfaces around their seat. (emphasis added).

Southwest's argument that it relied on the ruling in *FARE* to only allow preboarding for those with peanut and tree nut allergies is disingenuous. ACAA regulations, adopted after notice and comment rulemaking, have always been clear that individuals with disabilities who need to be preboard for safety must be permitted to do so, and when Southwest attempted to circumvent this legal obligation, DOT explicitly rejected its attempts and cautioned Southwest in the November 2019 EAD.[3]

Further, compliance with the ACAA by allowing passengers with food allergies to preboard would NOT raise "operational, legal and policy concerns" that would affect the entire industry as Southwest claims. In fact, the law already protects individuals with disabilities and other carriers have complied with this law. The ACAA simply ensures that disabled passengers who need to do so to be seated and travel safely be allowed to preboard, a process that airlines already have in place for passengers with disabilities.[4]

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[3] Southwest admits that allergens are present in a "variety of common foods." This is why it is important for any passenger with food allergies to be able to wipe their seating area since allergens are most likely present on seat tray-tables.

[4] Moreover, Southwest's proposition is hypothetical as it admits in footnote 4 to its response ("As a result, it is *possible* that Southwest sees more abuse of the preboarding

Since the ACAA already broadly prohibits discrimination against individuals with disabilities, including individuals with allergies, there is no need for additional rulemaking to make even clearer that such discrimination is not permitted. There is no carveout exempting from coverage individuals with allergens to anything other than nuts, and Southwest's arguments to the contrary demonstrate the need for enforcement action to enforce the ACAA as written.

II. ACAA REGULATIONS PROHIBIT REQUIRING MEDICAL CERTIFICATES FOR INDIVIDUALS WITH FOOD ALLERGIES

Southwest also suggested that a medical certificate be required for people with allergies to fly. Southwest's suggestion contravenes ACAA regulations which permit such medical certificates *only* for specifically enumerated categories of individuals: those who (1) "travel[] in a stretcher or incubator"; (2) "need[] medical oxygen during a flight"; (3) have a medical condition "such that there is reasonable doubt that the individual can complete the flight safely without requiring extraordinary medical assistance during the flight"; or (4) have a "communicable disease or condition that could pose a direct threat" to others on the flight. 14 C.F.R. § 382.23(b)(1); *id.* § 382.23(c). For all other categories of individuals with disabilities, such as individuals with food allergies, carriers are prohibited from requiring medical certificates. 14 C.F.R. § 382.23(a). Also except for certain enumerated disabilities not at issue here, carriers also "must not require a passenger with a disability to provide advance notice of the fact that he or she is traveling on a flight." 14 C.F.R. § 382.25; *see also id.* § 382.27.

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system…compared to other airlines.") (emphasis added). By their logic, the rights of passengers with severe allergies to be safe onboard during flight is outweighed by the hypothetical possibility of abuse by "albeit a small percentage of passengers." The ACAA was passed specifically to prevent discrimination and allow for everyone to fly safely. Southwest's contention is contrary to the intent and the spirit of the ACAA.

Given this clear regulatory guidance, Southwest may not require individuals with allergies to carry medical certificates. Southwest's suggestion to the contrary again demonstrates the need for enforcement action.

III. THE DEPARTMENT OF TRANSPORTATION HAS EXERCISED STATUTORY AUTHORITY TO BROADLY PROHIBIT DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES, INCLUDING INDIVIDUALS WITH FOOD ALLERGIES

Finally, Southwest claims that the "major questions" doctrine prohibits DOT from prohibiting discrimination against individuals with allergies to allergens other than nuts. Southwest's argument completely ignores the broad language of the statute which, as described *supra*, prohibits broadly discrimination against individuals with disabilities without any exception for individuals with allergies. Southwest's invitation to carve out individuals with allergies to allergens other than nuts would contravene the broad wording of the statute, and should be rejected. *See supra*.

CONCLUSION

For the foregoing reasons, DOT should levy civil penalties against Southwest, require reimbursement of passengers who were forced as the result of Southwest's discriminatory actions to pay additional fees to preboard, require training, and retract Southwest's EAD.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon the following via electronic mail on March 17, 2023.

/s/Mary C. Vargas
Mary C. Vargas