

**2021 SENATE INDUSTRY, BUSINESS AND LABOR**

**SB 2333**

# 2021 SENATE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Fort Union Room, State Capitol

SB 2333  
2/9/2021

relating to in-application payments for software applications and purchases
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**Chair Klein** opened the hearing at 10:30 a.m. All members were present. Senators Klein, Larsen, Kreun, Vedaa, Burckhard, and Marcellais.

### Discussion Topics:

- Application distribution platforms
- Big Tech Companies
- Competition between application stores

**Senator Davison** introduced the bill and testified in favor [10:30].

**Kyle Martin, Executive Director of ND Technology Council** testified in favor and submitted testimony #6095 [10:38].

**Jack McDonald, ND Newspaper Association** testified in favor and submitted testimony #6031 [10:50].

**Lacey Anderson, EPIC Games** testified in favor [10:56].

**Katie Mastel, FMWF Chamber of Commerce** testified in favor and submitted testimony #6034 [11:00].

**Brandon Kressin, Coalition for App Fairness** testified in favor and submitted testimony #6032 [11:04].

**Joe Sandin, CEO of Onsharp** testified in favor and submitted testimony #6035 [11:11].

**Jeff Zarling, DAWA Solutions Group LLC** testified in favor and submitted testimony #6036 [11:14].

**Morgan Reed, The App Association** testified in opposition and submitted testimony #6057 [11:17].

**Erik Neuenschwander, Chief Privacy Engineer for Apple Inc.** testified in opposition and submitted testimony #6054 [11:28].

**David Edmonson, TechNet** testified in opposition and submitted testimony #5699 [11:33].

**Carl Szabo, NetChoice** testified in opposition and submitted testimony #5815 [11:40].

**Cale Dunwoody, Americans for Prosperity** testified in opposition and submitted testimony #6094 [11:48].

**Perril Grossman, Attorney General's Office** testified neutral [11:52].

**David Heinemeier Hanson, Basecamp** testified in favor and submitted testimony #6046 [11:59].

**Kirsten Daru, Tile Inc.** testified in favor and submitted testimony #6038 [12:03].

**Additional written testimony:** 5953, 6037, and 6048.

**Chair Klein** ended the hearing at 12:05 p.m.

*Isabella Grotberg, Committee Clerk*



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**Testimony of Kyle Martin**  
Executive Director  
Technology Council of North Dakota

**In Support of SB 2333**  
February 8, 2021

Mr. Chairman and members of the Senate Industry, Business and Labor Committee:

My name is Kyle Martin, executive director of the Technology Council of North Dakota (TechND). I am here today to voice support of SB 2333.

TechND was created in 2000 by North Dakota business, government and education leaders who recognized the need to strengthen the state's information technology infrastructure and reposition the state as a national leader in IT. The organization has since expanded its focus to include members from the technology industry as a whole. TechND has over 60 member organizations, with representatives from both the public and private sector.

Nearly 13 years ago, Apple launched the App Store, a relatively small online marketplace to download software on Apple's newest hardware, the iPhone. At its time of launch, 500 different applications were made available through the app store, providing software

developers with a new platform to sell mobile software that we've all come to know today simply as "apps." The App Store disrupted traditional software supply chain models by selling software directly to consumers through their devices. The trade-off however was Apple would collect 30 percent off the sale of all applications or in-application digital purchases.

Today, the App Store is one of the world's largest platforms of mobile digital commerce, offering nearly two million apps that generate nearly a half trillion dollars in sales each year. Today, the iPhone accounts for nearly 53 percent of the mobile phone market in the United States. Yet Apple today still demands developers yield 30 percent of their profits to its company, including all microtransactions, digital goods and in-app subscriptions. Apple's practice set forth a standard which was later adopted by Google who today also imposes a 30 percent transaction fee on app purchases.

These practices have led to considerable headaches and lost revenue for software developers and companies wishing to sell digital goods or subscriptions, forcing them to raise their prices, limit their software's functionality, implement cumbersome solutions to process transactions or even abandon their ambitions to launch their own apps. In some instances, developers who have implemented their own in-app payment solutions that bypassed Apple's payment processing mandates, have been banned entirely from the App Store or are prohibited from advertising alternative subscription payment options.

Companies wishing to sell digital goods and services on the internet can choose who processes their transactions because the internet is a broad, robust platform not regulated by a singular entity. However, mobile devices are an entirely different ecosystem, largely controlled by two key players, Apple and Google, who can unfairly decide its winners and losers by choosing who does and doesn't pay their extraordinarily high transaction fees.

Mobile app stores have been likened to a digital mall where an agreement is set in place between the retailers and a landlord who agree that in exchange for access to a digital marketplace (or in this example, a mall), merchants must yield a portion of their profits to the landlord. However, this simplistic model omits that broadly speaking, there are only two digital malls in existence: the Google Play Store and Apple's App Store. Because Apple develops its own software and hardware, its own app store is the only mall authorized to operate on its hardware. While other platforms exist on the Android operating system, the Google Play marketplace accounts for a staggering 73 percent of Android's market share. In other words, a developer wishing to be successful simply cannot abandon a digital mall in search of another because either no alternative exists, or the alternatives are impracticable at best.

While large developers and technology companies have been impacted, these practices negatively impact small developers and companies alike here in North Dakota. Local newspapers or magazines for example, wishing to sell subscriptions are forced to pay Apple or Google's high transaction fees, forcing subscription-based services to raise fees that are ultimately passed onto their subscribers. If a local fitness club or yoga studio were to try selling

their courses online due to the impacts of the pandemic through their own gym or studio application, their courses would also be subject to Apple and Android's policies. If North Dakota, for example, were to render services through the app store such as implementing a digital driver's license, theoretically, Apple or Google could impose a high transaction fee resulting in lost revenue for the state or higher fees for residents. OnSharp, a TechND member located in Fargo, will share with the committee today its own experience on how Apple and Google's policies have impacted its business and clients, forcing its company to scale back software features or in some instances, discouraging companies from launching an app of their own.

Typically, the free market determines how business is conducted. If a user is unhappy, they are free to take their business elsewhere. Yet in today's mobile universe, both consumers and developers are limited largely to two digital marketplaces.

Recently, users discovered the ability to rent or buy movies on the Amazon Prime Video app made available through the Apple App Store. Previously these options didn't exist. Apple later disclosed it had established a program, dubbed the "Apple Tax Credit." Apple contends this program is for premium subscription video entertainment providers that offers a variety of customer benefits. One of these benefits allows Amazon to bypass Apple's high processing fees. In exchange however, Amazon was forced to ensure its services integrated core Apple components including AirPlay 2, tvOS apps, universal search and Siri Support, encouraging users to utilize Apple devices and bolstering its own subscription service alternatives such as Apple

TV. Further, if someone opts to use Amazon's video streaming service on an Apple device and is not already an Amazon Prime Video subscriber, the sign-up flow forces the user to process their subscription payment through Apple's payment system.

TechND acknowledges that app stores serve two very distinct and powerful purposes: first, to widely distribute software to enrich or benefit the lives of its users and secondly, to safeguard users from downloading malicious or harmful software. When a developer submits a software application for distribution on Google Play or Apple's App Store, they are thoroughly vetted and reviewed to ensure their applications meet both accessibility, usability, security and quality standards meant to protect consumers from data breaches, identity theft or malware.

Alternative app stores could also negatively impact software developers and threaten intellectual property by encouraging digital piracy. Therefore, TechND concedes that forcing tech companies to adopt app distribution platforms other than their own could lead to unintended, negative consequences, and would like to see this portion of SB 2333 removed.

However, it is not unreasonable to suggest app stores should give developers a choice in choosing a payment processing platform. Google and Apple for example do not impose a fee on in-app purchases of physical goods, merchandise or food. Instead, retailers and food vendors are free to process their own transactions, bypassing Apple and Google's 30 percent processing fees. Why should software developers be treated differently? Given the profits both Apple and Google generate from developers and merchants, they bear a burden of responsibility to treat iOS and Android developers fairly and consistently. While some may



argue today that passage of this legislation could lead to a gap in services by forcing companies to implement alternative payment systems, these arguments are unfounded given both Apple and Google currently provide these options to thousands of merchants including Walmart, Target, Amazon and Starbucks.

In recent weeks, Apple has rolled out a program titled the “Small Business Developer Program” that reduces its fees to 15 percent from 30 percent for applications that earn less than \$1 million per year. This is a step in the right direction, however, small developers and businesses should still be allowed to choose who processes their payments.

Ideally, TechND would like to see legislation passed at the federal level that addresses the concerns brought forth in SB 2333 to prevent a patchwork of state laws. However, Congress has failed to address these issues that are impacting thousands of software developers and businesses. This bill would send a powerful message that technology companies should treat software developers fairly.

TechND asks the committee to consider an amended version of this bill that gives software developers the choice to choose their own payment processing solution - a choice that Apple and Google currently extend to select developers. This solution would be a win-win for both consumers and developers by reducing subscription fees and creating a platform more accessible to small businesses and software developers.

