

AB 2844: still a waste of funds, still unconstitutional ... and more deceptive than ever

Memo of opposition, July 25, 2016

To: California Senate Appropriations Committee

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“The proponents of this bill are desperately eager to single out and punish companies that engage in boycotts against Israel. Realizing that their initial proposal ran contrary to the free speech protections guaranteed in the Bill of Rights, they have now come back with a convoluted, redundant and most likely ineffectual bill that allows them to say they’ve passed an anti-BDS bill. ...

“Politicians are free to denounce BDS if they choose. But they must do so without infringing on the rights of their constituents.”

-- Editorial, Los Angeles Times, July 5, 2016¹

INTRODUCTION

AB 2844, a successor to the now defunct AB 1551 and 1552, has itself gone through four major rewrites as the authors seek to amend away the unconstitutionality of their core objective from the start: to single out, stigmatize and suppress those who exercise their First Amendment right to carry out nonviolent protest activities, including boycott and divestment campaigns, to press Israel’s government to end its human rights violations.

The latest version would invite a deluge of frivolous complaints to the Attorney General’s Office, forcing it to expend precious resources investigating allegations that certain acts constituting political speech are actually driven by an ulterior, discriminatory motive. Whether or not actual prosecution for the bill’s newly created, felony “thought crime” ensues, the chilling effect of AB 2844’s scheme on speech would surely lead to costly litigation seeking to void it for vagueness and other causes of action.

‘ANTI-DISCRIMINATION’: A PRETEXT FOR THE SAME ATTACK ON SPEECH

AB 2844’s legislative odyssey began with a straight-up blacklist and public-contract ban against any entity that supports boycott or divestment in connection with Israel or has otherwise ceased doing business in or with Israel. Because boycotts to effect social justice are protected under the First Amendment as political speech,² and because the state may not condition financial benefits, including contracts, on a waiver of constitutional rights³ or on a person’s political beliefs,⁴ every legal

¹ <http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html>

² *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)

³ *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F.Supp.2d 184 (E.D.N.Y. 1999)

⁴ *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); for a full discussion of the issues in these three cases and others, see the initial opposition memo of Feb. 11, 2016, from the Center for Constitutional Rights, Palestine Legal and the National Lawyers Guild: <http://tinyurl.com/h3e4yee>

organization that weighed in, as well as the Assembly Judiciary analysis,⁵ concluded that the bill was blatantly unconstitutional.

In light of these damning conclusions, the authors of AB 2844 sought to sidestep constitutional defects by concocting a link between boycott activity against Israel and unlawful discrimination, first under California's discriminatory business practices statutes,⁶ and now, in the very different version before the Senate Appropriations Committee, under state civil rights law.

This strategy conveniently bolsters the false premise advanced by the government of Israel and the Israel-aligned organizations behind AB 2844: that criticism of Israel generally, and boycott campaigns specifically, are inherently "discriminatory" because they are "anti-Semitic." In fact, the bill is utterly redundant as far as preventing illegal discrimination is concerned. The phenomenon is already covered under the existing laws to which AB 2844 itself refers: the Unruh Civil Rights Act and the Fair Employment and Housing Act (FEHA). In addition, Government Code section 12990 already requires state contractors to certify compliance with nondiscrimination under Unruh and FEHA, and imposes civil sanctions for false certification.

That the veneer of "anti-discrimination" is itself a pretense aimed at salvaging AB 2844's attack on protected speech is demonstrated by the fact that the word "discrimination" appeared nowhere in the bill's early versions. Its centrality in the text now is an attempt to obscure the authors' unchanged objectives and to seek support from legislators justly concerned with the First Amendment by pretending that the bill is something that it is not. That its true animus is not discrimination but protected boycott activity is also evident from the rationale for supporting the bill consistently given by the author and supporters at every hearing, where they unabashedly smear critics of Israel as anti-Jewish and grossly misrepresent the use of boycott, divestment and sanctions (BDS) as, among other epithets, "diabolical."⁷

UNPRECEDENTED CREATION OF A FELONIOUS THOUGHT CRIME

The twists and turns necessary to mask the fact that what is being proposed is no less than a state crackdown on certain political speech is revealed both in the exceedingly convoluted language of the bill's current version and in the dangerous and unprecedented criminalization process it would create.

In addition to certifying compliance with nondiscrimination as already required under existing law, anyone submitting a "bid or proposal" for a contract with the state of over \$100,000 would now be required to "certify, under penalty of perjury," (*emphasis added*) 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 Act.

