

1 DAN WOODS (SBN: 78638)
 2 EARLE MILLER (SBN: 116864)
 3 WHITE & CASE LLP
 4 633 W. Fifth Street, Suite 1900
 5 Los Angeles, CA 90071-2007
 6 Telephone: (213) 620-7700
 7 Facsimile: (213) 452-2329
 8 Email: dwoods@whitecase.com
 9 Email: emiller@whitecase.com

10 Attorneys for Plaintiff
 11 Log Cabin Republicans

12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA**

14 LOG CABIN REPUBLICANS, a
 15 nonprofit corporation,

16 Plaintiff,

17 v.

18 UNITED STATES OF AMERICA and
 19 ROBERT M. GATES (substituted for
 20 Donald H. Rumsfeld pursuant to FRCP
 21 25(d)), SECRETARY OF DEFENSE,
 22 in his official capacity,

23 Defendants.

Case No. CV 04-8425 VAP (Ex)

**PLAINTIFF LOG CABIN
 REPUBLICANS' RESPONSE TO
 DEFENDANTS' OBJECTIONS TO
 APPLICATION TO THE CLERK TO
 TAX COSTS**

Judge: Hon. Virginia A. Phillips

Date: November 12, 2010

Time: 10:00 a.m.

Place: Before the Clerk (telephonic)

1 I.

2 **INTRODUCTION**

3 On September 9, 2010, the Court issued its Memorandum Opinion finding
4 that 10 U.S.C. § 654 and its implementing regulations, collectively known as
5 “Don’t Ask, Don’t Tell,” violate United States servicemembers’ substantive due
6 process rights under the Fifth Amendment to the United States Constitution and
7 rights to freedom of speech and to petition the government for redress of grievances
8 guaranteed by the First Amendment. Judgment, including a permanent injunction,
9 in favor of Log Cabin Republicans (“Log Cabin”) was entered on October 12, 2010
10 (Doc. No. 249). Under Rule 54(d) of the Federal Rules of Civil Procedure and
11 Local Rule 54 of this district as well as the Equal Access to Justice Act, 28 U.S.C. §
12 2412(a) (the “EAJA”), Log Cabin is entitled to its costs of suit, as the prevailing
13 party.

14 Local Rule 54 is a straightforward codification of the widely recognized
15 presumption in favor of awarding the prevailing party its costs. *See, e.g., Save Our*
16 *Valley v. Sound Transit*, 335 F.3d 932, 944-45 (9th Cir. 2003) (“Rule 54(d) creates
17 a presumption for awarding costs to prevailing parties; the losing party must show
18 why costs should not be awarded.”); *Ass’n of Mexican-Am. Educators v. Cal.*, 231
19 F.3d 572, 591 (9th Cir. 2000) (“By its terms [Rule 54(d)] creates a presumption in
20 favor of awarding costs to a prevailing party”); *Lichter Found., Inc. v. Welch*,
21 269 F.2d 142, 146 (6th Cir. 1959) (“The prevailing party is prima facie entitled to
22 costs, and it is incumbent on the unsuccessful party to show circumstances
23 sufficient to overcome the presumption.”). There is no question that Log Cabin is
24 the prevailing party. The government has failed to meet its burden to overcome the
25 presumption in favor of awarding the full amount of requested costs. Accordingly,
26 the Clerk should grant Log Cabin’s application to tax costs in the amount of
27 \$24,343.21.

1 **II.**

2 **LOG CABIN IS ENTITLED TO RECOVER**

3 **\$24,343.21 IN COSTS, ASSESSED IMMEDIATELY**

4 **A. Rule 54 Provides that Costs Should Be Awarded to the Prevailing Party,**
5 **Promptly Following Entry of Judgment**

6 Rule 54(d) provides that costs, other than attorneys' fees, should be allowed
7 to the prevailing party, except that "costs against the United States, its officers, and
8 its agencies may be imposed only to the extent allowed by law." Fed. R. Civ. P.
9 54(d)(1). The EAJA provides the authority to award costs, as provided in 28
10 U.S.C. § 1920, "to the prevailing party in any civil action brought by or against the
11 United States" 28 U.S.C. § 2412(a)(1). Section 1920 allows for the taxation
12 of certain costs as follows:

- 13 (1) Fees of the clerk and marshal;
14 (2) Fees for printed or electronically recorded transcripts necessarily
15 obtained for use in the case;
16 (3) Fees and disbursements for printing and witnesses;
17 (4) Fees for exemplification and the costs of making copies of any
18 materials where the copies are necessarily obtained for use in the case;
19 (5) Docket fees under section 1923 of this title;
20 (6) Compensation of court appointed experts, compensation of
21 interpreters, and salaries, fees, expenses, and costs of special
22 interpretation services under section 1828 of this title.

23 28 U.S.C. § 1920.

