

1 remaining claims. For the reasons set forth below, this Court should decline Plaintiffs' invitation
2 to exercise its discretion in a manner that would lead to such potentially duplicative litigation.

3 **BACKGROUND**

4 The Court previously has described the procedural history of this case. *See Jewel v. NSA*,
5 965 F. Supp. 2d 1090, 1097-99 (N.D. Cal. 2013). In sum, on September 18, 2008, Plaintiffs filed
6 their Complaint against the United States, the National Security Agency ("NSA"), the
7 Department of Justice, and various now-former senior U.S. Government officials, some
8 exclusively in their personal capacities and others in both their personal and official capacities.
9 *See* ECF No. 1. The Complaint contains 17 counts by five Plaintiffs alleging various statutory
10 and constitutional violations arising out of the NSA's alleged warrantless electronic surveillance
11 activities that commenced upon presidential authorization after the terrorist attacks of September
12 11, 2001. Plaintiffs specifically allege that the NSA has engaged in a program of dragnet
13 surveillance first authorized by the President in October 2001 that "indiscriminately intercepted
14 the communications content and obtained the communications records of millions of ordinary
15 Americans." *Jewel*, 965 F. Supp. 2d at 1098. Five counts in the Complaint (counts 2, 4, 8, 11,
16 and 14) exclusively seek monetary damages against former government officials in their personal
17 capacities and are thus not directed at the Government Defendants. *See id.*

18 After the Government initially sought dismissal on various grounds, including that
19 information necessary to litigate the claims was properly subject to the state secrets privilege, the
20 Court previously (per then-Chief Judge Walker) dismissed the case for failure to adequately
21 plead standing. *See Jewel v. NSA*, 2010 WL 235075, at *6-9 (N.D. Cal. Jan. 21, 2010). The
22 Ninth Circuit reversed, concluding that Plaintiffs' "claims are not abstract, generalized
23 grievances and instead meet the constitutional standing requirement of concrete injury" at the
24 pleading stage. *See Jewel v. NSA*, 673 F.3d 902, 905 (9th Cir. 2011). Thereafter on remand, the
25 Government renewed its prior motion to dismiss, again based in part on the state secrets
26 privilege. On July 23, 2013, this Court dismissed all statutory claims against the Government

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1 Defendants in which Plaintiffs sought injunctive relief (counts 5, 7, 10, 13, and 16), and
2 dismissed Plaintiffs' claim (count 6) under the Foreign Intelligence Surveillance Act ("FISA")
3 insofar as it was directed at the Government Defendants. *See Jewel*, 965 F. Supp. 2d at 1112.
4 The Court also requested further briefing on various issues, including the impact of the
5 declassification of information related to NSA activities and whether litigation of the Plaintiffs'
6 claims could proceed without risk of harm to national security. *See id.* at 1111-13.

7 Subsequently, three of the five Plaintiffs filed a motion for partial summary judgment on
8 one aspect of one claim they purport to have raised in this case: specifically they sought a
9 "determination that the government defendants are violating the Fourth Amendment by their
10 ongoing seizures and searches of plaintiffs' Internet communications" undertaken pursuant to the
11 authority of Section 702 of FISA, *see* 50 U.S.C. § 1881a. *See* Plaintiffs Carolyn Jewel, Erik
12 Knutzen, and Joice Walton's Notice of Motion and Motion for Partial Summary Judgment (ECF
13 No. 261) ("Partial Summ. Judg. Mot.") at 1 & n.1. Plaintiffs emphasized, however, that only
14 their Fourth Amendment claim and, indeed, far from all aspects of that single claim, *see* ECF No.
15 1, count 1, were at issue in the motion. *Id.* at 1-2. Aside from not asking for "a determination of
16 the appropriate remedy," Plaintiffs specified that they were not seeking to establish liability for
17 "past Fourth Amendment violations" such as they allege occurred "during periods [when] those
18 activities were conducted solely under presidential authority without any [FISA Court] order."
19 *Id.* Nor did the partial summary judgment motion address other aspects of the three Plaintiffs'
20 Fourth Amendment claim, such as their challenge to collection of non-content communication
21 records or information as they were conducted either pursuant to Presidential authority or,
22 subsequently, under the authority of the FISA Court. *Id.* Nor, by the nature of their assertions
23 and the evidence they sought to use in support, *see id.* at 2-11, did Plaintiffs' motion seek a
24 determination that their Fourth Amendment rights were violated by other aspects of the NSA's
25 collection of content as authorized by Section 702 of FISA (referred to as the so-called PRISM
26 collection). Instead, the motion for partial summary judgment addressed only a single

