June 27, 2016

The Honorable Richard Bloom

California State Capitol, Room 2003

Sacramento, California 95814

**Re: AB 2844 – as amended 6/20/16**

**Oppose unless amended**

Dear Assembly Member Bloom:

The American Civil Liberties Union of California regrets that we must respectfully renew our opposition to AB 2844 as most recently amended*.* As with prior versions of this bill that explicitly sought to penalize individuals and businesses engaged in political advocacy regarding the government of Israel, this bill is suspect because it evidently seeks to burden and deter constitutionally-protected speech by targeting those who criticize or protest actions by the Israeli government*.* If the intent of the bill is to ensure that state contractors adhere to existing anti-discrimination laws, that worthwhile goal could be achieved by amending the bill as suggested below.

It seems plain that this bill is motived by concerns about the political views expressed by those who have “promoted a policy of Boycott, Divestment and Sanctions (BDS) against Israel” because they have allegedly 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]](#footnote-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]](#footnote-2)

Even if the current version of this bill were construed to be facially content-neutral, it may still be seen to be content-based regulation of speech 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).

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 of the 1970s to the South Africa apartheid boycotts of the 1980s.

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.”[[3]](#footnote-3) It is not for the state to determine which political viewpoints are acceptable, or whose beliefs and 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.

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.”[[4]](#footnote-4) Boycotts “to bring about political, social and economic change” through speech, association, assembly, and petition are unquestionably protected under the First Amendment.[[5]](#footnote-5) “In many different contexts … the Supreme Court has made clear that, although the government is under no obligation to provide various kinds of 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.”[[6]](#footnote-6) “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.”[[7]](#footnote-7) 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.[[8]](#footnote-8) 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.

For these reasons, the bill’s assertion that boycotts or other protests against the state of Israel are not constitutionally protected (page 4, lines 12-15 after the word “individual”) should be stricken, along with the language equating protests of Israel with discrimination against people of the Jewish faith, in light of the fact that the government of Israel is secular, not religious, and that the people of Israel include many who are not Jewish. Likewise, the bill should be amended to delete irrelevant and intimidating allusions to policies against the nation and people of Israel (page 4, lines 33-35 after the word “have.”) The bill should also clarify that its various references to “discrimination” must be specifically limited to discrimination that is unlawful under the Unruh Civil Rights Act and the Fair Employment and Housing Act.

We also object to the provision authorizing complaints to and investigations by the Attorney General. We know of no precedent for permitting administrative complaints to the Attorney General for any other non-discrimination certification by a state contractor (*cf.* Public Contract Code section 6108 requiring contractors to certify nondiscrimination in apparel and related contracts) or for any other declaration under penalty of perjury. This process is not only out of the ordinary, it is likely to be expensive for the state in light of past experience with anti-BDS groups who have repeatedly filed administrative complaints with federal civil rights investigators, to say nothing of the likely costs of defense for state contractors. If this provision is nevertheless retained, it should at minimum be amended to provide that the Attorney General may impose sanctions comparable to the anti- SLAPP statute (CCP section 425.16 et seq.) in order to prevent and remedy improper complaints seeking to chill legitimate free speech, petition, and association. In addition, the complaint and investigation process should have sensible deadlines for filing complaints and concluding investigations so that the complaint process does not drag out and contractors are not required to defend themselves indefinitely.

Finally, it is troubling that the bill demands a backward-looking declaration under penalty of perjury that state contractors “have complied with” certain nondiscrimination statutes. This retrospective certification appears to be unlimited in time. Thus, any state contractor that is later found to have discriminated against someone at any time in history prior to the contract would apparently be guilty of perjury. 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, this sweeping certification 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 a certification may be more troublesome business partners.

Please do not hesitate to contact us should you have any questions or concerns.

Sincerely,

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| Kevin G. Baker |  |
| Legislative Director |  |

cc: Members and Committee Staff, Senate Judiciary Committee

1. Author’s fact sheet, AB 2844 (Bloom) California Combating the Boycott, Divestment and Sanctions of Israel Act of 2016. [↑](#footnote-ref-1)
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 [↑](#footnote-ref-2)
3. New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (internal quotations omitted). [↑](#footnote-ref-3)
4. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) [↑](#footnote-ref-4)
5. *Id., at 913* [↑](#footnote-ref-5)
6. *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp.2d 184, 200 (E.D.N.Y. 1999). [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *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). [↑](#footnote-ref-8)