NetChoice *Promoting free speech & free enterprise on the net*

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RE: **Opposing HB 494 – Digital Interference Censorship Act**

We respectfully ask that you **not** advance HB 494, because it:

- Violates the First Amendment of the U.S. Constitution;
- Interferes with private parties and the right to contract;
- Represents government picking winners and losers;
- Intervenes when there are already multiple payment options for consumers and developers;
- Increases costs to App Developers;
- Increases costs to North Carolina consumers; and
- Violates conservative principles of limited government and free markets.

Below we explain why HB 494 will likely be set aside for violating the First Amendment. Then, we describe serious issues and unintended but likely consequences if the law were to survive constitutional challenges.

HB 494 violates the First Amendment of the US Constitution

The First Amendment makes clear that government may not *regulate* the speech of private individuals or businesses.[1] This includes government action that compels speech by forcing app stores to host applications that allow speech the app stores would otherwise not host.

HB 494 acts as a blatant form of compelled speech since it would force digital application distribution platforms to host applications they otherwise would not allow based on their "political" or "religious" content.

While there are limited, narrow exceptions, laws mandating private actors to host content are subject to a "strict scrutiny" test. Under this test, the law must be:

- justified by a compelling governmental interest and
- narrowly tailored to achieve that interest.[2]

[1] *See, Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *Pacific Gas & Elec. v. PUC*, 475 U.S 1, 15-16 (1986).
[2] *Id.*

On at least the last prong of this test, HB 494 is unconstitutional and will fail.

Interference with Private Contracts

Even if HB 494 were to survive the constitutional challenges described above, it still raises a number of serious issues. Suppose someone builds a shopping mall. They build the structure, the food court, the parking lots—everything. They advertise the availability of store space to potential tenants. And rather than charge 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 interfered with this private contract between a mall and its tenants. But HB 494 would do just that, only here the mall is a virtual space. 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 their service fee agreements with app developers. 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 app price as well as a portion of any transactions within the app. Since most apps are now offered at a price point of zero, distributors earn most of their income through in-app transactions. App stores use their commission on in-app transactions to improve services, scan for malware, engage in marketing, and provide necessary customer service, all of which benefit the app developers and their end-users. These service fees also pay for storage and security for the apps and the internet infrastructure, allowing them to deliver apps to customers effectively and safely. They pay for advertising to potential customers about the app stores. And these service fees may be used to offset the costs of the devices, making it easier for more customers to access the app stores.

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 a percentage of their transactions.

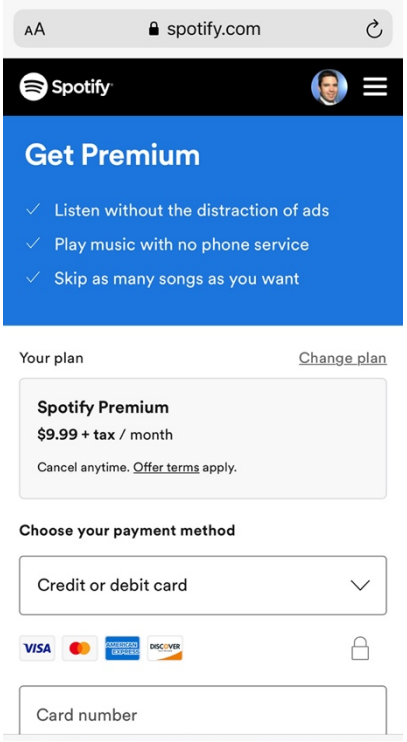
The Government Should Not Pick Winners and Losers

Today, these contract issues are being addressed through the courts and on the negotiating table between multi-billion-dollar businesses. The chief supporters of HB 494 represent some of the most well-established app developers in the world like Spotify, Epic Games, and Match Group, owner of Tinder.

These are not small businesses. Spotify is the largest music-streaming service and has a market cap of $50 billion. Match Group, the parent company of some of the largest online dating services, is worth $40 billion. And Epic Games, one of the largest video game companies, was valued at over $17 billion in its most recent funding round.

It is not a group of down-on-their-luck businesses pushing HB 494 because they want greater fairness in their fee-sharing agreements. It is a group of powerful players trying to get the government to enable them to avoid paying the service fees they previously agreed to.

HB 494 would benefit these well-established app developers by preventing the Apple and Google app stores from entering into contracts that limit the extent to which these app developers can offer their own in-app payments systems. It is better to let the private sector negotiate these contracts rather than having the government step in to distort the market and pick winners and losers.



