

Date of Hearing: April 19, 2016

ASSEMBLY COMMITTEE ON JUDICIARY
Mark Stone, Chair
AB 2844 (Bloom) – As Amended April 11, 2016

SUBJECT: PUBLIC CONTRACTS: CALIFORNIA COMBATING THE BOYCOTT, DIVESTMENT, AND SANCTIONS OF ISRAEL ACT OF 2016

KEY ISSUES:

- 1) SHOULD THE STATE OF CALIFORNIA REFUSE TO CONTRACT WITH COMPANIES THAT PARTICIPATE IN A BOYCOTT AGAINST ISRAEL, EVEN THOUGH A BOYCOTT IS PROTECTED SPEECH AND DENYING A BENEFIT BASED ON THE EXERCISE OF PROTECTED SPEECH IS MOST LIKELY AN UNCONSTITUTIONAL CONDITION?
- 2) ALTERNATIVELY, SHOULD THE STATE OF CALIFORNIA REFUSE TO CONTRACT WITH COMPANIES THAT ENGAGE IN DISCRIMINATORY BUSINESS PRACTICES AS OPPOSED TO PROTECTED SPEECH WHICH WOULD MOST LIKELY BE A CONDITION THAT WOULD SURVIVE CONSTITUTIONAL CHALLENGE?

SYNOPSIS

This bill is a response to the Boycott, Divestment and Sanctions (BDS) movement, an organized campaign calling upon businesses, unions, churches, universities, and academic associations, among others, to divest all funds from Israel, or from any company that does business in or with Israel. It calls for boycotts of Israeli goods and products and seeks to prohibit academic and cultural exchanges between Israel and the United States. The most commonly asserted goal of BDS is to pressure Israel to change its policies toward, and treatment of, Palestinians in the occupied territories. The author and supporters of this bill see the BDS movement as a continuation of the Arab League boycott, an effort to isolate and "demonize" Israel. This bill would, therefore, prohibit a public entity from entering into a contract if the company seeking the contract is participating in a boycott against Israel. The bill would require the Department of General Services (DGS) to develop a list of companies engaged in a boycott against Israel. The bill sets forth procedures by which a company could seek removal from the list, and it would impose civil penalties on any company that falsely certified that it was not engaged in a boycott of Israel. As noted in the analysis, the bill in print raises serious and perhaps insurmountable First Amendment concerns. Most notably, it offers a clear illustration of the "unconstitutional conditions" doctrine, which holds that a government may not condition a government benefit on the recipient's willingness to forgo a constitutional right, and its corollary, that government cannot deny a benefit to penalize a person for exercising a constitutional right. The Committee has recommended amendments that may address the constitutional issues, but at the time of this writing, the author had not informed the Committee as to whether he would accept the suggested amendments. The bill is supported by Jewish-American groups, including the Jewish Public Affairs Committee of California and the Simon Wiesenthal Center, as well as the California Teamsters Public Affairs Council. The bill is opposed by dozens of groups representing a range of civil rights, civil liberties, religious, peace, human rights, and Palestinian groups. The bill recently passed out the Assembly Committee on Accountability and Administrative Review on a 5-1 vote, with three members abstaining.

SUMMARY: Prohibits a public entity from entering into a contract if the contracting company is participating in a boycott against Israel. Specifically, **this bill:**

