

February 5, 2015

Subject: AB 1551 and AB 1552 (Travis Allen)

Position: OPPOSE

We write in urgent opposition to two bills, AB 1551¹ and AB 1552,² that if passed, would unconstitutionally penalize core political speech, set standards that are impossibly vague and overbroad, contradict longstanding U.S. foreign policy, and result in the blacklisting of businesses, major churches and other entities.

AB 1551, the “California Israel Commerce Protection Act” introduced Jan. 4, 2016, by Assembly member Travis Allen, R-Huntington Beach, would prohibit the state from investing in businesses and institutions that comply with boycotts called for by a foreign country or international organization against Israel or Israeli-controlled territories.

AB 1552, introduced by Assemblyman Allen in tandem with AB 1551, would prohibit the state from contracting with entities that engage in what he calls “boycotts due to discrimination and bigotry.” Although it does not make explicit reference to Israel, the author has made clear that its intent is the same as AB 1551’s: to penalize participation in boycotts affecting Israel.³

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. Such measures, including boycott, divestment and sanctions (“BDS”) campaigns, are being adopted by an increasing number of socially responsible investors, churches, academic associations, unions, elected student governments and many thousands of individuals, who are motivated by conscience.

The context for boycott and divestment campaigns in connection with Israel

Israel’s occupation of the West Bank, including East Jerusalem, and of the Gaza Strip has been ongoing for almost half a century, with the daily violence of occupation periodically becoming deadly on a far greater scale. Gaza has been held under a crippling land, air and sea blockade by Israel for nearly a decade. Despite the strict prohibition under international law against transferring citizens of an occupying power to occupied territory, there are now over 650,000 Jewish-Israeli settlers residing in the West Bank. These settlers enjoy the full rights of Israeli citizenship, while nearly 5 million Palestinians in the territories lack basic human rights, including the right to move freely, the right to due process and the right to elect those who exercise ultimate control over their lives. Most of the Palestinian land that was once expected to form the basis for a Palestinian state has been confiscated to accommodate settlements, their infrastructure and the massive “separation wall,” all of which are illegal under international law.⁴ In addition, Palestinian citizens of Israel – 20 percent of the population – experience many forms of de jure and de facto discrimination, while Palestinians forced from their homes by Israel in the period surrounding its establishment in 1948 and their descendants are denied the right, guaranteed under international law, to return to their homeland.

¹ http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1551

² http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1552

³ See Allen’s press releases of Dec. 10, 2015, <https://ad72.asmr.org/press-release/13866>, and Jan. 4, 2016, <https://ad72.asmr.org/press-release/14104>.

⁴ See the 2004 opinion by the International Court of Justice. Its summary: <http://www.icj-cij.org/docket/index.php?pr=71&code=mwp&p1=3&p2=4&p3=6>

Despite abundant documentation and condemnation of Israeli policies by the United Nations and virtually every major human rights organization in the world, the global community has failed to hold Israel accountable and to enforce compliance with international law.

Because of this, in 2005 some 170 Palestinian civil society organizations called upon people of conscience throughout the world to engage in a grassroots campaign to implement nonviolent boycotts against and divestment from companies and institutions that perpetuate these human rights violations and to demand sanctions against Israel until Palestinian rights are recognized in full.

Many thousands of people and organizations worldwide have responded by embracing a variety of strategies as a way to peacefully pressure Israel to end its human rights violations and to influence public opinion in favor of Palestinian rights. These campaigns have undoubtedly been controversial, and they have begun to bear fruit, to a small extent economically and much more so in the court of public opinion. Major church denominations have voted to boycott products from illegal settlements and/or divest from Israeli and multinational corporations whose actions and profits are tied to the occupation. Numerous student governments, unions and academic associations have declared their support. Some large corporations, under pressure from public outcry, have ended their involvement with Israel's occupation.

