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10
 11 UNITED STATES DISTRICT COURT
 12 SOUTHERN DISTRICT OF CALIFORNIA
 13

14 CAREY L. JOHNSON,
 15 Plaintiff,
 16
 17 v.
 18 UNITED STATES OF AMERICA, et al.,
 19 Defendants.

Case No. 18-cv-02178-BEN-MSB

**DEFENDANT UNITED STATES OF
 AMERICA’S MOTION FOR
 SUMMARY JUDGMENT –
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 SAME**

DATE: January 25, 2021
 TIME: 10:30 a.m.
 JUDGE: Hon. Roger T. Benitez
 COURTROOM: 5A Fifth Floor
 Edward J. Schwartz
 United States Courthouse
 221 West Broadway
 San Diego, CA 92101

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Motion for Summary Judgment

Defendant the United States of America hereby brings its motion for summary judgment, under Fed. R. Civ. P. 56, on Plaintiff Carey L. Johnson’s claims brought under the Rehabilitation Act and the Bane Act.

Memorandum of Points and Authorities in Support of Motion for Summary Judgment

I. Introduction

This is a case about a repeat SENTRI lane violator who decided he was not going to take “No, you can’t use the SENTRI lane without a SENTRI pass – and if you keep doing so, you’ll be fined and your car seized” for an answer. Instead of heeding this message and following the rules (rules about which he was repeatedly warned), Plaintiff Carey L. Johnson (Johnson) turned around and sued. Now, Defendant the United States of America brings this motion for summary judgment on Johnson’s Rehabilitation Act and Bane Act claims.

A. Facts About Border Incidents Underlying Johnson’s Complaint

Sometime in 2012, Johnson and his daughter began residing periodically in Tijuana, Mexico, rather than full-time in the Bay Area where Johnson’s wife worked. *See* Declaration of Kyle W. Hoffman, Ex. 1 (Carey Johnson Depo. at 11:15 – 15:3). Johnson started residing in Mexico even though he had been formally diagnosed with bipolar disorder much earlier, in March 2011. *See* Sealed Declaration of Kyle W. Hoffman, Ex. 1.¹ And despite his bipolar disorder, Johnson travelled frequently back and forth over the United States-Mexico border: he drove his car into the United States at least 174 times in the period from November 2013 to September 2016. *See* Declaration of Erik J. Gantzel, Ex. 1. Other than two or three incidents early in this period, Johnson proved quite capable

¹ Johnson has himself disclosed his bipolar disorder in public filings in this case. *See, e.g.,* ECF Doc. 74, p. 11. But with respect to Johnson’s actual medical records, Defendant the United States is providing certain of them to the Court under seal, attached to the indicated declaration listing them.

1 of repeatedly crossing the border *through the general vehicle lanes*. See Gantzel Dec., Ex.
2 2.² And even after the incidents identified in Johnson’s complaint – whose most salient
3 dates range from September 2016, through December 2017, see ECF Doc. 29 (Johnson’s
4 Second Amended Complaint) – Johnson continued repeatedly to cross the border *through*
5 *the general vehicle lanes*. He has done so roughly 179 times between September 2016 and
6 August 5, 2020. See Gantzel Dec., Ex. 1.

7 But in September 2016, Johnson apparently decided he had had enough of waiting
8 in the general vehicle lanes. On July 26, 2016, Johnson was sent a letter from the Veterans
9 Administration awarding him a 100% service-connected disability rating for bipolar
10 disorder, effective September 8, 2010. See Hoffman Dec., Ex. 2. Johnson evidently took
11 this VA disability rating letter to be his ticket to expedited entry into the United States.
12 And so, on September 22, 2016, Johnson entered the United States through the expedited,
13 trusted-traveler SENTRI lane at the San Ysidro Port of Entry (POE), but without a SENTRI
14 card.³ When asked whether he understood that he was in the SENTRI lane, without a
15 SENTRI card, Johnson said yes, but told the Customs and Border Protection (CBP) primary
16 inspector – on video⁴ – that he “couldn’t wait in that other line today for a medical reason,”
17

18 ² At p. 2, this document (ATS Printout of Incidents_Redacted.pdf) shows that during
19 the 18 months prior to November 1, 2016, Johnson had crossed the border 112 times in a
20 vehicle.

21 ³ SENTRI – *Secure Electronic Network for Travelers Rapid Inspection* – gives
22 known travelers expedited processing through designated vehicle and pedestrian lanes at
23 the border. SENTRI applicants must provide detailed information about themselves,
24 undergo a background investigation, and pay a fee. See <https://www.cbp.gov/travel/trusted-traveler-programs/sentri>. (The Court may properly take judicial notice of this information,
25 available on an official government website. See, e.g., *DanielsHall v. Nat’l Educ.*
26 *Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of information contained
27 on government website) (citing further cases)). Applicants found to pose a low risk of
28 committing violations are granted a SENTRI card. Most important for this case, only
SENTRI card holders are authorized to use the SENTRI lanes. See 8 C.F.R. 235.7. The
only regular exception to this is Mexican consular employees.

⁴ The United States has submitted with the accompanying Declaration of Erik J. Gantzel
as Ex. 3 (3-1 to 3-9) a separate DVD containing *all* the videos it was able to retrieve

1 that “I guess what I’m saying is it’s a medical necessity.” *See* Gantzel Dec., Ex. 3-1 (CBP
2 POE Video 9-22-16 at 0:33, 0:47). When warned he would be fined \$5,000 or his car taken
3 if, after this occasion, he again used the SENTRI lane without authorization, Johnson
4 responded that he wanted a “better solution” than getting a SENTRI card – which he stated
5 he didn’t qualify for, because of a marijuana offense. *Id.* (at 1:49-2:30, 3:17-3:24).⁵ And
6 as if to sum up his intent to litigate from the very beginning, Johnson challenged the officers
7 to “do me a favor, cite me, go do me a favor and I’ll take it in front of a federal judge.” *Id.*
8 (at 2:35).⁶

9 Later that same day, Johnson visited the SENTRI office at Otay Mesa. *See* Hoffman
10

11 _____
12 concerning the case. The videos appear on the DVD in chronological order, corresponding
13 to the incidents complained of in Johnson’s complaint. They also have the indicated
14 lengths.

