

**STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA
REGARDING THE UNCONSTITUTIONALITY OF HF400**

Executive Summary

The American Civil Liberties Union of Minnesota (“ACLU-MN”) opposes HF400 in its current form because the bill infringes upon the First Amendment rights of freedom of expression, assembly, and association guaranteed by the Fourteenth Amendment of the U.S. Constitution. It also violates Article 1, Sections 3 and 16 of the Minnesota Constitution. The basis of our opposition is as follows:

1. HF400 requires vendors who wish to contract with the State of Minnesota to certify that they are not engaged in a boycott of Israel, meaning that they are not boycotting Israel “in compliance or adherence to calls for a boycott of Israel,” and that they are not discriminating against Israel without “a valid business reason.”
2. A boycott for the purpose of trying to force political or social change is protected expression under the First Amendment.
3. Under the “unconstitutional conditions” doctrine government may not require a person or business entity to forego a constitutional right in order to do business with government.
4. Requiring vendors to forego the right to boycott Israel as a condition of doing business with the State of Minnesota places an unconstitutional condition upon such vendors.
5. Therefore, HF400 is unconstitutional.

Background

HF400 reads as follows:

A bill for an act relating to state contracts; requiring that the vendor not engage in a boycott of Israel; proposing coding for new law in Minnesota Statutes, chapter 16C.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1.

[16C.053] NO BOYCOTT OF ISRAEL.

- (a) A contract for goods or services must require the vendor to certify that the vendor is not currently engaged in, and agrees for the duration of the contract not to engage in, a boycott of Israel. This section applies to the Minnesota State Colleges and Universities and to contracts entered into by entities in the

legislative branch. This section does not apply to contracts with a value of less than \$1,000.

- (b) For purposes of this section, “boycott of Israel” means engaging in refusals to deal, terminating business activities, or other actions that are intended to limit commercial relations with Israel, or persons or entities doing business in Israel or in Israeli-controlled territories, when such actions are taken: (1) in compliance or adherence to calls for a boycott of Israel other than those boycotts to which United States Code Appendix, title 50, section 2407(c), applies; or (2) in a manner that in any way discriminates on the basis of nationality or national origin and is not based on a valid business reason.

HF400 explicitly penalizes vendors who have a *political* reason for not doing business with or in Israel by forbidding them from contracting with the State of Minnesota. This is a viewpoint-based restriction on speech that violates the First Amendment: Out of all businesses that do not transact business with Israel, it penalizes only the ones who have declined to transact business with Israel as part of a politically-motivated boycott. The First Amendment protects political expression, including politically-motivated boycotts. Therefore, HF400 is unconstitutional.

HF400 would require persons who wish to boycott Israel as a means of political expression to sacrifice their First Amendment rights of freedom of speech, freedom of assembly, and freedom of association in order to do business with the State of Minnesota. In particular, it purports to punish supporters of the BDS movement. “The Boycott, Divestment, Sanctions (BDS) movement works to end international support for Israel’s oppression of Palestinians and pressure Israel to comply with international law.” <https://bdsmovement.net>. HF 400 does not mention the BDS movement, but it would penalize supporters of the BDS movement who wish to boycott Israel because the bill includes in its prohibition boycotts undertaken “in compliance with adherence to calls for a boycott of Israel . . .” or to discriminate on the basis of nationality “not based on a valid business reason.”

The ACLU-MN takes no position on the merits of the BDS movement or its objectives. Nor does the ACLU-MN take a position on the merits of the opposition to the BDS movement or its objectives. The mission of the ACLU-MN is to protect constitutional rights, particularly those guaranteed by the First Amendment. Because HF 400 would infringe those rights the ACLU-MN opposes its enactment.

Legal Analysis of ACLU-MN’s Position

Well-established law protects politically-motivated boycotts. “Concerted action is a powerful weapon. * * * [O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932-933 (1982). For that reason economic boycotts that seek to “bring about political, social, and economic change” constitute protected speech, assembly, and petition under the First Amendment. *Id.*, 458 U.S. at 911-912.

In *Claiborne*, a boycott of white merchants led by the NAACP had as its “acknowledged purpose . . . to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing.” The Supreme Court held: “Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendment,” and went on to state:

The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them right to equal treatment and respect. As we so recently acknowledged in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294, ‘the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.’ We recognized that by ‘collective effort individuals can make their views known, when, individually, their voices would be faint or lost.’ *Ibid.* In emphasizing ‘the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues, *id.*, 295, we noted the words of Justice Harlan, writing for the Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460:

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized upon the close nexus between the freedoms of speech and assembly.”