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1 component of a single claim in this case: a purported Fourth Amendment challenge by three of
2 the five Plaintiffs to the NSA's Upstream collection of Internet content pursuant to Section 702
3 of the FISA.¹

4 The Government Defendants opposed Plaintiffs' motion and cross-moved for summary
5 judgment on the same component of the Fourth Amendment claim. *See* Cross Motion. In that
6 motion, the Government argued that the evidence presented by Plaintiffs was insufficient to
7 establish their standing to challenge the NSA program, or even if it was, that the state secrets
8 privilege required entry of judgment for the Government on the standing issue; *id.* at 12-23; that
9 no seizure or search occurred as Plaintiffs posited how the program worked, *id.* at 23-34; that,
10 even if seizures and searches occurred, they were reasonable under the special needs doctrine, *id.*
11 at 34-43; and, that even if Plaintiffs had presented evidence of a seizure or search, not justified
12 under the special needs doctrine, their Fourth Amendment claim still could not be litigated
13 without national-security information protected by the state secrets privilege, *id.* at 43-45.

14 On February 10, 2015, after oral argument, the Court denied Plaintiffs' motion for partial
15 summary judgment and granted the Government Defendants' motion for partial summary
16 judgment. *See* Order, ECF No. 321. In its decision, the Court specifically found "that the
17 Plaintiffs have failed to establish a sufficient factual basis to find that they have standing to sue
18 under the Fourth Amendment regarding the possible interception of their Internet
19 communications." *Jewel v. NSA*, 2015 WL 545925, at *1 (N.D. Cal. Feb. 10, 2015).

20 Alternatively, the Court found that, "even if Plaintiffs could establish standing, a potential Fourth
21 Amendment Claim would have to be dismissed on the basis that any possible defenses would
22 require impermissible disclosure of state secret information." *Id.* In light of this and other prior
23 rulings, the claims remaining against the Government Defendants are three counts seeking

24 ¹ The Government Defendants do not concede that count 1 of Plaintiffs' Complaint, as
25 pled, contains such a challenge to the NSA's ongoing surveillance activities conducted under the
26 authority of the FISA. *See, e.g.,* Government Defendants' Opposition to Plaintiffs' Motion for
27 Partial Summary Judgment and Cross-Motion for Partial Summary Judgment on Plaintiffs'
Fourth Amendment Claim ("Cross Motion") (ECF No. 286) at 11-13.

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1 injunctive relief for alleged constitutional violations (count 1, Fourth Amendment; count 3, First
2 Amendment; and count 17, separation of powers) and three counts seeking damages for alleged
3 violations of the Stored Communications Act and the Wiretap Act (counts 9, 12, and 15). These
4 various counts by five Plaintiffs each implicate multiple now-discontinued and ongoing NSA
5 intelligence-gathering programs, which present, in effect, more than three dozen claims against
6 the Government Defendants.

7 More than two months after the Court issued its decision, three Plaintiffs moved the
8 Court, pursuant to Rule 54(b), for entry of final judgment as to their purported Fourth
9 Amendment claim challenging the NSA's Upstream collection. *See* Pls.' Mot. at 1. Plaintiffs
10 did so because of what they describe as "the constitutional importance and significant and
11 historic impact of the Court's order." *Id.* at 3.

12 ARGUMENT

13 A. "Plainly, sound judicial administration does not require that Rule 54(b) requests be
14 granted routinely." *Curtiss-Wright Corp. v. GE, Co.*, 446 U.S. 1, 10 (1980). Indeed, an appeal
15 following the grant of a Rule 54(b) motion is "the exception rather than the rule." Charles Alan
16 Wright *et al.*, Fed. Prac. & Proc. § 2654; *see also Wood v. GCC Bend, LLC*, 422 F.3d 873, 879
17 (9th Cir. 2005) ("not routine"); *Gausvik v. Perez*, 392 F.3d 1006, 1009 n.2 (9th Cir. 2004)
18 ("should be used sparingly"); *Roberts v. C.R. England, Inc.*, 2012 WL 711903, at *4 (N.D. Cal.
19 Mar. 5, 2012) ("disfavored").

