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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CAREY L. JOHNSON,

Plaintiff,

vs.

UNITED STATES OF AMERICA, ET AL,

Defendants.

No. 3:18-cv-02178-BEN-MSB

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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1. Background

A. Carey Johnson

Plaintiff Carey Johnson served in the United States Marines from June 6, 1995 to December 23, 1997. *See* VA Disability Rating, *Declaration of Joel B. Robbins*, **Exhibit 1, Attachment A**. He is veteran of the Gulf War era. *Declaration of Cary Johnson*, **Exhibit 2** at ¶ 2.

After his honorable discharge from the Marines, Mr. Johnson married and had one daughter. *See Carey Johnson Deposition*, **Exh. 1**, **Att. B**, at p. 14. His wife works in the Bay Area. *Id.* In 2012, he moved to Mexico, where he resides with his daughter. *Id*. at 11-12. As Mr. Johnson cannot work—as shall shortly be explained—Mexico is considerably less expensive for him to raise and educate his daughter. *Johnson Declaration,* **Ex. 2**, at ¶ 3. Further, due to his disability, the pace of life and warmer climate in Mexico are better suited for him. *Id*. Mr. Johnson split his time in Mexico between the communities of Hipodromo and Popotla. *Johnson Deposition*, **Exh. 1**, **Att. B**, at pp. at 12-13.

Mr. Johnson suffers from bipolar disorder. *VA Disability Award*, **Exh. 1, Att. A**. The Veterans Administration concluded that "[s]ervice connection for bipolar disorder is granted with an evaluation of 100 percent effective September 8, 2010." *Id*. at p. 1.

As a veteran, Mr. Johnson receives his medical care from the Veterans Administration. The nearest VA facility is in San Diego; thus, to obtain this care, Mr. Johnson must routinely cross the border from Mexico into the United States. *See Johnson Deposition*, **Exh. 1, Att. B**, at pp. 33-34, 127.

As the Government correctly notes, most times when Mr. Johnson crossed the border for routine medical care, he used normal border crossing lanes. *Motion*

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for Summary Judgment, Doc. 80, at p. 2. Many times, he would cross at times when the lines in non-dedicated lanes were relatively short, not triggering his anxiety. *Johnson Deposition*, **Exh. 1, Att. B,** at pp. 146-47. However, in light of his disability, Mr. Johnson occasionally needed medical care from the VA on a more emergent basis. He would sometimes experience extreme anxiety when encountering heavy traffic or long waits or would need to seek immediate medical care for an emerging manic phase of his bipolar disorder. *See Report of Jon McCaine*, *Sealed Declaration of Joel B. Robbins*, **Exh. 3, Att. A**, at p. 15.[1] He therefore sought a means of expedited entry via the SENTRI lane as an accommodation for times when he was experiencing a medical emergency or the lengthy lines were like to exacerbate his disability.

Thus, Mr. Johnson decided to ask officers at the Otay Mesa Border Crossing[2] for a border crossing accommodation, a procedure to enable him to obtain the medical care he needed on a more expedited basis. It was Mr. Johnson's efforts to seek such reasonable accommodation that he, a disabled American veteran deserved, that gives rise to the present dispute.

On September 22, 2016, Mr. Johnson approached the SENTRI-gate at the Otay crossing. *Johnson Deposition*, **Exh. 1, Att. B,**. SENTRI stands for Secure Electronic Network for Travelers Rapid Inspection, which is little more than one or two of 12 lanes for vehicular traffic to enter the United States at this border

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1 Due to the discussion of Mr. Johnson's sensitive personal and medical history contained in Dr. Jon McCaine's report, Plaintiff has filed a motion requesting permission to file the report and the accompanying declaration of Plaintiff's counsel under seal.

2 The Otay Border Crossing is one of three ports of entry in the San Diego—Tijuana metropolitan region, the others being San Ysidro and Tecate. San Ysidro is the busiest, and Otay the second.

crossing.[3] *See Robert Alvino Deposition*, **Exh.1, Att. C**, at p. 21. However, traffic in the SENTRI lane is limited to persons who have applied for and received SENTRI certification, entitling them to the benefits of a faster border crossing. *See generally Kevin Guisinger Deposition*, **Exh. 1, Att. D**, at p. 30.

