(ORDER LIST: 586 U.S.)

TUESDAY, JANUARY 22, 2019

ORDERS IN PENDING CASES

18A625 TRUMP, PRESIDENT OF U.S., ET AL. V. KARNOSKI, RYAN, ET AL.

The application for stay presented to Justice Kagan and by her referred to the Court is granted, and the District Court's December 11, 2017 order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

18A627 TRUMP, PRESIDENT OF U.S., ET AL. V. STOCKMAN, AIDEN, ET AL.

The application for stay presented to Justice Kagan and by her referred to the Court is granted, and the District Court's December 22, 2017 order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall

terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

18A669 IN RE GRAND JURY SUBPOENA

The applications for leave to file the application for stay, the response, and the reply under seal presented to The Chief Justice and by him referred to the Court are granted.

18M89 GARCIA, EDGAR B. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

18M90 HARRIS, NICHOLAS V. FULLER, LINDA

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

18M93 IN RE GRAND JURY SUBPOENA

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

17-1657 MISSION PRODUCT HOLDINGS, INC. V. TEMPNOLOGY, LLC

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

17-1705 PDR NETWORK, LLC, ET AL. V. CARLTON & HARRIS CHIROPRACTIC

The motion of petitioners to dispense with printing the joint appendix is granted.

17-1717) AMERICAN LEGION, ET AL. V. AMERICAN HUMANIST ASSN., ET AL.
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18-18) MARYLAND-NATIONAL CAPITAL PARK V. AMERICAN HUMANIST ASSN., ET AL.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted. The joint motion of petitioners for enlargement of time for oral argument and for divided argument is granted and the time is divided as follows: 15 minutes for petitioner in No. 18-18, 10 minutes for petitioners in No. 17-1717, 10 minutes for the Acting Solicitor General as *amicus curiae*, and 35 minutes for respondents.

18-6048 IN RE DANIEL A. SPOTTSVILLE

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

CERTIORARI GRANTED

18-280 NY STATE RIFLE & PISTOL, ET AL. V. NEW YORK, NY, ET AL.

The petition for a writ of certiorari is granted.

CERTIORARI DENIED

17-6891 WOOD, TREMANE V. OKLAHOMA

17-6943 JONES, JULIUS D. V. OKLAHOMA

18-475 ZAREMBA FAMILY FARMS, ET AL. V. ENCANA OIL & GAS INC.

18-500 FIRST PRESBYTERIAN, ET AL. V. DOE, JOHN

18-506 HASSELL, DAWN L. V. YELP, INC.

18-561 BERKLEY, ORUS A., ET AL. V. FERC, ET AL.

18-615 MUNRO, BRUCE, ET AL. V. LUCY ACTIVEWEAR INC., ET AL.

18-618 GUTIERREZ, DOLORES, ET AL. V. WELLS FARGO BANK, ET AL.

18-628 COOPER, REBEKAH V. HAQ, EHTSHAM, ET AL.

18-630 RICHARDS, CHARLES A. V. DES MOINES POLICE DEPT., ET AL.

18-634 EL-SABA, AED V. UNIVERSITY OF SOUTH ALABAMA

18-646 MARQUETTE TRANSP. CO., ET AL. V. ENTERGY MS, INC.

18-647 PULTE HOMES OF NEW YORK LLC V. CARMEL, NY, ET AL.

18-655 SPITZER, CRAIG J. V. ALJOE, TRISHA A., ET AL.

18-659 MASOMI, MOSTAFA V. MADADI, MEHRANDOKHT

18-660 TAGGART, KENNETH J. V. WELLS FARGO BANK, N.A., ET AL.

18-662 McDONALD, MARY V. WICHITA, KS

18-665 ALVIS, JAMES M. V. SCHILLING, LELAND W.

18-764 STEINMETZ, OSCAR H. V. UNITED STATES

18-793 BREWSTER, MARION Q. V. UNITED STATES

18-5694 JAMES, TAUMU V. ASUNCION, WARDEN

18-5760 BROWN, WILLIAM B. V. MANSUKHANI, WARDEN

18-5965 HARMON, RAYBURN S. V. UNITED STATES

18-6062 IBARRA, RAMIRO R. V. DAVIS, DIR., TX DCJ

18-6097 MARQUEZ, LEONARD G. V. UNITED STATES

18-6330 RODRIGUES, JOSE A. V. DAVIS, WARDEN

18-6375 WHISBY, MICHAEL V. UNITED STATES

18-6378 PEEDE, ROBERT I. V. FLORIDA

18-6650 DUPLESSIS-JEAN, IMRAN V. WHITAKER, ACTING ATT'Y GEN.