24 Local Rule 54 limits the allowable costs by further specifying which costs are
25 taxable costs. L.R. 54-4.

26 **1. Log Cabin is the prevailing party**

27 The threshold requirement for an award of costs pursuant to Rule 54(d),
28 Local Rule 54, and the EAJA is that the party "prevail." A party prevails if it

1 succeeds on any significant issue in litigation which achieves some of the benefit
2 the party sought in bringing the suit. *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct.
3 1933, 76 L.Ed. 2d 40 (1983); *U.S. v. Real Prop. at 2659 Roundhill Dr., Alamo,*
4 *Cal.*, 283 F.3d 1146, 1150 (9th Cir. 2002). Here, Log Cabin is the prevailing party
5 because on October 12, 2010, the Court entered judgment in favor of Log Cabin,
6 affording it the complete relief it had sought.

7 **2. Rule 54 creates a presumption for awarding costs to prevailing**
8 **parties**

9 The presumption in Fed. R. Civ. P. 54 “provides all the reason a court needs
10 for awarding costs” *Save Our Valley*, 335 F.3d at 945. A court has discretion
11 to refuse an award of costs; such discretion, however, is not unlimited. *Ass’n of*
12 *Mexican-Am. Educators*, 231 F.3d at 592. To deny costs to a prevailing party, a
13 district court must “specify reasons” for such denial. *Id.* In this case, there are no
14 valid reasons to deny Log Cabin its costs.

15 The government’s argument that costs should be denied because “important
16 and complex legal issues” were presented in this case must be rejected.
17 Defendants’ Objections to Plaintiff’s Bill of Costs, p.2, ll. 9-10. The very purpose
18 of the EAJA, which permits a prevailing party to recover costs from the United
19 States, is to eliminate “the financial disincentive to challenge unreasonable
20 governmental actions.” *Commissioner v. Jean*, 496 U.S. 154, 163, 110 S.Ct. 2316,
21 110 L.Ed.2d 134 (1990). Such cases commonly present important and complex
22 legal issues. *See, e.g., Pierce v. Underwood*, 487 U.S. 552 (1999) (granting
23 attorneys fees to attorneys who represented a class of low-income tenants residing
24 in housing projects subsidized by Housing and Urban Development); *Meinhold v.*
25 *U.S. Dep’t of Def.*, 123 F.3d 1275 (9th Cir. 1997) (allowing attorney fees to
26 attorney representing a servicemember who was discharged for revealing his sexual
27 orientation under predecessor regulations to “Don’t Ask, Don’t Tell”). Indeed,
28 denying Log Cabin costs in this case because Log Cabin brought an important and

1 complex constitutional challenge would undermine the very purpose of the EAJA.

2 **3. Log Cabin’s costs should be awarded immediately**

3 There is no reason to delay granting Log Cabin’s application to tax costs.
4 First, contrary to the government’s absurd assertion, there is no question which
5 party is the prevailing party. Simply because there is an appeal pending in this case
6 does not change the fact that Log Cabin prevailed in this Court. Second, the
7 pending appeal is not a sufficient reason to delay a decision on Log Cabin’s
8 application to tax costs. *See* Fed. R. Civ. P. 54(d) advisory committee notes, 1993
9 amendments (“if an appeal on the merits of the case is taken, the court may rule on
10 the claim for fees”); *Fid. & Guar. Ins. Co. v. Reddy*, 2008 WL 3126207, at *1
11 (E.D. Cal. Aug. 6, 2008) (“The fact that plaintiffs subsequently filed an appeal of
12 the court’s underlying judgment has no bearing on the court’s jurisdiction to
13 consider this bill of costs”); *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir.
14 1995) (noting “an important limitation on the rule that just one court at a time
15 possesses jurisdiction: the doctrine applies only to those aspects of the case
16 involved in the appeal” resulting in a district court’s ability to “award attorney’s
17 fees while the merits are on appeal” (internal citations omitted)).

18 **B. Costs Should Be Awarded in the Amount of \$24,343.21**

19 The government objects to Log Cabin’s cost claim only in two respects: the
20 airfares for two trial witnesses; and the 14 cents per page claimed for photocopies,
21 which the government contends should be 8 cents per page, even for color copies.
22 Both objections should be overruled.

23 **1. The airfare charges for Messrs. Bradley and Meekins are**
24 **reasonable**

25 The airfare claimed for Philip Bradley is reasonable within the meaning of 28
26 U.S.C. § 1821. On June 30, 2010, Mr. Bradley purchased a roundtrip airfare
27 between Charleston, South Carolina and Ontario, California through Orbitz.com.
28 As evidenced on the confirmation attached to the Bill of Costs, the total amount of

1 Mr. Bradley's itinerary was \$965.36. See Orbitz.com itinerary, a copy of which is
2 attached to the Bill of Costs as Exhibit 4B, pp. 64-66. Per his itinerary, Mr.
3 Bradley was scheduled to fly to Ontario airport on July 12, 2010 on American
4 Airlines and fly out of Ontario airport on July 13, 2010 on Delta Airlines.
5 Unfortunately, Mr. Bradley missed his early morning American Airlines flight
6 departing out of Charleston on July 12, 2010. When Mr. Bradley checked with
7 American Airlines at the airport to see if he could secure a seat on the following
8 flight, he was told that his only option was to be placed on standby. Mr. Bradley
9 was placed on standby for the next departing flight but was ultimately unable to
10 secure a seat. As Mr. Bradley was scheduled to testify the following morning, he
11 was obligated to purchase another flight to Ontario on a different airline. Mr.
12 Bradley purchased a one-way ticket on Continental Airlines, which cost \$676.90
13 and enabled him to arrive into Ontario the night of July 12th. See Continental
14 Airlines itinerary, a copy of which is attached to the Bill of Costs as Exhibit 4B, pp.
15 67-69.

