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Lori Wallach
American Economic Liberties Project's Rethink Trade Program

Hearing on "Protecting American Innovation by Establishing and Enforcing Strong Digital Trade Rules."

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Thank you for the opportunity to submit written comments for the record. I am the director of Rethink Trade, a program of the American Economic Liberties Project. Economic Liberties is a think tank and advocacy organization focused on addressing concentrated economic power in the United States. Rethink Trade promotes trade policies that can deliver benefits to most Americans via resilient supply chains and fair markets, the creation and support of good jobs with workers empowered to earn decent wages, public health and safety, and the ability for those who will live with the results to shape the policies affecting their lives.

I am submitting comments to provide a different perspective on representations made at the hearing related to the text or meaning of relevant trade pact terms and recent developments, including the Biden administration's October 2023 withdrawal of U.S. attributions from a draft text of a digital trade pact called the Joint Statement Initiative on E-Commerce (JSI) being negotiated proximate to World Trade Organization (WTO).

1. The Biden Administration's Digital Trade Moves at the WTO JSI Safeguarded Congress from Prospective International Preemption, Including of the *Protecting Americans' Data from Foreign Adversaries Act of 2024* that Passed the House 414-0 in March 2024.

On March 20, 2024, the House passed the *Protecting Americans' Data from Foreign Adversaries Act of 2024* by 414-0.[1] It was signed into law in April 2024 as part of a broader national security package. The law forbids data brokers from sending U.S. residents' personal data to countries of concern, such as China and Russia. Notably, both China and Russia are part of WTO JSI talks. Thus, it was startling to hear committee members attack Biden trade officials for withdrawing U.S. support for proposed JSI terms that would have designated the U.S. data brokers law as an illegal trade barrier and empowered those two countries to use a trade pact to attack the policy. The proposed text in question forbids governments from restricting the cross-border movement of data, which is precisely what the U.S. law does. The proposal replicated language in the U.S.-Mexico-Canada Agreement (USMCA), which requires: "*No Party shall prohibit or restrict the cross-border transfer of information, including personal information, by electronic means if this activity is for the conduct of the business of a covered*

[1] "Actions - H.R.7520 - 118th Congress: Protecting Americans' Data from Foreign Adversaries Act of 2024," Congress.gov, March 21, 2024, https://www.congress.gov/bill/118th-congress/house-bill/7520/all-actions; Angelika Munger, "House Passed New Bill to Prohibit Data Brokers from Transfering Sensitive Data to Foreign Adversaries," *The National Law Review*, March 21, 2024, https://natlawreview.com/article/house-passed-new-bill-prohibit-data-brokers-transfering-sensitive-data-foreign.

person."[2] A witness at the hearing claimed that a "public policy exception" in the proposed text would preserve regulatory space. In fact, the relevant exception cynically replicated General Agreement on Tariffs and Trade (GATT) Article XX language that has been rejected by WTO tribunals in 46 of 48 attempted uses to defend a domestic law.[3] Additionally, it is worth noting that the proposed JSI security exception is also useless, although it was not referenced in the hearing as an alternative means to protect our domestic policy. The draft JSI Security Exception replicates terms that WTO tribunals have ruled does not provide a defense for U.S. policies related to China and that President Trump's USTR Lighthizer replaced in USMCA with effective language. WTO tribunals have ruled against the United States *twice* when U.S. officials raised the GATT Art. XXI Security Exception language included the draft JSI text. The WTO tribunals ruled that the WTO, not the United States, decides when there is an "emergency in international relations" that justifies use of the exception and that the U.S.-China situation does not qualify.

