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 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 REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
 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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1 **I. Introduction**

2 Plaintiff Carey L. Johnson’s Rehabilitation Act claim fails for the simplest of reasons.
3 The undisputed facts – indeed, the facts Johnson himself has repeatedly admitted – show
4 that he is not “otherwise qualified” to receive the benefit he seeks (use of the SENTRI lanes
5 at the Ports of Entry). These undisputed facts also show that Johnson was not denied that
6 benefit “solely by reason of his disability.” Instead, Johnson never applied, never qualified,
7 and was never approved for SENTRI membership – a membership which he himself has
8 repeatedly stated he does not qualify for, because of his past criminal offenses. For these
9 basic reasons, the Court should grant the United States’ motion for summary judgment on
10 Johnson’s Rehabilitation Act claim.

11 **II. Argument**

12 **A. The United States is Entitled to Summary Judgment Because Johnson is Not**
13 **“Otherwise Qualified,” Nor Is He Being Denied Anything “Solely by Reason**
14 **of His Disability”**

15 As both parties agree, to prove a public program or service violates Section 504 of
16 the Rehabilitation Act, Johnson “must show: (1) he is an ‘individual with a disability’; (2)
17 he is ‘otherwise qualified’ to receive the benefit; (3) he was denied the benefits of the
18 program solely by reason of his disability; and (4) the program receives federal financial
19 assistance.”¹ Here, however, on the second and third essential elements, there is no genuine
20 dispute as to any material fact, and the United States is entitled to judgment as a matter of
21 law. To start with, Johnson does not “otherwise qualify” for SENTRI membership. To
22 become a SENTRI member – and thus to be qualified to use the SENTRI lanes at the Ports
23 of Entry into the United States from Mexico – a person must apply, meet the program’s
24 requirements (including undergoing a background investigation and paying a fee), and be
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26 ¹ *Weinreich v. Los Angeles Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997)
27 (quoting 29 U.S.C. § 794); *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002). *See*
28 *also* ECF Doc. 80 (USA’s MSJ at 14 (quoting *Wienreich* and citing *Lovell*)); ECF Doc. 85
(Johnson’s Response to USA’s MSJ at 11 (quoting *Lovell*)).

1 approved. *See, e.g.*, <https://www.cbp.gov/travel/trusted-traveler-programs/sentri>. In
2 addition, an applicant “may not be eligible for participation in the SENTRI program if [the
3 applicant]: . . . [Has] been convicted of any criminal offense [or] Cannot satisfy CBP
4 of [the applicant’s] low risk status.” *See* [https://www.cbp.gov/travel/trusted-traveler-](https://www.cbp.gov/travel/trusted-traveler-programs/sentri/eligibility)
5 [programs/sentri/eligibility](https://www.cbp.gov/travel/trusted-traveler-programs/sentri/eligibility)

6 Here, there is no dispute that Johnson is not enrolled in – and does not qualify for
7 participation in – the SENTRI program. In fact, Johnson has repeatedly admitted that he
8 has not applied, and does not qualify, for SENTRI membership. *See* ECF Doc. 80 (USA’s
9 MSJ at 6 and n.6; at 7 and n.8 (citing videos where Johnson (i) admits he had no SENTRI
10 pass, and (ii) responds to officers’ queries about why he did not apply for SENTRI
11 membership with the words, “I don’t qualify.”)). In addition, Johnson has criminal
12 convictions. These include not just possession of a controlled substance with intent to
13 distribute (which Johnson’s Response unilaterally demotes to now-legal possession of
14 marijuana), but also possession of a firearm by a restricted person – a firearms conviction
15 that Johnson’s Response ignores. *See* ECF Doc. 80 (USA’s MSJ at 3 n.5). Thus, not only
16 has Johnson *not* applied, *not* met the requirements, and *not* been approved for SENTRI
17 membership: he is also highly likely ineligible for participation in the SENTRI program
18 because of his past criminal convictions and high-risk status. Finally, none of this failure
19 to be “otherwise qualified” has anything to do with Johnson’s disability.