The government of Israel and its supporters in the United States and Europe are engaged in a concerted campaign to stifle and suppress activism for Palestinian human rights.⁵ They are pressing for legislation at the federal, state and local levels to unconstitutionally punish people who support this nonviolent political movement. AB 1551 and AB 1552 are part of this campaign of repression.

Boycotts are political 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.*⁶ 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.

It is a stunning inversion of free speech principles for AB 1551 to make "politically motivated" boycotts a singular target of government repression, since it is precisely their political dimension that requires heightened First Amendment protection for those who engage in such boycott activity. As the Supreme Court pointed out in *Claiborne*, a political boycott, like other forms of speech concerning public issues, "occupies the highest rung of the hierarchy of First Amendment values."⁷

⁵ Report by Palestine Legal and the Center for Constitutional Rights, Sept. 2015: <http://palestinelegal.org/the-palestine-exception>

⁶ [458 U.S. 886 \(1982\)](#)

⁷ *Claiborne*, at p. 913, quoting *Carey v. Brown*, [447 U.S. 455](#), at p. 467

Boycotts against companies and institutions complicit in Israel’s human rights violations are not “discriminatory”

AB 1552 prohibits the state from contracting with people or entities that engage in boycotts “based on the race, color, religion, gender, or nationality of the targeted person or entity.” While it does not make explicit reference to Israel it is clearly intended by the author to be applied, apparently exclusively, against those who support the Palestinian call for boycotts, divestment and sanctions (known as BDS). In his statement introducing AB 1552, Assembly Member Allen points to “BDS” as his sole example of a discriminatory boycott, and characterizes it as “as a pretext for anti-Jewish activity.”⁸

In fact, boycott and divestment campaigns in support of Palestinian rights are directed not against classes of people, but against Israeli policies that proponents maintain violate international law. The entities targeted are companies and institutions complicit in such abuses. These boycott and divestment campaigns in support of Palestinian rights in no way discriminate against individuals based on their national origin, ethnicity or religion; indeed they are undertaken to challenge policies and laws that discriminate against people based on ethnicity and religion.

To portray such a struggle for human rights as “anti-Jewish” is itself an expression of bigotry, especially offensive given the many Jewish people in this country who are well-represented among critics of Israel. In Israel itself, Jewish and Palestinian citizens who seek to change what they view as their government’s increasingly undemocratic agenda and harmful policies have joined the call for boycotts. Lately, protest has focused on their government’s attempt to penalize citizens who advocate boycott, a step made feasible because Israel lacks both a constitution and a guarantee of free speech.⁹

The state may not single out “discriminatory” expression for punishment

The state may establish classifications of people vulnerable to discrimination (e.g., based on their race, religion or national origin) for the purpose of protecting their civil rights in such areas as public accommodations, employment, housing and education. But the Supreme Court has held that the state may not single out these classifications as a basis for punishing speech, because to do so would be unconstitutional viewpoint-based discrimination by the state.¹⁰ AB 1552 is therefore unconstitutional on its face.

Moreover, the landmark boycott case in this country stemmed from a boycott that was based on race, which was morally justified and resulted in positive social change. The *NAACP v. Claiborne Hardware* boycott vindicated by the Supreme Court (see above), was organized by black residents against white merchants. It was meant to pressure local officials to meet their demands for racial and economic justice, and to educate the white community about their grievances. Under AB 1552, that boycott would have barred NAACP from entering into contractual relationships with the state.

Denial of financial relationship with the state on the basis of political beliefs is constitutionally impermissible

In *Rutan v. Republican Party of Illinois*,¹¹ 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

⁸ <https://ad72.asmrc.org/press-release/14104>

⁹ The Association for Civil Rights in Israel, similar to the U.S. ACLU, was prominent in challenging the law. See <http://www.acri.org.il/en/2015/04/16/hcj-boycott-law/>

¹⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). R.A.V. further holds that speech targeting people on the basis of their race, religion or other protected classification may be sanctioned, like any other speech, if it amounts to an exception to free speech, such as “fighting words.” But such speech may not be statutorily singled out for sanction as distinct from other expression that may fall within the same exception – for example “fighting words” used to express hostility on the basis of political affiliation, union membership or sexual preference. 505 U.S. at 391.

