

AB 2844: Narrowed, but still dangerous

- It should be defeated due to the blacklist it would create
- Bill's previous, even worse attacks on speech should not be restored

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

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To: California Senate Judiciary Committee

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Introduction

AB 2844 proceeds to the state Senate a shadow of its former self – but remains a dangerous threat to free speech. It should be defeated, and its previous draconian elements must certainly not be restored.

The original AB 2844 would have barred state and local government contracts with any business, sole proprietorships and multinational corporations alike, that was considered – under standards both impossibly vague and overly broad – to be “participating in a boycott of Israel.” The burden to challenge this designation would have fallen on the companies themselves, which could have been penalized with stiff fines if found violating the edicts.

In passing a series of narrowing amendments, Assembly members correctly recognized that the bill's original intent, “to combat the boycott, divestment and sanctions movement against Israel” (as stated by the author, Assembly Member Bloom, on the floor June 2), would have unconstitutionally singled out and penalized certain political speech that he happens to dislike: criticism of Israeli government policies accompanied by boycott and divestment campaigns designed to exercise economic and moral pressure to support human rights for Palestinians.

Along the way, some of AB 2844's most draconian elements were dropped, and the target became not only boycott of Israel but all businesses “engaging in discriminatory business practices in furtherance of a boycott of any sovereign nation or peoples recognized by the government of the United States” – a formulation that itself begs the question: Why target boycotts when “discriminatory business practices” are already prohibited?

As finally passed by the Assembly, AB 2844 no longer contains the word “Israel.” Gone is its ban on state or local government contracts with businesses that boycott – at least until the Attorney General opines on whether that would be constitutional. But the bill would require the AG to examine, in perpetuity and at great expense, the business practices of every existing and potential public contractor in the state, then post a list of those the AG determines to be engaged in a proscribed boycott.

While AB 2844 no longer explicitly targets speech that expresses a certain viewpoint, it still impermissibly singles out a certain form of highly protected speech for heightened scrutiny by the state. And the echoes of its original content, which the author has declared he seeks to restore, ensure that even in its narrowed form, it would surely still be wielded as a club against critics of Israeli policies. This constitutes a classic example of an unconstitutional chilling effect on speech.

The Assembly's series of reformulations of AB 2844 testify to an effort – doomed, as we shall show – to cure the fatal constitutional flaws called out by the Assembly Judiciary Committee and every legal organization that has weighed in on this legislation, including the ACLU, the Bill of Rights Defense Committee, the Center for Constitutional Rights, the National Lawyers Guild and Palestine Legal¹. Their message: *Boycotts to effect social change are a form of political speech that must be accorded the highest form of First-Amendment protection against government interference; and government is prohibited from threatening to make receipt of a state benefit – contract, in this instance – conditional on one's waiver of a constitutional right such as free speech.*^{2,3}

Anti-boycott legislation: a concerted, nationwide offensive

AB 2844 is part of a coordinated national effort⁴ in which similar bills in at least 21 states – and now, an executive order in one – are aimed at countering growing criticism of Israel's policies and nonviolent action taken to express and make meaningful that criticism. Such measures, including boycott, divestment and sanctions (commonly referred to as “BDS”) campaigns, are being adopted by an increasing number of socially responsible investors, churches, academic associations, unions, elected student governments and many thousands of individuals, motivated by concern for denial of Palestinian rights and by a desire to promote peace and justice for all peoples of the region.

Israel's occupation of the West Bank, including East Jerusalem, and the Gaza Strip has gone on for almost 50 years, with daily violence and repression periodically becoming deadly on a far greater scale. Gaza has been held under a crippling land, air and sea blockade for nearly a decade. Despite the strict prohibition under international law against an occupying power transferring its citizens to occupied territory,⁵ over 650,000 Jewish-Israeli settlers now reside in the West Bank. They enjoy the full rights of Israeli citizenship, while nearly 5 million Palestinians in the territories lack basic human rights, including the right to move freely, the right to due process and the right to elect those who exercise ultimate control over their lives. Most of the Palestinian land that was once expected to form the basis for a Palestinian state has been confiscated or placed off limits to accommodate settlements, their infrastructure and the massive “separation wall,” all of which are illegal under international law.⁶ In addition, Palestinian citizens of Israel – 20 percent of the population – experience many forms of de jure and de facto discrimination, while Palestinians forced from their homes by Israel in the period surrounding its