Claiborne, id., 458 U.S. at 907-908. The Court noted “Through speech, assembly, and petition -- - rather than through riot or revolution ---petitioners sought to change a social order that had consistently treated them as second-class citizens.” *Id.*, at 911-912. Thus, “While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values’ . . . ‘There is a profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust and wide-open.’” *Id.*, at 913 (internal citations omitted).

HF400 would impose a condition upon the right of vendors to contract with the State of Minnesota: A vendor would have to give up its First Amendment right to boycott Israel “in compliance or adherence to calls for a boycott of Israel” and without “a valid business reason” as a condition of doing business with the State of Minnesota. But under the “unconstitutional-conditions doctrine,” government contractors are protected against unconstitutional conditions placed on the exercise of constitutional rights, including coercion of political association, and, as here, coercion of non-association, as is evident from any number of Supreme Court decisions. Discussion of just two of those cases will suffice.

In *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996), the issue was whether “an independent contractor, who, in retaliation for refusing to comply with demands for political support, has a government contract terminated or is removed from an official list of contractors authorized to perform public services” had been subjected to treatment that was not “reasonably appropriate.” *Id.*, at 714. The Court initially noted that nobody has a right to a government job (a policeman “may have a constitutional right to talk politics . . . [but] he has no constitutional right to be a policeman”). *Id.*, at 717 (internal citation omitted). Nonetheless, “A state may not condition public employment on an employee’s exercise of his or her First Amendment rights.” *Id.* The plaintiff in *O'Hare* was a vendor that was the subject of an effort to coerce its owner to give up his right to support a political party or its candidates by supporting the candidates of a different political party. The Court viewed this situation as falling squarely within its long line of “unconstitutional-condition” cases, such as *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (teaching position conditioned upon nonmembership in ‘subversive’ organizations). *Id.*, at 720-721.

O'Hare refused to recognize a distinction between independent contractors and employees because such a distinction “would invite manipulation by government, which could avoid constitutional liability simply by attaching different labels to particular jobs.” *Id.*, at 721-722. The Court went on to say “Independent contractors, as well as public employees, are entitled to protest wrongful government interference with their rights of speech and association.” *Id.*, at 723. Recognizing that government officials have the discretion to terminate at-will contracts without cause, the Court said “it does not follow that this discretion can be exercised to impose conditions on expressing, or not expressing, specific political views.” *Id.* At 725-726. Thus, the Court concluded, “We decline to draw a line excluding independent contractors from the First Amendment safeguards of political association afforded to employees.”

Agency for International Development v. Alliance for Open Society International, 133 S.Ct. 2321 (2013) involved a statute appropriating billions of dollars to fund efforts by nongovernmental organizations to assist in the fight against HIV and AIDS. The statute imposed two conditions on receipt of funding. First, no funds made available by the act could be used to advocate in favor of prostitution. Second, no funds could be used by an organization “that does not have a policy explicitly opposing prostitution and sex trafficking.” *Id.*, at 2324-2325. The Court framed the question before it as follows:

“The Policy Requirement mandates that recipients of Leadership Act funds explicitly agree with the Government Policy to oppose prostitution and sex trafficking. It is, however, a basic First Amendment principle that “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citing *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and *Wooley v. Maynard*, 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977)). “ At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broadcasting System, Inc. v.*

FCC, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); see *Knox v. Service Employees*, 567 U.S. ___, ___-___, 132 S.Ct. 2277, 2288, 183 L.Ed.2d 281 (2012) (“The government may not ... compel the endorsement of ideas that it approves.”). Were it enacted as a direct regulation of speech, the Policy Requirement would plainly violate the First Amendment. The question is whether the Government may nonetheless impose that requirement as a condition on the receipt of federal funds.”

Id., at 2327. The Court held that the condition violated the First Amendment, concluding its detailed analysis by saying “we cannot improve upon what Justice Jackson wrote for the Court 70 years ago: ‘If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.’” *Id.*, [internal citation omitted].

The Legal Rationale Advanced By Proponents of HF400 Is Seriously Flawed

We are aware that certain proponents of HF400 have provided members of the legislature with a May 10, 2016, letter drafted by Eugene Kontorovich, a law professor at Northwestern University. Minnesota legislators should not rely on the analysis in this letter for several reasons.

The principal Supreme Court case upon which Professor Kontorovich relies in his letter is *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (2006) (“*FAIR*”). Unfortunately, and undoubtedly unbeknownst to the supporters of HF400 who are circulating Professor Kontorovich’s letter, his description of *FAIR* is incomplete and misleading. As Professor Kontorovich describes it, “The Supreme Court unanimously held in *Rumsfeld v. FAIR* that the government could deny federal funding to universities that boycott military recruiters. To be sure, the boycott was based on political considerations – but even that did not make it speech. The Court rejected the argument that dealing with military recruiters sends a message of support for the military’s policies or any other kind of message.” It went on to quote the decision in *FAIR* as follows:

“[T]he conduct regulated by the [law] is not inherently expressive. . . . These actions were expressive only because the law schools accompanied their conduct with speech or explaining it The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.”

