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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SHAUN FREDERICKSON, an individual;
HEATHER CAUVEL, an individual;
WILLIAM HYDE, an individual,
Plaintiffs,
v.
SAN DIEGO COUNTY BOARD OF
SUPERVISORS,
Defendant.

Case No.: 21cv1958-LL-JLB

**ORDER GRANTING DEFENDANT’S
MOTION TO DISMISS PLAINTIFFS’
SECOND CAUSE OF ACTION (FREE
SPEECH UNDER THE FIRST
AMENDMENT) WITH PREJUDICE**

[ECF No. 5];

**ORDER GRANTING IN PART
PLAINTIFFS’ MOTION TO
REMAND REMAINING STATE
CLAIMS**

[ECF No. 8]

Presently before the Court is Defendant County of San Diego’s (erroneously sued as “San Diego Board of Supervisors”) Motion to Dismiss Plaintiffs’ First Amended Complaint (“FAC”). ECF No. 5. Plaintiffs Shaun Frederickson, Heather Cauvel, and William Hyde filed an Opposition [ECF No. 7], and Defendant filed a Reply [ECF No. 9].

1 Also before the Court is Plaintiffs’ Motion to Remand [ECF No. 8], Defendant’s
2 Opposition [ECF No. 10], and Plaintiffs’ Reply [ECF No. 12]. The Motions are fully
3 briefed, and the Court deems them suitable for submission without oral argument.

4 For the reasons set forth below, the Court **GRANTS** Defendant’s Motion to Dismiss
5 Plaintiffs’ Second Cause of Action for Violation of Free Speech Rights under the First
6 Amendment of the United States Constitution with prejudice. It is further **ORDERED** that
7 the Court declines supplemental jurisdiction over the remaining state law claims, and
8 Plaintiffs’ Motion to Remand is **GRANTED IN PART**.

9 **I. Background**

10 On November 16, 2021, Defendant County of San Diego filed a Notice of Removal
11 removing the instant case to federal court pursuant to 28 U.S.C. § 1441 and § 1446. ECF
12 No. 1. The operative complaint is Plaintiffs’ FAC filed on November 19, 2021. ECF No.
13 3-1. In the FAC, Plaintiffs bring the following causes of action against the Defendant: (1)
14 Liberty of Speech, Article 1, Section 2, of the California Constitution; (2) Violation of Free
15 Speech Rights under the First Amendment of the United States Constitution (3) Equal
16 Protection Clause, Article 1, Section 7, of the California Constitution; (4) Liberty Clause:
17 Article 1, Section 1, of the California Constitution; and (5) Right to Liberty and Substantive
18 Due Process: Article 1, Sections 1 and 7, of the California Constitution. ECF No. 3-1.
19 Plaintiffs’ causes of action arise out of Resolution No. 21-142 (the “Resolution”) that was
20 passed by the County Board of Supervisors on August 31, 2021. FAC at ¶ 5. The Resolution
21 is entitled “A Resolution of the Board of Supervisors of the County of San Diego Declaring
22 Health Misinformation a Public Health Crisis.” See Resolution at ECF No. 5-4 at 2-3.¹

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25 ¹ Under Federal Rule of Evidence 201, a court may take judicial notice of matters of public
26 record. *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court
27 may take judicial notice of “undisputed matters of public record”). The Court takes judicial
28 notice of Exhibits 1 through 5, attached to Defendant County of San Diego’s Request for
Judicial Notice In Support of San Diego County’s Motion to Dismiss the First Amended
Complaint at ECF No. 5-3.

1 The gravamen of the allegations in Plaintiffs’ FAC is that the Resolution violates
2 Plaintiffs’ civil rights including their right to free speech under the First Amendment and
3 the “vagueness and overbreadth doctrines.” FAC at ¶¶ 7-8. Defendant argues in the Motion
4 to Dismiss that “the Resolution constitutes government speech that does not violate
5 Plaintiffs’ constitutional rights.” MTD at 6. Specifically, Defendant County of San Diego
6 argues that: (1) “[t]he Resolution is the Board of Supervisor’s Expression of Opinion;”
7 (2) “[t]he FAC fails to allege facts showing the resolution violates Plaintiffs’ constitutional
8 rights;” and (3) “[t]he Resolution constitutes government speech not subject to the First
9 Amendment.” *Id.* at 6-14. Plaintiffs oppose on the grounds that “the [R]esolution is a
10 blatant attempt by the Defendant to infringe on the Plaintiffs’ right to free speech under
11 both the First Amendment of the United States Constitution and the California
12 Constitution’s Liberty of Speech.” *Oppo.* at 2. Plaintiffs argue that “the Resolution itself is
13 vague and overbroad in its application and is subject to a facial challenge on its
14 constitutionality.” *Id.* Plaintiffs further argue that “the plain meaning of the words used
15 show the Resolution seeks to take an active role in regulating speech within San Diego
16 County.” *Id.*