The busiest border crossing between the San Diego area and Mexico is the San Ysidro Border Crossing. Notably, until 2016, the San Ysidro Border Crossing could have actually accommodated Mr. Johnson's request for handicap accommodation. CBP Officer Robert Alvino testified that there had been a dedicated lane for medical issues and emergencies that a handicapped person could use:

> Q. But in the car, the automobile part, was there a dedicated medical lane?
>
> A. Yes. Every day.
>
> Q. And what was the purpose or what was your understanding of the purpose for the medical lane?
>
> A. For medical emergency.
>
> Q. So if a person had a handicap, which at the time required emergency medical treatment, they would use that lane?
>
> A. If they could. It all depends, you know, if they meet the standard, as long as they had their proper documents for admissibility.

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3 The San Ysidro crossing had 25 lanes. *Robert Alvino Deposition*, **Exh. 1, Att. C**, at p. 23. The number of SENTRI lanes can change, depending on need.

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Robert Alvino Deposition, **Exh. 1, Att. C,** at pp. 29-30. In fact, if someone seeking to cross for emergent medical care used the SENTRI lane, that person would have been redirected to the medical lane:

> Rather than violating them, as a reasonable accommodation if someone went to the SENTRI lane for the first time and said, hey, I've got this condition where I need medical treatment, immediately, one of the things that could have been done to accommodate them would have been to say, hey, there's a medical lane that is expressly open for the purpose of medical emergencies, next time you come through go to that lane.

Id. at 32. However, in the summer of 2016, the lane was eliminated when the building accompanying it was torn down. *Id.* at 28-29.

A couple of months later, Mr. Johnson approached the SENTRI lane at Otay to determine what he should do to accommodate the times he needed to cross the border promptly for medical reasons. Given the elimination of the medical lane in San Ysidro, Mr. Johnson's request is entirely reasonable.[4]

Specifically, on September 22, 2016, Mr. Johnson presented his VA identification card with a disability designation and his passport to the CBP officer, and explained his need for a disability accommodation as a qualified disabled person. *Johnson Declaration,* **Exh. 2**, at ¶ 5. This officer sent Johnson to secondary inspection where he spoke with a supervising officer, CBPO Robert

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4 It takes an average of 60-90 seconds to process a vehicle in a normal lane, once that person reaches the entry area. *Sally Carrillo Deposition*, **Exh. 1, Att. E**, at 243. In the SENTRI lane, it typically takes 10-15 seconds to process a vehicle in the SENTRI lane. *Id*. at 242. Mr. Johnson has not asked that he be given the same clearance as a SENTRI participant, and is aware that he would need to be sent to secondary inspection, which may add up to five minutes for processing. *Id*. at 242-43. Thus, the added burden on CBP for Mr. Johnson's limited accommodation request is just a few minutes for his occasional border crossings.

Alvino. *Johnson Deposition,* **Exh. 1, Att. B**, at 49-50. Alvino remembered Johnson from a prior breakdown and told Johnson that he should speak with an agent at the Otay Mesa SENTRI office about formalizing his request for an ongoing accommodation. *Id*. at 49-50, 61.

At the Otay Mesa SENTRI office, CBPO Rolenio Murillo informed Mr. Johnson that the proper procedure was the one he already was employing; that is, to approach the agents at the SENTRI gate and present his identification card supporting his disability, along with his passport. *Johnson Declaration*, **Exh. 2**, at ¶ 6. Johnson recalls Murillo stating:

> And Murillo explained to me that he was a disabled vet, as well, and that he kind of said that what I was req- -- there was a policy gap, and there wasn't a lot, but that the officers had discretion and, also, that a lot of the officers were prior military, so they should be sympathetic and understanding, and that if I presented my case, that they had discretion; and if they didn't, it would be an abuse of discretion.

Johnson Deposition, **Exh. 1, Att. B,** at 61-62.

