

Costly, burdensome ... and still unconstitutional

Memo in opposition to AB 2844, as amended in the Assembly Judiciary Committee

May 5, 2016

To: Lorena Gonzales, chair, and members of the Assembly Appropriations Committee

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I. FISCAL CONSIDERATIONS

A. AB 2844 would impose substantial burden and expense on the state Attorney General's Office (AG) plus counties, cities and special districts throughout the state.

- It would require the AG to investigate the many thousands of companies that contract or might potentially contract with the state or local public agencies, in order to ascertain which among them engage in the type of boycott the bill seeks to discourage.
- The AG would have to continuously monitor every such company in the state to know whether it starts or stops engaging in such a boycott.
- The AG would have to maintain and publish a blacklist of such companies.
- The AG would have to undertake the process the bill specifies to notify companies of their appeal rights, adjudicate such appeals administratively and defend the state when a business appeals its inclusion on the blacklist in court – as explicitly permitted in AB 2844 (and it would be a denial of due process not to allow such appeals). Given that the criteria in the bill for determining whether a company is improperly boycotting are vague and confusing, there are bound to be many such appeals.
- Every state and local government agency and special district that contracts with private business for any purpose would be disadvantaged by having to rule out potential low bidders (for contracts worth \$10,000 or more – any but the most incidental) that appear on the AG blacklist.
- They would also have to seek out new partners when a contract with a blacklisted company ends – even if the company was performing well and its contract could have been renewed in a much simpler, less costly process.
- Consistent with state law on unfunded mandates, AB 2844 notes that the state would have to cover all such expenses incurred by local agencies.

B. AB 2844 remains unconstitutional and would therefore be challenged not merely over factual disputes as to whether a particular business is in violation, but in its entirety, forcing the state to defend it in court

As amended following the April 19, 2016, hearing in the Assembly Judiciary Committee, AB 2844 strains to legitimize its attack on the First Amendment by incorporating anti-discrimination verbiage. But as discussed below, it still takes aim at constitutionally protected boycotts that protest political abuses and it still would penalize contractors on the basis of their political viewpoint. At the very least, the chilling effect on speech resulting from its vagueness and from its unabashed targeting of critics of Israel would invite major litigation that the state would be required to defend, and futilely so.

II. THE AMENDED BILL CONTINUES TO SINGLE OUT ISRAEL FOR PROTECTION FROM BOYCOTT, AND TO TARGET BOYCOTTS OF ISRAEL FOR SPECIAL SCRUTINY AND REPRESSION

The Judiciary Committee analysis of AB 2844, dated April 17, 2016 proposed amending the bill so that it “would not single out Israel, but would rather apply to discriminatory business practices against any sovereign nation or peoples.”¹ It suggested that “broadening the statute in this way may address some of the problematic, one-sided ‘viewpoint discrimination’ in the [then] current version.”

As incorporated and resubmitted by the Legislative Counsel, however, the amended bill fails to broaden and generalize its scope.

On the one hand, the word “Israel” has been excised from the entire definition section, where it was previously ubiquitous. “Boycott” is now defined generically as “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 the boycotted entity for reasons other than business, investment, or commercial reasons.”²

Yet the bill’s title remains “California Combating the Boycott, Divestment, and Sanctions of Israel Act of 2016”; and the five declaratory clauses in Section 2 are entirely about trade and other relations between California and Israel. The first four expound on how the Legislature has supported these ties and why it should continue to do so. The fifth declares that “boycott of Israel by companies doing business in California undermine the aforesaid express policy,” and that therefore, California should “not contract with any company participating in a boycott of Israel.”

Thus, there is no mistaking that the purpose of AB 2844 remains as it was: to castigate those who call for boycotts of Israel in an effort to discourage them, and to deter businesses from acceding to such calls by illegally threatening them with economic harm on the part of the state.

Finally, the amended bill’s operative section still bars public contracting with companies that violate its dictates, with specified exceptions, and now tasks the attorney general with discovering what companies are in violation. It then attempts to bridge the yawning gap between the generic definitions and the declaratory provisions singling out Israel by substituting the original, clear (though unconstitutional) description of what constitutes a violation -- “*participating in the boycott of Israel*” -- with a full 31 words: “*engaging in discriminatory business practices in furtherance of a boycott of any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation of Israel.*”

The tag line, “*including, but not limited to, the nation of Israel,*” is another clear indication that the bill persists, contrary to Judiciary’s recommendation, in singling out Israel for special protection.

¹ See below for a discussion of the “discriminatory business practices” issue.

