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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO - UNLIMITED

BRIGADIER GENERAL JEFFREY W. MAGRAM (RET.), an individual, Plaintiff, vs. MAJOR GENERAL MATTHEW P. BEEVERS; STATE OF CALIFORNIA; CALIFORNIA MILITARY DEPARTMENT; GAVIN NEWSOM; AND DOES 1-20, Defendants.	Case No.24CV009096 **PLAINTIFF BRIGADIER GENERAL JEFFREY W. MAGRAM'S OPPOSITION TO DEFENDANTS' DEMURRER TO FIRST AMENDED COMPLAINT; DECLARATION OF JOSEPH W. SINGLETON IN SUPPORT THEREOF** Date: August 28, 2025 Time: 1:30 p.m. Dept: 53 Complaint filed: January 26, 2025

Plaintiff, Brigadier General Jeffrey W. Magram (Ret.) hereby respectfully submits this Opposition to the Demurrer to Plaintiff's First Amended Complaint ("FAC") filed by Major General Matthew P. Beevers; State of California; California Military Department (collectively referred to herein as "Defendants").

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I.
INTRODUCTION

Magram alleges that Defendant Beevers intentionally discriminated against him and other officers on the basis of their Jewish faith in violation of Article I, Section 4 of the California Constitution which guarantees the "free exercise and enjoyment of religion without discrimination or preference" and various California statutory schemes in service of the California Constitution. Magram further alleges that other Defendants participated in the discrimination, ratified it, and adopted the discrimination as a de-facto policy.

Defendants bring their Demurrer based on the premise that the *Feres* Doctrine established in *Feres v. United States* (1950) 340 U.S. 135 ("*Feres*") applies absolutely to every action where a member of the military sues the government. However, Courts are required to perform a case by case analysis of the facts before the jurisdictional bar found in *Feres* is brought to bear. Particularly, when the service member's claim sounds in an intentional tort as opposed to negligence.

Defendants argue that they are immune from suit because Magram's allegations of religious and ethnic discrimination because of his Jewish heritage involve injuries which arose, incident to his military service and are therefore barred by the *Feres* doctrine. Ultimately, Defendants are asking this Court to adjudicate that anti-Semitism and all forms of religious discrimination and bigotry are incident to military service, thereby, depriving this Court, of subject matter jurisdiction.

Magram opposes the application of *Feres* on the basis that religious and ethnic discrimination against Jewish service members is not incident to military service and that every person in California is protected by the California Constitution regardless of the military status or religious faith.

II.
STATEMENT OF FACTS

Beevers, while in command, made repeated bigoted comments about Jewish military personnel to Magram and others. He questioned a Jewish officer's discount negotiation, saying "How Jewish can you get," and called the State Guard leadership "Kike" lawyers. (FAC ¶10.) Beevers instigated a flawed disciplinary action against Magram, where Beevers violated Magram's due process and intimidated witnesses due to antisemitism and retaliation. (FAC ¶¶ 12-14.) Newsom and his staff were informed of Beevers' antisemitic behavior by Magram and other senior CMD officers but chose to

ignore it and ratify Beevers' actions. (FAC ¶18.)

Beevers violated Magram's privacy by releasing his private personnel information to the press, including false information about his termination and federal Air National Guard status. Specifically, the released information incorrectly stated Magram was being fired from the Federal Air National Guard, when the action only related to his CMD position. Magram was honorably discharged from the Air National Guard and Air Force. Beevers' public release of false and defamatory information which was motivated by Beevers's animus towards Magram's Jewish heritage. (FAC ¶¶15, 23.)

After learning of Magram's whistleblower complaint to Governor Newsom's office, Beevers retaliated by attempting to sabotage Magram's disability retirement by instigating an investigation into Magram'a medical approvals, knowing it could interfere with Beevers' efforts to remove Magram from the California Air National Guard. This was completely outside the scope of Beevers' responsibilities. (FAC ¶¶ 17, 19.)

After learning a senior-ranking Jewish General (the "kike" lawyer mentioned previously) complained about his antisemitic behavior, Beevers retaliated by trying to get the general removed, undermining his actions, trying to turn his command against him, and denying him the ability to testify before the state legislature. (FAC ¶26.)

Beevers and the Department misled the DAB, the Governor's staff, and the public about Magram, a decorated 40-year veteran. They attempted to rewrite Magram's history, damaging his reputation and future prospects. This discrimination forced Magram into early retirement with a limited pension and prevented other senior employment. (FAC ¶27.)

