

AB 2844: Still an attack on speech, not ‘discrimination’

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The latest, convoluted version of AB 2844 obscures its attack on free speech with a veneer of anti-discrimination language, but it can't hide what remains the bill's goal: To single out, stigmatize and pave the way for suppression of those who advocate for Palestinian human rights – by conflating criticism of Israeli policies with anti-Semitism.

I. AB 2844's CREATION OF A NEW CRIME IS VOID FOR VAGUENESS

- **AB 2844 creates a new crime – a felony – if a bidder falsely certifies under penalty of perjury that “any policy that they have adopted against any sovereign nation or peoples recognized by the government of the United States, including, but not limited to, the nation and people of Israel, is not used as a pretext for discrimination in violation of the Unruh Civil Rights Act or the California Fair Employment and Housing (FEHA).”**

Under Supreme Court “void for vagueness” rulings, a penal statute that “forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” violates the first essential of due process of law.

- **AB 2844 gives no explanation whatsoever of what constitutes a “policy” against a foreign country for purposes of the required certification.**
- **Declaring under penalty of perjury that one has or hasn't acted under “pretext” involves an improper administrative inquiry into state of mind and subjective intent.**

“Pretext” means “a reason that you give to hide your real reason for doing something.” The absurd premise of the proposed certification is that the AG must function as “thought police” to determine the truth or falsity of a certification of “no pretext,” and the contractor must plumb the complexities of First Amendment law before taking a political stand.

- **AB 2844 criminalizes the subjective reason for a contractor's alleged act of discrimination, although the act itself remains subject to civil sanction only.**

All state contractors are required to certify that they will comply with Unruh and FEHA laws against discrimination. If in the course of the contract, a contractor violates those laws, it may face loss of the contract and other civil sanctions. Under AB 2844, if the contractor is found to have a “policy” against a foreign country in connection with the same act of discrimination, it may be subject to far harsher penalty: criminal prosecution for felonious perjury.

II. INVESTIGATING COMPLAINTS OF FALSE CERTIFICATION OF COMPLIANCE WITH NON-DISCRIMINATION LAWS IS AN EXTRAORDINARY USE OF AG RESOURCES AND WOULD INVOLVE EXTRAORDINARY EXPENSE TO THE STATE

- **AB 2844 requires that the Attorney General receive and investigate complaints that a bidder for a state contract falsely certified to compliance with nondiscrimination law. Anyone may file a complaint.**

We know of no precedent for mandating the filing of administrative complaints with the Attorney General for false certification by a state contractor or for any other declaration

- **Israel-aligned groups have a history of flooding official bodies – up until now primarily universities – with complaints that political activity critical of Israeli policies is anti-Semitic (See Palestine Legal's report: <http://palestinelegal.org/the-palestine-exception>). Although these complaints are overwhelmingly found to be without merit, the monetary and emotional toll on investigators, university administration and the accused students and faculty has been great.**

There is little doubt that these groups will use the AG procedure that AB 2844 would set to retaliate against state contractors who support boycott or protest activity against Israeli policies, and to chill their protected free speech.