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12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

14 MOHANAD ELSHIEKY,
15 Plaintiff,
16 v.
17 UNITED STATES OF AMERICA,
18 Defendant.

No. 2:20-CV-00064-SAB

**PLAINTIFF'S RESPONSE
TO MOTION TO DISMISS**

With Oral Argument
(Telephonic):
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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiff Mohanad Elshieky was granted asylum in the United States after
3 threats and violence from warring factions made it clear he could not safely return to
4 his home country, Libya. Rather than being welcomed in his new home, Mr. Elshieky
5 was unlawfully detained and subjected to discriminatory treatment by the same
6 government that had promised to protect him from persecution. Armed United States
7 Customs and Border Protection (“CBP”) agents unlawfully detained Mr. Elshieky
8 and treated him differently based on his North African appearance after Mr. Elshieky
9 boarded a domestic bus at the Spokane Intermodal Center (the “Center”).

10 Despite producing two valid forms of identification that confirmed his lawful
11 presence—one of which was Mr. Elshieky’s employment authorization document
12 (“EAD”) issued by U.S. Citizenship and Immigration Services (“USCIS”)—Mr.
13 Elshieky was forced off the bus and into the cold in full sight of the other passengers.
14 The officers told him that “illegals fake these [documents] all the time,” ignored Mr.
15 Elshieky’s attempts to explain his immigration history, and continued to detain him.
16 Although Mr. Elshieky was ultimately permitted to re-board the bus and complete his
17 journey, he suffered loss of liberty, significant humiliation, fear, trauma, stress,
18 disruption, emotional distress, and other damages.

19 The Federal Tort Claims Act (“FTCA”) waives federal sovereign immunity
20 “under circumstances where the United States, if a private person, would be liable to
21 the claimant in accordance with the law of the place where the act or omission
22 occurred.” 28 U.S.C. § 1346(b)(1). Mr. Elshieky asserts three FTCA claims against
23 the United States based on false arrest, false imprisonment, and violation of the

1 Washington Law Against Discrimination (“WLAD”). The government does not
2 challenge the first two claims, but moves to dismiss the WLAD-based FTCA claim
3 (the “WLAD claim”) under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

4 Less than six months ago, this Court issued an order denying the United States’
5 motion to dismiss a similar WLAD-based FTCA claim brought by Andres Sosa
6 Segura, another bus passenger who was unlawfully detained by CBP agents at the
7 Center. *See generally Sosa Segura v. United States*, 418 F. Supp. 3d 605 (E.D. Wash.
8 2019) (Bastian, J.). In doing so, the Court held: (1) the Federal Tort Claims Act
9 waived the United States’ sovereign immunity for Mr. Sosa Segura’s WLAD claim;
10 and (2) the United States can be held liable under WLAD in “situations where federal
11 officers enter places of accommodation and wield their power over individuals at
12 places of accommodation,” regardless of whether the United States owns, operates,
13 or exercises control over the place. *Id.* at 613.

14 Now, just like in *Sosa Segura*, the United States moves to dismiss
15 Mr. Elshieky’s WLAD claim. Once again, the United States relies on the same
16 flawed arguments this Court already rejected in that case. And once again, the Court
17 should not allow the United States to avoid answering to Mr. Elshieky’s charge that
18 the CBP agents caused him harm by violating his right to be free from
19 discrimination.¹ The United States’ sole attempt to distinguish this case from *Sosa*

20 _____
21 ¹ Although non-mutual offensive collateral estoppel generally does not apply to the
22 United States government’s re-litigation of issues, *see United States v. Mendoza*,
23 464 U.S. 154, 160 (1984), such estoppel may be appropriate here because there is

1 *Segura* is its assertion that Mr. Elshieky was not deprived of “full enjoyment” of the
2 Center because he was ultimately permitted to re-board the bus and complete his trip
3 to Portland after his unlawful detention. This distinction fails when analyzed against
4 the plain language of the WLAD, its statutory purpose, and Washington cases. The
5 Court should deny the government’s motion to dismiss for three reasons:

6 **First**, this Court has jurisdiction because the United States waives its sovereign
7 immunity under the FTCA. Indeed, this Court has previously rejected the United
8 States’ arguments on this point in *Sosa Segura*, when it held that sovereign immunity
9 was waived for a WLAD claim with nearly identical facts.

10 **Second**, Mr. Elshieky has pleaded facts sufficient to allege a WLAD claim
11 against the United States, including that the CBP agents’ discriminatory behavior
12 deprived him of “full enjoyment” of the Center. Washington law does not limit
13 WLAD claims only to individuals that are denied the right to purchase a service or
14 commodity. WLAD’s broad definition of “full enjoyment” assigns liability for
15 mistreatment that makes a person feel “not welcome, accepted, desired, or solicited.”
16 RCW 49.60.040(14).

