



September 23, 2016

Hon. Edmund G. Brown, Jr.
California State Capitol
Sacramento, California 95815

Re: Request to Veto AB 2844, targeting constitutionally protected boycotts for Palestinian rights

Dear Governor Brown:

As civil and human rights organizations committed to upholding the rights of individuals to express their political beliefs without fear of government retaliation or retribution,¹ we write to convey our strong opposition to AB 2844. This bill's authors have rewritten AB 2844 at least four times since it was first introduced in attempts to address constitutional concerns. But a fundamentally flawed bill cannot be fixed. At its core, AB2844 still targets and would chill constitutionally protected political speech. If enacted, AB 2844 would require prospective state contractors to make a certification under penalty of perjury based on their political position critical of a nation, specifically the State of Israel. We urge you to veto it.

A. The goal of AB 2844 is and always has been to punish, suppress, and chill boycott, divestment, and sanctions (BDS) campaigns for Palestinian freedom

Originally introduced in February 2016 as the "California Combating the Boycott, Divestment, and Sanctions of Israel Act of 2016," the first version of AB 2844 proposed prohibiting California from contracting with any company that boycotts Israel.² Since then, AB 2844 has undergone several rounds of revisions in response to constitutional concerns raised by lawyers,³ activists,⁴ the media,⁵ and the California Assembly's own Judiciary Committee, which concluded that the bill raises "very serious and perhaps insurmountable First Amendment concerns."⁶

The version of AB 2844 that ultimately passed the state Legislature requires prospective state contractors to certify – under penalty of perjury – that they are in compliance with preexisting anti-discrimination laws and that any policy they have "against a sovereign nation is not used to unlawfully

¹ For more information, visit Palestine Legal (www.palestinelegal.org) and Center for Constitutional Rights (www.ccrjustice.org).

² The original version of AB 2844 is available at https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2844.

³ Legal memoranda from the National Lawyers Guild, ACLU, Bill of Rights Defense Committee, Center for Constitutional Rights, and Palestine Legal can be found here: <http://palestinelegal.org/california>.

⁴ A list of roughly 100 organizations opposed to AB 2844 is available at <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/57a3a71df7e0ab397a7644bb/1470342942424/endorsers+lis+July+2016-2.pdf>

⁵ See, e.g., Editorial: Boycotts of Israel are a protected form of free speech, Los Angeles Times, <http://www.latimes.com/opinion/editorials/la-ed-bds-bill-20160630-snap-story.html>.

⁶ The California Assembly Judiciary Committee's legal analysis is available at: <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/574e0a69d210b8bdf5ff4ef7/1464732273109/judiciary+staff+analysis+%281%29.pdf>.

discriminate.” AB 2844 states that the intent of the legislation is to ensure that taxpayer funds do not support discriminatory actions under the pretext of the exercise of First Amendment rights; the legislation names no nation other than Israel, and no discrimination other than that against Jewish individuals under the “pretext of a constitutionally protected boycott or protest of the State of Israel.” In other words, the bill still seeks to target BDS campaigns and other protests regarding Israel, but it now attempts to do so by shrouding its goal in anti-discrimination language, promoting the false notion that boycotts for Palestinian rights are presumptively discriminatory.⁷ In fact, Sec. 2, Sec. 2010(c)(1) of AB 2844 serves no purpose other than to chill speech critical of Israel, as the preceding sections 2010(a) & (b) already require that a prospective contractor certify that it is in compliance with California anti-discrimination laws.

Detractors of BDS campaigns sometimes allege that protesting Israeli human rights abuses amounts to national origin discrimination or anti-Semitism. BDS campaigns do not target individuals based on their Israeli nationality; rather, they target Israeli institutions because of their ties to state policy, or corporations for their complicity in human rights violations. Similarly, BDS campaigns do not target institutions or individuals based on Jewish identity. In fact, proponents of BDS campaigns often express their opposition to all forms of racism, which includes anti-Semitism and anti-Arab racism.⁸

By requiring prospective contractors to certify under penalty of perjury that their constitutionally protected political viewpoints are not being used to unlawfully discriminate, AB 2844 opens the floodgates for complaints, investigations, and possible felony prosecutions into the thoughts and beliefs motivating a prospective contractor’s support for Palestinian human rights.

B. AB 2844 targets core political speech in violation of the First Amendment

AB 2844 is before you at a time when Palestinian human rights activists in the United States and elsewhere are embracing boycotts as a way to peacefully pressure Israel to respect the human rights of Palestinians and to influence public opinion in the United States in favor of Palestinian rights. This bill seeks to stifle this human rights movement.

