



## LETTER TO CALIFORNIA CLERGY

July 3, 2020

**Re:** OSHA Prohibition On Singing & Chanting (or “the day the music died”)<sup>1</sup>

Dear Faith Leader,

On July 1, 2020, the California division of Occupational Safety and Health (OSHA)<sup>2</sup> released a 14-page document entitled *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies (OSHA Guidance)*.<sup>3</sup> Although the *OSHA Guidance* addresses numerous activities in places of worship, this letter focuses on the language which reads, “Places of worship must...discontinue singing and chanting activities.” This letter seeks to explain the legal limitations of the *OSHA Guidance* and is not intended as medical advice.<sup>4</sup>

### What is covered?

The *OSHA Guidance* addresses more than 50 activities and physical items.<sup>5</sup> Of importance for purposes of this discussion is the admonition to discontinue singing and chanting. This includes rehearsals and performances.<sup>6</sup> A brief explanation of chanting is in order. *Chanting* is defined as the making of melodic sounds with the voice. It also refers to reciting something in a monotonous and repetitive tone. Similarly, a chant includes a rhythmic monotonous utterance or song.<sup>7</sup> In addition to being commonly heard at sporting events and protests, chants are used in a variety of religious services. For example, chants are used in Buddhist temples, Muslim mosques, Hindu ashrams, Eastern Orthodox churches, Roman Catholic masses, and Jewish synagogues.

### Who is covered? (Cal OSHA Jurisdiction)

OSHA’s jurisdiction is limited to the workplace. Stated otherwise, OSHA’s jurisdictional reach extends to employers and employees within the venue that work is performed.<sup>8</sup> Despite the language set forth in the *OSHA Guidance*, OSHA has no legal authority over volunteers<sup>9</sup> or

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<sup>1</sup> McClean. “American Pie.” United Artists Records. 1971.

<sup>2</sup> OSHA is a division of the California Department of Industrial Relations.

<sup>3</sup> Accessed at: <https://files.covid19.ca.gov/pdf/guidance-places-of-worship.pdf>

<sup>4</sup> In that regard, it is of interest to note that the *OSHA Guidance* cites to no peer reviewed scientific literature in support of discontinuing singing and chanting.

<sup>5</sup> *OSHA Guidance*, *passim*.

<sup>6</sup> *OSHA Guidance*, p. 12.

<sup>7</sup> Accessed at: <https://www.merriam-webster.com/dictionary/chant>

<sup>8</sup> See, State of California Department of Industrial Relations: *Cal/OSHA Jurisdiction*. Accessed at: <https://www.dir.ca.gov/dosh/calosha-jurisdiction.html>

<sup>9</sup> In addition to the California division, there is a federal OSHA. Like California OSHA, the federal counterpart also has no jurisdiction over volunteers.

congregants who attend services. With regards to volunteers, there are few jurisdictional exceptions, none of which are applicable here.<sup>10</sup>

In view of that, the *OSHA Guidance* extends to singers or chanters who are paid employees or other persons receiving financial compensation from the religious institution. For example, such would include a paid song leader, music director who sings, and a cantor. Of importance, the *OSHA Guidance* does not apply to volunteers who sing. Therefore, to stay outside of the reach of OSHA's jurisdiction, if a religious service intends to continue the use of song, those singing on a platform at a religious service should not include employees or persons who are otherwise paid by the ministry.

### **Is the *OSHA Guidance* an Order?**

The *OSHA Guidance* does not self-identify as an order. It does not cite to legal authority as a basis for its issuance nor how volunteers and non-employee members of the public come within OSHA's reach. Further, if one compares executive orders from the Governor or public health officials, the *OSHA Guidance* does not provide for penalties or other mechanisms of enforcement. Of interest, a violation of an OSHA regulation carries extensive fines.<sup>11</sup> Here, as a matter of law, the *OSHA Guidance* is not a regulation.<sup>12</sup> Further, the *OSHA Guidance* relies primarily on the use of permissive, rather than mandatory, language such as *recommended*, *guidance*, and *consideration*. Terms such as *mandate* (and its cognates) and *order* appear in reference to directives from other government officials or agencies. Finally, unlike this letter, the *OSHA Guidance* is an unsigned document. All of the above stand as indicators of whether or not a government document qualifies as an order. The *OSHA Guidance* is just that – guidance.

### **Conclusion**

The constitutional implications of the government prohibiting core religious practices and rituals is outside of the scope of this letter. Moreover, ministers should also be aware that there are executive orders from the Governor, as well as orders and guidelines issued by public health officials that must be considered. Some of the latter are mandatory and others serve as mere recommendations. Like the *OSHA Guidance*, some communications exceed the jurisdiction of the entity and thus are not enforceable. If you would like an attorney to go over a specific paper, contact the Pacific Justice Institute's Legal Department for review by e-mailing a link or PDF of the document to [info@pji.org](mailto:info@pji.org). As a Christian ministry, such review is provided without charge.

Ministers must listen to, and weigh in the balance, competing arguments that include medical considerations, witness to governmental authorities and the community, and the spiritual needs of congregants. Each of these voices seek to be heard as they shout over the top of the others.

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<sup>10</sup> One exception is volunteer firefighters. 8 Cal. Code of Reg. § 3411.

<sup>11</sup> By way of example, see 8 Cal. Code of Reg. § 336.

<sup>12</sup> The drafting, adoption and implementation of regulations is a complex process. Under the Administrative Procedure Act (Cal. Gov. Code § 11340, et seq.) every department, division, office, officer, bureau, board or commission in the executive branch must follow specified rulemaking procedures.

This letter is intended to assist in providing guidance on legal obligations in order to expand your ministry's options as you deliberate on whether to include singing and/or chanting in worship services.

Very truly yours,



Kevin T. Snider, Chief Counsel  
PACIFIC JUSTICE INSTITUTE  
9851 Horn Road, Suite 115  
Sacramento, CA 95827

Tel. (916) 857-6900

E-mail: [ksnider@pji.org](mailto:ksnider@pji.org)

*P.S.* If you would like a PJI staff attorney to provide a one to two-hour seminar on legal topics related to the operation of churches and other religious institutions, please call the number above for available topics and scheduling.<sup>13</sup>

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<sup>13</sup> Though seminars are free, they require a minimum registration of representatives from twenty churches or ministries. 3