Beevers' actions against Magram were not related to military service or purpose but stemmed from his religious animus and in retaliation for Magram's complaints about Beevers' antisemitic conduct. Hatred of Jewish people cannot be considered furthering a military purpose. (FAC ¶ 28)

III.
LEGAL STANDARD

When considering the merits of a demurrer, the complaint will be construed "liberally . . . with a view to substantial justice between the parties." (C.C.P. § 452; see *Stevens v. Sup.Ct.* (API Auto Ins. Services) (1999) 75 Cal.App.4th 594, 601.) More importantly, the allegations must be accepted as true regardless of the fact that they may be improbable. (*Del E. Webb Corp. v. Structural Materials Co.*

(1981) 123 Cal.App.3d 593, 604.) A court cannot sustain a demurrer if the Complaint states facts sufficient to constitute any cause of action or some entitlement of relief. (*California Federal Bank v. Matreyek* (1992) 8 Cal. App. 4th 125, 130.) The court must overrule defendant's demurrer if any valid cause of action is pleaded. (*See Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal. App. 4th 1547, 1561-62.)

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably respond—i.e., defendant cannot reasonably determine what issues must be admitted or denied, or what counts or claims are directed against defendant. (*Khoury v. Maly's of Calif., Inc.* (1993) 14 CA4th 612, 616.)

A demurrer should not be sustained without leave to amend if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal. 4th 962, 967.) It is an abuse of discretion to sustain a Demurrer without leave to amend where there exists a mere possibility that a defect can be cured. (*Kilgor v. Unger* (1982) 30 Cal. 3d 770, 781.)

IV.
ARGUMENT

A. Magram's Injuries Were Not "Incident To Service" And Are Not Barred By *Feres*.

Defendants, the California Military Department and the State of California ("CMD") filed their demurrer on the basis that this Court lacks jurisdiction and Plaintiff fails to state facts sufficient to constitute a cause of action against Defendants because they are protected by sovereign immunity in accordance with the holding in *Feres v. United States* (1950) 340 U.S. 135 ("Feres"). *Feres* is an anachronism that has been widely criticized since its inception, and it is specifically inapplicable in this case because intentional religious and ethnic discrimination against Jewish soldiers and airmen is not in furtherance of any legitimate military purpose, and therefore, not incident to military service.

1) The History and Evolution of the Feres Doctrine Weighs in Favor of This Claim.

In *Feres*, the Supreme Court held that the United States is not liable under the Federal Tort Claims Act ("FTCA") for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." (*Feres*, 340 U.S. 135, 146.) Crafting a judicially-created exception to the government's waiver of sovereign immunity now commonly known as the "*Feres* doctrine," the

Supreme Court articulated two policy reasons for its holding: first, that the relationship between the government and members of the armed forces is distinctly federal, and second, that the government already has a no-fault statutory compensation plan for military personnel under the Veterans' Benefit Act. (*Id*. at 143-145.) Adding a third factor in *United States v. Brown* (1954) 348 U.S. 110 ("*Brown*") the Court noted that the *Feres* doctrine is necessary to protect and preserve military discipline. (*Brown*, 348 U.S. 110, 112.) The Supreme Court addressed *Feres* again in *U.S. v. Johnson* (1987) 481 U.S. 681 ("*Johnson*"). In *Johnson*, the Supreme Court clarified the *Feres* doctrine, concluding that all three rationales should be weighed equally. (*Id*., 481 U.S. at 685.)

Dissenting in *Johnson*, Justice Scalia, joined by three other justices, called for the complete elimination of the *Feres* bar. (*Id* at at 688-691.) By a narrow majority, the Court held that active duty servicemembers cannot bring tort actions against the government for injuries that "arise out of or are in the course of activity incident to service." (*Id*. at 686.) Subsequently, circuit courts have held that *Feres* will bar suit only if all three of its rationales are applicable (the special relationship with the government, the availability of a statutory compensation scheme, and the maintenance of the suit might impair military discipline). (*See Del Rio v. United States* (11th Cir. 1971) 833 F.2d 282.)

Post-*Johnson*, the Ninth Circuit adopted a four-factor test for determining whether an injury is incident to service, applied on a case-by-case basis of whether policy rationales articulated by the Supreme Court in creating the *Feres* doctrine are applicable. The four factors are: 1) the place where the negligent act occurred; 2) the duty status of the plaintiff when the negligent act occurred; 3) the benefits accruing to the plaintiff because of his status as a service member; and 4) nature of plaintiff's activities at the time of the negligent act. (*See Costo v. United States* (9th Cir. 2001) ("*Costo*") 248 F.3d 863, 867 *(quoting Dreier v. United States* (9th Cir. 1997) ("*Dreier*") 106 F.3d 844, 848.)

