

United States Senate
WASHINGTON, DC 20510

September 30, 2024

VIA ELECTRONIC TRANSMISSION

The Honorable Joseph R. Biden, Jr.
President of the United States
The White House
Washington, D.C.

The Honorable Kamala D. Harris
Vice President of the United States
The White House
Washington, D.C.

President Biden and Vice President Harris:

In 2005, Congress passed the DNA Fingerprint Act, which authorized federal government agencies to collect DNA samples from arrested, charged, and convicted individuals, and non-U.S. persons detained under the authority of the United States.¹ According to the Office of Special Counsel (OSC), for a decade and primarily during the Obama-Biden Administration, the Department of Homeland Security (DHS) did not follow the law to fully collect DNA samples.² In 2019, two months after being notified by OSC that the law was not being followed, the Trump Administration's Department of Justice (DOJ) published a proposed federal rule to fix the non-compliance, which was finalized in 2020.³ Despite this, according to legally-protected whistleblower disclosures, the Biden-Harris Administration has still failed to fully implement the DNA Fingerprint Act, resulting in preventable consequences to the American people.

In FY 2021, the Biden-Harris Administration collected DNA from only 16% of the 1.9 million individuals encountered by Customs and Border Protection (CBP) and the Office of Field Operations (OFO).⁴ Further, in FY 2022, DNA was collected from only 37% of the 2.7 million individuals

¹ Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, § 1004, 119 Stat. 2960, 3085 (codified as amended at 42 U.S.C. § 14135a (2006)).

² Letter from Henry J. Kerner, U.S. Office of Special Counsel, to Donald J. Trump, President of the United States (Aug. 21, 2019), <https://osc.gov/Documents/Public%20Files/FY19/DI-18-3920.%20DI-18-3924.%20and%20DI-18-3931/Redacted%20DI-18-3920.%20DI-18-3924.%20DI-18-3931%20Letter%20to%20the%20President.pdf> (“Furthermore, although CBP was granted a one-year exemption, as stated in the language of the exemption itself, CBP was supposed to use that period to begin complying with DNA collection. The passage of nearly a decade without compliance is unacceptable.”) (“CBP did not successfully implement these processes within the one-year timeframe granted by Attorney General Holder, who noted in 2010 that: ‘The principal Department of Justice investigative agencies...are collecting DNA samples from their arrestees. All federal agencies that have not already done so, including DHS agencies, should complete their implementation of arrestee DNA sample collection as expeditiously as possible.’”).

³ See DNA – Sample Collection From Immigration Detainees, 84 Fed. Reg. 56,397-56,401 (Oct. 22, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-10-22/pdf/2019-22877.pdf>; see also DNA – Sample Collection From Immigration Detainees, 85 Fed. Reg. 13,483-13,493 (Mar. 9, 2020) (codified at 28 C.F.R. pt. 28), <https://www.govinfo.gov/content/pkg/FR-2020-03-09/pdf/2020-04256.pdf> (On March 9, 2020, the Department of Justice (DOJ) finalized a rule that removed 28 CFR 28.12(b)(4), which the Secretary of DHS had used to exempt certain detained aliens from the DNA-sample collection requirement beyond the one year exemption, as discussed in the OSC memorandum to the president. The rule filing states, “[a]s a result, the rule restores the Attorney General’s plenary authority to authorize and direct all relevant Federal agencies, including the Department of Homeland Security, to collect DNA samples from such individuals.”); see also, U.S. Gov’t Accountability Office, GAO-23-106252, *DNA Collections: CBP is Collecting Samples from Individuals in Custody, but Needs Better Data for Program Oversight* (May 24, 2023), <https://www.gao.gov/assets/gao-23-106252.pdf>.