At 8:30 a.m. on September 23, 2016, following CBPO Murillo's advice, Mr. Johnson went to the SENTRI gate, presented his passport and ID, and explained that he needed to proceed to secondary inspection to speak to the supervisor regarding his request for accommodation. *Johnson Declaration*, **Exh. 2**, at ¶ 7. While waiting in his car to be processed, two CBP agents approached Mr. Johnson and verbally harassed him, claiming that there was nothing wrong with him. *Id*. at ¶ 8. The supervisor appeared and immediately became aggressive and abusive towards Mr. Johnson. *Johnson Deposition*, **Exh. 1, Att. B**, at 65.

> When I was in secondary the first time, I went to secondary, and I was waiting in my car. And then Officer Andrade -- Supervisor

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> Andrade came over. She kind of started yelling at me. I was kind of taken aback. And then she left.
>
> And then a few of the other officers that were working there, they actually started heckling me and, you know, saying: Oh, I'm a disabled vet. And they pulled out their ID card. They were like, you know, 20, 30 percent and whatnot. And I was like: That's a little different.

Id. at 66.

CBP Officer Ferguson ultimately suggested that things might go better if Johnson brought his VA disability determination letter with him. *Id*. at 67.

Again, Mr. Johnson followed the advice given to him by Officer Ferguson, and retrieved his VA disability determination letter from his home, and then returned to the SENTRI gate. *Id*. at 71. He explained to the SENTRI gate agent that he needed to go to secondary inspection to talk to a supervisor and show them his disability paperwork. Mr. Johnson was sent to secondary inspection but was again met by an aggressive agent who ridiculed him and claimed he was not actually disabled. Several more agents came out to take Mr. Johnson into custody. *Id*. at 72-73.

The agents handcuffed Johnson and shackled him to a bench. After nearly three hours, CBP agents told Mr. Johnson he could go but would have to pay a $5,000 fine or they would impound his car. *Id*. at 74-79. Mr. Johnson paid the fine, needing his vehicle to transport his daughter. *Id*. at 79.

On October 31, 2016, Mr. Johnson waited in the regular crossing lane to enter the U.S. However, he began to experience a severe anxiety attack when the lane he was in suddenly closed and he could not merge into the open lane. *Id*. at 84-86. When Mr. Johnson exited his car and moved an orange traffic cone, he was approached by two CBP officers and directed to a primary inspection booth. *Id.* Mr. Johnson complied and drove to the inspection booth, but when CPBO Ibarra

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became aggressive, he rolled up his window out of fear. *Id*. at 87. CBP officers forcibly removed him from his car. *Id*. They slammed him against the exterior of the vehicle and brandished a Taser. *Id*. By the time the officers backed off of Mr. Johnson, he could not longer feel his legs. Officers summoned an ambulance and transported him to a nearby hospital. *Id*. at 88.

Mr. Johnson had further interactions with CBP officers. The very next day, November 1, 2016, during an emerging manic episode, he was traveling to the VA Hospital and sought expedited border crossing due to the severity of his symptoms. *Id*. at 99-100. However, the CBP officers did not believe him, and made an independent medical decision—for which they were distinctly unqualified—that Mr. Johnson's situation was not a medical emergency. *Johnson Deposition*, **Exh. 1, Att. B**, at 101-02; *Chantelle North Deposition*, **Exh. 1, Att. F**, at 80. When Mr. Johnson was taken by ambulance to the VA Hospital—where he remained in psychiatric care for four days—the CBP officers seized his vehicle for an alleged SENTRI violation and issued a $10,000 fine. *Johnson Deposition*, **Exh. 1, Att. B**, at 109; *Johnson Declaration*, **Exh. 2**, at ¶ 8.

On December 2, 2017, CBP officers assaulted and detained Mr. Johnson yet again while crossing the border in the pedestrian lane. *Johnson Deposition,* **Exh. 1, Att. B**, at 111-115.

On January 5, 2018, CPB approved Mr. Johnson's formal written request for an ongoing disability accommodation. However, the permitted "accommodation" was that Mr. Johnson could get expedited crossing through the San Ysidro pedestrian lanes by showing CBP's letter of approval and appropriate identification. *See Jan. 5, 2018 Letter from Sidney Aki, Port Director, to Carey Johnson*, **Exh. 1, Att. G**.