- 1) Provides that, notwithstanding any other law, a public entity shall not enter into a contract on or after January 1, 2017, to acquire or dispose of goods, services, information technology, or for construction if the contracting party is participating in a boycott against Israel.
- 2) Prohibits a company that is on a list of designated companies engaging in a boycott of Israel from bidding on, submitting, or entering into or renewing a contract with a public entity to acquire or dispose of goods, services, information technology, or construction for \$10,000 or more.
- 3) Requires the Department of General Services (DGS) to create, based upon a specified federal report, a list of companies engaged in a boycott of Israel, and to update that list every 180 days. Requires DGS to provide a company with 90-days prior notice of its intent to place the company on the list. Provides the company with an opportunity to contest its inclusion on the list.
- 4) Requires any company that submits a bid or proposal to enter into or renew a contract for \$10,000 or more with a public entity to certify that it is not on the DGS list and is not engaging in a boycott against Israel. If the public entity determines, by credible information, that a company has submitted a false certification, the company shall be subject to a civil penalty of \$250,000 dollars or twice the amount of the value of the contract, whichever is greater. Permits a city attorney, county counsel, or district attorney to bring a civil action to recover the civil penalty and associated costs and fees of recovery. A company that submits a false certification would also be ineligible to bid on any contract for three years. Requires DGS to submit the name of any company that submits a false certification to the Office of the Attorney General.
- 5) Defines "boycott of Israel" to mean refusing to deal with, terminating business activities with, or taking other actions that are intended to penalize, inflict economic harm, or otherwise limit commercial relations with Israel or persons or entities incorporated with Israel or doing business in Israel for reasons other than business, investment, or commercial reasons. Specifies that "boycott" does not include any of the following: a decision based on business or economic reasons; termination or prohibition of commercial activity within a particular jurisdiction that is required by federal or state law.
- 6) Defines "company" to mean a sole proprietorship, organization, association, corporation, partnership, joint venture, limited partnership, limited liability partnership, limited liability company, or other business association, including all wholly owned subsidiaries, majority-owned subsidiaries, and parent companies, that exist for the purpose of making profit.

EXISTING LAW:

- 1) Prohibits Congress and, through the Fourteenth Amendment, any state from abridging freedom of speech or of the press. (United States Constitution, Amendments I and XIV.)
- 2) Provides that every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. Provides that no law may restrain or abridge liberty of speech or press. (California Constitution, Article I, Section 2(a).)

- 3) Holds that an economic boycott, even though it may cause economic disruption, is protected expression under the First Amendment. (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886.)
- 4) Holds, under the unconstitutional conditions doctrine, that the government cannot condition a benefit on the requirement that a person forgo a constitutional right, and, as a necessary corollary, that the government may not deny a benefit to a person because he or she exercises a constitutional right. (*Regan v. Taxation with Representation of Washington* (1983) 461 U.S. 540, 545, citing *Perry v. Sindermann* (1958) 408 U.S. 593, 597; see also *Speiser v. Randall* (1958) 357 U.S. 513, especially at 518-519; *Federal Communications Commission v. League of Women Voters* (1984) 468 U.S. 364; *Legal Services Corporation v. Velazquez* (2001) 531 U.S. 533; and *Rumsfeld v. Forum for Academic and Institutional Rights* (2006) 574 U.S. 47, 59.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: According to the author and sponsors, this bill is a response to the Boycott, Divestment and Sanctions (BDS) movement, an organized, international campaign calling upon businesses, unions, churches, universities, and academic associations, among others, to divest any funds or investments in Israel, or any company that does business in Israel. It calls for boycotts of Israeli goods and products, and seeks to prohibit academic and exchanges between Israel and the United States. The most commonly asserted purpose of these actions to pressure Israel to change its policies toward, and treatment of, Palestinians in the occupied territories. While the proponents of this bill depict the BDS movement as an anti-Semitic, internationally-led effort to demonize Israel, the opponents of this bill – including many Jewish American groups who have nothing to do with the BDS movement – contend that the purpose is to change Israel's policies. Both proponents and opponents are understandably passionate about this bill, which pits one group who is deeply and genuinely concerned about the fate of Israel's existence, against another group that is just as deeply and genuinely concerned about the fate of Palestinians in the occupied territories. This analysis, however, deals with a different issue: whether the provisions of this bill would likely violate the First Amendment. Not surprisingly, proponents of the bill seem quite certain that it does not violate the First Amendment; while opponents are equally certain that it does. This analysis presumes that matters of constitutional law are rarely if ever certain. It concludes that the bill in print raises very serious and possibly insurmountable First Amendment concerns; however, it also concludes that if the bill were amended to focus on discriminatory "practices," as opposed to boycotts, it would be more likely to withstand a First Amendment challenge.

