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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 First Amendment Coalition of Arizona, Inc.;
10 Charles Michael Hedlund; Graham S. Henry;
11 David Gulbrandson; Robert Poyson; Todd
12 Smith; Eldon Schurz; and Roger Scott,

11 Plaintiffs,

12 v.

13 Charles L. Ryan, Director of ADC; James
14 O'Neil, Warden, ASPC – Eyman; Greg
15 Fizer, Warden, ASPC – Florence; and Does
16 1-10, Unknown ADC Personnel, in their
17 official capacities as Agents of ADC,

18 Defendants.

No. CV-14-01447-PHX-NVW

ORDER

19
20 Before the Court is the Plaintiffs' Motion for Entry of Final Judgment as to Claims
21 3 and 4. (Doc. 125.) On May 18, 2016, the Court partially granted Defendants' Motion
22 to Dismiss the Second Amended Complaint, dismissing several of Plaintiffs' claims,
23 including Claims 3 and 4, which alleged First Amendment violations. (Doc. 117.)
24 Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Plaintiffs ask the Court to
25 enter judgment on those claims. As set forth herein, the motion is denied.

26 **APPLICABLE LAW**

27 When more than one claim for relief is presented in an action, or when multiple
28 parties are involved, entry of final judgment as to one or more but fewer than all of the
claims or parties is appropriate "only if the court expressly determines that there is no just

1 reason for delay.” Fed. R. Civ. P. 54(b). “Judgments under Rule 54(b) must be reserved
2 for the unusual case in which the costs and risks of multiplying the number of
3 proceedings and of overcrowding the appellate docket are outbalanced by the pressing
4 needs of the litigants for an early and separate judgment as to some claims or parties.”
5 *Frank Briscoe Co. v. Morrison–Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir.1985); see
6 also *Gausvik v. Perez*, 392 F.3d 1006, 1009 n. 2 (9th Cir.2004) (“in the interest of judicial
7 economy Rule 54(b) should be used sparingly”). The Ninth Circuit has emphasized that
8 “[w]e cannot afford the luxury of reviewing the same set of facts in a routine case more
9 than once without a seriously important reason.” *Wood v. GCC Bend, LLC*, 422 F.3d
10 873, 882 (9th Cir. 2005).

11 “The burden is on the party endeavoring to obtain Rule 54(b) certification to
12 demonstrate that the case warrants certification.” *Braswell Shipyards, Inc. v. Beazer E.,*
13 *Inc.*, 2 F.3d 1331, 1335 (4th Cir. 1993) (citation omitted). The court must first determine
14 that it has rendered a “final judgment,” that is, a judgment that is “an ultimate disposition
15 of an individual claim entered in the course of a multiple claims action.” *Curtiss–Wright*
16 *Corp. v. General Electric Co.*, 446 U.S. 1, 8 (1980) (quotation omitted); see *Wood v.*
17 *GCC Bend, LLC*, 422 F.3d 873, 878 (9th Cir. 2005). The ruling in the order of May 18,
18 2016, disposes of all claims by a party and therefore, if reduced to a separate document
19 and certified as final, that separate document would be a final, appealable judgment.
20 Rule 58(a).

21 The court must then determine whether there is any just reason for delay. *Curtiss-*
22 *Wright*, 446 U.S. at 8. In making that determination, the court “must take into account
23 judicial administrative interests as well as the equities involved . . . to assure that
24 application of the Rule effectively ‘preserves the historic federal policy against piecemeal
25 appeals.’” *Id.* (citation omitted) Courts can also consider “such factors as whether the
26 claims under review were separable from the others remaining to be adjudicated and
27 whether the nature of the claims already determined was such that no appellate court
28 would have to decide the same issues more than once even if there were subsequent
appeals.” *Id.* Similar legal and factual issues between the parties’ claims “will weigh

1 heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order
2 will be proper only where necessary to avoid a harsh and unjust result.” *Gregorian v.*
3 *Izvestia*, 871 F.2d 1515, 1519 (9th Cir. 1989) (citation omitted).