Professor Kontorovich says “even when it comes to Israel boycotts, the act of boycotting itself does not explain a company’s motives, or express any political viewpoint. Companies may boycott Israel to prevent further harassment from anti-Israel activists; to curry favor with Arab states; or to protest particular policies of Israel’s. Unless the company explains its actions, those actions have no message.”

Taking Professor Kontorovich's latter statement first, even if he were correctly describing the holding in *FAIR*, his analysis is inapplicable to HF400 because boycotting Israel to prevent harassment by anti-Israeli activities, or to curry favor with Arab states would not appear to be prohibited by HF400; HF 400 only applies to boycotts that are "in compliance or adherence to calls for a boycott of Israel," or that discriminate against Israel without a legitimate business reason; in other words, to engage in concerted effort to protest Israeli policies.

More significantly, the Supreme Court's rationale underlying the holding in *FAIR* differs from Professor Kontorovich's description of it and also differs from the reasoning in unconstitutional-condition cases like *O'Hare* and *Agency for International Development* because of the subject matter at issue-military recruitment. In *FAIR* the Court noted that the constitutional power of Congress to "provide for the common Defence," "[t]o raise and support Armies," and "to provide and maintain a Navy," Art. 1, sec. 8, cls. 1, 12-13, is "broad and sweeping," and that "*there is no dispute in this case that it includes the authority to require campus access for military recruiters.*" *FAIR*, 547 U.S. at 58 (italics added). While acknowledging that there are some First Amendment constraints on Congress' exercise of its power to raise armies and a navy, the Court said that "does not mean that we ignore the purpose of this legislation when determining its constitutionality." *Id.*, at 58. In the case of the statute at issue in *FAIR*---the Solomon Amendment --- Congress "chose to secure campus access for military recruiters indirectly, through its Spending Clause power, giving universities the choice of allowing students the same access to military recruiters that it affords to other recruiters or forego certain federal funds. *Id.*, at 58. The Court said "Congress' decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs . . . Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities." *Id.*, at 58-59.

The Court explicitly noted that under the unconstitutional-conditions doctrine --- the doctrine under which *O'Hare* and *Agency for International Development* were decided --- the statute at issue in *FAIR* "*would be unconstitutional if Congress could not directly require universities to provide military equal access to their students.*" *Id.*, at 59 (italics added). In other words, "It is clear that a funding condition cannot be unconstitutional if it could constitutionally be imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds." *Id.*, at 59-60. Finally, it should be noted that *FAIR* was decided seven years before *Agency for International Development*, a case which cites *FAIR* but nonetheless finds a violation of the unconstitutional-conditions doctrine on facts closely analagous to those presented by HR400; significantly, both decisions were written by Chief Justice Roberts.

In considering HF400, the Minnesota legislature does not have the benefit of Congress' constitutional power to raise an army and a navy which might allow it to avoid the unconstitutional conditions doctrine. Indeed, it is not clear that the Minnesota legislature has the power to have a foreign policy independent of that of the federal government. Moreover, it is quite clear that the Minnesota legislature could not pass a law prohibiting (or requiring) support of a boycott of Israel, unlike Congress, which has the power to directly mandate that universities allow military recruiters on campus. Thus the analysis in *FAIR* is inapplicable to consideration of the constitutionality of HF400.

The rest of Professor Kontorovich's arguments are unsupported by case law tied to cogent analysis, and in any event don't apply to the language of HF400. Most of his arguments are analyzed and refuted in Recent Legislation, *South Carolina Disqualifies Companies Supporting BDS From Receiving State Contracts*, 129 Harv. L. Rev. 2029 (May 10, 2016). Moreover, Professor Kontorovich's summary dismissal of the importance of *Claiborne* to the right of people to engage in economic boycotts for political purposes --- the indisputable holding in *Claiborne* --- by saying that it didn't deal with state funding is a red herring. *Claiborne* holds that the right to engage in politically motivated boycotts is protected by the First Amendment. The question regarding HF400 is whether requiring someone to give up that right in order to get a state contract violates the unconstitutional-conditions doctrine; the unconstitutional-conditions doctrine was not at issue in *Claiborne*, so noting that the case did not involve conditions on state funding is a *non sequitur*.

Conclusion

In short, HF400 imposes an unconstitutional condition that violates the First Amendment. The legislature should not enact it in its present form.