17 **Third**, the United States cannot avoid WLAD liability simply because it does
18 not own, operate, or control the Center. The government mischaracterizes the

19 _____
20 “close alignment in both time and subject matter ... and ... it is the same issue in
21 essentially the same controversy.” *United States v. Butner*, 2000 WL 1842410, at
22 *8 (W.D. Mo. Nov. 14, 2000). However, Mr. Elshieky rests his opposition on the
23 substantive merits of the government’s motion.

1 elements of Mr. Elshieky's WLAD claim, which is brought under the broad statutory
2 language of RCW 49.60.030. Moreover, Washington courts have repeatedly rejected
3 this argument in analogous cases, and this Court did the same in *Sosa Segura*.

4 **II. BACKGROUND**

5 **A. CBP's Operations at the Spokane Intermodal Center**

6 The Center is a transportation facility that Greyhound leases for use as a bus
7 station. ECF No. 1 ¶ 16. Over the last several years, CBP has systematically patrolled
8 the Center and boarded buses arriving at and departing from the Center to target and
9 selectively question passengers of color about their immigration status. *See, e.g.,*
10 Chad Sokol, *In less than six years, Border Patrol made nearly 200 arrests at the*
11 *Spokane Intermodal Center*, Spokesman-Review (July 25, 2018),
12 [https://www.spokesman.com/stories/2018/jul/25/in-less-than-six-years-border-](https://www.spokesman.com/stories/2018/jul/25/in-less-than-six-years-border-patrol-made-nearly-2/)
13 [patrol-made-nearly-2/](https://www.spokesman.com/stories/2018/jul/25/in-less-than-six-years-border-patrol-made-nearly-2/); Suzanne Phan, *Father, son with DACA detained on*
14 *Greyhound bus by Border Patrol in Spokane*, KOMO News (Jan. 11, 2018),
15 [https://komonews.com/news/local/federal-way-father-and-son-with-daca-detained-](https://komonews.com/news/local/federal-way-father-and-son-with-daca-detained-in-spokane-on-greyhound-bus-by-border-patrol)
16 [in-spokane-on-greyhound-bus-by-border-patrol](https://komonews.com/news/local/federal-way-father-and-son-with-daca-detained-in-spokane-on-greyhound-bus-by-border-patrol).

17 **B. Mr. Elshieky's Immigration Journey**

18 Mr. Elshieky is a citizen of Libya who entered the United States on a J-1
19 exchange student visa in June 2014. Prior to leaving Libya, Mr. Elshieky spent time
20 working as an English teacher at a school funded by the U.S. State Department and
21 as a translator for international journalists. He also helped run a local radio program.
22 ECF No. 1 ¶ 13. Shortly after he arrived in the United States, civil war erupted in
23 Libya, and Mr. Elshieky was informed that people were looking for him in Libya,

1 had raided his room, and were searching for documents to prove his allegiance to one
2 of the warring factions. *Id.* ¶ 14. Due to his work as an interpreter and English
3 teacher, as well as his radio program, Mr. Elshieky could not safely return to Libya.
4 He was granted asylum in October 2018. Mr. Elshieky has applied for long-term
5 permanent residency, and his application is currently pending. *Id.* ¶ 15.

6 **C. CBP's Discrimination Against Mr. Elshieky**

7 On January 27, 2019, Mr. Elshieky was traveling by Greyhound bus from
8 Pullman, Washington to his home in Portland, Oregon after performing a comedy
9 show at Washington State University. ECF No. 1 ¶ 19. Shortly after Mr. Elshieky
10 boarded his transfer bus at the Center, two armed CBP officers entered the bus. *Id.*
11 ¶ 20. The CBP agents singled out Mr. Elshieky and three other individuals of color
12 on board the bus and questioned them on their immigration status. *Id.* Mr. Elshieky
13 does not recall the CBP agents questioning any Caucasian passengers. *Id.* When
14 questioned by the agent, Mr. Elshieky promptly produced his valid, unexpired
15 Oregon driver's license, which alone should have constituted proof of lawful
16 presence. *See id.* ¶ 22; Or. Rev. Stat. § 807.021(1) (requirement for driver's license).