- 15 1. CBP POE Video 9-22-16 (4 min 25 sec).wmv
- 16 2. CBP POE Video 9-23-16 (9 min 12 sec).wmv
- 17 3. CBP POE Video 10-31-16 (26 min 01 sec).wmv
- 18 4. CBP POE Video 11-1-16 Lane 4 (2 min 06 sec).wmv
- 19 5. CBP POE Video 11-1-16-01 (1 hr 17 min 06 sec).wmv
- 20 6. CBP POE Video 11-1-16 Lot (17 min 8 sec).wmv
- 21 7. CBP POE Video 12-2-17a Ped East (9 min 10 sec).wmv
- 22 8. CBP POE Video 12-2-17b Escort (12 min 17 sec).wmv
- 23 9. CBP POE Video 12-2-17c Security (1 hr 5 min 31 sec).wmv

24
25 ⁵ Johnson has Class A misdemeanor convictions from the state of Utah for possession
26 of a controlled substance with intent to distribute and possession of a firearm by a restricted
27 person. Essentially, in September 2010, Johnson was pulled over on the interstate outside
28 Salt Lake City, and was found to have 17 one-pound bags of marijuana concealed in a box
– and a loaded .45 Sig pistol in his car’s center console. *See* Hoffman Dec., Exs. 3 and 4.

⁶ The primary CBP officers also told Johnson that: because he was not a SENTRI
member, he was going to be sent to secondary; if he had a medical emergency – to which
Johnson replied that “I didn’t say it was a medical emergency” – he should call 911; if he
didn’t qualify for SENTRI, he should use the “Ready Lanes”; and that “there’s an open
lane, and there’s . . . a ready lane, there’s a SENTRI lane. This one [SENTRI] will give
you a fine.” *Id.* (at 1:26, 1:32, 1:37, 2:32, 3:31).

1 Dec., Ex. 1 (Johnson Depo. at 61: 9-22). There, he spoke with a CBP officer, asking to use
2 the SENTRI lane as an accommodation for his disability. *See* Hoffman Dec., Ex. 5 (Murillo
3 Depo. at 25:13 – 26:5). The officer told Johnson that the SENTRI office did not have that
4 authority, *id.* (Murillo Depo. at 27:10-25, 38:12 – 39:7), and suggested that Johnson submit
5 an application for the SENTRI program. *Id.* (Murillo Depo. at 36:28 – 37:13).

6 On September 23, 2016, Johnson twice improperly drove into the United States
7 through the SENTRI lane at the San Ysidro POE. The first time, Johnson was referred to
8 secondary, where CBP issued Johnson a letter expressly warning him that further
9 unauthorized use of the SENTRI lane would subject him to a monetary penalty and seizure
10 of his vehicle. *See* Gantzel Dec., Ex. 4 and Hoffman Dec., Ex. 1 (Johnson Depo. at 67:14
11 – 68:1). Johnson refused to sign an acknowledgement that he had received the letter – but
12 he took it with him. *Id.*⁷

13 Johnson then crossed back into Mexico and returned later that morning to the United
14 States, again through the SENTRI lane, this time with his VA disability letter and the
15 warning letter against SENTRI lane misuse he had received earlier in the day. At primary,
16 when asked if he had a SENTRI card, Johnson again acknowledged “no,” but again said
17 “I’m in this line because of medical necessity.” *See* Gantzel Dec., Ex. 3-2 (CBP POE Video
18 9-23-16 at 0:30). Amidst a lengthy back and forth – again, this is on video – Johnson
19 provided the officers with his disability rating letter, insisting they read it; he also claimed
20 that he was just coming through SENTRI to “resolve this issue,” and that someone else at
21 the SENTRI office had told him that “if I presented that to you, you had discretion,” that if
22 “you just give those documents to them, you’ll be good to go.” *See* Gantzel Dec., Ex. 3-2
23 (CBP POE Video 9-23-16 at 2:02-2:31, 3:12-3:37, 4:36, 4:42; 7:05, 0:30, 1:05); *see also*
24 Hoffman Dec., Ex. 1 (Johnson Depo. at 69:12 – 70:3).⁸

25
26 ⁷ There is not video of the primary or secondary encounters from Johnson’s first entry
27 on September 23, 2016.

28 ⁸ The CBP officers again told Johnson that: to be a SENTRI member, he had to pay and
go through a background process; and although [Mexican] consulate officials could use

1 Yet Johnson also showed the primary inspection officers the letter he had received
2 earlier from CBP, warning him of the consequences of misusing the SENTRI lane. *See*
3 Hoffman Dec., Ex. 1 (Johnson Depo. at 69:12 – 70:3); *see also* Gantzel Dec., Ex. 3-2 (at
4 1:57 (CBP officer: “This just says it’s his prior violation.”)). Based on Johnson’s continued
5 misuse of the SENTRI lane, and his disregard of the warning letter, CBP issued a \$5,000
6 penalty and held Johnson’s 2008 Mercedes E350 to secure payment. *See* Gantzel Dec., Ex.
7 5. Johnson later that day paid the monetary penalty, *id.*, and retrieved his car.

8 On October 31, 2016, Johnson entered the United States through the Otay Mesa POE.
9 An officer saw Johnson move traffic cones in the pre-primary traffic lanes. *See* Hoffman
10 Dec., Ex. 6 (Ibarra Depo at 32:1 – 33:2). This was a potential indication that Johnson might
11 be carrying something – a hidden person in close quarters, a gas-tank load of drugs –
12 requiring him to get over the border quickly. *Id.* (Ibarra Depo at 37:6-20, 39:11-17). But
13 when confronted, Johnson initially refused the officer’s commands to provide his passport.
14 *Id.* (Ibarra Depo at 32:1 – 33:2). When Johnson was escorted up to the primary inspection
15 booth (again, on video), he would not cooperate, refusing to provide his car keys, and
16 locking his car doors. *Id.* (Ibarra Depo at 40:4 – 41:24). Nor would he get out of the car so
17 it could be inspected – and so the initial officer employed a “stop stick” to prevent Johnson
18 driving any further. *Id.* (Ibarra Depo at 42:8 – 44:17); *see also* Gantzel Dec., Ex. 3-3 (CBP
19 POE Video 10-31-16). Because the officer was unsuccessful in persuading Johnson to
20 cooperate, the officer threatened to use a Taser, and pulled Johnson out of the car,
21