What the Bill Does: As currently in print, this bill would prohibit a public entity, on or after January 1, 2017, from entering into a contract with a company if the company seeking the contract is participating in a boycott against Israel. It would, correspondingly, prohibit a company participating in a boycott against Israel from bidding on a contract with any public agency if the contract is valued at more than \$10,000. The bill would also require the Department of General Services (DGS) to develop a list of companies that it determines are engaged in a boycott against Israel. In order to develop this list, DGS is directed to use a report that the President of United States will be required to submit to Congress pursuant to the recently signed HR 644, known as the Trade Facilitation and Trade Enforcement Act of 2015. DGS would be required to update its list every 180 days.

Once the relevant companies are identified and the list becomes effective, DGS would provide each company with 90 days' written notice of its intent to include the company on the list. The notified company would be afforded an opportunity to contact DGS in writing if it believed that it had been wrongly placed on the list. The bill does not specify what would happen if DGS were not persuaded by the company's claim, or what remedies, if any, the company would have after that point.

In addition, the bill requires any company that submits a bid for a new contract, or for renewal of an existing contract, to "certify" that it is not on the DGS list and is not engaged in a boycott of Israel. If DGS or the contracting public entity determined, based on "credible evidence," that the company was engaged in a boycott of Israel after certifying that it was not, the company would be liable for a civil penalty of \$250,000 or twice the value of the contract, whichever is greater.

The bill defines "boycott of Israel" in a customary way: refusing to deal with, terminating business activities with, or taking other actions that are intended to penalize, inflict economic harm, or otherwise limit commercial relations with Israel, or with persons or entities doing business in Israel, for *other than* business, investment, or commercial reasons. The bill specifies that "boycott" does not mean a decision for business or economic reasons. While the definition is customary, it nonetheless illustrates a problem when applied to this context; it may be difficult to distinguish when a decision is made to inflict harm on Israel from when a decision is made for "business or economic reasons." That is especially difficult considering that the very purpose of a boycott is to exert economic pressure. What if a company decided to stop doing business with Israel, not out of sympathy with the boycott, but because it feared that, in light of the boycott, continuing to do business with Israel would hurt its business? Would that decision constitute impermissible "participation" in the boycott, or would it be a decision for business and economic reasons?

Problems with the DGS "List" of Companies: Before addressing the larger constitutional issues, it is necessary to consider a practical problem with the bill in print. As noted, the bill requires DGS to develop a list of companies engaged in a boycott of Israel, based on a report required by "Section 909" of the Trade Facilitation and Trade Enforcement Act of 2015. (In fact, "Section 909" refers to the section of the *bill*, HR 644, that enacts the Act; the Act itself will have a different section number in the United States Codes, but that is an easily addressed technical problem.) However, it is not clear how the report required by Section 909 could possibly provide DGS with any information to help it develop a list of private companies engaged in a boycott against Israel. Section 909 does not require that the report contain any information on private companies engaged in a boycott of Israel. Rather, it requires the report to include a "description" of barriers to trade with Israel and a summary of what the President has done to remove those barriers. The final part of the report requires information on "decisions by foreign persons, including corporate entities and state-affiliated financial institutions, that limit or prohibit economic relations with Israel or persons doing business in Israel or in any territory controlled by Israel." It seems unlikely that DGS could develop a meaningful list of "companies" engaged in a boycott of Israel when all that the report calls for is a description of barriers to trade with Israel; a summary of what the President has done to remove those barriers; and information about "decisions by foreign persons" that limit or prohibit economic relations with Israel. There is no indication that the report will include any information about companies, foreign or domestic, that are participating in a boycott of Israel.