⁴ GAO-23-106252, *supra* note 3 at 8 (According to GAO, CBP and OFO collected DNA from 330,357 individuals encountered); see also U.S. Customs and Border Protection, *Nationwide Encounters*, (last modified Aug. 28, 2024) <https://www.cbp.gov/newsroom/stats/nationwide-encounters>.

encountered by CBP and OFO.⁵ Whistleblowers also disclosed that in the first three quarters of FY 2023, CBP and OFO collected DNA from only 36% of the 2.3 million individuals encountered.⁶ More recently, according to protected whistleblower disclosures, CBP officials visited United States Border Patrol (USBP) processing facilities in Tucson, Casa Grande, Yuma, and San Diego, and at no facility that these officials visited was DNA being collected.⁷ This blatant disregard for the law has been exacerbated by your administration's failed border policies, which have precipitated an unprecedented explosion in nationwide encounters of illegal immigrants at our borders—over 10 million in just three-and-a-half years and this staggering sum doesn't even account for the estimated 2 million that crossed and evaded apprehension.⁸

This failure to collect DNA at our borders has resulted in serious consequences. At a recent Senate oversight roundtable, “Reckless Disregard: How the Department of Homeland Security’s Failure to Collect DNA at the Border Endangers Americans,” the Senate and public heard from a panel with knowledge of the consequences of DHS’s failure to fully implement the DNA Fingerprint Act.⁹ The panelists, Mark Jones, Mike Taylor, and Fred Wynn, discussed how compliance with the DNA Fingerprint Act could’ve played a role in assisting law enforcement in the Rachel Morin case.¹⁰ Victor Antonio Martinez-Hernandez, the Salvadoran gang member that allegedly raped and killed Rachel Morin, and who also was linked to the murder of a young woman in El Salvador, crossed the border four separate times.¹¹ During three of these crossings—twice in January 2023 and once in February 2023—border patrol agents apprehended and deported him.¹² According to the panelists and other whistleblower disclosures, DHS did not collect DNA from Martinez-Hernandez, despite having “three bites at the apple.”¹³ On his fourth illegal crossing, Martinez-Hernandez was able to evade border patrol agents completely.¹⁴

Six months prior to Rachel Morin’s tragic murder, Martinez-Hernandez allegedly committed a home invasion, assaulting a 9-year-old girl and her mother in Los Angeles.¹⁵ DNA was collected at the crime scene and submitted to the FBI’s Combined DNA Index System (CODIS).¹⁶ Had DNA been

⁵ Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Nov. 1, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_cbp_dna_collection.pdf; see also, GAO-23-106252, *supra* note 3 (GAO did not include individuals expelled from the country under the Title 42 public health authority in FY 2022 despite collecting fingerprints and booking the individuals); see also Nationwide Encounters, *supra* note 4 (CBP and OFO encountered 2.8 million individuals in FY 2022).

⁶ Legally protected whistleblower disclosures.

⁷ Letter from Sen. Charles E. Grassley, Chairman, Senate Judiciary Committee, to the Honorable Joseph Cuffari, Inspector General, Department of Homeland Security (May. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_oig_-_cbp_dna_collection.pdf (Emails on File with Committee Staff).

⁸ U.S. Customs and Border Protection, *supra* note 4; see also Press Release, United States House of Representatives, Committee on Homeland Security, *STARTLING STATS: Biden’s Mass-Parole, Catch-And-Release Agenda Continues to Fuel Historic Border Crisis, Endanger Americans* (June 27, 2024), <https://homeland.house.gov/2024/06/27/startling-stats-bidens-mass-parole-catch-and-release-agenda-continues-to-fuel-historic-border-crisis-endanger-americans/>.

⁹ Press Release, Sen. Charles E. Grassley, *Reckless Disregard: How the Department of Homeland Security (DHS)’s Failure to Collect DNA at the Border Endangers Americans* (Posted July 24, 2024), <https://www.grassley.senate.gov/news/news-releases/grassley-shines-light-on-dhs-failure-to-collect-dna-from-illegal-immigrants0>.

¹⁰ Jennie Taer, NY Post, *Alleged El Salvador gang member charged in rape, killing of Maryland mom Rachel Morin crossed the border illegally at least three times in two months — before eluding agents on 4th try* (June 17, 2024), <https://nypost.com/2024/06/17/us-news/rachel-morins-accused-killer-crossed-the-border-illegally-at-least-three-times-in-two-months/>.

¹¹ *Id.*

¹² *Id.*

¹³ Catherine Herridge, *Breaking: Leaked government memo confirms whistleblowers were targeted by Border Agency after exposing federal DNA Collection law was not followed for immigration violations*, https://x.com/C_Herridge/status/1822769975150714900; see also *Reckless Disregard*, *supra* note 9; see also Emails on File with Senate Budget Committee Staff.