¹ Nearly 100 other national, state and local organizations have endorsed the call to defeat AB 2844. See <http://tinyurl.com/hnbcfyk>

² See opposition memo of Feb. 11, 2016, from the Center for Constitutional Rights, Palestine Legal and the National Lawyers Guild: See <http://tinyurl.com/h3e4yee>

³ Even the Anti-Defamation League, while reiterating its opposition to boycott and divestment campaigns, has increasingly criticized legislative attempts to suppress them. See <http://forward.com/news/national/342715/anti-defamation-league-stands-almost-alone-against-communal-push-for-anti-b/>

⁴ For status updates from all states and the federal government, see <http://palestinelegal.org/legislation>

⁵ Fourth Geneva Convention, Article 49. See <https://www.icrc.org/ihl/WebART/380-600056>

⁶ See the 2004 opinion by the International Court of Justice. Its summary: <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6>

establishment in 1948 and their descendants are denied the right, guaranteed under international law, to return to their homeland.⁷

Despite abundant documentation and condemnation of Israeli policies by the United Nations and virtually every major human rights organization in the world, the global community has failed to hold Israel accountable and to enforce compliance with international law. Attempts at armed resistance have failed, and decades of negotiations have led nowhere while less and less land, resources and opportunities remain for the Palestinian people.

Consequently, in 2005 some 170 Palestinian civil society organizations called upon people of conscience throughout the world to engage in a grassroots campaign to implement nonviolent boycotts against and divestment from companies and institutions that perpetuate these human rights violations and to demand sanctions against Israel until Palestinian rights are recognized.

Many thousands of people and organizations worldwide have responded by embracing a variety of strategies as a way to peacefully pressure Israel to end its human rights violations and to influence public opinion. These campaigns have undoubtedly been controversial, but they have begun to bear fruit, to a small extent economically and much more so in the court of public opinion. Major church denominations have voted to boycott products from illegal settlements and/or divest from Israeli and multinational corporations whose actions and profits are tied to the occupation. Numerous student governments, unions and academic associations have declared their support. Some large corporations, under pressure from public outcry, have ended their involvement with Israel's occupation.

Alarmed by such successes, the government of Israel and its supporters in the United States and Europe are engaged in a concerted campaign to stigmatize and suppress activism for Palestinian human rights.⁸ A frequent assertion has been to conflate criticism of Israeli policies with anti-Semitism, especially in highly exaggerated allegations that Jewish university students are being subjected to a wave of intimidation for expressing support of Israel.⁹ In their latest strategy, they are pressing for legislation at the federal, state and local levels to unconstitutionally punish people who support this nonviolent political movement. New York Governor Cuomo has issued a widely condemned executive order, sidestepping his state's Legislature when a bill there stalled.¹⁰ AB 2844 is part of this campaign of repression.

Evolution of California's anti-boycott legislation

On Jan. 4, 2016, Assembly Member Travis Allen introduced AB 1551, the "California Israel Commerce Protection Act," which would have prohibited state pension funds from investing in businesses and institutions that comply with boycotts called for by a foreign country or

⁷ Universal Declaration of Human Rights, Article 13: <http://www.un.org/en/universal-declaration-human-rights/>; and UN General Assembly Resolution 194: https://en.wikipedia.org/wiki/United_Nations_General_Assembly_Resolution_194#Full_text

⁸ Report by Palestine Legal and the Center for Constitutional Rights, Sept. 2015: <http://palestinelegal.org/the-palestine-exception>

⁹ In fact, such conflation and exaggeration make it more difficult to identify and confront actual anti-Semitism when it occasional does occur. See <https://jewishvoiceforpeace.org/jvp-releases-first-ever-report-on-the-use-of-false-charges-of-anti-semitism-to-limit-palestinian-rights-activism-on-campuses/>

¹⁰ See <https://theintercept.com/2016/06/06/andrew-cuomo-and-other-democrats-launch-severe-attack-on-free-speech-to-protect-israel/>

international organization aimed at limiting “commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories”; and AB 1552, “Public contracts: state and local agencies: businesses engaged in boycott,” which would have prohibited the state from contracting with entities that engage in what it called “boycotts due to discrimination and bigotry.” It would have affected all entities that adopt some form of boycott, including churches, unions, foundations and universities. Though AB 1552 made no explicit mention of Israel, Mr. Allen made clear that its intent was the same as AB 1551’s: to penalize participation in boycotts affecting Israel.¹¹