22 _____
23 SENTRI, Johnson could not, as he did not have a consulate pass nor work for the consulate,
24 as Johnson acknowledged. *Id.* (at 0:50. 3:37; 2:20-2:39). In response to Johnson’s claim
25 that he was entitled to use the SENTRI lane because of “medical necessity,” the officers
26 explained that if there were a medical emergency, Mexico would be sending the traveler to
27 the border in an ambulance, would contact CBP, and CBP would transfer the traveler to the
28 hospital. *Id.* (at 2:51, 4:06-4:44). And again, Johnson was: asked why he didn’t just apply
for SENTRI (Johnson’s response: “I don’t qualify”); warned he could “not keep coming
down this lane;” and told he would have to go to secondary. *Id.* (at 5:36-5:40, 7:48).
Finally, Johnson again threatened litigation: “maybe I need to be cited so it can be
challenged . . . this arbitrarily denying me access is not okay.” *Id.* (at 5:01).

1 whereupon he was handcuffed. *Id.* (Ibarra Depo at 44:19 – 49:6). After officers moved
2 Johnson to the rear of his car, he went limp and fell to the ground, prone. *See* Gantzel Dec.,
3 Ex. 3-3 (CBP POE Video 10-31-16 at approximately 2:45). At various times, his foot, leg,
4 shoulders and head are seen on the lengthy video that follows. Emergency response officers
5 are seen attending to him. An ambulance was called at Johnson’s request. *See* Hoffman
6 Dec., Ex. 6 (Ibarra Depo at 53:1- 4). Several officers carried Johnson, on a stretcher, into
7 the port building. *See* Gantzel Dec., Ex. 3-3 (CBP POE Video 10-31-16 at approximately
8 22:45). Eventually, an ambulance arrived and took Johnson away to Scripps Chula Vista –
9 where after initial check-in, he left the emergency department of his own accord, without
10 being seen. *See* Sealed Hoffman Dec., Ex. 2.

11 On November 1, 2016, Johnson again improperly attempted to enter the United States
12 through the SENTRI lane – Lane 4 – at San Ysidro, with his daughter in the back seat. As
13 shown on video, Johnson’s brief conversation with the primary inspector was utterly
14 unremarkable, without any indication Johnson was suffering any kind of emergency,
15 medical, psychiatric or otherwise. *See* Gantzel Dec., Ex. 3-4 (CBP POE Video 11-1-16
16 Lane 4). There was talk about what his daughter’s name was, how his daughter’s name was
17 pronounced, where Johnson lived, and how long he had lived in Mexico. *Id.* When asked
18 where he was going, Johnson said calmly, “the hospital.” *Id.* Because SENTRI lane
19 violators are routinely sent to secondary, Johnson was referred there – where he rolled up
20 his car windows, refused to talk with CBP officers, and sat in his car for 30+ minutes, while
21 refusing to answer questions. *See* Gantzel Dec., Ex. 3-5 (CBP POE Video 11-1-16-01).
22 Then he called 911 from inside his car. *See* Hoffman Dec., Ex. 1 (Johnson Depo. at 103:3
23 - 19). An ambulance and fire truck arrived – and Johnson conversed with the first
24 responders for another 30 minutes or so. *See generally* Gantzel Dec., Ex. 3-5 (CBP POE
25 Video 11-1-16-01 starting at 42:09). During this process, paramedics or EMTs told two
26 CBP supervisors that Johnson was not having a medical emergency. *See* Hoffman Dec.,
27
28

1 Exs. 7 and 8 (Delgado Depo. at 164:20 – 165:22; McCulloch Depo. at 43:8-17).⁹
2 Eventually, Johnson walked gingerly to the ambulance, and he and his daughter were driven
3 away. *See* Gantzel Dec., Ex. 3-6 (CBP POE Video 11-1-16 Lot, starting at 3:00). Because
4 this was Johnson’s fourth SENTRI violation since September 22, 2016,¹⁰ CBP officials at
5 the POE issued a \$10,000 penalty and seized Johnson’s car. *See* Gantzel Dec., Ex. 6.

6 After this incident, the ambulance took Johnson, at his request, to the VA hospital in
7 La Jolla. *See* Sealed Hoffman Dec., Ex. 3. There he stayed four days for in-patient
8 treatment for his bipolar disorder. *See* Sealed Hoffman Dec., Ex. 4. But even here, there
9 were indications that Johnson was responsible for his issues at the border, not CBP. Not
10 only did Johnson present normally on initial appearance, but his medical records revealed
11 that Johnson had been prescribed various medications for controlling his bipolar disorder.
12 *See* Sealed Hoffman Dec., Exs. 3 and 4. Yet Johnson refused to take them. *Id.* Instead, he
13 daily used marijuana, self-medicating rather than following the advice of his medical and
14 psychiatric providers. *Id.* Notably, Johnson tested positive for THC on November 1, 2016,
15 while he was at the VA. *Id.* At the VA, he was again prescribed medications for his bipolar
16 disorder, *see id.*, – which he later refused to take regularly, just as he had refused to do
17 before. *See* Sealed Hoffman Dec., Ex. 5.

18 Finally, on December 2, 2017, Johnson entered the United States through the
19 pedestrian lanes at San Ysidro. On video, he appears normal, although impatient, while his
20 backpack was scanned in an x-ray machine. *See* Gantzel Dec., Ex. 3-7 (CBP POE Video
21

22 ⁹ VA records confirm that Johnson presented normally on that day, in the main – with
23 one notable exception being that Johnson appeared “grandiose in his sense of entitlement
24 to freely cross the border into the United States via the Senti lane despite not having a
25 Senti pass.” *See* Sealed Hoffman Dec., Ex. 3 (Mental Status Exam).

