

No. 24-0301

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 14, 2025
KELLY L. STEPHENS, Clerk

In re: INTERNAL REVENUE SERVICE, et al.,)
)
Petitioners.)

ORDER

Before: SUTTON, Chief Judge; BOGGS and SILER, Circuit Judges.

Defendants—the Internal Revenue Service, Danny Werfel, in his official capacity as Commissioner of Internal Revenue, the United States Department of the Treasury, and Janet Yellen, in her official capacity as Secretary of the Treasury—petition under 28 U.S.C. § 1292(b) for permission to appeal the district court’s opinion and order denying the parties’ competing motions for summary judgment. Plaintiff—the Buckeye Institute—responds, asserting that it does not oppose the petition.

“Our jurisdiction usually encompasses final judgments alone.” *In re Somberg*, 31 F.4th 1006, 1008 (6th Cir. 2022) (order) (citing *Buccina v. Grimsby*, 889 F.3d 256, 258 (6th Cir. 2018)). “But that rule contains ‘safety valves,’” including § 1292(b), “which authorizes interlocutory review under specific circumstances,” *id.* (quoting *Page Plus of Atlanta, Inc. v. Owl Wireless, LLC*, 733 F.3d 658, 659–60 (6th Cir. 2013)). To qualify, a district court must find: (1) that the appeal “involves a controlling question of law,” (2) “as to which there is substantial ground for difference of opinion,” and (3) “that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). “[W]here, as here, the district court certifies its order and a timely petition follows, we must decide whether to exercise our discretion, as a

No. 24-0301

-2-

prudential matter, to permit an appeal to be taken from such order.” *In re Trump*, 874 F.3d 948, 951 (6th Cir. 2017) (order) (cleaned up). These criteria, along with other prudential factors, guide our decision. *Id.*

The three criteria listed in § 1292(b) weigh in favor of granting the petition. First, the appeal would involve a controlling question of law. Whether the district court is correct that 26 U.S.C. § 6033(b)(5) should be analyzed under exacting scrutiny, or whether a lesser (or greater) level of scrutiny should apply instead, is a purely legal question that “could materially affect the outcome of the case.” *In re City of Memphis*, 293 F.3d 345, 351 (6th Cir. 2002); *see 360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 270 (4th Cir. 2024) (acknowledging that the level of scrutiny to be applied is a question of law). The significant difference between satisfying rational-basis review and satisfying exacting-scrutiny review means that the question is likely dispositive in this case. *See EMW Women’s Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 432 n.7 (6th Cir. 2020) (“[R]ational-basis review is ‘the least demanding’ tier of scrutiny ‘used by the courts.’” (quoting *Berger v. City of Mayfield Heights*, 154 F.3d 621, 625 (6th Cir. 1998))).

Second, there is substantial ground for a difference of opinion. “[This] question is difficult and of first impression” *In re Miedzianowski*, 735 F.3d 383, 384 (6th Cir. 2013) (order) (citation omitted). And, as the district court noted, there are two competing cases which touch on the issue and arguably conflict—*Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021), and *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983).

Third, an immediate appeal from the order may materially advance the ultimate termination of the litigation. “Appeals fulfilling [this] criterion typically are those where, absent review, potentially unnecessary ‘protracted and expensive litigation’ will ensue.” *Somberg*, 31 F.4th at 1008 (quoting *Little v. Louisville Gas & Elec. Co.*, 805 F.3d 695, 699 (6th Cir. 2015)). Although

No. 24-0301

-3-

an appeal from the final judgment may still follow, if the constitutionality of § 6033(b)(5) is appropriately analyzed under rational-basis review, the underlying action will likely reach prompt resolution. *See EMW Women’s Surgical Ctr.*, 978 F.3d at 432 n.7. However, in the absence of our interlocutory review, Defendants anticipate substantial litigation involving lengthy discovery, motion practice to address privacy and privilege concerns, and an estimated eight-day trial involving at least sixteen witnesses.

Lastly, prudential factors also support our interlocutory review. “[C]ertified orders already stand out as ‘exceptional’ by virtue of another Article III judge’s opinion. District courts do not make a habit of certifying their own orders for interlocutory appeal. There is little risk that this order—read in its context—will open the floodgates.” *Trump*, 874 F.3d at 952–53. And as in *Trump*, the broader consequences of this case “are readily apparent.” *Id.* at 952. While we grant review under § 1292(b) “sparingly and only in exceptional cases,” *City of Memphis*, 293 F.3d at 350, this is one of those exceptional cases.

Accordingly, the petition for permission to appeal is **GRANTED**.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk