

NetChoice Promoting Convenience, Choice, and Commerce on the Net

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May 29, 2020

Senator Jack Johnson
Representative Sam Whitson
Tennessee State Legislature

RE: Opposition to HB 1593 & SB 2207

Dear Senator Johnson and Representative Whitson:

We write to you to express our **opposition** to HB 1593 and its companion bill SB 2207 because the legislation:

- ▶ Gives Big Rental yet another state-sanctioned special favor at the expense of consumers;
- ▶ Shields Big Rental from competition;
- ▶ Punishes innovation;
- ▶ Discriminates against average Tennesseans; and
- ▶ Is vulnerable to constitutional challenge.

No matter how well intentioned these bills may be, they are neither necessary nor fair. Indeed, the legislation picks winners (rental-car companies) and losers (Tennesseans who use peer-to-peer car sharing platforms).

The legislation's harm extends to average Tennesseans looking to supplement their incomes and to consumers looking for affordable transportation options. In other words, it hurts the very people it allegedly seeks to protect. Even worse, the legislation inflicts this harm during a time of economic uncertainty and suffering.

We respectfully ask that you withdraw this legislation for the following reasons.

1. Big Rental already gets special treatment at its competitors and consumers' expense

Big Rental, which includes companies like Hertz, Enterprise, Avis, already receive special treatment from Tennessee. Consider that although all Tennesseans—including car owners who use carsharing platforms—pay a state sales tax of 7% when they buy cars, Big Rental does not. That is because Big Rental lobbied for—and won—a special exemption from Tennessee's sales tax. This exemption costs the state **\$80.5 million** annually. And because the sales tax funds over half the state's expenditures¹, this costly exemption means that consumers and taxpayers must make up the difference in the form of

¹ Transparent Tennessee, State Financial Overview: Where Each State Dollar Comes From (FY 2019), <https://www.tn.gov/transparenttn/state-financial-overview.html> (last accessed May 26, 2020).

higher taxes, fees, or deficit spending. In other words, the exemption is a **state-sanctioned, taxpayer-paid subsidy** that goes directly to Big Rental's coffers.

This subsidy is unjustified. Like all industries, Big Rental has operating costs that it must pay to do business. Unlike most industries, however, Big Rental gets a guaranteed subsidy to offset its most important operating cost: buying new cars. Without rental cars, the industry could not exist.

Despite this, Big Rental convinced lawmakers across the United States—including Tennessee—that when it buys cars to run its business, it actually isn't *buying* the cars and therefore it should be exempt from sales taxes. The industry's argument goes like this: Because Big Rental sells its existing fleet and replaces it with new cars every year, it operates like a convenience store that buys candy bars only to later sell them to consumers. Because convenience stores collect a sales tax only when consumers buy the candy from them, the same should be true of rental-car conglomerates.

Common sense shows why this argument fails. First, unlike a convenience store that buys and sells candy, Big Rental *uses* rental cars to operate its business. This use immediately depreciates the value of the car and renders the car "used." Second, state residents must pay a sales tax on new *and* used cars. Big Rental does not. By eliminating the sales tax on their fleet purchases, the Big Rental companies escape sales taxes altogether because only subsequent buyers will have to pay taxes.

Even with this corporate giveaway in its pocket, Big Rental still wants more. This legislation, which exempts Big Rental from its effects, would give rental-car companies another unfair market advantage by saddling its competitors with new costs that are unrelated to consumer protection.

2. This legislation protects incumbents by shielding them from competition

Rather than innovate, Big Rental is running the same playbook that has worked well in the past: get the state legislature to pass laws that benefit its bottom line at the expense of others. Digital newcomers threaten established firms that have spent decades—and untold money—forcing out competition and creating barriers to entry for newcomers. When it succeeds, this behavior results in higher prices for consumers and fewer jobs for Tennesseans.

Big Rental's fear of car-sharing platforms is not surprising. Indeed, a recent survey of rental-car operators revealed that "Competition from peer-to-peer networks (Turo, GetAround)" ranked as one of the top self-reported "threats" in 2020.² It's not hard to see why. Peer-to-peer car sharing offers better service and deals than Big Rental does. First, they give consumers better choices, including specialty and antique cars. Second, they offer 24/7 roadside assistance. And third, they are more affordable than Big Rental—and they don't come with hidden fees.

To be sure, Big Rental's rent-seeking efforts are not unique. The hotel industry, for example, has been pushing legislation to crush Airbnb's growing popularity. Like Big Rental now, Big Hotels have pushed for unnecessary and harmful regulations under the guise of consumer protection. So, too, with taxi cabs toward ridesharing apps like Uber and Lyft. In all these cases, incumbents turned to the state for

² Auto Rental News, 2020 Fact Book 15 (2020), <http://digital.autorentalnews.com/factbook2020#&pageSet=6>.

protection. And in all these cases, they used consumer protection to mask their true intent of stifling competition.