In applying its four-part incident-to-service test, the Ninth Circuit has warned that no single factor is dispositive and courts must consider the totality of circumstances. (*Costo* at 867 (citing *Dreier* at 852) and *Millang v. United States* (9th Cir. 1987) 817 F.2d 533,535.) Further, "[n]ot every action by one member of the armed services against another implicates military decision making, relates to the military mission, or is incident to service." (*Lutz v. United States* (9th Cir. 1991) ("*Lutz*") 944 F.2d 1477, 1484; *see also McGowan v. Scoggins* (9th Cir. 1989) 890 F.2d 128, 129 (holding the Court must "review independently the question of whether the *Feres* doctrine is applicable to the facts reflected

in the record."); (*Costo* at 867 (stating the Court must look to the totality of the circumstances).)

The four part test has mainly been used and is most applicable in negligence cases involving personal injury. This is not a negligence case, but rather, a case alleging facially unconstitutional religious discrimination against a class of Jewish service persons. Such discrimination, does not, and cannot, implicate military decision making, the military mission, or be incident to service.

2) Defendants' Actions of Intentional Religious Discrimination Must Be Considered in Evaluating the Incident to Military Service Analysis.

Unlike negligence claims brought under the FTCA, in state law intentional torts claims, courts will consider the purpose of Defendant's conduct, and will not limit the analysis to whether the Plaintiff's activity at the time the injury was incident to military service. (*Lutz*, at 1485-86 (stating, the court could not "fathom" appellant/defendant's actions of entering a military office and removing personal items, were "activities incident to service."); *Durant v. Neneman* (10th Cir. 1989) 884 F.2d 1350, 1354 (holding, it is "hard, if not impossible, to decide at what point actions leading to the performance of a military task are not incidental to that end" without focusing on the defendant's conduct precipitating plaintiff's injury"); *Brown v. United States* (8th Cir. 1984) 739 F.2d 362, 369 (holding, *Feres* did not apply because defendants' conduct precipitating the injury, "mock lynching a young black man" did not further a military purpose).

Therefore, Defendants' activity of religious and ethnic bigotry should be considered when evaluating whether an activity is incident military service. Magram argues that considering all of the relevant factors as a whole leads to the conclusion that Defendants' unconstitutional, religious discrimination does not further any military purpose, and is, therefore, not incident to service.

3) *Lutz v. United States* (9th Cir. 1991) 944 F.2d 1477 is Illustrative.

"[E]ven *Feres* concatenations must come to an end. Intentional tortious and unconstitutional acts directed by one service member against another which further no conceivable military purpose and are not perpetrated during the course of a military activity surely are past the reach of *Feres*." (*Lutz* at 1487 citing *Persons v. United States* (9th Cir. 1991) 925 F.2d 292, 299.)

In *Lutz*, the court specifically looked at the defendants' conduct when evaluating if an activity resulting in injury was incident to military service. In doing so, the court declined to apply *Feres* to bar plaintiff's suit against defendants servicemembers who broke into plaintiff's military office, stole

her private mail and disseminated its contents in an attempt to obtain and disseminate information related to her sexual orientation.

In determining that *Feres* immunity was inapposite, the court considered several key factors, including: (i) Courts should not "examine the possible effect of a suit on military discipline in a particularized fact based manner" (*Lutz*, 944 F.2d at 1485) regardless of whether the Air Force conducted an investigation of defendant's conduct, and regardless of whether at disciplinary decision was made based on that investigation. (*Id*. at 1484-85); (ii) when looking at defendants intentional actions, it was inconceivable that any obligation or duty to report same-sex relationships require defendants to remove personal items from plaintiff's desk; (iii) *Stauber* was readily distinguishable because it involved harassment during working hours and pertained to work activity; (iv) Plaintiff's injury arose because of defendant's intentional conduct, not from the use of her military office; and (v) being generally subject to military discipline cannot form a basis for immunity, because servicemembers would be completely barred from bringing suit for civil remedies of any kind. (*Id*. at 1484-85, 1485, 1486, 1486 n.11, 1486-87.)

The Court in *Lutz* also relied in part on the Eighth Circuit's decision in *Brown v. United States*, 739 F.2d 362 ("*Brown v. United States*"), a case involving racial harassment culminating in a mock lynching at an on-base party. (*Id*. at 362-364.) There, the court refused to apply *Feres* where "the defendants' actions could not conceivably serve any military purpose." (*Lutz*, 944 F.2d at 1487 (citing Stauber, 837 F.2d at 400-01 n. 10).)

In *Brown v. United States*, the plaintiff was the target of when other guardsmen put a noose around his neck in a mock lynching. The court held that military personnel can be held liable for an intentional tort committed by them when the conduct is based on racial discrimination, as opposed to negligence (*Brown v. United States*, 739 F.2d at 362-364). Here, the facts similarly demonstrate that Beevers' conduct was driven by intentional racial and religious discrimination. His repeated disparaging remarks about Jewish people, harassment, retaliation for complaints about anti-Semitism, and proceedings motivated by animus are intentional acts, and not negligent or accidental.

