



**Bill of Rights Defense Committee &  
Defending Dissent Foundation**

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April 18, 2016

Assembly Judiciary Committee  
1020 N Street, Room 104  
Sacramento, CA 95814

Dear Assembly Member Mark Stone, Chair of the Judiciary Committee;  
Assembly Member Donald P. Wagner, Vice Chair of the Judiciary Committee:

*CC: Honorable Members of the California State Assembly Committee on Judiciary*

***Letter of Opposition to AB 2844***

The Bill of Rights Defense Committee/Defending Dissent Foundation (BORDC/DDF) is a national organization dedicated to fulfilling the promise of the Bill of Rights for all people. BORDC/DDF traces its origins back to the National Coalition to Abolish the House Un-American Activities Committee (HUAC), which was founded in California in 1960. Today, we have over 5,000 grassroots members in California, many of whom have already expressed opposition to this bill in their individual capacities.

As a civil liberties organization, we do not take positions on international issues, such as the ongoing crisis in the Middle East, or the desirability of the aims of the Boycotts, Divestment, and Sanctions (BDS) movement. However we do support the right of individuals to engage in lawful political speech and oppose any attempt to suppress dissent. The very name of this bill, “The Combating Boycotts, Divestment, and Sanctions Against Israel Act of 2016,” reveals an impermissible aim: combating a social movement disfavored by the bill’s supporters. While individuals are just as free to oppose BDS as they are to support BDS, this freedom is not license to use the power of the state to suppress a particular point of view.

AB 2844 violates the First and Fourteenth Amendments and will have chilling effect on dissent that will be felt widely throughout California. For these reasons, we oppose AB 2844 and urge you to reject it.

**AB 2844 Violates the First Amendment**

AB 2844 violates the First Amendment of the United States Constitution for three reasons. First, boycotts against Israel are protected political speech under the First Amendment. Second, the state bill would penalize individuals and businesses for their exercise of First Amendment protected activity by denying them a public benefit. Finally, the bill discriminates against a

particular viewpoint, mainly those who are supportive of Palestinian human rights or critical of Israeli policy.

AB 2844 seeks to “combat” boycotts against the state of Israel. Boycotts are a nonviolent form of social protest that have been used historically in the civil rights and anti-South African apartheid movements, as well as more recently against the state of North Carolina for its anti-LGBT bill. Boycotts against Israel have become a popular form of expression amongst many advocates for Palestinian human rights.

In 1982, the Supreme Court ruled that boycotts to “bring about political, social, and economic change” are a form of political speech.<sup>1</sup> Political speech receives the maximum protection afforded by the First Amendment. It is not only not the place of the state of California to “combat” political speech, it is unconstitutional for a state to suppress it.

AB 2844 seeks to combat the BDS movement by using the state’s procurement powers to deny contracts to individuals and businesses boycotting Israel. The state’s procurement powers are not exempt from the First Amendment’s protection of free speech. Even when one does not have a right to receive a public benefit, a public benefit cannot be denied on the basis of an unconstitutional condition. Denying someone a public benefit, because of their political speech is such an unconstitutional condition.

In the 1950s the state of California required that in order for individuals to receive a tax benefit for veterans they sign an oath affirming that they did not advocate the overthrow of the government by force and would not side with a foreign power in the event of hostilities between said government and the United States. California argued that this was not an infringement of the First Amendment, as the tax benefit was a privilege, not a right. But the Supreme Court stated that “To deny an exemption to claimants who engage in certain forms of speech is, in effect, to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.”<sup>2</sup>

This principle has been applied more broadly than just tax benefits; it has been applied to any public benefit. The Supreme Court has found that the state could not elect not to renew an employee’s contract because of his First Amendment protected speech, nor could the government require that recipients of funding to fight HIV/AIDS oppose the legalization of sex work.<sup>3</sup> Government contracts are such a public benefit and thus cannot be denied on the basis of political views. The Supreme Court has explicitly ruled that one cannot be denied a government contract based on one’s First Amendment protected political views.<sup>4</sup>

AB 2844 does just that; it denies a contract due to the political views of the potential contractor. Boycotting Israel is done to enact political, social or economic change, namely to change Israel’s human rights policies toward the Palestinian people. Such a boycott is a form of political speech. By conditioning a public contract on the recipient refraining from such boycotts, the state of

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<sup>1</sup> See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886

<sup>2</sup> See *Speiser v. Randall*, 357 U.S. 513 (1958).

