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3 The Honorable Ronald B. Leighton  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN WASHINGTON  
9 AT

10 MARGARET WITT,

11 Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT OF  
14 THE AIR FORCE; ET AL.,

15 Defendants.  
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17  
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No. 06-5195 RBL

**PLAINTIFF'S REPLY IN  
SUPPORT OF MOTION FOR  
COSTS**

NOTE ON MOTION CALENDAR:  
OCTOBER 29, 2010

19  
20 **INTRODUCTION**

21 Defendants oppose \$2,959.77 of Plaintiff's claimed costs under subsections (2) and (4) of  
22 28 U.S.C. §1920. Specifically, Defendants argue against the award of taxed costs for: Loverde's  
23 videotaped deposition, counsels' copies of exhibit binders, and two photographic enlargements.  
24 Defendants also request the Court hold plaintiff's motion for costs in abeyance pending a final  
25 resolution of this matter. Plaintiff disagrees with Defendants and respectfully requests the Clerk  
26 to make a ruling on taxable costs now while the matter is still in the Court's recent memory, and  
27 because an appeal could extend far into the future. *See Lorenz v. Valley Forge Ins. Co.*, 23 F.3d  
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1 1259, 1260 (7th Cir. 1994) (Easterbrook, J.) (holding that a district court may award costs even  
2 while a substantive appeal is pending).<sup>1</sup>

3 **A. Anthony Loverde's Videotaped Deposition Is a Taxable Cost**

4 First, Defendants take the Court's comments out of context when contending that  
5 Loverde's videotape deposition was not necessary. The issue discussed in court was not whether  
6 the videotape deposition itself was necessary, but whether it was necessary to play it in open  
7 court.

8 Plaintiff is entitled to recover the cost of both Loverde's deposition transcript and the  
9 videotape. Each has distinct benefits; "Videotape may provide insight into the demeanor and  
10 bearing of a witness, while a written transcript ensures consistency in the written record  
11 regarding statements made during the deposition." *Slaughter v. Uponor, Inc.*, No. 2:08-CV-  
12 01223-RCJ-(GWF), 2010 WL 3781800, at \*3 (D. Nev. Sept. 20, 2010) (taxing the costs for  
13 obtaining a videotape transcript and recognizing that the Ninth Circuit has not made a clear  
14 determination on whether videotape and written depositions can both be taxed).

15 Defendants cite one case where the court found that the videotaped deposition was  
16 unnecessary because a stenographically recorded one existed. *See Pullela v. Intel Corp.*, No. CV  
17 08-1427-AC, 2010 WL 3361089, at \*3 (D. Or. Aug. 25, 2010). In contrast to that case where the  
18 party seeking costs prevailed on summary judgment and the videotape deposition was not used at  
19 trial, Plaintiff here played a segment of Loverde's videotape deposition in trial (Dkt. No. 154).

20 **B. The Copies of Plaintiff's Exhibit Binders Were Necessarily Obtained for Trial**

21 Plaintiff's photocopying of multiple copies of trial exhibits was necessary to trial  
22 preparation and performance during trial. Defendants argue that only two sets were necessary,  
23 but this neglects to account for Plaintiff's own set of exhibit binders for each counsel. *Endress &*  
24 *Hauser, Inc. v. Hawk Measurement Systems Pty. Ltd.*, 922 F. Supp. 158, 163 (S.D. Ind. 1996)  
25 (granting copying costs of preparing five sets of trial exhibit books, used by the Court, its Clerk,  
26 and the parties).

27  
28 <sup>1</sup> Defendants also assert in their opposition that Plaintiff abandoned her First Amendment claim before the Ninth  
29 Circuit. Plaintiff did not. Plaintiff has reserved the right to raise such a claim en banc to the Ninth Circuit or to the  
Supreme Court. *See* Reply Brief of Appellant at 26-27 n.11, *Witt v Dep't of Air Force*, No. 06-35644 (9th Cir. Jan.  
5, 2007); Rough Draft Transcript of Proceedings, Vol. VI at 110:14-111:2 (Sept. 21, 2010).

1 Counsel relied on hard copies of exhibits during the six day trial, which consisted of over  
2 140 exhibits contained in seven large binders. Plaintiff was represented by two lead counsel,  
3 James Lobsenz and Sarah Dunne. At a minimum, two sets of exhibit binders were needed for  
4 each of them to independently prepare and examine witnesses. Attorney Kung also examined  
5 five witnesses and used exhibits during examination. It would have been impractical to require  
6 counsel to share one set of exhibits, carting them back and forth between hotel rooms each  
7 evening during the week of trial. Further, Plaintiff's legal assistant was required to have her own  
8 set of hard copy exhibits in order to show a clean version on the Elmo during direct and cross  
9 examinations.

### 10 **C. The Photographic Enlargements Were Significant Exhibits Used at Trial**

11 Defendants cite *King v. Kalama School District No. 40*, No. C05-5675RBL, 2008 WL  
12 110518, at \*2 (W.D. Wash. Jan. 7, 2008), where the Court found that enlargements were  
13 unnecessary. Unlike *Kalama School District*, the public interest in this litigation was and  
14 continues to be significant. Given such, one of the enlarged exhibits displayed during opening  
15 statements provided a representation of Plaintiff's service in the military. The other enlargement  
16 captured the honor and recognition of her service by fellow servicemembers—after finding out  
17 she was a lesbian—which goes to the heart of Plaintiff's contention that her presence had and  
18 will have no negative impact on unit cohesion or morale. This retirement photo was a significant  
19 exhibit used in James Schaffer's key testimony (Dkt. No. 152), and it was necessarily replicated  
20 in actual size to preserve likeness.

### 21 **CONCLUSION**

22 For the reasons stated above, the court should tax the entirety of Plaintiff's submitted bill  
23 of costs, which is already reduced from the actual costs incurred.

24  
25 DATED this 27th day of October, 2010.

26 Respectfully submitted,  
27 ACLU OF WASHINGTON FOUNDATION

28 By: /s/ Sher S. Kung  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2010, I electronically filed *Plaintiff's Reply In Support of Motion for Costs* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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Attorneys for Defendants

DATED this 27th day of October, 2010.

AMERICAN CIVIL LIBERTIES UNION OF  
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