In *Brown v. United States*, the court dismissed plaintiff's claims against the United States and superior officers to prevent the incident and for failing to perform an adequate investigation reasoning that they were barred by the *Feres* doctrine. Here however, unlike *Brown*, all defendants, the superior

officers and the CMD, directly participated in or ratified the discriminatory conduct. The allegations show that Beevers' discrimination was facilitated, ratified, and supported by others and California state agencies (Magram complaint, paragraphs 11-12, 18-19). For instance, the State of California and CMD were aware of Beevers' anti-Semitic conduct and facilitated and ratified it, which makes their conduct an active endorsement of discrimination which could not conceivably serve any military purpose and is, therefore, not incident to service.

B. *Feres* Is Fatally Flawed and Should Not Continue to Be the Law.

The much-maligned *Feres* doctrine has been "criticized by 'countless courts and commentators' across the jurisprudential spectrum," including the Supreme Court and the Ninth Circuit. (*Ritchie v. U.S.* (9th Cir. 2013) ("*Ritchie*") 733 F.3d 871, 874 (*quoting Persons v. United States* (9th Cir. 1991) 925 F.2d 292, 295); see *Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) ('*Feres* was wrongly decided and heartily deserves the widespread, almost universal criticism it has received."); *Costo* 248 F.3d 863, 875 (9th Cir.2001) ("The articulated 'rational bases' for the *Feres* doctrine lead in this case, as in many cases, to inconsistent results that have no relation to the original purpose of *Feres*.").

In *Johnson*, no party argued that *Feres* should be overturned. (*Id*. at 692 (Scalia, J. dissenting).) Nevertheless, Justice Scalia and three other justices were prepared to overrule *Feres*. (*Id*. (Scalia, J. dissenting).) Not only does *Feres* violate the plain statutory text and rest on unsound policy rationales, it is also unconstitutional. As Judge Ferguson of the Ninth Circuit opined, *Feres* violates a serviceman's constitutional right to equal protection under the law, and it violates the Constitution's separation of powers doctrine. *Costo*, 248 F. 3d 863, 869 (9th Cir. 2001) (Ferguson, J. dissenting).

1) *Feres* Hurts Military Discipline by Denying Service Members Legal Remedies.

Feres does not promote military discipline; it hurts it. *Ritchie* notes that the *Feres* military discipline rationale "has become a guise for denying a selected class - servicemembers - remedies for otherwise judicially-cognizable wrongs." *Ritchie*, 733 F.3d at 879. In *Johnson*, Justice Scalia threw the *Feres* "military discipline" rationale on its head, contemplating that Congress may have thought that preventing servicemen from obtaining a civil recovery might itself adversely affect military discipline. (*Johnson*, supra, 481 U.S. at 691 (Scalia, J., dissenting).)

In spite of the ostensible deference to military decision-making as the rationale for the denial of monetary relief under *Feres*, *Feres* nevertheless allows service members to assert equitable remedies

against the military. (*Ritchie* at 880; *Murphy v. United States* (Fed.Cir.1993) 993 F.2d 871, 873; *Watkins v. U.S. Army* (9th Cir. 1989) 875 F.2d 699, 705-11 (en banc) (applying equitable estoppel to enjoin the U.S. Army from denying plaintiff's reenlistment on the basis of his homosexuality); *Bledsoe v. Webb* (9th Cir. 1988) 839 F.2d 1357, 1360 ("Indeed, courts often review cases in which military officials are alleged to have violated their own regulations.").

The *Ritchie* court noted this plainly unjust inconsistency when it said, "The *Feres* bar ... prevents compensation for what would otherwise be judicially-reviewable acts in these cases." (Cf. *Wilkins v. United States*, 279 F.3d 782, 784 (holding that 'the *Feres* bar does not extend to the claims for nonmonetary relief').) *Ritchie*, 733 F.3d at 879. The decisions of military officers can be justiciable. (*Id*. at 881, *citing Sterling v. Constantin*, 287 U.S. 378 (1932) 401 ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").)

The *Ritchie* court went on to note that "military decisions, carried out through the orders of military officers that contravene military policies and regulations are judicially reviewable." (*Id*., *citing Wenger v. Monroe* (9th Cir.2002) 282 F.3d 1068, 1072. For example, "the military's policies and actions towards pregnant servicewomen are not discretionary, but rather, are clearly matters the judiciary has jurisdiction to consider." (*Id*., *citing Crawford v. Cushman* (2d Cir. 1976) 531 F.2d 1114 (invalidating on constitutional grounds Marine Corps' regulation mandating discharge for pregnancy).

