

Tuesday, February 9, 2021

Senate Industry, Business & Labor Committee
SB 2333

REP. KLEIN AND COMMITTEE MEMBERS:

CAF: ND Hearing Testimony

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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.

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, SB223 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.