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

Consumers and Developers Have Other Options

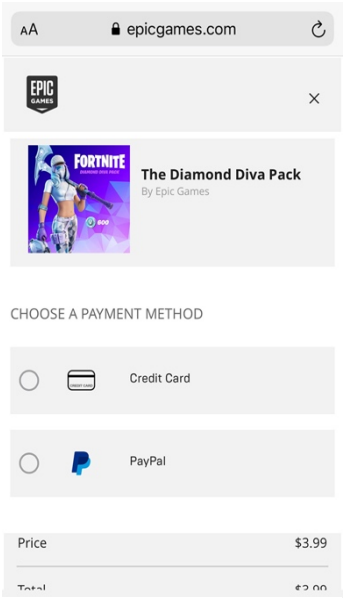
Contrary to what billion-dollar companies like Spotify and Epic Games say, there are multiple ways for consumers to make purchases without going through the App Stores of Google or Apple. For example, right on the iPhone's web browser, Spotify users can purchase subscriptions directly from Spotify – without going through the app stores. Users can even listen to music via the Spotify webpage without ever installing the app. 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 using the store's app payment systems.

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

Likewise, Epic Games makes micro-transitions for Fortnite available without ever having to download the game or the Epic Store app. In fact, users can go directly to the Epic Store webpage on their mobile device and buy V-Bucks or other microtransactions. At the same time, Match.com, Spotify and Epic Games make gift cards available for purchase at drug stores and shopping centers. Here citizens can use essentially their chosen means of payment to buy these gift cards and redeem at Match.com, Spotify.com, and EpicGames.com. This can all be done without any involvement of the Apple and Google stores, so there is simply no "monopoly" on payments.

Increasing Costs to App Developers

Since HB 494 would make today's contracts illegal, it would force stores to allow app developers to use their own payments processor. As a result, app developers would be able to collect as much money as they please through in-app transactions without sharing any of the revenue with app stores. Considering that app stores make a substantial portion of their revenue through in-app purchases, this would significantly undermine the economics of app distribution and result in fewer and worse options for up-and-coming app developers as well as those that offer their products for free.



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

Increasing Costs and Risks to American Consumers

HB 494 will harm consumers too. Today, the price of consumer devices is partly subsidized 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 stores would need to find another way to cover their costs for development and operations. They would have to reduce costs, increase prices for devices, or begin charging to distribute free apps—leaving consumers worse off.

Criminals are trying to con Americans into disclosing banking and credit information for potentially fraudulent purposes. Today, app stores can immediately suspend an App for such behavior. But HB 494 would prohibit app stores from what could be termed "retaliating" against the app, which would expose American citizens to potential fraud. Further, it would be harder for consumers to seek restitution when fraud does occur. Currently, an aggrieved party can seek redress from Apple or Google in the event of fraud or malice in the processing of payments. However, under HB 494, consumers would be forced to identify the specific payments processor for each individual app and seek redress from them, something that could be extremely difficult or outright impossible in the case of fraud.

In addition, parents would lose a powerful tool to control the devices used by their kids. App stores currently place limits on the dollar amount of in-app purchases and often compensate parents when a child makes purchases without permission. They also provide parental controls that allow parents to restrict access to payments by requiring a password to make a purchase. Each of these would be unavailable if app store providers were forced to allow each app to employ their own payments processor.

HB 494 violates conservative values of limited government and free markets

In 1987, President Ronald Reagan repealed an earlier incarnation of HB 494, the infamous "Fairness Doctrine," which required equal treatment of political views by broadcasters, saying:

"This type of content-based regulation by the federal government is … antagonistic to the freedom of expression guaranteed by the First Amendment. In any other medium besides broadcasting, such federal policing … would be unthinkable."[3]

We face similarly unthinkable restrictions in HB 494, which punishes application distribution platforms for moderating their services in ways that they see fit for their customer base.

Today, conservative speech has never been stronger. No longer limited to a handful of newspapers or networks, conservative messages can now reach billions of people across multiple social media platforms, including Facebook, Twitter, YouTube, SnapChat, Reddit, Gab, Parler, Rumble, and MeWe.

We've seen the rise of conservative voices without having to beg for an op-ed in the Washington Post or New York Times, or a speaking slot on CNN. Social networks allow conservative voices to easily find conservative viewers.

Nonetheless, some want government to regulate app stores' efforts to remove applications that host objectionable content. This returns us to the "fairness doctrine" and creates a new burden on conservative speech.

HB 494 also violates the American Legislative Exchange Council (ALEC) *Resolution Protecting Online Platforms and Services*:

> WHEREAS, online platforms are businesses that should be allowed to operate in ways that best serve their users — and the government should not interfere with these businesses in order to advance a particular belief or policy;
>
> WHEREAS, even if online platforms were to exhibit political bias in content display or moderation, the First Amendment protects this exercise of editorial discretion from government intervention; …
>
> THEREFORE LET IT BE FURTHER RESOLVED, ALEC finds that it is well settled that the First Amendment restricts the government from regulating speech or restricting the publishing rights of online platforms or services, including the right to curate content.

NetChoice supports limited government, free markets, and adherence to the United States Constitution, so we respectfully ask that you not approve HB 494.

Sincerely,

Carl Szabo
Vice President & General Counsel,
NetChoice

[3] Veto of Fairness in Broadcasting Act of 1987, 133 Cong. Rec. 16989 (June 23, 1987), http://www.presidency.ucsb.edu/ws/?pid=34456 .