² As explained in our previous memos, boycotts as defined here and as applied in support of campaigns for human or civil rights are not only legal; as a form of political speech, they are afforded the highest level of First Amendment protection. See also below.

III. CONSTITUTIONAL ANALYSIS OF AB 2844 AS AMENDED

A. Legislation that penalizes the right to boycott to effect political change is patently unconstitutional

In its analysis, the Judiciary Committee supported and expanded on the constitutional arguments we had made in our previous memos of February 11,³ April 7 and April 18, 2016. In brief, the Committee analysis found AB 2844 in clear violation of the “unconstitutional conditions doctrine,” which says that government may not condition a benefit on a person’s waiver of a constitutional right. In this instance, the right to exercise a form of protected speech, participating in a boycott involving Israel, would have to be waived in order to contract with state or local government. That would constitute impermissible viewpoint discrimination.

As discussed in our previous memos, boycotts in support of campaigns for human or civil rights are not only legal; as a form of political speech, they are afforded the highest level of First Amendment protection.⁴

Moreover, such boycotts have a long and distinguished history in the evolution of American democracy – against slavery, segregation, exploitation of labor, discrimination of immigrants and apartheid.⁵ A very current campaign is pressing for boycott of several states that have passed anti-LGBTQ legislation; a pending Assembly bill would commit California to observe it. And a motley collection of advocacy groups – including some that vehemently condemn any boycott aimed at changing Israeli policies – is agitating for boycott of Turkey, for a variety of political reasons. Agree or disagree with them, the impulse to press for change in Turkey’s policies by advocating boycott has not led its opponents to sponsor legislation that would bar companies adhering to it from contracting with the state. It would be unthinkable – and as unconstitutional.

B. Business & Professions Code Sections 16721 and 16721.5 cannot constitutionally be made applicable to political boycotts

1. Boycotts to advance civil or human rights are not ‘discriminatory business practices’

In attempting to purge its unconstitutional persecution of protected speech and viewpoint discrimination, the amended AB 2844 adopts the term “discriminatory business practices in furtherance of a boycott” as its targeted behavior. It then defines “discriminatory business practices” as “business arrangements that are prohibited by §16721 and §16721.5 of the Business and Professions Code.”

These sections provide that “no person within the jurisdiction of this state shall be excluded from a business transaction [or require another person to be excluded, or be required to exclude another person]” pursuant to a written policy requiring discrimination against that person on the basis of any characteristic listed or defined in subdivision (b) or (e) of Section 51 of the Civil Code (i.e., on the basis of race, religion, etc.), or because “the person conducts or has conducted business in a particular location.”

³ The first memo (https://ccrjustice.org/sites/default/files/attach/2016/02/2015-02-05_AB1551-1552_Oppose_LegMemo.pdf – this online version is dated Feb. 5) dealt with AB 1551 and AB 1552, an amended version of which was reintroduced as AB 2844.

⁴ See extensive discussion in the Feb. 11 memo of *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982), <https://supreme.justia.com/cases/federal/us/458/886/case.html>, and other cases.

⁵ Please see the section (pages 1-2) of the Feb. 11 memo describing the nature and history of boycott, divestment and sanctions used to press for changes in Israeli policies on the basis of human rights and international law. https://ccrjustice.org/sites/default/files/attach/2016/02/2015-02-05_AB1551-1552_Oppose_LegMemo.pdf

An Attorney General letter, not binding but given great weight in interpreting state law, was issued shortly after the sections' adoption (Opinion No. SO 76-54, November 24, 1976). Among other things the letter notes: "Many of the discriminatory practices and restraints on trade condemned by Chapter 1247 [which includes §§16721 and 16721.5] may already be forbidden by the Cartwright Act ([Business and Professions Code §§ 16720, 16727](#)) or the Unruh Civil Rights Act ([Civil Code §§ 51-52](#)), depending on the facts of the particular case."

In fact, §16721.5 quotes the categories ("sex, race, color, religion, ancestry, or national origin") on which basis discrimination in certain areas is strictly forbidden under state civil rights law. And California already requires that contractors certify that they do not engage in any such discrimination, as a condition of contracting with the state.⁶

Given the history of efforts by some proponents of this bill to publicly label boycott activity against Israel "anti-Semitic" and intended to "destroy Israel," AB 2844 lends itself to being construed as casting boycott of Israel as an inherently "discriminatory business practice," and to the blacklisting of businesses without evidence of any proscribable conduct. This would contradict the stated reason for the amendments as articulated in the Judiciary Committee analysis: "Unless coupled with other kinds of unlawful conduct, [boycotts] are protected speech under the First Amendment."