17 After reviewing Mr. Elshieky's license, the CBP agent asked if Mr. Elshieky
18 was a U.S. citizen. When Mr. Elshieky responded that he was a citizen of Libya, the
19 officer's demeanor shifted, and he blocked Mr. Elshieky's exit and restrained his
20 movement from his seat. ECF No. 1 ¶ 23. Mr. Elshieky then produced his original
21 EAD issued by USCIS. *Id.* ¶ 24. Instead of acknowledging both valid forms of
22 identification that proved Mr. Elshieky was lawfully present, the CBP agents detained
23 him and forced him to exit the bus, along with two other people of color. *Id.* ¶¶ 24-

1 25. When Mr. Elshieky explained that USCIS had recently granted asylum and
2 pointed out he had produced a valid, USCIS-issued EAD, the agents responded that
3 “illegals fake these [documents] all the time and use them” and refused to hear his
4 explanation of how he had lawfully received asylum. *Id.* ¶ 28. Mr. Elshieky repeated
5 that he was lawfully present in the United States, after which an agent took his EAD
6 and made a phone call. *Id.* ¶ 29. Mr. Elshieky overheard the officer reading the
7 information off his EAD and that the person on the phone verified a record existed of
8 Mr. Elshieky. *Id.* ¶ 30. Nonetheless, the officer thereafter claimed that there were no
9 records of Mr. Elshieky’s grant of asylum. *Id.* ¶ 31. Mr. Elshieky then stated that he
10 wished to speak to his lawyer and wanted his paperwork back, at which point a CBP
11 agent yelled at him. *Id.* ¶ 33.

12 Ultimately, the CBP agents informed Mr. Elshieky they would “let him go this
13 time,” even though he was at all times lawfully present and the agents had no grounds
14 to detain him. *Id.* ¶¶ 35-36. The agents detained Mr. Elshieky for around 20 minutes
15 before letting him re-board the bus, which delayed the bus’s departure. *Id.* ¶ 36. Mr.
16 Elshieky was one of three people removed from the bus, all of whom were people of
17 color. *Id.* ¶ 25. The CBP agents had no reasonable suspicion, much less probable
18 cause, to believe Mr. Elshieky had violated or was violating any law (including
19 immigration laws) when they singled him out. *Id.* ¶¶ 21-22, 26-27.

20 **D. Consequences of CBP Agents’ Unlawful Acts**

21 The CBP agents’ actions caused Mr. Elshieky to suffer severe emotional
22 distress. *Id.* ¶¶ 38-42, 65. Mr. Elshieky feared he would be unlawfully deported to
23 Libya, where threats from warring militias made him fear for his life. *Id.* ¶¶ 14-15,

1 38. Mr. Elshieky burst into tears when he re-boarded the bus and was consumed by
2 anxiety during his 6.5 hour ride to Portland. *Id.* ¶ 37. These events reignited Mr.
3 Elshieky’s post-traumatic stress disorder and caused him to cancel several of his
4 shows as a professional comedian. *Id.* ¶¶ 39–40. After publicizing the CBP agents’
5 actions, Mr. Elshieky became the target of hateful, xenophobic, and smearing
6 messages that exacerbated the emotional harm he experienced because of the agents’
7 actions. *Id.* ¶ 1.

8 On April 25, 2019, Mr. Elshieky submitted an administrative tort claim to CBP
9 for the humiliation, fear, trauma, loss of liberty, and economic loss he suffered. ECF
10 No. 1 ¶ 8; *see generally* ECF. No. 1-1. CBP issued a final disposition denying the
11 claim on September 11, 2019. On February 14, 2020, Mr. Elshieky filed this FTCA
12 action, asserting claims for false arrest, false imprisonment, and violation of the
13 WLAD. *See generally* ECF No. 1.

14 The United States now moves to dismiss only the WLAD claim under Rules
15 12(b)(1) and 12(b)(6).

16 III. LEGAL STANDARD

17 On a “motion to dismiss for lack of subject matter jurisdiction,” the Court must
18 “accept as true all facts alleged in the complaint and construe them in the light most
19 favorable to plaintiffs, the non-moving party.” *Snyder & Assocs. Acquisitions LLC*
20 *v. United States*, 859 F.3d 1152, 1156-57 (9th Cir. 2017), *opinion amended on other*
21 *issues*, 868 F.3d 1048 (9th Cir. 2017).

22 To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege “enough
23 facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*,

1 550 U.S. 544, 570 (2007). In deciding whether the plaintiff has stated a claim upon
2 which relief can be granted, the court must assume that the plaintiff’s allegations are
3 true and must draw all reasonable inferences in the plaintiff’s favor. *Usher v. City of*
4 *Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

5 **IV. ARGUMENT**

6 **A. As This Court Has Previously Held, the United States Has Waived**
7 **Sovereign Immunity for WLAD Claims Brought Under the FTCA.**

8 This Court has explained the requirements for jurisdiction under the FTCA:

9 The FTCA gives federal district courts subject matter jurisdiction over
10 civil actions against the United States for money damages for injury or
11 loss or property, or personal injury or death caused by the negligent or
12 wrongful act or omission of any employee of the government while
13 acting within the scope of his office or employment under
14 circumstances in the United States, if a private person would be liable
15 to the plaintiff in accordance with the law of the place where the
16 challenged act or omission occurred.

