



CENTER FOR ADVOCACY & POLICY

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September 16, 2016

Hon Edmund G. Brown, Jr.
California State Capitol
Sacramento, California 95814

Re: AB 2844 (Bloom)
Request for veto

Dear Governor Brown:

The American Civil Liberties Union of California respectfully requests that you veto AB 2844, an unnecessary and polemical attempt to take sides in an ongoing political debate and embroil the State of California in an inappropriate and costly effort to police, deter, and criminalize political speech.

As the author has repeatedly made clear, the bill is motivated by concerns about the political views expressed by those who have “promoted a policy of Boycott, Divestment and Sanctions (BDS) against Israel.” The author alleges that supporters of BDS have engaged in a campaign “based on false comparisons to apartheid South Africa, false accusations of human rights violations, and false accusations of ‘war crimes.’”¹ The author has also complained 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 has pointed 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.”²

While BDS opponents can and should express their views, this is an issue for public discourse, not government control. The rationale for the bill is the faulty premise that participation in a political boycott is a form of unlawful discrimination that is not protected by the First Amendment. Indeed, the bill itself declares that it is aimed at “discriminatory actions against individuals under the pretext of exercising First Amendment rights ... [including] but ... 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.” The legislative history makes clear that the

¹ Author’s fact sheet, AB 2844 (Bloom) California Combating the Boycott, Divestment and Sanctions of Israel Act of 2016.

² 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

intent of the bill is that “the State of California ... not contract with any company participating in a boycott of Israel.”³

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. Politically-motivated economic boycotts, as well as their related divestment and sanctions campaigns, 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 in support of farmworkers in the 1970s, to the South Africa apartheid boycotts of the 1980s.

The BDS movement, particularly focused on college campuses, has been the subject of much heated debate in recent years. BDS reportedly “advocates boycotts, divestment and sanctions against companies deemed players in Israeli human rights violations,”⁴ and “calls on people and companies to boycott Israel until that country ends its occupation of ‘all Arab lands,’ ensures equal legal rights for its Arab citizens and accepts the right of Palestinian refugees to return to the former homes of their families in Israel. Some supporters of BDS accept the ‘two-state solution’ in which Israel and an independent Palestine would exist side by side; others don’t.”⁵ In the last four years, student governments at eight of nine UC undergraduate campuses have voted to support the BDS campaign. This movement has generated significant opposition largely funded by Sheldon Adelson and other supporters of Israel, “alarmed by the precipitous growth in young Americans’ support for Palestinians,” which they attribute to the BDS campus movement.⁶ Many supporters of Israel have sought to portray the BDS movement as anti-Semitic.⁷

In response to the debate sparked by the BDS movement, the University of California recently adopted a report calling for increased dialog, civility, and mutual understanding.⁸ The Regents approach is the right policy. The appropriate response to speech that some find offensive is not to prohibit that speech but to foster free speech on both sides. AB 2844 bill takes the wrong approach. It requires companies that want to do business with the state to make three nebulous certifications, and opens them up to criminal prosecution for perjury – a felony punishable by imprisonment for up to four years⁹ – if any one of these certifications is found not to be true. Each potential contractor would be required to certify that it is in compliance with both the Unruh Civil Rights Act and the Fair Employment and Housing Act, and in addition “that any policy [it has] against

³ See Senate Floor Analysis of AB 2844, at 4.

⁴ “How a casino tycoon is trying to combat an exploding pro-Palestinian movement on campuses,” Los Angeles Times, August 21, 2016, <http://www.latimes.com/local/la-me-uc-israel-palestinian-adv-snap-story.html>

⁵ “Editorial: Boycotts of Israel are a protected form of free speech,” Los Angeles Times, <http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html>

⁶ “How a casino tycoon is trying to combat an exploding pro-Palestinian movement on campuses,” Los Angeles Times, August 21, 2016, <http://www.latimes.com/local/la-me-uc-israel-palestinian-adv-snap-story.html>

⁷ “Editorial: Boycotts of Israel are a protected form of free speech,” Los Angeles Times, <http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html>

⁸ “UC regents say anti-Semitism has ‘no place’ on campus but reject blanket censure of anti-Zionism,” Los Angeles Times, March 23, 2016, <http://www.latimes.com/local/lanow/la-me-ln-uc-regents-intolerance-20160322-story.html>

⁹ Penal Code section 126.