Thereafter, any person may file a complaint with the Attorney General alleging that the contractor has falsely certified to not using a "policy" against a foreign nation as a "pretext" for discriminatory acts. The Attorney General would be required to investigate all such complaints.

⁵ <http://tinyurl.com/hx3jjnz>

⁶ See the version of AB 2844 that emerged from the Assembly Judiciary Committee, dated April 26, 2016: http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2844; and the opposition's legal memo addressing it: <http://tinyurl.com/z7446za>

⁷ See video of the Senate Judiciary Committee hearing, June 28, 2016, <http://senate.ca.gov/media-archive#>, starting at 2:52:00.

Under existing law, state contractors are already required to certify that they will comply with Unruh and FEHA laws against discrimination. If a contractor violates those laws, it may face loss of the contract and other civil sanctions. Under AB 2844, a contractor found to have a “policy” against a foreign country in connection with the same act of discrimination could be subject to far harsher penalty: criminal prosecution for felonious perjury. In other words, AB 2844 would newly criminalize the purported motivation behind a contractor’s alleged act of discrimination, although the act of discrimination itself would remain subject to civil sanction only.

THE CERTIFICATION LANGUAGE EFFECTIVELY PROFILES THOSE WHO ENGAGE IN PROTECTED BOYCOTT ACTIVITY AS LIKELY TO BE BIGOTED AND DUPLICITOUS

The certification language reinforces negative stereotypes that drive profiling and discrimination. For example it would be equally outrageous for gay and lesbian teachers, to have to certify that their sexual orientation is not a “pretext” for sinister behavior with students. Or transgender use of a bathroom consistent with gender identity, also protected, is not a “pretext” for predatory behavior.

These hypothetical examples presume insidious intent on the part of a class of people disfavored by those in power, then stereotype and target the disfavored class as duplicitous and likely to engage in unlawful conduct. That’s exactly what the latest version of AB 2844 does in its attempt to appear to be merely against discrimination while in fact it is crafted to stigmatize a class of people because of their political beliefs, and to intimidate them from exercising their rights.

AB 2844’s CREATION OF A NEW CRIME IS VOID FOR VAGUENESS

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.⁸

AB 2844 gives no explanation whatsoever of what constitutes a “policy” against a foreign country for purposes of the required certification. The term is not defined anywhere in California statutes, as far as we know.

Declaring under penalty of perjury that one has or hasn’t acted under a “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.”⁹ 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 that a current or prospective contractor can no longer confidently engage in protected political speech without worrying that its motivations may be subject to an inquisition.

THE COMPLAINT PROCESS FOR FALSE NON-DISCRIMINATION CERTIFICATION WOULD CONFLICT WITH EXISTING STATUTES, AND LEAD TO HARASSMENT OF THE ATTORNEY GENERAL AND PERSECUTION OF THE BILL’S TARGETS

AB 2844 authorizes complaints to and investigations by the Attorney General regarding allegations that a bidder for a state contract falsely certified to compliance with Unruh and FEHA, or that a “policy ... against” a foreign country was not used as a “pretext” for discrimination prohibited by Unruh and

⁸ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926),
<https://supreme.justia.com/cases/federal/us/269/385/case.html>

⁹ Merriam-Webster Dictionary

FEHA. There would be no restriction on who may submit complaints, so they could be filed by any member of the public.

Placing investigation of complaints about false certification of nondiscrimination under the jurisdiction of the AG is, to our knowledge, unprecedented. The process set out in AB 2844 conflicts with existing statutory schemes for investigation of all other false certification of nondiscrimination. For example, under Government Code section 12990, complaints of this sort with regard to the Fair Employment and Housing Act are under the jurisdiction of the Department of Fair Employment and Housing, which investigates and may recommend civil sanctions, the sole prescribed penalty. Would AB 2844 supersede the existing law? Unless the multiple statutes and regulations governing public contracts are scrutinized for compatibility with the provisions of AB 2844, more such conflicts would likely arise.

AB 2844's provisions would likely lead to a proliferation of meritless complaints and costly investigations. Israel-aligned groups already have a history of flooding officials, including legislators, the Attorney General and especially, university administrators, with complaints that political activity critical of Israeli policies is anti-Semitic and must be stopped. The Center for Constitutional Rights and Palestine Legal have published a report documenting the extent and nature of such incidents of censorship.¹⁰ Although these complaints are overwhelmingly found to be without merit, they are costly in terms of time and resources expended investigating and defending against false accusations.

