Unchecked Checkpoints: Why TSA's Facial Recognition Plan May Need Congressional Approval

ABSTRACT

The Transportation Security Administration (TSA) has begun using facial recognition technology (FRT) to screen passengers at airports. Although travelers can currently opt out, it is not clear that this will continue to be an option as the program expands. This raises significant concerns about the amount of personally identifiable information being collected by the agency, as well as the level of discretion the agency has to implement this increasingly invasive technology without input from Congress. This Note proposes that, in light of the United States Supreme Court's shift away from its deferential Chevron *standard for reviewing agency action, litigators can and should argue that the TSA's program ought to be struck down. Furthermore, it concludes that, regardless of whether the TSA's program would be invalidated in court, Congress should step in and pass legislation guiding the agency's adoption of FRT. Although much has been written about the Court's evolving* Chevron*-deference jurisprudence, this Note contributes to the discussion by applying this analysis to the TSA's potentially problematic new FRT program.*

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The Transportation Security Administration (TSA) has begun implementing a controversial new plan to take Facial Recognition Technology (FRT) scans of all individuals passing through airport security checkpoints.[1] The agency argues that this program will "modernize aviation passenger identity verification,"[2] and will allow for more efficient and accurate security screenings.[3] While efficiency is important, the TSA's adoption of FRT also inevitably raises serious privacy concerns and significant questions about the agency's authority to adopt this invasive technology without any clear guidelines from Congress.[4] The statute that created the TSA and granted its authority, the Aviation and Transportation Security Act (ATSA),[5] tasks the administration with providing security screening at all US airports.[6] As part of this responsibility, the Act gives the TSA authority to use biometric technologies in certain limited circumstances to mitigate internal security threats.[7] The TSA is also authorized to use biometrics to mitigate at least some external security threats; the ATSA allows the agency to use "voice stress analysis, biometric, or other technologies to prevent a person who might pose a danger to air safety or security from

1. *See Facial Recognition Technology*, TRANSP. SEC. ADMIN., https://www.tsa.gov/news/press/factsheets/facial-recognition-technology [perma.cc/7E7U-8WDD] (last visited Feb. 20, 2024); Kris Van Cleave, *TSA Expands Controversial Facial Recognition Program*, CBS NEWS (June 5, 2023, 10:45 AM), https://www.cbsnews.com/news/tsa-facial-recognition-program-airports-expands/ [perma.cc/T2FZ-3VRL].

2. *TSA Myth Busters: Biometrics*, TRANSP. SEC. ADMIN., https://www.tsa.gov/sites/default/files/biometricsmythvsfacts_6_7_22.pdf [perma.cc/9R2C-64AN] (last visited Feb. 20, 2024).

3. *Facial Recognition Technology*, *supra* note 1; Van Cleave, *supra* note 1.

4. Rebecca Santana, *TSA Is Testing Facial Recognition Technology at More Airports, Raising Privacy Concerns*, PBS (May 15, 2023, 4:23 PM), https://www.pbs.org/newshour/politics/tsa-is-testing-facial-recognition-technology-at-more-airports-raising-privacy-concerns [perma.cc/Q4WE-CCNZ]; KRISTIN FINKLEA, LAURIE A. HARRIS, ABIGAIL F. KOLKER & JOHN F. SARGENT JR., CONG. RSCH. SERV., R46586, FEDERAL LAW ENFORCEMENT USE OF FACIAL RECOGNITION TECHNOLOGY 12–13, 15 (2020) ("There are currently no federal laws specifically governing law enforcement agencies' use of FRT.").

5. Aviation and Transportation Security Act, Pub. L. No. 107–71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

6. 49 U.S.C. § 114(e) (2001) ("The Administrator shall . . . be responsible for day-to-day Federal security screening operations for passenger air transportation.").

7. The Act explicitly authorizes the TSA to use biometrics to screen airport employees and law enforcement officers who have access to secure areas of the airport. 49 U.S.C. § 44903(h)(4)(E) (2001). "Secured Areas" include air traffic control operations areas, maintenance areas, crew lounges, baggage handling areas, concessions, and catering delivery areas. 49 U.S.C. § 44903(g)(2)(G) (2001).

boarding the aircraft of an air carrier."[8] The agency currently interprets this section broadly, construing it to mean that the TSA can use any biometric technology at its disposal to collect the unique body measurements of every airline traveler.[9]

Significant advancements in biometric technologies, particularly the recent strides in facial recognition and artificial intelligence,[10] have prompted the TSA to expand its biometric capabilities.[11] This expansion involves a new TSA program that aims to integrate FRT into the primary security checkpoints at a growing number of US airports.[12] Although US citizens can currently opt out of the program, the TSA has indicated that it intends to expand FRT screening to all US airports, and eventually make it mandatory.[13]

The widespread integration of FRT by the TSA exemplifies how emerging technologies are enabling federal agencies to collect intimate personal information from individuals with little congressional oversight.[14] Moreover, this expansion of data collection is proceeding despite bipartisan agreement in Congress that FRT poses a threat to the privacy interests of US citizens.[15] The Supreme Court's apparent

8. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 109(a)(7), 115 Stat. 597, 614 (2001) (codified as amended at 49 U.S.C. § 114).

