

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 By order entered on February 22, 2011, the Clerk has assessed costs of
4 \$20,869.29. As a threshold matter, any assessment of costs in this case is
5 inappropriate. The government has appealed the Court's injunction against the
6 government's implementation of 10 U.S.C. § 654, the "Don't Ask, Don't Tell"
7 statutory policy. Given the importance and complexity of the constitutional issues
8 presented, any award of costs is inappropriate. In addition, in light of the
9 government's appeal, any assessment of costs should await final appellate
10 resolution. Because the appeal may very well result in the reversal of the Court's
11 judgment and worldwide permanent injunction, interests of judicial economy
12 weigh strongly in favor of awaiting final appellate resolution before costs are
13 assessed.

14 At a minimum, the costs awarded by the Clerk should be reduced. The
15 airfare of two of Plaintiff's witnesses, Phillip Bradley (\$1,159.58) and Christopher
16 M. Meekins (\$1,819.40), well exceed the amount charged for the fares of other
17 witnesses. Because Plaintiff has failed to show that these rates were the most
18 economical rates reasonably available to Plaintiff, as required by 28 U.S.C.
19 § 1821(c)(1), neither charge is appropriately taxed to Defendants. Accordingly,
20 the airfares charged for both witnesses should be excluded from the amount taxed.

21 **ARGUMENT**

22 **I. No Costs Should Be Charged Here Given the Important And Complex**
23 **Legal Issues Presented In This Constitutional Challenge**

24 Fed. R. Civ. P. 54(d)(1) provides that costs other than attorneys' fees shall
25 be allowed as a matter of course to the prevailing party unless "a court provides
26 otherwise." By its terms, therefore, the District Court has discretion to refuse to
27 award costs. Save Our Valley v. Sound Transit, 335 F.3d 932, 945-946 (9th Cir.
28 2003); Ass'n of Mexican-American Educators v. California, 231 F.3d 572, 591-

1 593 (9th Cir. 2000). Thus, where a case involves issues of substantial public
2 importance, see Ass'n of Mexican-American Educators, 231 F.3d at 593, or where
3 the legal issues are close and complex, see Save Our Valley, 335 F.3d at 946, the
4 district court has the discretion to deny any award of costs under Rule 54.

5 This case presents a constitutional challenge to a federal statute. It
6 accordingly presents issues of substantial public importance. Furthermore, while
7 the District Court has found the statute and implementing regulations to be
8 unconstitutional, all of the courts of appeals to have addressed the matter had
9 sustained the constitutionality of § 654 against both substantive due process and
10 First Amendment challenges. See Cook v. Gates, 528 F.3d 42 (1st Cir. 2008);
11 Able v. United States, 155 F.3d 628, 631-36 (2d Cir. 1998); Richenberg v. Perry,
12 97 F.3d 256, 260-62 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 927-31,
13 934 (4th Cir. 1996) (en banc). No award of costs is accordingly appropriate here.

14 **II. Consideration of Plaintiff's Application Should Be Deferred Until There**
15 **Is A Final Appellate Resolution of Plaintiff's Challenge**

16 At the very least, no award of costs should be made now. This matter is now
17 on appeal, and implementation of the Court's judgment has been stayed pending
18 the Ninth Circuit's decision. See Doc. 284. "[A] determination of who is the
19 prevailing party for purposes of awarding costs should not depend on the position
20 of the parties at each stage in the litigation but should be made when the
21 controversy is finally decided." 10 Wright, Miller & Kane, Federal Practice and
22 Procedure § 2667 (3d ed. 1998).

23 And it is well-established that a Court may deny without prejudice or defer
24 its ruling on attorney's fees when an appeal on the merits is pending. See 1993
25 Advisory Committee notes to Fed. R. Civ. P. 54(d) ("if an appeal on the merits of
26 the case is taken, the [district] court may rule on the claim for fees, may defer its
27 ruling on the motion, or may deny the motion without prejudice[.]"). The same
28 principles apply to a ruling on a bill of costs. See Lasic v. Moreno, No. 05-161,

1 2007 WL 4180655, *1 (E.D. Cal. Nov. 21, 2007) (finding that interests of judicial
2 economy warrant deferring consideration of bill of costs while an appeal on the
3 merits is pending); see also In re Farmers Ins. Exchange Claims Representatives
4 Overtime Pay Litig., No. 33-1439, 2009 WL 3834034, *3 (D. Or. Nov. 13, 2009)
5 (deferring payment of costs pending Ninth Circuit disposition of pending appeals).

6 Accordingly, to the extent the Court concludes that costs are otherwise
7 recoverable in this constitutional challenge, Defendants request that Plaintiff's
8 application for costs be held in abeyance until this action has been finally resolved
9 through the appellate process.

10 **III. At a Minimum, The Airfare Taxed for Messrs. Bradley and Meekins Do**
11 **Not Appear to be the Most Reasonably Available Economical Rates**

12 Pursuant to L.R. 54-4.7, a prevailing party may charge for certain statutory
13 witness fees, including airfare. But the airfare charged must be "at the most
14 economical rate reasonably available." 28 U.S.C. § 1821(c)(1). The airfare of two
15 of Plaintiff's witnesses, Phillip Bradley (\$1,159.58) and Christopher M. Meekins
16 (\$1,819.40), are almost three times the amount charged for Plaintiff's other trial
17 witnesses. Compare Exhibits 4B & F to Doc. 279 with Exhibits 4A, 4C-E,
18 4G-I. Because Plaintiff has failed to show that the rates charged for Messrs.
19 Bradley and Meekins were "the most economical rate reasonably available," as
20 required by 28 U.S.C. § 1821(c)(1), the amounts charged should be disallowed.

21 Indeed, the receipts attached to Plaintiff's Bill of Costs show that Mr.
22 Meekins' return flight was first-class (or business class). See Doc. 279, Exhibit
23 4F. The same is true of Mr. Bradley's departing flight on July 12, 2010. See Doc.
24 279, Exhibit 4B (indicating trip from Charleston, S.C. to Houston, TX was in "b"
25 or business class). Defendants should not be charged for luxury travel, particularly
26 where the governing statute requires that Plaintiff obtain the most economical rates
27 reasonably available. See Hemmerick v. Chrysler Corp., 769 F. Supp. 525, 531
28 (S.D.N.Y. 1991)(disallowing first class air travel from taxed costs, and recognizing

1 that such travel “does not constitute ‘the most economical rate reasonably
2 utilized.’”) Defendants accordingly request that, at a minimum, the airfares for
3 Messrs. Meekins and Bradley be excluded from the amount taxed.

4 **CONCLUSION**

5 Therefore, no costs should be awarded in this constitutional challenge. In
6 any event, in light of Defendants’ appeal, Plaintiff’s application for costs should be
7 denied without prejudice to re-file upon the conclusion of the appellate process or
8 held in abeyance until this action has been finally resolved through the appellate
9 process. Should any costs be awarded now, the amount taxed by the Clerk should
10 be reduced to exclude, pursuant to 28 U.S.C. § 1821(c)(1), the amount that has
11 been taxed for the airfare of Messrs. Bradley and Meekins.

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13 Dated: March 1, 2011

Respectfully submitted,

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