

NetChoice *Promoting Convenience, Choice, and Commerce on the net*

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NetChoice

February 18, 2021

The Honorable Regina Cobb, Chairman
Committee on Appropriations
Arizona House of Representatives
Phoenix, AZ

NetChoice Opposition to HB 2005

Dear Chair Cobb and members of the committee:

We ask you **not** advance HB 2005 as it:

- Interferes with private parties and right to contract;
- Represents government picking winners and losers;
- There are multiple payment options for consumers and developers outside of the app stores;
- Increases costs to App Developers; and
- Increases costs to Arizona consumers.

Interference with private contracts

Suppose someone decides to build a shopping mall. They build the structure. They build the roads. They advertise the existence of the mall to potential customers. And rather than charging a monthly rental for space in the mall, they enter into a service fee agreement where the mall collects a percentage of each sale. If the business has no sales or gives away its wares, the mall makes no money. If the business makes lots of sales the mall earns its percentage.

We would balk if the government decided to interfere with this private agreement between a mall and the businesses within. But HB 2005 does just that -- the only difference is that that mall is virtual. Not only is this antithetical to our system of private property and limited government, but it is also ultimately harmful to consumers.

Today, app stores on Apple and Android devices are funded by the service fee agreements between the apps and the app stores. These service fees pay for the data storage of the developer's apps. These service fees pay for the internet infrastructure to deliver these apps to the customers. These service fees pay for the advertising to potential customers about the app stores. And these service fees are used to offset the costs of the devices making it easier for more customers to access the app stores.

App distributors earn their revenue primarily by entering into fee-sharing agreements with app developers that give them the right to a portion of the price of the app as well as a portion of any

microtransactions offered through the app. As the vast majority of apps are now offered at a price point of zero, distributors make the bulk of their income through microtransactions. App distributors then use this money to improve their services, scan for malware, cover operational costs, engage in marketing, and provide customer service, all of which ultimately benefit the app developers themselves.

Currently, many contracts between these parties have provisions that allow app developers to access these digital marketplaces so long as they use the distributor's payments processing system and share a small portion of the revenue from each transaction. App developers are familiar with this system. In fact, Epic actually launched its own app distributor called Epic Store, which-like other app distributors-charges third-party developers for a percentage of their transactions.

HB 2005 is Government Picking Winners and Losers

Today, these contract issues are being fought in the courts and on the negotiating table between multi-billion-dollar businesses. Some of the chief supporters of the bill represent some of the most well-established app developers like Spotify, Epic Games, and Match Group, owner of Tinder.

These are not small businesses. Spotify, the largest music streaming service, currently has a market cap of over \$58.6 billion. Match Group, parent company of some of the largest online dating services, has a market cap is over \$42 billion. And Epic Games, one of the largest video game companies, made over \$17 billion last year alone.

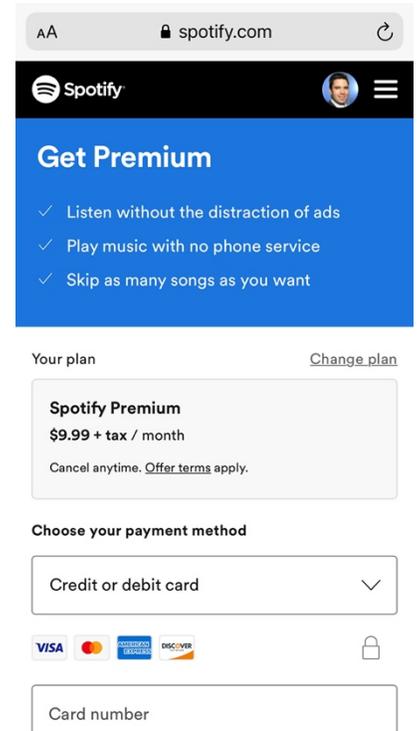
These are not down-on-their-luck businesses pushing HB 2005 because they want greater fairness in their fee-sharing agreements, they are powerful players trying to get the state government to enable them to avoid paying the service fees to which they agreed.

HB 2005 is about benefiting these well-established third-party app developers by forcibly preventing digital application distribution platforms like the Apple App store and Google Play store from creating contracts that limit the extent to which these app developers can offer their own in-app payments processing systems.

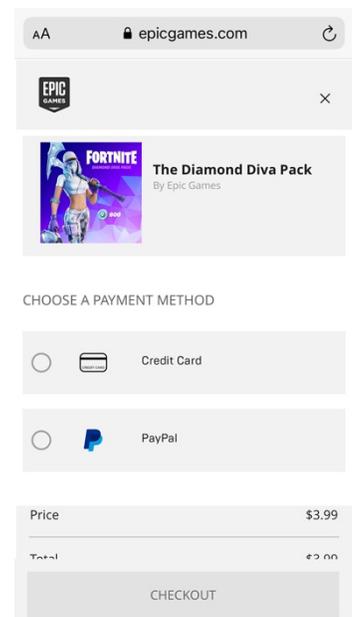
There is a reason why ALEC has multiple resolutions and model policies opposing this type of interference with private agreements because it is better to let the private sector and free market make these choices.

There are multiple payment options for consumers and developers

Despite what billion-dollar companies like Spotify and Epic Games that are pushing HB 2005 say, there are multiple ways for consumers to make purchases without going through the App Stores of Google or Apple.



Users can signup at Spotify.com on their mobile device and the store never connected to the transaction



Epic Games can do transactions with users on mobile devices without engaging the store's app payment systems

For example, right on the iPhone's web browser, Spotify users can purchase subscriptions directly from Spotify - without going through the app stores. Users can even listen to music via the Spotify webpage without ever having to install the app.