This purported accommodation had two issues. *First*, it was not really an accommodation at all. Mr. Johnson explained when asked about this purported "accommodation":

> Because I wasn't -- it didn't -- it didn't facilitate me getting to my medical appointments. It was not practical…. [¶]Because how do I -- how do I -- how do I get from San Ysidro to La Jolla on a consistent basis? Someone that doesn't even have the ability to show up for work, and public transportation, it just wasn't practical.

Johnson Deposition, **Exh. 1, Att. B**, at 127.

Second, it didn't prevent the abuse from continuing. In April of 2019, Mr. Johnson utilized the San Ysidro pedestrian lane. This is what transpired:

> And when I went to the officer, the officer was kind of -- I gave him -- I gave him the letter. And he was just kind of like: Man, get this shit out of here. You know, I was like: What? Let me speak to a supervisor.
>
> And he called a supervisor over. And the supervisor came over and didn't want to acknowledge the letter, either. And he told me to leave.
>
> And I says: No, I'm not leaving. I want to talk to your boss.
>
> Then, at that point, he pulled out the handcuffs and like five officers grabbed me, roughed me up. They took me to the secondary office. And then they called. They thought I had a fraudulent letter….

Id. at 128-29.

Mr. Johnson brought the present disability discrimination and excessive force matter on September 20, 2018. *Doc. 1; Doc. 29.* He alleged eight claims for relief:

(1) Bivens: Unlawful Seizure and Excessive Use of Force;

(2) Violation of Section 504 of the Rehabilitation Act;

(3) Federal Tort Claims Act: Assault and Battery;

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(4) FTCA: False Arrest;

(5) FTCA: Negligence/Gross Negligence;

(6) FTCA: Conversion;

(7) FTCA: Intentional Infliction of Emotional Distress; and

(8) FTCA: Violation of California Civil Code § 52.1 (Bane Act)

Id. In their motion for summary judgment, the Government seeks summary judgment as to two of these eight claims: (1) Section 504 of the Rehabilitation Act, and (2) the Bane Act. For the reasons set forth herein, Mr. Johnson respectfully requests that this Court deny the Government's motion.

2. Discussion

A. This Court can award injunctive and declaratory relief to Mr. Johnson under the Rehabilitation Act, which is vital given the Government's refusal to provide Mr. Johnson with a meaningful and workable accommodation.

In *Lane v. Pena*, 518 U.S. 187 (1996), the United States Supreme Court held that Congress had not waived the federal government's sovereign immunity for monetary damages under section 504 of the Rehabilitation Act. *Id.* at 200 ("Section 1003(a) is not so free from ambiguity that we can comfortably conclude, based thereon, that Congress intended to subject the Federal Government to awards of monetary damages for violations of § 504(a) of the Act"). Under *Lane*, Mr. Johnson does not seek monetary damages under the Rehabilitation Act.

However, Plaintiff may obtain both injunctive and declaratory relief from the Government. Within the past few months, the district court for the District of Columbia, citing numerous cases (including those within the Ninth Circuit) affirmed that the Rehabilitation Act did *not* bar injunctive claims against the federal government. *Nat'l Ass'n of the Deaf v. Trump*, -- F.Supp.3d --, 2020 WL 5411171 (D.D.C. Sept. 9, 2020).

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> The structure of the Rehabilitation Act further indicates that Congress intended to create a private remedy for equitable relief, rather than — as Defendants argue — requiring plaintiffs to rely on the Administrative Procedure Act's remedial scheme for rights enforcement…. [¶] While Congress undertook in section 505 to enact new provisions to clarify which plaintiffs should look to the remedial schemes of other statutes, it never directed those plaintiffs who seek relief from Executive agencies' violations of section 504 to rely on the Administrative Procedure Act. Nor would it make sense to assume — particularly when the text of section 504 indicates otherwise — that Congress intended to direct such plaintiffs to the APA's remedial scheme when section 504's reference to "any Executive agency" is meant to be more inclusive of entities than is the APA's definition of an agency.

Id., slip op., at 7 (citations omitted).