9. *See TSA Biometrics Strategy For Aviation Security & the Passenger Experience,* TRANSP. SEC. ADMIN. (July 2018), https://www.tsa.gov/sites/default/files/tsa_biometrics_roadmap.pdf [perma.cc/7REC-WYFZ] ("[T]his initial release of the TSA Biometrics Strategy is focused on verifying aviation passenger identity using biometrics per TSA's authorities under applicable laws and regulations including the Aviation and Transportation Security Act (Section 109(a)(7)).") [hereinafter *TSA Biometrics Strategy*].

10. *See* Michael L. Littman, Ifeoma Ajunwa, Guy Berger, Craig Boutilier, Morgan Currie, Finale Doshi-Velez, Gillian Hadfield, Michael C. Horowitz, Charles Isbell, Hiroaki Kitano, Karen Levy, Terah Lyons, Melanie Mitchell, Julie Shah, Steven Sloman, Shannon Vallor & Toby Walsh, *Gathering Strength, Gathering Storms: The One Hundred Year Study on Artificial Intelligence (AI100) 2021 Study Panel Report*, STAN. U. (Sept. 16, 2021), https://ai100.stanford.edu/sites/g/files/sbiybj18871/files/media/file/AI100Report_MT_10.pdf [perma.cc/YC8D-GBYB].

11. *See TSA Biometrics Strategy*, *supra* note 9.

12. *See Facial Recognition Technology*, *supra* note 1; Van Cleave, *supra* note 1.

13. *See TSA Biometrics Strategy*, *supra* note 9; Bonnie Kristian, *TSA's Biometric Screening May Not Be Optional for Long*, REASON (Mar. 31, 2023, 12:45 PM), https://reason.com/2023/03/31/tsas-biometric-screening-may-not-be-optional-for-long/ [perma.cc/H3SR-WYLH].

14. *See TSA Biometrics Strategy*, *supra* note 9; Matt Berg, *The FBI, DoD and the Shock of (Facial) Recognition*, POLITICO (Mar. 7, 2023, 4:03 PM), https://www.politico.com/newsletters/digital-future-daily/2023/03/07/the-fbi-dod-and-the-shock-of-facial-recognition-00085944 [perma.cc/FH9H-TXGT].

15. Drew Harwell, *Both Democrats and Republicans Blast Facial-Recognition Technology in a Rare Bipartisan Moment*, WASH. POST (May 22, 2019, 4:09 PM), https://www.washingtonpost.com/technology/2019/05/22/blasting-facial-recognition-technology-lawmakers-urge-regulation-before-it-gets-out-control/ [perma.cc/WAP5-R62K].

shift away from the deferential standard granted to agency action, initially articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[16] also complicates the legal analysis; the extent to which the Court may limit the scope of judicial deference, however, still remains to be seen.[17] That being so, it is already clear that the Court has become less willing to defer to agency interpretations of ambiguous statutes when those interpretations are challenged.[18] With the future of agency deference in doubt,[19] the need to evaluate the validity of potentially overreaching actions by executive agencies has become even more important.[20]

This Note examines the validity of the TSA's current position that the ATSA authorizes it to conduct FRT screening of all airport travelers. It contends that the legal rationale used to justify the TSA's broad deployment of FRT is tenuous and that, despite the potential for judicial invalidation of the TSA's FRT initiative,[21] it remains imperative that Congress act proactively to steer and restrain the agency's implementation of FRT. To reach these conclusions, Part I provides the necessary foundation for understanding the TSA, its statutory authority, and its FRT program. Part II then illustrates that the TSA's adoption of FRT technology has significant legal consequences; rapid advancements in biometric technologies have made it much easier for law enforcement agencies to collect personal data at an unprecedented scale, implicating the privacy interests and civil liberties of US

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16. 467 U.S. 837, 844 (1984).

17. In *West Virginia v. Environmental Protection Agency*, decided in 2022, the Court limited the scope of *Chevron* by applying the major questions doctrine, which provides that courts should not defer to agency interpretations of ambiguous statutes when those statutes involve "major questions," because major questions ought to be clearly answered by the legislative, rather than the executive, branch. West Virginia v. Env't Prot. Agency, 597 U.S. 697, 732 (2022). It also now appears that the Supreme Court may choose to overrule *Chevron* entirely when it decides the upcoming cases *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce* at the end of this term. *See* Amy Howe, *Supreme Court Likely to Discard Chevron*, SCOTUSBLOG (Jan. 17, 2024, 6:58 PM), https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/ [perma.cc/3CM2-STKX].