Hopefully this concrete example regarding the data brokers law answers some committee members' questions about what the Biden administration meant when it said that its action of withdrawing U.S. support for four specific JSI proposals was done to protect domestic policy space. But this is not the only existing U.S. federal or state law that would conflict with the proposals from which support was withdrawn. There are other existing U.S. policies that would conflict with the proposed data flows and data storage rules. Also, numerous U.S. states' Right to Repair laws that require consumers are provided access to source code updates, digital keys, schematics, and the like would be undermined by the "Source Code" proposal from which U.S. officials withdrew support. That term guaranteed extra secrecy protections just for source code and algorithms. Notably, already the trade secrets and other expansive existing intellectual property protections provided by the WTO and free trade agreements (FTAs) cover source code and algorithms. (Point 3 in this testimony notes what existing WTO and FTA rules *already* provide the protections some of the hearing witnesses argued were the justification for the four digital trade rules from which U.S. officials withdrew support.) Finally, a proposal on "non-discrimination"—which altered the standard language found in past U.S. pacts that forbade discriminatory treatment based on the nationality of a firm or product—would undermine various tech competition proposals before the U.S. Congress with bipartisan support. The twisted language in this proposal would make competition policies and other laws that apply equally to domestic and foreign firms and platforms an illegal trade barrier if it might have a disparate impact on a foreign firm not based on that firm's nationality, but because of the firm's dominance in a market. But of course, anti-monopoly policies inherently focus on market dominance. If enacted, this policy would have meant that competition policies that the U.S. Congress might enact could be applied to U.S. firms, but not to, say, a huge Chinese firm doing business here like Alibaba.

It was not only federal law that could have threatened if the digital trade proposals in question had been enacted. We recently conducted research that identified more than 100 state laws in 42 states and Washington, DC, covering Right to Repair, children's online safety, civil liberties, artificial intelligence (AI) safety, and other measures that would conflict with the four specific proposals from which the Biden administration withdrew support.[4]

By way of background about how the proposals would have related to U.S. law, the Agreement

[2] "United States-Mexico-Canada Agreement, Chapter 19: Digital Trade," Office of the United States Trade Representative, July 1, 2020, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf.
[3] Daniel Rangel, "WTO General Exceptions: Trade Law's Faulty Ivory Tower," Public Citizen's Global Trade Watch, February 4, 2022, 18-19, https://www.citizen.org/article/wto-general-exceptions-trade-laws-faulty-ivory-tower/.
[4] "Big Tech's 'Digital Trade' Agenda Threatens States' Tech Policy Goals: Interactive State Policy Tracker," Rethink Trade, accessed October 3, 2024, https://rethinktrade.org/big-techs-digital-trade-agenda-threats-states-tech-policy-goals/.

Establishing the WTO requires: "*Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements*."[5] This means that the United States is obligated to conform its domestic law to WTO rules. The proposed terms from which U.S. trade officials withdrew support, if ever agreed to and enacted, conflicted with and effectively would have internationally preempted U.S. federal and state law.[6]

In sum, including the wrong "digital trade" terms in agreements will undermine federal and state data privacy and security, anti-monopoly, online civil liberties, and AI policies being developed by Democrats and Republicans in Congress and state legislatures nationwide. The Biden administration's action on digital trade at the WTO safeguards unanimously supported congressional action on data security and also protected the future ability of the U.S. Congress to enact data security and privacy provisions. As described below, the other three draft proposals from which U.S. trade officials withdrew U.S. support at JSI also conflicted with domestic policies in effect or those with bipartisan support in Congress and/or state legislatures.

2. <u>The Biden Administration Revived Deadlocked WTO Digital Trade Talks When It Withdrew U.S. Support for Four Proposals in October 2023</u>

Some witnesses at the hearing described the Biden administration's actions on digital trade at the WTO inaccurately. What actually occurred was a rather routine action: On October 25, 2023, U.S. officials informed the WTO that the United States would no longer support ***four specific provisions*** in the draft JSI text that the Trump administration had proposed in 2019. Three other countries had supported three of these proposals for which other countries also had numerous other language proposals. This includes terms for cross border data flows, location of data storage, and source code secrecy. (Notably, most of the different versions of proposed language on data flows and storage promote free flows, but with different versions of language that typically more specifically ban specific practices, such as requiring local storage of data, requiring use of local servers, etc. and that include functioning exceptions for privacy policy.) The fourth U.S.-proposed provision, on Non-Discriminatory Treatment of Digital Products, already had been relegated to an annex of orphan ideas along with scores of pages of other proposals that had been unable to gain a single other country in support. Countries routinely withdraw or add "attributions" at the WTO, which is to say they notify those leading negotiations whether their country indicator can be listed in favor of or should be delisted from a specific proposal or draft text in a negotiation. In October 2023, U.S. officials asked to have "US" removed from four draft proposals.