Likewise, Epic Games makes micro-transactions for Fortnite available without ever having to download the game nor the Epic Store. In fact, users can, once again, go directly to the Epic Store webpage on their mobile device and buy V-Bucks or other microtransactions.

At the same time, corporations like Match.com, Spotify and Epic Games make gift cards available for purchase at local drug stores and shopping centers. Here citizens can use essentially whatever payment form they want to buy these gift cards and then redeem them at Match.com, Spotify.com, and EpicGames.com.

This can all be done without any involvement of the Apple and Google stores, so the argument that there is a "monopoly" on payments is false.



Consumers can buy Match.com gift cards at local retailers using the payment form they want

Increasing costs to App Developers

Since HB 2005 would make these contracts illegal, it would force distributors to allow third-party app developers to create and use their own payments processor. As a result, app developers would be able to collect as much money as they please through in-app microtransactions without sharing any of the revenue with app distributors. Considering that app distributors make a substantial portion of their revenue through microtransactions, this would serve as a major blow.

Increasing costs to Arizona consumers

HB 2005 harms consumers too. Today, part of the cost of these devices is offset by the expectation of service fees from in-app purchases - a loss-leader model akin to razors. With the loss of revenue from in-app transactions, app platforms would need to find another way to cover their costs—including for things like innovative features, day-to-day operations, etc.—and recoup some of their investment. As a result, they would be left with a choice of either saving on costs by reducing the quality of their offerings, redirecting resources that would have otherwise been invested in innovation, or charging higher prices for base downloads, leading to fewer free apps or raising the prices on the devices themselves. HB 2005 would leave consumers worse off.

We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President and General Counsel, NetChoice



February 16, 2021

To: Members of the Arizona House Commerce Committee
From: ALEC Action
Re: Please Oppose House Bill 2005

Dear Members of the Arizona House Commerce Committee,

ALEC Action writes to encourage you to **oppose House Bill 2005**. The proposal would hamper the innovation economy and would result in harm to consumers by reducing the number of apps available to them.

Apps have offered great value to the national and state economies, including the economy of Arizona and have been of particular value during the COVID-19 pandemic. Citizens can request transportation, reserve overnight stays in hotels and homes, purchase needed supplies, receive health care, and attend school through online services and apps. **HB 2005 would reduce the number of options available to Arizona citizens** by requiring smartphone and electronic device manufacturers to accept apps that have not gone through rigorous security vetting and much more.

HB 2005 would **interfere with the free market** and its ability to drive innovation in the states, which in the internet space is **characterized by vibrant change**. Public policy should always remain neutral with respect to existing and emerging business models and technologies, which includes the contracts between platforms, manufacturers, developers, and innovators. **Governments should avoid requiring specific contractual terms or implementing policies that would lock in specific relationships between innovators and those who can help promote their ideas.**

With respect to contracts between private parties, ALEC acknowledges that “a privately negotiated contract...is the fundamental basis for doing business in the United States” and that “the U.S. Constitution and most state constitutions specifically prohibit impairment of contracts freely and openly entered into by the parties.” Consequently, as ALEC policy makes clear, its members “**oppose the enactment of laws that interfere with private business agreements freely and openly negotiated and entered into by parties.**”

The text of HB 2005 would apply to both future and existing contracts between developers and smartphone operating system manufacturers. Providers large and small, national and regional—from Uber, Lyft, Airbnb, to app developers in Arizona—have existing contracts with Apple and Google. **HB 2005 would impair the obligations of those terms by substituting exclusivity and payment clauses into them.**

HB 2005 reflects concerns raised in a couple private antitrust suits, such as [Apple v. Pepper](#) and [Epic Games v. Apple](#). The suits ask courts to declare Apple’s contractual provisions requiring developers to work through the App Store and use certain payment systems for in-app purchases as violations of antitrust law. The suits are likely to fail, since Apple developed the iPhone and iPad and has the right to control both the iOS and access to the devices as its property. Not to mention, both Apple and Google primarily use contractual terms to ensure that bad actors cannot install malware or software with back doors onto consumers’ devices.

The suits, along with HB 2005 ignore contracts signed by developers and are trying to change the antitrust debate in an effort to reign in so-called big tech. Antitrust should never be used political tool, including **legislation seeking to achieve the same end as litigation**. Antitrust policies should not be used in response to, or to control, the procedures social media platforms use to moderate or display content. Any antitrust suits or legislative proposals

should be based solely on a bona fide violation of antitrust laws, which require proof of economic injury to consumers through a reduction in competition. Competition and disruptive innovation are the best protectors of consumers. Concerns about the dominance of a single online platform are nothing new. This does not mean that tech companies should be immune from antitrust laws, but that “if a company’s dominance... can be shown to harm consumer welfare, existing antitrust law should be enforced. **But there is no need to rewrite antitrust doctrine to protect online speech, and doing so will likely harm consumers.**

For more information, you can refer to several ALEC models, including:

[Six Principles for Communications and Technology](#)

[Resolution on Legislation that Interferes with Business Agreements](#)

[Resolution Protecting Online Platforms and Services](#)

[Statement of Principles on Online Speech](#)

Because HB 2005 is contrary to multiple ALEC resolutions and principles, ALEC Action encourages members of the Arizona House Commerce Committee to oppose it.

Sincerely,

Michael Bowman
President
ALEC Action

ALEC Action is the 501(c)4 affiliate of the American Legislative Exchange Council.

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