18-6708 WILLIAMS, CLIFFORD D. V. OHIO

18-6722 PORTER, CRAIG V. TEXAS

18-6735 TAYLOR, PERRY A. V. FLORIDA

18-6740 LASHER, LENA V. BUREAU OF OCCUPATIONAL AFFAIRS

18-6743 KULICK, ROBERT J. V. LEISURE VILLAGE ASSN., INC.

18-6744 SCHAEFER, WESLEY W. V. DAVIS, DIR., TX DCJ

18-6749 BARNES, JAMES V. JONES, SEC., FL DOC, ET AL.

18-6762 THOMAS, EDWARD L. V. TEXAS

18-6769 MIDDLETON, KENNETH G. V. PASH, RONDA

18-6785 SCOTT, CHRISTOPHER V. ILLINOIS

18-6786 HILL, CURTIS J. V. LIZARRAGA, WARDEN

18-6788 BEAN, RHETT V. HAMILTON, WARDEN

18-6790 OTWORTH, CLARENCE V. TRUMP, PRESIDENT OF U.S.

18-6832 WEST, KEDDRON R. V. GEORGIA

18-6843 DAILEY, JAMES M. V. FLORIDA

18-6880 LENZ, JASON A. V. JONES, SEC., FL DOC, ET AL.

18-6889 BOOKER, STEPHEN T. V. FLORIDA

18-6945 WASHINGTON, WILLIAM N. V. FRAUENHEIM, WARDEN

18-6973 MINOR, ANDY E. V. MISSISSIPPI

18-7072 HARPER, KENNETH V. UNITED STATES

18-7077 PULHAM, JC C. V. UNITED STATES

18-7078 O'SHAUGHNESSY, JOSEPH V. UNITED STATES

18-7079 MORILLO, FRANKLYN V. UNITED STATES

18-7108 PRYER, TIMOTHY G. V. GARDNER, THOMAS

18-7138 ALVAREZ-MORENO, ANTONIO V. UNITED STATES

18-7144 RUSSELL, RODNEY V. UNITED STATES

18-7156 JOHNSON, ANTONEZ T. V. UNITED STATES

The petitions for writs of certiorari are denied.

18-676 TRUMP, PRESIDENT OF U.S., ET AL. V. KARNOSKI, RYAN, ET AL.

The motion of Foundation for Moral Law for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari before judgment is denied.

18-677 TRUMP, PRESIDENT OF U.S., ET AL. V. DOE 2, JANE, ET AL.

18-678 TRUMP, PRESIDENT OF U.S., ET AL. V. STOCKMAN, AIDEN, ET AL.

The petitions for writs of certiorari before judgment are denied.

18-6684 MATELYAN, ARIKA V. FOX 11

18-6736 WHITNEY, JAMES E. V. GLOVER, CINDY, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

18-6882 CRAIN, WILLIE S. V. FLORIDA

The petition for a writ of certiorari is denied. Justice Sotomayor, dissenting from the denial of certiorari: I dissent for the reasons set out in *Reynolds* v. *Florida*, 586 U. S. ___ (2018) (Sotomayor, J., dissenting).

18-7048 NANCE, JIMMY L. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

MANDAMUS DENIED

18-6745 IN RE DONALD L. SPENCER

18-6868 IN RE PETER T. ROUKIS

The petitions for writs of mandamus are denied.

18-6825 IN RE ALONZO D. SHEPHARD

The petition for a writ of mandamus and/or prohibition is denied. The Chief Justice and Justice Kavanaugh took no part in the consideration or decision of this petition.

REHEARINGS DENIED

17-9054 TOWBRIDGE, OTIS L. V. FLORIDA

17-9213 WILLIAMS, STEVEN D. V. KENT, WARDEN

18-344 SHAO, LINDA V. McMANIS FAULKER, LLP

18-5420 HEAGY, TYLER T. V. PENNSYLVANIA

18-5548 TUTTLE, BRIAN V. ALLIED NEVADA GOLD CORP., ET AL.

18-5569 WEISNER, SEAN V. DAVIS, DIR., TX DCJ

The petitions for rehearing are denied.

SUPREME COURT OF THE UNITED STATES

JOSEPH A. KENNEDY *v.* BREMERTON SCHOOL DISTRICT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 18–12. Decided January 22, 2019

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join, respecting the denial of certiorari.

I concur in the denial of the petition for a writ of certiorari because denial of certiorari does not signify that the Court necessarily agrees with the decision (much less the opinion) below. In this case, important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review.

I

Petitioner Joseph Kennedy claims that he lost his job as football coach at a public high school because he engaged in conduct that was protected by the Free Speech Clause of the First Amendment. He sought a preliminary injunction awarding two forms of relief: (1) restoration to his job and (2) an order requiring the school to allow him to pray silently on the 50-yard line after each football game. The latter request appears to depend on petitioner's entitlement to the first—to renewed employment—since it seems that the school would not permit members of the general public to access the 50-yard line at the relevant time.

