

Assembly Floor Alert

AB 2844: SENATE VERSION RESTORES CONSTITUTIONAL DEFECTS THE ASSEMBLY SOUGHT TO ELIMINATE, HIKES COSTS DRAMATICALLY AND CREATES A NEW CRIME THAT IS VOID FOR VAGUENESS

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Background: 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 advance social justice are a highly protected form of political speech,¹ and because the government may not condition financial benefits on an applicant's political beliefs or 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 the Assembly successively narrowed the bill, finally passing a version that required the Attorney General to compile a list of companies engaging in discriminatory business practices, as defined under the Business and Professions Code, in furtherance of a boycott of a foreign country. The Attorney General was also mandated to provide an assessment to the legislature of the constitutionality of a public-contract ban against companies on the list. All previous references to Israel as the country to be shielded from boycott were eliminated. Language making the bill's provisions applicable to "any" boycotting entity were changed to limit applicability to for-profit entities only.

Senate version of AB 2844: In addition to certifying compliance with nondiscrimination laws as already required under existing law, every bidder for a public contract exceeding \$100,000 would be required to certify, "under penalty of perjury," 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 to discriminate in violation of the Unruh Civil Rights Act or the California Fair Employment and Housing Act."³

In addition to restoring the primacy of Israel by repeated use of the phrase, "including but not limited to Israel" as the sole example of a nation that would be shielded under the bill, a declaratory provision specifies the type of activity it seeks to eliminate as "discriminatory actions taken against individuals of the Jewish faith under the pretext of a constitutionally protected boycott or protest of the State of Israel." No other type of activity and no other country is mentioned. In this way, the Senate version resurrects the "viewpoint discrimination" constitutional defect that the Assembly version eliminated.

The bill eliminates Assembly language limiting applicability of the bill to for-profit contractors only, so that now churches and other non-profit entities would again be targeted. More and more such institutions have adopted boycotts of illegal Israeli settlement products and/or divested from corporations complicit in Israeli human rights abuses

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

After the Assembly Judiciary Committee concluded that a bill penalizing protected political speech presents "insurmountable constitutional problems," and the Assembly passed a version that deleted all reference to Israel and explicitly questioned the constitutionality of blacklisting boycotting entities, the authors scrambled to find a formula to stigmatize boycotts of Israel in a way that would appear to pass constitutional muster. Their ultimate solution was to recast the bill as combatting "discrimination" against protected classes and to fabricate an utterly

¹ NAACP v. Claiborne Hardware Co., 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 A previous version of AB 2844 required bidders to certify that they were not engaged in a boycott of Israel, and imposed severe sanctions for certifications deemed to be false. In its review of this version, the Assembly Judiciary Committee noted that the certification presented a "coerced speech problem", and concluded: "It is difficult to imagine legislation more clearly calculated to have a chilling impact on the exercise of protected speech."

unsubstantiated link between boycott of Israel and unlawful discrimination in public accommodations, employment and housing.

THE AUTHOR HAS CONSISTENTLY DEMONSTRATED THAT THE PURPOSE OF AB 2844 IS NOT TO PREVENT DISCRIMINATION BUT TO SHIELD ISRAEL FROM HUMAN-RIGHTS ACTIVISM

- At every hearing on the bill in its various iterations, the author and proponents have focused extensively on the need to protect Israel from the evils of “BDS,” which they have characterized as “diabolical,” “anti-Semitic”, and intended to destroy the Jewish state. In fact, BDS refers to Palestinian civil society’s call for grassroots “boycott, divestment and sanctions” campaigns to press Israel to end its violations of international law and grave human rights abuses, which have been documented and condemned by every major human rights organization in the world. BDS is modeled on earlier campaigns that successfully employed boycotts to advance human rights, including those against Jim Crow, apartheid and farm worker abuses.
- In his Senate floor analysis,⁴ the author, Assembly Member Bloom, focused 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.
- In the Senate floor debate, co-author Senator Block was asked by a fellow senator whether “a company could still take a position for or against Israel” as long as it didn’t violate the Unruh Act or FEHA by discriminating against a person in California based on a protected classification such as race or religion. Senator Block immediately replied that the bill would also prohibit “boycott of any nation based on discrimination.” In other words, the bill is intended to expand Unruh’s and FEHA’s protected classes of “persons” resident in California to include a foreign country, Israel, and to target boycotts of Israel as a form of unlawful discrimination in and of itself.

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

- Each and every bidder for a public contract over \$100,000 would be required to certify under penalty of perjury that “any policy” they have adopted against a foreign country is not used to discriminate in violation of Unruh or FEHA. What constitutes a “policy” against a foreign country is not defined in the bill nor, as far as we know, in any other state statute. Further, as discussed, proponents of AB 2844 deliberately confound the meaning of Unruh’s and FEHA’s prohibitions of discrimination based on protected classifications by casting Israel as a protected class and protest of Israel’s policies as inherently anti-Semitic.
- Responsible contractors would refuse to sign a vaguely worded certification that risks exposure to criminal liability.
- 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 undoubtedly exploit the vaguely worded certification to deluge the state with frivolous complaints of alleged discrimination.⁵

ADMINISTRATIVE COSTS - POTENTIALLY MORE THAN \$140 MILLION ANNUALLY

To summarize the Senate Appropriations Committee analysis:⁶

- Fielding and investigating complaints, and possibly prosecuting them, are estimated at \$625,000 a year.⁷
- 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.”

⁴ https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB2844

⁵ Proponents of AB 2844 have a demonstrated record of filing frivolous lawsuits and administrative complaints against those who speak critically of Israeli policies. Such complaints fail in a legal sense, but they succeed in draining government resources. See Palestine Legal and Center for Constitutional Rights, *Palestine Exception to Free Speech*, Sept. 2015, <http://palestinelegal.org/the-palestine-exception#tactics7>.)

⁶ <http://tinyurl.com/zvoslts>

⁷ 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.

- 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."⁸

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 regarding the Senate version 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.⁹

⁸ <http://tinyurl.com/zxb58er>

⁹ <http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html>. Note that contrary to Sen. Jackson's statement on the Senate floor after Sen. Monning quoted from it, the LA Times editorial responded to the same version of AB 2844 now before the Assembly, except for several minor amendments. The basis for the paper's opposition remain unchanged.