<sup>3</sup> See *Perry v. Sindermann*, 408 U.S. 593 (1972); *USAID v. Alliance for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2332 (2013)).<sup>3</sup>

<sup>4</sup> See *O’Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

California would be imposing an unconstitutional condition, i.e., a condition that violates the recipient's First Amendment rights.

The final reason that AB 2844 violates the First Amendment is that it is not viewpoint neutral. Under the First Amendment, the government cannot discriminate against some points of view. This law only affects individuals who express a certain point of view, criticism of Israel, and thus is not viewpoint neutral.

### **AB 2844 Violates the Fourteenth Amendment**

AB 2844 violates the Equal Protection Clause of the Fourteenth Amendment. AB 2844 treats differently those who boycott Israel and those who do not, denying public benefits to the former. For such a state-imposed classification like this to be consistent with the Equal Protection Clause of the Fourteenth Amendment, it must be rationally related to a legitimate government purpose. A law based on animus toward a particular group cannot be said to be rationally related to a legitimate government purpose. A federal district court in Idaho struck down a law criminalizing certain speech in relationship to the agricultural industry as violating the Fourteenth Amendment's Equal Protection Clause, as it was "motivated in substantial part by animus" toward those with unpopular political views.<sup>5</sup> Similarly, AB 2844 is motivated in substantial part by animus toward those who oppose Israeli policies or advocate for Palestinian human rights. As a result, by treating those who boycott Israel differently from those who do not boycott Israel, AB 2844 violates the 14th Amendment's Equal Protection Clause.

### **AB 2844 Chills Dissent**

We know that whenever the state takes measures to repress a social movement, the effects of that repression are felt more widely than by only the immediate targets of the legislation in question. While AB 2844 would have legal implications only for those seeking contracts with California, it will cast a wide chill over public discussion of the ongoing crisis in the Middle East. The BDS movement has in recent years gained significant traction, and churches, professional associations, labor unions and student governments have debated varying degrees of support for the BDS movement. While such institutions would not be penalized under AB 2844, it is difficult to imagine that once the state begins denying public benefits to individuals because of disfavored speech about Israel, other Californians might think twice before speaking in favor of Palestinian rights. In fact, that seems to be the aim of the bill.

A particularly worrisome component of AB 2844 is that it mandates the Attorney General's Office to compile a list of companies engaged in boycotts of Israel -- in other words, a blacklist of those who have expressed political views disfavored by the state of California. As part of AB 2844, public statements made "*by a company that it is participating in a boycott of Israel, or that it has initiated a boycott in response to a request for a boycott of Israel or in compliance with, or in furtherance of, calls for a boycott of Israel, may be considered by a public entity to be evidence that a company is participating in a boycott of Israel.*"

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<sup>5</sup> See *Animal Legal Defense Fund, et al. v. Otter*, Case No. 1:14-cv-00104-BLW  
Available online at <http://aldf.org/wp-content/uploads/2015/08/8-3-2015-ALDF-decision-ag-gag.pdf>

As an organization that traces its founding to the movement to abolish HUAC, we are particularly aware of what happens when any body of the government is authorized to investigate the political views of ordinary individuals and to assemble lists of those who have dared to utter political heresies. We are also aware that the victims of the HUAC era include not only those who were called to testify before the committee or found themselves blacklisted. Amongst HUAC's victims are those who dared not speak their conscience for fear of government reprisal. If any good can come from this shameful epoch in our nation's history it will be that we learned that such actions are corrosive to the democratic liberties embodied in our Bill of Rights. As an organization whose founder was called before both HUAC, as well as, the California Senate Committee on Un-American Activities, we have a special obligation to see that history doesn't repeat itself.

## **Conclusion**

BORDC/DDF is opposed to AB 2844 and urges the Judiciary Committee to reject it. AB 2844 violates the First Amendment by suppressing core political speech, tying public benefits to the political views of the potential recipient, and discriminates against those who take a viewpoint critical of Israeli policy. As AB 2844 seeks to "combat" the speech of those whose views are disfavored by the state, it is rooted in an animus toward individuals and organizations holding political views disfavored by the bill's sponsors and thus violates the Fourteenth Amendment. Finally, while AB 2844 is limited only to for-profit entities that wish to receive contracts from the state of California, we fear that by singling out a particular social movement for penalization, the bill could have a broad chilling effect.

Sincerely,

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