

Supplementary opposition memo regarding AB 2844

To: Members of the California Assembly Accountability and Administrative Review (A&AR) and Judiciary committees, and all other interested parties

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Introduction

This memo is submitted to supplement a previous one dated February 11, 2016, by the Center for Constitutional Rights, Palestine Legal and the National Lawyers Guild, in opposition to AB 1551 and AB 1552, introduced on Jan. 4, 2016, by Assembly Member Travis Allen. The new memo comes from the same primary authors named at the end of the earlier one, and was reviewed and approved by fellow attorneys at the three legal organizations that submitted the original memo.

The coalition in opposition to anti-boycott legislation named at the end of the original memo, comprising eight major national organizations and nearly 100 other national, statewide, and local groups and chapters, remains intact and continues to grow, now in opposition to AB 2844.

This new document clarifies which parts of the February 11 memo remain relevant in relation to AB 2844, and provides an analysis of new provisions in AB 2844 that give rise to additional constitutional defects. Lengthy quoted portions of the previous memo are indented.

Legislative history

AB 2844 was amended in its entirety from a previous, unrelated bill and reintroduced by Assembly Member Richard Bloom on March 28, 2016.

Like AB 1552, AB 2844 now deals with state contracting. But unlike the earlier bill, which was ostensibly a generic measure against “discriminatory” boycotts (though the author’s public statements made clear that it was meant to counter boycotts of Israel), AB 2844 explicitly names “*boycott of Israel*” as its target, both in the title and numerous times in the text.

AB 1551, which dealt with state trust fund investment, all along named boycott of Israel as its target.

AB 2844 is thus a hybrid of the two earlier bills. In fact, it is virtually identical to an amended version of AB 1552 submitted by Assembly Member Allen himself to the Legislative Counsel on March 9, 2016. - Partisan political considerations apparently led to the advancement of AB 2844 instead under a new number and with a different author.

The new bill was assigned on April 4 to the Assembly Accountability and Administrative Review (April 13 hearing) and Judiciary (April 19 hearing) committees. Neither earlier bill was referred, so they are effectively dead.

Political context

Like its predecessors, AB 2844 falls squarely within the category of legislation being proposed in approximately half the states, and already passed in several. As we wrote in the previous memo’s introduction: “*Under the guise of expressing concern for purported discriminatory practices affecting Israel, the true agenda of these bills is to shield Israel from growing criticism of its policies and from nonviolent measures taken to express and make meaningful that criticism.*”

In fact, since then, twin bills introduced in Congress (HR 4514 and S 2531) illustrate clearly the concerted effort under way in pursuit of this agenda. The federal bills encourage states to pass such

legislation and purport to enable them to avoid potential obstacles such as preemption or interference with interstate commerce. But the congressional bills do not attempt to explain how they could reconcile with the First Amendment any of these state measures that in some or another variation, would penalize political speech by denying investment and/or contracts from entities that are perceived to be boycotting Israel.

Constitutionality

Like AB 1551 and the original AB 1552, AB 2844 provides for the state to penalize protected speech in the form of political boycott. It would deny economic benefits to entities based on their political beliefs. Thus, the following excerpts from the original memo's section on constitutionality are fully applicable to AB 2844:

Boycotts are protected speech and therefore must be accorded the highest level of First Amendment protection

Boycotts in pursuit of political aims are an integral part of American history. From the original Boston Tea Party protest have followed other transformative campaigns such as the Montgomery bus boycott against segregation, the grape boycott in support of farm labor rights, boycotts of companies and institutions enabling South African apartheid, and current divestment campaigns against fossil fuel and private prison companies. All of these boycotts were controversial when first proposed by small groups of activists. Eventually, all came to win widespread public and bipartisan political support.

The constitutional protection due a political boycott was articulated in the landmark Supreme Court case, *NAACP v. Claiborne Hardware Co.*¹ In that case, a local NAACP branch boycotted white merchants to pressure elected county officials to adopt racial justice measures. The merchants sued NAACP for interference with business. The Supreme Court found that “the boycott clearly involved constitutionally protected activity” through which the NAACP “sought to bring about political, social, and economic change.” It concluded that the boycott constituted a political form of expression protected by the First Amendment rights of speech, assembly, association and petition. ...

Denial of financial relationships with the state on the basis of political speech is constitutionally impermissible

In *Rutan v. Republican Party of Illinois*,² the Supreme Court held that the government could not deny employment opportunities to punish public contractors in retaliation for political beliefs. The court observed that although the government may deny a benefit for a number of reasons, “it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. ... Such interference with constitutional rights is impermissible.”³

¹ 458 U.S. 886 (1982) <https://www.law.cornell.edu/supremecourt/text/458/886>

² 497 U.S. 62 (1990) <https://www.law.cornell.edu/supct/html/88-1872.ZO.html>

³ See also *O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 712 (1996); Independent contractors are entitled to the same First Amendment protection against retaliation for political expression as government employees).

<https://www.law.cornell.edu/supct/html/95-191.ZO.html>

Thus, regardless of one's views on Israel and Palestine or on strategies involving boycott and divestment, AB 1551 and AB 1552 must be rejected as a blatantly unconstitutional means to penalize and inhibit protected speech by withholding financial relationships with the state due to the speakers' political beliefs.

AB 2844's proposed addition of a Section 2100(a) to the Public Contract Code perpetuates the prior bills' unconstitutional adoption of viewpoint discrimination: "*A public entity shall not enter into a contract on or after January 1, 2017, to acquire or dispose of goods, services, information technology, or for construction if the contracting company is participating in a boycott of Israel.*"

Who could be blacklisted under AB 2844, if implemented?