Tuesday, February 9, 2021

Senate Industry, Business & Labor Committee SB 2333
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REP. KLEIN AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing on behalf of the North Dakota Newspaper Association. It supports SB 2333 and ask you to give this a unanimous DO PASS.

I won't pretend to tell you I understand all the technical aspects of this bill because I don't. But I do know what it's intended to do – break the stranglehold Apple and Google have on mobile app distribution.

Local newspapers have always been –and continue to be – the major source of news for most North Dakotans. This traditionally has been through the printed page. However, as we constantly hear, times are changing, and they are for newspapers as well. Nearly all North Dakota newspapers now have digital or e-paper editions as well as their print versions.

Forum Communications has been a leader in this area, and this month subscriptions to its e-paper will surpass those to its print editions. It has also been a leader in developing its own apps to assist its subscribers in reading the e-paper and other Forum products.

While news outlets have several online options for reaching their consumers, including apps, newsletters, and podcasts, the greatest percent after the web is through mobile apps. In a Pew Research Center 2019 study about 46% of newspaper digital readers have apps for at least one of the two main mobile platforms, but down from the 57% in 2018. This is at least partly due to the exorbitant 30% fee charged by these platforms to offer app based subscriptions developed at the newspapers' time and expense. Passing this cost onto local newspaper readers would price the newspapers out of the market.

Most merchants charge a flat fee for the same service. But not Apple. Apple takes 30% of the sale of a \$25 newspaper subscription. It also takes

30% for the sale of a \$500 newspaper subscription. Thus, the more the publisher is able to charge for its service then the more Apple benefits, despite providing the same service.

What is also hard to understand is why Apple favors some apps over others with no explanation. High quality content apps, like local digital newspaper apps, are charged a 30% fee, while giant companies like Amazon are given discounts. This is a prime example of the big guys helping the big guys while the little guys suffer.

Under SB 2333 app providers such as our North Dakota newspapers would be able to use third party distribution platforms other than Apple or Google to distribute their apps to subscribers' devices such as phones and tablets.

The app providers (newspapers) could use whatever payment system they please – I believe that's called free enterprise in some circles – and not have to go through Google or Apple – regardless of where the app is distributed from – and thereby eliminating the 30% take.

For local papers to survive, we need fair treatment and negotiating power. This bill would give our local papers the access and opportunity to do that and to ensure we can continue to tell the stories important to North Dakotans into the digital age.

Please give this bill a Do Pass. Thank you for your time and consideration. I'd be glad to try to answer any questions you might have, but frankly there are others giving testimony this morning that have far more expertise in this area than me.



To: Senate IBL  
From: Katie Mastel, Government Affairs Manager, FMWF Chamber of Commerce  
Date: February 9, 2021  
RE: **Support SB 2333**

Chair Klein, members of the Senate IBL Committee,

For the record my name is Katie Mastel and I serve as the Government Affairs & Advocacy Manager at the Fargo, Moorhead West Fargo Chamber of Commerce. I'm speaking today in **support of SB 2333**.

We are supportive of the concept of this bill as it will benefit our business community and economy. In our region, we have small business app developers who are currently unable to compete without the risk of big tech monopolies shutting them out or pricing them out. Especially this past year our local small businesses undoubtedly took a big hit while big businesses just kept getting bigger. The solution isn't to disadvantage the big businesses, as they have an appropriate place in our economy, rather to address the inequities in the market to allow for a more fair, free market model.

No developer should be blocked from a platform based on their business model, delivery of content or services, or whether it competes in any way with the app store owner. As long as the app meets fair, objective and nondiscriminatory standards for security, privacy, quality, content, and digital safety, every developer should have access to app stores.



We of course are sensitive to cybersecurity and privacy concerns, and as such, would only support legislation that doesn't compromise them. We realize that we may not be the technology experts with a final solution, however as a business association, we encourage the state to move in a direction that better supports our small business app developers. Consequently, we support the concept of this solution, however will leave the technical viability of this specific legislation to those experts.

Thank you for your consideration.

Katie

[kmastel@fmwfcchamber.com](mailto:kmastel@fmwfcchamber.com)

701.516.2114

Tuesday, February 9, 2021

Senate Industry, Business & Labor Committee  
SB 2333

REP. KLEIN AND COMMITTEE MEMBERS:

**CAF: ND Hearing Testimony**

Feb. 9, 2021

Thank you for providing me with an opportunity to speak with you today. My name is Brandon Kressin, and I am here on behalf of my client, the Coalition for App Fairness, to speak in favor of SB 2223. I am an experienced antitrust lawyer with a specific focus on the technology industry, including issues involving mobile platforms and app distribution and monetization.

The Coalition for App Fairness is an independent nonprofit organization made up of industry-leading app developers—from large popular apps to small startups and indie app developers. These developers have come together to advocate for freedom of choice and competition across platforms. To that end, the Coalition's members are committed to the creation of a competitive system for app distribution and monetization, and to curbing the abuses of power perpetuated by dominant digital platforms. The Coalition's vision is set forth in their App Store Principles, a list of rights and responsibilities for developers that would restore and preserve competition on mobile platforms.

The Coalition is a true developer-driven organization, with members ranging from household names to small startups. We are here representing the *real* interests of independent developers and their consumers, who for too long have been subject to the arbitrary whims of powerful platforms. Since we launched five months ago, the Coalition has received support from hundreds—if not thousands—of other app developers who, like our members, recognize the urgent need for a fairer system, but who live in fear of retaliation if they were to speak publicly against these companies.

The Coalition for App Fairness takes *no* money from Apple or Google, full-stop. This is a stark contrast from some of the other organizations you will hear from today or that have sent letter to the Committee, such as TechNet, NetChoice, and ACT. While they claim to represent developer interests, they instead serve as mere mouthpieces for these powerful platforms. For example, yesterday, TechNet testified against a similar bill in Georgia, despite the fact that there are TechNet members that strongly disagree with their testimony and would welcome SB2223. When you hear these organizations speak, do not assume that they speak for all of their members, much less all app developers. When you hear them argue for less competition among app stores and in favor of higher fees on developers, ask yourselves whose interests they really represent. How could an association purporting to represent developers reasonably advocate for higher fees and restrictions on the ability of developers to inform users of lower prices?

Additionally, if the implications of this sensible legislation were as dire as some other organizations claim, you would think that Apple and Google would be here today to speak in their own voices. Instead, they have sent trade associations to protect their interests. These organizations claim to represent developers, but in reality they are here to insulate the platforms from the prospect of meaningful competition. We encourage the members of this Committee to ask these associations directly how much money they receive from Apple and Google, or from their affiliated organizations, and to consider why they are arguing so forcefully against competition to the benefit of developers.

SB 2223 will benefit consumers and app developers in North Dakota by limiting the ability of dominant platforms to impose onerous and anticompetitive restrictions on app developers. These restrictions result in higher prices and less choice for consumers, as well as limitations on developers' ability to innovate. Additionally, these exclusionary terms and conditions prevent developers from communicating directly with their consumers, instead allowing the platforms to act as intermediaries and fully control the customer relationship. If passed, SB 2223 will enable app developers to offer lower prices, greater innovation, and more choice to smartphone users throughout North Dakota.

Without the innovation and ingenuity of app developers, there is no way Apple could sell its iPhone 12 for extremely high prices: the iPhone 12 starts at approximately \$800 for the basic version and its Pro version starts at approximately \$1,000 with fully loaded versions costing approximately \$1,600.

But over the course of the last few years, the dominant platforms have increasingly imposed a wide range of onerous and exclusionary restrictions on app developers. The platforms often impose these restrictions without warning and with, at most, pretextual justifications that the platforms could otherwise achieve through less restrictive alternatives. And when developers resist, the platforms often threaten to expel developers from the app stores altogether, a penalty that would devastate almost any app developer regardless of size or reputation.

The platform's Byzantine restrictions take many forms. In some cases, the restrictions impede the ability of independent developers to offer apps and services that compete with the platforms' own apps. In other cases, the platforms have used their app stores as weapons to intimidate developers. They have arbitrarily expelled apps from their platforms, without sufficient justification or any real right of appeal.

Aside from arbitrarily excluding developers from their platforms, another form of egregious abuse is the way the dominant platforms seek to control how app developers engage with consumers and process payments. Developers who offer "digital" products and services have no choice but to use the platforms' proprietary payment systems exclusively. The platforms then extract an astronomical fee for this "privilege."

Allow me to illustrate: suppose I am an independent developer and I create a game, podcast-streaming app, or some innovative new digital service. If I want to reach users on iPhones, then I have to use Apple Pay as the exclusive means to process my in-app transactions. When I want to sell digital products or functionality to my users through my iPhone app, Apple prohibits me from using PayPal, Square, or another payment processor. Instead, I have to use Apple Pay and

ONLY Apple Pay, which requires me to pay an exorbitant 30% commission. That is more than six times as much as I would normally pay for payment processing in almost any other situation.