20 For these reasons, Johnson cannot prove that he is “otherwise qualified” to receive
21 the benefit of the SENTRI program or service – and the United States is entitled to summary
22 judgment on his Rehabilitation Act claim as a matter of law. Notably, this is so without
23 even considering the issue of what might constitute a “reasonable accommodation.”
24 Rehabilitation Act, Americans with Disabilities Act and similar claims often fail and are
25 dismissed on precisely this ground – a plaintiff’s lack of being “otherwise qualified.” And
26 courts in such cases have expressly stated that where the individual is not “otherwise
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1 qualified” in the first place, they need not consider whether an accommodation is
2 reasonable.²

3 Second, Johnson has not shown that he has been denied the benefits of the SENTRI
4 program or service “solely by reason of his disability.” It is not his disability that has
5 prevented Johnson from becoming a SENTRI member, or from properly having access to
6 the SENTRI lanes. It is his failure to apply, undergo a background investigation, and pay
7 the necessary fee, as well as his (likely) positively disqualifying drug and firearm
8 convictions and consequent inability to meet CBP’s “low-risk” traveler requirement. And
9 so there is no dispute as to any material fact concerning Johnson’s inability to prevail on
10 two of the essential elements of his Rehabilitation Act claim: he is not “otherwise
11 qualified,” and he has not been denied a benefit “solely by reason of his disability.”

12 Finally, Johnson’s request to use the SENTRI lane as an accommodation is not
13 reasonable as a matter of law. An accommodation cannot be deemed reasonable if it would
14 require an agency to violate federal law or regulations.³ Here, CBP’s regulations require a

15 ² See, e.g., *Anthony v. Trax Intern. Corp.*, 955 F.3d 1123, 1134 (9th Cir. 2020) (“We need
16 not ‘consider reasonable accommodation in determining whether [an employee] satisfied
17 the *job prerequisites*,’ however ‘[U]nless a disabled individual independently satisfies
18 the job prerequisites, she is not “otherwise qualified,” and the employer is not obligated to
19 furnish any reasonable accommodation.”); *Johnson v. Bd. of Trustees of Boundary Cty.*
20 *Sch. Dist. No. 101*, 666 F.3d 561, 565-66 (9th Cir. 2011) (there is no “requirement of
21 providing reasonable accommodation to disabled individuals who fail to meet the job
22 prerequisites on their own”); *Gomez v. American Building Maintenance*, 940 F.Supp. 255,
23 259 (N.D. Cal. 1996) (“an employer is not required to hire or retain an employee who is not
24 qualified to perform a job. It therefore follows that an employer need not make an
25 accommodation for an individual who is not otherwise qualified.”); *Gallagher v. San Diego*
Unified Port District, 2009 WL 311120, at *4 (S.D. Cal. Feb. 6, 2009) (granting motion to
dismiss, because plaintiff who sought disabled access under the ADA to an anchorage area
in the San Diego Bay failed to allege that he was “otherwise qualified” to participate in the
anchorage services offered by the Port District).

26 ³ See *Moore v. Housing Authority of the City of Los Angeles*, 2015 WL 9872270, at *10
27 (C.D. Cal. Dec. 21, 2015) (requested accommodation was not reasonable because it would
28 have required the agency to violate federal law and regulations), report and
recommendation adopted 2016 WL 241471 (C.D. Cal. Jan. 19, 2016); *Doe v. Housing*

1 Port Director evaluating an applicant for the SENTRI program to consider the applicant's
2 criminal history. *See* 8 C.F.R. § 235.7(x). Johnson's request for an accommodation that
3 would require CBP to simply ignore his criminal history in violation of a federal regulation
4 is not reasonable.

