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UNITED STATES DISTRICT COURT

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EASTERN DISTRICT OF CALIFORNIA

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11 JOHN N. HARAMALIS, Colonel,  
12 United States Army,

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Plaintiff,

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v.

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15 DAVID S. BALDWIN,  
16 individually and in his  
17 official capacity as MAJOR  
18 GENERAL, CALIFORNIA NATIONAL  
19 GUARD; CALIFORNIA MILITARY  
20 DEPARTMENT; and DOES 1  
21 through 10, inclusive,

18

Defendants.

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No. 2:17-cv-498-JAM-CKD

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

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This matter is back before the Court on David S. Baldwin and California Military Department's (collectively "Defendants") Motion to Dismiss John N. Haramalis's ("Plaintiff") First Amended Complaint. For the reasons set forth below, Defendants' motion is GRANTED, with leave to amend as limited in this order.<sup>1</sup>

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<sup>1</sup> This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for October 17, 2017.

1 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

2 The following facts are taken as true for the purposes of  
3 this motion:

4 Plaintiff John N. Haramalis is a Colonel in the United  
5 States Army on Federal Active Duty and assigned as the Chief J2  
6 LNO, Joint Intelligence Directorate, National Guard Bureau, in  
7 Arlington, Virginia. First Amended Complaint ("FAC") ¶ 1.  
8 Plaintiff was affiliated with the California National Guard prior  
9 to his tour of active duty at the Pentagon. Id. Defendant  
10 Baldwin is the Adjutant General of the California National Guard,  
11 of which the California Army National Guard is a component. Id.  
12 at ¶ 3.

13 Back in 2016, Plaintiff sought out and accepted a position  
14 in the Arizona National Guard that would follow his tour of  
15 active duty. Id. at ¶¶ 19-22. Plaintiff began working with  
16 human resources to arrange for the conditional release from  
17 California to Arizona. Id. at ¶ 24. At first, Defendant Baldwin  
18 approved of the voluntary transfer request. Id. at 23-32. But,  
19 after much of the process had been completed, Defendant Baldwin  
20 retracted his approval and conveyed that Plaintiff would have to  
21 wait for a board to convene and approve the request. Id. at  
22 ¶¶ 23-35. This decision created a delay that resulted in  
23 Plaintiff losing the position and promotion with the Arizona  
24 National Guard. Id. at ¶ 39.

25 After Plaintiff filed the Complaint in this action,  
26 Defendants offered to negotiate the terms of Plaintiff's release  
27 from the California National Guard. Id. at ¶ 41. Plaintiff  
28 asserts that he became a citizen of Virginia, requiring his state

1 commission as an officer of the California National Guard to be  
2 vacated. Id. at ¶ 45. Defendants delayed action. Id. at ¶ 43.  
3 Plaintiff petitioned this Court for a writ to compel Defendants  
4 to vacate his state commission based on Plaintiff's Virginia  
5 citizenship. ECF No. 7. Defendant Baldwin then issued a  
6 memorandum directing the separation; Defendants issued a  
7 separation order separating Plaintiff from the California  
8 National Guard and directing his transfer to the USAR Individual  
9 Ready Reserve. Id. at ¶ 43.

10 Contending that the order was illegal in that it transferred  
11 Plaintiff to a USAR Control Group (in this case, the Individual  
12 Ready Reserve) involuntarily, Plaintiff filed a Motion for  
13 Mandamus/Injunctive relief asking the Court to compel Defendant  
14 Baldwin to revoke and reissue the order without this directive.  
15 ECF No. 20. The Court denied mandamus relief because Plaintiff  
16 failed to establish the Court had authority to issue the writ  
17 under California Code of Civil Procedure Section 1085. ECF No.  
18 36. The Court declined to issue injunctive relief because  
19 Plaintiff failed to address and support the elements required  
20 under Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7  
21 (2008).