17 II. Legal Standard

18 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the
19 claims asserted in the complaint. Fed. R. Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729,
20 731 (9th Cir. 2001). To avoid dismissal, a complaint must plead with enough facts to state
21 a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
22 (2007). A claim has “facial plausibility when the plaintiff pleads factual content that allows
23 the court to draw the reasonable inference that the defendant is liable for the misconduct
24 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).
25 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires
26 more than labels and conclusions, and a formulaic recitation of the elements of a cause of
27 action will not do.” *Twombly*, 550 U.S. at 555 (citation omitted). “[W]here the well-pleaded
28 facts do not permit the court to infer more than the mere possibility of misconduct, the

1 complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’”
2 *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

3 **III. Discussion**

4 **A. First Amendment Claim**

5 **1. The Resolution Constitutes Government Speech that is Not Subject** 6 **to the First Amendment.**

7 To state a First Amendment claim, a plaintiff must allege that the government action
8 complained of burdens protected speech, whether through restricting speech, punishing
9 speech, or chilling people from engaging in speech. *See Index Newspapers LLC v. United*
10 *States Marshals Serv.*, 977 F.3d 817, 825 (9th Cir. 2020) (First Amendment injury can
11 include chilling speech); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d
12 1011, 1019 (9th Cir. 2009) (First Amendment injury can include forcing plaintiff to modify
13 speech). In order to state a claim under the First Amendment, the plaintiff’s right to
14 freedom of expression must have been in some way abridged by the challenged regulation
15 or act; if the challenged government action has no effect on or relation to the protected
16 expression, there can be no First Amendment injury.

17 As an initial matter, the Resolution is the Board of Supervisor’s expression of
18 opinion, which is distinct from an ordinance. *San Diego City Firefighters, Local 145 v. Bd.*
19 *of Admin. of San Diego City Emps. Ret. Sys.*, 206 Cal. App. 4th 594, 607-08 (2012)
20 (resolution is an expression of an opinion while an ordinance is a local law prescribing a
21 rule of conduct). Plaintiffs’ FAC states in relevant part that “[t]he Resolution resolved:
22 ‘That it is the sense of the Board of Supervisors that health misinformation is declared a
23 public health crisis and the County of San Diego should commit to combatting health
24 misinformation and curb the spread of falsehoods that threaten the health and safety of our
25 residents.’” *See* Plaintiffs’ FAC at ¶ 20; *see also* Resolution at ECF No. 5-4 at 2-3. Plaintiffs’
26 FAC and arguments made in the Opposition fail to address the distinction between an
27 ordinance and the “sense of the Board of Supervisors” resolution, which is an expression
28 of their opinion. *See Yang v. Cal. Dep’t of Soc. Servs.*, 183 F.3d 953, 958, and n.3 (9th Cir.

1 1999) (“sense of Congress resolutions do not have the force of law”); *Alameda*
2 *Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1415 (9th Cir. 1996) (“The written
3 resolution is in essence a declaration of principle or conscience. . . . The resolution has no
4 binding force on anyone.”). The Resolution is the Board of Supervisor’s position that health
5 misinformation constitutes a public health crisis that should be combatted. Plaintiffs have
6 failed to provide any evidence that it prohibits any speech or otherwise infringes on their
7 First Amendment rights.

8 Additionally, Plaintiffs’ FAC and Opposition fail to consider or otherwise address
9 that the Resolution constitutes government speech not subject to the First Amendment. *See*
10 *Miller v. Cal. Com. On Status of Women*, 151 Cal. App. 3d 693, 700 (1984) (there is a
11 “critical First Amendment distinction between the government’s addition of its own voice
12 and the government’s silencing of others.”); *see also Pleasant Grove City v. Sumnum*, 555
13 U.S. 460, 467-68 (2009) (a government has the “right to speak for itself” and “say anything
14 it wishes”) (internal citations and quotations omitted). As the Court noted in relevant part
15 in *Miller*:

16 If the government, i.e., the Governor and legislative leaders, cannot
17 appoint a commission to speak on the topic without implicating
18 plaintiffs’ First Amendment rights it may not address any other
19 ‘controversial’ topics. If the government cannot address controversial
20 topics it cannot govern.