5 **B. Johnson's Counterarguments Fail to Meet – Let Alone Overcome – the**
6 **Essential Points of the United States' Motion**

7 On this aspect of the United States' MSJ, Johnson's argument to the contrary consists
8 of two related points. First, Johnson claims that the "Government misstates the 'service' to
9 which Mr. Johnson is entitled. Mr. Johnson . . . is entitled to the *service* of being able to
10 enter the United States." *See* ECF Doc. 85 (Johnson's Response at 12.). Second, and
11 relatedly, Johnson tries to disconnect *use of the SENTRI lane* from *the requirements of the*
12 *SENTRI program*. *Id.* (at 12-13). This is seemingly on the theory that Johnson's
13 unauthorized *use* of the SENTRI lane is just his idiosyncratic way of *entering* the United
14 States – and entering the United States is all that he seeks to do.

15 These arguments fail, for the following reasons. First, Mr. Johnson has never been
16 denied the "service" of being able to enter the United States. Unsurprisingly, however,
17 Johnson must do so on the same terms and conditions that govern *everyone*, citizen or non-
18 citizen, veteran or non-veteran, disabled or not. For example, just as *everyone* else must,
19 when Johnson seeks to enter the United States from Mexico at a Port of Entry, he must
20 submit to inspection by CBP officers. CBP officers have legal authority to require everyone
21 to comply with these inspections, and all travelers must undergo the required inspections
22 on pain of penalties, including criminal penalties.⁴ Further, in order to be inspected,
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Authority of Portland, 2015 WL 758991, at *6 (D. Or. Feb. 23, 2015) ("Plaintiff's requested
25 accommodation is patently unreasonable because if granted, it would violate federal
26 regulations.") (citations omitted).

27 ⁴ *See, e.g.*, 19 U.S. Code § 1433 - Report of arrival of vessels, vehicles, and aircraft; 19 U.S.
28 Code § 1436 - Penalties for violations of arrival, reporting, entry, and clearance
requirements; 19 U.S. Code § 1459 - Reporting requirements for individuals. *See esp. e.g.*,
§ 1459(d) ("any person required to report to a designated customs facility under subsection

1 Johnson – just like anyone else – can seek to enter the United States from Mexico at the
2 Ports of Entry through the general vehicle lanes, or through the general pedestrian lanes.
3 That “service” is as available to Johnson as it is to everyone else – no less, but also no
4 more.⁵

5 Moreover, Johnson has repeatedly shown that he *can* enter the country through the
6 general vehicle (or pedestrian) lanes. The undisputed evidence shows this, and Johnson’s
7 Response rightfully concedes as much. *See* ECF Doc. 80 (USA’s MSJ at 1-2 (citing
8 evidence of Johnson’s hundreds of entries through the general vehicle lanes); ECF Doc. 85
9 (Johnson’s Response at 1 (“most times when Mr. Johnson crossed the border . . . he used
10 normal border crossing lanes.”). Johnson could even – if he would only put forth the
11 minimal time, money, and effort to obtain an RFID-enabled document – enter the United
12 States through the Ready Lanes, thus decreasing some of the time spent he might spend
13 waiting in a car at the Ports of Entry. *See* ECF Doc. 80 (USA’s MSJ at 10: noting Ready
14 Lanes’ availability, potential benefits, and minimal requirements). And so Johnson is not
15 at all being denied the “service” of entry into the United States when he is not allowed to
16 use the SENTRI lane without properly qualifying to do so.

17 Second, Johnson seems to suggest that mere physical use of the SENTRI lane is
18 somehow distinct and separable from the laws, regulations, requirements, and rules
19 governing the SENTRI program. Of course, Johnson could always *use* the SENTRI lane,
20 as a matter of brute fact. And despite multiple verbal and written warnings to the contrary,
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22 (a), (b), or (c) of this section *may not depart that facility until authorized to do so by the*
23 *appropriate customs officer*”), § 1459(e) (making non-compliance unlawful, including non-
24 compliance with regulations), and § 1459(g) (criminal penalties for violations).

