

AB 2844: One step forward, five huge steps back

June 20 amendments make the anti-free speech bill more dangerous than ever

Memo of opposition, June 22, 2016

To: California Senate Judiciary Committee

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Introducing author amendments late on June 20, Assembly Member Richard Bloom made good on his vow to restore aspects of AB 2844 that had been stripped in successive Assembly committees in the wake of persuasive opposition. The core objection all along has been, and remains, that it would be a serious violation of the First Amendment of the U.S. Constitution to single out a certain type and/or content of highly protected speech – boycotts directed at protesting Israel’s violations of international law – and for the state to penalize it in any way.¹

With the last several iterations of the bill, opposition focused particularly on the literal blacklist of boycotting companies AB 2844 would have mandated, causing an unconstitutional chilling effect on speech, among other unacceptable outcomes. That odious feature of the bill has now been removed. But it has been replaced with three highly problematic elements that had been eliminated at earlier stages, plus two dangerous new features – all of which maintain the centrality of a more figurative but still McCarthy-style blacklist as the natural result of the bill’s operation.

AB 2844 once again singles out boycotts of Israel

Opponents and legislators had previously removed the bill’s specific references to Israel, recognizing the constitutional problem with singling out critics of one country’s government and not others. That the reference is now couched as “*including, but not limited to, the nation and people of Israel,*” restores what was found objectionable several versions ago, and does nothing to absolve it of unconstitutionality. The fact that Israel is the only country named reflects clearly the bill’s intent from its inception.

Israel and its supporters have been unable to counter growing global concern over violations of human rights and violence against Palestinians under Israeli rule, and the accompanying grassroots campaigns to apply economic and moral pressure for change. With AB 2844, the author and supporters seek to sidestep the public forum and instead legislate against such nonviolent, protected speech.

This phenomenon is not unique to California: similar legislation is being pursued in most states and several countries;² and in New York recently, where a bill ran into similar opposition, the governor took the drastic step of seeking to impose its blacklists by executive order.³

Of further note is new language in the latest version of AB 2844, directed at critics not of the “state of Israel” but the “nation and people of Israel.” This suggests the false and dangerous conflation of protests against Israeli government policies with attacks on Jews everywhere, who are sometimes referred to in a historical, ethnic sense as “the people of Israel” and whom the government of Israel often claims to represent. It also suggests that the bill is intended to protect Jews within Israel and around the world from the imagined discriminatory acts associated with boycotts of Israel, even though the anti-discrimination laws referred to in the bill protect residents of California only. At the same time the phrasing appears to

¹ For a review of the bill history and analysis of the previous version, most of which is still relevant, please see the opposition’s June 19 memo, *AB 2844: Narrowed but still dangerous*, <http://tinyurl.com/hhrkcoe>

² See <http://palestinelegal.org/legislation>; and http://www.slate.com/blogs/outward/2016/04/29/a_new_york_bill_penalizing_boycotts_is_a_threat_to_democracy.html

³ See <http://www.nydailynews.com/opinion/rebecca-vilkomerson-cuomo-repressive-anti-bds-crusade-article-1.2666385>

ignore that the “state of Israel” includes Palestinian citizens, who make up over 20 percent of that country’s population.

The unconstitutional ban on state contracts with those who boycott has been restored

The previous set of amendments, by the Assembly Appropriations Committee, had dropped a key element of the bill: The provision barring government contacts with businesses found to be engaging in a disallowed boycott (the definition of which changed over time). It remained an implied threat, but first, the Attorney General’s Office would have been asked to provide an opinion on such a provision’s constitutionality, which had come under serious question.

Now, it’s full speed ahead with the ban on state contracting with anyone who violates the law’s terms, despite the convincing case that has been made for its unconstitutionality.

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).

Very early on, the blacklisting dimension of the bill was narrowed to 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 have 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.

The new crime created by AB 2844 violates the Due Process Clause of the Constitution as being “void for vagueness”

In its latest iteration, AB 2844 creates a new crime – a felony – if a bidder certifies under penalty of perjury (as it requires) 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.”

The concept of using boycott “as a pretext for discrimination” has never before been invoked or defined under California law. By any measure, it is unconstitutionally vague under the Fifth Amendment’s Due Process Clause. The key constructs of the void for vagueness doctrine were enunciated by the Supreme Court are as follows:

[T]he terms of a penal statute [...] must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, ... and a statute which either 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.⁴

⁴ *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), <https://supreme.justia.com/cases/federal/us/269/385/case.html>

Opponents have consistently noted the inherent vagueness in determining whether, and if so, why a business is engaged in a boycott of a country. If a California company doesn't do business with a particular country, or if it once did business with a country but ceased because of commercial or economic reasons, would that constitute a boycott? As the Assembly Judiciary analysis observed: "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 a boycott, or would it be a decision for business and economic reasons?"⁵

As for "pretext," this word refers to "a reason that you give to hide your real reason for doing something."⁶ This would involve an inquiry into a person's motivations and subjective intent, and would compel the Attorney General's office to function as thought police.