17 *Sosa Segura*, 418 F. Supp. 3d at 609 (citing 28 U.S.C. § 1346(b)). The United States
18 is also “liable ‘in the same manner and to the same extent as a private individual under
19 like circumstances.’” *Id.* (quoting 28 U.S.C. § 2674). “The words ‘like
20 circumstances’ [in § 2674] do not restrict a court’s inquiry to the *same circumstances*,
21 but require it to look further afield.” *Id.* at 610 (quoting *United States v. Olson*, 546
22 U.S. 43, 46 (2005)) (alteration in original).

23 In *Sosa Segura*, this Court recently held the FTCA waived the United States’
sovereign immunity as to a plaintiff’s WLAD claim where the plaintiff alleged CBP
agents wrongfully detained him at the Spokane Intermodal Center without probable
cause because of his Latinx appearance. *Id.* at 608, 613. Here, where Mr. Elshieky’s

1 allegations are nearly identical to Mr. Sosa Segura’s, and the United States does not
2 raise any argument that changes the Court’s earlier analysis, the Court should reach
3 the same result and hold the United States has waived sovereign immunity for Mr.
4 Elshieky’s WLAD claim under the FTCA.

5 **1. The United States Has Waived Sovereign Immunity for State**
6 **Civil Rights Claims Under the FTCA.**

7 This Court has already analyzed and rejected the United States’ argument that
8 it has not waived sovereign immunity for state civil rights claims under the FTCA.
9 *Compare* ECF No. 4 at 6-7, *with Sosa Segura*, 418 F. Supp. 3d at 610-12. The instant
10 motion adds nothing new to the discussion. The Court should not diverge from its
11 previous ruling.

12 Both the government’s motion and this Court’s analysis in *Sosa Segura* focus
13 on three cases published by the Ninth Circuit: *Delta Savings Bank*, *Xue Lu*, and
14 *Anderson*. *See generally* ECF No. 4 at 6-7; *Sosa Segura*, 418 F. Supp. 3d at 610-12
15 (discussing *Delta Savings Bank v. United States*, 265 F.3d 1017 (9th Cir. 2001); *Xue*
16 *Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010); and *Anderson v. United States*, 127 F.3d
17 1190 (9th Cir. 1997)). The United States argues (and argued) that *Delta Savings*
18 *Bank*, an FTCA case involving alleged violations of the plaintiff’s civil rights,
19 supported “a blanket rule that the United States has not waived its sovereign
20 immunity for state civil rights torts.” *Sosa Segura*, 418 F. Supp. 3d at 610; *see* ECF
21 No. 4 at 6-7. This Court disagreed, stating it “[did] not read *Delta Savings Bank* so
22 expansively.” 418 F. Supp. 3d at 610. Among other things, *Delta Savings Bank* was
23 premised on violations of *federal* civil rights law, and thus failed the FTCA’s

1 jurisdictional requirement that liability must be based on “the law of the place” (e.g.,
2 state law). *Id.* at 611; 28 U.S.C. § 1346(b). *Delta Savings Bank* also applied a
3 California anti-discrimination law that was limited to situations “where the plaintiff
4 was in a relationship with the offending organization similar to that of the customer
5 in the customer-proprietor relationship”—a limitation not present in the WLAD. 418
6 F. Supp. 3d at 611 (quoting *Delta Savings Bank*, 265 F.3d at 1025). The United States
7 had not (and still has not) “pointed to any case that specifically limits the WLAD to
8 only those situations where the plaintiff was in a relationship with the offending
9 organization.” *Id.*; *see generally* ECF No. 4.

10 This Court also construed *Xue Lu* and *Anderson* to support the waiver of
11 sovereign immunity. In *Xue Lu*, the Ninth Circuit allowed the plaintiffs to bring an
12 FTCA claim for compensation based on “interference with their civil rights” under
13 the Bane Act, a California civil rights statute. *Sosa Segura*, 418 F. Supp. 3d at 611-
14 12 (citing *Xue Lu*, 621 F.3d at 949-50). In *Anderson*, the plaintiffs filed an FTCA
15 claim based on sexual harassment under the WLAD. *Id.* at 612 (citing *Anderson*, 127
16 F.3d at 1191). In light of courts’ “independent obligation to determine whether
17 subject matter jurisdiction exists,” this Court found it persuasive that “both the district
18 court and the Ninth Circuit accepted without question that the United States waived
19 its sovereign immunity” for the plaintiffs’ WLAD-based FTCA claim. *Id.*