The key question, therefore, is whether petitioner showed that he was likely to prevail on his claim that the termination of his employment violated his free speech rights, and in order to answer that question it is necessary

to ascertain what he was likely to be able to prove regarding the basis for the school's action. Unfortunately, the answer to this second question is far from clear.

On October 23, 2015, the superintendent wrote to petitioner to explain why the district found petitioner's conduct at the then-most recent football game to be unacceptable. And in that letter, the superintendent gave two quite different reasons: first, that petitioner, in praying on the field after the game, neglected his responsibility to supervise what his players were doing at that time and, second, that petitioner's conduct would lead a reasonable observer to think that the district was endorsing religion because he had prayed while "on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees." 869 F. 3d 813, 819 (CA9 2017). After two subsequent games, petitioner again kneeled on the field and prayed, and the superintendent then wrote to petitioner, informing him that he was being placed on leave and was forbidden to participate in any capacity in the school football program. The superintendent's letter reiterated the two reasons given in his letter of October 23. And the district elaborated on both reasons in an official public statement explaining the reasons for its actions.

When the case was before the District Court, the court should have made a specific finding as to what petitioner was likely to be able to show regarding the reason or reasons for his loss of employment. If the likely reason was simply petitioner's neglect of his duties—if, for example, he was supposed to have been actively supervising the players after they had left the field but instead left them unsupervised while he prayed on his own—his free speech claim would likely fail. Under those circumstances, it would not make any difference that he was praying as opposed to engaging in some other private activity at that time. On the other hand, his free speech claim would have

far greater weight if petitioner was likely to be able to establish either that he was not really on duty at the time in question or that he was on duty only in the sense that his workday had not ended and that his prayer took place at a time when it would have been permissible for him to engage briefly in other private conduct, say, calling home or making a reservation for dinner at a local restaurant.

Unfortunately, the District Court's brief, informal oral decision did not make any clear finding about what petitioner was likely to be able to prove. Instead, the judge's comments melded the two distinct justifications:

> "He was still in charge. He was still on the job. He was still responsible for the conduct of his students, his team. . . . And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith . . . ." App. to Pet. for Cert. 89.

The decision of the Ninth Circuit was even more imprecise on this critical point. Instead of attempting to pinpoint what petitioner was likely to be able to prove regarding the reason or reasons for his loss of employment, the Ninth Circuit recounted all of petitioner's prayer-related activities over the course of several years, including conduct in which he engaged as a private citizen, such as praying in the stands as a fan after he was suspended from his duties.

If this case were before us as an appeal within our mandatory jurisdiction, our clear obligation would be to vacate the decision below with instructions that the case be remanded to the District Court for proper application of the test for a preliminary injunction, including a finding on the question of the reason or reasons for petitioner's loss of employment. But the question before us is different. It is whether we should grant discretionary review, and we generally do not grant such review to decide highly

fact-specific questions. Here, although petitioner's free speech claim may ultimately implicate important constitutional issues, we cannot reach those issues until the factual question of the likely reason for the school district's conduct is resolved. For that reason, review of petitioner's free speech claim is not warranted at this time.

II

While I thus concur in the denial of the present petition, the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future.

The Ninth Circuit's opinion applies our decision in *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006), to public school teachers and coaches in a highly tendentious way. According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.

This Court certainly has never read *Garcetti* to go that far. While *Garcetti* permits a public employer to regulate employee speech that is part of the employee's job duties, we warned that a public employer cannot convert private speech into public speech "by creating excessively broad job descriptions." *Id.,* at 424. If the Ninth Circuit contin-

ues to apply its interpretation of *Garcetti* in future cases involving public school teachers or coaches, review by this Court may be appropriate.

What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty. I hope that this is not the message that the Ninth Circuit meant to convey, but its opinion can certainly be read that way. After emphasizing that petitioner was hired to "communicate a positive message through the example set by his own conduct," the court criticized him for "his media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others)." 869 F. 3d, at 826. This conduct, in the opinion of the Ninth Circuit, "signal[ed] his intent to send a message to students and parents about appropriate behavior and what he values as a coach." *Ibid.* But when petitioner prayed in the bleachers, he had been suspended. He was attending a game like any other fan. The suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.

III

While the petition now before us is based solely on the Free Speech Clause of the First Amendment, petitioner still has live claims under the Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964. See Brief in Opposition 11, n. 1. Petitioner's decision to rely primarily on his free speech claims as opposed to these alternative claims may be due to certain decisions of this Court.

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise

Clause, and in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), the Court opined that Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit those decisions.