> This understanding of section 504 — namely, that private parties can rely on it in bringing suits against Executive agencies for injunctive and declaratory relief — is shared by many courts across the country. *See also, e.g.*, *Doe* [*v. Attorney Gen. of U.S.*], 941 F.2d [780], 789 [(9th Cir. 1991), *disapproved of on other grounds by Lane v. Pena*, 518 U.S. 187 (1996)]; *J.L.* [*v. Soc. Sec. Admin.*], 971 F.2d [260], 264 [(9th Cir. 1992), *disapproved of on other grounds by Lane v. Pena*, 518 U.S. 187 (1996)]; *Yeh v. U.S. Bureau of Prisons*, No. 18-943, 2019 WL 3713874, at *5 (M.D. Pa. May 15, 2019) ("[A] plaintiff may bring a claim for injunctive relief under section 504(a) of the [Rehabilitation Act] against [Executive] agencies and individuals acting in their official capacities"); *Davis v. Astrue*, No. 06-6108, 2011 WL 3651064, at *5 (N.D. Cal. Aug. 18, 2011) (considering history of Rehabilitation Act amendments and concluding that Congress created private right of action under section 504 for declaratory and injunctive relief against Executive agencies); *Washington v. Fed. Bureau of Prisons*, No. 16-3913, 2019 WL 2125246, at *8 (D.S.C. Jan. 3, 2019) (collecting cases and concluding same), report and recommendation adopted, No. 16-3913, 2019 WL 1349516 (D.S.C. Mar. 26, 2019); *McRaniels* [*v. United States Dep't of Veterans Affairs*], 15-CV-802-WMC, 2017 WL 2259622, at *4 (W.D. Wis. May 19, 2017)(concluding, in suit against Executive agency, that "reading sections 504 and 505 [of the

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> Rehabilitation Act] together compels a finding of an implied private right of action."); *Howard v. Bureau of Prisons*, No 05-1372, 2008 WL 318387, at *9 (M.D. Pa. Feb. 4, 2008) ("With regard to the Rehabilitation Act ..., injunctive relief is available even though damages are not" in suits against Executive agencies).

Id. (citations omitted). So, too, Mr. Johnson can seek injunctive and declaratory relief against the Government in this matter under section 504 of the Rehabilitation Act.

Further, Plaintiff is entitled to attorney's fees should he receive injunctive relief under the Rehabilitation Act. The *National Ass'n for the Deaf* Court observed that Congress has expressly incorporated Title VI's remedial scheme for violations of section 504 against the federal government. *Id*. (citing 29 U.S.C. § 794a(a)(1)). Section 794a also provides in pertinent part:

> (b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C.A. § 794a(b). Thus, while the United States itself may not recover fees, Mr. Johnson is entitled to his reasonable fees as part of his taxable costs once he achieves injunctive relief in this matter.

B. Johnson's occasional use of the SENTRI lane for medical or emergency purposes is a reasonable accommodation, to which Johnson is unquestionably entitled.

To establish a violation of § 504 of the Rehabilitation act, "a plaintiff must show that (1) she is handicapped within the meaning of the RA; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance." *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). The Government contends that Mr. Johnson

cannot show either the second or third element, claiming that he is not qualified for the "SENTRI service."

Despite the fact that possession of marijuana is now fully legal in at least sixteen states and decriminalized in numerous others, the Government acknowledges that Mr. Johnson's marijuana-related conviction years earlier would preclude him from obtaining the security clearance for SENTRI lane use. Thus, the Government reasons, Mr. Johnson is not "qualified for the benefit or services sought." *Motion for Summary Judgment*, *Doc. 80*, at 14-15.

The Government misstates the "service" to which Mr. Johnson is entitled. Mr. Johnson, as an American citizen and veteran, is entitled to the *service* of being able to enter the United States. And thus, under the Rehabilitation Act, where this entry exacerbates his disability—a 100% disability found by the United States Government itself—he is entitled to a reasonable accommodation.

"The question whether a particular accommodation is reasonable depends on the individual circumstances of each case and requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002) (quotation omitted). The party seeking an accommodation bears the initial burden of showing that a reasonable accommodation is possible; thereafter "the burden shift[s] to the [defendant] to produce rebuttal evidence that the requested accommodation was not reasonable." *Id.*

Here, Mr. Johnson has demonstrated that a reasonable accommodation—use of the SENTRI lane—is possible. There is nothing physically unique about the SENTRI lane; it is simply one of multiple border crossing lanes available to vehicle seeking entrance to the United States. It is staffed by the same CBP

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officers that staff any of the other entry lanes. Travelers through the SENTRI lane must show documentation that they are entitled to use that lane. Under this reasonable accommodation, Mr. Johnson would simply have to show documentation that he, too, is entitled to use the lane, albeit without the other special dispensations available to SENTRI participants. Other than permitting his vehicle to pass through that particular lane, the CBP officers would do nothing more than treat Mr. Johnson as it would any other vehicle passing through any of the normal entry lanes. The Government has not rebutted Mr. Johnson's assertion; at the very least, this creates an issue of fact that must be tried to the factfinder.