26 ¹⁰ Johnson’s first SENTRI violation was on September 22, 2016, for which Johnson was
27 warned but received no fine or penalty. He violated SENTRI’s requirements twice on
28 September 23, 2016, where the first of that day’s violations was not penalized, but where
the second violation of the day (and third overall) resulted in a car seizure pending payment
of a penalty. So, on November 1, 2016, it was Johnson’s fourth SENTRI violation in the
space of roughly six weeks.

1 12-2-17a Ped East). In his backpack were license plates, and so Johnson was referred to
2 pedestrian secondary inspection – since unattached plates might indicate participation in
3 stolen car rings, for example. *See* Hoffman Dec., Ex. 9 (Guisinger Depo. at 44:23 – 46:7).
4 In pedestrian secondary (and on video), Johnson initially tried to grab his backpack. *See*
5 Gantzel Dec., Ex. 3-7 (CBP POE Video 12-2-17a Ped East at 3:58). Then, even though he
6 was clearly told to sit during the backpack’s inspection, Johnson became visibly agitated,
7 got back up in front of the inspecting officer, again reached for it, and would not sit down.
8 *See* Gantzel Dec., Ex. 3-7 (CBP POE Video 12-2-17a Ped East starting at 4:15). This was
9 in a temporary secondary inspection area, small, crowded, with other travelers sitting or
10 coming in and out. *Id.*; *see also* Hoffman Dec., Ex. 9 (Guisinger Depo. at 43:3-23, 85:1-
11 12). At that point, when Johnson had been repeatedly non-compliant, exhibiting “pre-
12 assaultive” behavior, officers attempted to handcuff him. *Id.* (Guisinger Depo. at 54:4 –
13 56:9).¹¹ Johnson resisted and collapsed on the floor – and, according to his own deposition
14 testimony, he did not cooperate: “Hell, no. I fought them. Hell, no, I fought. . . . I fought
15 every which way that I could.” *See* Hoffman Dec., Ex. 1 (Johnson Depo. at 122:5 – 123:22).
16 Because he fought and was “completely noncompliant, 100 percent noncompliant” even
17 after handcuffing and being provided a wheelchair, *id.*, the officers had to physically carry
18 Johnson to a padded holding cell, where he remained handcuffed lying on the floor for
19 approximately 30-35 minutes. *See* Gantzel Dec., Ex. 3-9 (CBP POE Video 12-2-17c
20 Security). Once Johnson settled down and cooperated with the inspection, he was released.
21 *Id.*

22 B. Facts Concerning Efforts to Accommodate Johnson

23 Johnson, through his mother/attorney, sought to make CBP aware of Johnson’s
24

25 ¹¹ Notably, the officer inspecting Johnson’s backpack testified that 3-6 months prior
26 to this incident (where Johnson repeatedly tried to grab his backpack from the inspecting
27 officer) a similar incident resulted in the traveler reaching into his backpack, grabbing a
28 lengthy metal bolt – and then wielding that bolt to inflict injury on two CBP officers. *See*
Hoffman Dec., Ex. 9 (Guisinger Depo. 51:12 – 52:10).

1 situation, and their views of the incidents, in a series of demand letters to CBP. As to
2 Johnson’s SENTRI lane misuse, CBP did not insist on Johnson paying the full fines for his
3 repeated unauthorized use of the SENTRI lanes. Before Johnson filed his current suit, the
4 Fines Penalties and Forfeitures office of CBP provided mitigation to Johnson
5 administratively, in light of his requests and explanations. *See* Gantzel Dec., Par. 8. In
6 particular CBP offered to mitigate Johnson’s initial \$5,000 penalty to \$500 (and in fact
7 refunded \$4,500 to Johnson). *Id.* CBP also offered to mitigate his second \$10,000 penalty
8 to \$1,000, and to release Johnson’s vehicle upon payment of the second penalty’s mitigated
9 amount (\$1,000) and execution of a hold harmless agreement regarding the car and its
10 seizure. *See* Gantzel Dec., Ex. 7. Johnson’s counsel at the time – his mother – rejected
11 this, apparently because of the hold harmless agreement. *See* Gantzel Dec., Ex. 8.

12 In addition, and more important for this motion, CBP did try to provide some
13 reasonable accommodation to Johnson, in light of his claimed disability. Thus, per CBP
14 policy, there was an “interactive dialogue” between Johnson, his attorney (his mother,
15 Leigh Johnson), and CBP officials concerning accommodating Johnson’s disability.
16 During that dialogue and after, the Assistant Port Director – Sally Carillo – informed
17 Johnson and his counsel that, while he would not be permitted to use the SENTRI lanes
18 without being enrolled in the SENTRI program, his disability would be accommodated
19 through the pedestrian lanes, through a process available to other disabled travelers. *See*
20 Gantzel Dec., Ex. 9.¹² It was also suggested, yet again, that Johnson submit an application
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22 ¹² Specifically, Johnson was advised that he should contact a CBP officer regarding
23 his need for accommodation, whereupon he would be permitted to sit in a designated area
24 to await his inspection. This is the accommodation made for other disabled travelers who
25 are unable to wait in line. Their place in line effectively remains the same, but they do not
26 have to stand in line with other travelers. But of course all travelers must still comply with
27 inspection requirements.

28 During this interactive dialogue process, Ms. Carillo made clear that, whatever
Johnson may have heard – or whatever he said or thought that he heard – about CBP
allowing disabled persons to jump to the head of the line at the border, this was simply
incorrect. “Ms. Carrillo apologized that he was provided with incorrect information [sic]

1 for the SENTRI program. *Id.*¹³ And it was suggested that Johnson obtain an RFID-enabled
 2 identity document that would allow him to use the border’s “Ready Lanes.” *Id.* While the
 3 “Ready Lanes” are not as reliably speedy as the SENTRI lanes are, they are often more
 4 speedy – sometimes much more so – than the general vehicle lanes. *See*
 5 <https://bwt.cbp.gov/details/09250401/POV> (CBP website allowing comparison of wait
 6 times for General, Ready and SENTRI lanes).¹⁴ Other than paying a small amount of
 7 money and taking the steps to obtain a RFID-enabled identity document (such as a passport
 8 card),¹⁵ there is absolutely no bar to Johnson’s obtaining such a means of expedited border
 9 crossing. Yet Johnson confirmed in discovery that he has never applied for an RFID-
 10 enabled document so as to use the border’s “Ready Lanes,” and that he has no intention of
 11 doing so, asserting flatly that the “Ready Lanes” are no better than the general ones. *See*
 12 Hoffman Dec., Ex. 1 (Johnson Depo. at 52:23 – 54:7). Instead, Johnson has insisted that
 13 he must be accommodated through the SENTRI lanes. *See* ECF Doc. 29 (Johnson’s Second
 14 Amended Complaint: in Rehabilitation Act count, Par. 102, identifying only one requested
 15

