

LATEST AMENDMENTS FAIL TO SALVAGE AB 2844 FROM UNCONSTITUTIONALITY

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Last-minute author amendments, posted Sat., Aug. 20, introduce two minor changes to the latest version of AB 2844:

1. An “exception” clarifies that any act “*reasonably necessary to comply with federal or state sanctions or laws affecting sovereign nations or their nationals shall not be construed as unlawful discrimination.*”
2. The phrase “as a pretext for discrimination” is replaced -- in two of the three places the word “pretext” appeared in AB 2844 -- by “to discriminate,” including in the certification language that would be required of state contractors.

1. The unconstitutionally chilling insinuation that certain disfavored “policies” are inherently discriminatory remains

It goes without saying that specific federal and state laws requiring boycotts of other countries-- Iran, for instance -- would not be superseded by AB 2844.

AB 2844 purports to smoke out “unlawful discrimination” in political protests disfavored by its author and supporters. In fact, the amendment, and the entire bill itself, are superfluous on this score because acts of unlawful discrimination based on a person’s protected characteristics are already covered by the Unruh Act and FEHA. What AB 2844 adds is the false and chilling insinuation that boycotts, or other “policies” critical of Israel, are somehow inherently discriminatory. This opens the door for the Israel-aligned organizations that support the bill to flood the state with complaints against any and all contracting entities that boycott or are otherwise critical of Israel.

As we have noted in previous analyses and the Aug. 17 Floor Alert, the invocation of “discrimination” as the purported target of AB 2844 -- absent from the original and several earlier versions -- is spotlighted now as a pretext for state intervention. The latest amendments are seventh in a series of rewrites as proponents press to win passage of a bill -- any bill -- that signals a legislative repudiation of the growing criticism of Israel’s policies on campuses and in the public forum.

2. Removing the word “pretext” from the required certificate of compliance under AB 2844 does not alter the unconstitutionality of singling out political boycotts for heightened state scrutiny and criminal prosecution

This latest change attempts to soften the sting of the bill’s terminology but continues to insinuate that critics of Israeli policy are hiding their true discriminatory motives. The author’s intent, the reason why AB 2844 is being so zealously promoted, remains unchanged and crystal clear in section 1(j): ***“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. 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.”***

As further demonstrated repeatedly in all of Assembly Member Bloom’s presentations of the bill and in his floor analysis, the true purpose of AB 2844 is to single out those who use political boycott or other forms of protest to press Israel to change its policies, stigmatize them and lay the groundwork for suppressing their voice on campuses and elsewhere.

The constitutional protection due a political boycott was articulated in the landmark 1982 case, *NAACP v Claiborne Hardware Co.* (458 U.S. 886). The Supreme Court found that a civil rights boycott challenged by white merchants constituted a political form of expression protected by the First Amendment rights of speech, assembly, association and petition. Moreover, because a political boycott is a form of speech concerning public issues, it “occupies the highest rung of the hierarchy of First Amendment values.”

It is a stunning inversion of free speech principles that AB 2844, instead of recognizing political boycotts as requiring the highest form of protection from government interference, casts certain of them as a special target for government scrutiny and even criminal prosecution by fabricating an utterly unsubstantiated link between criticism of Israel and unlawful discrimination in public accommodation, employment and housing.