Thus, a bill penalizing "discriminatory conduct in furtherance of a boycott" is at best, superfluous, both because there is no evidence that such conduct is being carried out by opponents of Israeli policies or proponents of any other such political boycott, and because if it were, there are multiple bills already in place to penalize that conduct.

2. AB 2844 would reverse First Amendment priorities, punishing political boycotts while allowing those undertaken for other reasons

Not only are political boycotts not inherently discriminatory, they typically seek to end discriminatory practices by a particular class of people in positions of power or privilege against other classes of people subject to that power. Thus, in *NAACP v Claiborne Hardware*, the targets of an NAACP-led boycott were white merchants who engaged in or profited from the city's systemic discriminatory practices against black residents. Examining its motives, the U.S. Supreme Court found the boycott a clear form of political speech, entitled to the highest protection.

A 2nd Circuit case, *Jews for Jesus v. JCRC*,⁷ builds on the *Claiborne* conclusion and drills more deeply in distinguishing between protected boycotts "designed to secure governmental action to vindicate legitimate rights" and others conducted primarily out of personal, business or ideological disputes. The boycott threatened against a resort by JCRC in order to force it to cancel a contract with Jews for Jesus was found to be the latter type, and therefore not entitled to the superior protection that must be accorded to political speech.

Boycotts against Israel, which remain the primary target of amended AB 2844, are, like the NAACP boycott, intended by proponents to "secure governmental action to vindicate legitimate rights." Under terms analogous to those of AB 2844, a similar attempt could have been made to apply the anti-discrimination provisions of B&P §16721 and 16721.5 to the NAACP boycott, prohibiting the state from contracting with any business that participated in it. But the courts would have quickly stricken such a prohibition as patently unconstitutional.

⁶ See Government Code 12990, <http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=12001-13000&file=12990>, and numerous other specific provisions in various statutes.

⁷ 968 F 2d, 286, <http://openjurist.org/968/f2d/286/jews-for-jesus-inc-v-jewish-community-relations-council-of-new-york-inc-d>

As articulated by the Judiciary Committee analysis: “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.”

Indeed, AB 2844 unconstitutionally reverses First Amendment priorities when it comes to boycotts aimed at opposing a country’s human rights violations: Under the First Amendment, political speech on matters of public concern, including political boycotts, must be accorded the highest protection against government interference. AB 2844, even as amended, sets out to penalize boycott activity against a foreign country to protest that country’s political abuses, but would exempt the same activity if it is undertaken “for commercial reasons.”

3. B&P §§16721 and 16721.5 were enacted to address boycotts affecting foreign trade, not the type AB 2844 aims to penalize

The AG letter also notes that there is no published legislative history for these sections, but explains that they were enacted in order to apply to businesses in California certain portions of the federal Export Administration Act (EAA) that discourage and in some cases, bar participation by U.S. companies in what was known as the “Arab League Boycott of Israel.” That rationale for the adoption of §§16721 and 16721.5 is made explicit in §16721.6.⁸

In any event, EAA, and therefore B&P §§16721 and 16721.5, apply to matters concerning foreign trade, and not boycotts motivated by struggles for civil or human rights. In keeping with that fact, the AG letter suggests, among other things, that the statute should be applied “narrowly,” and should not even bar compliance with what it calls “primary” boycotts against countries, imposed as conditions of foreign trade.

The Business and Professions code sections referenced in AB 2844 as the source for defining “discriminatory business practices” are therefore unsuited for the declared purpose. They were enacted to address issues arising in foreign commerce, including boycotts instituted by one country against another.

4. ‘Business conducted in a particular location’

B&P §16721 bars “discrimination ... on the basis that the person conducts or has conducted business in a particular location.” For the reasons explained above, it is difficult to fathom a rationale for applying the provision to participation in a political boycott by a California resident. Political boycotts protesting discriminatory practices are often naturally tied to the location where those discriminatory practices are carried out, as in the boycott of North Carolina to protest that state’s anti-LGBTQ laws; the boycott of South Africa to end apartheid in that country; or the boycott of Montgomery, Ala. buses to end segregation in public transit.

If AB 2844 made B&P §16721 applicable to, for example, the boycott of North Carolina based on the “particular location” provision, the state would be prohibited from contracting with any of the companies complying with that boycott, including Deutsche Bank, PayPal, General Electric, Dow Chemical Company, Pepsi, Hyatt, Hewlett Packard, Choice Hotels International, Whole Foods, Levi Strauss & Co. and Lions Gate.

⁸ “It is the intent of the Legislature that Sections 16721 and 16721.5 be interpreted and applied so as not to conflict with federal law with respect to transactions in the interstate or foreign commerce of the United States to the extent, if any, not preempted by the Export Administration Act of 1969 as amended (50 U.S.C.App. Sec. 2401 and following) and any regulations promulgated thereunder.”