16 but *clarified that the Senti lane has never been used as a disability priority lane*. She noted
 17 that when the port has worked with CRCL and the ACLU to resolve disability related
 18 complaints, *the port has never agreed to provide “front of the line” access to persons with*
 19 *disabilities*. The port has agreed to provide benches, water, and bathroom facilities to
 20 persons who are waiting but *they are not allowed to just move to the front of the line.”* *See*
 21 Gantzel Dec., Ex. 10 (italics added).

22 ¹³ Although in light of Johnson’s criminal convictions for possession of drugs with
 23 intent to distribute and improper possession of a firearm, it was highly unlikely that Johnson
 24 would be able to obtain such a trusted traveler designation.

25 ¹⁴ Again, the Court may properly take judicial notice of this information, available
 26 on an official government website. *See, e.g., DanielsHall v. Nat’l Educ. Ass’n*, 629 F.3d
 27 992, 998-99 (9th Cir. 2010) (taking judicial notice of information contained on government
 28 website) (citing further cases).

29 ¹⁵*See* https://www.cbp.gov/travel/clearing-cbp/ready-lanes?_ga=2.65060582.959864417.1607636165-375161675.1607636165 (CBP website
 30 providing information regarding obtaining access to Ready Lanes). The Court may
 31 properly take judicial notice of this information, available on an official government
 32 website. *See DanielsHall*, 629 F.3d at 998-99.

1 accommodation with specificity, i.e., that CBP “modify[] its policies with respect to
2 allowing disabled individuals to use the Sentri lane for expedited crossing at the US/Mexico
3 border in San Diego.”¹⁶ Finally, Johnson has been able to use the pedestrian lanes and the
4 accommodation offered there, although he has done so intermittently. And even his
5 attorney has admitted that this method of crossing the border through the pedestrian lanes
6 has worked for Johnson at times. *See* Gantzel Dec., Ex. 11 (at p. 2).

7 C. Johnson’s Claims

8 Just as he threatened to do from the very beginning (during his initial encounter of
9 September 22, 2016, where he promised “to take it before a federal judge”), Johnson filed
10 a federal complaint, asserting not only FTCA claims (for Assault and Battery, False Arrest,
11 Negligence, Conversion, Intentional Infliction of Emotional Distress) against the United
12 States, but also *Bivens* claims against 16 individual CBP defendants, as well as a
13 Rehabilitation Act claim and a California Bane Act claim.

14 The *Bivens* claims have been dismissed. *See* ECF Doc. 58. While the United States
15 believes that Johnson’s FTCA claims are meritless, this motion for summary judgment
16 focuses on Johnson’s claims under the Rehabilitation Act and the Bane Act.

17 The United States’ motion has three main prongs. First, based on the undisputed
18 material facts, Johnson’s Rehabilitation Act claim fails, on several grounds. Second, at
19 minimum, the Rehabilitation Act claim does not permit an award of monetary or
20 compensatory damages against the United States, because of sovereign immunity; nor is
21 Johnson entitled to a jury trial on his Rehabilitation Act claim. Third, Johnson’s Bane Act
22 claim also fails, as a matter of law.

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25 ¹⁶ *See also* ECF Doc. 29 (Johnson’s Second Amended Complaint, Par. 86):
26 “Plaintiff’s written request for ongoing medical accommodation was approved on January
27 5, 2018, allowing disability accommodation through the San Ysidro pedestrian lanes by
28 showing the letter of approval and appropriate identification; however, it does not address
the issue of crossing in an automobile, which is the primary mode of travel for Plaintiff.”

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II. Legal Standards

A. Summary Judgment

“A party is entitled to summary judgment if the ‘movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). “The moving party initially bears the burden of proving the absence of a genuine issue of material fact.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).¹⁷ “The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant’s favor.” *City of Pomona*, 750 F.3d at 1049. But “‘Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.’” *Id.* (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

III. Argument: Johnson Cannot Prevail Based on the Rehabilitation or Bane Acts

Congress enacted the Rehabilitation Act in 1973. *National Association of the Deaf, v. Trump*, --- F.Supp.3d ---, 2020 WL 5411171, at *4 (D.D.C. Sept. 9, 2020). The Act underwent a series of amendments over the years. *See id.* Public entities operating programs or activities that receive federal financial assistance are subject to § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). *Shankar v. DHS*, 2014 WL 523960, at *7 (N.D. Cal. Feb. 6, 2014). Federal executive agencies also fall within the coverage of § 504. *Id.*; *Davis v. Astrue*, 2011 WL 3651064, at *3 (N.D. Cal. Aug. 18, 2011). As amended, § 504

¹⁷ “At the summary judgment stage, [however,] a party no longer can rely on allegations alone, however plausible they may be.” *Lopez v. Pac. Mar. Ass’n*, 657 F.3d 762, 768 (9th Cir. 2011). Rather, “a party opposing summary judgment must present some significant probative evidence tending to support the complaint.” *Bias v. Moynihan*, 508 F.3d 1212, 1222 (9th Cir. 2007). If a plaintiff fails to present any evidence to support a claim, summary judgment in favor of the defendant is appropriate. *Id.*

1 provides:

2 No otherwise qualified individual with a disability in the United States ...
3 shall, solely by reason of her or his disability, be excluded from the
4 participation in, be denied the benefits of, or be subjected to discrimination
5 under any program or activity receiving Federal financial assistance or
6 under any program or activity conducted by any Executive agency...

6 29 U.S.C. § 794(a) (in pertinent part).