And what do I get for my 30% fee? Apple now owns my customer relationship. If a customer wants a refund, or a cancellation, or has a problem with their payment, I can't help them. I have to send them to Apple. If one of my users switches from iPhone to Android, they have to cancel their subscriptions on their iPhone and resubscribe through their Android app. If I want to manage security for my app or limit its use to adults, I can only do so through Apple and Google. And Apple's limitations on customer communications cuts off our ability to tell them about offers and deals, as well as provide customer service, undermining both the ability to connect with our own customers as well as the user experience.

Compare that situation to an app offering a physical service, like Uber. Apple provides all of the same services to Uber that it offers to digital service apps. But when a user gets to the payment screen in their Uber app, they have a choice of which payment processor to use. And even though Apple Pay is one of those choices, if the user selects Apple Pay, then Apple will only charge Uber a 3-5% commission. That discrepancy illustrates how much of Apple's fee is attributable to the services it offers developers and how much is attributable to a lack of competition.

In effect, these payment processing restrictions act as a massive tax on certain developers. And when you tax something, you get less of it. In this case, what we are getting less of is app development. Fewer developers creating innovative new services. Fewer entrepreneurs taking a chance on new app ideas. For those apps that do still get created, the platforms' tax often means higher prices for consumers. As a result, we get less and less competition, and the dominant platforms tighten their grip over the industry. This harms not only developers, but consumers as well.

Additionally, these restrictions create considerable confusion for consumers. For example, when a consumer uses payment processing for a particular app, they believe they are transacting directly with that app. In reality, the consumer is transacting with Apple, and the developer has no control over that relationship. By hiding the nature of the transaction, Apple can capture the benefits of payment processing exclusivity, while reserving blame for the app developers when things go wrong. Again, I would encourage members of this Committee to ask Apple and Google's trade associations how that could possibly be beneficial for developers or consumers.

SB 2223 will begin to give some control back to the innovative developers who build the applications and services that make our smartphones compelling. It opens up the platforms to competition between app marketplaces and competition between payment processors. That competition will ensure that the platforms' app stores will not be the only realistic way for app developers to reach North Dakota consumers. It also will mean app developers will have more freedom in how they engage with consumers in North Dakota. If passed, SB 2223 will unlock innovation and lower prices.

Before closing my remarks, I would like to briefly address some of the counterarguments I have heard from the platforms and their captive trade associations. What they argue is that the



platforms need to retain their control to protect the privacy of their users and the security of their operating systems. Those arguments are little more than a smokescreen.

First, having two dominant companies collect all of the user data doesn't do anything for user privacy. Quite the opposite. This should not be surprising. As monopolists, the platforms have little incentive to invest in ensuring that they protect users. Indeed, just yesterday, there were reports that Apple has allowed scam apps in its App Store, as well as apps that clone popular software from other developers, to run rampant. And an Android barcode-scanner app infected more than 10 million users with malware. Consolidating user data with just two platforms creates massive cyber and privacy risk.

Second, there is no credible argument that the platforms' payment processing rules are motivated by a concern for user privacy. Recall the Uber example. If the payment rules were attributable to privacy concerns, then the platforms would not give Uber or other physical services apps a choice of which payment processor to use. Moreover, Apple limits developers' ability to inform users that subscriptions might be available for lower prices on another platform on the web. What does that restriction have to do with user privacy? Nothing. It illustrates that the platforms' payment restrictions are driven solely by a desire to leverage their market power over developers.

Finally, any claim that the platforms must either forbid other app stores or favor their own due to security concerns is also specious. We all have personal computers and Macs, which for decades now have allowed users to download and install software from different sources. Users are now more sophisticated than ever and capable of deciding which app stores offer the best mix of choice, security, and quality features. They do not need the platforms to impose that decision on them.

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Competition is critical to preserving a free market economy. The Coalition for App Developers supports SB 2223 because it believes that consumers, developers, businesses, and even the platforms themselves all benefit from more competition and freedom of choice. This will result in better prices, more innovation, better security, better privacy, and greater freedom of choice for consumers. Finally, SB2223 will strengthen the North Dakota economy by encouraging greater investment in the state.

Once again, thank you for giving the Coalition for App Fairness the chance to speak with you today, and I am eager to answer any questions.



**Senate Industry, Business and Labor Committee**  
**Testimony in Support of SB 2333 on behalf of Joe Sandin with Onsharp**  
**Chairman Jerry Klein**

2/8/2021

Chairman Klein and members of the Senate Industry, Business and Labor Committee:

My name is Joe Sandin and I am the President and CEO of Onsharp, headquartered in Fargo, ND. I am writing this letter to confirm my support for Senate Bill No. 2333.

We are a technology firm that builds custom web and mobile applications for businesses across the Midwest and across the country. I started the business over 20 years ago as a college sophomore and have been blessed to build a team of 25+ technology professionals, most of whom live in the local area.

As an app development company, we have built hundreds of web app for our customers in many industries such as banking & finance, agriculture, manufacturing, and utilities. It is quite common that these apps include some form of payment processing, whether that be buying physical goods, digital goods, subscriptions, or other goods and services. On the web, there are many options for providing our customers with a way to charge their customers using a merchant account, where our customer simply pays typical merchant fees of 2-5% per transaction. There is freedom and there is choice.

When it comes to mobile app development, the same cannot be said. The app store owners require companies to process payments through their exclusively controlled payment models, models that take 20-30% of the cut of the revenues from the companies we build apps for. This causes many of our customers to either have to increase their prices to cover the fees, leave payment functionality out of their apps (tarnishing the user experience), or not build apps at all.

The payment platform options in mobile app development should be no different than in web development. Do the web browsers force you to process payments through their proprietary means? No. Thus, developers of mobile apps should have the ability to handle payment processing within their apps however they choose.

Sincerely,

Joe Sandin  
President & CEO  
Onsharp, Inc.

## SB2333 Testimony – Jeff Zarling

Jeff Zarling  
President  
DAWA Solutions Group, LLC.  
[izarling@dawasg.com](mailto:izarling@dawasg.com)

I stand in support of Senate Bill 2333 – In-application payment Prohibitions.

Big Tech has made big impacts on our lives. The computers, phones, Internet, and applications we use enable nearly every aspect of our daily activities. These applications have become integral to consumers and businesses. I am a supporter of free enterprise and lean toward less regulation and intervention in the marketplace. However, in the case of natural monopolies, I understand and support the idea of regulatory requirements.

A natural monopoly is a type of monopoly that exists typically due to the high start-up costs or powerful economies of scale of conducting a business in a specific industry which can result in significant barriers to entry for potential competitors<sup>1</sup>

Historical examples include railroads and telecommunications. The costs of laying tracks and buying or leasing the trains prohibits or deters the entry of any competitor and the industry was assumed to be an industry with significant economies of scale. Similarly, the costs of building telecommunications poles, laying fiber and installing cell networks make it cost prohibitive for new companies to enter the telecommunications market.

What we are experiencing in the software world are natural monopolies created out of user groups. While options existed in the 1990's for operating systems other than Windows such as MacOS, IBM's OS2, and Unix, users overwhelmingly chose Windows. These large user groups become an inherent value for software developers who may choose to only write software for the platform that has the largest user group instead of the costly prospect of writing software for multiple operating systems.

We are now seeing this in the market for mobile phone operating systems (iPhone or Android) and their associated App platforms or stores. As a developer, I only have to write software for two operating systems as Google Android and Apple iOS jointly possess over 99% of the global market share.<sup>2</sup>

As stated, there are benefits to developers from these natural monopolies and the services they provide. But there is the risk that the Operating System companies abuse their position with onerous policies, practices, and pricing as did the railroads.

In the 1870's, it was western farmers in particular that suffered. A central issue was rate discrimination between similarly situated customers and communities. Railroads charged exorbitant fees to some and gave preference to others. It wasn't until the Granger laws, a series of laws passed in several

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<sup>1</sup> [https://www.investopedia.com/terms/n/natural\\_monopoly.asp](https://www.investopedia.com/terms/n/natural_monopoly.asp)

<sup>2</sup> <https://www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009/#:~:text=Android%20maintained%20its%20position%20as,of%20the%20global%20market%20share.>

midwestern states, that things started to change. Certain aspects of the Granger Laws varied from state to state, but all of the involved states shared the same intent: to make pricing of railroad rates more favorable to farmers, small rural farmers in particular, in the states. This state action eventually led to the Interstate Commerce Commission and finally the Sherman Act in 1890, ten years before Teddy Roosevelt was elected and carried the mantle of “trust-busting.”

Teddy Roosevelt was opposed to bad trusts, or companies that expanded through unfair practices. If companies became dominate by eliminating competition and forcing consumers to pay unfair rates, Roosevelt declared that the government must step in. Roosevelt wasn't against big companies; he simply understood that the government must provide effective regulation to prevent corporations from abusing their natural monopolies and engaging in unfair trade.