C. Permitting Johnson to use the SENTRI lane as a reasonable accommodation would not fundamentally alter the traffic lane.

The Government claims that permitting Mr. Johnson to use the SENTRI lane as an accommodation would "fundamentally alter" the SENTRI lane. *Motion for Summary Judgment*, *Doc. 80* at p. 23. The Government has not made a colorable showing in this regard.

An accommodation is not "reasonable" if it would "fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." 42 U.S.C. § 12182(b)(2)(A)(ii) (Americans with Disabilities Act). The Government's contention is that Mr. Johnson is not qualified to be approved for the SENTRI ***program***. But this case is not about the SENTRI ***program***. Mr. Johnson is not claiming that he should be accommodated for entry into this program; indeed, he has acknowledged that he would not be approved for the program. *Johnson Deposition*, **Exh. 1, Att. B**, at p. 54.

The issue here is about a traffic lane at the border. CBP has chosen to make that lane exclusively available for SENTRI members who, as noted above, show their credentials when traveling through, and are treated accordingly (i.e., with the

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privileges of having passed an extensive background check). Mr. Johnson seeks none of these privileges. When entering the SENTRI lane, he would show his passport and accommodation credentials, but would otherwise be treated the same as any other traveler seeking entry through normal entry lanes. Nothing about this accommodation impacts the SENTRI program itself in any manner; it would not inconvenience any SENTRI participants, and certainly not any CBP officer assigned to the SENTRI lane.

In *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), the United States Supreme Court explained the "fundamental alteration" provision of the ADA and Rehabilitation Act. In *Martin*, a professional golfer, Casey Martin, sought an accommodation for his disability from the PGA. Martin was afflicted with Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart; his leg had atrophied, making walking a course for the duration of a tournament impossible. Thus, he requested to use a golf cart between holes as an accommodation. The PGA refused, claiming that this accommodation would "fundamentally alter" the nature of the competition, claiming that the "fatigue element" of having to walk the course was part of the competition.

The Supreme Court disagreed that the single accommodation requested by Martin constituted such a fundamental alteration. The PGA's "refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA." *Id.* at 688. To comply with [the ADA's] command, an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not work a fundamental alteration. *Id.* "[The PGA]'s

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claim that all the substantive rules for its 'highest-level' competitions are sacrosanct and cannot be modified under any circumstances is effectively a contention that it is exempt from Title III's reasonable modification requirement." *Id.* at 689.

So too here, the mere act of permitting Mr. Johnson to use the SENTRI lane—without any of the other security perks of SENTRI membership—does not fundamentally alter the SENTRI program. Indeed, it is notably unintrusive. It does not "fundamentally alter" the SENTRI program in any respect.

D. Johnson's claims fall within the scope of the Bane Act.

Civil Code section 52.1, subdivision (a), provides that if a person interferes, or attempts to interfere, by threats, intimidation, or coercion, with the exercise or enjoyment of the constitutional or statutory rights of "any individual or individuals," the Attorney General, or any district or city attorney, may bring a civil action for equitable or injunctive relief. Subdivision (b) allows "[a]ny individual" so interfered with to sue for damages. Subdivision (g) states that an action brought under section 52.1 is "independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law," including Civil Code section 51.7.

Likewise, Civil Code section 51.7, a separate and independent enactment referred to in section 52.1, declares that all persons have the right to be free from violence or intimidation because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because they are perceived by another to have any of these characteristics. Section 52, subdivision (b), makes persons who violate section 51.7 liable for actual and exemplary damages and penalties. These provisions are

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all part of California state law, *not* federal. *See Venegas v. County of Los Angeles*, 32 Cal. 4th 820, 841–42, 87 P.3d 1, 13 (2004).