7 In *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991), the
8 Ninth Circuit concluded that Congress intended to create a private right of action when it
9 enacted § 504. *Id.*, at 794-95; *see also J.L. v. Social Sec. Admin*, 971 F.2d 260, 264 (9th Cir.
10 1992) (following *Doe* and finding a private right of action against federal agencies for
11 violations of § 504).

12 *Doe* was later overruled in part by *Lane v. Pena*, 518 U.S. 587, 591 (1996)
13 (concluding that Congress did not waive the federal government’s immunity against
14 monetary awards for violations of § 504). Thus, in the present case, *Lane* bars Johnson
15 from obtaining any monetary award against the United States under the Rehabilitation Act
16 – as argued more fully below. But *Lane* did not foreclose the possibility there could still be
17 a private right of action under § 504 for injunctive or equitable relief. *Davis*, 2011 WL
18 3651064, at *3.

19 Although not yet addressed by the Ninth Circuit, district courts in this circuit have
20 interpreted *Lane* to bar only a monetary damages remedy when a plaintiff pursues the
21 private right of action against a federal agency recognized in *Doe*. *See Mendez v. Gearan*,
22 947 F. Supp. 1364, 1367 (N.D. Cal. 1996) (stating that, under *Lane*, “[w]ith monetary
23 damages unavailable to plaintiffs suing a federal agency under the Rehabilitation Act, the
24 private right of action established under § 504(a) by the Ninth Circuit is limited to equitable
25 remedies”); *Robinson v. Brown*, 2018 WL 4951965, at *6 (S.D. Cal. Oct. 12, 2018)
26 (equitable or injunctive relief, not monetary damages, are available under § 504). *Doe* and
27 *J.L.* are still binding precedent as they relate to claims for injunctive relief. *Gray v. Golden*
28

1 *Gate Nat'l Recreation Area*, 2012 WL 13140460, at *8 (N.D. Cal. July 3, 2012).¹⁸

2 Similar to the Rehabilitation Act, Title II of the Americans with Disabilities Act
3 (“ADA”) provides that “no qualified individual with a disability shall, by reason of such
4 disability, be excluded from participation in or be denied the benefits of the services,
5 programs, or activities of a public entity, or be subjected to discrimination by any such
6 entity.” 42 U.S.C. § 12132. Because Title II of the ADA was expressly modeled after
7 Section 504, “[t]here is no significant difference [between the two] in analysis of the rights
8 and obligations created.” *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1045 n. 11 (9th
9 Cir. 1999). Claims brought under the ADA and Rehabilitation Act should be analyzed
10 together; and case law interpreting each statute is applicable to both. *Id.*; *Duvall v. Cnty. of*
11 *Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). The same test governs claims brought under
12 both. *Henning v. Cty. of Santa Clara*, 2017 WL 1036729, at *5 (N.D. Cal. March 17, 2017).

13 **A. Johnson Cannot Establish a Violation of § 504 of the Rehabilitation Act**
14 **Based on CBP’s Not Allowing Him to Use the SENTRI Lane – Because**
15 **Johnson is Simply Not Qualified to Do So**

16 To prove a public program or service violates Section 504 of the Rehabilitation Act,
17 “a plaintiff must show: (1) he is an ‘individual with a disability’; (2) he is ‘otherwise
18 qualified’ to receive the benefit; (3) he was denied the benefits of the program *solely by*
19 *reason of his disability*; and (4) the program receives federal financial assistance.”
20 *Weinreich v. Los Angeles Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)
21 (quoting 29 U.S.C. § 794) (emphasis added); *Lowell v. Chandler*, 303 F.3d 1039, 1052 (9th
22 Cir. 2002). When seeking a reasonable accommodation, a plaintiff must demonstrate he or
23

24 ¹⁸ The non-availability of monetary or compensatory damages against the United
25 States under the Rehabilitation Act, but only the possibility of equitable relief, has a further
26 consequence: it means that Johnson has no right to a jury trial on his Rehabilitation Act
27 claim. *See Smith v. Barton*, 914 F.2d 1330, 1336-38 (9th Cir. 1990) (concluding that “there
28 is no statutory entitlement to jury trial in section 504 cases,” but holding that because the
plaintiff in that case sought, and was entitled to seek, monetary damages, the claim was
legal not equitable in nature, and thus a jury trial was constitutionally required).

1 she is “otherwise qualified” to utilize the facility, program or service at issue. *See Gallagher*
2 *v. San Diego Unified Port District*, 2009 WL 311120, at *4 (S.D. Cal. Feb. 6, 2009)
3 (plaintiff who sought disabled access to an anchorage area in the San Diego Bay could not
4 state an ADA claim because he did not allege that he was “otherwise qualified” to
5 participate in the anchorage services offered by the Port District).

6 Here, even if Johnson is disabled, he cannot establish the second and fourth of the
7 Rehabilitation Act’s requirements: that (2) he is otherwise qualified to participate in or
8 receive the benefit of the SENTRI lane for crossing the border; and that (4) any such
9 exclusion, denial of benefits, or discrimination was solely by reason of his disability.
10 Johnson seems to think that he is entitled under the Rehabilitation Act to use the SENTRI
11 lane just because he is disabled. But Johnson is not otherwise qualified to use the SENTRI
12 lane. He has never applied for SENTRI membership. He has not undergone the background
13 check and interview or paid the fee. And he would almost certainly be positively
14 disqualified because of his narcotics and weapons convictions. Nor is any exclusion etc.
15 solely because of his disability or based on some discriminatory motive – it is rather because
16 of his utter lack of qualification, indeed his positive disqualification by reason of his drug
17 and weapons convictions. In short, Johnson is not qualified to benefit from CBP’s trusted
18 traveler programs, including SENTRI, never having applied, and likely being per se
19 disqualified by reason of his criminal record. Indeed, when asked why he didn’t just apply
20 to become a SENTRI member, Johnson himself has repeatedly stated: “I don’t qualify.”
21 On this point, anyway, Johnson is 100% correct.