As a small business owner, I feel I'm in a similar position as those farmers and support common-sense guardrails to prevent Operating System/App companies from engaging in unfair trade.



February 3, 2021

The Honorable Jerry Klein  
Chairman  
Committee Industry, Business and Labor  
North Dakota State Senate  
Bismarck, North Dakota 58505

Dear Chairman Klein,

We write to share our views on proposed legislation before your committee this legislative session, which could unintentionally harm innovative companies in North Dakota. ACT | The App Association (the App Association) is the leading trade group representing small mobile software and connected device companies in the app economy, a \$1.7 trillion ecosystem led by U.S. companies and employing 7,720 people in North Dakota.<sup>1</sup> Our member companies create the software that brings your smart devices to life and make the connected devices that are revolutionizing healthcare, education, public safety, and virtually all industry verticals. They propel the data-driven evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections. We have serious concerns with the proposal you are considering, SB 2333. We believe SB 2333 would devalue the services we purchase from software platforms while jeopardizing security as well as intellectual property (IP) and privacy protections for consumers.

In today's connected world, small software companies need three things from the platforms they use: easy access to a global market, the ability to offload overhead (like managing credit cards and preventing piracy), but most importantly, ensuring consumer trust. Consumer trust is fundamental for competitors in the app economy, especially for smaller firms that may not have substantial name recognition, and platforms have responded to this need (and competed with each other) in developing novel transparency and trust mechanisms.<sup>2</sup>

Before the entry of large software platforms like the Apple App Store and the Google Play store—and the mobile operating systems that power smart devices—software distribution was a more complex and costly undertaking for developers. The software ecosystem ran on personal computers and required companies to develop and market as well as carve out a supply chain that was far from streamlined. During this time, app companies were not only required to write code for their products, but they were also responsible for printing boxes and CDs, hiring third parties to handle financial transactions, employing legal teams to protect their IP, and contracting with distributors to provide access to retail store shelves in ways that promote and secure trust in their product. Even after the internet made it possible to distribute software electronically, generating consumer trust in software was unavoidably and often prohibitively expensive: developers spent up to 50 to 70 percent of their revenue on distribution, paying for magazine ads, marketing costs to publishers, and literally buying shelf space at big retailers. This is incredibly expensive when

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<sup>1</sup> ACT | THE APP ASSOCIATION, STATE OF THE U.S. APP ECONOMY: 2020, available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>.

<sup>2</sup> Martens, Bertin, "An Economic Policy Perspective on Online Platforms," INSTITUTE FOR PROSPECTIVE TECHNOLOGICAL STUDIES, Digital Economy Working Paper 2016/05. 2016.

compared to fees of 15 percent for developers making \$1 million or less on Apple's App Store or 30 percent for higher-grossing apps and apps across the other major platforms.<sup>3</sup>

Beyond cost reductions, consumers are now depending on mobile devices to store their most important information, and the ability to protect that data is vital. SB 2333 puts users' most vital data at risk. Today's software ecosystem depends on strong privacy, security, and IP protections at the platform level, therefore proposals to require platforms to allow circumvention of these protections would harm consumers and app economy competitors alike. Platforms currently work to keep apps that violate user trust out of their stores. In particular, apps that promote pornography, assist stealing music and movies, and allow for the illicit stalking or tracking of a person are banned. Those three categories of apps are also known vectors for malware and other software that either steals and sells personal data or uses the device resources in unexpected ways. SB 2333 creates an easy avenue for applications that would do real harm to consumers.

SB 2333 would circumvent the general prohibitions on such content by a platform and would render parental controls enabled by those platforms ineffective. In another example, there is strong demand for stolen content, especially during the pandemic as consumers are streaming content at home. Now, more than ever, we need to empower platforms to help content creators enforce their IP rights. Unfortunately, this proposal would help IP infringers circumvent the measures platforms use to sniff out IP theft and help IP owners eliminate the infringing content.

Just as the proposal would allow several questionable forms of content and activities—from which platforms currently protect consumers—it would also open new avenues for cyber attacks and privacy violations that would undermine the offerings of our member companies. For example, some bad actors market their device monitoring apps designed to track children's mobile device use as a way to track anyone, including adults, without their knowledge or permission. These “stalker apps” operate outside the bounds of what is allowable in app stores or mobile operating systems by accessing troves of personal data including location, messaging, and calls. Stalker apps put domestic abuse victims at further risk for harassment and harm by their abusers. In 2019, The Federal Trade Commission (FTC) acknowledged the dangers of allowing third-party apps access to bypass manufacturer restrictions in its first ever action against a purveyor of so called “stalker apps”, Rentina-X. The FTC stated in its enforcement action that “the purchasers were required to bypass mobile device manufacturer restrictions, which the FTC alleges exposed the devices to security vulnerabilities and likely invalidated manufacturer warranties.”<sup>4</sup>

Requiring platforms to allow the installation of unapproved content would impede the ability of platform operators to ubiquitously update devices' functionality and security. This requirement would make an attack like the one involving SolarWinds easier, as that breach involved the

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<sup>3</sup> Mark Gurman, *Apple to Cut App Store Fees in Half for Most Developers*, BLOOMBERG, (November 18, 2020), <https://www.bloomberg.com/news/articles/2020-11-18/apple-to-cut-app-store-fees-in-half-to-15-for-most-developers>.

<sup>4</sup> Press Release, Fed. Trade Comm'n, *FTC Brings First Case Against Developers of “Stalking” Apps* (Oct. 22, 2019), *available at* <https://www.ftc.gov/news-events/press-releases/2019/10/ftc-brings-first-case-against-developers-stalking-apps>.

installation of software onto personal devices.<sup>5</sup> A key element of our member companies' ability to reach their markets is this built-in trust, which the proposal could significantly erode as unsecured apps find their way onto the devices of our members' clients and customers. Those developers who seek to reach consumers and clients outside the software platforms (or in addition to providing apps on the platforms) can provide robust offerings as progressive web apps or on the internet. Software is not inaccessible even if its characteristics make it difficult to offer on the various software platforms; legal cannabis sellers, for example, make their products and services available off the platforms, even though payment processing using federally insured depository institutions is illegal and therefore unavailable on the platforms.<sup>6</sup> However, for our member companies and other small companies innovating in the app economy and creating jobs in North Dakota, much of the platforms' value derives from their ability to create a trusted space for consumers, developers, and content creators alike.

We appreciate this opportunity to weigh in as you work to ensure that public policy strikes the right balance to best promote competition and consumer protection. We strongly support public policy that enables the free market to create trusted software spaces that address privacy, security, and IP threats for consumers and for software developers to compete, create jobs in North Dakota, and provide innovative products and services.

Sincerely,



Morgan Reed  
President

ACT | The App Association  
1401 K Street NW (Suite 501)  
Washington, District of Columbia 20005

Cc:

The Honorable Doug Larsen  
The Honorable Randy A. Burckhard  
The Honorable Curt Kreun  
The Honorable Richard Marcellais  
The Honorable Shawn Vedaa

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<sup>5</sup> Isabella Jibilian, *Here's a Simple Explanation of How the Massive SolarWinds Hack Happened and Why it's Such a Big Deal*, BUSINESS INSIDER, (December, 24, 2020), <https://www.businessinsider.com/solarwinds-hack-explained-government-agencies-cyber-security-2020-12>.

<sup>6</sup> Caleb Danzinger, *It's Complicated: Can you Sell Cannabis Online?*, CANNABIS & TECH TODAY, (June 30, 2020), <https://cannatechtoday.com/its-complicated-can-you-sell-cannabis-online/>.

**Testimony of Erik Neuenschwander  
Chief Privacy Engineer, Apple, Inc.**

**Hearing before the North Dakota Senate  
Joint Industry, Business, and Labor Committee on  
Senate Bill No. 2333**

**February 9, 2021**

Mr. Chairman, and members of the Committee, my name is Erik Neuenschwander, and I am the chief privacy engineer for Apple. I have dedicated my career to something I really care about, and I know you do, too: improving privacy, security, safety, and performance for users of technology. I appreciate the opportunity to offer testimony today in opposition to Senate Bill 2333, and I only wish that I could be there with you in person.

Many of you—or your friends or family or constituents—probably have an iPhone in your pocket right now. I hope that’s the case—we are passionate about our products, and we believe they deliver the best possible customer experience. To do that, we work day-and-night, year-after-year to innovate and improve.

We know that your iPhone is not just a phone. Today, we all use our mobile devices to store our most sensitive information—communications with loved ones, photos of our kids, our location, our banking information, our health information, and more. Bad actors, including those in foreign countries, try to infiltrate our devices and access that sensitive information using something called “malware”—which is software that is used for bad, even dangerous, purposes. You can think of it like a Trojan horse—it’s software that gets into your phone and then wreaks havoc.