Many courts have held that a violation of the Bane Act, a state statute, may give rise to liability under the Federal Tort Claims Act. *See, e.g., Plascencia v. United States,* 2018 WL 6133713, *slip op.* at 13 (C.D. Cal. May 25, 2018) (finding that Bane Act claim asserting a violation of the California Constitution was adequately pled in an FTCA action); *Xue Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010) (finding that Plaintiff had adequately stated a Bane Act claim premised on the interference with their right to asylum); *Anonymous v. United States*, 2017 WL 1479233, *slip op.* at 4 (S.D. Cal. Apr. 25, 2017) (determining that the relevant caselaw "not only support[s] a finding that the FTCA constitutes a sovereign immunity waiver for Bane Act claims, but also that the FTCA encompasses state-statutory violations").

The California Constitution expressly provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws…." Calif.Const. Art I, § 7(a). Likewise, under California law:

> Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places.

Cal.Civ.Code § 54(a). Further, under the common law of California, the CBP officers controlled Mr. Johnson's ability to obtain necessary medical care, and as such owed a duty to Mr. Johnson, which they breached by their unreasonable delay and refusal to permit him to get such care. *See Dix v. Live Nation Entertainment, Inc.*, 56 Cal.App.5th 590, 270 Cap.Rptr.3d 532 (2020) (music

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festival operator owed duty of care to attendee, where attendees were dependent on operator to seek medical care in case of emergency).

Plaintiff alleged in his complaint:

> 136. … This [the Bane Act] includes any interference of these rights by threats, intimidation, coercion or attempted threats, intimidation, or coercion.
>
> 137. Defendants interfered with Plaintiff's right to be free from excessive force.

Second Amended Complaint, Doc. 29, at pp. 22-23. These allegations all involve underlying violations of California law, and subsumed into the Bane Act. As in *Plascensia, Xue Lu,* and *Anonymous*, Mr. Johnson has stated a valid Bane Act claim under the FTCA.

Further, Mr. Johnson is entitled to an award of attorney's fees once he prevails on his Bane Act claim:

> In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court may award the petitioner or plaintiff reasonable attorney's fees.

Cal. Civ. Code § 52.1(i). This fee shifting statute "brought under state law is a **substantive matter to which state law applies**." *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 809 (9th Cir. 2018) (emphasis added). Further, this fee shifting is an integral part of the Bane Act's remedial scheme, part of the Act's recognition of the "importance of civil rights suits in protecting the public against abuses at the hands of "large or politically powerful defendants." *Id.* (quoting *Horsford v. Bd. of Trustees of California State Univ.*, 132 Cal. App. 4th 359, 399–401, 33 Cal.Rptr.3d 644 (2005).

Mr. Johnson has stated a valid claim under the Bane Act and is entitled to seek attorney's fees once he prevails on this claim.

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E. Johnson is entitled to attorney's fees for any violation of the Bane Act under the Equal Access to Justice Act.

The Equal Access to Justice Act provides in pertinent part that:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. **The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award**.

28 U.S.C. § 2412(b) (emphasis added). As noted above, the Bane Act expressly provides for an award of attorney's fees to a prevailing plaintiff. Cal. Civ. Code § 52.1(i). Further, under the Federal Tort Claims Act, the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances" under applicable state law. 28 U.S.C. § 2674; *see also id.* § 1346(b)(1). Although the federal government "could never be exactly like a private actor, a court's job in applying the standard is to find the most reasonable analogy." *LaBarge v. Mariposa County*, 798 F.2d 364, 367 (9th Cir. 1986).

A private party would be responsible for a fee award to a prevailing party in a Bane Act case. The FTCA seeks to hold the United States liable in the same manner as a private party, and the Equal Access to Justice Act makes the United States liable for attorney's fees "to the same extent any other party would be liable . . . ." The attorney's fees provision of the Bane Act applies to Mr. Johnson's Bane Act claim against the United States.

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3. Conclusion

For the reasons set forth herein, Plaintiff Carey Johnson respectfully requests that this Court deny the Defendants' motion for partial summary judgment.

RESPECTFULLY SUBMITTED: January 11, 2021.

By: /s/Joel B. Robbins
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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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