20 Nothing has changed. *Delta Savings Bank*, *Xue Lu*, and *Anderson* remain the
21 same cases they were six months ago. Courts routinely hold the United States waives
22 sovereign immunity for FTCA claims based on a violation of state or territorial civil
23 rights. *See, e.g., Martinez v. City of W. Sacramento*, 2019 WL 448282, at *8 n.2

1 (E.D. Cal. Feb. 5, 2019) (“In the Ninth Circuit, Bane Act claims fall within the
2 purview of the Federal Tort Claims Act.”); *Anonymous v. United States*, 2017 WL
3 1479233, at *5 (S.D. Cal. Apr. 25, 2017) (“United States’ waiver of sovereign
4 immunity in the FTCA encompasses Plaintiff’s causes of action for violation of the
5 Bane Act”); *Plascencia v. United States*, 2018 WL 6133713, at *13–14 (C.D. Cal.
6 May 25, 2018); *Bonilla-Olmedo v. United States*, 677 F. Supp. 2d 511, 516 (D.P.R.
7 2009); *cf. Santillo v. United States*, 2011 WL 2729243, at *3 (S.D. Cal. July 13, 2011)
8 (granting dismissal after United States argued Bane Act claim “falls within the scope
9 of the FTCA and thus is untimely under the FTCA’s two year statute of limitations”).

10 The United States has waived sovereign immunity for FTCA claims based on
11 state civil rights laws, including the WLAD.

12 **2. The United States Has Waived Sovereign Immunity for Mr.**
13 **Elshieky’s WLAD Claim Based on a “Private Security**
14 **Officer” Analogy.**

15 Likewise, this Court should reject the United States’ argument that the Court
16 previously erred in *Sosa Segura* when it held “a private security officer is the best fit
17 to analyze whether the United States waived its sovereign immunity” for an FTCA
18 claim in these circumstances. ECF No. 4 at 9-10; 418 F. Supp. 3d at 613. As it did
19 in *Sosa Segura*, the government maintains Mr. Elshieky cannot bring a WLAD claim
20 against the United States because the CBP agents do not have an adequate
21 “connection” to the Center. ECF No. 4 at 8–10; 418 F. Supp. 3d at 613. But as
22 explained below, and as this Court already held in *Sosa Segura*, the WLAD has no
23 requirement that the defendant have a “connection” to the place of public
accommodation. *See infra* Section IV.B.2; 418 F. Supp. 3d at 613.

1 The government’s argument suffers from another fatal flaw. The United States
2 assumes without analysis that the only person liable for a security guard’s violation
3 of the WLAD public accommodation provision is a public accommodation who hired
4 the security guard (whether as a direct employee or “contracted through a third-party
5 company”). ECF No. 4 at 10 & n.4. But the security guard herself is also liable under
6 the WLAD, as she is the one who actually caused the plaintiff “to be treated as not
7 welcome, accepted, desired, or solicited” because of his race. RCW 49.60.040(14);
8 *cf. State v. Arlene’s Flowers, Inc.*, 193 Wash.2d 469, 487–89 (2019) (affirming, *inter*
9 *alia*, trial court’s ruling that florist who violated WLAD’s public accommodation
10 provision was personally liable for violation), *petition for cert. filed*, No. 19-333
11 (Sept. 12, 2019). As this Court has held, “it is clear Washington courts would hold a
12 security guard company liable for the discriminatory conduct of its security guards.”
13 *Sosa Segura*, 418 F. Supp. 3d at 613; *see also id.* at 612-13 (discussing employer
14 liability under *Floeting*). Thus, under the FTCA’s private person analysis, the CBP
15 agents who discriminated against Mr. Elshieky are the security guards, and the United
16 States (their employer) is liable to Mr. Elshieky under the WLAD as if it were the
17 security guard company.

18 The government’s discussion of *Liranzo* is misplaced. *See* ECF No. 4 at 8-9.
19 In *Liranzo*, the Second Circuit applied *New York* law when analyzing the false arrest
20 and imprisonment torts that formed the basis of the plaintiff’s FTCA claim. *See*
21 *Liranzo v. United States*, 690 F.3d 78, 94-95 (2d Cir. 2012). Nonetheless, the United
22 States argues the private person analogy for Mr. Elshieky’s false arrest and false
23 imprisonment claims under *Washington* law must be the same as the analogy in

1 *Liranzo*—“a private citizen acting in a private capacity.” ECF No. 4 at 9-10 & n.3
2 (citing 690 F.3d at 94-95). The United States’ position is untenable.