Writing in concurrence in *Ritchie*, Judge Nelson also had a similar scathing critique of *Feres*. She states that it is a "fiction" that a judicial review in cases where the military fails to follow its own regulations will destroy military discipline and that it will actually perpetuate a "grave injustice." *Ritchie* at 880 (Nelson, C.J. concurring). It is "past time for the judiciary to reconsider its reasons for refusing compensation to servicemembers under the FTCA." (*Id*. at 879.)

C. Plaintiff's FEHA and Wrongful Termination in Violation of Public Policy Claims Are Not Barred Because Defendants' Antisemitic Discrimination Cannot Serve Any Military Purpose and Is, Therefore, Not Incident to Service.

Defendants rely on *Estes v. Monroe* (2004) 120 Cal.App.4th 1347 ("*Estes*") for the proposition that *Feres* precludes all of Plaintiff's claims under the California Fair Employment and Housing Act ("FEHA"; Gov.Code, § 12900 et seq.)

However, *Estes* is materially distinguishable. *Estes* involved a physical disability and the termination was found to be incident to service. (*Estes* at 1360.) The plaintiff in *Estes* was an active duty officer in the National Guard, who was partially paralyzed and confined to a wheelchair as the result of a car accident. (*Id*. at 1351.) He requested a transfer to the retired reserve, but the National Guard terminated him, without offering to accommodate his physical disability and Plaintiff sued for wrongful termination. (*Id*.) The action was dismissed, and the court of appeal affirmed. (*Id*. at 1350.) The court reasoned, the decision to terminate plaintiff without accommodating his disability was incident to military service because "... the physical tasks demanded by the military is, without doubt, a military decision integrally connected to the unique demands of the National Guard." (*Id*. at 1362.)

Here, Defendants' religious and ethnic discrimination is not related to the military's war fighting capabilities and the need for armies to be able to maneuver in battle.

D. Plaintiff's Fifth Cause of Action for Retaliation under Labor Code Section 1102.5 and Military and Veterans Code Section 56 Are Not Barred Because Religious Discrimination Is Not Incident to Service.

At the outset Defendants cite no authority, and admit, that no authority exists for the proposition that Labor Code section 1102.5's prohibition against retaliation is barred by *Feres*.

As discussed, *Estes* requires that Defendants' actions serve a military purpose and be incident to service for *Feres* to preclude claims pursuant to FEHA. As discussed religious and racial bigotry do not, and cannot, conceivably serve any military purpose and, therefore, are not incident to service.

Defendants' citation to *Stirling v. Brown* (2018) 18 Cal.App.5th 1144 ("*Stirling*") for the proposition that Section Mil. & Vet. Code, § 56 ("§ 56) does not provide a private cause of action. However, *Stirling* says no such thing. The Plaintiff in *Stirling* petitioned for a writ of mandate to compel Governor Brown to act on Stirling's whistleblower allegation (*Id*. at 1147-1148). The central issue was whether § 56 requires the Governor to undertake the same investigation and reporting procedures as the inspector general when a whistleblower allegation is referred to the Governor pursuant to § 56(e) (*Id*. at 1148). The Court of Appeal held that § 56 does not require the Governor to undertake the procedures required of the inspector general (*Id*. at 1148, 1154.)

Here, Magram Defendants directly violated the subsection (b)(2) of the statute by taking "an unfavorable personnel action ... as a reprisal against a member of the department for making a

communication ...” after Magram complained about Beever’s anti-Semitism and harassment.

E. Magram’s Equal Protection Claim Is Not Barred by Sovereign Immunity.

Magram concedes that his Tamney Claim is barred by sovereign immunity. However, Defendants wrongfully conflate Magram’s Equal Protection Claim with his claim for wrongful termination. As discussed more fully below, Margam’s Equal Protection claim seeks equitable and injunctive relief that prohibits Defendants from continuing to discriminate against all of its employees on the basis of the religion and/or ethnicity. Further, Magram’s wrongful termination is not the only unlawful action taken as Beevers released confidential information and attempted to scuttle Magram’s medical disability claims. (FAC ¶¶ 15, 17, 19, 23.)

Miklosy v. Regents of University of California (2008) 44 Cal.4th 876 (“*Miklosy*”) cited by Defendants is the controlling California Supreme Court case which held, “The Government Claims Act (§ 810 et seq.) establishes the limits of common law liability for public entities, stating: ‘Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.’ (§ 815, subd. (a).) (*Id*. at 899.) *Miklosy* stands for the proposition that a public entity is not liable for monetary damages without a statute authorizing monetary damages. As discussed more thoroughly below, Magram is not seeking monetary damages for his Equal protection claim. Therefore, The Government Claims Act (§ 810 et seq.) is not applicable to Magram’s Equal protection claim.

F. Military and Veterans Code Section 392 Does Not Immunize Beevers, Because, Anti-Semitic Discrimination Is Outside the Performance of Beever’s Military Duty.