Apparently responding to vehement objections from a quickly formed opposition coalition, Mr. Allen submitted an amended version of AB 1552, now explicitly targeting boycott of Israel, which soon became AB 2844, with a new author, Assembly Member Richard Bloom. (Neither of the two original bills was ever assigned to committee.) Among other changes, AB 2844 deleted reference to the occupied territories and limited the entities affected to for-profit businesses, including sole proprietorships. But it retained the blacklisting and public-contract ban against companies that participated in a boycott against Israel.¹²

On April 13, the Assembly Accountability and Administrative Review Committee passed AB 2844 with the bare minimum of votes needed, against the chair’s recommendation, sending it next to Assembly Judiciary. The Judiciary Committee’s legal analysis¹³ concluded that the bill could not pass constitutional muster because boycott is protected political speech, and the government may not deny a benefit, such as a public contract, because of a person’s exercise of a constitutional right. It criticized use of a federal law governing boycotts in foreign trade as a yardstick for application of state policy regarding domestic speech; and it faulted the singling out of critics of Israel. Though it proposed some ideas for amendment, the analysis suggested that even with changes, the constitutional defects might well be “insurmountable”; and it sounded a stern warning regarding the motivation for the bill: “It is difficult to imagine legislation more clearly calculated to have a chilling impact on the exercise of protected speech.”

Based on the committee’s recommendations, AB 2844 was revised, most notably to make the blacklisting and banning provisions applicable broadly to all companies that “engage in discriminatory business practices in furtherance of boycott ... including, but not limited to, the nation of Israel.”

Aside from keeping mention of Israel and no other country in its operative clause, opponents noted, the amended bill still singled out critics of Israel in its title¹⁴ and in the extensive declaratory section extolling California’s relations with that country and stating that boycotts undermine them.¹⁵

¹¹ See Allen’s press releases of Dec. 10, 2015, <https://ad72.asmtc.org/press-release/13866>, and Jan. 4, 2016, <https://ad72.asmtc.org/press-release/14104>.

¹² See *Supplementary opposition memo regarding AB 2844*, <http://tinyurl.com/jd5mr94>

¹³ <http://tinyurl.com/hx3jjnz>. See also opposition coalition memo, *Yes, AB 2844 is Unconstitutional*, <http://tinyurl.com/j53wpuh>.

¹⁴ “California Combating the Boycott, Divestment, and Sanctions of Israel Act”

¹⁵ See the fourth opposition memo, *Costly, burdensome ... and still unconstitutional*, <http://tinyurl.com/z7446za>.

The current version of AB 2844

In the Assembly Appropriations Committee, AB 2844 was further amended, over the vehement objections of its author. It no longer explicitly singles out Israel but applies to boycotts against “any sovereign nation or peoples recognized by the government of the United States.” The proscribed conduct remains “discriminatory business practices in furtherance of a boycott,” however, and the Attorney General’s Office is still mandated to compile, maintain and post a list of boycotting companies. But a public contract ban against such companies is held in abeyance until the AG assesses its constitutionality.

This is the version of AB 2844 that proceeds to the state Senate: narrowed, but still bearing an unconstitutional stain in its requirement for the blacklist of boycotting companies. As was true from the start, it would still serve to shame the businesses named, threatening and stigmatizing their protected speech and that of others.

AB 2844 still unconstitutionally singles out political boycotts for heightened scrutiny

Earlier versions of AB 2844 were justly criticized as unconstitutional for targeting protected speech in the form of boycott and for taking aim at such speech involving just one particular country, Israel. As amended, AB 2844 now names no specific country and appears to narrow the proscribed behavior, targeting only companies that “engage in discriminatory business practices in furtherance of a boycott of any sovereign nation or peoples recognized by the government of the United States.”

This phrase has never before been invoked or defined under California law. What is defined, however, and already proscribed, are “discriminatory business practices.” For this purpose, AB 2844 refers to Business and Professions Code Sections 16721 and 16721.5, which in turn reference Civil Code Section 51 (the Unruh Act). That act lists characteristics, including a person’s race, religion, etc., that trigger protection from discrimination in certain situations.