AB 2844 caters to the characterization of boycotts and protests of Israel as "anti-Semitic," which is promoted by the Israeli government and Israel-aligned groups.

Since the 2005 call from Palestinian civil society for boycott, divestment and sanctions ("BDS") to press Israel on human rights issues, most Israel-aligned organizations have prioritized crushing such campaigns. These groups often act in concert with Israeli government offices and are part of the well-endowed Israel Action Network, which is dedicated to eliminating BDS, and various other organizations.

The most commonly used weapon 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, whether in the United States or elsewhere, including Israel. In fact, many members of the Jewish communities around the world support the use of such strategies to foster changes in Israeli policies.

Because the BDS initiative so obviously has none of the characteristics of traditional anti-Semitism (commonly defined as "hostility towards or discrimination against Jews as a religious, ethnic, or racial group"),⁷ Israeli officials and major Israel-aligned organizations are at pains to emphasize that it is a "new" version of anti-Jewish bigotry. For example Prime Minister Benjamin Netanyahu has called BDS advocates "classical anti-Semites in modern garb;"⁸ Malcolm Hoenlein, executive vice-chairman of the Conference of Presidents of Major American Jewish Organizations, called BDS "the 21st century form of 20th century anti-Semitism;"⁹ Danny Dannon, Israel's ambassador to the United Nations, said that BDS amounts to "modern-day anti-Semitism;"¹⁰ and Roz Rothstein, CEO of Stand With Us, stated that "BDS is the newest form of anti-Semitism."¹¹

Tammi-Rossman Benjamin, founder of Amcha Initiative, has said in an interview with the Forward that most forms of campus protest against Israel's policies are "anti-Semitic," including BDS campaigns, protests in which pro-Palestinian students erect a wall to symbolize Israel's illegal separation barrier, and campus events in which former Israeli soldiers testify about abuses and crimes against Palestinians in the occupied territories that they have committed or witnessed during their military service.¹²

⁵ <http://tinyurl.com/hx3jjnz>

⁶ Merriam Webster dictionary

⁷ Merriam Webster dictionary

⁸ <http://www.jpost.com/Diplomacy-and-Politics/Netanyahu-Iran-must-be-stopped-in-drive-for-nuclear-weapons-341693>

⁹ <http://www.israelnationalnews.com/News/News.aspx/177581#.V2Tv7zX1kel>

¹⁰ <http://jewishnews.timesofisrael.com/boycott-movement-is-modern-anti-semitism-says-israels-un-envoy/>

¹¹ <https://www.standwithus.com/news/article.asp?id=3552>

¹² Could California Ban Anti-Israel Campus Protests as 'Anti-Semitic' Hate? June 10, 2015, <http://forward.com/news/national/309450/what-is-anti-semitism/#ixzz4CFadwoLB>

By engrafting a presumption of anti-Semitic intent on boycotts of Israel, AB 2844 encourages characterizations of BDS as anti-Semitic and provides a foothold for calls for sweeping censorship.

AB 2844 unconstitutionally profiles those who boycott Israel as likely to violate anti-discrimination laws

Under the latest amendments, AB 2844 coins a new concept: Potential state contractors must certify, under penalty of perjury, *“that any policy that they have 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.”* A declaratory provision expands on this concept as it applies to Israel: *“... discriminatory actions against individuals under the pretext of exercising First Amendment rights. This includes, but is not limited to, discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel.”*

This construction ennobles the slur against those who support Palestine rights as anti-Semites, and makes it a basis for government intervention. It reinforces the negative stereotypes that drive profiling and discrimination, and is not unlike having a statute, for instance, providing that teachers are protected against employment termination based on their homosexuality – unless teaching is a pretext for recruiting young people. Or that transgender use of a bathroom consistent with gender identity is protected – unless it's 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 simply against discrimination while remaining true to its original intent: to single out, stigmatize and suppress certain forms and content of speech disfavored by its supporters.

AB 2844 invites Israel-aligned organizations to file a barrage of complaints with the AG's office demanding that individuals who boycott Israel be banned from public contracts and be subjected to criminal penalties

Israel-aligned organizations routinely flood university administrators, the U.S. Department of Education and the courts with complaints that boycotts and protests of Israel are anti-Semitic. For a summation of the extraordinary number of formal complaints and accusations made by these organizations against students and faculty alone, see *The Palestine Exception to Free Speech*¹³ and *Stifling Dissent*¹⁴.

Legislators should be aware of the floodgates that will open if the latest version of AB 2844 is passed, and of the burden that will be placed on the Attorney General's Office both to process complaints and to repeatedly act as a surrogate for the courts in the arduous task of trying to determine when protected political speech is somehow “discriminatory.”

There is simply no way to square such a law with the Constitution's free speech principles. In its latest incarnation, AB 2844 remains fatally flawed and harmful, and should be defeated.

¹³ Published by Palestine Legal, 2015

¹⁴ Published by Jewish Voice for Peace, 2015, <https://jewishvoiceforpeace.org/jvp-releases-first-ever-report-on-the-use-of-false-charges-of-anti-semitism-to-limit-palestinian-rights-activism-on-campuses/>