Contrary to the comments of witnesses, the administration did NOT somehow remove terms from an existing WTO agreement. At issue was a <u>draft</u> text for talks that had been deadlocked since their 2019 start. From the beginning, numerous countries had tabled diametrically opposing language for scores of provisions and these conflicts had not been resolvable over the proceeding years of JSI negotiations.

Contrary to the comments of witnesses, the Biden administration did NOT walk away from JSI talks or end U.S. engagement in them. Indeed, U.S. officials remained engaged and, ironically, the U.S. October 2023 action and ongoing engagement moved the negotiations closer to completion. The terms from which U.S. trade officials withdrew support were never going to be included in a final deal

[5] "Agreement Establishing the World Trade Organization, Art. XVI-4," World Trade Organization, April 15, 1994, https://www.wto.org/english/docs_e/legal_e/marrakesh_decl_e.htm.
[6] Daniel Rangel and Lori Wallach, "International Preemption by 'Trade' Agreement: Big Tech's Ploy to Undermine Privacy, AI Accountability, and Anti-Monopoly Policies," Rethink Trade, last modified March 15, 2023, https://rethinktrade.org/reports/international-preemption-by-trade-agreement/.

because there were blocs of countries with diametrically opposed positions and no middle ground available after four years of discussions. Those terms have passionate support by the largest tech platforms and the business trade associations and think tanks that they fund. But most governments, including other western democracies, opposed these terms as handcuffing their domestic authority with respect to oversight of the digital economy and its impact on basic rights, including privacy, civil liberties and the like, and well-functioning markets.

When the U.S. government announced that it needed to reconsider its approach to the most contested digital trade topics so as to preserve policy space for the U.S. Congress and regulators, it simply underscored what had been apparent for years in Geneva at the JSI talks: There was no consensus among the participating countries about *if*—much less *how*—the WTO should address certain questions about data and algorithms. After the U.S. attributions notification in October 2023, the countries chairing the negotiations issued a new JSI text at the end of 2023 that covered the provisions on which consensus was possible. The talks seemed to have been on track for conclusion at the end of 2024. But then the countries leading the talks refused to modify the Security Exception to make it operational as U.S. officials have demanded for several years and have refused to address several specific drafting problems in a close-to-final text. As a result, quite a few countries have indicated that they cannot support the latest text until these issues are remedied, and the JSI negotiations will continue into 2025.

3. Clarifying the Protections Already Provided by WTO and Other Trade Agreement Rules and Why Adding New "Digital Trade" Rules Will Not "Fix" Problematic Conduct by Autocratic Countries

The companies that seek the certain digital trade rules seemingly to limit domestic regulation have not explained their goals as such. Rather, the firms, their trade associations, and other groups that they fund argue in favor of USMCA-style digital trade data flows and algorithm/source code special secrecy rules as critical to protecting an "open" internet and fighting against autocratic governments' online surveillance, informational platform blocking and other abuses.

While some of the problems that they spotlight are real and serious, the sorts of digital trade rules that they propose will not provide solutions. To start with, there already are rules in effect in the WTO and other trade pacts that provide the protections that, ostensibly, the USMCA-style digital trade rules from which the United States withdrew support are intended to enact.

A witness spoke about autocratic governments blocking news media and other sites that would provide people critical information about their governments and more. But such access is a matter of information flow, which is covered by the WTO's General Agreement on Trade in Services (GATS) Telecommunications Annex, not the data flow proposals from which U.S. officials withdrew support at the JSI. The GATS Telecommunications Annex Article 5(c) already requires companies to allow access to their telecommunications networks for free movement of information:

> ***5.(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders****, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly*

affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.[7] (emphasis added)