25 ⁵ Here, however, because he is “otherwise qualified” to use the general pedestrian lanes,
26 and because he has a disability that sometimes affects his ability to wait, Johnson has been
27 permitted to wait physically apart from the pedestrian lines in an area available to people
28 who have trouble standing in line for long periods, as a “reasonable accommodation” for
his disability.

1 he has done so, repeatedly. But as Johnson was expressly warned each time, both orally
2 and in writing, if he continued to *use* the SENTRI lanes *without proper enrollment in the*
3 *SENTRI program*, he would also be subject to the fines and forfeitures that would legally
4 accompany his unauthorized use of those lanes.⁶ Use without proper membership entails
5 certain consequences – and so Johnson’s physical *use* of the SENTRI lane cannot be so
6 disentangled from the SENTRI program’s *requirements*, or its purposes.

7 In short, it is a mere sleight of hand to argue that Johnson is just trying to obtain
8 access to the “service” of being able to enter the United States, when he has never been
9 denied that service. And it is not simply entry into the United States that Johnson seeks.
10 Instead, Johnson mistakenly insists on coupling that entry with unauthorized use of official
11 lanes that are supposed to be devoted to members of a program (SENTRI) (i) for which
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13 ⁶ In the facts or Background section of his Response, Johnson asserts that certain CBP
14 officers told him that he could use the SENTRI lane, without being a SENTRI member, if
15 he merely showed CBP officers his VA disability papers; and that if fellow CBP officers
16 did not so allow him, this would be an abuse of officer discretion. *See* ECF Doc. 85
(Johnson’s Response at 5:5 – 6:13).

17 But these assertions – not further argued – are immaterial to deciding the United
18 States’ motion. They fail to show that Johnson “otherwise qualified” for participation in
19 the SENTRI program, or that he was denied the program’s benefits “solely by reason of his
20 disability.” Further, individual CBP officers cannot make policy for CBP that violates
21 program rules and is inconsistent with federal regulations governing the eligibility criteria
22 for SENTRI. *Cf. Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1981) (“[p]ersons dealing
with the government are charged with knowing government statutes and regulations, and
they assume the risk that government agents may exceed their authority and provide
misinformation.”).

23 Finally, even if Johnson’s claims *were* material to the present motion, they are utterly
24 belied by (i) the videos of his encounters with CBP officers at primary inspection, and (ii)
25 the written warnings Johnson received. *See Scott v. Harris*, 550 U.S. 372, 378-381 (2007)
26 (reversing denial of motion for summary judgment, because video evidence rendered
27 plaintiff’s contrary version of events unbelievable: “The videotape quite clearly contradicts
28 the version of the story told by respondent and adopted by the Court of Appeals . . .
. Respondent’s version of events is so utterly discredited by the record that no reasonable
jury could have believed him. The Court of Appeals should not have relied on such visible
fiction; it should have viewed the facts in the light depicted by the videotape.”).

1 Johnson admits he does not otherwise qualify, and (ii) for which he is rather positively
2 disqualified, not by reason of his disability, but by reason of his criminal record.

3 **C. To Require Not Only Unapproved but Positively Distrusted Travelers to**
4 **Have Access to CBP’s Trusted-Traveler Programs Would Fundamentally**
5 **Alter the Nature of those Programs**

6 As the United States argued in its MSJ, granting Johnson what amounts to SENTRI
7 privileges without SENTRI application and membership would fundamentally alter the
8 nature of SENTRI and other trusted-traveler programs. SENTRI and similar programs vet
9 travelers beforehand, not just to enable trusted travelers to enter the United States more
10 quickly – in other words, these programs are not just for the travelers’ benefit. This pre-
11 vetting also enables CBP to more effectively marshal its resources, and to turn its fuller
12 attention to other security issues. *See, e.g.*, Harmonization of the Fees and Application
13 Procedures for the Global Entry and SENTRI Programs and Other Changes, 85 Fed. Reg.
14 55597, 55598 (September 9, 2020).