At Apple, we are relentless about protecting your iPhone from these types of attacks. We are striving constantly to improve the privacy, security, safety, and performance of your iPhone. And I am here as a software engineer to tell you—in no uncertain terms—that Senate Bill 2333 threatens to destroy iPhone as you know it. To explain why this is the case, I’d like to provide some background on how we’ve built iPhone for over a decade—and how the proposed legislation would require us to abandon the integrated and curated iPhone experience our users expect.

First, the iPhone’s hardware and software are built to work together seamlessly. The App Store is an integrated feature of iPhone, not a separate component, and if you mandate changes to it, you are fundamentally changing iPhone and the user’s experience with it. So, for example, right now, your iPhone is designed to prevent software from obtaining unauthorized access to your camera or your photos or your location. But if you force other software onto iPhone, as Senate Bill 2333 might do, you would undermine the privacy, security, safety, and performance that is built into iPhone by design.

Second, the App Store is curated. I understand some of you have owned stores yourselves, so this will be familiar to you: you don’t put just any product on your shelves; you stock your shelves only with products that meet your standards for safety and quality. You don’t want to sell products that don’t work or pose a danger to your customers. And that’s how we run the App Store: to keep



out apps that would steal your banking information, or break your phone, or spy on your kids. Each week, we review about 100,000 submissions, and we reject about 40% of them because they don't meet our standards. And we know that our approach works: research shows that iPhone has far fewer malware infections than the Android Platform.

Simply put, we work hard to keep bad apps out of the App Store; Senate Bill 2333 could require us to let them in. For a store owner, that would be like the government forcing you to stock your shelves with products you know lack in quality, authenticity, or even safety.

And, remember: customers can make this choice for themselves. Today, if a customer wants our curated App Store approach, he can buy an iPhone; but if he wants a different approach without the protections Apple provides, then he can choose one of our competitors. We think our approach is better, but at the end of the day, it's the customer's choice to go with us or with someone else. Senate Bill 2333 could eliminate that choice if it required all mobile device makers to adopt the same approach of stocking their shelves without first screening the products.

That's what's at stake here. Since we launched iPhone in 2007 and the App Store in 2008—over a decade of hard work and breakthrough innovations—we have built a product and experience that many customers prefer over the alternatives in the marketplace: an integrated, curated mobile device that is designed to maximize privacy, security, safety, and performance. With the stroke of a pen, Senate Bill 2333 could destroy that.



**TECHNET**  
THE VOICE OF THE  
INNOVATION ECONOMY

#5699

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February 5, 2021

The Honorable Jerry Klein  
Chair, North Dakota Senate Committee on Industry, Business and Labor  
North Dakota State Senate  
Bismarck, ND 58505

**RE: TechNet opposition to SB 2333**

Dear Chairman Klein:

I write on behalf of TechNet to express our opposition to SB 2333. The bill would undermine the entire app delivery and development ecosystem while placing consumer data and privacy at considerable risk.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents more than three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.

SB 2333 would destroy the existing app ecosystem that has allowed developers to access billions of global users while providing consumers with a safe, secure, and convenient place for users to search for apps. The benefits that app stores provide to developers and consumers include not only immediate access to global users, but also the infrastructure necessary to support regular malware scanning, prevent restricted content like hate speech and sexual content, prevent spamming apps, and manage safe and secure payment activities. Without these resources that are available to all developers, the app market would be balkanized, confusing, and expensive for both developers and users.

In addition to the concerns regarding undermining the operation of app stores generally, each provision of the bill is of concern. The restriction on the use of exclusive modes of distribution would essentially mandate "sideloading", which is the practice of downloading unvetted applications on to a connected device. While not all platforms require exclusivity in distribution, removing it for those that do would undermine the platform's ability to provide a secure environment for its developer and user communities and threaten the security and privacy of their consumers.

Sideloads circumvents a device's operating system and adds an application that has not necessarily been approved for that operating system. All applications on leading app stores, for example, are carefully vetted to eliminate security risks, which successfully prevents the vast majority of malicious apps from entering the environment and reaching the end-user. By contrast, sideloading allows access to apps that are unavailable in official app stores for any of a number of reasons, including those that risk a user's privacy and security. Once these malicious apps are installed, they expose users and their broader connected networks to nefarious threats.

Prohibiting in-app payment systems creates a situation that might not appear acceptable in other scenarios. What other business is expected to provide technical assistance, distribution, and marketing to a global customer base for free? Should a Major League Baseball ballpark be required to build bleachers outside of the stadium so fans can watch a baseball game from there? Perhaps the local hot dog stand should be required to allow patrons of a food truck to come and use their tables, condiments, and facilities to enjoy a Cobb salad during the lunch hour.

Finally, it is unclear how North Dakotans would benefit from the bill. Should North Dakota take this route of specifying how app stores can operate, it would undoubtedly lead to other states doing the same, but states rarely do things exactly the same. A foreseeable conclusion of this process would be a country of mini-app stores providing fewer choices, less safety, and more complexity for developers looking to launch their own apps.

The technology industry is fully committed to securing privacy and security for consumers and engages in a wide range of practices to provide consumers with control over their data. The success of our member companies hinges on their ability to build and maintain trust from their consumers, and choosing partners and platforms that ensure a secure environment is of paramount importance. SB 2333 would completely undercut those critical efforts and open up North Dakotans to new privacy and cybersecurity risks.

Today's software ecosystems depend on strong privacy, security, and IP protections at the platform level. Proposals that require platforms to allow circumvention of these protections through sideloading would harm consumers and app economy competitors alike. We strongly urge you to oppose SB 2333 and any similar attempts to undermine these critical protections.

Sincerely,

A handwritten signature in black ink, appearing to read "Santana" followed by a large, stylized "Q" or "K".

Samantha Kersul  
Executive Director, Northwest

Cc: The Honorable Doug Larsen  
The Honorable Randy Burckhard  
The Honorable Curt Kreun  
The Honorable Richard Marcellais  
The Honorable Shawn Vedaa

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

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)

**NetChoice**

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



# AMERICANS FOR PROSPERITY®

## NORTH DAKOTA

SB 2333

Senate Industry, Business, and Labor

February 9<sup>th</sup>, 2021

Chairman Klein and members of the Senate Industry, Business, and Labor Committee,

My name is Cale Dunwoody, and I am here on behalf of Americans for Prosperity-North Dakota (AFP-ND). Our organization is dedicated to reducing barriers for individuals, allowing them to reach their full potential. Each and every day we are fighting to reduce burdensome regulations, allowing for greater personal choice. Today, I stand before this committee in opposition to Senate Bill 2333. I believe this bill hinders North Dakotans' personal choice and stifles innovation.

Objectively, our organization is opposed to regulations of this sort. More subjectively, Americans for Prosperity is opposed to this bill for two reasons:

- First, this bill places unnecessary mandates on the technology sector.
- Second, this bill limits competition in the free market.

North Dakota is a place of common sense; we favor limited government. This committee often deciphers between which bills are necessary to protect consumers and which are a governmental overreach. Frankly, Americans for Prosperity believes this bill is an overreach. Our organization fundamentally opposes government mandates on private businesses. This bill is directly telling private businesses how to run their business. Unless it can be established that business practices create harm for consumers or competition, the government should not impose its' heavy hand.

This bill would limit how software developers can sell applications on their platforms. The free market is what drives our economy and our way of life. The influence of personal choice is the most powerful thing in America, whether it be choosing an elected official or a can of pop, we all make a choice. Many of us have chosen between Apple and Android. If you would like a more isolated experience you, chose Apple, and if you want a more flexible experience, you chose Android. We are asking that people, not the government, decide between software developers.

While I am not a technological expert, it is said that these restrictions would ultimately hinder a companies' ability to keep their devices secure. For instance, if you have a house with three doors, you will have to make sure each door is locked and secure to protect from invaders. Whereas, if you only had one door to enter your house, it would be much



easier to protect your home because there is only one way to enter. While that was a gross oversimplification, the same can be assumed for our devices. If you have one single point of entry, then it makes it easier to catch bugs and malware. This bill would reduce that option and force private businesses to have multiple points of entry.

Senate Bill 2333 is specifically affecting businesses such as Apple, primarily because they have their own app store (sub-section 2). It would force private businesses to allow their customers to download applications from other app stores. Specifically, this bill would not apply to other digital platforms like Microsoft's Xbox or Sony's Playstation (sub-section 4).

Today I am respectfully asking this committee to give Senate Bill 2333 a do not pass recommendation. For the most part, we all fundamentally agree on the power of the free market. If the consumer is dissatisfied with a product, they have the ability to switch. This bill creates undue government regulation on companies, like Apple, while smothering any further innovation. I ask that this committee keep North Dakota a place of common sense and a place of limited government.

I will now stand for any questions.

Cale Dunwoody  
Grassroots Engagement Director  
Americans for Prosperity-North Dakota



February 8, 2021

*Senate Industry, Business and Labor Committee*

*Testimony in Support of SB 2333 on behalf of David Heinemeier Hansson*

*Chairman Jerry Klein*

Chairman Klein and members of the Senate Industry, Business and Labor Committee-

My name is David Heinemeier Hansson, and I'm the CTO and co-founder of Basecamp, a small internet company from Chicago that sells project-management software and email services.