3 The United States has not provided any legal authority for the proposition that
4 only private citizens acting in a private capacity are liable for false arrest and false
5 imprisonment under Washington law. *Cf. Vargas Ramirez v. United States*, 93
6 F. Supp. 3d 1207, 1218-19 (W.D. Wash. 2015) (discussing and applying Washington
7 false arrest and false imprisonment law to detention by Border Patrol agent in FTCA
8 lawsuit). Further, the United States has not provided any legal authority for the
9 proposition that security guards cannot be held liable for false arrest and false
10 imprisonment. *Cf. Demelash v. Ross Stores, Inc.*, 105 Wash. App. 508, 513, 517
11 (2001) (referring to defendant’s characterization of lawsuit involving detention by
12 security agent as “a ‘simple false arrest’ case”).

13 **B. Mr. Elshieky Has Alleged Facts Sufficient to State a Claim that CBP**
14 **Discriminated Against Him in Violation of the WLAD.**

15 Under the WLAD, one is liable for violating another’s “right to be free from
16 discrimination because of race,” including the “right to the full enjoyment of any of
17 the accommodations, advantages, facilities, or privileges of any place of public resort,
18 accommodation, assemblage, or amusement.” RCW 49.60.030(1)(b), (2).

19 The government does not dispute that Mr. Elshieky belongs to a protected
20 class, that the CBP agents acted based on discriminatory and retaliatory reasons
21 explicitly prohibited by law, or that the Center qualifies as a place of public
22 accommodation. *See generally* ECF No. 4 at 11–14. Instead, it argues that: (1) the
23 CBP agents’ conduct, which included singling Mr. Elshieky out for questioning based

1 on his North African appearance, detaining him, forcing him to get off the bus in front
2 of the other passengers, calling him “illegal,” accusing him of faking his valid EAD
3 and Oregon driver’s license, and yelling at him when he asserted his right to
4 counsel—when CBP did not subject any Caucasian passengers to such treatment—
5 did not violate Mr. Elshieky’s right to full enjoyment of the Center because he was
6 eventually permitted to re-board his bus and complete his trip to Portland; and (2) the
7 United States is not a proper defendant because it has no “connection” to the Center.
8 *Id.*; *see, e.g.*, ECF No. 1 ¶¶ 18-28, 33, 63-66. Both arguments fail.

9 **1. Washington Law Does Not Limit WLAD Claims Only to**
10 **Individuals that Are Denied Services.**

11 Under Washington law, private persons are liable to plaintiffs “injured by any
12 act in violation” of the WLAD. RCW 49.60.030(2). The WLAD’s declaration of
13 civil rights includes the “right to be free from discrimination because of race.” RCW
14 49.60.030(1). WLAD also declares the “right to the full enjoyment of any of the
15 accommodations, advantages, facilities or privileges of” a place of public
16 accommodation. RCW 49.60.030(1)(b). “Full enjoyment of” *includes* the right to
17 purchase any service ... offered or sold on, or by, any establishment to the public,
18 *and* the admission of any person” to a place of public accommodation “*without acts*
19 *directly or indirectly causing persons of [a protected class] ... to be treated as not*
20 *welcome, accepted, desired, or solicited.*” RCW 49.60.040(14) (emphasis added).

21 The United States ignores the second half of the statutory definition of “full
22 enjoyment” and asserts the WLAD applies only when a plaintiff is denied services,
23 not when the plaintiff is treated poorly during the provision of those services due to

1 the plaintiff’s race or other protected class. *See* ECF No. 4 at 11-13. This argument
2 is directly contrary to the plain language of the statute and, if accepted, would insulate
3 objectively racist conduct. The United States would have this Court undo the past 70
4 years of progress, returning to a time when society excused discriminatory treatment
5 on segregated buses because a person of color was still “allowed to [board] his bus
6 and complete his trip,” even though he was forced to ride in the back while doing so.
7 *Id.* at 13.

8 Washington courts liberally construe the WLAD so as to promote WLAD’s
9 legislative mandate “to eradicate discrimination, including discrimination in places
10 of public accommodation”—not to undermine it. *Sosa Segura*, 418 F. Supp. 3d at
11 613 (citing RCW 49.60.010). The government’s position contradicts the plain
12 language of the WLAD, its legislative purpose, and interpretive case law.

13 **a. Statutory Language**

14 “When reviewing a statute, the court will give effect to the statute’s plain
15 language.” *Floeting v. Grp. Health Coop.*, 192 Wash.2d 848, 852 (2019). “Statutes
16 must be interpreted and construed so that all the language used is given effect, with
17 no portion rendered meaningless or superfluous.” *Id.* at 860 (internal quotation marks
18 omitted). The United States has provided no legal basis for escaping these rules of
19 statutory interpretation.