¹⁴ Taer, *supra* note 10.

¹⁵ Herridge, *supra* note 13; Taer, *supra* note 10.

¹⁶ Herridge, *supra* note 13; *Reckless Disregard*, *supra* note 9; Emails on File with Senate Budget Committee Staff.

collected during any of Martinez-Hernandez's three encounters with DHS, "there would've been an instant possibility that any future criminal activity would have stopped immediately. And there was a definite potential for the individual to be apprehended."¹⁷

Congress became aware of your administration's massive failures when these brave DHS and Customs and Border Protection (CBP) whistleblowers, Mr. Jones, Mr. Taylor, and Mr. Wynn, came forward to Senator Grassley's office and disclosed that not only has DHS failed to implement the DNA Fingerprint Act, but each of them was retaliated against by their superiors at the Department for lawfully disclosing that failure.¹⁸

Retaliation against Mr. Jones, Mr. Taylor, and Mr. Wynn continues to this day by your administration, despite OSC corroborating their claims and finding that prohibited personnel practices did occur.¹⁹ Specifically, Mr. Jones and Mr. Taylor had their firearms and law enforcement authority removed, resulting in Mr. Taylor losing his retirement coverage after 30 years of federal service. Further, according to these whistleblowers, a DHS official in your administration said that the agency wanted to "bankrupt [them], make [them] quit, die, kill [themselves], or, preferably, all of the above."²⁰ To date, no disciplinary action has been taken against anyone at DHS for this retaliatory conduct.

Whistleblowers are the cornerstone of government accountability and must be protected so they can come forward without fear of retribution. Your administration's failure to protect whistleblowers undermines the law and allows for DHS's continued violations of the DNA Fingerprint Act.²¹ Following the law, protecting whistleblowers, and ensuring the safety of American citizens like Rachel Morin shouldn't be controversial. The Biden-Harris Administration's DHS must follow the law—the consequences are stark when they don't. We call upon you both to instruct DHS Secretary Mayorkas to fully comply with the DNA Fingerprint Act and subsequent regulations, fully investigate the whistleblower retaliation against Mr. Jones, Mr. Taylor, and Mr. Wynn, and hold accountable the officials responsible for engaging in retaliation against them.

We cannot allow these failures to fully implement the DNA Fingerprint Act to occur any longer. The American people deserve better, and their lives are at stake.

¹⁷ Herridge, *supra* note 13 at 6:00-6:10.


¹⁸ Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security (Aug. 18, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_whistleblower_retaliation.pdf; *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Sept. 11, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_dhs_-_whistleblower_retaliation_follow-up.pdf; *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Alejandro Mayorkas, Secretary, Department of Homeland Security, and Troy A. Miller, Senior Official performing the Duties of Commissioner, Customs and Border Protection (Sep. 27, 2023), https://www.grassley.senate.gov/imo/media/doc/ceg_to_dhs_-_cbp_ny_post_comments.pdf.

¹⁹ Letter from Alejandra Dove, U.S. Office of Special Counsel, to Mary M. Musilek, Attorney, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, (Dec. 2, 2021), <https://www.grassley.senate.gov/download/dec-2-2021-osc-to-cbp>.

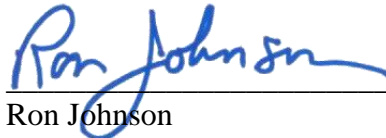
²⁰ Legally protected whistleblower disclosures.

²¹ *See* Press Release, Sen. Charles E. Grassley, *Grassley Fights to Protect DOJ Whistleblowers from Unlawful Retaliation* (May 31, 2024), <https://www.grassley.senate.gov/news/news-releases/grassley-fights-to-protect-doj-whistleblowers-from-unlawful-retaliation>; *see also* Press Release, Sen. Charles E. Grassley, *Lawmakers Demand Investigation into IRS Whistleblower Retaliation in Hunter Biden Probe* (July 5, 2023), <https://www.grassley.senate.gov/news/news-releases/lawmakers-demand-investigation-into-irs-whistleblower-retaliation-in-hunter-biden-probe>; *see also* Letter from Sen. Charles E. Grassley, Ranking Member, Senate Budget Committee, to the Honorable Merrick Garland, Attorney General, Department of Justice (Apr. 7, 2023), https://www.grassley.senate.gov/imo/media/doc/grassley_to_justice_deptwhistleblowerreprisalconcerns.pdf.