The Unconstitutional Conditions Doctrine: Proponents of the bill have suggested that this bill does not violate the First Amendment because it would not prohibit anyone from engaging in a boycott; it would only provide that those who do so would forgo the *privilege*, not the *right*, to seek a government contract. This reasoning, however, ignores the well-established "unconstitutional conditions" doctrine. An underlying principle of the doctrine is that the government cannot condition the receipt of a government benefit upon the recipient's willingness to forgo a constitutional right. The U.S. Supreme Court has also recognized a necessary corollary: just as the government may not condition a benefit on a willingness to forgo a constitutional right, it may not deny a benefit to a person because he or she has exercised a constitutional right. As a number of constitutional scholars have noted, the unconstitutional conditions doctrine is especially relevant when the constitutional right is one of the "preferred rights" of the First Amendment. The doctrine is also bolstered by the principle that the government may not leverage a benefit to prohibit indirectly what it cannot constitutionally prohibit in a direct manner. Because a government cannot prohibit speech directly (and the Supreme Court, as noted below, has held that a peaceful boycott is protected speech), it cannot withhold a government benefit to achieve that unconstitutional end indirectly. (For a concise overview of the doctrine see Erwin Chemerinsky *Constitutional Law: Policies and Principles* 3d. Ed., pp. 980-984; for a more extended treatment see Kathleen Sullivan, "Unconstitutional Conditions," 102 *Harvard Law Review* 1413 (1989).)

The author submitted to the Committee a four-page article from the magazine, *Tablet*, to provide the Committee with what was described as a legal "analysis" purporting to show the inapplicability of the unconstitutional conditions to this issue. While the article is indeed written by a respected constitutional law scholar, Eugene Kontorovich of Northwestern University School of Law, it is *not* a scholarly analysis of the issue. For example, the article begins by comparing the legislative approach endorsed by this bill with federal and state laws that require contractors to not discriminate "on the basis of sexual orientation or gender identity," because there is "no doubt that the First Amendment protects a potential contractor's belief that homosexuality is wicked behavior." The obvious problem with this comparison is that unlawful discrimination is not protected speech. Under those federal and state laws, a contractor is not denied a contract because of his or her constitutionally protected "belief" that homosexuality is wicked; rather, the contractor is denied the contract because discrimination in employment on those grounds is an illegal "practice." There is a substantial difference between the government refusing to contract with someone who engages in an illegal practice, on the one hand, and the government refusing to contract with someone who engages in a legal boycott, on the other hand, because the U.S. recognizes a boycott as protected speech. (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886.) No court has ever held that unlawful discrimination is protected speech.

Professor Kontorovich's *Tablet* article also compares legislation of the sort proposed by this bill to a law or policy that prohibits someone from wearing an "obscene T-shirt," even though "wearing obscene T-shirts is a clear First Amendment right, more obviously expressive than refusing to do business with Israeli companies. Yet states can obviously rethink contracts to companies whose executives habitually show up to meetings in such shirts, because wearing obscene T-shirts is also bad business." The problem with this comparison is that "obscenity" is a classic example of "unprotected speech" under First Amendment case law. Thus wearing an obscene T-shirt is *not* "a clear First Amendment right." Professor Kontorovich next discusses the U.S. Supreme Court's decision in *Rumsfeld v. Forum for Academic and Institutional Rights* (2006) without noting that the decision actually endorsed the unconstitutional conditions doctrine, holding that the "government may not deny a benefit to a person on a basis that

infringes constitutionally protected . . . freedom of speech even if he had not entitlement to that benefit.” (*Rumsfeld, supra*, 574 U.S. 47, at 59.) The Court upheld a policy in that particular case not because it rejected the unconstitutional conditions doctrine, but because it found the specific prohibited activity was "conduct" not "speech." Professor Kontorovich fails to acknowledge that the Court has held that a *boycott is speech*. (Curiously, Professor Kontorovich claims that those who cite *NAACP v. Claiborne* for the proposition that boycotts are protected speech are trying to "confuse people," and that it "takes more than waving one's hands in the direction of a Supreme Court case to make a legal argument." But it also does not prove that a United State Supreme Court case, widely and repeated cited as holding that a boycott is speech, is not relevant by merely asserting so. Professor Kantorovich claims that the case only held that the picketing and speeches that *accompanied* the boycott were protected. It is certainly true that the Court found the picketing and speeches to be protected speech. But it is equally true that the Court found that a boycott itself, unless accompanied by violence or other unlawful activity, is also protected speech.)