20 As noted above, the WLAD expressly defines “full enjoyment” to include the
21 right to be admitted to a place of public accommodation “without acts directly or
22 indirectly causing persons of [a protected class] ... to be treated as not welcome,
23 accepted, desired, or solicited.” RCW 49.60.040(14). Further, “full enjoyment”

1 means *full* enjoyment; that is, enjoyment “at the highest or greatest degree.”
2 Merriam-Webster, (third definition for “full”), [https://www.merriam-
4 webster.com/dictionary/full](https://www.merriam-
3 webster.com/dictionary/full) (last visited May 7, 2020). The plain language of the
5 statute supports Mr. Elshieky’s WLAD claim, and the government’s position would
6 violate Washington canons of statutory construction by rendering much of the
7 definition meaningless.

7 **b. Statutory Purpose**

8 This Court has already recognized “the Washington legislature has directed
9 courts to liberally construe WLAD to eradicate discrimination, including
10 discrimination in places of public accommodation.” *Sosa Segura*, 418 F. Supp. 3d at
11 613; *see also, e.g., Floeting*, 192 Wash.2d at 852. Such a “statutory mandate of liberal
12 construction requires that [the court] view with caution any construction that would
13 narrow the coverage of the law.” *Marquis v. City of Spokane*, 130 Wash.2d 97, 108
14 (1996). Washington state courts have interpreted this statutory directive to mean
15 WLAD “should not be construed so as to leave any patron victimized by such a
16 discriminatory act without a remedy.” *Floeting v. Grp. Health Coop.*, 200 Wash.
17 App. 758, 768 (2017), *aff’d and remanded*, 192 Wash.2d 848 (2019).

18 **c. Washington Case Law**

19 Washington case law demonstrates that WLAD does not have the restriction
20 proposed by the United States. *See, e.g., Johnson v. Grady Way Station, LLC*, 2009
21 WL 3380641, at *3 (W.D. Wash. Oct. 16, 2009) (expressly rejecting argument that
22 WLAD claim must be tied to an underlying commercial transaction and recognizing
23 that plaintiff’s “WLAD claim *does not require him to prove that* [defendant] refused

1 to sell him gas because of his race. He need only prove that he was deprived of his
2 ‘right to full enjoyment’ of the gas station because of his race”) (emphasis added);
3 *see also, e.g., B.L. v. Tonasket Sch. Dist.*, 2018 WL 2670031, at *4 (E.D. Wash. June
4 4, 2018) (Mendoza, J.) (recognizing plaintiff “alleged facts that could constitute
5 discrimination” under “broad standards of the WLAD” where defendant allegedly
6 “‘catcalled’ at the basketball team and shouted ‘fix your hair, princess’” to plaintiff);
7 *Evergreen Sch. Dist. No. 114 v. Wash. State Human Rights Comm’n*, 39 Wash. App.
8 763, 775 (1985) (“[D]iscrimination may arise just as surely through ‘subtleties of
9 conduct’ as through an openly expressed refusal to serve.”) (internal quotation marks
10 omitted).

11 The prevalence of successful WLAD claims against law enforcement officers
12 for conduct wholly unrelated to the purchase of a service or commodity further
13 reflects that, under WLAD, conduct that makes a member of a protected class to feel
14 “treated as not welcome, accepted, desired, or solicited” in a place of public
15 accommodation is enough to support a prima facie claim. *See infra* Section IV.B.2.

16 *Floeting*, which the United States cites in support of its argument that
17 deprivation of “full enjoyment” does not occur in the absence of a denial of the right
18 to purchase a service or commodity, stands for exactly the opposite. There, the
19 Washington Supreme Court recognized that “WLAD’s broad definition of ‘full
20 enjoyment’ *extends beyond denial of service* to include liability for mistreatment that
21 makes a person feel ‘not welcome, accepted, desired, or solicited.’” 192 Wash.2d at
22 855 (quoting RCW 49.60.040(14)) (emphasis added). Indeed, that case involved
23 sexual harassment of a patient by a healthcare employee *without any allegations of*

1 *denial of healthcare services. See Floeting*, 200 Wash. App. at 762-63 (describing
2 sexual harassment during patient’s eleven visits to medical center during relevant
3 period).

4 Here, CBP agents mistreated Mr. Elshieky on the basis of his North African
5 appearance after he had already boarded a bus at the Center. ECF No. 1 ¶¶ 1-2, 18-
6 20. The CBP agents selectively questioned Mr. Elshieky and three other passengers
7 of color on the bus. *Id.* ¶ 20. Then, among other things, Mr. Elshieky was unlawfully
8 detained despite showing multiple valid forms of proof of lawful presence in the
9 United States and subjected to accusations that he was an “illegal” who “faked” his
10 documents. *Id.* ¶¶ 24, 28. The CBP agents’ actions so affected Mr. Elshieky that he
11 cried when he re-boarded the bus and was consumed by anxiety during his 6.5 hour
12 bus ride to Portland. *Id.* ¶ 37. The CBP agents did not detain any Caucasian
13 passengers—thus treating Mr. Elshieky unequally and demonstrating the CBP agents
14 were motivated by his race. These facts are sufficient to support Mr. Elshieky’s
15 WLAD claim. *See Sosa Segura*, 418 F. Supp. 3d at 613 (“Under the plain language
16 of the WLAD, the United States may be liable because alleged CBP acts ‘directly or
17 indirectly’ caused Plaintiff ‘to be treated as not welcome, accepted, desired, or
18 solicited’ at the Spokane Intermodal Center based on his race ... and/or ‘directly or
19 indirectly result[ed] in ... discrimination’ against him at the Center based on his
20 race.”) (alteration in original).

