Senate Floor Alert

AB 2844: A COSTLY, DECEPTIVE ATTACK ON POLITICAL SPEECH

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AB 2844 INVOKES 'ANTI-DISCRIMINATION' LANGUAGE TO CONCEAL ITS STEADFAST OBJECTIVE TO UNCONSTITUTIONALLY SUPPRESS POLITICAL SPEECH CRITICAL OF ISRAEL

AB 2844 began as a straight-up blacklist and public-contract ban against any entity that supports boycott or divestment in connection with Israel or has otherwise ceased doing business in or with Israel. Because boycotts to effect social justice are a highly protected form of political speech[1] and because the government may not condition financial benefits on the waiver of constitutional rights,[2] the Assembly Judiciary Committee analysis and every legal organization that weighed in concluded that the bill was patently unconstitutional. Thereafter, through seven rewrites, the authors scrambled to find a formula to stigmatize boycotts of Israel in a way that would appear to pass constitutional muster. The solution was to recast the bill as combatting "discrimination" – a word entirely absent from early versions – and to concoct an utterly unsubstantiated link between boycott of Israel and unlawful discrimination by state contractors in public accommodations, employment and housing. In this way, the bill is framed to obscure the authors' unchanged unconstitutional objectives: to single out, stigmatize and suppress protected boycott activity concerning Israel.

THE AUTHOR HAS CONSISTENTLY DEMONSTRATED THAT THE SOLE PURPOSE OF AB 2844 IS TO 'COMBAT' POLITICAL BOYCOTTS AFFECTING ISRAEL

- At every hearing on the bill in its various incarnations, including the latest, the author and proponents have focused extensively on the need to protect Israel from the evils of "BDS." which they have mischaracterized as "diabolical," "delegitimizing" and "demonizing" Israel, and its supporters as anti-Semitic. Short for "boycott, divestment and sanctions," BDS refers to a category of strategies, among others employed by advocates for Palestinian human rights, aimed at pressing Israel to end its occupation and other serious international law violations. It is modeled on earlier campaigns that successfully employed boycotts to advance human rights, including those against Jim Crow, apartheid and farm worker abuses.
- The declaratory provisions of earlier versions of the bill emphasized that its purpose was to remove boycott activity as an obstacle to enhanced trade relationships between California and Israel.
- In his current Senate Floor analysis,[3] the author, Assembly Member Bloom, focuses exclusively on the fiscal implications of BDS, its impact on trade with Israel and the need to join other states that have passed anti-BDS legislation. The issue of discrimination against protected classes is entirely absent as a rationale for the bill.
- Earlier versions of AB 2844 were titled "Combating the BDS Movement." When it became clear that legislation that openly targeted such protected activity would be struck down as unconstitutional, that title was dropped. But on his website, Mr. Bloom retains that title even when describing the latest versions of the bill.

AB 2844 AS AMENDED CREATES A FELONIOUS THOUGHT CRIME THAT IS VOID FOR VAGUENESS

- In addition to certifying compliance with nondiscrimination laws as already required under existing law, anyone submitting a bid or proposal for a contract with the state of over $100,000 would be required to "certify, under penalty of perjury" the following: "*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*." What constitutes a "policy" against a foreign country is completely undefined. Declaring under penalty of perjury that one hasn't acted under a "pretext" involves an improper administrative inquiry into state of mind and subjective intent. AB 2844 would newly criminalize the purported motivation behind an alleged act of discrimination, although the act of discrimination itself remains subject to civil liability only.
- The certification language singles out and profiles those who engage in protected boycott activity against a foreign country as especially likely to be bigoted and duplicitous.
- Responsible contractors would refuse to sign a vaguely worded certification that risks exposure to criminal liability.