C. Designed to deter a form of protected speech, AB 2844, even if never enforced, would still create an unconstitutional chilling effect on free expression

1. A legacy of blacklists and witch hunts

Many definitions of “chilling effect” can be found in the literature on constitutional law. Here is one of the more comprehensive:

The inhibition or discouragement of the legitimate exercise of a constitutional right, especially one protected by the First Amendment to the United States Constitution, by the potential or threatened prosecution under, or application of, a law or sanction.⁹

In Supreme Court jurisprudence, the concept of chilling effect arose and proliferated surrounding 1950s McCarthyist witch hunts, beginning with in *Wieman v. Updegraff*.¹⁰ An Oklahoma law mandated a loyalty oath for public employees, who were required to swear that they were not members of any organization found on a federal blacklist of purportedly subversive groups. If they refused, they would be denied public employment. Justice Hugo Black, after coining the term “chill” as applied to speech, wrote, at page 194:

Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended. We must have freedom of speech for all or we will in the long run have it for none but the cringing and the craven.

The 1950s cases are an entirely appropriate antecedent to AB 2844, which would have California create a new blacklist in an effort to deter businesses from participating in an entirely legal exercise of their speech rights by threatening them with an administrative finding that would harm their economic interests.

Commenting on AB 2844 before the latest amendments, the Judiciary Committee analysis observed: “It is difficult to imagine legislation more clearly calculated to have a chilling impact of the exercise of protected speech.”

The comment still rings true with regard to the amended version of the bill. Though some of the onerous burdens imposed by AB 2844 would be lifted under the amendments, others would not. A company found, by the bill’s vague criteria, to be engaged in an allegedly prohibited boycott would have to appeal its listing in order to bid on a public contract. If unsuccessful, it would have to sue. And meanwhile, it would be branded with the stigma of state condemnation, further affecting its all-important business reputation.

Moreover, the remaining extensive language singling out Israel and specifically condemning boycotts against it alone sends a clear message to any business about the state’s position on an issue extraneous to a potential contract. This, too, creates an unconstitutionally chilling effect.

2. Chilling effect due to vagueness

The characteristic of vagueness in laws proscribing or disfavoring certain acts is frequently a major element of “chilling effect” discourse.

Take, for instance, the possible application of AB 2844 on the Veolia company, a France-based multinational with dozens if not hundreds of public contracts in California encompassing

⁹ [Webster's New World Law Dictionary](#), 2010, Wiley Publishing

¹⁰ 344 U.S. 183 (1952) <https://supreme.justia.com/cases/federal/us/344/183/case.html>

transportation, water supply, trash and sewage treatment. It operates both public transport options to reach Sacramento airport, SuperShuttle and YoloBus, under contract with Sacramento County and Yolo Transportation District, respectively. For years, Veolia was roundly criticized for operating segregated bus lines in the occupied West Bank and other services for illegal Israeli settlements. Last year, it pulled out of its operations in Israel. We don't know whether it had a sudden attack of conscience or acted because of all the contracts it was losing. Will that be considered a boycott of Israel? Would it fall under AB 2844's "business, investment or commercial reasons" exception? Would some insist on calling it a "discriminatory business practice"? Might an attorney-general therefore put Veolia on the AB 2844 blacklist? Who knows?

The uncertainty engendered by such vagueness is not merely theoretical. In February, the state of Illinois published its first blacklist under similar legislation. It included G4S, a private security company that in a pattern similar to Veolia's, has announced that it will not renew its contracts with the Israeli military and West Bank settlements. Illinois now faces a real threat of litigation as a result.¹¹

Other companies, faced with such prospects, may well refrain from an otherwise clear moral and/or business decision to stop – or not to start – abetting human rights violations. It's what the proponents of AB 2844 want: the state putting its thumb on one side of the scale in a dispute irrelevant to the content of public contracts, but affecting them in a way that would seriously chill political speech. This chilling effect, too, is undoubtedly unconstitutional.

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In short, AB 2844 is unnecessary, unconscionable and unconstitutional. It would be costly to administer, and even costlier to defend. It should be rejected outright.

¹¹ A highly partisan online newsletter, Legal Insurrection, which supports legislation like AB 2844, recently wrote: "Keep an eye on how Illinois handles these disputes. If the state fails to give listed companies a robust opportunity to challenge their designation, they may seek recourse in court." <http://legalinsurrection.com/2016/03/illinois-names-names-under-anti-bds-law/#comments>