In sum, notwithstanding the claims of Professor Kontorovich, the well-established unconstitutional conditions doctrine provides that the government may not condition a benefit on the recipient's willingness to forgo a constitutional right, nor can it deny a government benefit to a person because that person has exercised a constitutional right. While it is true that "conduct," as opposed to "speech," is not protected by the First Amendment, the U.S. Supreme Court has held that a boycott is a form of protected speech. This bill, as currently in print, would prohibit a public entity from contracting with a private company that engages in a boycott of Israel. It would require a company wishing to contract with the state to certify that is not engaged in a boycott of Israel (a possible coerced speech problem) and impose draconian and unprecedented penalties (\$250,000 or twice the value of the contract) for any false certification. It allows the company to submit a letter to DGS challenging its placement on a list of companies boycotting Israel, but it provides no legal remedy if DGS rejects this challenge. It is difficult to imagine legislation more clearly calculated to have a chilling impact of the exercise of protected speech.

Federal and State Laws Restricting Boycotts Do Not Justify the Approach Taken in this Bill.

In addition to dismissing the unconstitutional conditions doctrine, proponents of this bill also claim that the approach adopted by this bill squares with prior California legislation and current federal legislation. It is true that federal and state laws were passed, beginning in the 1970s, in response to the Arab League boycott. However, while one could question the constitutionality of those laws as well, it should be noted that those laws are different from this bill in very substantial ways.

Since 1977, federal law has imposed various restrictions on foreign entities that boycott Israel, as well as restrictions on private entities that participate in boycotts against Israel fostered by foreign states. For example, the federal Foreign Relations Authorization Act of 1994, like AB 2844, prohibits government contracts with persons or entities boycotting of Israel. However, the differences between that Act and this bill are substantial and revealing. The Act prohibited the Department of State from entering into any contract with either of the following:

(A) ~~with~~ a *foreign person* that complies with the Arab League boycott of Israel, or

(B) ~~with~~ a foreign or *United States person* that discriminates in the award of subcontracts *on the basis of religion*. (22 USC Section 2679c (1)(A)-(B); emphasis added.)

In other words, the Department of State may not enter into contracts with a “foreign person” that participates in the Arab League boycott of Israel; but, significantly, when it comes to a “United States person” (defined elsewhere in the statute as a United States resident or citizen) the prohibition only applies if that person “discriminates . . . on the basis of religion.” In other words, when it comes to a citizen or resident of the United States, as opposed to a “foreign person,” the contract cannot be denied simply because the person participated in the Arab League boycott of Israel. That person must have done something more; that person must have also “discriminated” – engaged in conduct, not speech – “on the basis of religion.” Clearly, Congress understood that American citizens could not be denied a government contract simply for engaging in a boycott of Israel, even one unquestionably led by for a foreign entity and disfavored by the American government. A U.S. resident or citizen, protected by the First Amendment, could only be denied a contract if he or she engaged in a discriminatory practice “based on religion.” Clearly, Congress understood that a boycott is speech that is protected by the First Amendment, while discriminatory practices are conduct and therefore unprotected.

This federal law is remarkably consistent with California’s existing Arab League boycott law, enacted in 1992, two years before the federal law cited above. Codified as Government Code Section 16649.80 *et seq.*, the California law prohibits the State of California from investing funds in financial institutions engaged in the Arab League boycott of Israel. The author and supporters of AB 2844 cite this existing law as supporting the constitutionality of the bill under consideration. However, the California statute is substantially different than AB 2844. Specifically, the 1992 legislation does not apply to companies that engage in a boycott, but rather to companies “engaging in discriminatory business practices” *in furtherance* of a boycott of Israel. (Government Code Section 16649.82.) The existing law then defines “discriminatory business practices” to mean any activity prohibited by Business & Professions Code Section 16721 and 16721.5. These sections, in turn, prohibit business discrimination “on the basis of any characteristic listed” in the Unruh Civil Rights Act. Clearly the existing law is much more limited than AB 2844, because it does not condition the benefit on forgoing the exercise of free speech but instead denies the benefit based upon the company’s engagement in discriminatory “practices” that are already prohibited by law. It is one thing to say that the state will not contract with, or invest in, any company that violates anti-discrimination laws or engages in discriminatory behavior based on the protected characteristics in the Unruh Act; it is quite another to say that the state will not contract with a company that participates in a lawful boycott.