Defendants contend that, “Section 392's immunity is consistent with other law establishing that "commonly necessary personnel management actions ... do not come within the meaning of harassment.’” (Demurrer p. 21, ll. 4-5.) Magram disagrees with Defendants’ argument which would require that anti-Semitic discrimination be a “commonly necessary personnel management action.”

Defendants, as they do with *Feres*, present the immunity found in Mil. & Vet. Code, § 392 (“§ 392") as being absolute. However, that is not the case. As discussed further below, the immunity found in § 392 is qualified by subsection (b) of § 392 and by harmonizing § 392 with the qualified immunity of “honest and reasonable judgment” found in Mil. & Vet. Code, § 366.

Mil. & Vet. Code, § 392. Civil and criminal liability states:

> (a) Members of the militia in the active service of the state shall not be liable civilly or criminally for any act or acts done by them in the performance of their duty.
>
> (b) Subdivision (a) shall not apply to any act or acts by members of the militia in the active service of the state done by them outside the performance of their military duty, including, but not limited to, sexual assault, as defined in Section 470.5, and sexual harassment, as defined in Section 475.

Here, Beever's religious and ethnic discrimination because of Magram's and others Jewish heritage is both, not in furtherance of any legitimate military purpose, and outside the performance of Beever's military duty and, therefore, not under the umbrella of § 392's immunity protections.

Further, there is a second code section, enacted in the same legislative session, which also addresses immunity of militia members. Military and Veterans Code § 366 reads:

> Whenever any portion of the National Guard, or of the unorganized militia when called into the service of the State or Naval Militia is called into active service to suppress an insurrection or rebellion, to disperse a mob, or in an emergency or in any of the cases provided for in Sections 128, 143, or 146 of this code, or to enforce the execution of the laws of the State or of the United States, the commanding officer shall use his own discretion with respect to the propriety of attacking or firing upon any mob or unlawful assembly, or of attacking or using fire power in the military situation present. His honest and reasonable judgment in the exercise of his duty shall be full protection, civilly and criminally, for any act or acts done while on duty.

In essence, the quoted code section provides for discretionary immunity for a commanding officer like Beevers. This immunity is qualified. It requires an action to be taken pursuant to "honest and reasonable judgment." Consequently, to read the prior section 392 as providing absolute immunity for members of the militia, which includes commanding officers, creates a contradiction between the statutes in pari materia which properly should be construed harmoniously. (2A Sutherland, Statutory Construction, § 51.03 p. 469; *Williams v. City of San Carlos* (1965) 233 Cal.App.2d 290, 294.)

The two sections can be harmonized in the following way. Section 392, which speaks of the liability of "members" generally, and for acts done "in the performance of their duty," appears to be directed at the rank and file, as opposed to the commanding officers of the militia. So read, the section arguably confers absolute immunity for actions taken under compulsion of a direct order, and, in line with sound military discipline, encourages and protects unquestioning acquiescence to orders, because the section relieves a soldier of liability for improper acts.

However, case law interpreting civil immunity for acts done in the course of military duties does

not apply for acts done under orders the militiaman should reasonably have known to be unlawful. (*Armstrong v. Sengo* (1936) 17 Cal.App.2d 300, 307.) Therefore, section 366 creates a qualified immunity requiring a showing of "honest and reasonable judgment" for discretionary acts, those not taken pursuant to a direct order, and section 392 creates a qualified immunity for acts under direct order reasonably thought to be lawful.

Here, Beevers multiple instance of anti-Semitic discrimination and harassment were discretionary, known to be unlawful, intentional, not in furtherance of any legitimate military purpose, and outside the performance of Beever's military duty.

G. Plaintiff's Eighth Cause of Action for Violation of the Equal Protection Clause Succeeds Because Magram Is Only Seeking Equitable Remedies under this Claim and Magram Identified a Class of Jewish Officers Being Subjected to Religious Discrimination.

Feres is not a bar to Equal Protection claims as Equal Protection claims seek equitable remedies. Magram, via his Equal Protection claim, seeks injunctive relief that prohibits Defendants from continuing to discriminate against all of its employees on the basis of the religion and/or ethnicity. (See Magram's Prayer, No. 7 (a) ("Defendants immediately cease and desist from discrimination or other unlawful employment practices against Defendants' employees, consistent with the FEHA"); No. 9 ("An order enjoining Defendants from continuing its discriminatory practices and requiring it to take appropriate measures to prevent future discrimination.")

1) Magram's Equal Protection Claim Is Actionable Against CMD Because Magram Is Seeking Equitable Remedies and *Feres* Allows Service Members to Assert Equitable Remedies Against the Military.

