

# Bench Memos

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## Prop 8 Plaintiffs' Frivolous Motion to Vacate Stay Pending Appeal

By [Ed Whelan](#)

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A week ago, on the same day that the Obama administration announced its decision to abandon its defense of DOMA, the plaintiffs-appellees in the Prop 8 appeal filed a [motion](#) to vacate the stay pending appeal that a Ninth Circuit motions [panel](#) (with two very liberal Clinton appointees) had previously issued. The plaintiffs' motion is objectively frivolous, but given the fact that Judge Stephen Reinhardt sits on the merits panel that will rule on the motion, that fact doesn't guarantee that the motion will be denied. (I think, though, that it ought to be very difficult for Judge Michael Hawkins, who is on the merits panel with Reinhardt and was on the motions panel that issued the stay, to reverse course.)

Prop 8 plaintiffs cite three new developments—the Ninth Circuit panel's order certifying a question to the California supreme court, the California supreme court's response to that certification request, and the Obama administration's decision no longer to defend DOMA—that they claim amount to “materially changed circumstances that warrant vacatur of this Court's decision to grant a stay pending appeal.” But these developments don't materially change anything:

1. Prop 8 plaintiffs claim that the Ninth Circuit's certification order “makes it unmistakably clear that proponents cannot make the requisite ‘strong showing that [they are] likely to succeed on the merits’ of their appeal.” (Emphasis and bracketed material in original.) But Prop 8 plaintiffs' identical claim about proponents' supposed lack of standing was at the heart of their previous opposition to a stay pending appeal, and nothing in the certification order alters the legal assessment of this issue.
2. Prop 8 plaintiffs claim that the briefing and oral argument schedule that the California supreme court has established indicates that the ultimate resolution of the appeal will take longer than previously anticipated and that this schedule thus alters the balance of hardships. But (as I discussed

in point 2 [here](#)) it was clear from the moment that the Ninth Circuit motions panel issued the stay pending appeal that ultimate resolution of the appeal (including the Supreme Court review process) could easily take until June 2013 or 2014. Nothing in the certification process materially alters that timetable.

Moreover, Prop 8 plaintiffs have little standing to complain about delay. Had they not encouraged Judge Walker's resort to an unnecessary show trial, the case could have been decided at the trial level on cross-motions for summary judgment a good six to nine months earlier than it was. Further, by encouraging state officials not to appeal Walker's ruling, Prop 8 plaintiffs have engineered the standing issue that has led to the certification process that they now complain about.

3. Prop 8 plaintiffs claim that the Obama administration's conclusion (as part of its decision to abandon DOMA) that "heightened scrutiny applies to classifications based on sexual orientation is clearly correct." It's absurd to expect the Ninth Circuit decide this hotly contested question on a motion to vacate a stay.

I'll also note the curiosity that the new attorney general of California, Kamala Harris, has filed a [statement](#) in support of plaintiffs' motion. Given that Harris's predecessor, Jerry Brown, declined to take part in the appeal and that Harris hasn't taken any steps to undo Brown's decision (or to seek amicus status), I don't understand on what basis Harris purports to take part in this matter.

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