Civil campaigns to boycott and/or divest from companies complicit in Israel's human rights violations have fast been gaining ground in the United States and throughout the world, and have had an impact on large multinational corporations as well as smaller businesses that have profited from and facilitated the occupation. For example, Veolia, a French-based firm that deals in transportation, water projects and sanitation, with many facilities in California, recently announced that it was ending its activities in the occupied Palestinian territory. For several years it had come under heavy criticism – and lost billions in contracts – for running segregated (Jewish settlers only) buses, a light rail line from West Jerusalem to illegal settlements and a West Bank landfill for settlement trash dumped on Palestinian land.

Other major multinationals that have recently announced plans to end commercial activities in Israel and/or the occupied territory in compliance with boycott calls include CHR, the world's largest producer of building materials and supplies; and Orange, one of the largest telecommunications providers in the world. Corporations that have acceded to calls that they end their operations in West Bank settlements include Unilever and SodaStream. All these companies (or their subsidiaries) have a strong business presence in California. A legislative mandate to boycott and divest from them would foreclose major contractual options for California, without moral justification for such a restriction.

The scope of AB 2844 is narrower than that of its predecessors: It limits affected entities to companies that exist "for the purpose of making profit." This avoids the dire implications discussed in the original section on "Who could be blacklisted" under AB 1551/1552, which targeted a more sweeping category of "entities." AB 1552, for instance, could have required the state to end its funding of the charitable works of the growing ranks of churches that divest from corporations profiting from Israel's human rights violations, or to deny contracts with, for example, unions, foundations and universities that have voted for divestment.

As long as any entity is threatened by the state with economic disadvantage, however, due to its expressed views on a political matter not relevant to the proposed economic relationship, as in AB 2844, the core constitutional problem remains.

The implementation mechanisms of AB 2844 are impossibly vague, and enforcement would therefore be capricious and arbitrary

The earlier memo remains relevant in part, but AB 2844 raises additional constitutional concerns.

While the specific directions for implementation in AB 2844 differ from those of its predecessors, the key problems remain: How is the state to identify a company that is boycotting Israel, and how is the

state to determine whether a company refusing to do business with Israel is motivated by political or by commercial/economic considerations, which all the bills exempt from penalty?

Clearly, these are crucial matters, requiring clarity for any rational and fair enforcement.

Gone in AB 2844 is the AB 1551 requirement that the state rely on a (nonexistent) federal report to indicate who is boycotting Israel. Gone too is its requirement that a boycotting entity's governing body formally resolve not to boycott as a condition of doing business with the state. And the now-explicit targeting of boycotts of Israel obviates the earlier vague and burdensome formulation barring contracts with any entity that boycotts a "jurisdiction with which the state can enjoy open trade."

Instead, however, AB 2844 now defines a punishable boycott as "*refusing to deal with, terminating business activities with, or taking other actions that are intended to penalize, inflict economic harm, or otherwise limit commercial relations with Israel or persons or entities incorporated in Israel or doing business in Israel for reasons other than business, investment, or commercial reasons.*"

But as with the earlier vague formulations, how is one to know why, in fact, a company abstains from or ceases doing business with Israel? In a very real current scenario, several major corporations long accused by human rights activists of complicity with Israeli violations of international law have recently announced that they will be pulling out of the occupied territories or of Israel altogether. As we pointed out in our original memo, these include corporations with a strong presence in California, such as Veolia, CHR and Orange Telecommunications, joined most recently by G4S, the world's largest private security company. Is the Legislature prepared to require that these corporations be banned from doing business with any public entity in California? If so, how will it be determined whether they ceased doing business for political reasons, or are exempt from the ban because they were motivated by economic or commercial reasons -- which are in fact a function of the losses they suffered as a result of boycott and/or divestment campaigns against them?

In the struggle to end South African apartheid, the state and other government agencies joined campaigns to push corporations to sever connections with human rights abuse. Under AB 2844, the state would *penalize* corporations for taking similar steps.

In its next sentence, AB 2844 spells out the sole method it offers for the state or other public agency to determine whether a company is boycotting Israel: "*A statement by a company that it is participating in a boycott of Israel, or that it has initiated a boycott in response to a request for a boycott of Israel or in compliance with, or in furtherance of, calls for a boycott of Israel, may be considered by a public entity to be evidence that a company is participating in a boycott of Israel.*"

Clearly, it borders on the absurd to depend for implementation of the contracting ban on a declaration by the company itself that its conduct disqualifies it for the contract it seeks. And what if a company is in fact engaged in targeted boycott activity, but denies it, or says nothing at all? Would a "Don't Ask, don't tell" policy apply? Or since self-declaration "may" be used as evidence to identify a company subject to the ban, is the state free to develop behind closed doors other techniques for deciding which companies to blacklist?

AB 2844's drafters may have attempted to simplify, compared to AB 1551 and AB 1552, the proposed methods of determining who is in fact subject to its contracting ban, but it remains impossibly – and dangerously – vague.

Moreover, reliance upon a company's literal speech *about* boycott as evidence of its *engaging* in a proscribed boycott only underlines the fact that AB 2844 constitutes an unconstitutional attack on protected speech.

Conclusion

While narrower in scope than AB 1551 and AB 1552 and reflecting efforts to respond to faults we previously pointed out, AB 2844 remains deeply flawed. It still purports to penalize political speech, an utterly unconstitutional undertaking; and it introduces new, equally vague formulations that would foil any attempt to implement it rationally and invite lawsuits by aggrieved parties. It should be summarily sidelined or defeated.

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