Proposed Committee Amendments: As currently in print, AB 2844 does not appear to the Committee able to pass constitutional muster, and even if it could, the mechanism for identifying relevant companies is simply not up to the task. ***The Committee therefore strongly recommends that the author amend the bill to model the 1992 statute on the Arab League boycott of Israel (Government Code Section 16649.80 et seq.)*** As proponents of this bill have repeatedly told the Committee, this statute has never been challenged on constitutional grounds. This appears to be true, but that also means that the statute has never been upheld as constitutional. It may be that the statute was never challenged because apparently it was rarely if ever used. At any rate, the existing state law, like the federal statute noted above, raises less compelling constitutional concerns because it focuses on “discriminatory business practices” linked to existing prohibitions in the Unruh Act, instead of focusing on boycotts which, unless coupled with other kinds of unlawful conduct, are protected speech under the First Amendment. In addition, the Committee's proposed amendments would remove any reference to a DGS list and the federal report that, even when it comes into existence, will not keep track of companies engaged in

boycotts against Israel. In addition, the Committee's proposed amendments would not single out Israel, but would rather apply to discriminatory business practices against any sovereign nation or peoples, including, but not limited to, Israel. Broadening the statute in this way may address some of the problematic, one-sided "viewpoint discrimination" in the current version of the bill.

The Committee proposes the following amendments:

- Throughout the bill replace "boycott against Israel" with "discriminatory business practices in furtherance of a boycott of a sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the State of Israel."
- Add a definition of "discriminatory business practices" that is identical to the existing Arab League boycott statute (GC 16649.80 *et seq.*), which requires discrimination based on a characteristic listed in the Unruh Act.
- Delete subdivision (c) which requires the DGS to consult the President's report from HR 644 in order to create a "list."
- Insert a new subdivision (c) that requires the Attorney General to develop, keep, and maintain a list of companies that engage in discriminatory business practices in furtherance of a boycott of a sovereign nation or peoples.
- Make conforming changes in the subsequent subdivisions so as to account for the removal of the DGS list requirement. Where appropriate in the subsequent subdivisions replace DGS with "Attorney General."
- While keeping the provisions that allow the company to challenge its inclusion on the list, delete the sections that require a company to certify that it is not engaged in a discriminatory business practice and penalize the company if it makes a false certification. It seems unduly harsh to require a company to certify or prove what it is *not* under the threat of such a severe penalty.

ARGUMENTS IN SUPPORT: According to the author:

Since 2004, organized campaigns around the world have promoted a policy of Boycott, Divestment and Sanctions (BDS) against Israel. Campaigns have been launched demanding the "divestment" of university, municipal, church, union and other investment portfolios from companies that do business with Israel, as well as the banning of Israeli products, professionals, academics, academic institutions and artistic performances (in Israel and abroad).

The arbitrary nature of these boycotts and divestments has caused concern about financial uncertainty within investment portfolios and has caused corporations to stray from their fiduciary responsibilities.

In July 2015, the Legislature affirmed its support for the MOU by passing SCR 25, noting that participants in the MOU had already expanded cooperation between Israel and California in areas such as alternative energy, agriculture, business innovation, and academia, and declaring that collaboration with Israel will foster peace and democracy in the Middle East.

Companies adhering to boycotts of Israel undermine the aforesaid policy and purpose of encouraging trade, business, and academic cooperation between California and Israel. Therefore, it is in the best interest of the State of California that it not contract with any company participating in a boycott of Israel.