Therefore, AB 2844 is entirely redundant in its proscription, since any “discriminatory business practices” are already prohibited by the very statutes it invokes. The fact that they might be committed “in furtherance of a boycott” adds nothing to the nature of these proscribed practices.

Furthermore, all state contractors have long been required to certify that they do not discriminate, and companies that are found to engage in discriminatory business practices are already banned from state contracts, for instance under Government Code Section 12990.

What AB 2844 does that is unprecedented is to carve out a specific category of companies – those that boycott foreign countries – to be investigated regarding these long-proscribed discriminatory business practices. In effect, then, AB 2844 would reverse the constitutional requirement that political boycotts be accorded heightened protection against government interference and instead single out certain of them – those of foreign countries -- for heightened state scrutiny. In this way, AB 2844 would unconstitutionally place companies that engage in such political boycotts under a cloud of suspicion, simply for exercising their First Amendment rights.

AB 2844 remains unconstitutionally vague regarding the meaning of “boycott”

Earlier versions of the bill were criticized as unconstitutionally vague for failing to make clear what constitutes a boycott. This fault persists in the bill as amended. If a California company doesn’t do business with a particular “sovereign nation or people,” or if it once did business with

a country but ceased, how is the Attorney General to know if it was for “business or economic reasons” – exempt under the bill – or due to a proscribed boycott?

Making the determination would be “especially difficult considering that the very purpose of a boycott is to exert economic pressure,” the Assembly Judiciary analyst observed.¹⁶ “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?”

Without definitive criteria – and they would be difficult if not impossible to design – this vagueness would necessitate highly intrusive and cumbersome investigations into companies’ thoughts and motives.

Amended AB 2844’s true target remains boycotts of Israel

Since the 2005 call from Palestinian civil society for boycott, divestment and sanctions to press Israel on human rights issues, most Israel-aligned organizations have prioritized funding and action to crush such activism. These groups – many of which have stepped forward as proponents of the original AB 2844 – often act in concert with Israeli government offices and are part of the well-endowed Israel Action Network, which is dedicated to eliminating BDS.

The most commonly used bludgeon in the anti-BDS arsenal is to characterize it as inherently anti-Semitic, despite the fact that boycott proponents emphasize that their actions are directed against a country’s policy, not Jews. In fact, many members of the Jewish communities around the world support the use of such strategies to foster changes in Israeli policies.

Because BDS activism so obviously has none of the characteristics of traditional anti-Semitism,¹⁷ Israeli officials and major Israel-aligned organizations are at pains to emphasize to supporters that it is a “new” version of that form of bigotry. For example: Prime Minister Benjamin Netanyahu: Advocates of BDS are “classical anti-Semites in modern garb”¹⁸; Malcolm Hoenlein, executive vice chairman of the Conference of Presidents of Major American Jewish Organizations: BDS is “the 21st century form of 20th century anti-Semitism.”¹⁹; Danny Dannon, Israeli Ambassador to the United Nations: BDS amounts to “modern-day anti-Semitism.”²⁰; Roz Rothstein, CEO of Stand With Us: “BDS is the newest form of anti-Semitism.”²¹

Judging from previous versions of the bill, the declared intentions of the author and tactics used against BDS campaigns in other contexts, these Israel-aligned forces would maintain that boycotts of Israel, without reference to any other conduct, constitute a priori a “discriminatory business practice.” Based on such a construction, they would likely issue interminable demands on the Attorney General’s Office and other agencies to scrutinize businesses seen as boycotting

¹⁶ On page 4: <http://tinyurl.com/hx3jjnz>.

¹⁷ Defined, for example, in the Merriam Webster dictionary as “hostility toward or discrimination against Jews as a religious, ethnic, or racial group.”

¹⁸ <http://www.jpost.com/Diplomacy-and-Politics/Netanyahu-Iran-must-be-stopped-in-drive-for-nuclear-weapons-341693>

¹⁹ <http://www.israelnationalnews.com/News/News.aspx/177581#.V2Tv7zX1kel>

²⁰ <http://jewishnews.timesofisrael.com/boycott-movement-is-modern-anti-semitism-says-israels-un-envoy/>

²¹ <https://www.standwithus.com/news/article.asp?id=3552>

Israel. Acceding to such demands would restore what the Assembly Judiciary Committee analysis called one of the earlier AB 2844's "insurmountable" constitutional defects: stigmatization and suppression of protected speech based on political viewpoint alone

AB 2844's original intent also casts its shadow over the title of the now ostensibly content-neutral bill. "Boycotts, Divestment and Sanctions of Recognized Sovereign Nations or Peoples" adopts the specific phrase coined by Palestinian civil society in its call for economic and moral pressure on Israel to end its human rights violations. Its use presages that boycotts of Israel would be the target of scrutiny if this bill passes.