I first testified on the topic of big tech monopolies at the House Antitrust Subcommittee's field hearing in Colorado just over a year ago<sup>1</sup>, where I described the fear and loathing many small software makers have toward the app store duopoly.

How fees upwards of 30% of revenue, applied selectively, and in many cases capriciously, put an enormous economic burden on many small software businesses. And how paired with the constant uncertainty as to whether the next software update will be rejected, or held for ransom, and put their entire businesses in jeopardy.

I was then merely speaking on behalf of my many fellow small business owners. As someone who'd heard the tragic stories from app store duopoly victims, whispered out of fear of further retribution, for the better part of the last decade.

Little did I know that just six months later, Basecamp would be in its own existential fight for survival<sup>2</sup>, after launching a new, innovative email service called HEY.com. Apple first approved our application to the App Store, only to revert themselves days later, after we had publicly launched to great critical acclaim. They demanded we start using their in-application payment system, such that they could take 30% of our revenues, or we'd be kicked off the App Store. A virtual death sentence for a new email service that was aiming to compete with the likes of Google's Gmail and Apple's own iCloud email hosting.

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<sup>1</sup> <https://m.signalnoise.com/testimony-before-the-house-antitrust-subcommittee/>

<sup>2</sup> <https://hey.com/apple/>

Against all odds, and due to Apple's exceptionally poor timing and the bad PR that resulted from this skirmish happening during their yearly Developer Conference, we managed to beat back the bully, but so many other developers have tried the same and failed, or never dared try at all, and suffered in silence.

I concluded that original congressional testimony in January with a simple plea: "Help us, congress. You're our only hope." Meaning, the market is not going to correct itself. The free market depends on legislative guardrails that prevent monopolies from exploiting their outsized power, and preying on smaller competitors.

But when we were fighting for our survival and future over the stressful summer, whatever hope I had for congressional involvement seemed very far off. If your house is on fire, and you call for help, it's no good if the red engine arrives after daffodils have started growing where your house once were.

While I still hope we'll get relief from on a federal level, there are no bills currently under consideration. No specific proposals on the table. So if and when that happens, it will be too late for the many businesses that either got crushed in the interim or never got started out of the above-mentioned fear and loathing.

So I was extremely pleased to learn that this plea for help with the app store duopoly abuses was in fact being heard, it just so happened to be in the form of state senate bills, like SB 2333. And not only had the plea been heard, but it had been answered in the most succinct and effective manner possible!

After the recitals, the just 17 lines of SB2333 read like music. Written in a language I can understand without hiring counsel to parse it for me. It almost seems too good to be true! But I sincerely hope that it is not. That you will listen to the small software developers from all over the country, who are tired of being bullied and shaken down by a handful of big tech monopolists out of Seattle and Silicon Valley.

We need a fair digital marketplace free of monopoly abuse as much in Chicago as in Bismarck. And when it comes to the app store duopoly, no single change will have a greater impact than giving small software makers like us a choice when it comes to in-app payment systems, and protection from retaliation, if we refuse the onerous deal the monopolists are offering.

Apple and Google would like to take credit for all the jobs and all the progress that has happened on top of their mobile platforms. But that's a grotesque appropriation of the ingenuity and innovation that's happening all over the country. It's like if a shipping company wanted credit for all the products inside the containers it carried by rail or sea. Apple and Google may control tracks and shipping lanes, but without the work of millions of independent software makers, they'd have little to deliver to customers.

And handouts don't help either. We're not interested in a slightly lower rate on their obscene payment processing fees. We're interested in choice<sup>3</sup>. Unless we have choice, we'll never have a fair hand to negotiate, and the market forces that has driven credit-card processing fees down to around 2% can't work their magic.

North Dakota has the opportunity to create this level playing field, such that the next generation of software companies can be started there, and that if a team in Bismarck builds a better digital mouse trap, they won't be hampered by abusive, extortive demands for 30% of their revenue from the existing big tech giants.

It's simply obscene that a small software company that makes \$1,000,000 dollars in revenue have to send a \$300,000 check to Cupertino or Mountain View, rather than invest in growing their business, while Facebook makes billions off those same app stores without paying any cut of their revenues whatsoever.

You have the power to chart a new path for the entire country by taking care of software developers who already do or would like to call North Dakota home. It's incredibly inspiring to see a state senate that's not afraid to take on the biggest, most powerful tech giants in America, and write plain, simple rules that force them to give the next generation a chance.

Thank you so much for your consideration.



David Heinemeier Hansson  
CTO & Cofounder, Basecamp

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<sup>3</sup> <https://hey.com/apple/iap/>



**Testimony of  
Kirsten Daru**  
Chief Privacy Officer and General Counsel for  
Tile, Inc.

**February 9, 2021**

I would like to begin by thanking this subcommittee for convening this hearing and would further like to thank and commend the members of the Committee and your staff for the commitment that you have shown to promoting competition in the digital marketplace.

## **Introduction**

My name is Kirsten Daru, and I am the Chief Privacy Officer and General Counsel of Tile, Inc.

I am here to talk about Apple's systemic abuse of market power that has stifled innovation and competition in this state and around the world. While Tile is not domiciled in North Dakota, our experience with Apple's anti-competitive practices is—quite unfortunately—not unique. The abuses that have unfolded over the years have affected virtually all developers and consumers of mobile app stores. Yet, few feel comfortable speaking up about their experiences for fear of retaliation or retribution by Apple. Indeed, speaking up is difficult for us too. Apple in many ways controls the fate of its app ecosystem.

However, I am not here today to ask for protection or relief. Instead, I'm here because right now, we have a unique opportunity to begin to restore innovation, competition, consumer choice and freedom to the app ecosystem. I'm here to share our story in favor of a level playing field and in favor of SB 2333 which will help drive competition and help North Dakota consumers get the benefit of great services and new innovations at fair prices.

## **About Tile**

Tile helps people find lost items. Our devices work with the Tile App to provide an interface to help people find their keys, wallet, purse—really anything. And we also embed our software into third party products like headphones and laptops.

Tile is a small company. We only have around a hundred and twenty five employees. But we have a successful digital subscription business, over a hundred and eighty patent assets and much of our success relates to our collaboration with a diverse group of technology partners. This includes Hewlett-Packard, Google, Amazon and importantly, Apple who was a critical platform partner since 2013.

However, our partnership with Apple has taken a sharp turn in the wrong direction.

## **Apple's Developer Terms**

For context, it's helpful to take a look at Apple's developer terms. The developer terms are the rules that developers must follow to offer their apps on the AppStore on your iPhone. From time to time, our engineers get a pop up message from Apple alerting them that there are new terms.<sup>1</sup> When new terms appear, we are blocked from updating our app until we agree to

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<sup>1</sup> See Exhibit A.

them.<sup>2</sup> The new terms are offered on a take it or leave it basis without meaningful notice and without an opportunity to negotiate.

Those terms currently require apps to be distributed on Apple's App Store. No competing app stores are allowed. Essentially the only way to make an app available to an iPhone user is to agree to these terms and offer the app through the App Store. Apple also imposes a requirement that most digital purchases be made via its in-app payment system. No competing payment systems for applicable digital purchases are allowed. And for the "privilege" of using Apple's in-app payment system, we have to pay Apple as much as **30%** of our digital revenues.

Congressional findings indicate that there is no nexus between the 30% fee and the cost of Apple running the App Store.<sup>3</sup> Apple App Store revenues are in the billions- but the former director of app review for the App Store, Philip Shoemaker, estimated that Apple's costs for running the App Store are less than \$100 million.<sup>4</sup> It's pure exploitation. An exercise of the complete control they now have over access to iPhone users.

Yet because of Apple's prohibition on competition, owners of iOS devices have no alternative means to download apps other than the App Store. Developers are forced to relinquish thirty percent of their revenue in exchange for what is really just a payment processing service.<sup>5</sup> Imagine a small coffee shop in North Dakota being forced to hand over 30 cents to a processor in order to sell a \$1 cup of coffee. That's the reality for a lot of us in Apple's App Store.

More importantly, Apple's artificial and unilateral prohibition on competition leaves no alternatives for customers. Without regulatory intervention, Apple will be free to increase its fees over time-further crushing developers and consumer pocketbooks.

But that's just the beginning. For many developers like Tile, Apple isn't just the owner of the App Store. Apple is also a competitor, which makes the App Store fee dynamic that much more critical to address.

### **Apple Manipulates Its Ecosystem to Disadvantage Competitors**

After years of being a critical platform partner, and even featuring us on stage at Apple's World Wide Developer Conference, reports started surfacing that Apple was going to release a Tile-like competing hardware device.<sup>6</sup> Shortly afterward, they decided to no longer carry our products in their retail stores.

