

Carl Szabo, Vice President and General Counsel  
1401 K St NW, Suite 502  
Washington, DC 20005  
202-420-7485  
[www.netchoice.org](http://www.netchoice.org)

February 8, 2021

Senator Jerry Klein, Chair  
Industry, Business and Labor Committee  
North Dakota State Senate  
Bismarck, ND

## **NetChoice Opposition to SB 2333**

Dear Chair Klein and members of the committee:

We ask you **not** advance SB 2333 as it:

- Interferes with private parties and right to contract;
- Represents government picking winners and losers;
- Increases costs to App Developers; and
- Increases costs to North Dakota 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 SB 2333 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.

### SB 2333 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 SB 2333 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.

SB 2333 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.

### Increasing costs to App Developers

Since SB 2333 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 North Dakota consumers

SB 2333 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. SB 2333 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

We thank you for your consideration.

Sincerely,

Carl Szabo

Vice President and General Counsel, NetChoice