20 Rule 54(b) provides that "[w]hen an action presents more than one claim for relief, . . .
21 the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . .
22 only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P.
23 54(b). The district court therefore must first determine whether there has been a "final
24 judgment" on at least one "cognizable claim for relief" by one party against another party in a
25 suit involving multiple claims, *see Curtiss-Wright Corp.*, 446 U.S. at 7,² and, if so, it must

26 ² There is a question whether the Court's order granting partial summary judgment to the
27 Government is a final judgment on at least *one cognizable claim* for relief. Although the circuit
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1 “expressly . . . determine that no just reason for delay exists.” *SEC v. Capital Consultants LLC*,
2 453 F.3d 1166, 1174 (9th Cir. 2006).

3 The district court, functioning as a “dispatcher,” *Sears, Roebuck & Co. v. Mackey*, 351
4 U.S. 427, 435 (1956), may exercise its discretion to determine the “appropriate time” when, “in
5 the interest of sound judicial administration,” a final decision in a multiple claims action is ready
6 for appeal. *See Curtiss-Wright Corp.*, 446 U.S. at 8. In deciding whether there is no just reason
7 for delay, the district court “must take into account judicial administrative interests,” *id.*, such as
8 the “interrelationship of the claims” left to be decided with the claim already decided, *id.* at 10,
9 so as “to assure that application of the Rule effectively preserves the historic federal policy
10 against piecemeal appeals.” *Wood*, 422 F.3d at 878. The Court of Appeals, which must satisfy
11 itself of its own jurisdiction to hear any subsequent appeal, *see id.* at 877, “particularly
12 scrutinize[s],” *id.* at 879, this determination in order to prevent such piecemeal appeals. *See id.*;
13 *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1084 (9th Cir. 2010).

14 Rule 54(b) also requires “an assessment of basically equitable concerns,” which is “made
15 only *after* the judicial concerns . . . are satisfied.” *Gregorian v. Izvestia*, 871 F.2d 1515, 1519
16 (9th Cir. 1989) (emphasis added). An appellate court will “disturb” the district court’s
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18 courts of appeal have articulated “various methods to determine what constitutes” a “claim for
19 relief” for purposes of Rule 54(b), *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 741-42 (5th
20 Cir. 2000) (collecting cases and discussing methods), the Ninth Circuit found that the “word
21 ‘claim’ in Rule 54(b) refers to a set of facts giving rise to legal rights in the claimant, not to legal
22 theories of recovery based upon those facts.” *CMAX, Inc. v. Drewry Photocolor Corp.*, 295 F.2d
23 695, 697 (9th Cir. 1961). Thus, to the extent that Plaintiffs will rely on the same set of facts in
24 any subsequent challenge to the NSA’s Upstream collection under a First Amendment (count 3)
25 theory of recovery, separation of powers (count 17) theory of recovery, or to claim damages
26 under the Wiretap Act (count 9) or the Stored Communications Act (counts 12 & 15), these still-
27 pending counts would be part of the same claim the Court has already adjudicated. The Ninth
28 Circuit, however, later revisited the issue of what a “claim” means for Rule 54(b) purposes,
without reference to the earlier decision, and noted only that the “the solution” was a “pragmatic
approach focusing on severability and efficient judicial administration.” *Continental Airlines,
Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987).

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1 “assessment of the equities,” such as those involving “prejudice and delay,” *id.*, “only if it can
2 say that the judge’s conclusion was clearly unreasonable.” *Curtiss-Wright Corp.*, 446 U.S. at 10.