22
23 **B. Even if Johnson Could Establish the Elements of a Claim, CBP Has a**
24 **Legal Defense for Not Providing the Requested SENTRI Lane**
25 **Accommodation**

26 Whether a public entity’s failure to reasonably accommodate an otherwise qualified
27 individual’s disability constitutes discrimination depends on the outcome of three inquiries:
28 (1) whether the requested modification is necessary for the disabled individual; (2) whether

1 it is reasonable; and (3) whether it would fundamentally alter the nature of the public
2 program. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683 n. 38 (2001). “The plaintiff bears
3 the burden of proving that the requested modification is both necessary and reasonable; the
4 defendant bears the burden of proving that the requested modification would be a
5 fundamental alteration.” *Doherty v. Colonial Williamsburg Foundation*, 925 F.3d 663, 671
6 (4th Cir. 2019); *see also Karczewski v. DCH Mission Valley, LLC*, 862 F.3d 1006, 1010
7 (9th Cir. 2017) (“If Plaintiffs establish a prima facie case, namely that their requested
8 modification was reasonable and necessary, then Defendant ‘must make the requested
9 modification unless it proves that doing so would alter the fundamental nature of its
10 business.’”) (quoting *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1080 (9th Cir.
11 2004)). A “fundamental alteration” is a modification to an essential aspect of a program.
12 *Martin*, 523 U.S. at 683. Public entities are not required to create new programs to provide
13 services to assist the disabled. *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003)
14 (construing Title II of the ADA). Courts also have recognized that requested
15 accommodations involving special entry access to people with disabilities can in some cases
16 not be reasonable because they would change an essential aspect of the program as to the
17 non-disabled. *See Galvan v. Walt Disney Parks and Resorts, U.S., Inc.*, 425 F.Supp.3d
18 1234, 1241-42 (C.D. Cal. 2019) (allowing the disabled immediate “front of the line” special
19 access to rides at Disneyland would fundamentally alter the theme park experience)
20 (applying the ADA).

21 Here, Johnson’s proposed accommodation with regard to SENTRI – that he
22 somehow be allowed to use the SENTRI lane, and thus jump the queue at the border, despite
23 not being a SENTRI member – is neither necessary nor reasonable. It is not necessary since
24 Johnson has proved himself capable of using the general vehicle and pedestrian lanes to
25 cross the border, e.g., crossing in a vehicle in the general vehicle lanes over 300 times since
26 2012. He has also crossed repeatedly through the general pedestrian lanes. And allowing
27 Johnson to use SENTRI without application and approval completely flouts SENTRI’s
28 qualifying requirements – and so is unreasonable. This is particularly so since allowing

1 Johnson such use would inevitably mean that others too would claim similar privileges,
2 inundating the SENTRI program with non-SENTRI participants.

3 In addition, granting Johnson SENTRI privileges without SENTRI application and
4 membership would fundamentally alter the nature of the SENTRI trusted traveler program.
5 The purpose of SENTRI and similar trusted traveler programs is to vet travelers beforehand
6 so that trusted ones can enter more quickly, thus allowing CBP to turn its fuller attention to
7 other security issues. *See, e.g.*, Harmonization of the Fees and Application Procedures for
8 the Global Entry and SENTRI Programs and Other Changes, 85 Fed. Reg. 55597, 55598
9 (September 9, 2020). Instead, allowing Johnson to use the SENTRI lane without meeting
10 its requirements would reward a positively untrustworthy traveler, not a trusted one, with
11 expedited access at the border. And it would require CBP to divert its attention solely to
12 whatever issues Johnson presents, each time, rather than to make its own informed and
13 discretionary choices about where best to expend manpower, time, effort, and money in
14 conducting inspections at the border – which is what the SENTRI and other trusted traveler
15 programs are intended to do. In sum, Johnson’s requested accommodation would constitute
16 a fundamental alteration of an essential aspect of the SENTRI program.

17 **C. CBP Provided Johnson with a Reasonable Accommodation**
18 **Involving Use of the Pedestrian Lanes and Advised Him He Also**
19 **Could Avail Himself of the Ready Lanes for Expedited Entry When**
20 **Crossing in a Vehicle**

21 After engaging in the interactive process with Johnson, CBP provided him with a
22 reasonable accommodation involving the pedestrian crossing. *See Gantzel Dec.*, Ex. 9.
23 Through his counsel, Johnson has effectively admitted that crossing the border through the
24 pedestrian lanes – although not ideal – was satisfactory, at least at times. *See Gantzel Dec.*,
25 Ex. 11 (p. 2: (Johnson’s attorney, explaining that after Johnson’s car was seized, “he has
26 been using the San Ysidro Border foot lanes to cross. [Par.] Initially, Mr. Johnson had no
27 problem obtaining medical access in the walking lane to quickly cross over into the US . . .
28 . [Par.] At first he had no problems at all, and was allowed expedited crossing simply by

1 showing his documentation”). CBP has also advised Johnson of his right to use the
2 “Ready Lanes” to obtain expedited crossing in a vehicle. But Johnson contends that these
3 accommodations are insufficient, because they are less desirable for him than crossing the
4 border in the SENTRI vehicle lane.

5 Although he appears to think otherwise, Johnson does not get to choose his
6 accommodation. An entity does not have to provide a plaintiff with the accommodation of
7 his choice, or the best possible accommodation, so long as the one provided is reasonable.
8 *Temple v. Hudson View Owners Corporation*, 222 F.Supp.3d 318, 324 (S.D.N.Y. 2016)
9 (applying ADA). Moreover, an accommodation is not required solely to prevent a
10 plaintiff’s discomfort or difficulty accessing a facility, service or program. The
11 accommodation must be *necessary* to enable access that otherwise is beyond his or her
12 capacity. *Dougherty*, 925 F.3d at 672. Furthermore, individuals who meet the “disability”
13 definition solely because they are “regarded” as having an impairment are not entitled to an
14 accommodation. *Galvan*, 425 F.Supp.3d at 1241; *Kaplan v. City of North Las Vegas*, 323
15 F.3d 1226, 1233-34 (9th Cir. 2003) (same).

