

1 In the cases pending before this Court, Plaintiffs challenge City park closure ordinances
2 as precluding them, members of the Occupy Homelessness branch of Operation Occupy Public
3 Land, from exercising their First Amendment rights in a city park, overnight. As alleged in the
4 recently filed Third Amended Complaint (TAC), the Plaintiffs' First Amendment activities
5 moved from the park to the sidewalk bordering the Veinte de Agosto (VDA) Park, with the City
6 allegedly violating Plaintiffs' First Amendment rights to protest on the city sidewalks and
7 harassing Plaintiffs in their use of the sidewalks to exercise First Amendment rights.

8 On December 22, 2014, the Court granted the Plaintiffs leave to file the TAC to add
9 claims that Plaintiffs were being harassed when exercising their First Amendment rights on the
10 sidewalk by being arrested and having their personal property seized, or being threatened with
11 both. The Court allowed Plaintiffs to add specific instances when these alleged constitutional
12 violations to the Fourth, Fifth, and Fourteenth Amendments occurred, which included arrests
13 or threats of arrest on April 26 and June 21, 2012, September 17, October 1 and 2, 2013, and
14 February 1, 2014, and threats or seizures of their personal property on January 24, 25, March
15 9, 12, and 16, 2014.

16 The Court applied Rule 15 of the Federal Rules of Civil Procedure, which provides for
17 the Court to freely grant leave to amend after considering the following four factors, with all
18 inferences made in favor of the moving party: (1) undue delay, (2) prejudice to the opposing
19 party, (3) futility, and (4) bad faith. *Griggs v. Pace American Group, Inc.*, 170 F.3d 877, 880
20 (9th Cir. 1999); *see also Forman*, 371 U.S. at 182 (listing "undue delay, bad faith or dilatory
21 motive on the part of the movant, repeated failure to cure deficiencies by amendments
22 previously allowed, undue prejudice to the opposing party by virtue of allowance of the
23 amendment, [and] futility of amendment" as relevant factors). Prejudice to the opposing party
24 carries the greatest weight in the analysis. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
25 1048, 1052 (9th Cir. 2003). The Court allowed the amendment because in large part the
26 Plaintiffs alleged supplemental claims occurring since they had filed the Second Amended
27 Complaint on July 11, 2012. (Order (Doc. 90) at 4-5 (relying on Fed. R. Civ. P. R.15(d)).
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1 The Court reasoned that Plaintiffs did not unduly delay seeking the amendment because
2 Plaintiffs were appointed counsel to represent them *pro bono* in March, 2014, and the Motion
3 for Leave to File the TAC was filed on May 16, 2014. *Id.* at 2. The Court limited the prejudice
4 to Defendants by allowing only a limited extension of discovery in respect to the TAC, with
5 discovery to end by March 16, 2015, dispositive motions due April 16, 2015, and the Proposed
6 Pretrial Order due on May 15, 2015.

7 At the time of the amendment, discovery had ended and the parties had filed cross
8 motions for summary judgment on the question of Tucson’s park permit fee provision. The City
9 had filed a motion for summary judgment challenging the Plaintiffs’ standing to bring a claim
10 against its sidewalk enforcement policy because the SAC failed to allege facts reflecting that
11 Cooper or McLane were arrested. Subsequent to the TAC, the parties stipulated to the City’s
12 withdrawal of the Motion for Summary Judgment challenging Plaintiffs’ standing.

13 At the same time the Court granted Plaintiffs’ motion to file the TAC, it also granted a
14 preliminary injunction against the City’s application of the 3-B policy to preclude Plaintiffs’
15 First Amendment activities while sitting or lying on the sidewalk at the VDA Park with more
16 than a beverage, back pack, and blanket. On January 16, 2015, the City filed a Notice of
17 Appeal.

18 In response to the Plaintiffs’ motion to transfer and consolidate CV 15-13 TUC JAS, the
19 City notes: “In general, filing of a notice of appeal confers jurisdiction on the court of appeals
20 and divests the district court of control over those aspects of the case involved in the appeal.”
21 (Response (Doc. 117) at 2) (quoting *Marrese v. American Academy of Orthopaedic Surgeons*,
22 470 U.S. 373, 379 (1985)), *see also* *Mayweathers v. Newland*, 258 F. 3d 930, 935 (9th Cir.
23 2001). “The district court’s exercise of jurisdiction should not “materially alter the status of
24 the case on appeal.” *Id.* (quoting *Mayweathers*, 258 F. 3d at 935 (quoting *McClatchy*
25 *Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir.1982)).

26 The interlocutory appeal is limited to the merits of the 3-B policy and does not reach the
27 substance of the case as it relates to park ordinances or the threshold question of whether the
28 Plaintiffs are exercising any First Amendment rights. The 3-B policy assumes Plaintiffs’

1 activities are speech and is proposed by the City to be a reasonable time, manner and place
2 restriction on free speech. The Court does not believe the Motion to Consolidate involves
3 aspects of the case on appeal, but does agree that granting consolidation would materially alter
4 the status of the case: CV 12-208 TUC DCB. With consolidation, Plaintiffs appearing, *pro se*,
5 in CV 15-13 TUC JAS will make an end-run around Rule 15 of the Federal Rules of Civil
6 Procedure to add further allegations of specific instances of alleged harassment without filing
7 a Fourth Amended Complaint in CV 12-208 TUC DCB. More importantly, consolidation will
8 expand the case to include general allegations of discrimination against the homeless in
9 violation of the Equal Protection Clause under the Fourteenth Amendment to the Constitution,
10 whereas the TAC in CV 12-208 TUC DCB is solely a First Amendment case.