22 While Plaintiff's motion was pending, Plaintiff filed his  
23 First Amended Complaint ("FAC"). ECF No. 24. Defendants move to  
24 dismiss the FAC and Plaintiff opposes dismissal. Mot., ECF No.  
25 39; Opp'n, ECF No. 58. Plaintiff's concessions have narrowed the  
26 issues in dispute considerably. Plaintiff is no longer pursuing  
27 his equal protection claim or his claim for a state law writ of  
28 mandate, which this Court previously denied. See Mot. at 15;

1 Opp'n. In addition, Plaintiff did not oppose Defendants'  
2 argument to dismiss his substantive due process–stigma plus  
3 claim. See Opp'n; Rep. at 3. Therefore, the only claims  
4 remaining before the Court are Plaintiff's substantive due  
5 process claim based on occupational liberty and Plaintiff's civil  
6 rights claim under 42 U.S.C. § 1983.

7 II. OPINION

8 A. Judicial Notice

9 Defendants seek judicial notice of several filings in the  
10 Sacramento Superior Court action, Haramalis v. Baldwin et al.,  
11 Case No. 34-2016-80002378. Request for Judicial Notice ("RFJN"),  
12 Exhs. A-F. Plaintiff filed objections to this request, arguing  
13 that the Court should not take notice of the contents of those  
14 filings for any purpose related to the truth of the matters  
15 stated therein. See Objections to RFJN, ECF No. 58-1. The Court  
16 may take judicial notice of court filings and other matters of  
17 public record. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442  
18 F.3d 741, 746 n.6 (9th Cir. 2006). The Court may consider these  
19 filings to determine whether any of Plaintiff's claims are barred  
20 by res judicata. See Quinto v. JP Morgan Chase Bank, No. 11-CV-  
21 02920, 2011 WL 6002599, at \*5 (N.D. Cal. Nov. 30, 2011) (taking  
22 judicial notice of prior judgment and other court records to  
23 determine whether to grant a motion to dismiss on res judicata  
24 grounds). The filings are properly subjects of judicial notice  
25 and the Court takes notice of them.

26 Defendants also seek judicial notice of Plaintiff's military  
27 orders. RFJN, Exh. G. Plaintiff does not oppose or dispute the  
28 accuracy of the exhibit. Records reflecting official acts of the

1 Executive Branch may be subject to judicial notice. Graybill v.  
2 Wells Fargo Bank, N.A., 953 F. Supp. 2d 1091, 1093 n.2 (N.D. Cal.  
3 2013). Although Defendants have not cited a case in which the  
4 Court took judicial notice of military orders, the Court finds  
5 notice appropriate because the orders are not subject to  
6 reasonable dispute and because the contents of the orders are  
7 alleged in the Complaint. See FAC ¶ 17 ("On April 27, 2015, the  
8 National Guard Bureau published orders . . . "); Knievel v. ESPN,  
9 393 F.3d 1068, 1076 (9th Cir. 2005) (a court may take into  
10 account documents whose contents are alleged in a complaint and  
11 whose authenticity no party questions). The Court will take  
12 judicial notice of Exhibit I, the National Guard Bureau's orders  
13 withdrawing Plaintiff's federal recognition, as well. The order  
14 reflects an official act of the Executive Branch, is unopposed,  
15 and is not subject to reasonable dispute.

16 Finally, Defendants seek notice of National Guard Regulation  
17 635-100, dated September 8, 1978. RFJN, Exh. H. Plaintiff does  
18 not oppose. This regulation, too, reflects an official act of  
19 the Executive Branch and is not subject to reasonable dispute.  
20 The Court takes judicial notice of the regulation.