Moreover, even if not explicitly named in the bill, Israel is currently the country whose policies are most commonly challenged with boycotts called by human rights advocates. Throughout the Assembly floor debate, proponents of the bill vehemently expressed hostility only to boycotts of Israel, and not to similar tactics used by critics of any other countries.

And though he vehemently objected on the Assembly floor to the Appropriations amendments, Mr. Bloom nevertheless asked for an aye vote, vowing to seek restoration in the Senate of provisions reflecting his original intent to target boycotts of Israel – and to abandon AB 2844 if he does not get them.²²

The high cost of implementing AB 2844

As amended, AB 2844 would place most of the burden for implementation on the Attorney General's Office. Costs would start at an estimated \$1.2 million a year for creation and maintenance of the blacklist alone.²³ Additional unknown costs would stem from appeals by companies claiming they are listed erroneously; from defending such claims in court; and from complex, lengthy litigation when the law's constitutionality is itself challenged.

Conclusion

We concur with Assembly Member Allen, who stated on the Assembly floor:

Boycotts are a tool. They are neither inherently bad nor good. Much depends on how they are used. Boycotts of companies doing business with the South African apartheid government regime are one thing. Boycotts of Jewish businesses in 1930s Germany are something else altogether.

Mr. Allen, like anyone, is entitled to his opinions as to which boycotts are justified and whether they are likely to be effective under given circumstances. We actually agree on the two examples he gives – the first a stellar example of boycott in pursuit of human rights, the second overtly discriminatory against a protected class. Under existing California law, a business that "boycotted" Jews, Latinos or gays and lesbians would rightly be barred from state contracting due to its overtly discriminatory behavior.

California has, however, endorsed boycotts against other countries – not a protected category under anti-discrimination law – undertaken in support of human rights: against apartheid, for instance, the example that Mr. Allen noted. Two such proposals are currently pending before the legislature: one targets Turkey, a NATO member, for its Armenian genocide denial and other

²² Video of the June 2 floor debate and the previous April 19 (Judiciary) and May 11 (Appropriations) committee hearings is available at <http://www.calchannel.com/video-on-demand/>

²³ Appropriations Committee staff analysis, <http://tinyurl.com/zt83hxo>

violations of the rights of the Armenian people, including ongoing ethnic cleansing;²⁴ the other would boycott U.S. states that have recently passed discriminatory anti-LGBT legislation.²⁵

Mr. Allen and other proponents of AB 2844 may or may not support those or other such initiatives. But while they would have legislators weigh the pros and cons of committing the state to a boycott whose proponents seek to uphold human rights, AB 2844 would actually do the opposite: It would stigmatize and suppress the protected political speech of certain private citizens who undertake such a boycott on their own initiative.

It would never occur to anyone in the Legislature to bar the state from doing business with Armenian activists who choose to boycott Turkey, or with the many corporations (e.g. Paypal), celebrities (e.g. Bruce Springsteen) and others who have declared a boycott of North Carolina. It should be just as unthinkable – as it would be unconstitutional – to restrict or undermine the protected speech of those who employ boycotts to protest and seek to stop Israeli human rights violations.

We call on senators and Assembly members to resist all efforts to restore any element of AB 2844 that would actively deny public contracts to entities for exercising their First Amendment rights; and to refrain from singling out those who advocate for Palestinian human rights.

Moreover, just as AB 2844 should never have been introduced in the first place, neither should it pass into law, even in its present, narrowed form. The very creation of the blacklist it still mandates – no matter whom it targets or how vague its operation – would constitute heightened government scrutiny of protected speech. No one should be subjected to the chilling effect on speech that this would cause.

²⁴ AB 2650 (Nazarian),
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2650

²⁵ AB 1887 (Low), also now before the Senate Judiciary Committee,
http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1887