4 ANALYSIS

5 Defendants contend that Claims 3 and 4 overlap significantly with the remaining
6 claims in the Second Amended Complaint. Specifically, they argue that “Plaintiffs have
7 tightly woven Defendants’ purported concealment of information—the conduct
8 challenged in Claims 3 and 4—into Claims 1, 6, and 7.” (Doc. 131 at 6.) The Court
9 agrees that the factual allegations in Claims 3 and 4 are interrelated with those supporting
10 Claims 6 and 7.¹

11 Claims 6 and 7 allege Eighth Amendment and due process violations based on
12 Defendants’ failure to follow, and discretion to deviate from, the written execution
13 protocol. In Claims 3 and 4, the First Amendment Coalition and the Inmates,
14 respectively, alleged that Defendants violated their First Amendments rights by
15 concealing facts such as the source, quality, and amounts of drugs used in executions, and
16 the timing, method, and effect of the administration of the drugs.

17 As Defendants note, the Second Amended Complaint contains a single set of
18 “Relevant Facts” that applies to all the claims. *See Jewel v. Nat’l Sec. Agency*, 810 F.3d
19 622, 629 (9th Cir. 2015) (finding Rule 54(b) order not appropriate where “the complaint
20 present[s] one section entitled ‘Factual Allegations Related to All Counts.’”). The
21 “Relevant Facts” includes a section entitled “Arizona’s Continued Refusal to Cabin Its
22 Discretion and Provide Transparency.” (Doc. 97 at 37.)

23 There is a factual overlap between the dismissed First Amendment claims and
24 Claims 6 and 7. In both sets of claims, Plaintiffs allege that Defendants have deliberately

25 ¹ Claim 1 consists of an Eighth Amendment challenge to the lethal injection
26 protocol that used midazolam and a paralytic. Defendants have removed midazolam from
27 their protocols and have moved to dismiss Claim 1 as moot. (Doc. 135.) Briefing on that
28 issue is ongoing. The Court previously dismissed Plaintiff’s argument that the use of a
paralytic in combination with midazolam violated their First Amendment rights. (Doc.
117 at 19.)

1 concealed information and prevented access to the execution proceedings. (*See, e.g.*, Doc.
2 97, ¶¶ 162, 183.) For example, in Claim 3, the Coalition alleged that Defendant violated
3 its First Amendment rights by preventing it from:

4 observing the provenance and amounts of drugs actually used, the timing
5 and method of their administration, and their effect upon the prisoner—
6 from the time the prisoner is escorted to the execution chamber until the
7 prisoner dies—and by failing to disclose, in advance of the execution,
8 details about the drugs used, the rationale for the selection of these drugs
9 and their dosages, the chain of custody in how the drugs were obtained and
10 stored, the qualifications and training of the persons administering them,
11 and Defendants’ ability to respond and preparation for responding to
12 complications. . . .

13 (*Id.*, ¶ 162.) In Claim 7, the Inmates allege that Defendants have violated their due
14 process rights “[b]y deliberately concealing information about the specific drugs,
15 expiration dates, provenance, storage, dosages, administration technique, and other
16 details about how ADC intends to execute Condemned Plaintiffs.” (*Id.*, ¶ 183.)

17 Plaintiffs argue that the First Amendment claims are legally distinguishable from
18 the Eighth Amendment and due process claims. (Doc. 125 at 4.) For purposes of Rule
19 54(b), however, “‘The word ‘claim’ . . . refers to a set of facts giving rise to legal rights in
20 the claimant.’” *Purdy Mobile Homes v. Champion Home Bldrs.*, 594 F.2d 1313, 1316
21 (9th Cir. 1979) (quoting *CMAX, Inc. v. Drewry*, 295 F.2d 695, 697 (9th Cir. 1961)).