Defendants argue that damages claims for constitutional violations are barred against the State agency (CMD) by case law, such as *Gates v. Superior Court* and *Katzberg v. Regents* that restrict suits for damages against the State. However, as stated above Magram seeks equitable, injunctive, and declaratory remedies that prohibit Defendants from continuing to discriminate against all of its employees. *Feres* does not extend to bar claims for nonmonetary relief. (*Wilkins v. United States* (9th Cir.2002) 279 F.3d 782, 784; *Ritchie* at 880; *Watkins v. U.S. Army* 875 F.2d 699, 705-11(applying equitable estoppel to enjoin the U.S. Army from denying plaintiff's reenlistment on the basis of his homosexuality.) "The rationales supporting *Feres* are not implicated by an action for injunctive and

declaratory relief." (*Walden, II v. Bartlett* (10th Cir. 1988) 840 F.2d 771, 774.)

The equitable relief sought in plaintiffs' Complaint is akin to the relief sought in *Wilkins v. United States* (9th Cir. 2002) 279 F.3d 782, 786-787 in which an allegedly improperly discharged military chaplain sought damages and reinstatement, but also sought plaintiff sought termination of religious discrimination allegedly occurring in Navy chaplaincy. The Ninth Circuit has "consistently entertained [plaintiffs'] constitutional challenges to military policies on the merits." (*Id*. at 788.) In particular, "[t]he military has not been exempted from constitutional provisions that protect the rights of individuals," and "[i]t is precisely the role of the courts to determine whether those rights have been violated." (*Emory v. Sec'y of Navy* (D.C. Cir. 1987) 819 F.2d 291, 294; *see also, e.g. Pruitt v. Cheney* (9th Cir. 1991) 963 F.2d 1160 (addressing merits of plaintiff's equal protection claim challenging Army regulations requiring discharge of openly homosexual service members).

2) Magram's Equal Protection Claim Pleads Sufficient Facts and Is Not Uncertain

Magram alleges that he and other Jewish officers were discriminated against because of their Jewish heritage in violation of both FEHA and the California Constitution.

> During the course of Magram's interactions with Beevers over the past few years, Beevers has displayed a pattern of antisemitism and bigotry that created a hostile and toxic work environment. Over the course of time while Magram was under Beevers' command, Beevers made multiple bigoted and disparaging statements to Magram and to other officers about Jewish military personnel. When Beevers learned a Jewish Lieutenant Colonel in the California State Guard negotiated a military discount on a car he said, "How Jewish can you get" and said he was giving "you guys (referring to Jews) a bad name." Beevers described the California State Guard Leadership as run by a bunch of "Kike" lawyers, which he stated in the presence of another senior leader in the CMD. (FAC ¶10.)
>
> ... Newsom and his staff knew well that the internal Inspector General (IG) investigation of the allegations made by others against Beevers for antisemitism ...(FAC ¶18.)
>
> ... when Beevers found out in late 2022 that a senior ranking Jewish General from the State Guard (the commander referenced in paragraph 11 herein as a "kike" lawyer) complained of Beevers antisemitic behavior, Beevers retaliated against this Jewish General by first making it widely known to other senior leaders that he wanted this Jewish general out of the department ... (FAC ¶26.)

A demurrer for uncertainty will be sustained only where the complaint is so bad that defendant cannot reasonably. (*Khoury v. Maly's of Calif., Inc.*, 14 CA4th 612, 616.)

Here, Magram sufficiently alleged that Beevers displayed a pattern of antisemitism and bigotry that was approved and ratified by CMD and California. Magram adequately alleged the existence of a classification that affects two or more similarly situated groups in an unequal manner. Magram

alleged that Beevers and the CMD treated Jewish officers differently than other officer by subjecting the anti-Semitic discrimination and harassment by forcing them out of the CMD. (FAC ¶¶ 10, 18, 26.)

If this Court were to find that Magram's Equal Protection Claim is Uncertain, Magram should be allowed to amend this claim.

3) Magram's Equal Protection Claim Is Not Subject to Government Claim Presentation Requirement, and Even If it Were, Magram's Equal Protection Claim Is Based on the Same Facts Contained in His Government Claim Form.

As stated above, Magram is seeking equitable relief for his Equal Protection claim. The immunities provided in the Act do not limit a plaintiff's right to obtain relief other than money or damages against a public entity. (*Gov.C.* § 814; *Montoya v. City of San Diego* (SD CA 2020) 434 F.Supp.3d 830, 842.)

Further, California Government Code § 910 does not explicitly require that the claim specify the legal cause of action (e.g., negligence), but rather that it describe the injury and circumstances such as the date, place, injury, etc. (California Government Code § 910.) Magram's government claim satisfied all of the Act's requirements. Magram's Equal Protection relies on the same facts presented in his Government Claim of June 27, 2023.