11 To the extent CV 15-13 TUC JAS is duplicative to CV 12-208 TUC DCB, it is subject
12 to dismissal. “As a general rule, a federal suit may be dismissed ‘for reasons of wise judicial
13 administration ... whenever it is duplicative of a parallel action already pending in another
14 federal court.’” *See Foster v. Arcata Associates*, 772 F.2d 1453, 1458 (9th Cir.1985) (quoting
15 *Ridge Gold Standard Liquors v. Joseph E. Seagram*, 572 F.Supp. 1210, 1213 (N.D.Ill.1983)
16 (citing *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976)).
17 “[G]enerally, a suit is duplicative if the “claims, parties, and available relief do not significantly
18 differ between the two actions.” *Id.* (quoting *Ridge Gold*, 572 F.Supp. at 1213 (citations
19 omitted)).

20 A court may stay or dismiss a subsequent suit that duplicates a claim or claims already
21 pending before another court under the “prior pending action doctrine.” *Curtis v. Citibank*, 226
22 F.3d 133, 138 (2nd Cir. 2000). The rule against duplicative litigation, also referred to as “claim
23 splitting,” is the “‘other action pending’ facet of the *res judicata* doctrine.¹” *Davis v. Sun Oil*
24 *Co.*, 148 F.3d 606, 613 (6th Cir.1998). Claim splitting precludes a plaintiff from prosecuting
25 a case piecemeal and requires a plaintiff to bring all claims arising out of a single wrong in one
26 action. *Curtis*, 226 F.3d at 138–39. So, a claim is precluded that was or could have been

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28 ¹Res judicata applies when a second suit is filed after a final adjudication of a first suit.

1 asserted, *id.* (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)), but a
2 party is not barred from bringing claims in a subsequent action that could not have been
3 included in the prior pending action, even if the claims are related, or arise out of, the previously
4 filed claim, *id.* at 139 (citing *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1464 (2nd Cir. 1996)
5 (explaining the crucial date is when the complaint was filed)).

6 In *Walton v. Eaton Corp.*, 563 F.2d 66 (3d Cir.1977), the United States Court of Appeals
7 for the Third Circuit held that a plaintiff has “no right to maintain two separate actions involving
8 the same subject matter at the same time in the same court against the same defendant.” The
9 *Walton* case is instructive because the appellate court considered the consolidation of two cases
10 to determine that plaintiffs were not entitled to a jury trial where the first case did not, but the
11 second suit did, contain a jury demand.

12 The first suit in *Walton* was brought as a putative class action in which the plaintiff
13 sought to represent a class of all black and female workers who had been subjected to race
14 and/or sex discrimination by her employer. The second suit was brought while the first was still
15 pending and alleged the same causes of action as the first suit but differed from the first because
16 it was not brought as a class action and it contained a jury demand. The district court
17 consolidated the two cases and held a non-jury trial. On appeal, the United States Court of
18 Appeals for the Third Circuit considered whether the plaintiff was entitled to a jury trial. It
19 began its analysis by noting that the second action was duplicative and, therefore, the district
20 court could have dismissed or stayed the second proceedings until judgment was entered in the
21 first. *Id.* at 69-70.

22 Either way, the plaintiff would have had no right to a jury trial. The court reasoned the
23 district court was correct to impose the same outcome at trial even though the second suit had
24 not been dismissed, because when the two suits were consolidated, the second complaint
25 became essentially an amendment of the first and a waiver of a right to a jury cannot be revived
26 by amending the original pleadings. *Id.* at 71. While approving the district court's discretion to
27 consolidate the two cases, the appellate court cautioned that consolidation might be the “most
28 administratively efficient procedure” in some cases but a district court must “carefully insure[

1] that the plaintiff does not use the tactic of filing two substantially identical complaints to
2 expand the procedural rights he would have otherwise enjoyed.” *Id.* “In particular, the court
3 must insure that the plaintiff does not use the incorrect procedure of filing duplicative
4 complaints for the purpose of circumventing the rules pertaining to the amendment of
5 complaints, Fed. R. Civ. Proc. 15, and demand for trial by jury, Fed.R.Civ.P. 38.” *Id.* at 2-3.

6 The *Walton* message is particularly meaningful, here, because the Plaintiffs are
7 represented in CV 12-208 TUC DCB by counsel, and may not therefore “appear or act in [their]
8 own behalf in the cause, or take any steps therein, unless an order of substitution shall first have
9 been made by the Court after notice to the attorney of each such party, and to the opposite
10 party.” LRCiv. 83.3(c)(2). “The attorney who has appeared of record for any party shall
11 represent such party in the cause and shall be recognized by the Court and by all the parties to
12 the cause as having control of the client’s case, in all proper ways,” LRCiv. 83.3(b). Like
13 *Walton*, consolidation in this case is essentially an amendment of the TAC in CV 12-208 TUC
14 DCB, and allows Plaintiffs, acting *pro se* in CV 15-13 TUC JAS, to essentially act *pro se* and
15 control CV 12-208 TUC DCB, while represented by counsel.

