



**Statement of the ACLU of Minnesota
In Opposition to HF 400
House State Government Finance Committee
February 15, 2017**

The ACLU of Minnesota (ACLU-MN) is a nonpartisan, nonprofit organization dedicated to protecting the civil liberties of all Minnesotans under the United States and Minnesota constitutions. We have over 38,000 supporters throughout Minnesota, and promote our mission through litigation, public education and lobbying efforts.

The ACLU-MN opposes HF 400 because it 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.

HF 400 would require persons who wish to boycott Israel as a means of political expression to sacrifice their First Amendment rights 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>.

While the ACLU-MN takes no position on the BDS movement, we oppose bills like these that would require state and local governments to deny benefits (such as contracts) in retaliation for the exercise of freedom of expression and association. They place unconstitutional conditions on the exercise of constitutional rights.

Boycotts to achieve political goals are a form of expression that the Supreme Court has ruled are protected by the First Amendment’s protections of freedom of speech, assembly and petition. *See, NAACP v. Claiborne Hardware Co*, 458 U.S. 886, 932-933 (1982). SF 247 violates what the Supreme Court refers to as the “unconstitutional conditions” doctrine. In other words, the government violates the First Amendment when it requires someone to forego their constitutional rights, or requires someone to exercise their constitutional rights in a particular way, in order to enter into contracts or receive grants of money from government bodies. *See, O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).

The U.S. Supreme Court upheld the unconstitutional conditions doctrine as recently as three years ago. The Court held that the United States could not, as a condition of providing funding to non-governmental agencies to combat HIV and AIDS in Africa, require those NGOs to adopt policies opposing prostitution. They held that because NGOs have a constitutional right to take any position they want about issues involving prostitution, Congress could not condition their receipt of federal funds on adopting a point of view dictated by the government. *Agency for International Development v. Alliance for Open Society International*, 133 S.Ct. 2321 (2013).



The right to boycott to achieve political ends such as persuading Israel to change its policies regarding West Bank settlements is expression protected by the First Amendment. HF 400 requires a potential vendor to forego the right to engage in such a boycott as a condition of entering into a contract with the State. For that reason, HF 400 violates the unconstitutional conditions doctrine and the First Amendment to the Constitution.

These anti-BDS bills should not be equated with other laws that prohibit various kinds of discrimination in the business world. Previous anti-discrimination laws did not target those who participated in protected boycotts. Simply put, those who discriminate in things like hiring or public accommodations are not protected by the First Amendment, while participating in a peaceful economic boycott to bring about political, social or economic change is constitutionally protected.

Proponents of anti-BDS bills frequently cite a U.S. Supreme Court case called *Rumsfeld v. FAIR* as one that supports the notion these bills do not impose an unconstitutional condition. In *Rumsfeld*, the Court found that there was no unconstitutional condition because the power of Congress to raise an Army and a Navy gave it the right to mandate that military recruiters be allowed on college campuses as a condition of the colleges receiving certain types of federal funds, regardless of whether the colleges agreed with the government's position regarding military actions in the Middle East. This is quite obviously a very different situation.

Supporters also point to federal anti-boycott legislation from the 1970s as justification for this bill. However, federal anti-boycott legislation is enacted pursuant to Congress' exclusive power to regulate foreign commerce. *U.S. Constitution, Article 1, Section 3, Clause 8*. Accordingly, state laws attempting to regulate foreign commerce – as SF 247 would do – are unconstitutional. Finally, the very legislation that proponents cite has a pre-emption provision that specifically invalidates any state anti-boycott laws. *See 50 U.S.C. § 4067*. Supporters note that there is a bill currently before Congress that would amend this statute to permit states to engage in this type of regulation. Even if the federal government enacts such a law, state laws are still not allowed to violate the First Amendment.

Because HF 400 infringes upon Minnesotans' First Amendment rights, we respectfully urge you to oppose it.