

Yes, AB 2844 is unconstitutional

April 18, 2016

To: Mark Stone, chair, and members of the Assembly Judiciary Committee

From: David L. Mandel and Carol Sanders, on behalf of the Coalition to Stop AB 1551 and AB 1552 (now AB 2844)

This memo, supplementary to our previous submissions of February 11 and April 7, 2016, comes in direct response to an article distributed by AB 2844 author Richard Bloom at the April 13 hearing of the Accountability and Administrative Review Committee, "Can States Fund BDS," by Eugene Kontorovich, Tablet Magazine, July 13, 2015 (<http://www.tabletmaq.com/jewish-news-http://www.tabletmaq.com/jewish-news-and-politics/192110/can-states-fund-bdsand-politics/192110/can-states-fund-bds>).

Denial of public contracts based on an applicant's political views is an unconstitutional infringement of free speech

Kontorovich does not dispute that politically motivated boycotts are a form of protected speech under *NAACP v Claiborne Hardware*. He claims instead that state laws barring public contracts with companies that comply with such boycotts have nothing to do with free speech, since such laws "simply limit a state's business relationships with companies that discriminatorily limit their own business relations. These laws do not prohibit or penalize any kind of speech."

His conclusion flies in the face of the line of Supreme Court cases holding that state denial of economic benefits based on political views is patently unconstitutional. In *Rutan v Republican Party of Illinois*, 497 U.S. 62 (1990), <https://www.law.cornell.edu/supct/html/88-1872.ZO.html>, the governor's office had denied a public contract based on the contractor's political beliefs and affiliations. The Court held that although the government may deny a benefit for a number of reasons, "it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. Such interference with constitutional rights is impermissible."

Rutan exemplifies a subcategory of what's known as the "unconstitutional conditions doctrine," which "bars a government from imposing a condition on the grant of a benefit requiring the waiver of a constitutional right." <https://www.law.cornell.edu/supct/html/88-1872.ZO.html>. A recent example is *USAID v Alliance for Open Society International*, 570 U.S. ____ (2013), <https://supreme.justia.com/cases/federal/us/570/12-10/>, where the court found that the government "violated the First Amendment by requiring organizations that receive federal HIV- and AIDS-related funding to adopt a policy explicitly opposing prostitution and sex trafficking."

Kontorovich mentions *Rumsfeld v. FAIR* as a counterexample in which the Supreme Court did not apply the unconstitutional conditions doctrine. But its facts are easily distinguishable from *Rutan*, *USAID* and laws like AB 2844. In *Rumsfeld*, the condition imposed was found to constitute conduct, not speech, and therefore did not violate the First Amendment.

Kontorovich is correct that "governments can, without any constitutional question, attach conditions relevant to the actual expenditure of funds." (Our emphasis.) But AB 2844 bans contracts

with all companies seen as boycotting Israel, regardless of the nature of the contract. That is unconstitutional.¹

Boycotts against companies and institutions complicit in Israel's human rights violations are not "discriminatory"

Kontorovich likens anti-boycott provisions in bills like AB 2844 to "anti-discrimination restrictions on government contractors [that] are commonplace and a normal requirement for government funding."

Boycott and divestment campaigns in support of Palestinian rights, however, are directed not against classes of people, but against policies that proponents maintain violate international law. The entities targeted are companies and institutions complicit in such abuses. These campaigns in no way commit illegal discrimination based on national origin, ethnicity, religion or other specifically proscribed categories; indeed they are undertaken to challenge policies and laws that discriminate against people based on ethnicity and religion.

The state may act to protect people from discrimination under civil rights laws, but it may not penalize speech even if it is discriminatory

Kontorovich equates restrictions on companies that comply with boycotts in support of Palestinian rights with laws prohibiting contractors from discriminating on the basis of sexual orientation. He cites to a recent presidential executive order prohibiting employment discrimination against LGBT people by federal contractors, and to the president's remark that the government is not required to "subsidize discrimination."

