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VIA HAND DELIVERY

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Marion County District Attorney's Office
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Scott A. Burgess
Legislative Administrator
900 Court St. NE, Room 140-A
Salem, Oregon 97301

RE: Michele Darr, Criminal Trespass II

Gentlemen:

We represent Michele Darr, on behalf of the ACLU, concerning her citations and arrests for criminal trespass and her political protest on the State Capitol steps. We are grateful for the communication we have had already on this case, and we hope to continue our cooperative efforts. However, we write to inform you that we believe Ms. Darr's arrests have resulted in several constitutional violations and that she is currently being threatened, without justification, with several others.

Ms. Darr has stationed herself on the Capitol steps in Salem for more than a month, protesting the proposed deployment of the Oregon National Guard to Iraq and Afghanistan. As part of her protest, Ms. Darr has displayed protest signs and staged candlelight vigils. She has also been on a hunger strike for more than three weeks. She states that she will end her hunger strike once the Governor meets with her and several representatives from the Oregon National Guard and their families to discuss their concerns about Oregon soldiers.

On November 13, 2008, while Ms. Darr was engaging in her peaceful protest on the Capitol steps, the Legislative Administration Committee held a meeting in which it discussed an existing "policy." The "policy" appears to give the Legislative Administrator discretion, without any guidance as to how that discretion is to be exercised, as to whether to allow use of the State Capitol steps between 11 p.m. and 7 a.m. Many times that discretion has been exercised in favor of allowing groups to be on the Capitol steps between those hours. For example, the Salem Bible Reading Marathon – which stages continuous, 24-hour readings of the Bible – has been

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given overnight access to the steps routinely since 2000, without any interference from the State. The members of the Legislative Administration Committee were made aware of this at the meeting. In fact, a representative of the Salem Bible Reading Marathon testified before the Committee. At the meeting, members of the Committee also acknowledged that enforcement of the "policy" has been, as one member put it, "all over the map." Yet the Committee decided, in light of "the current use," to begin "enforcing" the discretionary "policy" immediately.

On the same day the Committee "reaffirmed" its "policy," it dispatched Mr. Burgess to deliver a letter to Ms. Darr demanding that she immediately obey the "reaffirmed" "policy" and leave the premises by 11:00 p.m. that night. When she did not obey that command, the State arrested Ms. Darr for criminal trespass. In fact, Ms. Darr was arrested on two separate occasions – once on November 13 and again on November 15, 2008. Ms. Darr – presumably much like the Bible readers – has not caused any harm to anyone or any property at the Capitol and has not impeded public access.

We have serious doubts as to whether the "policy" at issue – which even Legislative Administration Committee staff had difficulty locating – and which apparently is not readily available to the public, is a "law" the violation of which justifies a charge of criminal trespass. In any event, as the elected State legislators who comprise the Legislative Administration Committee must surely know, the State cannot allow those expressing favored views access to the Capitol steps and then suddenly discover a "policy" and decide to "reaffirm" and enforce it in a manner which denies access to others.

Sections 8, 20 and 26 of Article I of the Oregon Constitution protect Ms. Darr's right to protest on the Capitol steps, including candlelight vigils, her ongoing hunger strike, and display of political signs. Under the analytical framework set forth by the Supreme Court of Oregon in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the citations and arrests, and the conduct of the Legislative Administration Committee, violate protected rights to free expression. See *City of Eugene v. Lincoln*, 183 Or App 36, 50 P3d 1253 (2002); *City of Eugene v. Lee*, 177 Or App 492, 34 P3d 690 (2001). The citations and arrests likewise violate Article I, section 26, which protects her rights to assembly and to petition the Governor for redress of grievances.

The Legislative Administration Committee's decision to begin rigid "enforcement" of its "policy" while Ms. Darr was engaging in her peaceful protest – essentially changing the rules midstream, and causing her to be arrested for doing the same thing others have been allowed to do for many years – also violates her rights under the First and Fourteenth Amendments of the U.S. Constitution and Article I, section 20 of the Oregon Constitution. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 US 471, 497, 119 S Ct 936 (1999) (Ginsburg, J., concurring) ("Under our selective prosecution doctrine, the decision to prosecute may not be deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights.") (internal

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citations and quotations omitted); *United States v. Oaks*, 508 F2d 1403 (9th Cir 1974) (reasserting that “a policy of selective prosecution which purposefully discriminates against persons choosing to exercise their First Amendment rights is impermissible.”) (internal citation omitted); *City of Eugene v. Crooks*, 55 Or App 351, 353-54, 637 P2d 1350 (1981).

We urge you immediately to reconsider the decision to prosecute Ms. Darr, and to allow her the same access to the steps of the Capitol building that has been allowed to participants in the Salem Bible Reading Marathon, and perhaps other groups, for many years. Ms. Darr is scheduled to be arraigned on Thursday, December 11, 2008. Unless the State withdraws its charges against Ms. Darr and retracts any threats to have her arrested or removed from the Capitol steps by 5:00 p.m. on Thursday, December 11, we will initiate appropriate legal action on her behalf.

Sincerely,

MICHAEL E. SWAIM, P.C.

DAVIS WRIGHT TREMAINE, LLP

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Attorneys for Michele Darr

cc: Senator Peter Courtney, Senate President
Representative Dave Hunt, House Majority Leader
Chin See Ming