21 151 Cal. App. 3d at 701 (internal citations and quotations omitted). Here, Plaintiffs fail to
22 cite any evidence or supporting authority why the Resolution at issue would not be
23 considered government speech and therefore not subject to the First Amendment. In light
24 of this failure, Plaintiffs’ vagueness and overbreadth arguments are also without merit.
25 *Pleasant Grove*, 555 U.S. at 467 (“The Free Speech Clause . . . does not regulate
26 government speech.”); *see also Puphus v. Ayers*, 249 F. Supp. 3d 238, 254 (D.D.C. 2017).

27 Ultimately, even assuming Plaintiffs alleged facts (as opposed to the speculation and
28 conclusion in the current FAC) that Defendant violated their First Amendment rights, the
alleged “tweets” made by Supervisor Fletcher set forth in Plaintiffs’ FAC and Opposition

1 are not properly before the Court for consideration at this time. *See, e.g.*, *Oppo*. at 6
2 (“Supervisor Fletcher had tweeted on September 9, 2021; ‘Our action is not just symbolic,
3 we will invest resources to call out misinformation and provide people with facts.’”); *see*
4 *also* FAC ¶¶ 23-27. In interpreting the Resolution, the Court must first determine whether
5 the language at issue has a plain and unambiguous meaning with regard to the particular
6 dispute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). “The plainness or ambiguity
7 of statutory language is determined by reference to the language itself, the specific context
8 in which that language is used, and the broader context of the statute as a whole.” *Id.* at
9 341. If the language is “unambiguous and the statutory scheme is coherent and consistent,”
10 the Court’s inquiry must cease. *Id.* at 340 (internal quotation marks omitted). Here, the
11 Court finds that the language of the Resolution has a plain and unambiguous meaning that
12 the County Board of Supervisors intended to proclaim that medical misinformation, within
13 the context of the COVID-19 pandemic, is harmful and should be combatted. Accordingly,
14 the Court’s inquiry must end on the face of the Resolution. For the reasons set forth herein,
15 Plaintiffs have not and cannot state a claim for a violation of their First Amendment rights
16 arising out of the Resolution, and the second cause of action must be dismissed with
17 prejudice.

18 Having dismissed Plaintiff’s sole federal claim, the Court’s “decision of whether to
19 exercise supplemental jurisdiction over the remaining state law claims ‘is purely
20 discretionary.’” *Couture v. Wells Fargo Bank, N.A.*, No. 11-CV-1096-IEG (CAB), 2011
21 WL 3489955, at *4 (S.D. Cal. Aug. 9, 2011) (*quoting Carlsbad Tech., Inc. v. HIF Bio, Inc.*,
22 556 U.S. 635, 639 (2009)); *see also Holt v. First Franklin Fin. Corp.*, No. C 10-5929 SBA,
23 2011 WL 4595195, *4 (N.D. Cal. Sept. 30, 2011) (“When the federal claims that served as
24 the basis for jurisdiction are eliminated, either through dismissal by the court or by a
25 plaintiff amending his or her complaint, federal courts may decline to assert supplemental
26 jurisdiction over the remaining state law causes of action.”) (citing 28 U.S.C. § 1367(c)(3)).

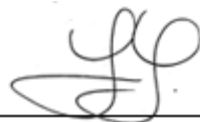
27 Here, because the Court is dismissing the only federal claim at the outset of the
28 litigation, it is appropriate to decline supplemental jurisdiction over the state law claims.

1 *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (“Where, as here, all
2 federal-law claims in the action have been eliminated and only pendent state-law claims
3 remain, the district court has a powerful reason to choose not to continue to exercise
4 jurisdiction.”); *see also Sanford v. MemberWorks, Inc.*, 625 F.3d 550, 561 (9th Cir. 2010)
5 (“A district court ‘may decline to exercise supplemental jurisdiction’ if it ‘has dismissed
6 all claims over which it has original jurisdiction.’”) (quoting 28 U.S.C. § 1367(c)(3)).
7 Accordingly, Plaintiffs’ **MOTION TO REMAND** claims one and three through five is
8 **GRANTED**.

9 In light of the foregoing, it is hereby **ORDERED** that Defendant’s Motion to
10 Dismiss Plaintiffs’ Second Cause of Action for Violation of Free Speech Rights under the
11 First Amendment of the United States Constitution is **GRANTED** and that claim is
12 **DISMISSED WITH PREJUDICE**. It is further **ORDERED** that because the Court
13 declines supplemental jurisdiction over the remaining state law claims, Plaintiffs’ Motion
14 to Remand is **GRANTED IN PART**. The Court hereby **REMANDS** to state court causes
15 of action one and three through five in Plaintiffs’ FAC. The Clerk is ordered to close the
16 case.

17 **IT IS SO ORDERED.**

18 Dated: February 16, 2022

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21 Honorable Linda Lopez
22 United States District Judge
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