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[1] *NAACP v. Claiborne Hardware Col, 458 U.S. 886 (1982)*

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

[3] https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2844

- Based on their history of "lawfare" against those who support Palestinian rights, and their mischaracterization of boycotts of Israel as "anti-Semitic," the Israel-aligned organizations that support AB 2844 would exploit the vaguely worded certification to deluge the state with frivolous complaints of alleged discrimination.[4]

ADMINISTRATIVE COSTS - POTENTIALLY MORE THAN $140 MILLION

To summarize the Senate Appropriations Committee analysis:[5]

- Fielding and investigating complaints, and possibly prosecuting them, are estimated at $625,000 a year.[6]
- Higher costs for state contracting due to lack of exclusions for sole-source contracting, no-bid renewals, etc., estimated at 0.5 percent of current state contracting costs: $140 million annually.
- Other agencies' increased administrative workload and costs for goods and services due to specified contracting requirements are "unquantifiable but potentially significant."
- Law enforcement agencies: unknown costs for arrest and incarceration.

ADDITIONAL COSTS OF DEFENDING AGAINST LEGAL CHALLENGE

- Every legal organization that has weighed in on AB 2844 in its various incarnations, including ACLU, the Center for Constitutional Rights, National Lawyers Guild and others, has warned of the unconstitutionality of penalizing or chilling political expression, including in the form of boycott. Potential plaintiffs are not only individuals, churches and nonprofits that receive state funds, but also multinational corporations that have chosen for whatever reason to cease doing business in Israel. Public contracts with such entities could result in complaints alleging perjury against them, and they would have both the resources and motivation to forcefully challenge such a process.

DEPARTMENT OF FINANCE OPPOSITION: AB 2844 IS COSTLY AND REDUNDANT OF EXISTING LAW

- The Department's memo states that it "opposes this bill because it would result in additional costs without providing additional protections against discrimination beyond existing state law. This bill merely requires self-certification of compliance with existing law, yet incurs costs to the General Fund, which is inconsistent with the current budget."[7]

CONCLUSION

AB 2844's transformation from "Combatting the BDS Movement" into a purported "anti-discrimination" bill is but a pretext for the same unconstitutional purpose it has had from the start: to stigmatize and suppress controversial political speech. As a *Los Angeles Times* editorial put it: ***"The proponents of this bill are desperately eager to single out and punish companies that engage in boycotts against Israel. Realizing that their initial proposal ran contrary to the free speech protections guaranteed in the Bill of Rights, they have now come back with a convoluted, redundant and most likely ineffectual bill that allows them to say they've passed an anti-BDS bill. … Politicians are free to denounce BDS if they choose. But they must do so without infringing on the rights of their constituents."***[8]

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[4] Proponents of AB 2844 have a demonstrated record of filing frivolous lawsuits and administrative complaints against speech critical of Israeli policies. Such complaints fail in a legal sense, but they succeed in draining government resources. For example, beginning in 2012, an Israel lobby organization called the AMCHA Initiative repeatedly filed complaints with the Attorney General alleging that a CSU professor violated state law by posting information about a boycott of Israel on his CSU website, even after CSU and the AG rejected the complaint, finding no violations. (See National Lawyers Guild letter to the CSU Chancellor and trustees, http://tinyurl.com/zxeug6v). Israel lobby organizations also filed an unsuccessful federal lawsuit and three administrative complaints to the U.S. Department of Education against the University of California under Title VI of the Civil Rights Act alleging that Palestinian rights advocacy created a hostile environment for Jewish students. All four cases were roundly rejected on First Amendment grounds. (See Palestine Legal and Center for Constitutional Rights, *Palestine Exception to Free Speech,* Sept. 2015, http://palestinelegal.org/the-palestine- exception#tactics7.)

[5] http://tinyurl.com/zvoslts

[6] This figure was arrived at before a final amendment passed by the Senate Appropriations Committee eliminated the provision that assigned investigative responsibility to the Attorney General's Office for complaints of false certifications of compliance with Unruh and FEHA. However, as noted in the subsequent Senate Appropriations analysis of this latest amendment, under existing law such investigative jurisdiction would rest with the Department of Fair Employment and Housing. Responsibility for prosecuting alleged perjury by false certification would remain with the AG's Office. There is no reason to expect that the cost would be any less.

[7] http://tinyurl.com/zxb58er

[8] http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html