21 B. Analysis

22 In addition to attacking the merits of Plaintiff's claims,  
23 Defendants argue that the Feres doctrine, sovereign immunity,  
24 militia immunity, and qualified immunity prevent Plaintiff from  
25 recovering damages from Defendants. Plaintiff seeks more than  
26 just damages; Plaintiff's prayer for relief seeks an injunction.  
27 Though the Court denied the earlier motion for  
28 mandamus/injunctive relief, Plaintiff does not appear to have

1 abandoned that prayer. Given the relief sought, the Court will  
2 first evaluate the merits of Plaintiff's claims and then turn to  
3 the damages question, if necessary.<sup>2</sup>

4 1. Res Judicata

5 Plaintiff filed an action in Sacramento Superior Court  
6 against Defendant Baldwin and the California Military Department  
7 on June 27, 2016, seeking a writ of mandate, temporary  
8 restraining order, preliminary and permanent injunction, and  
9 consequential damages. RFJN, Exh. A at 13. The Complaint  
10 alleged that Defendants approved Plaintiff's interstate transfer  
11 to the Arizona National Guard, but then Defendant Baldwin revoked  
12 his approval and Plaintiff was informed his request would have to  
13 go through a General Officer Executive Personnel Council. Id. at  
14 4-8. Plaintiff further alleged that the revocation was illegal  
15 and the delay caused by this process would result in Plaintiff  
16 losing the position and promotion opportunity with the Arizona  
17 National Guard. Id. at 8-11. Plaintiff asserted a breach of  
18 contract claim and sought both a writ of mandate and injunctive  
19 relief compelling Defendants to strike Defendant Baldwin's  
20 disapproval of the transfer. Id. at 11-12. The Sacramento  
21 Superior Court denied Plaintiff's application for a Temporary  
22 Restraining Order on July 8, 2016. RFJN, Exh. B. Defendants  
23 then filed a demurrer, RFJN, Exh. C, which the Superior Court

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25 <sup>2</sup> The parties do not address whether the Feres doctrine bars  
26 injunctive relief in this context. The Court's merits analysis  
27 does not imply a holding that Feres would not bar such relief.  
28 See Wilkins v. United States, 279 F.3d 782 (9th Cir. 2002)  
(declaratory and injunctive relief not barred by the Feres  
doctrine where plaintiff challenged the constitutionality of a  
Navy policy that caused his early retirement).

1 granted, without leave to amend, on March 7, 2017, and on which  
2 final judgment was entered on April 10, 2017, RFJN, Exh. F.

3 The Superior Court found that Plaintiff's quest for review  
4 of Defendant Baldwin's actions was barred by the Feres doctrine  
5 as interpreted by both the California Third Appellate District  
6 and the Ninth Circuit. RFJN, Exh. F at 7-10. It also applied  
7 the four-factor Mindes test—a test from the Fifth Circuit used to  
8 determine whether a military action is justiciable—and held that  
9 all four factors “counsel[ed] against review[.]” Id. at 14.  
10 After concluding these precedents barred issuance of a writ, it  
11 found the doctrine precluded Plaintiff's breach of contract  
12 claim, which it otherwise found “fatally uncertain.” Id. at 14-  
13 15. After sustaining the demurrer on each claim, the Superior  
14 Court denied leave to amend because Plaintiff failed “to convince  
15 that amendment would cure the defects raised by the demurrer.”  
16 Id. at 16.

17 “Res judicata, or claim preclusion, prevents relitigation of  
18 the same cause of action in a second suit between the same  
19 parties or parties in privity with them.” Ass'n of Irrigated  
20 Residents v. Dept. of Conservation, 11 Cal. App. 5th 1202, 1220  
21 (2017) (citation omitted). Defendants argue res judicata  
22 precludes Plaintiff's claims about the interstate transfer  
23 because those claims were adjudicated in the state court action,  
24 outlined above. Mot. at 14. Plaintiff contends that the state  
25 court's ruling that his claims were not justiciable under the  
26 Feres doctrine is not a finding on the merits and thus does not  
27 have res judicata effect. Opp'n at 5-6. He argues the decision  
28 was reached on “procedural or technical grounds that did not

1 resolve or depend on the claim's merits[,]” similar to dismissal  
2 based on mootness, unripeness, or lack of jurisdiction, which do  
3 not trigger res judicata. Id. (citing Ass'n of Irrigated  
4 Residents, 11 Cal. App. 5th at 1220).