16 Log Cabin ultimately reimbursed Mr. Bradley for only half of the cost of his
17 Orbitz.com itinerary (\$482.68), plus the cost of his Continental Airlines itinerary
18 (\$676.90), which totals \$1,159.58. Log Cabin did not reimburse Mr. Bradley for
19 the full cost of his Orbitz.com itinerary because, as a result of missing his American
20 Airlines flight, Mr. Bradley has a credit with American Airlines to use
21 for future travel.

22 The amount of Mr. Bradley's airfare, in the sum of \$1,159.58, is reasonable
23 for three reasons. First, the amount Log Cabin claims here (\$1,159.58) is only
24 \$194.22 more than the cost of Mr. Bradley's original Orbitz.com itinerary
25 (\$965.36). This is a *de minimis* difference given the circumstances. Second, Mr.
26 Bradley's airfare is higher than the other witnesses' because he lives in Charleston,
27 South Carolina, a location with no direct flight to Ontario, California. Mr.
28 Bradley had a limited number of flight options to choose from and ultimately had to

1 make a connection in another state before arriving in California. By contrast, Log
2 Cabin's other witnesses traveled from larger hubs such as Washington, D.C., which
3 has many flight options. Finally, it is an unfortunate fact of life that passengers
4 miss their flights from time to time. Mr. Bradley dealt with the situation to the best
5 of his ability, and Log Cabin submits that the costs it seeks to recoup from the
6 government in connection therewith are reasonable and warranted under the
7 circumstances.

8 The airfare sought for Christopher M. Meekins is also reasonable within the
9 meaning of 28 U.S.C. § 1821. Mr. Meekins' current employer's company policy
10 requires business class travel. As a cost-saving measure, however, Mr. Meekins
11 flew from New York to Los Angeles business class only one way, and coach class
12 the other way. Mr. Meekins' airfare, which totals \$1,819.40, reflects this
13 modification to his company's requirements and was, therefore, the most
14 economically available fare under the circumstances. In light thereof, Log
15 Cabin submits that Mr. Meekins' airfare is reasonable.

16 **2. Log Cabin should be awarded \$2,637.34 for photocopies because**
17 **they were necessary to the case**

18 The costs of creating exemplifications and copies "necessarily obtained for
19 use in the case" are taxable costs pursuant to 28 U.S.C. § 1920(4). Local Rule 54-
20 4.11, however, limits the taxable costs of document preparation to "[t]he cost of
21 copies of an exhibit attached to a document necessarily filed and served; other than
22 exhibits, the costs of copies of documents filed and served is generally not taxable."
23 L.R. 54-4.11. Strictly following Local Rule 54-4.11's guidelines, Log Cabin seeks
24 recovery of \$490.14 for costs relating to in-house photocopying of exhibits attached
25 to filed pleadings. The Itemization and Documentation of Costs, attached to the
26 Bill of Costs, lists each pleading filed and the number of pages of the attached
27 exhibits that were photocopied, as specified by Local Rule 54-4.11. Log Cabin's
28 attorneys' regular charge for in-house photocopying is \$.14/page.

1 The government attempts to reduce the per-page rate to \$.08, since that was
2 the charge from an outside vendor that Log Cabin used for the voluminous copying
3 involved in producing multiple sets of trial exhibit binders; but that reduced rate is
4 for bulk copying at the trial stage and is not the standard for photocopying in the
5 ordinary course during pretrial proceedings for documents to be filed with the
6 Court.

7 Additionally, Log Cabin incurred costs for photocopying exhibit binders used
8 at trial. The Court required that exhibit binders be provided to the Court and the
9 witnesses. Log Cabin therefore produced identical binders: if certain exhibits were
10 in color in their original form, Log Cabin reproduced them in color so that the
11 Court and the witnesses had identical exhibits to those that were admitted at trial.
12 Accordingly, the Clerk should find that Log Cabin's request in the amount of
13 \$2,147.20 for the production of such exhibit binders (containing over 330 exhibits
14 each) is reasonable.

15 **III.**

16 **CONCLUSION**

17 For the reasons stated above, the Court should tax Log Cabin's submitted
18 Bill of Costs, which has already been reduced from the actual costs incurred in
19 certain circumstances, overrule the government's objections, and award costs to
20 Log Cabin as claimed.

21
22 Dated: November 9, 2010

WHITE & CASE LLP

23
24 By: /s/ Earle Miller

25 Earle Miller
26 Attorneys for Plaintiff
27 Log Cabin Republicans
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