



October 12, 2023

Via Email: bor.yang@oregonlegislature.gov

Senate Conduct Committee
c/o Legislative Equity Officer Bor Yang

Re: Response to Rule 27 Report

Dear Senate Conduct Committee,

Senator Hayden knew when he filed his Rule 27 complaint that a majority of the Conduct Committee—whose members all serve at the pleasure of the Senate President—would almost certainly decline to publicly acknowledge that the Senate President violated Rule 27. Regardless, Senator Hayden has endeavored to follow the Rule 27 process to give the Senate an opportunity to correct past errors by definitively rejecting the unconstitutional discrimination that occurred in the 2023 session.

Over more than eight years of legislative service, Senator Hayden has routinely been granted excused absences for religious observance and other purposes, including early in the 2023 legislative session. Senator Hayden informed the Senate President and his staff multiple times of his religious convictions and family needs.¹

Midway through the 2023 legislative session—on May 2, 2023—Senator Hayden voted to try to remove Senator Rob Wagner from the office of Senate President, but the vote failed. After that vote, things changed.

Senate President Rob Wagner violated longstanding legal protections by denying Senator Hayden’s requests for excused absences—and even threatening fines—for: (1) First Amendment rights, including religious observance and preaching as a church elder at a Saturday service; (2) protected leave for such purposes as caring for his daughter with Williams Syndrome since the public school refuses to serve his daughter’s disabilities and he needs to share caretaking responsibilities with his wife several days a week;² and (3) federal government obligations as a contracted wildland firefighter, which preempt state law and are essential to preserving public safety for all Oregonians, Oregon’s natural environment and resources, and our air quality.

¹ Although there are a few errors in the investigator’s fact findings, most are not worth noting at this time. However, the Senate President’s claim not to have been aware of Senator Hayden’s Saturday religious observance is inconsistent with multiple emails. For example:

- April 12 email chain between Senator Hayden’s staff and Senate President’s staff it was noted that: “If there is floor on Saturday, [Senator Haden] will not be present due to religious services.”
- April 27 email chain between Senator Hayden’s staff and Senate President’s staff noting “if there is a Saturday session scheduled this week, he has a religious commitment on that day (generally all Saturdays but particularly on days where his attendance is part of the services).”

² You can learn more about Williams Syndrome here: https://en.wikipedia.org/wiki/Williams_syndrome It is widely known that children with Williams Syndrome need special education programs, although the Haydens’ public school refuses to provide educational services.

These denials occurred at the same time that excused absences were granted to other senators for other reasons, which exposes the obvious illegality of such discriminatory actions. Notably, there were no written standards regarding what would or would not qualify as an excused absence; all decisions were at the whim of the Senate President.

Between May 2 and the end of session, the Senate President only attempted to hold session on two Saturdays, May 6 and June 24. Both times Senator Hayden requested an exemption for religious reasons. Both times the Senate President denied the request, once when the Senate President did not expect to have quorum and once when the Senate President did expect to have quorum. The Senate President (via his spokesperson and floor comments at the time, and now through the investigator) maintains that the May 6 denial was only about restoring quorum and not religious discrimination, but the evidence shows this was not the case. Even considering only the facts as determined by the investigator who works for the Senate President is sufficient to find constitutional violations.

These actions are a textbook example of religious discrimination and retaliation that is illegal under the First Amendment to the United States Constitution. It is true that actions “incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable.” *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021). However, a government policy “is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions.” *Id.* at 1877 (internal punctuation removed) (citing example of discrimination against Seventh-day Adventist fired for not working on Saturdays in *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790 (1963)). Thus, where there is—like here—“a system of individual exemptions, [the Senate President] may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Id.* Similarly, a policy “lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way.” *Id.* (describing example in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 531–532, 113 S.Ct. 2217 (1993)).

There is no dispute that Senator Hayden was denied an excused absence for observing the Sabbath on Saturday, May 6, 2023 while on that very same day the Senate President granted two excused absences to other Senators. See, e.g., <https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023051101> (at 11:20). Here, as in *Fulton*, “creation of a system of exceptions [at the Senate President’s sole discretion] undermines the [Senate President’s] contention that [his] policies can brook no departures. The [Senate President] offers no compelling reason why [he] has a particular interest in denying an exception to [Senator Hayden] while making them available to others.” *Fulton* at 1882.

The Senate President cannot claim that all excused absence requests had to be denied because that is inconsistent with what actually occurred. There can be no dispute that Senator Hayden was denied an excused absence for observing the Sabbath on Saturday, May 6, 2023 while on that very same day two excused absences were granted to other Senators for non-religious reasons. Any claim that most excused absence requests had to be denied to restore a

quorum is not sufficient to justify the anti-religious discrimination inherent in protecting physical health but not spiritual health, nor to justify denial of Senator Hayden's religious accommodation request on June 24, 2023 after quorum was restored.

The US Supreme Court has routinely rejected the type of excuses for discrimination that are offered by the Senate President here—even during the COVID-19 pandemic when considering far weightier interests that a few weeks of session delays.

During the relevant time period, even the investigator noted that the Senate President allowed excused absences for funeral attendance,³ a burst waterline, health conditions, and participating in the Rule 27 process. Once the Senate President gave such activities favored status, the burden shifts to the Senate President to show why religious observance is excluded from such favored status. *See, e.g., Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 73, 208 L. Ed. 2d 206 (2020) (Kavanaugh, J. concurring). Even under the Senate President's claimed nebulous "standard," there is zero logical justification for why the allowed excused absences substantively differed from the core First Amendment activity of a church elder preaching at a church service.

Under well-established case law, the Senate President engaged in unconstitutional religious discrimination. This is more than sufficient to demonstrate a Rule 27 violation because Rule 27(8)(c) prohibits conduct that is "an unlawful practice that aids or abets discrimination in a place of public accommodation under the laws of the state," Rule 27(4)(a) prohibits religious-based harassment, and Rule 27(8)(a) prohibits conduct that is "harassment and creates a hostile work environment." Similar analysis would demonstrate other legal violations, but further discussion is not worthwhile due to the political power of the Senate President over the legislative process.

Senator Hayden requested reasonable accommodations from a place of public accommodation that provides a public service, and he was denied, without an interactive process or discussion regarding the denial. Senator Hayden faced a Hobson's choice of suffering unexcused absences in order to honor his religious convictions and care for his family when excused absences were freely granted to others. This is illegal. This violates Rule 27.

We submit this letter on behalf of Senator Hayden instead of appearing at the hearing. There is no need for further fact-finding. All that remains is to apply the law. How this complaint is handled will demonstrate whether Rule 27 is sufficient to hold power accountable or if other remedies are required.

Yours truly,

SHERMAN, SHERMAN, JOHNNIE & HOYT, LLP

s/ Steve Elzinga
steve@shermlaw.com

³ A funeral service is one type of religious observance that the Senate President evidently favors over Seventh Day Adventists and thus also shows the even greater constitutional violation of viewpoint discrimination.