5 The Court finds that the Superior Court's dismissal of  
6 Plaintiff's claims without leave to amend constitutes a final  
7 judgment on the merits and precludes this Court's review of  
8 claims based on those allegations. Unlike the situations  
9 described in Ass'n of Irrigated Residents—judgments based on  
10 laches, statute of limitations, and lack of jurisdiction are  
11 examples of judgments that are not on the merits—the Superior  
12 Court reached the substance of Plaintiff's claims. See id. (“A  
13 judgment is on the merits for purposes of res judicata if the  
14 substance of the claim is tried and determined. This may include  
15 a judgment of dismissal following a general demurrer or a  
16 dismissal motion if the disposition was plainly reached on a  
17 ground of substance.”) (citations and quotation marks omitted).  
18 The Superior Court evaluated Plaintiff's allegations under Estes  
19 (finding that the California writ statute does not evidence the  
20 Legislature's intent for it to apply to the military), Mier  
21 (applying Ninth Circuit precedent to Plaintiff's facts), and  
22 Mindes (analyzing Plaintiff's allegations under the Fifth  
23 Circuit's four-factor test). See RFJN, Exh. H (citing Estes v.  
24 Monroe, 120 Cal. App. 4th 1347 (2004); Mier v. Owens, 57 F.3d 747  
25 (9th Cir. 1995); Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971)).  
26 Although there does not appear to be binding authority holding  
27 that a finding of non-justiciability under Feres constitutes a  
28 decision on the merits, see Terrell v. United States, 7 Cl. Ct.

1 171 (Cl. Ct. 1984) (finding plaintiff's constitutional and  
2 statutory claims were resolved on the merits and barred by res  
3 judicata where first court had held that claims were barred under  
4 Feres), the Court finds that the Superior Court reached the  
5 substance of Plaintiff's claims and made a final determination.  
6 Therefore, insofar as Plaintiff's claims rest on the cause of  
7 action litigated in Sacramento Superior Court—revoked approval of  
8 the interstate transfer—they are barred by res judicata and  
9 cannot be further litigated in this Court.

10 2. Substantive Due Process—Occupational Liberty

11 In the Ninth Circuit, a plaintiff can make out a substantive  
12 due process claim if she is unable to pursue an occupation and  
13 this inability is caused by government actions that were  
14 arbitrary and lacking a rational basis. Engquist v. Oregon Dept.  
15 of Agric., 478 F.3d 985, 997 (9th Cir. 2007). However, nearly  
16 all of the Ninth Circuit cases recognizing this right have dealt  
17 with legislation or regulation and not review of government  
18 employer decisions, which is more restrained. Id. When it comes  
19 to a public employer's violation of occupational liberty, the  
20 Circuit "limit[s] the claim to extreme cases, such as a  
21 'government blacklist, which when circulated or otherwise  
22 publicized to prospective employers effectively excludes the  
23 blacklisted individual from his occupation, much as if the  
24 government had yanked the license of an individual in an  
25 occupation that requires licensure.'" Id. at 997-998 (quoting  
26 Olivieri v. Rodriguez, 122 F.3d 406, 408 (7th Cir. 1997)). This  
27 is because "[s]uch a governmental act would threaten the same  
28 right as a legislative action that effectively banned a person

1 from a profession, and thus calls for the same level of  
2 constitutional protection." Id. at 998. On the question of how  
3 much interference constitutes a denial, the Ninth Circuit adopted  
4 the Seventh Circuit's standard:

5 [A] plaintiff must show that the "character and  
6 circumstances of a public employer's stigmatizing  
7 conduct or statements are such as to have destroyed an  
8 employee's freedom to take advantage of other  
9 employment opportunities." "It is not enough that the  
10 employer's stigmatizing conduct has some adverse  
11 effect on the employee's job prospects; instead, the  
12 employee must show that the stigmatizing actions make  
13 it virtually impossible for the employee to find new  
14 employment in his chosen field."