¹¹ 497 U.S. 62 (1990)

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.”¹²

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 1551 supports illegal settlements, contrary to longstanding U.S. policy

A new Human Rights Watch¹³ report comprehensively documents how illegal Israeli settlements and industrial zones in the occupied West Bank cause major harm to prospects for Palestinian economic development there. Moreover, it details “the ways in which Israeli and international businesses have helped to build, finance, service, and market settlement communities” and concludes: “[B]y virtue of doing business in or with settlements or settlement businesses, companies contribute to one or more of these violations of international humanitarian law and human rights abuses.”

AB 1551 would penalize those who heed the recommendations of Human Rights Watch and stop or decline to start doing businesses “in Israeli-controlled territories,” including in the occupied West Bank. In this way, it seeks to protect and legitimize Israel’s settlements.

Successive U.S. administrations have determined Israeli settlements in the West Bank to be illegitimate and a serious “obstacle to peace.” In 2015, reacting to an amendment in a federal trade bill that opposed trading partners’ discriminating between products from illegal settlements and those from Israel, the State Department issued a statement saying the U.S. government “has never defended or supported Israeli settlements or activity associated with them, and, by extension does not pursue policies or activities that would legitimize them.”¹⁴ The California Legislature should not do so either.

Who could be blacklisted under AB 1551 and AB 1552?

- **Multinational corporations**

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 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 investment and contractual options for California, without moral justification for such a restriction.

¹²See also *O’Hare Truck Service Inc. v. City of Northlake*, [518 U.S. 712 \(1996\)](#) (independent contractors entitled to same First Amendment protection against retaliation for political expression as government employees).

¹³ Occupation, Inc.: How Settlement Businesses Contribute to Israel’s Violations of Palestinian Rights, <https://www.hrw.org/node/285045/>

¹⁴ <http://www.politico.com/story/2015/06/administration-objects-to-israeli-settlements-provision-in-trade-bill-119620>

- **Major churches**

The Presbyterian Church (USA), the United Methodist Church, the World Council of Churches, the United Church of Christ and the Quakers have all voted to divest from several corporations implicated in supporting Israel's occupation regime, and/or to boycott products produced in illegal settlements in the occupied Palestinian territory. Other faith-based groups actively considering joining them include the Episcopal Church and Unitarian Universalists.

AB 1552 could make these churches ineligible to receive state funds for their charitable programs that feed, clothe, heal and shelter vulnerable populations in California.

- **Other entities that could be blacklisted include universities, foundations and unions.**

Campaigns to divest from companies complicit in Israel's occupation have won student government backing at seven UC campuses, plus several CSU and private California universities. Recently the University of California decided to divest from G4S, a private security company, as part of a policy to oppose private prisons. In addition to its activities in the United States and Europe, G4S has also come under widespread criticism for providing services and equipment to West Bank settlements, Israeli military prisons that hold thousands of Palestinian political prisoners, including hundreds of children, and to checkpoints around the separation wall in the West Bank. Under the proposed legislation, could California be required to sever its relations with public universities in the state?

The Bill Gates Foundation has also withdrawn investments in G4S, following protests and a petition signed by over 14,000 people calling on the foundation to divest from that company because of its role in Israel's prison abuses.

In 2014, the membership of UAW Local 2865, representing over 13,000 UC graduate students, teaching assistants and other student workers, voted overwhelmingly to endorse boycott, divestment and sanctions. In 2015, the United Electrical Workers Union (UE), representing over 30,000 private and public sector workers across the country, became the first U.S. national union to do so as well. Under AB 1552, contractors employing UE workers (such as PG&E) or UC student workers, could be banned from commercial relations with the state.