But government actions and restrictions cannot be based on the desire to punish or suppress First Amendment activities that aim to encourage social and political change in a nation’s policies. 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.”⁹ The Court has specifically held that boycotts “to bring about political, social and economic change,” like human rights boycotts of Israel, are unquestionably protected under the First Amendment.¹⁰

It is undisputed that individuals, institutions, and companies may boycott in response to issues of public concern, as many have done historically to challenge racial segregation in the U.S., poor labor standards for farm workers in California, the apartheid regime in South Africa, and currently, fossil fuel companies and the prison industry. BDS campaigns for Palestinian rights cannot be differentiated from these and other historical examples of boycotts simply because they may be unpopular with elected

⁷ The primary sponsor and supporters have been transparent about the fact that the bill is a response to the BDS movement. Jared Sichel, How California’s anti-BDS bill became ‘no longer a pro-Israel bill,’ Jewish Journal, June 5, 2016, http://www.jewishjournal.com/california/article/how_californias_anti_bds_bill_became_no_longer_a_pro_israel_bill.

⁸ See Palestine Legal (formerly Palestine Solidarity Legal Support), Boycott and Divestment, Frequently Asked Legal Questions, March 2015, <http://static1.squarespace.com/static/548748b1e4b083fc03ebf70e/t/55a006a3e4b01f5eb3cfd32e/1436550819443/Legal+FAQ+BDS+March+2015.pdf>.

⁹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (citing *Carey v. Brown*, 447 U.S. 455).

¹⁰ *Id.*

representatives today. Such a differentiation would constitute viewpoint discrimination prohibited by the First Amendment.

C. Denial of public contracts, where motivated by a desire to suppress core political speech, including BDS campaigns, violates the First Amendment

The United States Supreme Court has repeatedly affirmed that government officials' determinations about what views are acceptable cannot infringe on the First Amendment-protected right to freely express political views – however controversial or unpopular.¹¹ Thus, in deciding that the government could not punish public contractors in retaliation for political beliefs, the Supreme Court stated, “[i]f 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.”¹²

This bill represents an action by public officials to thwart or penalize protected speech activities because of the officials' disapproval of the viewpoint expressed. There is no question that the bill is aimed at suppressing and punishing BDS campaigns, as discussed above. “Such interference with constitutional rights,” the Court has stated, “is impermissible.”¹³

D. Penalizing those that boycott Israel will have a chilling effect on protected speech

AB 2844 infringes on protected First Amendment activities by subjecting political positions to government suspicion, investigation, approval, and penalty. If enacted, this bill will chill the free speech rights of individuals and businesses by effectively casting a shadow of suspicion over their position on a pressing human rights issue. Whether or not actual prosecution of the bill's newly created perjury “thought crime” ensues, the specter of government investigation into the motivation behind one's support for BDS campaigns is likely to chill protected speech and conduct. Individuals and businesses may refrain from adopting ethical political stances or making ethical business decisions if they know that decisions based on human rights concerns could result in the denial of state contracts and/or an inquiry – and possible prosecution – into their motivations.

In addition, this bill would discourage grassroots human rights advocacy aimed at pressuring companies to boycott Israel. It would effectively chill advocates' voices by undermining their goal of influencing companies to take ethical political stances, and by stigmatizing their speech. Notably, courts have long recognized that even if a party continues to exercise its First Amendment rights, it “does not mean that it was not being chilled into engaging in less speech than it otherwise would have.”¹⁴

E. Conclusion

We are committed to upholding the First Amendment rights of those advocating for compliance with international law and on behalf of human rights, and ensuring that they are able to challenge orthodox views on a sensitive political issue like Israel/Palestine without government obstruction, investigation, and prosecution. AB 2844 could be used to punish individuals and companies that use an honored American tactic to effect political change, solely because public officials disagree with that tactic in this context. This bill is constitutionally indefensible, and its enactment could invite a legal challenge in

¹¹ *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

¹² *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996).

¹³ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

¹⁴ *Housing Works, Inc. v. City of New York*, 72 F. Supp. 2d 402, 421 (S.D.N.Y. 1999).

order to protect the right to engage in speech activities such as boycotts intended to effect social, political and economic change.

Allowing AB 2844 to stand would threaten a crucial vehicle by which individuals and groups can make their collective voices heard. We urge you to veto it.

Sincerely,



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Deputy Legal Director
Center for Constitutional Rights



Liz Jackson
Staff Attorney
Palestine Legal



Natasha Lycia Ora Bannan
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