16 Here, to the extent Johnson qualified for reasonable accommodation for his disability
17 under the Rehabilitation Act, CBP provided him with reasonable accommodations: both
18 through the pedestrian lanes, and – provided he simply apply – through the “Ready Lanes.”
19 That Johnson chooses not to avail himself of one (the “Ready Lanes”) and would prefer to
20 drive over the border rather than use the pedestrian lanes does not make these
21 accommodations unreasonable.

22 **D. Johnson Cannot Recover Money Damages on His Rehabilitation Act**
23 **Claim – and His Claim Must be Tried to the Court Only**

24 As discussed above, Johnson cannot prevail on his Rehabilitation Act claim. But
25 even if he could, he cannot recover money damages, because the United States has not
26 waived its sovereign immunity from suit. *Lane*, 518 U.S. at 591-97 (finding that Congress
27 has not waived the federal government’s sovereign immunity against monetary damages
28 awards); *Robinson v. Brown*, 2018 WL 4951965, at *6 (S.D. Cal. Oct. 12, 2018). Instead, a

1 plaintiff may seek only injunctive or equitable relief. *Robinson*, 2018 WL 4951965, at *6;
2 *SAI v. Smith*, 2018 WL 534306, at *10 (N.D. Cal. Jan. 24, 2018); *Turner v. Langford*, 2020
3 WL 4001621, at *11 (C.D. Cal. March 13, 2020) (dismissing Rehabilitation Act for money
4 damages against the government). Similarly, based on sovereign immunity grounds, a
5 plaintiff cannot recover money damages for emotional distress suffered as a result of a
6 Rehabilitation Act violation. *Plater v. United States*, 359 F.Supp.3d 930, 938 (C.D. Cal.
7 2018). Finally, because Johnson’s relief under the Rehabilitation Act is confined to the
8 possibility of equitable relief, and does not encompass monetary damages, he has neither a
9 statutory nor a constitutional right to a jury trial on his Rehabilitation Act claim: his
10 Rehabilitation Act claim must be tried to the Court only. *See Smith v. Barton*, 914 F. 2d
11 1330, 1336-38 (9th Cir. 1990) (concluding that “there is no statutory entitlement to jury
12 trial in section 504 cases,” but holding that because the plaintiff in that case sought, and was
13 entitled to seek, monetary damages, the claim was legal not equitable in nature, and thus a
14 jury trial was constitutionally required).

15 **E. Johnson’s Bane Act Claim Against The United States Should Be**
16 **Dismissed To The Extent It Is Based On Alleged Constitutional**
17 **Violations Or Seeks Attorneys’ Fees, Because There Has Been No**
18 **Waiver Of Sovereign Immunity Permitting Those Claims**

19 As the Ninth Circuit has recognized, there has been no waiver of sovereign
20 immunity under the FTCA that would permit a recovery of attorneys’ fees and costs
21 against the government. *Anderson v. United States*, 127 F.3d 1190, 1191-92 (9th Cir.
22 1997). This is the rule even when a state statute such as the Bane Act permits the
23 recovery of such fees and costs. *See id.* In light of the foregoing, Johnson’s request for
24 attorneys’ fees in his Bane Act claim and Prayer for Relief should be dismissed or
25 stricken. *See Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000) (striking prayer
26 for attorneys’ fees with respect to FTCA claims).

27 Consistent with Ninth Circuit law, Johnson also cannot base his Bane Act claim
28 on alleged constitutional violations.

1 The district court lacked subject matter jurisdiction over Lewis' Bane Act
2 claim. The FTCA waives sovereign immunity only 'where the United
3 States, if a private person, would be liable ... in accordance with the law
4 of the place where the act or omission occurred.' 28 U.S.C. § 1346(b)(1).
5 Based on the terms of that waiver, *F.D.I.C. v. Meyer*, 510 U.S. 471, 114
6 S.Ct. 996, 127 L.Ed.2d 308 (1994), established that 'the United States
7 simply has not rendered itself liable under § 1346(b) for constitutional tort
8 claims.' *Id.* at 478, 114 S.Ct. 996, 127 L.E.2d 308 (1994). Lewis' Bane Act
9 claim imports a constitutional violation – the use of excessive force – that
10 could not otherwise be the basis for a claim against a private person.
11 Although *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010), concluded the
12 FTCA allows a Bane Act claims predicated on the violation of a federal
13 statute, *id* at 950, it did not suggest that the FTCA waiver extends to Bane
14 Act claims deriving from constitutional violations.

15 *Lewis v. Mossbrooks*, 788 Fed.Appx. 455, 460 (9th Cir. Oct. 4, 2019); *see also Reynoso v.*
16 *Prater*, 2013 WL 5937223, at *4 (S.D. Cal. Nov. 4, 2013) (Section 52.1 Bane Act claim
17 brought under the FTCA cannot be based on a violation of the United States Constitution).

18 Here, to the extent Johnson's Bane Act claim is premised on violations of the United
19 States and California Constitutions, it should be dismissed for lack of subject matter
20 jurisdiction.

21 **IV. Conclusion**

22 Defendant the United States does not dispute that Johnson has been diagnosed with
23 some form of bipolar disorder, and that he has a disability rating from the VA. Nor does it
24 intend to show any disrespect to the plaintiff, or disregard for his mental health status, in
25 vigorously opposing his lawsuit, or filing this motion. What the United States does contend,
26 however, is that (i) Johnson has shown himself quite capable of crossing the United States-
27 Mexico border, on his own, through the general vehicle and pedestrian lanes; (ii) Johnson
28 is not otherwise qualified to use the SENTRI lane, having never applied, and having his
particular criminal convictions; (iii) to allow Johnson to use the SENTRI lane, despite his
lack of qualification, would fundamentally alter the nature of the SENTRI trusted traveler
program; and (iv) Johnson has been provided reasonable accommodation, through the

1 pedestrian lanes, and – if he would only take the trouble to obtain an RFID-enabled
2 document – through the “Ready Lanes.” It is no inconsistency to say at one and the same
3 time that, while Johnson may indeed be suffering from bipolar disorder, his claim under the
4 Rehabilitation Act must fail, for all the above reasons.

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7 Dated: December 17, 2020

Respectfully submitted,

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ROBERT S. BREWER, JR.
United States Attorney

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/s/*Kyle W. Hoffman*
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