3 **B.** Plaintiffs make two arguments in support of their Rule 54(b) motion, both of which
4 lack merit. First, Plaintiffs assert that entering judgment under Rule 54(b) is appropriate here
5 because the “remaining claims” are “legally and factually distinct” “from the single claim at
6 issue in the Court’s summary judgment order.” Pls.’ Mot. at 2, 3. This is not so. The parties
7 have not briefed, and thus the Court has not addressed, the impact of its ruling on any of the
8 remainder of Plaintiffs’ claims. Nevertheless, several of Plaintiffs’ remaining claims evidently
9 are “closely intertwined,” *Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d
10 738, 749 (9th Cir. 2008), with the one putative component of Plaintiffs’ Fourth Amendment
11 claim that the Court decided. For example, two of the five Plaintiffs did not move for partial
12 summary judgment on any Fourth Amendment claim purporting to challenge the NSA’s
13 Upstream collection, so the evidence and legal issues related to any such claims they purport to
14 have is likely to overlap with the legal and evidentiary rulings addressed by the very judgment
15 Plaintiffs now seek to appeal.

16 Similarly, the Court’s order granting partial summary judgment may affect the resolution
17 of Plaintiffs’ First Amendment claims (count 3) that the content of any of their Internet-based
18 communications has been collected by the NSA. Nothing in the record suggests that any of the
19 five Plaintiffs have any different (or additional) evidence to support their standing in any First
20 Amendment challenge to the NSA’s Upstream collection under Section 702 of the FISA. Such
21 an evidentiary foundation would remain pertinent to that claim because any subjective chill any
22 plaintiff might allege—without evidence that their communication was subject to collection—is
23 insufficient to establish their standing. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 4, 10, 14 (1972)
24 (holding that “[a]llegations of a subjective ‘chill’” arising from plaintiffs’ knowledge of the
25 existence of “a governmental investigative and data-gathering activity,” without “any specific
26 action of the [Government] against them,” were “not an adequate substitute for a claim of

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1 specific present objective harm or a threat of specific future harm”); *United Presbyterian Church*
2 *in the USA v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (chilling effect produced by fear of
3 surveillance is an insufficient basis for standing under *Laird*); *see also Clapper v. Amnesty*
4 *International, USA*, 133 S. Ct. 1138, 1147-50 (2013) (“speculative fear” of surveillance
5 insufficient to establish standing injury). And, because the same evidence the Court found
6 wanting also undergirds Plaintiffs’ separation of powers and monetary damages claims
7 challenging the NSA’s Upstream collection, the Court’s decision will impact those claims also.

8 Additionally, all five Plaintiffs still have Fourth Amendment claims (count 1) against the
9 Government Defendants arising from their allegations of a “dragnet” content collection of
10 communications that they allege occurred under the now-discontinued Presidential Surveillance
11 Program. But the record does not suggest that Plaintiffs have any more (or different) evidence to
12 support these Fourth Amendment claims than the evidence the Court found wanting—dating
13 from a decade ago—that they presented in support of their asserted Fourth Amendment claims
14 concerning ongoing Upstream collection of the content of certain Internet-based
15 communications. And these Fourth Amendment challenges also face the same legal hurdles
16 Plaintiffs faced in their partial summary judgment motion: whether Plaintiffs can establish their
17 standing without access to classified information; and, if they can, whether the collection
18 constitutes a seizure and/or search; and, if it does, whether the program was reasonable within
19 the meaning of the Fourth Amendment or whether the reasonableness of the program can be
20 litigated without resort to classified national security information. And, indeed, any First
21 Amendment challenge to content collection under presidential authorization would implicate at
22 least some of the same legal and evidentiary issues.³

23 ³ Likewise, the presence of Plaintiffs’ “claims challenging the acquisition of telephone
24 and Internet records, as distinct from content,” Pls.’ Mot. at 3-4, provides no basis for pressing
25 ahead with these claims while one component of Plaintiffs’ Fourth Amendment claim is heard on
26 appeal. While these claims challenging non-content collection programs may raise different (or
27 additional) factual issues than the evidentiary questions the Court decided on Plaintiffs’ putative
28 Fourth Amendment challenge to the NSA’s Upstream collection program, these remaining
claims also implicate similar issues such as whether standing can be established without harm to
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1 This likely “similarity of legal or factual issues”—between Plaintiffs’ claim that the
2 Court found wanting in its recent decision and those issues involved in the unadjudicated claims
3 described above⁴—“weigh[s] heavily against entry of judgment” under Rule 54(b). *Morrison-*
4 *Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). This is because the “greater the
5 overlap the greater the chance” that the Court of Appeals, or even this Court, will engage in
6 “[d]uplication of proceedings,” *Wood*, 422 F.3d at 882, in violation of the “long established rule
7 prohibiting piecemeal litigation.” *CMAX, Inc.*, 295 F.2d at 697.