California courts have held that where the purpose of the Government Claims Act is satisfied, it must not be used as a trap for the unwary. (*City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447; *Johnson v. San Diego Unified School Dist.* (1990) 217 Cal. App. 3d 692.) Consequently, courts apply a test of "substantial compliance" rather than "strict compliance" in determining whether a claimant has met the presentation requirements of the Act. (*City of San Jose v. Superior Court*, 12 Cal. 3d 447.) A claim that fails to substantially comply with statutory requirements may still be considered if it puts the public entity on notice that the claimant is attempting to file a valid claim and that litigation will result if the matter is not resolved. (*Del Real v. City of Riverside* (2002) 95 Cal. App. 4th 761.)

Here, a brief perusal of Magram's allegations in his Government Claim Form show that the factual allegations and claims are nearly identical. (Defendants' Request for Judicial Notice, Ex. 1.) As an example, Magram's first allegation in his Government Claim Form Attachment, concerning anti-Semitic discrimination directed at Magram and others, states:

> During the course of Magram's interactions with Beevers over the past few

> years, Beevers has displayed a pattern of antisemitism, bigotry and intemperance that created a hostile and toxic work environment, and Magram reported these incidents to command. ... Beevers made multiple bigoted and disparaging statements to Magram and to another general officer about other Jewish military personnel. ... He also described the California State Guard Leadership as run by a bunch of "Kike" lawyers, ... (Id. at p. 2.)

4) Magram's Equal Protection Claim Is Not An Improper New Cause of Action.

For an amended complaint to relate back to the original complaint as to parties named in it by their true names, it must: 1) be based on the "same general set of facts" as the original; 2) seek recovery against the same defendants for the "same injuries"; and 3) refer to the "same incident"—i.e., the "same accident" caused by the "same offending instrumentality." (*Barrington v. A. H. Robins Co.* (1985) 39 C3d 146, 150; *Fix the City, Inc. v. City of Los Angeles* (2024) 100 CA5th 363, 374; *see Pointe San Diego Residential Comm., L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 CA4th 265, 277 ("critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading," and "in applying the relation-back analysis, courts should consider the strong policy in this state that cases should be decided on their merits.").)

It is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative. Thus, amendments alleging a new theory of liability against the defendant relate back to the original complaint, so long as based on the same set facts previously alleged. (*Amaral v. Cintas Corp. No. 2* (2008) 163 CA4th 1157, 1199-1200.) Similarly, an amendment seeking new damages "relates back" to the original complaint if those damages resulted from the same operative facts previously alleged—i.e., the same misconduct and same injury. (*Id*. at 1200.)

Here, Magram's claim for Equal Protection is based on the "same general set of facts" as the original, namely, Beevers discriminated against Magram and other Jewish officers by harassing and discriminating against them because of their Jewish faith, and heritage (FAC ¶¶ 18, 26.); 2) seek recovery against the same defendants for the "same injuries," namely, religious discriminations, harassment and adverse employment actions (FAC, Prayer); and 3) refer to the "same incident[s] (FAC ¶¶ 10, 12-15, 17-19, 23, 26-29.). Magram's FAC merely identified his Equal Protection violation claim that was alleged in his Original Complaint.

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V.
CONCLUSION

Beevers' actions against Magram were not related to military service or purpose but stemmed from his religious animus and in retaliation for Magram's complaints about Beevers' antisemitic conduct. Hatred of Jewish people cannot be considered furthering a military purpose. For the reasons set forth above, Plaintiffs respectfully request that the Court enter an order denying Defendants' Demurrer Magram's FEHA claims and Equal Protection claim. In the event any portion of Defendants' Demurrer is granted. Plaintiffs respectfully request an opportunity to amend his First Amended Complaint.

DATED: August 15, 2025

JWS, PC

By: //Joseph Singleton//
JOSEPH W. SINGLETON
Attorney for Plaintiff, Brigadier General Jeffrey W. Magram (Ret.)

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, Joseph W. Singleton, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is 23035 Ventura Blvd., Woodland Hills, California 91364.

On August 15, 2025, I served the following documents: **PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER TO PLAINTIFFS' FIRST AMENDED COMPLAINT** in this action by placing a true copy thereof addressed as follows:

Lorinda D. Franco, Esq.
Deputy Attorney General V
CA Office of the Attorney General
Civil Division-Employment Law Section
300 S. Spring Street, Suite 1702
Los Angeles, California 90013
lorinda.franco@doj.ca.gov

X BY ELECTRONIC SERVICE VIA EMAIL

__ I placed such envelope for deposit in the U.S. MAIL, with postage thereon fully prepaid.

X I sent an email to the above listed email addresses pursuant to stipulation of the parties (lorinda.franco@doj.ca.gov)

X (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

.

Executed on August 15, 2025, at Woodland Hills, California.

//Joe Singleton//