Another witness argued that the U.S. government withdrawal of support for the special source code and algorithm secrecy rules opened the door for China and other competitors to steal U.S. innovations. But existing World Trade Organization (WTO) obligations and many nations' domestic laws already require governments to provide copyright protections and guarantees against disclosure of companies' confidential business information, including software's source code and other algorithmic data.[8] There is no justification for special secrecy guarantees just for digital platforms and products. U.S. law does not offer this. Rather, U.S. law provides what the WTO's Agreement on Trade-Related Aspects of Intellectual Property Article 39 on "Protection of Undisclosed Information" already requires of all WTO nations. That is 'trade secrets' protection for firms' business-confidential information and for data submitted to government authorities for regulatory purposes. (For example, the U.S. government can require a firm to provide, for instance, the formula and testing data for a drug it wants to sell in the United States, but is prohibited from sharing that data beyond the officials conducting the safety and efficacy review.)

Industry interests say the "Source Code" proposal from which U.S. officials withdrew support would stop foreign governments from passing U.S. firms' innovations to competitors. But China and other nations have spent 30 years flouting the existing WTO trade secrets rules: These countries are not going to change conduct because of new trade-pact terms on paper that say they should provide tech firms additional secrecy protections.

The actual result would be only to limit U.S. regulators and tech oversight in other countries that do adhere to the rule of law.[9] Stronger enforcement of existing rules against Chinese or other governments passing off confidential information to business competitors of U.S. firms seems in order. However, the proposed new digital trade secrecy rule would not alter the fact that countries willing to flout the existing trade secrets rules will not suddenly change because there are more rules. But such terms would undermine the sovereignty of the U.S. Congress in deciding how it will regulate AI, ensure civil liberties in an era of pervasive facial recognition applications, and ensure state Right to Repair laws can survive. Indeed, the digital trade secrecy guarantees would bind scores of democratic countries worldwide that are considering new rules to prescreen or otherwise review the algorithms and source code running artificial intelligence applications in sensitive sectors. That industry's real goal is foreclosing AI regulation is underscored by the fact that the countries currently involved in U.S.-led trade negotiations do not have policies in place or under consideration that

[7] "General Agreement on Trade in Services: Annex on Telecommunications," World Trade Organization, accessed October 3, 2024, https://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm. Definitions of the key terms are provided in Article 3: "(Definitions) For the purposes of this Annex: (a) 'Telecommunications' means the transmission and reception of signals by any electromagnetic means. (b) 'Public telecommunications transport service' means any telecommunications transport service required, explicitly or in effect, by a Member to be offered to the public generally. Such services may include, inter alia, telegraph, telephone, telex, and data transmission typically involving the real-time transmission of customer-supplied information between two or more points without any end-to-end change in the form or content of the customer's information. (c) 'Public telecommunications transport network' means the public telecommunications infrastructure which permits telecommunications between and among defined network termination points."

[8] Ulla-Maija Mylly, "Preserving the Public Domain: Limits on Overlapping Copyright and Trade Secret Protection of Software," *IIC* 52, (2021): 1314–1337, https://doi.org/10.1007/s40319-021-01120-3.

[9] It is worth noting that the USMCA "Source Code" term (Art. 19.16) replicated in the JSI proposal from which support was withdrawn has a limited exception for a "regulatory body" or a "judicial authority" to demand disclosure "for a specific investigation, inspection, examination, enforcement action, or judicial proceeding." This exception is extremely limited: It does not allow for general pre-screenings or pre-market reviews that are needed to avoid widespread online civil liberties, competition law, and other violations. Such pre-market reviews are central to many artificial intelligence safety and oversight policies. Plus, this exception does not permit governments to require firms to provide consumers with software updates or digital keys that are necessary for consumers' Right to Repair.

require government access to or transfer of source code or proprietary algorithms, according to a 2023 U.S. government review.[10]

4. The Biden Administration Has Broad Support for Its Approach to Digital Trade

While the lineup of the hearing certainly did not make this apparent, the Biden administration enjoys support for its digital trade policy from most[11] congressional Democrats,[12] some congressional Republicans, business groups,[13] civil rights groups,[14] labor[15], and many other outside groups[16] for ensuring that closed-door trade talks in Geneva did not force international rules that would limit what Congress decides to enact as U.S. policy or that preempts our states.