8 Second, Plaintiffs also argue that granting their Rule 54(b) motion is appropriate based on
9 equitable considerations. *See* Pls.’ Mot. at 1-3. As an initial matter, “an assessment of basically
10 equitable concerns” such as these “is made only after the ‘judicial concerns’” are “satisfied.” *See*
11 *Gregorian*, 871 F.2d at 1519. And here, for the reasons set forth above, judicial concerns are not
12 satisfied. *See supra*, at 7-9. Plaintiffs nevertheless argue that their motion should be granted
13 because of the “strong public interest” in this case and the “importance of plaintiffs’ claim to
14 [the] national debate on the NSA’s activities.” Pls.’ Mot. at 3. But national debate about

15 national security. Moreover, because the Presidentially-authorized bulk metadata collection
16 programs that are being challenged have been discontinued, “the sound administration of
17 justice,” *Wood*, 422 F.3d at 880, does not weigh in favor of risking duplicative proceedings on
18 appeal and in district court in order to adjudicate Plaintiffs’ challenges to these programs. And,
19 similarly, to the extent Plaintiffs also seek to challenge the *ongoing* bulk telephony metadata
20 program undertaken pursuant to Section 215 of FISA, the presence of such a claim provides no
21 basis for granting the Rule 54(b) motion and proceeding with the challenge to the Section 215
22 program. A Fourth Amendment challenge to that program has already been briefed and heard by
23 the Ninth Circuit in *Smith v. Obama*, 24 F. Supp. 3d 1005 (D. Idaho 2014), *appeal pending*, No.
24 14-35555 (9th Cir.). Any decision by the Court of Appeals will provide guidance to this Court
25 on any such claim. In addition, another challenge to the legality of that program is fully briefed
26 by the same counsel for the Plaintiffs here in *First Unitarian et al. v. NSA et al.*, 3:13-cv-03287,
27 which is also pending before this Court.

28 ⁴ Also, to the extent that Plaintiffs make similar claims against former senior government
officials in their personal capacities arising out of a similar set of facts, the pendency of these
claims in the district court provides further support for denying the Rule 54(b) motion. This
conclusion remains true even though, and is actually bolstered because, the individual-capacity
claims remain stayed pursuant to this Court’s prior order, pending a final resolution of Plaintiffs’
claims against the Government Defendants.

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1 intelligence programs is proceeding robustly, including in Congress, apart from this lawsuit.
2 And equitable considerations that warrant an interim partial final judgment more appropriately
3 apply where a party whose claim is entirely resolved need not wait until the claims of other
4 parties still before the Court are adjudicated. *See, e.g., Curtiss-Wright*, 446 U.S. at 11 (large
5 liquidated debts would not be paid for many months while case proceeded); *AmerisourceBergen*
6 *Corp. v. Dialysist W.*, 465 F.3d 946, 955 (9th Cir. 2006) (certifying final judgment in favor of
7 party owed \$2.2 million). Here, the same Plaintiffs will be contesting numerous other claims for
8 relief going forward.

9 Plaintiffs' other equitable argument fares no better. Plaintiffs contend that there is no just
10 reason to delay appealing the Court's recent decision when their case "has been pending for over
11 six years," when "progress has been slow," when "[m]uch labor remains," and when it will
12 "likely" take "years" to "resolve the remaining claims." Pls.' Mot. at 1, 2, 3. But Plaintiffs'
13 impatience with the pace of proceedings is not grounds for a piecemeal appeal, nor is speculation
14 as to the scope of further litigation. While Plaintiffs are correct that "[e]ntry of judgment under
15 Rule 54(b) 'is proper if it will aid 'expeditious decision' of the case,'" Pls.' Mot. at 2 (quoting
16 *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 797 (9th Cir. 1991)), Plaintiffs do not explain how
17 appealing one aspect of one claim in the case, while numerous claims raising similar factual and
18 legal issues would remain in district court, would expedite or otherwise "streamline the ensuing
19 litigation." *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir. 2009).

20 CONCLUSION

21 For the reasons set forth above, Plaintiffs' Rule 54(b) motion should be denied.
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1 Dated: May 1, 2015

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