The Jewish Public Affairs Committee of California (JPACC) writes that this bill "reaffirms a commitment to increased cooperation, trade, and mutually beneficial partnerships between California and Israel on key issues such as water and energy. Similar to the author's statement above, JPACC stresses that the BDS movement seeks to damage this important relationship but adds that, in addition to this, the BDS movement seeks to "demonize and isolate Israel on our campuses, in our communities, and on the world stage." JPACC claims that "BDS does not further efforts to negotiate a lasting peace for the people of Israel and the Palestinians, but rather seeks to isolate one party rather than build trust and goodwill between both. With recent BDS efforts intent on harming public opinion and delegitimizing Israel," JPACC concludes, "there is no more crucial time to pass this legislation."

ARGUMENTS IN OPPOSITION: Representatives of the Berkeley and Sacramento chapters of Jewish Voice for Peace (JVP) argue that "in the guise of expressing concern for purported discriminatory practices affecting Israel, the true agenda for these bills [AB 2844 as well as AB 1551 and AB 1552] is to shield Israel from growing criticism of its policies and from nonviolent measures taken to express and make meaningful that criticism." In addressing the constitutionality of this measure, JVP cites several court cases holding that "boycotts are protected speech and therefore must be accorded the highest level of First Amendment protection." JVP cites two U.S Supreme Court decisions holding that government contractors cannot be punished for political beliefs. JVP quotes the following language from the 1996 case, *O'Hare Truck Service Inc. v. City of Northlake*: "[government] may not deny a benefit to a person on a basis that infringes his constitutionally protect interest – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited . . . Such interference with constitutional rights is impermissible." Finally JVP argues that the bill's mechanisms for identifying the blacklisted companies and implementing the measure are "impossibly vague, and enforcement would therefore be capricious and arbitrary." JVP concludes that AB 2844 is "deeply flawed" and "an utterly unconstitutional undertaking."

The American Civil Liberties Union of California opposes AB 2844 because it would penalize constitutionally-protected political speech. ACLU argues that that "however sympathetic one might be to the cause the government seeks to support, the constitutional rights to free speech cannot depend on whether the content of the speech is admired or abhorred. Nor can any governmental right to speak in aid of its interests outweigh the individual right of its people to disagree. If governmental speech rights trumped individual speech rights, the First Amendment would have no meaning." ACLU also disputes the claims of the author and supporters that this bill is about promoting trade and cooperation between Israel and California, pointing to statements in the bill's fact sheet and supporter statements made elsewhere suggesting that the bill is motivated by opposition to the political beliefs and motives of the BDS movement and its critical stance on Israel. From the ACLU's point of view, therefore, this bill is clearly a content-based, if not viewpoint-based, infringement on free speech rights. ACLU concludes: "Just as the government may not exercise its sovereign power against its people in retaliation for their political speech, it cannot deprive them of valuable financial benefits to chill their speech on

matters of public concern without a compelling governmental interest – and unquestionably not because it prefers another view. To uphold the right to engage in a boycott is not necessarily to support its aims or objectives – just as to uphold freedom of speech is not to endorse the ideas expressed."

RELATED LEGISLATION: AB 1552 (Allen), currently awaiting referral in Assembly Rules Committee, would generally prohibit a public entity from entering into a contract to acquire or dispose of goods, services, information technology, or construction unless the contract includes a representation that the contractor is not currently engaged in, and an agreement that the contractor will not during the duration of the contract engage in, the boycott, as defined, of a person or an entity based in or doing business with a jurisdiction with which the state can enjoy open trade, defined as a state that is a member of the World Trade Organization.

AB 1551 (Allen), also awaiting referral in Assembly Rules Committee, would prohibit the investment of certain state funds in business firms or financial institutions that engage in discriminatory business practices in furtherance or in compliance with the boycott of Israel, as defined. The bill would require state trust funds to use the most recent federal report on politically motivated acts of boycott, divestment from, and sanctions against Israel to determine which business firms and financial institutions engage in those practices.

REGISTERED SUPPORT / OPPOSITION:

Support

30 Years After

Agudath Israel of California

Alpha Epsilon Pi Fraternity, Inc.