Israel-aligned groups have also filed numerous Civil Rights Act Title VI complaints nationwide with the U.S. Department of Education's Office of Civil Rights, alleging that political activity on campus critical of Israeli policies creates a "hostile" environment for Israel-identified Jewish students. These complaints have resulted in lengthy investigations and caused reputational damage to students and faculty as they dragged on. None of the complaints has been found meritorious, and all of those filed against UC campuses have been dismissed.

At a June 2, 2016, conference organized by major Israel lobby leaders, titled "BDS – the New Anti-Semitism," a spokeswoman for the Lawfare Project called on supporters to "make the enemy pay." She disclosed that the group is preparing more Title VI complaints, naming San Francisco State University and UC Irvine as targets, and that it and other groups are encouraging Jewish UC students to file police complaints against Palestine solidarity activists. Israeli Ambassador to the UN, Danny Danon, assured attendees that such efforts have the full support of the Israeli state.¹¹

There is every reason to expect, therefore, that if AB 2844 passes, these groups will use its mandated procedure to file multitudes of complaints against state contractors and grantees that exercise their First Amendment right to participate in boycotts or protests of Israeli policies.

ACLU has suggested that at very least, the bill be amended to impose sanctions for meritless complaints. In its June 27 statement opposing AB 2844, the civil liberties group said that if the bill's complaint provisions are retained, it must at minimum be amended to provide that the Attorney General may impose sanctions comparable to those permitted by California's anti-SLAPP statute (Code of Civil Procedure, Section 425.16 et seq.) to prevent and remedy improper complaints that seek to chill legitimate free speech, petition and assembly.

¹⁰ <http://palestinelegal.org/the-palestine-exception/>

¹¹ <https://electronicintifada.net/blogs/ali-abunimah/israel-lawfare-group-plans-massive-punishments-activists>

ANY ‘PRIVATE ENTITY’ IS TARGETED, NOT ONLY FOR-PROFIT BUSINESSES

The latest version of AB 2844 declares that it is “the intent of the Legislature to ensure that taxpayer funds are not used to do business with or otherwise support any state or private entity that engages in discriminatory actions against individuals under the pretext of exercising First Amendment rights” (emphasis added).

In an earlier revision, the bill’s coverage was narrowed to include only businesses operating in California for profit. In the latest amendments, it is extended again to include anyone.

As opponents noted at the time of the earlier version, if private entities are subject to the ban, those affected could include churches affiliated with denominations that have refused to buy goods made in illegal Israeli settlements in the West Bank or divested their funds from corporations complicit in Israel’s violations of human rights and international law. Their state-funded work serving California’s most vulnerable populations could be cut off. Similarly, unions, student bodies, universities, charitable foundations or individual socially responsible investors who support boycott of Israel or divestment from complicit corporations or institutions could be banned from doing business with the state.

RESPONSIBLE CONTRACTORS WOULD REFUSE TO SIGN A VAGUELY WORDED CERTIFICATION THAT THREATENS EXPOSURE TO CRIMINAL LIABILITY

The certification of “no pretext” quoted above is sweeping, open-ended, convoluted and loaded. It presumes those with policies against foreign countries are more inclined than other contractors to discriminate. It doesn’t define “policy,” but it requires an answer that posits that whatever “policy” means, the contractor has one.

As ACLU pointed out in its June 27 statement of opposition to AB 2844, “Few conscientious companies would undertake such exposure to criminal prosecution, ... leaving only the most careless as potential state contractors.” This too would mean increased costs for the state as the field of businesses, charities and others willing to seek state contracts or funds for their work would shrink, lessening competition, placing quality more at risk -- and raising prices.

COSTS OF DEFENDING AGAINST LEGAL CHALLENGE

Every legal organization that has weighed in on AB 2844 in its various incarnations has warned of the unconstitutionality of penalizing or chilling political protest, including in the form of boycott. These include ACLU, the Bill of Rights Defense Committee, Center for Constitutional Rights, National Lawyers Guild and Palestine Legal.

Potential plaintiffs are not only individuals, sole proprietors, churches and charitable bodies that receive state funds, but also multinational corporations that have chosen to cease doing business in Israel, whether on principle or because it made business sense to do so. Veolia is one such corporation, and it has a strong presence in California, providing transit, wastewater treatment and other services. Any contracts with such corporations could result in complaints alleging perjury against them, and they would have both the resources and the motivation to forcefully challenge such a process.

CONCLUSION

For all these reasons, AB 2844 should never have been introduced and should not be supported now. Its transformation into an ostensible “anti-discrimination” bill is but a pretext for the same illegitimate purpose it has had from the start: to stigmatize and suppress controversial political speech.