21 **2. The United States’ “Connection” to the Center Is Irrelevant**
22 **to Mr. Elshieky’s WLAD Claim.**

23 Finally, the United States once again argues it cannot be liable under the

1 WLAD because it has “no connection to the Intermodal Center.” ECF No. 4 at 14;
2 *see Sosa Segura*, 418 F. Supp. 3d at 613. In *Sosa Segura*, this Court properly
3 “decline[d] to read the WLAD as narrowly as the United States suggests” and held
4 “the WLAD covers situations where federal officers enter places of accommodation
5 and wield their power over individuals at places of accommodation.” 418 F. Supp.
6 3d at 613. The Court should decline the United States’ invitation to revisit this issue.

7 The plain language of the WLAD forbids “*any* person ... to commit an act
8 which directly or indirectly results in ... discrimination ... in any place of public
9 resort, accommodation, assemblage, or amusement” RCW 49.60.215 (emphasis
10 added). “Person” is broadly defined to “include[] one or more individuals,
11 partnerships, associations, organizations, corporations, cooperatives ... or any group
12 of persons” RCW 49.60.040(19). Unlike Washington’s criminal code, which
13 limits criminal liability for a public accommodations violation to persons “engaged
14 in or exercising control over the operation of” the place of public accommodation,
15 RCW 9.91.010(1)(a), (2), there is no statutory requirement that a “person” have a
16 “connection” to the place under the WLAD. The United States cannot violate the
17 “well-established principle of statutory interpretation that [the court] may not add
18 words to an unambiguous statute when the legislature has chosen not to include that
19 language” by adding restrictions to a liberally construed statute. *State v. Dennis*, 191
20 Wash.2d 169, 173 (2018) (internal quotation marks omitted).

21 Further, Mr. Elshieky does not rely solely on the public accommodation
22 provision, but asserts a violation of his right to be free from discrimination under
23 RCW 49.60.030(1). The “broad protections of RCW 49.60.030” allow plaintiffs to

1 bring an action for discrimination under the WLAD even if other provisions of the
2 WLAD do not expressly define the right. *Marquis*, 130 Wash.2d at 100; *see, e.g., id.*
3 at 101, 110 (“[B]y its own terms, RCW 49.60.030(1) does not limit the actions which
4 may be brought to those listed in the statute.”).

5 Tellingly, the United States ignores the myriad of cases in which courts have
6 recognized WLAD liability for law enforcement officers and security guards who
7 racially discriminate when detaining plaintiffs in a place of public accommodation
8 without any mention of a “connection” requirement, and which this Court cited
9 favorably in *Sosa Segura*. *See* 418 F. Supp. 3d at 612 (citing *Taylor v. City of Seattle*,
10 2018 WL 5024029 (W.D. Wash. Oct. 17, 2018); *A.J. v. City of Bellingham*, 2018 WL
11 3390485 (W.D. Wash. July 12, 2018); *Turner v. City of Port Angeles*, 2010 WL
12 4286239 (W.D. Wash. Oct. 26, 2010); *Demelash v. Ross Stores, Inc.*, 105 Wash. App.
13 508 (2001); and *McKinney v. City of Tukwila*, 103 Wash. App. 391 (2000)); *see also*
14 *Wingate v. City of Seattle*, 198 F. Supp. 3d 1221, 1230 (W.D. Wash. 2016).

15 The Court properly rejected the United States’ argument in *Sosa Segura*, and
16 it should do the same here.² 418 F. Supp. 3d at 613.

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18

19 ² To the extent the Court is inclined to view the United States’ connection with the
20 Center as material to Mr. Elshieky’s WLAD claim, Mr. Elshieky requests the
21 opportunity to conduct jurisdictional discovery into the extent of United States’
22 relationship with the Center and bus operator, and to submit supplemental briefing
23 on the same.

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V. CONCLUSION

For the reasons stated above, Mr. Elshieky respectfully requests the Court deny the United States' motion to dismiss.

DATED this 11th day of May, 2020.

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PROOF OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

Dated this 11th day of May, 2020.

By s/ Benjamin J. Robbins
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