15 Id. at 998 (quoting Bordelon v. Chi. Sch. Reform Bd. of Trs., 233  
16 F.3d 524, 531 (7th Cir. 2000)). "[S]ubstantive due process  
17 protects the right to pursue an entire profession, not the right  
18 to pursue a particular job." Id.

19 Plaintiff alleges that Defendant Baldwin's separation order,  
20 removing Plaintiff from the Army National Guard and causing his  
21 involuntary separation from the Special Reserves, "blacklisted  
22 plaintiff, jeopardizing his ability to obtain approval by the  
23 National Guard Bureau and/or Secretary of the Army for extension  
24 of his mandatory retirement date." FAC ¶ 66. Plaintiff alleges  
25 that the order carries "the distinct appearance within  
26 plaintiff's chain of command that he committed some form of  
27 misconduct warranting" the order. Id.

28 Accepting as true Plaintiff's contention that the separation  
order created adverse opinions about Plaintiff (despite the fact  
that the order lists Plaintiff's separation as "Honorable," see  
FAC, Exh G), the alleged harm to Plaintiff's employment  
opportunities is limited to assignments with the National Guard

1 Bureau and the National Guards of the states. He has not alleged  
2 facts that could show it is virtually impossible for him to find  
3 new employment in his chosen field or pursue an entire  
4 profession; the only restriction is further opportunity with a  
5 particular employer. Although employment opportunities within a  
6 branch of the military could conceivably constitute a  
7 "profession," the Court declines to construe the occupational  
8 liberty analysis in this manner. Clear authority instructs that  
9 there is no constitutional right or property interest in  
10 continued employment in the military or National Guard. See,  
11 e.g., Navas v. Vales, 752 F.2d 765, 768 (1st Cir. 1985) (no  
12 constitutionally protected property interest in continued  
13 employment in the Guard). Though framed as a liberty, rather  
14 than property, interest, it would run counter to this established  
15 precedent to find that substantive due process protects a  
16 plaintiff's interest in pursuing military employment.

17       Appearing to concede that he cannot rely on continuing  
18 employment in the military in support of this claim, Plaintiff  
19 argues he has a constitutionally protected right to obtain  
20 civilian employment while he is otherwise qualified to do so as  
21 an officer in the military. Opp'n at 8. As Defendants argue,  
22 Plaintiff's inability to secure a job as a civilian technician  
23 with the Arizona National Guard does not constitute exclusion  
24 from a profession. To the extent Plaintiff alleges he is being  
25 denied access to all civilian employment with the National Guard,  
26 Plaintiff fails to explain how the separation order has deprived  
27 him of these opportunities *apart from* limiting his continued  
28 employment with the National Guard. His alleged difficulty in

1 pursuing post-active duty civilian employment stems from the  
2 separation order's interference with his extended military  
3 career. The Court's analysis with respect to Plaintiff's  
4 continued employment in the National Guard extends to his  
5 civilian employment with the same employer. Cf. Tennessee v.  
6 Dunlap, 426 U.S. 312 (1976) (finding that the property interest  
7 the National Guard Technicians Act created in continued civilian  
8 employment is confined to the guardsman's term of enlistment).  
9 The Fifth Circuit's opinion in NeSmith v. Fulton does not dictate  
10 or counsel otherwise. 615 F.2d 196 (5th Cir. 1980) (finding the  
11 plaintiff stated a due process claim where he was dismissed from  
12 his civilian technician position before he was terminated from  
13 the Georgia Air National Guard; holding the decision was  
14 unreviewable). Plaintiff's substantive due process claim based  
15 on occupational liberty is dismissed.