USTR had suspended negotiations on similar terms in the Indo-Pacific Economic Framework (IPEF) in spring 2023 after Democrats[17] and GOP[18] in Congress, digital businesses like Yelp,[19] unions,[20] civil rights[21] and faith groups, privacy[22] and right to repair[23] advocates, and consumer groups[24] raised

[10] Regarding countries involved in the Indo-Pacific Economic Framework Negotiations, see: "What Industry Identified as 'Digital Trade Barriers' in the Indo-Pacific Region as Part of the National Trade Estimate Report Process," Rethink Trade, last modified April 17, 2023, https://rethinktrade.org/reports/ipef-nte-digital-trade-barriers/. Neither Kenya or Taiwan nor any Latin American or Caribbean country has imposed or is considering imposing this type of requirement according to the 2023 National Trade Estimate report. See: United States Trade Representative, "2023 National Trade Estimate Report on Foreign Trade Barriers," Office of the United States Trade Representative, March 2023, https://ustr.gov/sites/default/files/2023-03/2023%20NTE%20Report.pdf.

[11] "DeLauro Leads 87 Representatives in Letter Supporting U.S. Trade Representative Katherine Tai's Worker-Centered Digital Trade Policy," Office of United States Representative Rosa DeLauro, February 13, 2024, https://delauro.house.gov/media-center/press-releases/delauro-leads-87-representatives-letter-supporting-us-trade.

[12] "Warren, Schakowsky Lead 10 Lawmakers Commending Biden Administration for Countering Big Tech Influence in Trade Negotiations," Office of United States Senator Elizabeth Warren, November 6, 2023, https://www.warren.senate.gov/oversight/letters/warren-schakowsky-lead-10-lawmakers-commending-biden-administration-for-countering-big-tech-influence-in-trade-negotiations.

[13] "Coalition for App Fairness Applauds Biden-Harris Administration's Withdrawal from Digital Trade Negotiations," Coalition for App Fairness, last modified November 13, 2023, https://appfairness.org/coalition-for-app-fairness-applauds-biden-harris-administrations-withdrawal-from-digital-trade-negotiations/; "Yelp Letter to President Biden Re: Trade and Competition," Yelp Inc., last modified November 8, 2023, https://blog.yelp.com/wp-content/uploads/2024/01/Yelp-Letter-to-President-Biden.docx.pdf.

[14] "Groups Praise USTR Tai for Defending Privacy, Workers & Civil Rights in "Digital Trade" Negotiations," Trade Justice Education Fund, last modified February 2, 2024, https://tradejusticeedfund.org/groups-praise-ustr-tai-for-defending-privacy-workers-civil-rights-in-digital-trade-negotiations/; Cristiano Lima-Strong with David DiMolfetta, "Civil Rights Groups Warn Trade Talks May Hurt Efforts to Counter Discriminatory Algorithms," ***Washington Post***, May 25, 2023, https://www.washingtonpost.com/politics/2023/05/25/musk-gives-desantis-twitter-boost-breaking-another-tech-norm/.

[15] AFL-CIO (@AFLCIO), "The Biden Administration's decision to withdraw U.S. support for Big Tech-friendly digital trade rules at the WTO is a win for workers, consumers, and society…," X (formerly Twitter), November 10, 2023, https://x.com/AFLCIO/status/1722962710231482512; "Groups Thank Biden, Tai for Course Change on 'Digital Trade," Rethink Trade, last modified November 2, 2023, https://rethinktrade.org/letters-filings/letter-to-president-biden-on-digital-trade-ipef-nov-2023/.

[16] "Groups Thank Biden, Tai."

[17] "Senator Warren, Lawmakers Reiterate Concern over Big Tech Pushing Digital Trade Rules that Conflict with Biden Competition Agenda and Pending Legislation," Office of United States Senator Elizabeth Warren, April 21, 2023, https://www.warren.senate.gov/oversight/letters/senator-warren-lawmakers-reiterate-concern-over-big-tech-pushing-digital-trade-rules-that-conflict-with-biden-competition-agenda-and-pending-legislation.