15 Here, allowing Johnson to use the SENTRI lane without meeting all its prerequisites
16 would reward an unapproved and positively untrustworthy traveler, not a pre-approved and
17 trusted one. More important, it would divert CBP resources, as Johnson would need to be
18 sent to secondary inspection when he used the SENTRI lane⁷ – thereby requiring CBP to
19 shift its manpower, time, and attention from other matters.

20 But it’s not just the effect this would have when considering Johnson only. CBP
21 needs to consider the cumulative effects of allowing unauthorized or even positively
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23 ⁷ For example, because SENTRI lane travelers spend less time in line, it stands to reason
24 that there is less opportunity for pre-primary roving inspections, with canines for instance.
25 Which in turn means that the opportunity for a (positively distrusted) traveler to break
26 United States law increases. Which in turn also means that CBP would have to increase
27 effort on the back end, so to speak, at secondary inspection, to make up for the decreased
28 security on the front end, in pre-primary. And all this diversion of effort and resources
would occur not because of CBP’s expertise and knowledge, but for other reasons
altogether, reasons not related to and even fundamentally at odds with the essential purposes
of CBP’s trusted-traveler programs.

1 distrusted travelers access to trusted-traveler benefits – and the Court should consider the
2 cumulative effects of legally requiring CBP to do so. Allowing Johnson this bypass – and,
3 inevitably, all others who claim to be similarly situated – runs the risk of swamping the
4 SENTRI trusted-traveler program and others. It runs the risk of turning the SENTRI lane
5 into an express lane for those not preapproved as SENTRI members, and even those
6 positively disqualified by reason of previous criminal convictions, but who claim disability
7 and “anxiety” because of long waits at the border. It is hard to imagine that this –
8 particularly in its cumulative aspect – would not constitute a fundamental alteration of
9 SENTRI and CBP’s other trusted-traveler programs. *See Walt Disney Parks and Resorts,*
10 *U.S., Inc.*, 425 F.Supp.3d 1234, 1241-42 (C.D. Cal. 2019) (court considers cumulative
11 impact of allowing all disabled individuals immediate “front of the line” special access to
12 rides at Disneyland when finding such a requirement would fundamentally alter the theme
13 park experience).

14 In sum, Johnson’s requested accommodation – particularly considered more broadly
15 – would constitute a fundamental alteration of an essential aspect of the SENTRI program.
16 And so Johnson’s Rehabilitation Act claim fails on this ground as well.

17 **D. Johnson’s Bane Act Claim Must Be Dismissed Because It Is Based on Alleged**
18 **Excessive Force in Violation of The Fourth Amendment**

19 The Ninth Circuit has held that a Bane Act claim may not be premised on a violation
20 of the United States Constitution because Congress has not waived sovereign immunity to
21 permit such a claim. *Lewis v. Mossbrooks*, 788 Fed.Appx. 455, 460 (9th Cir. Oct. 4, 2019);
22 *see also Reynoso v. Prater*, 2013 WL 5937223, at *4 (S.D. Cal. Nov. 4, 2013) (Section 52.1
23 Bane Act claim brought under the FTCA cannot be based on a violation of the United States
24 Constitution). For this reason, in *Lewis*, the Ninth Circuit determined that a plaintiff’s Bane
25 Act claim could not survive under the FTCA because it imported a constitutional
26 violation—the use of excessive force. *Lewis*, 788 Fed.Appx. at 460.

27 Here, Johnson also bases his Bane Act claim on alleged excessive force. ECF Doc.
28 29 (SAC, ¶ 137 (“Defendants interfered with Plaintiff’s right to be free from excessive

1 force.”)). But the only constitutional violation Johnson alleges to support his Bane Act
 2 claim is a violation of the Fourth Amendment of the United States Constitution. *Id.* (SAC,
 3 ¶ 138 (“Defendants committed this interference [excessive force] with Plaintiff’s rights in
 4 violation of California Civil Code § 52.1 and the Fourth Amendment.”)). Under these
 5 circumstances, Johnson’s Bane Act claim should be dismissed for lack of subject matter
 6 jurisdiction.