3. This legislation is anti-innovation and therefore anti-consumer

The rise of digital platforms, especially peer-to-peer ones, has threatened incumbents in all industries. This disruptive technology has proven popular with consumers. So much so that incumbents have been caught so off guard that rather than invest in their own research and development, or rather than adapt to changing consumer preferences, they have instead sought to squash innovation and strangle competition.

This legislation is no different. By forcing innovative platforms to assume liability for their drivers' actions, the legislation will drive many platforms from the market. And it sends a signal to other incumbents threatened by innovative peers: the way to succeed in Tennessee is not by winning on the merits, but by legislating against competition.

These efforts should not succeed. The peer-to-peer economy helps average Americans supplement their incomes by letting them rent assets they already own. Here, for example, car-sharing platforms let Tennesseans earn from their own cars, which they can then use to make car payments, pay insurance premiums, or cushion the financial blow from coronavirus.

4. The legislation discriminates against average Tennesseans hoping to stay afloat during coronavirus, while favoring Big Rental companies

Although the legislation is ostensibly aimed at carsharing platforms, it really targets average Tennesseans who seek to earn extra income. Because the legislation would make it cost-prohibitive for these platforms to operate in the state, these car owners will be robbed of this opportunity. Indeed, Big Rental's real competitors are not the platforms, but the car owners themselves. These are people who supply the cars for others to use; these are the people who give consumers a choice. The platforms merely coordinate the arrangement.

And even if the legislation does not force the platforms from the market entirely, it will force them to revise their contracts with car owners to protect themselves from untold liability. Those revisions would likely require car owners to maintain insurance policies beyond what's necessary, and therefore make it cost-prohibitive for the most financially strapped car owners to compete.

This is unacceptable. If the legislation were truly necessary to protect car owners and consumers, then its theory of liability would apply equally to Big Rental and to carsharing platforms. Unlike Big Rental, carsharing platforms require car owners to maintain car insurance. Big Rental does not require renters to have car insurance. In fact, Big Rental specifically offers car insurance as an add-on that consumers can buy. If they don't buy it, then those consumers must pay for accidents out of pocket. It's hard to see why Big Rental's consumers should be exempt from the legislation.

In fact, Big Rental has already proved that it is unnecessary for companies to assume liability for individuals. Rental-car companies have been in business for decades. And they continue to be one of the most popular forms of transportation. Yet, they've managed to go all this time without the type of liability regulations that this legislation would force on carsharing platforms.

5. Big Rental's competition prevention efforts must end

Not all regulations are bad. In fact, some are necessary and help markets function. But this legislation is not that. Instead, it is a blatant attempt by Big Rental to rig the game. Companies like Hertz and Enterprise do not want to compete with innovative competitors like Turo and GetAround. But they are wise enough to know that they cannot reveal this out loud.

Thus, they use legitimate justifications like "consumer protection" to advance illegitimate ends like stifled competition. This behavior should not be rewarded. Big Rental has already gotten enough state largesse—to the tune of \$80.5 million. It does not need more.

And if Big Rental succeeds in getting this legislation passed, it'll lend merit to the argument that the market is rigged against the little guy. Even worse, it genuinely *will* rig the market. And in so doing, the legislation will further erode average Tennesseans' ability to support themselves and their families.

6. This legislation invites litigation, uncertainty, and inefficiency

Although the U.S. Supreme Court eliminated the "physical presence rule" in *Wayfair v. South Dakota*, the Court suggested that a "substantial nexus" must exist between states and the businesses they require to collect and remit taxes from.³ Tennessee already requires certain marketplace facilitators—those with \$500,000 or more in annual receipts—to collect and remit taxes. This legislation, however, would extend the definition of marketplace facilitators to encompass all peer-to-peer carsharing platforms regardless of size.

This extension is vulnerable to attack under the Constitution's Commerce Clause and Due Process Clause. Indeed, the legislation lacks the specific identifiers that South Dakota used and that the Supreme Court blessed. Thus, the legislation will invite litigation and, as seen in the *Wayfair* case, that litigation can take years to sort out. In the meantime, businesses—of **all sizes** and of **all revenues**—will be left with uncertainty and unnecessary costs as they try to make sense of what's required. That is an inefficient and wasteful use of capital.

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Thank you for considering our views and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice⁴

³ 585 U.S. ___ at 22-23. (2018)

⁴ The views of NetChoice do not necessarily represent the views of each of its members.