### 16 3. Civil Rights—section 1983

17 Plaintiff's claim under 42 U.S.C. § 1983 is predicated, in  
18 part, on his other constitutional claims. As Plaintiff has  
19 abandoned his equal protection claim and stigma plus claim, and  
20 the Court has dismissed Plaintiff's occupational liberty claim,  
21 the section 1983 claim is dismissed insofar as it relies on these  
22 constitutional theories.

23 "To state a claim under § 1983, a plaintiff must allege the  
24 violation of a right secured by the Constitution and laws of the  
25 United States, and must show that the alleged deprivation was  
26 committed by a person acting under color of state law." West v.  
27 Atkins, 487 U.S. 42, 48 (1988). Other than the constitutional  
28 claims, the only federal law Plaintiff cites as being violated is

1 10 U.S.C. § 12683. FAC ¶ 45. In his Opposition, Plaintiff  
2 argues that his "claim that the illegal separation order violated  
3 provisions of federal law, as implemented through Army  
4 regulations, establishes a basis for recovery of damages under  
5 section 1983." Opp'n at 9.

6 Section 12683 of Title 10 restricts involuntary separation  
7 of reserve officers. "An officer of a reserve component who has  
8 at least five years of service as a commissioned officer may not  
9 be separated from that component without his consent except  
10 (1) under an approved recommendation of a board of officers  
11 convened by an authority designated by the Secretary concerned;  
12 or (2) by the approved sentence of a court-martial." 10 U.S.C.  
13 § 12683 (a). However, the sub-section does not apply to  
14 transfers under section 12213. 10 U.S.C. § 12683(b)(3). Section  
15 12213(b) provides:

16 Unless discharged from his appointment as a Reserve,  
17 an officer of the Army National Guard of the United  
18 States whose Federal recognition as a member of the  
19 Army National Guard is withdrawn becomes a member of  
the Army Reserve. An officer who so becomes a member  
of the Army Reserve ceases to be a member of the Army  
National Guard of the United States.

20 Defendants argue that the transfer was executed in compliance  
21 with this section and thus no federal law has been violated.

22 Plaintiff sought to have his state commission vacated under  
23 California Military and Veterans Code section 232 because he had  
24 become a citizen of the state of Virginia. See ECF No. 7. After  
25 Plaintiff filed the Complaint in this matter, Defendant Baldwin  
26 vacated Plaintiff's commission in accordance with that section.  
27 FAC, Exh. E. Under National Guard Regulation 635-100, the  
28 termination of an officer's appointment in the Army National

1 Guard is a function of the State and the withdrawal of Federal  
2 recognition of an officer is a function of the Chief, National  
3 Guard Bureau, acting for the Secretary of the Army. See RFJN,  
4 Exh. H at ¶ 2. An Army National Guard officer should be  
5 terminated from his state appointment in accordance with State  
6 laws or regulations (or for one of the other twenty-five  
7 enumerated reasons), such as California Military and Veterans  
8 Code section 232. Id. at ¶ 5a. The regulation further provides  
9 that Federal recognition of an officer in the Army National Guard  
10 will be withdrawn by the Chief, National Guard Bureau for, *inter*  
11 *alia*, separation or discharge from the State appointment as an  
12 officer of the Army National Guard. Id. at ¶ 5b. Under  
13 paragraph 7, an officer of the Army National Guard becomes a  
14 member of the Army Reserve when Federal recognition is withdrawn.  
15 Id. at ¶ 7a. "Upon separation from the Army National Guard  
16 (ARNG), State orders will specify the USAR unit or the control  
17 group in AR 140-10 to which the officer is to be assigned." Id.  
18 at ¶ 7d.