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<sup>2</sup> *Id.*

<sup>3</sup> *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020, p. 344-355.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at p. 345-346.

<sup>6</sup> See, e.g., Warren, Tom. "iOS 13.2 reveals Apple's Tile-like device could be called AirTag." *The Verge*, 10/28/19, <https://www.theverge.com/2019/10/28/20936650/apple-airtag-tile-device-reference-ios-13-2-rumors>, accessed 1/10/20; Gallagher, William. "Apple's Tile-like tracking device named 'AirTag' in iOS

To be clear, we welcome competition, but it has to be FAIR competition. And over the past year or so, Apple has exploited its market power to advance its own interests at our expense in numerous ways. Here are just a few examples:

- They copied our app. A new FindMy app was introduced with iOS 13 in late 2019 that included Tile features.<sup>7</sup> FindMy is installed by default on all Apple phones and cannot be deleted;
- At the exact same time, Apple made changes to their operating system that denigrated our user experience, while leaving theirs streamlined and otherwise intact;<sup>8</sup>
- Apple started sending prompts encouraging our customers to essentially turn Tile off. But they serve no prompts to turn off FindMy;<sup>9</sup>
- Apple hired an engineer we sent to work with them on a Tile/Siri integration;
- Apple refused to give us access to certain technology that we could use to enhance our user experience. Instead, they are reserving it only for customers of their anticipated competing Tile product;
- Apple launched a FindMy Network program whereby they withhold critical data unless we abandon our app and join the FindMy app.<sup>10</sup> They could easily grant Tile access if they were interested in fair competition.

Taken together, these examples demonstrate that Apple acts as the gatekeeper of third party access to data and technology in ways that favor its own interests.

### **Anti-Competitive Effects Of Apple's Behavior**

Apple owns and controls the entire commercial iOS ecosystem. They own the hardware, the operating system, the retail stores and the app store marketplace. This gives Apple access to competitively sensitive information, including identity of our iOS customers, subscription take rate, retail margins and more. And Apple's control over the ecosystem generally enables it to

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13.2." AppleInsider, 10/28/19, <https://appleinsider.com/articles/19/10/28/apples-tile-like-tracking-device-named-airtag-in-ios-132>, accessed 1/13/20.

<sup>7</sup> In iOS 13, Apple introduced offline finding, which helps find lost devices even if they're not connected to the Internet via networked Bluetooth community crowdsourcing. Albergotti, Reed. "Apple says recent changes to operating system improve user privacy, but some lawmakers see them as an effort to edge out its rivals." The Washington Post, 11/26/2019, <https://www.washingtonpost.com/technology/2019/11/26/apple-emphasizes-user-privacy-lawmakers-see-it-an-effort-edge-out-its-rivals/>, accessed 01/13/2020

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; Haggin, Patience. "iPhone Update Reminds Users – Again and Again – of Being Tracked." Wall Street Journal, 12/31/19, <https://www.wsj.com/articles/iphone-update-reminds-usersagain-and-againof-being-tracked-11577799336>, accessed 1/10/20

<sup>10</sup> *Investigation of Competition in Digital Markets*, Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, October 2020, p. 358, fn. 2273 (citing the FindMy Network Specification).



identify any successful app category and take it over by manipulating the ecosystem to give itself a sharp competitive edge.

Apple has done this in one way, shape or form to categories like screen time apps, flashlight, email apps, remote payments. It's happening now to health apps, fitness apps, news apps and more. And all the while, these small competing app developers line Apple's pockets with as much as thirty percent of their digital revenue to help fuel more anti-competitive behavior. If left unchecked, Apple will become a 3, 4, 5 trillion dollar company. Innovation will continue to suffer and consumers will ultimately be left with even less choice, lower quality and higher prices.

While testifying on similar behavior during a Congressional hearing last year, I used an analogy that may be helpful here. It's like playing a very warped game of football. You might have the best team in the league, but you're playing against a team that owns the field, the ball, the crowd and the league, and that can change the rules of the game in its own favor at any time. That's the field everyone in America is playing against Apple on.

### **Apple's Privacy Defense Is A Smokescreen**

In a common refrain in response to concerns about Apple's anti-competitive conduct, Apple claims that prohibiting or impeding competition on its platform is necessary to ensure the privacy and security of Apple users. This is simply not true for many reasons, but the most obvious and indisputable reason is the following.

Nowhere does Apple say: "If an App Store or payment method can meet these certain reasonable and objective standards for privacy and security, then they may compete with us." Instead, the rule is: "No app store or payment method may compete with us." The blanket prohibition on competition has no reasonable nexus to privacy or security. There are many third party sellers and payment methods with excellent privacy and security practices. And the policy isn't consistent with Apple's own policy on Mac's or even for excluded assets purchasable on the iPhone, where it's perfectly fine for customers to purchase from any online merchant using any form of payment they choose on iOS or otherwise.

The bottom line is that this is what happens when you have a monopolist private company acting as a de facto regulator. The regulations will always tip the scale in favor of the monopolist and consumers lose the benefit of choice and fair prices.

### **Conclusion**

The functioning of a robust, healthy app distribution ecosystem is dependent upon open platforms that do not favor the owner. SB 2333 is a critical first step toward restoring innovation, competition and consumer choice in North Dakota and will serve as an example of what good looks like to regulators around the world struggling with how to free their citizens from the reign of Big Tech. Tile commends this subcommittee for its leadership on this critical

issue and is looking forward to the bright future of North Dakota consumers who will be so well served by this bill.

I would like to again thank you for your time. I look forward to answering any questions that you may have.

# Exhibit A

Exhibit A



## App Store Connect



### Review the updated Paid Applications Schedule.

In order to update your existing apps, create new in-app purchases, and submit new apps to the App Store, the user with the Legal role (Account Holder) must review and accept the Paid Applications Schedule (Schedule 2 to the Apple Developer Program License Agreement) in the Agreements, Tax, and Banking module.

To accept this agreement, they must have already accepted the latest version of the Apple Developer Program License Agreement in their account on the developer website.



My Apps



App Analytics



Sales and Trends



Payments and  
Financial Reports



Users and  
Access



Agreements, Tax,  
and Banking



Resources and  
Help

SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE  
JERRY KLEIN, CHAIRMAN  
FEBRUARY 9, 2021

TESTIMONY BY  
PARRELL D. GROSSMAN  
DIRECTOR, CONSUMER PROTECTION AND ANTITRUST DIVISION  
OFFICE OF ATTORNEY GENERAL  
RE: SENATE BILL NO. 2333

Mr. Chairman and members of the Senate Industry, Business and Labor Committee. I am Parrell Grossman, Director of the Attorney General's Consumer Protection and Antitrust Division.

The Attorney General agrees with proposed amendments which will remove the Attorney General from enforcement of this legislation and create a private cause of action.

Thank you for your time and consideration.

Tuesday, February 9, 2021

Senate Industry, Business & Labor Committee

SB 2333

REP. KLEIN AND COMMITTEE MEMBERS:

My name is Justin Auch. I've owned and operated a small software development consulting company in Grand Forks, ND for over 10 years. One of the primary services we provide is building custom mobile applications for businesses and startups. Over the past ten years, we've built, submitted and managed mobile applications for both iOS and Android operating systems.

Through my experience as a developer and a business owner, one of most painful parts of the job is submitting an app for review in the App Store. Here's how the process generally goes, (Google is pretty relaxed in this regard, so I'm going to pick on Apple): We build an app for the client and we're ready to ship it. Everyone's excited for the launch! We prepare the submission and send it off to Apple for review. After 2-7 days, the review team comes back with an approval or denial. In the event that the app is denied and if the issue can be corrected, we make the correction and resubmit, wait another 2-7 days, then repeat this cycle until we get approval. The process is cumbersome and has driven some of our clients to explore alternative solutions, like building a web based app designed for use on mobile devices. This is a great solution for many reasons, BUT... Apple is notorious for intentionally limiting the functionality, (push notifications), of web based applications. Limiting this functionality on all Apple devices makes this approach not viable for most applications.

Putting the submission process aside, there are also issues on the business front. These systems are designed to make money by taking a cut, (Apple takes 30%), of each sale and/or subscription. For some of our clients, this seriously reduces their profit margin and, in some cases, kills their business model. Some businesses develop expensive custom subscription management systems to try and get around this, but Apple usually catches this in review and denies the app for violation of their policies. In most cases, there is no way around this. There is only one way to add software to an iOS device and there is only one way to sell services and apps to individual users and that is through the App Store.

I get it.. they're businesses and businesses need to make money. The reality is, there are more iOS users in the United States than on any other system by a pretty wide margin. For this reason, mobile apps are almost always built for iOS first. Building custom software is really expensive, so if the software you're developing does not work on iOS devices, it's usually not worth releasing. This gives Apple a significant amount of control over the entire industry. By limiting how applications are monetized and administered, there is little chance that a 3rd or 4th option will ever successfully emerge.



