

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: GOVERNOR ERNIE FLETCHER;)
SECRETARY JOHN FARRIS; SECRETARY)
ROBBIE RUDOLPH,)

Petitioners (07-0515))

In re: MARK NICKOLAS,)

Cross-Petitioner (07-0516).)

ORDER

FILED

DEC 10 2007

LEONARD GREEN, Clerk

Eastern District of Kentucky

FILED

DEC 12 2007

AT FRANKFORT
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

Before: KENNEDY, MARTIN, and CLAY, Circuit Judges.

The defendants (petitioners) and the plaintiff (cross-petitioner) seek leave to appeal under 28 U.S.C. § 1292(b) an opinion and order of the district court that denied a motion to dismiss and a motion for a preliminary injunction. We shall deny both petitions.

The plaintiff, who is the author of a political blog covering Kentucky politics, challenges Kentucky's policy regulating the use of state computers by its employees. Under that policy, the state limits the internet access of the computers used by state employees in their jobs. The plaintiff sought a preliminary injunction enjoining that policy. The defendants moved to dismiss the complaint for lack of standing.

In a single opinion and order, the district court concluded that the plaintiff had standing to pursue the action, but denied his motion for injunctive relief. The defendants moved the court to certify its decision pursuant to 28 U.S.C. § 1292(b) based on the issue of standing. In a subsequent order, the district court granted the certification and stayed further proceedings pending this court's decision. The defendants now seek leave to appeal the district court's decision. The plaintiff

A TRUE COPY

Attest:

LEONARD GREEN, Clerk

By Ma. Pattison
Deputy Clerk

06-00043

opposes their petition. Alternatively, he requests permission to cross-appeal from the denial of injunctive relief.

When the district court is of the opinion that an order in a civil action “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation,” the court shall so certify. 28 U.S.C. § 1292(b). The court of appeals may permit such an interlocutory appeal, in its discretion, if a timely petition is made within ten days of the district court’s order. *Id.* The grant or denial of a petition to appeal an order so certified is within this court’s discretion. *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).

The standing question presented in this case is one of law. Because a reversal of the district court’s decision would terminate the litigation, it is a controlling question. *See Rafoth v. National Union Fire Insurance Co. (In re Baker & Getty Financial Services, Inc.)*, 954 F.2d 1169, 1172 n. 8 (6th Cir. 1992). Although the issue is subject to debate, we are not convinced that the ultimate advancement of this litigation would best be served by an interlocutory appeal. Notwithstanding the reluctance of the state defendants to proceed through the litigation before a final resolution of the standing issue, it appears that this action could be resolved with relatively brief proceedings. *See Kraus v. Board of County Road Com’rs for Kent County*, 364 F.2d 919, 922 (6th Cir. 1966); *see also Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446 (6th Cir. 1974).

In view of the above, the petition and cross-petition for leave to appeal under 28 U.S.C. § 1292(b) are **DENIED**.

ENTERED BY ORDER OF THE COURT


Clerk