



CENTER FOR ADVOCACY & POLICY

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April 15, 2016

The Honorable Richard Bloom  
California State Capitol, Room 2003  
Sacramento, California 95814

**Re: AB 2844**  
**Oppose as amended 4/11/16**

Dear Assembly Member Bloom:

The American Civil Liberties Union of California regrets to inform you that we must respectfully oppose AB 2844 because it would penalize constitutionally-protected political speech.

AB 2844 would prohibit both state and local public entities from entering into specified contracts with any company that is participating in a boycott of Israel.

The bill would require the Attorney General to maintain a list of companies that engage in a boycott of Israel. The bill would prohibit a company on that list from bidding on, submitting a proposal for, or entering into or renewing a contract with any public entity to acquire or dispose of goods, services, information technology, or construction for \$10,000 or more. The bill would also mandate that every state and local public entity require bidders, proposers and contractors to certify that the company is not on the list. If a public entity or the state Department of General Services determined that a company had submitted a false certification, and the company failed to demonstrate that the company has ceased engaging in a boycott of Israel, the company would be subject to a civil penalty of \$250,000 or more, termination of the contract, and ineligibility to bid on a contract for three years.

Boycotts are one method by which people sharing common views band together to achieve a common end, a practice deeply embedded in the American political process. By their collective effort, individuals can make their views known when individually their voices would be faint or lost. AB 2844 in essence proposes an official state blacklist of persons and corporations that engage in lawful politically-motivated speech and association, subject to severe financial penalties, apparently because the proponents object to the political views that motivate such conduct. Politically-motivated economic boycotts aimed at influencing public policy and advancing social change are a classic form of constitutionally protected speech – not coincidentally because they are often effective in accomplishing their political goals, from the Montgomery bus boycott of the Civil Rights era, to the grape boycott of the 1970s to the South Africa apartheid boycotts of the 1980s, as indeed this bill appears to recognize by proposing a boycott of its own.

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However sympathetic one might be to the cause the government seeks to support, the constitutional rights to free speech cannot depend on whether the content of the speech is admired or abhorred. Nor can any governmental right to speak in aid of its interests outweigh the individual right of its people to disagree. If governmental speech rights trumped individual speech rights, the First Amendment would have no meaning.

Supporters of this bill assert that it is motivated by the state's financial interest in "doing business with fiscally stable firms which are able to fulfill the duties, demands, and obligations of a contract with the State," and claim that the bill is "limited to affirming the State's fiduciary responsibilities related to fiscally responsible contracting practices." These assertions are belied by the author's stated concerns about the political views expressed by those who have "promoted a policy of Boycott, Divestment and Sanctions (BDS) against Israel" because they have allegedly engaged in a campaign "based on false comparisons to apartheid South Africa, false accusations of human rights violations, and false accusations of 'war crimes.'" <sup>1</sup> The author also complains that "[a] key element of the BDS campaign is the specific rejection of a two-state solution to the conflict." Further, as grounds for the bill and evidence showing the problem the bill seeks to address, the author points to a report by the Simon Wiesenthal Center contending that the BDS campaign "presents itself as a pro-peace initiative but in reality is a thinly-veiled, anti-Israel and anti-Semitic 'poison pill,' whose goal is the demonization, delegitimization, and ultimate demise of the Jewish State." <sup>2</sup>

Moreover, the bill does not evaluate or give preference to contractors that are fiscally sound; in fact, it specifically disqualifies businesses that may be the most economically responsible bidder simply because the company participates in a boycott of Israel. The bill also exempts businesses that provide goods or services that a public entity declares are necessary to perform its functions, without regard to whether those business are "fiscally stable." It therefore appears the bill is motivated not by concerns of fiscal responsibility so much as a desire of the proponents – however worthy their cause might be – to use the economic power of the state to vanquish those with whom they disagree. The bill itself admits its political motives by finding and declaring that "the provisions of this measure address the political nature of contracting with a company that is participating in the boycott of Israel and the need for the government of this state to respond to the policies of Israel in a uniform fashion."

Constitutional protection of political expression "does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered." <sup>3</sup> It is not for the state to determine which political viewpoints are acceptable, or whose beliefs and motivations are politically correct. And it is not within the province of government to coerce into silence those whose politics are inconsistent with views of state officials. The Supreme Court has held that "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." <sup>4</sup> Boycotts "to bring about political, social and economic change"

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<sup>1</sup> Author's fact sheet, AB 2844 (Bloom) California Combating the Boycott, Divestment and Sanctions of Israel Act of 2016.

<sup>2</sup> Boycott, Divestment, Sanctions (BDS) Against Israel: An Anti-Semitic, Anti-Peace Poison Pill, available at [http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/REPORT\\_313.PDF](http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/REPORT_313.PDF)

<sup>3</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (internal quotations omitted).

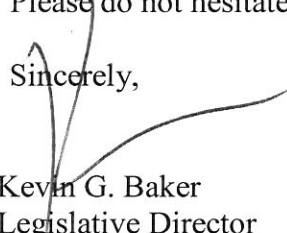
<sup>4</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982)

through speech, association, assembly, and petition are unquestionably protected under the First Amendment.<sup>5</sup> “In many different contexts ... the Supreme Court has made clear that, although the government is under no obligation to provide various kinds of benefits, it may not deny them if the reason for the denial would require a choice between exercising First Amendment rights and obtaining the benefit.”<sup>6</sup> “Where the denial of a benefit, subsidy or contract is motivated by a desire to suppress speech in violation of the First Amendment, that denial will be enjoined.”<sup>7</sup> More specifically, the Court has ruled that the Constitution prohibits governments from conditioning eligibility for public contracts upon the political affiliation of those bidding for a contract.<sup>8</sup> Just as the government may not exercise its sovereign power against its people in retaliation for their political speech, it cannot deprive them of valuable financial benefits to chill their speech on matters of public concern without a compelling governmental interest – and unquestionably not because it prefers another view.

To uphold the right to engage in a boycott is not necessarily to support its aims or objectives – just as to uphold freedom of speech is not to endorse the ideas expressed.

Please do not hesitate to contact us should you have any questions or concerns.

Sincerely,



Kevin G. Baker  
Legislative Director

cc: Members and Committee Staff, Assembly Judiciary Committee

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<sup>5</sup> *Id.*, at 913

<sup>6</sup> *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp.2d 184, 200 (E.D.N.Y. 1999).

<sup>7</sup> *Id.*

<sup>8</sup> See *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 726 (1996).