Kontorovich thereby confuses lawful state action to protect civil rights with unconstitutional state action that penalizes "discriminatory" speech.

The state may establish classifications of people vulnerable to discrimination (e.g., based on their race, religion or national origin) for the purpose of protecting their civil rights in such areas as public accommodations, employment, housing and education. But the state may not apply these classifications as a basis for punishing speech or expressive conduct, because to do so would be unconstitutional viewpoint-based suppression of protected speech. See *RAV v City of St. Paul*, 505 U.S. 377 (1992), <https://supreme.justia.com/cases/federal/us/505/377/case.html>.

The difference between discriminatory boycotts in violation of civil rights and political boycotts to advance social justice was central to the decision in *Jews for Jesus v JCRC*, 968 F2d, 286, 1992, <http://openjurist.org/968/f2d/286/jews-for-jesus-inc-v-jewish-community-relations-council-of-new-york-inc-d>. There, the Second Circuit considered New York state civil rights laws, under which the state may punish boycotts that discriminate based on protected classifications, such as refusing to do business with people because of their religious beliefs. The court upheld the statute, but emphasized that under *NAACP v Claiborne*, it must be construed to exempt political boycotts or it would not pass constitutional muster.

¹ The only exceptions to the ban are for contracts under \$10,000; involving goods or services unavailable elsewhere; "a decision based on business or economic reasons"; as "required by federal or state law."

Kontorovich falsely equates federal penalties for compliance with boycotts called for by foreign countries with state penalties for compliance with grassroots boycotts.

Kontorovich argues that current boycotts in support of Palestinian rights are essentially identical to the Arab League boycott of Israel, which decades ago barred commerce with any company that did business in or with Israel, or whose owner was an Israeli national. Compliance by U.S. companies with “boycotts fostered or imposed by any foreign country against a country friendly to the United States” was banned and in some instances penalized under the federal Export Administration Act of 1977, with the Arab League boycott the prime target.

The equation is false. The boycotts that AB 2844 targets are grassroots in origin, not called for by a foreign country, and are directed at businesses and institutions that profit from and perpetuate Israel’s human rights abuses and violations of international law. They have nothing to do with a person’s national origin or a business’s domicile. Not only do such boycotts not violate any U.S. law, but insofar as they are directed primarily at companies that facilitate the ongoing occupation and establishment of illegal settlements in the West Bank, they reflect U.S. policies that deem settlements to be “illegitimate” and “an obstacle to peace,” and the occupation to be something that should end.²

Why a ‘boycott of boycotters’ is so wrong

AB 2844’s defenders call the bill a “boycott of boycotters.” Its derivative nature in fact exemplifies the main constitutional violation. A current flurry of activism is calling for boycotts of several states that have passed discriminatory legislation against their LGBTQ citizens. Some companies and individuals have responded to the grassroots call. PayPal, for example, has canceled a planned expansion in North Carolina to protest its discriminatory laws, and Bruce Springsteen has canceled a concert in that state. Under a law analogous to AB 2844, PayPal would be banned from public contracts in California, and our cities would be barred from hosting a Bruce Springsteen concert in municipally owned arenas. Such measures would be as unconstitutional as is AB 2844 -- and as unthinkable as it should be.

² Kontorovich concedes that the Supreme Court has never passed judgment on the EAA anti-boycott provisions, but he cites two federal district court cases that he says uphold their constitutionality. In fact, they do no such thing: In *Karin Maritime v Omar*, the court’s superfluous affirmation of EAA’s validity was pro forma, having no bearing on the outcome of the case: “Respondent Omar’s non-payment of its contractual obligations, and Petitioner Karen’s alleged non-performance of its contractual duties, have nothing to do with the Arab boycott.” Similarly in *General Electric Co. v N.Y. State Assembly*, a legislative committee sought information from GE regarding its possible non-compliance with EAA anti-boycott provisions. GE’s motion for a preliminary injunction, dismissed by the court, reflected primarily a spat with the Legislature over its subpoena powers, not a challenge to EAA.