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 to discriminate in violation of the Unruh Civil Rights Act ... or the California Fair Employment and Housing Act....”¹⁰

It is not necessary or beneficial for the state to subject the state’s business partners and bidders to new criminal penalties based on such broad and vague certifications. Few conscientious companies would undertake such exposure to criminal prosecution. The bill would therefore likely deprive the state of responsible business partners, leaving only the most careless as potential state contractors. Moreover, these sweeping certifications could well be costly – both because the state would artificially exclude qualified bidders and contractors, and because those businesses careless enough to be willing to sign such certifications may be more troublesome business partners.

As the Department of Finance noted in its opposition, this bill “would result in additional costs without providing additional protections against discrimination beyond existing state law.”¹¹ DOF observes that specified Government Code and Public Contract Code sections already explicitly prohibit discrimination and prohibit the state from entering into certain contracts with any contractor unless the contractor complies with all nondiscrimination standards as well as appropriate federal laws.¹² Indeed, the bill imposes significant administrative and operational costs for state agencies whose contractors are accused of discrimination, as well as the Department of Fair Employment and Housing to receive and investigate potentially numerous complaints, and state and local prosecutors who will be called on to investigate and prosecute accusations of perjury, and the potential costs of incarceration, as well as higher contract prices caused by the exclusion of bidders. Finally, DOF concludes, the bill is unnecessary because it “merely requires self-certification of compliance with existing law, yet incurs costs to the General Fund, which is inconsistent with the current budget.”¹³

The Los Angeles Times has said the bill is mistaken, unnecessary, convoluted, and raises serious constitutional concerns.¹⁴ With respect to those constitutional concerns, 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.”¹⁵ Boycotts “to bring about political, social and economic change” through speech, association, assembly, and petition are unquestionably protected under the First Amendment.¹⁶ “In many different contexts ... the Supreme Court has made clear that, although the government is under no obligation to provide various kinds of

¹⁰ As others have noted, what it means to have a policy against the nation and people of Israel is a difficult and complex question. “There are many strong supporters of the State of Israel, including our organizations, Americans for Peace Now, who oppose the extreme positions of BDS, but who support a boycott of economic activities that further Israel’s dangerous settlement policies in the West Bank and East Jerusalem. Does the “the nation and people of Israel” in AB 2844 include settlements that the United States government has long declared illegitimate and that are clearly illegal under international law?” Steven Kaplan and Sanford Weiner, “Governor Brown should veto flawed BDS law,” Jewish Journal, September 12, 2016, available at

http://www.jewishjournal.com/opinion/article/governor_brown_should_veto_flawed_bds_law

¹¹ http://dof.ca.gov/legislative_analyses/LIS_PDF/15/AB-2844-20160730013436PM-AB02844.pdf

¹² *Id.*

¹³ *Id.*

¹⁴ “Editorial: Boycotts of Israel are a protected form of free speech,” Los Angeles Times, <http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html>

¹⁵ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982)

¹⁶ *Id.*, at 913

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.”¹⁷ “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.”¹⁸ 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.¹⁹ 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.

The bill also fails constitutional standards as a content-based regulation of speech. Even if the bill were construed to be facially content-neutral, it may still be unconstitutional if it “cannot be justified without reference to the content of the regulated speech” or was “adopted by the government because of disagreement with the message” expressed. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (citations & quotation marks omitted). The fact that other individuals in addition to BDS opponents might be covered by the bill does not purge the bill of its apparently improper purpose. See *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (striking down facially neutral disenfranchisement law motivated by racial discrimination, where “an additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks”); *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1159 (9th Cir. 2013) (“willingness to inflict collateral damage” on third parties “does not cleanse the taint of discrimination; it simply underscores the depth of the defendant’s animus.”) See also *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005)(unconstitutional legislative purpose may be inferred from prior efforts to accomplish the same or similar result).

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. 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. Constitutional protection of political expression “does not turn upon the truth, popularity, or social utility of the ideas and beliefs which are offered.”²⁰ It is not for the state to determine which political viewpoints are acceptable, or whose beliefs and

¹⁷ *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp.2d 184, 200 (E.D.N.Y. 1999).

¹⁸ *Id.*

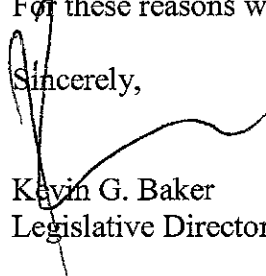
¹⁹ See *Board of Comm’rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668 (1996); *O’Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 726 (1996).

²⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (internal quotations omitted).

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.

For these reasons we respectfully request that you veto AB 2844.

Sincerely,



Kevin G. Baker
Legislative Director

cc: Hon. Richard Bloom