[18] Emily Birnbaum, "Republican Lawmakers Call for Tech Lobby Be Blocked from Indo-Pacific Trade Input," ***Bloomberg***, May 4, 2023, https://www.bloomberg.com/news/articles/2023-05-04/gop-lawmakers-urge-denial-of-tech-lobby-indo-pacific-trade-input?sref=q0qR8k34.

[19] Cristiano Lima-Strong, "Big Tech Rivals Enter Fight over U.S. Digital Trade," ***Washington Post***, May 18, 2023, https://www.washingtonpost.com/politics/2023/05/18/big-tech-rivals-enter-fight-over-us-digital-trade/.

[20] "A Worker-Centered Digital Trade Agenda," AFL-CIO, last modified February 7, 2023, https://aflcio.org/worker-centered-digital-agenda.

[21] Lima-Strong with DiMolfetta, "Civil Rights Groups Warn Trade Talks May Hurt Efforts to Counter Discriminatory Algorithms."

[22] "Letter to President Biden: Don't Replicate Big-Tech-Favored Terms in IPEF," Rethink Trade, last modified March 15, 2023, https://rethinktrade.org/letters-filings/letter-to-president-biden-dont-replicate-big-tech-favored-terms-in-ipef/.

[23] "Letter on 'Digital Trade' Implications for Right to Repair," PIRG, last modified September 12, 2023, https://pirg.org/resources/letter-on-digital-trade-implications-for-right-to-repair/.

[24] "403 Labor and Civil Society Groups Outline Shared Priorities for Indo-Pacific Trade Deal," Citizens Trade Campaign, last modified March 2, 2023, https://www.citizenstrade.org/ctc/blog/2023/03/02/403-labor-and-civil-society-groups-outline-shared-priorities-for-indo-

concerns.

5. The Biden Administration Digital Trade Approach Reaffirms Decades of Past U.S. Policy While the Proposals Tabled at the WTO JSI Negotiations Represented a Stark Break with Decades of U.S. Policy

As a practical matter, U.S. trade officials' actions on digital trade in 2023 ***reaffirmed*** longstanding U.S. trade pact e-commerce rules. The USMCA rules that the Trump administration had proposed at the JSI were an anomaly relative to the e-commerce policies that had been included in some U.S. trade agreements since the early 2000s. These free trade agreement "E-Commerce" chapters set technical rules on online exchanges of goods and services, such as parameters for legitimate digital contracts and rules for "Paperless Trading." The U.S. supports those rules at the JSI as well.

But what Big Tech interests have branded as "digital trade" rules and started pushing in more recent pacts is entirely different.[25] It focuses on controlling countries' ***domestic*** agendas by restricting or altogether forbidding common policies relating to online privacy and data security, tech anti-monopoly, online civil liberties, and AI oversight even if these policies apply equally to domestic and foreign firms.

The notion repeated at the hearing that the Biden administration had moved away from a "longstanding" U.S. position is simply false. USMCA is one of the only agreements in the world with the Big Tech-favored "digital trade" provisions, which do not appear in other nations' pacts that have digital terms or in past U.S. agreements. Indeed, USMCA is the only U.S. agreement approved by Congress that has the terms that formed the basis of the proposals from which U.S. officials withdrew support at the WTO in 2023. With respect to the USMCA, few in Congress realized that USMCA even had a "Digital Trade" chapter until it was too late to remove the terms that had never been in pact U.S. trade pacts with E-Commerce chapters. (Then-Speaker Pelosi and some conservative Republican senators tried to do so when they became aware.) The past U.S. pacts with E-Commerce terms do NOT forbid governments from regulating data flows, do not provide extra secrecy guarantees for algorithms and source code beyond the trade secrets and other IP protections provided in the WTO and numerous other pacts, and do not label laws on digital antitrust that treat domestic and foreign firms the same as illegal trade barriers.