Unconstitutional vagueness and impracticality

In addition to violating well-established First Amendment principles, AB 1551 and AB 1552 also present serious constitutional problems given the vast and imprecise net that is cast by requirements to create and maintain blacklists of individuals, nonprofit organizations, corporations, unions and other entities based on exercise of their free speech rights. For example:

- AB 1551 requires that state trust funds "use the most recent federal report on politically motivated acts of boycott, divestment from, and sanctions against Israel to determine which business firms and financial institutions engage in discriminatory business practices." To the best of our knowledge, no such report exists.
- AB 1551 absolves a financial institution or business from the bill's investment ban if a company's governing body adopts prescribed language promising to change its ways. State trust funds could thus be required to refrain from placing buy orders for thousands of securities until they obtained such commitments, a massively cumbersome exercise inimical to sound investment practice.
- AB 1551 penalizes "taking any action" in compliance with a foreign-country boycott, that is "politically motivated." Putting aside for the moment the fact that "politically motivated" expression is precisely what must be accorded enhanced protection under the First Amendment – what qualifies as "taking any action"? Who will judge the motivation for declining to buy Israeli products or to do business in Israel? What is the process for reporting and what is the process for challenging such a report?
- AB 1552 conditions public agency contracting on a representation that the potential contractor is not engaged in a discriminatory boycott of "a person or entity based in or doing business with a jurisdiction with which the state can enjoy open trade." That encompasses nearly 200 countries, and purports to cover any person or entity that might do business in or with them – or might not, for any number of reasons. Who will track compliance with such a massively overbroad prohibition?

In short, the bills' provisions are impossibly vague in identifying either the conduct to be penalized or the process for imposition of penalties. They would have the effect of intimidating people, businesses and institutions from engaging in all manner of protected political expression for fear that they would be blacklisted. If enacted, they will lead to confusion among trust funds, public agencies, sellers of securities and potential contractors alike, and will likely invite legal challenges.

An unconstitutional state boycott to punish boycotts of conscience

Governmental or other public entities can and sometimes do engage in boycotts against foreign governments on matters of important public policy or international relations. State accession to public calls for direct boycott of and divestment from companies and institutions that were complicit with the apartheid regime in South Africa, or more recently with human rights abuses in Sudan and Iran, or that despoil the environment (e.g. fossil fuel companies today) – all these are universally seen as state action to secure politically just resolutions.

In contrast, the boycotts imposed by AB 1551 and AB 1552 do not seek to bring about political or social justice – they aim to punish those of its citizens who do engage in boycott activity as an act of conscience, and thereby to silence them.

Conclusion

The state should not be used to shield a foreign country from political criticism by penalizing the decisions of private citizens and corporations regarding what companies they will do business with and how they will invest their money in a manner consistent with their values. This would be a grave overreach of governmental power and an unprecedented assault on the free speech rights of Californians and those who do business with the state of California.

Bills like AB 1551 and AB 1552 have passed in a few states and are being proposed in a number of others. But California has the opportunity to lead the way in blocking the agenda of enforcing uncritical support of Israeli policies that underlies these bills. The Legislature must uphold precious constitutional liberties while acting in the best interests of the economy, the people and their democratic institutions.

Respectfully submitted,

Maria Lahood, Deputy Legal Director, Center for Constitutional Rights (New York City)

Natasha Bannan, President, National Lawyers Guild

Liz Jackson, Staff Attorney, Palestine Legal (Chicago, Berkeley and New York)

For inquiries, please contact the primary authors:

- David L. Mandel, Jewish Voice for Peace and National Lawyers Guild, Sacramento: dmandel@gmail.com; 916 446-5066 or 916 769-1641
- Carol Sanders, Jewish Voice for Peace, Berkeley: carolsanders999@gmail.com, 510 849-3525 or 510 666-7932