Sincerely,



Charles E. Grassley
Ranking Member
Senate Committee on the Budget



Ron Johnson
Ranking Member
Permanent Subcommittee on Investigations



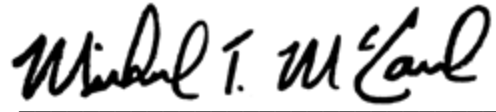
Rick Scott
United States Senator



Jim Jordan
Chairman
House Committee on the Judiciary



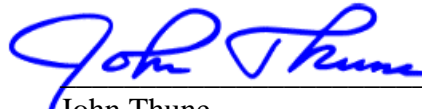
Mark Green
Chairman
House Committee on Homeland Security



Michael McCaul
Chairman
House Committee on Foreign Affairs



Mike Crapo
United States Senator



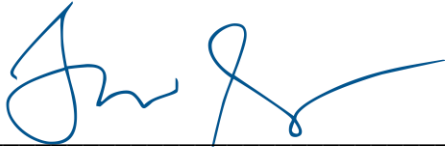
John Thune
United States Senator



James E. Risch
United States Senator



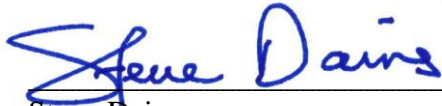
Marco Rubio
United States Senator



Tim Scott
United States Senator



Ted Cruz
United States Senator



Steve Daines
United States Senator



Mike Braun
United States Senator



Josh Hawley
United States Senator



Roger Marshall, M.D.
United States Senator



Eric Schmitt
United States Senator



Pete Ricketts
United States Senator



Tom McClintock
Chairman
House Committee on the Judiciary
Subcommittee on Immigration,
Integrity, Security, and Enforcement



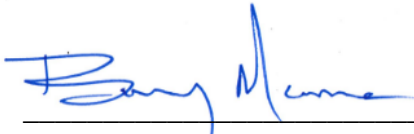
Chip Roy
Member of Congress



Cliff Bentz
Member of Congress



Lance Gooden
Member of Congress



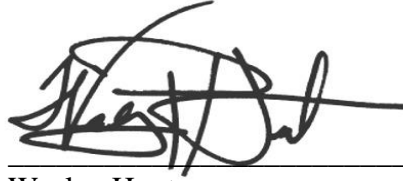
Barry Moore
Member of Congress



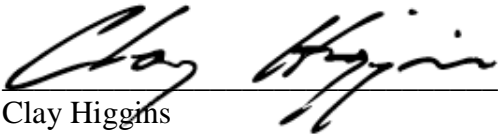
Troy Nehls
Member of Congress



Michael A. Rulli
Member of Congress



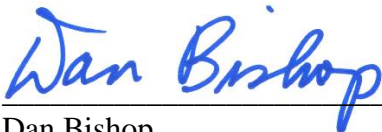
Wesley Hunt
Member of Congress



Clay Higgins
Chairman
House Committee on Homeland Security
Subcommittee on Border Security and
Enforcement



Michael Guest
Vice Chairman
House Committee on Homeland Security



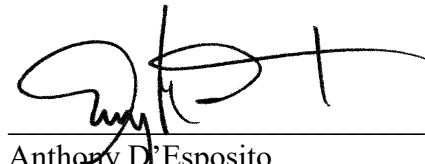
Dan Bishop
Chairman
House Committee on Homeland Security
Subcommittee on Oversight, Investigations,
and Accountability



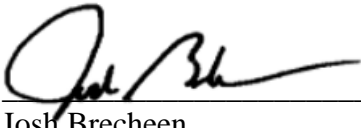
August Pfluger
Chairman
House Committee on Homeland Security
Subcommittee on Counterterrorism
Law Enforcement, and Intelligence



Mike Ezell
Member of Congress



Anthony D'Esposito
Chairman
House Committee on Homeland Security
Subcommittee on Emergency Management
and Technology

A handwritten signature in black ink, appearing to read "Josh Brecheen", written over a horizontal line.

Josh Brecheen
Member of Congress

Cc: The Honorable Alejandro Mayorkas
Secretary
Department of Homeland Security