7 **E. Johnson Cannot Recover Attorneys’ Fees Against the United States Under**
 8 **Either His Bane Act Claim or the Equal Access to Justice Act**

9 Even if Johnson could state a Bane Act claim, he may not recover attorneys’ fees.
 10 The federal government is immune from claims for attorneys’ fees unless it has waived its
 11 sovereign immunity. *Campbell v. United States*, 835 F.2d 193, (9th Cir. 1987); *Ruckelshaus*
 12 *v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 3278, 77 L.Ed.2d 938 (1983). Here,
 13 Johnson cites to the attorneys’ fees provision of the Bane Act as authority for an award of
 14 fees against the United States. Although it is true the Bane Act contains a fee provision,
 15 under Ninth Circuit law, Bane Act claims against the United States are treated as brought
 16 under the FTCA.⁸

17 But there has been no waiver of sovereign immunity under the FTCA that would
 18 permit a recovery of attorneys’ fees and costs against the government.⁹ The only attorneys’
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20 ⁸ See *Xu Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010) (allowing Bane Act claim to
 21 proceed as one brought under the FTCA to the extent based on an alleged violation of a
 22 federal statute); see also *Santillo v. United States*, 2011 WL 2729243, at *3 (S.D. Cal. July
 23 13, 2011) (Section 52.1 Bane Act claims fall within the FTCA); *Martinez v. City of West*
 24 *Sacramento*, 2019 WL 448282, at *8 n. 2 (E.D. Cal. Feb. 5, 2019) (“In the Ninth Circuit,
 25 Bane Act claims fall within the purview of the Federal Tort Claims Act.”).

26 ⁹ *Anderson v. United States*, 127 F.3d 1190, 1191-92 (9th Cir. 1997); see also *Nurse v.*
 27 *United States*, 226 F.3d 996, 1005 (9th Cir. 2000) (striking prayer for attorneys’ fees with
 28 respect to FTCA claims). This is the rule even when a state statute such as the Bane Act
 permits the recovery of such fees and costs. See *Anderson*, 127 F.3d at 1191-92; *Jackson*
v. United States, 881 F.2d 707, 712 (9th Cir. 1989) (the FTCA “is to be construed narrowly
 so that the government is never held liable for a plaintiff’s attorney fees, even if the local
 substantive law permits recovery of fees against a private individual in like

1 fees permitted under the FTCA are contingency fees taken out of a plaintiff’s recovery. 28
2 U.S.C. § 2678.

3 The Equal Access to Justice Act (EAJA) also does not permit attorneys’ fees to be
4 awarded against the United States in an FTCA action sounding in tort. *See La Loma*
5 *Grande, LLC v. United States*, 742 Fed.Appx. 288, 289 (9th Cir. 2018) (citing prohibition
6 in 28 U.S.C. § 2412(d)(1)(A) against EAJA awards in “cases sounding in tort”). Here,
7 Johnson characterizes the acts underlying his Bane Act claim as tortious when he states “the
8 CBP officers controlled Mr. Johnson’s ability to obtain necessary medical care, and as such
9 owed a duty to Mr. Johnson, which they breached by their unreasonable delay and refusal
10 to permit him to get such care.” *See* ECF Doc. 85 (Johnson’s Response at 16). This
11 allegation of tortious conduct cannot support an EAJA fee recovery.

12 **II. Conclusion**

13 For all the reasons given above, and in the United States’ original Motion for
14 Summary Judgment, the Court should enter summary judgment in favor of the United States
15 on Johnson’s Rehabilitation and Bane Act claims.

17 Dated: January 15, 2021

Respectfully submitted,

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/s/*Kyle W. Hoffman*
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circumstances.”).