16 In CV 15-13 TUC JAS, the allegations related to Plaintiffs’ First Amendment activities
17 at the VDA Park involve a July 1, 2014, incident. The motion to file the TAC was filed May 16,
18 2014. The Reply was filed on June 6, 2014. The motion remained pending, subject to being
19 supplemented until December 22, 2014, when the Court granted it. The crucial date is when
20 the TAC was filed, *SEC*, 101 F.3d at 1464, which was December 29, 2014.

21 The Complaint in CV 12-208 TUC DCB raises policy, custom, and practice challenges.
22 (CV 15-13 TUC JAS, Complaint (Doc. 1) at ¶¶ 97, 101, 108.) To the extent the Plaintiffs
23 attempt to raise duplicative claims in CV 15-13 TUC JAS, they are subject to dismissal or may
24 be stayed pending resolution of CV 12-208 TUC DCB.

25 For the most part, the Complaint in CV 15-13 TUC JAS reaches beyond the TAC filed
26 in CV 12-208 TUC DCB. Plaintiffs allege the Tucson City Court discriminates against
27 homeless citizens by charging fees for discovery in criminal cases, *id.* ¶¶ 48-54, and by
28 imposing pretrial release conditions that restrict their freedom to travel back to the area of arrest,

1 *id.* ¶¶55-61. Plaintiffs allege the City has enacted anti-homeless laws and ordinances that
2 discriminate against the homeless, including laws that criminalize: performing basic human
3 functions in public, restrict their right to travel, panhandling, storing personal property on the
4 public sidewalks, or generally obstructing of the public sidewalks. *Id.* ¶¶ 62-75. Plaintiffs sue
5 private citizens, members of the North Fifth Avenue Merchants Association, for conspiring to
6 influence such policies. *Id.* ¶¶ 23, 71-73.

7 One test to determine whether a suit is duplicative of a prior filed suit is whether “the
8 same or connected transactions are at issue and the same proof is needed to support the claims
9 in both suits or, in other words, whether facts essential to the second suit were present in the
10 first suit.” *Curtis*, 226 F.3d at 139.

11 The threshold question in CV 12-208 TUC DCB is whether Plaintiffs’ conduct is
12 protected speech, and if it is, whether the City imposes an unreasonable restraint on First
13 Amendment speech. (Order (Doc. 103) at 12-13 (citing *Spence v. Washington*, 418 U.S. 405,
14 409-11 (1974)). If Plaintiffs survive Defendants’ threshold challenge, reasonable time, place,
15 and manner restrictions are permissible, if they satisfy four criteria: “[1] that they are justified
16 without reference to the content of the regulated speech, [2] that they are narrowly tailored to
17 serve a significant governmental interest, and [3] that they leave open ample alternative
18 channels for communication of the information.” *Clark v. Cmty. for Creative Non-Violence*,
19 468 U.S. 288, 293 (1984).

20 In CV 13-15 TUC JAS, the Plaintiffs allege the City is preventing their equal access to
21 the City courts, violating their right to be free to travel, and treating them differently from other
22 citizens based on their homelessness. In CV 13-15 TUC JAS, Plaintiffs sue private citizens and
23 City Court administrators in addition to the City administrators and police they named as
24 Defendants in CV 12-208 TUC DCB. Neither the facts nor questions of law will be
25 substantially similar between these two cases; they do not involve the same nucleus of facts,
26 nor the same actors. The discovery which has been conducted and the limited discovery which
27 remains in CV 12-208 TUC DCB would have to be substantially broadened to accommodate
28 the new claims raised in CV 15-13 TUC JAS. There would be little economy to the courts to

1 consolidate the two, and there would be tremendous delay in resolving CV 12-208 TUC DCB,
2 which has one pending ripe dispositive motion and another due shortly.

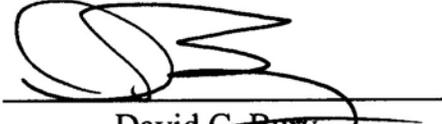
3 Except for duplicative claims which are subject to dismissal or a stay, the two cases do
4 not involve common questions of law or fact, and consolidation would not tend to avoid
5 unnecessary costs or delay. Fed. R. Civ. P. R. 42(a). The Court denies the Motion to
6 Consolidate Related Cases.

7 **Accordingly,**

8 **IT IS ORDERED** that Plaintiffs' Motion to Consolidate Related Cases (Doc.
9 Defendants' Motion to Transfer and Consolidate (document 113) is DENIED.

10 **IT IS FURTHER ORDERED** that a copy of this Order shall be provided to the
11 Honorable James A. Soto.

12 DATED this 30th day of March, 2015.

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17 David C. Bury
18 United States District Judge
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