22 The dismissed claims therefore share “common and intersecting facts” with
23 pending claims. *Jewel*, 810 F.3d at 629. This “weigh[s] heavily against entry of
24 judgment.” *Gregorian*, 871 F.2d at 1519. Plaintiffs have not made the required showing
25 that a Rule 54(b) order is “necessary to avoid a harsh and unjust result.” *Id.*

26 Plaintiffs contend that “the equities in favor of Rule 54(b) certification.” (Doc.
27 125 at 5.) They argue that because the Coalition has no remaining claims pending, there
28 is no reason to delay the appeal. (*Id.*) Plaintiffs also assert that they will be prejudiced if
the appeal is postponed because, even if they ultimately prevail on their First Amendment
claims, executions might take place before the appeal is completed. (*Id.*) “In such a case,
the harm to Plaintiffs from having been deprived access to information about each
execution will be irreversible.” (*Id.*)

1 Plaintiffs' arguments are not persuasive. First, while the Coalition has no
2 remaining claims, the Inmates are a party to the dismissed Claim 4 and to Claims 6 and 7.
3 *See Jewel*, 810 F.3d at 630 (citing *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 44
4 (1st Cir. 1988) ("It will be a rare case where Rule 54(b) can appropriately be applied
5 when the contestants on appeal remain, simultaneously, contestants below.")).

6 Next, the Coalition's desire to proceed with the appeal immediately is not a
7 sufficient basis for granting judgment on Claims 3 and 4. *See Spiegel*, 843 F.2d at 42
8 (explaining that "entry of judgment under the rule should not be indulged as a matter of
9 routine or as a magnanimous accommodation to lawyers or litigants"). Similarly,
10 Plaintiffs' speculation about the possible outcome of their appeal on the First Amendment
11 claims is not grounds for certification. "To entertain an early appeal just because reversal
12 of a ruling made by the district court *might* transpire and *might* expedite a particular
13 appellant's case would defoliate Rule 54(b)'s protective copse." *Id.* at 46.

14 Finally, because of the overlap between the operative facts supporting the
15 dismissed claims and the pending claims, applying Rule 54(b) would lead to multiple
16 appeals and piecemeal litigation. *See Wood*, 422 F.3d at 880 (9th Cir. 2005); *see also*
17 *Jordan v. Pugh*, 425 F.3d 820, 827 (10th Cir. 2005) (explaining that claims are not
18 separable if "the claim that is contended to be separate so overlaps the claim or claims
19 that have been retained for trial that if the latter were to give rise to a separate appeal at
20 the end of the case the [appeals] court would have to go over the same ground that it had
21 covered in the first appeal.") (quotation omitted); *Ebrahimi v. City of Huntsville Bd. of*
22 *Educ.*, 114 F.3d 162, 167 (11th Cir. 1997) ("The present case illustrates the wisdom of
23 this principle because if we were to decide this appeal, we undoubtedly would be
24 required to relearn the same set of facts if and when the case returned to us on appeal
25 from the district court's final judgment").

26 The facts concerning Arizona's alleged refusal to limit its discretion and provide
27 transparency apply to all the claims, including the dismissed First Amendment claims and
28 the remaining Eighth Amendment and due process claims. As discussed above, these
facts concern the provenance, dosages, and other details about the execution drugs, the

1 timing and method of their administration, their effect upon the prisoner, and the
2 qualifications and training of the persons administering them. (See Doc. 97, ¶¶ 162, 183.)
3 If the Court granted Plaintiffs' motion, the Ninth Circuit would inevitably hear later
4 appeals based "on the same set of facts." *Wood*, 422 F.3d at 879; see *Jewel*, 810 F.3d at
5 628.

6 **CONCLUSION**

7 Plaintiffs have not met their burden of showing that the circumstances of the case
8 merit Rule 54(b) judgment. The factual overlap between the dismissed claims and the
9 pending claims weighs heavily against entry of judgment. Plaintiffs have not
10 demonstrated that entry of judgment is necessary to avoid a harsh and unjust result.

11 Accordingly

12 IT IS ORDERED denying Plaintiffs' Motion for Entry of Final Judgment as to
13 Claims 3 and 4. (Doc. 125.)

14 Dated this 10th day of August, 2016.

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18 Neil V. Wake
19 Senior United States District
20 Judge
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