19 There is no basis for the Court to conclude Defendants  
20 violated the law in issuing the separation order. First, the  
21 declaration Plaintiff cites in support of his opposition is not  
22 before the Court on this motion. Second, although Plaintiff  
23 contends Defendant Baldwin lacked authority to execute the  
24 separation order in the manner he did, Plaintiff's Complaint  
25 fails to controvert the propriety of the actions taken.  
26 Defendant Baldwin's actions comply with the steps required by the  
27 regulation quoted above. Most importantly, Plaintiff failed to  
28 allege that he is a member of the "Selected Reserves," a fact

1 upon which his entire argument is based. See Opp'n at 5 n.1; 6-  
2 7. Plaintiff cannot defeat a motion to dismiss by relying on  
3 facts Plaintiff failed to plead and are not subject to judicial  
4 notice.

5 Furthermore, National Guard Regulation 635-100 reflects that  
6 withdrawal of Federal recognition is a function of the National  
7 Guard Bureau, not the state. Thus, Plaintiff has not  
8 sufficiently explained how Defendant Baldwin's order directly  
9 effectuated the loss. Based on the pleadings, the cited federal  
10 statutes, and the judicially noticed regulation, the Court finds  
11 Plaintiff has failed to state a claim.

12 4. Leave to Amend

13 Plaintiff requests leave to amend his complaint should the  
14 the Court grant the motion to dismiss in whole or in part. While  
15 leave to amend should be freely given, it should be denied where  
16 amendment would be futile. Deveraturda v. Globe Aviation Sec.  
17 Servs., 454 F.3d 1043, 1049-50 (9th Cir. 2006).

18 Plaintiff appears to concede that he cannot seek damages  
19 against Defendant Baldwin in his official capacity or against the  
20 California Military Department due to sovereign immunity. See  
21 Opp'n at 12 ("Defendants argue that damage claims against  
22 Defendant Baldwin are barred by principles of sovereign immunity  
23 . . . . None of these immunities preclude the right of plaintiff  
24 to recover damages against Defendant Baldwin in his individual  
25 capacity, acting under color of law."). Amendment on the damages  
26 claims against Defendant Baldwin in his official capacity and the  
27 California Military Department is thus futile and leave to amend  
28 is denied.

1 As to the damages claim against Defendant Baldwin  
2 individually and for injunctive relief more generally, Plaintiff  
3 is granted leave to amend his 42 U.S.C. § 1983 claim insofar as  
4 it relates to the March 2017 separation order, only. Plaintiff  
5 is denied leave to amend his first, second, and fifth claims,  
6 which he abandoned. Plaintiff is denied leave to amend his third  
7 claim relating to occupational liberty because Plaintiff has not  
8 pointed to any facts showing amendment could cure the  
9 deficiencies. As to the § 1983 claim based on the illegal order,  
10 it is not clear to the Court that amendment would be futile,  
11 given Plaintiff's citations to documents not before the Court and  
12 repeated assertions—though insufficiently supported at this time—  
13 that Defendant Baldwin lacked authority over him to issue the  
14 order and that different procedures had to be followed because he  
15 was a member of the Selected Reserve. Leave to amend is granted  
16 as to this claim. While the Court need not, at this time, decide  
17 whether the Feres doctrine and qualified immunity bar Plaintiff's  
18 damages claims against Defendant Baldwin in his individual  
19 capacity, Plaintiff should consider the impact of these  
20 doctrines, as well as mootness concerns, in deciding whether or  
21 not to file a Second Amended Complaint.

### 22 III. ORDER

23 For the reasons set forth above, the Court GRANTS  
24 Defendants' Motion to Dismiss, with leave to amend as described  
25 and limited above. If Plaintiff decides to file an amended

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1 complaint he should do so within twenty days of the date of this  
2 Order. Defendants' responsive pleading should be filed within  
3 twenty days thereafter.

4 IT IS SO ORDERED.

5 Dated: December 6, 2017

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7 JOHN A. MENDEZ,  
8 UNITED STATES DISTRICT JUDGE  
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