Chairman Klein and the Senate Industry, Business and Labor Committee:

Thank you for the opportunity to express our support for SB 2333.

Epic Games is a leading interactive entertainment company and provider of 3D engine technology, based in Cary, North Carolina. Epic operates Fortnite, one of the world's largest games with over 350 million accounts and 2.5 billion friend connections. Epic also develops Unreal Engine, which powers the world's leading games and is also adopted across industries such as film and television, architecture, automotive, manufacturing, and simulation.

Epic has long been an advocate for fairer and more open platform policies. We believe it is time to end Apple and Google's abuse of its dominant position of the app marketplace to ensure competition and freedom for consumers and developers alike.

The anticompetitive practices on mobile platforms today stifle innovation and subject mobile developers to crippling restrictions. This hurts consumers by reducing choice and inflating prices. People who buy a smartphone have a right to choose how and where they install apps and have the right to choose their in-app payment option.

Apple and Google demand that developers use their payment processing services, which charge an exorbitant rate of 30%. They block developers from using more efficient payment methods that would allow them to save money and pass those savings along to their customers. This 30% tax stifles competition, with many developers unable to survive under this burdensome policy. And it threatens the ability of developers to innovate and create new kinds of games, apps, and businesses. As SB 2333 points out, App Stores should not be able to require a developer to use an in-app payment system as the exclusive mode of accepting payments.

This is a material impediment to innovation in an increasingly necessary part of our American economy. If developers are not allowed to do businesses directly with their customers and if the platform holders are able to set arbitrary rules that tax the consumer and the developer without competition, this will devastate small businesses.

I want to sincerely thank you for taking the lead on this issue to stop the anticompetitive behavior. If we do nothing, we will see an increase in closed platforms where there is no freedom, anywhere. If platforms are allowed to continue on this path, other companies could be encouraged to similarly try to limit their platforms and consumers and businesses will pay the price.



Epic is a member of the [Coalition for App Fairness](#) which represents more than 50 companies who are working together to create a level playing field for app businesses and to give people freedom of choice on their devices. Thank you for taking action for the people and businesses of North Dakota and for helping app makers everywhere secure a lasting future.

The tech industry at the end of this battle will not be the same as the tech industry today. Thank you to the leaders of North Dakota for addressing this complicated but serious problem.

Best,

Tera Randall  
Epic Games  
VP, Communications and Policy



# 2021 SENATE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Fort Union Room, State Capitol

SB 2333  
2/10/2021  
09:06 AM

relating to in-application payments for software applications and purchases
---

**Chair Klein** opened the meeting at 9:06 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

### Discussion Topics:

- App Stores
- Payment Platforms

Senator Burckhard moved DO NOT PASS [9:06].  
Second from Vedaa [9:07].

[9:07]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	Y
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	Y
Senator Shawn Vedaa	Y

Motion passed: 6-0-0

**Senator Klein** will carry the bill [9:08].

**Chair Klein** ended the meeting at 9:09 a.m.

*Isabella Grotberg, Committee Clerk*

# 2021 SENATE STANDING COMMITTEE MINUTES

## Industry, Business and Labor Committee Fort Union Room, State Capitol

SB 2333  
2/10/2021  
09:45 AM

relating to in-application payments for software applications and purchases
---

Chair Klein opened the meeting at 9:45 a.m. All members were present. Senators Klein, Larsen, Burckhard, Vedaa, Kreun, and Marcellais.

### Discussion Topics:

- Mistake on previous vote

**Senator Larsen** moved to reconsider actions [9:45].

**Senator Kreun** seconded the motion [9:45].

**Voice vote:** motion passed [9:45].

**Senator Larsen** moved to adopt Amendment 21.1044.01002 [9:45].

Senator Kreun seconded the motion [9:45].

[9:45]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	Y
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	Y
Senator Shawn Vedaa	Y

Motion passed: 6-0-0

**Senator Burckhard** moved DO NOT PASS AS AMENDED [9:46].

**Senator Vedaa** seconded the motion [9:46].

[9:46]

Senators	Vote
Senator Jerry Klein	Y
Senator Doug Larsen	N
Senator Randy A. Burckhard	Y
Senator Curt Kreun	Y
Senator Richard Marcellais	Y
Senator Shawn Vedaa	Y

Motion passed: 5-1-0

**Senator Klein** will carry the bill [9:47].

Chair Klein ended the hearing at 9:47 a.m.

*Isabella Grotberg, Committee Clerk*

February 8, 2021

CS  
2/10  
1 of 2

PROPOSED AMENDMENTS TO SENATE BILL NO. 2333

Page 1, line 14, after the underscored period insert "The term includes a digital application platform provided or used only for a certain type of device, including a certain grade of computing device, a device made only by a particular manufacturer, or a device running a particular operating system."

Page 1, line 15, after "c." insert """Digital transaction platform" means a system for accepting payments from a user for an application or service received from a digital application distribution platform. The term includes a digital platform being usable for transactions not related to the digital application distribution platform.

d. "Domiciled in this state" means a person that is a resident of this state or is headquartered in this state, conducts business in this state, and the majority of the person's business is to create or maintain an application.

e. "

Page 1, line 18, replace "d." with "f. "Provider" means a person that owns, operates, implements, or maintains a digital application distribution platform, a digital transaction platform, or an in-application payment system.

g. "Resident of this state" means a person whose last known billing address, other than an armed forces post office or fleet post office address, is located within this state, as shown in the records of a provider of a digital application distribution platform.

h. "

Page 1, line 20, remove "special-purpose"

Page 1, line 20, after "hardware" insert "primarily intended for specific purposes"

Page 2, line 1, replace "A proprietor of" with "This section applies to"

Page 2, line 3, after "year" insert "which uses:

a. The platform to provide an application that was created by a person domiciled in this state to a user; or

b. The platform to provide an application to a resident of this state.

3. A provider of a digital application distribution platform"

Page 2, line 4, replace the second "a" with "the provider's"

Page 2, line 4, remove "or digital"

Page 2, line 5, remove "transaction platform"

Page 2, line 5, replace "mode" with "means"

Page 2, line 5, after "product" insert "to a user"

CS  
2/10  
2 of 2

Page 2, line 6, replace "an" with "the provider's digital transaction platform or"

Page 2, line 7, replace "mode of" with "means for"

Page 2, line 7, replace the second "a" with "the developer's"

Page 2, line 7, after "application" insert an underscored comma

Page 2, line 8, after "product" insert "or service created, offered, or provided by the developer"

Page 2, line 9, remove "an alternative application store"

Page 2, line 10, replace "or" with "another digital application distribution platform, digital transaction system, or"

Page 2, line 10, after the underscored period insert:

"d. Refuse to allow a developer to provide the provider's application or digital product to or through the provider's platform or system or refuse to allow a user access to the developer's application or digital product through the provider's platform or system, on account of the developer's use of another platform or system. A violation of this subdivision is considered retaliation under this section."

Page 2, line 11, replace "3." with "4. Conduct in violation of this section is an unlawful practice under section 51-15-02. A person aggrieved by a violation of this section may bring an action to enjoin the violation or for restitution, or both. The court may award the plaintiff costs, expenses, and reasonable attorney's fees. This subsection does not limit any other claim a person may have under any other provision of law."

5."

Page 2, line 13, replace "4." with "6."

Page 2, line 13, remove "proprietor of a"

Page 2, remove lines 15 through 17

Renumber accordingly

**REPORT OF STANDING COMMITTEE**

**SB 2333: Industry, Business and Labor Committee (Sen. Klein, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB 2333 was placed on the Sixth order on the calendar.

Page 1, line 14, after the underscored period insert "The term includes a digital application platform provided or used only for a certain type of device, including a certain grade of computing device, a device made only by a particular manufacturer, or a device running a particular operating system."

Page 1, line 15, after "c." insert "\"Digital transaction platform\" means a system for accepting payments from a user for an application or service received from a digital application distribution platform. The term includes a digital platform being usable for transactions not related to the digital application distribution platform.

d. "Domiciled in this state" means a person that is a resident of this state or is headquartered in this state, conducts business in this state, and the majority of the person's business is to create or maintain an application.

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Page 1, line 18, replace "d." with "f. \"Provider\" means a person that owns, operates, implements, or maintains a digital application distribution platform, a digital transaction platform, or an in-application payment system.

g. "Resident of this state" means a person whose last known billing address, other than an armed forces post office or fleet post office address, is located within this state, as shown in the records of a provider of a digital application distribution platform.

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3. A provider of a digital application distribution platform"

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Page 2, line 5, remove "transaction platform"

Page 2, line 5, replace "mode" with "means"

Page 2, line 5, after "product" insert "to a user"

Page 2, line 6, replace "an" with "the provider's digital transaction platform or"

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Page 2, line 7, replace the second "a" with "the developer's"

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5."

Page 2, line 13, replace "4." with "6."

Page 2, line 13, remove "proprietor of a"

Page 2, remove lines 15 through 17

Renumber accordingly