Alpha Epsilon Pi, California Polytechnic State University, San Luis Obispo

Alpha Epsilon Pi, Chapman University

Alpha Epsilon Pi, Claremont Colleges

Alpha Epsilon Pi, CSU, Chico

Alpha Epsilon Pi, CSU, Fullerton

Alpha Epsilon Pi, CSU, Northridge

Alpha Epsilon Pi, CSU, San Jose

Alpha Epsilon Pi, UC Berkeley

Alpha Epsilon Pi, UC Davis

Alpha Epsilon Pi, UC Irvine

Alpha Epsilon Pi, UCLA

Alpha Epsilon Pi, UC Riverside

Alpha Epsilon Pi, UC Santa Cruz

Alpha Epsilon Pi, UC Santa Barbara

Alpha Epsilon Pi, UC San Diego

Alpha Epsilon Pi, San Diego State University

Alpha Epsilon Pi, San Francisco State University

American Jewish Committee

California Teamsters Public Affairs Council

Chabad of San Diego State University

Democrats for Israel Los Angeles

Israeli-American Council

Israeli-American Nexus
Jewish Public Affairs Committee of California
Simon Wiesenthal Center
StandWithUs

Opposition

American Muslims for Palestine, various chapters
American-Arab Anti-Discrimination Committee
American Friends Service Committee
American Muslims for Palestine
Arab American Civic Council
Arab American Cultural Center of Silicon Valley
Arab Resource and Organizing Center, SF Bay Area
Bay Area Women in Black
BDS-LA for Justice in Palestine
Bill of Rights Defense Committee
Center for Constitutional Rights
Council on American Islamic Relations, California
California Democratic Party, Arab American Caucus
Chico Palestine Action Group
Coalition of Palestinian American Organizations
Cognitive Liberty
Culture and Conflict Forum
Defending Dissent Foundation
Davis Committee for Palestinian Rights
East Timor Action Network
Episcopal Peace Fellowship, Palestine Israel Network
Friends Committee on Legislation, California
Friends of Sabeel North America
Free Palestine Movement
If Americans Knew
International Jewish Anti-Zionist Network (IJAN)
International Solidarity Movement, Northern California
Islah Reparations Project
Islamic Shura Council of Southern California
Israel/Palestine Task Force of the California Nevada Conference of United Methodists
Jewish Voice for Peace, various chapters
Justice for Palestinians, San Jose
Kairos USA
Keep Hope Alive -- Bay Area Presbyterians
LA Jews for Peace
Middle East Peace Task Force, Southwest California Synod, Evangelical Lutheran Church
National Lawyers Guild, various chapters
North Coast Coalition for Palestine
Northern California Islamic Council
Our Developing World
Palestine American Congress
Palestine American League

Palestine Israel Action Committee
Palestine-Israel Working Group of Nevada County
Palestine Legal
Palestine Political Action Committee
Palestinian American Women's Association
Palestinian Youth Movement-USA
Peace Action of San Mateo Co.
Peninsula Peace and Justice Center
People for Palestinian-Israeli Justice
Petaluma Progressives
Pilgrims of Ibillin
Queers Undermining Israeli Terrorism
Ramallah Club of San Jose
Rebuilding Alliance
Resource Center for Non-Violence, Santa Cruz
Sacramento Regional Coalition for Palestinian Rights
San Jose Peace and Justice Center
Social Justice Center of Marin
Students for Justice in Palestine, various chapters
Sustainable Agriculture Water and Health (SAWAH)
Syria Solidarity Movement
UAW 2865 Joint Council/Executive Board
Unitarian Universalists for Justice in the Middle East
United Church of Christ Palestine Israel Network
United Methodist Kairos Response
U.S. Campaign to End the Israeli Occupation
U.S. Palestinian Community Network
Veterans for Peace, Chapter 87, Sacramento
Voices for Justice in Palestine, Rossmoor, Walnut Creek
Washington Interfaith Alliance for Middle East Peace
Wellstone Progressive Democrats of Sacramento
Women's International League for Peace & Freedom, various chapters
14 Friends of Palestine, Marin County
Several individual letters and e-mails

Analysis Prepared by: Thomas Clark / JUD. / (916) 319-2334