6. The Digital Trade Proposals from which U.S. Officials Withdrew Support Would Undermine Congress' Ability to Determine U.S. Policy

To underscore the point raised above about the uselessness of the "public policy exception" that is included in one of the four proposals from which U.S. officials withdrew support, committee Republicans might be most comfortable reading USTR Lighthizer's report on the threat to U.S. sovereignty posed by the WTO and its rulings.[26] With respect to whether the proposed digital trade rules could pose such threats, the strongest case is made by industry groups that have spent years criticizing privacy laws and digital competition proposals in other countries as illegal trade barriers.[27]

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[25] David Dayen, "Big Tech Lobbyists Explain How They Took Over Washington," ***The American Prospect***, April 18, 2023, https://prospect.org/power/2023-04-18-big-tech-lobbyists-took-over-washington/.

[26] "Report on the Appellate Body of the World Trade Organization," Office of the United States Trade Representative, February 2020, https://ustr.gov/sites/default/files/enforcement/DS/USTR.Appellate.Body.Rpt.Feb2020.pdf.

[27] Daniel Rangel, Taylor Buck, Erik Peinert, and Lori Wallach, "'Digital Trade' Doublespeak: Big Tech's Hijack of Trade Lingo to Attack Anti-Monopoly and Competition Policies," Rethink Trade, last modified November 2, 2022, https://rethinktrade.org/reports/digital-trade-doublespeak-big-techs-hijack-of-trade-lingo-to-attack-anti-monopoly-and-competition-

This includes lobbying for U.S. trade officials to attack Australia's News Media Bargaining Code and a similar Canadian policy that are almost identical to the proposed U.S. Journalism Competition and Preservation Act because they violate U.S.-Australia FTA or USMCA obligations, which in fact they do not. There have been similar industry attacks on Korea's App Store policy that is very similar to the U.S. Open App Markets Act based on claims that it violates the U.S.-Korea FTA. These policies do not violate those agreements because the Korea and Australia pacts do not include the extreme terms found in the USMCA that were the basis for the proposals from which U.S. officials withdrew support at the JSI. And the Canadian law does not violate USMCA because Canada negotiated a specific carveout for the applicable sector.

Yet cynically, today the same corporate lobbyists who have been using trade pact claims to attack other countries' laws that are similar to U.S. proposals with bipartisan support now are arguing there is no threat to digital regulation posed by the trade-pact digital trade rules that they seek. Thankfully, they put the original claims in writing. In a 2022 study, we documented years of written submissions related to the U.S. National Trade Estimate process where the industry interests now claiming such rules guarantee policy space argued the opposite as they urged trade challenges of numerous laws similar to those Congress seeks to enact here.[28]

Notably, the only reason why those corporate digital policy complaints have not translated into formal trade challenges is because most agreements do not have the extreme "digital trade" rules needed to do so. This fact also highlights the irrelevance of the argument that the fact that countries worldwide are regulating the digital sphere proves that the proposals from which U.S. officials withdrew support do not pose any problem. In fact, these rules are not in place now. Very few agreements include any of the language represented in the proposed text from which U.S. officials withdrew support. That is why the proposals from which the United States withdrew support have not undermined other countries' privacy, digital anti-trust, Right to Repair and other laws – not because the dust-binned proposals are compatible with the sorts of domestic digital policies Republicans and Democrats alike in Congress and in state legislatures have enacted or are contemplating.

CONCLUSION

For generations, 1100 Longworth, the historic Ways and Means hearing room, has witnessed the Republican- and Democratic-led Ways and Means Committee express concern about Executive Branch officials disrespecting Congress's constitutional authorities—over trade, over law-writing, and more. The September 2024 digital trade hearing seemed an anomaly to this rare matter of bipartisan consensus. Instead of thanking U.S. trade officials for preserving Congress's authority to determine key domestic policies and derailing what would have been broad international preemption of Congress's and U.S. state legislatures' policy space via "digital trade" agreement, some committee members were highly critical of the administration. While certainly there are disagreements within Congress and state legislatures about ***how*** to best ensure Americans' privacy online, data security, fair digital markets, civil liberties in a digital age, AI oversight, and more, certainly such U.S. policies should be determined through democratic processes at home, not imposed via WTO or other trade agreement rules that cannot be altered by one word but for consensus of every signatory country.

policies/.

[28] Rangel et al., "'Digital Trade' Doublespeak."