18. *See* Michigan v. Env't Prot. Agency, 576 U.S. 743, 751–54, 760 (2015) (ambiguity should be determined not only by the text but also by statutory context permissible in light of statutory context as well as text); King v. Burwell, 576 U.S. 473, 474, 485–86 (2015) (holding that *Chevron*-deference analysis does not extend to questions of "deep political and economic significance"); *West Virginia*, 597 U.S. at 724, 732 (distilling further the "major questions doctrine").

19. *See* Howe, *supra* note 17; Transcript of Oral Argument at 80–81, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2024) (No. 22-451).

20. *See* Jack M. Beerman, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 843 (2010).

21. *See* Transcript of Oral Argument at 3, 4–5, *Loper Bright Enters.*, 143 S. Ct. 2429 (No. 22-451).

citizens.[22] Considering these implications, Part III anticipates how the TSA's interpretation of the ATSA may be analyzed by the courts if challenged.[23] In doing so, it engages extensively with the evolving state of the Supreme Court's *Chevron*-deference jurisprudence.[24] Part IV argues that a court could reasonably conclude that the TSA does not currently have the authority to implement its FRT program. Regardless of a court's decision, however, this Note ultimately posits that Congress should provide explicit statutory limits to govern the agency's adoption and use of FRT.

I. BACKGROUND

TSA screening has become a standard part of airline travel.[25] Indeed, it can be difficult for younger generations to remember that, just over twenty years ago, flying required nothing more than a simple bag check conducted by the individual airline.[26] After the terrorist attacks on September 11, 2001, however, the federal government assumed responsibility for the safety of airline passengers by implementing the now-familiar, and often vexatious, security checkpoints at airports across the country.[27]

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22. Many conservative legal scholars take issue with the "so-called 'right to privacy.'" *E.g.*, Lawrence v. Texas, 539 U.S. 558, 594–95 (2003) (Scalia, J., dissenting); *id.* at 605–06 (Thomas, J., dissenting). Justices Scalia and Thomas have both criticized the notion that privacy is a fundamental constitutional right. *See id.* This debate is not relevant to the scope of this Note's argument, but this Note will nevertheless refer to the important interests US citizens have in protecting their personal privacy.

23. This Note focuses on whether Congress has actually authorized agencies to implement these technologies. It is also, of course, worth asking whether such actions are constitutional in the first place. This Note operates under the presumption that the TSA's biometric security screening would be substantively constitutional if properly authorized, as the government has a vital national security interest in using these technologies to prevent an act of terror. *See, e.g.*, Christopher Slobogin, *Policing as Administration*, 165 PENN. L. REV. 91, 98–109 (2016) (explaining that courts have generally upheld the constitutionality of security checkpoints and surveillance programs).

24. *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 723 (2022); Transcript of Oral Argument at 80–81, Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2024) (No. 22-451); Transcript of Oral Argument at 147, Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2024) (No. 22-1219).

25. *Security Screening*, TRANSP. SEC. ADMIN., https://www.tsa.gov/travel/security-screening [perma.cc/96UK-FMEV] (last visited Feb. 22, 2024).

26. *See* Diane Gerace, *A Look at How Airport Security Has Evolved Post 9-11*, PHL (June 11, 2021), https://www.phl.org/newsroom/911-security-impact [perma.cc/Q5DW-BUK6].

27. *See id.*

The ATSA was passed just months after the September 11 terrorist attacks and it established the TSA.[28] When signing the Act into law on November 19, 2001, President George W. Bush noted that the federal government was taking "permanent and aggressive steps to improve the security of our airways."[29] Describing the events of September 11 as a "call to action," he said that, "[f]or the first time, airport security will become a direct federal responsibility, overseen by [the] new undersecretary of transportation for security."[30] This historical context demonstrates the gravity of the situation Congress faced when it created the TSA.[31]

The ATSA mandates that the TSA "provide for the screening of all passengers and property . . . that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation."[32] The agency has interpreted this authority broadly and continually seeks to update its screening technology.[33] Accordingly, the TSA's screening technologies have evolved significantly over time, and not without controversy.[34] For example, when the TSA introduced a new X-ray machine in 2010, it was heavily criticized both because of the machine's high levels of radiation and because of the revealing nature of the scanner's images.[35] In response, the TSA eventually replaced these machines for less invasive scanners.[36]

Although the Department of Homeland Security (DHS) was established a few years after the TSA, the TSA and other agencies, like Customs and Border Protection (CBP), were placed under its authority upon its creation.[37] In 2004, DHS was tasked with implementing an

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28. Aviation and Transportation Security Act, Pub. L. No. 107–71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.).

29. *Text: President Bush Signs Aviation Security Bill*, WASH. POST (Nov. 19, 2001), https://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushtext_111901.html [perma.cc/TA6U-6BWT] (text of president's speech from bill signing).

30. *Id.*

31. *See id.*

32. 49 U.S.C. § 44901(a) (2001).

33. *See TSA Biometrics Strategy*, *supra* note 9; Gerace, *supra* note 26.

34. *See* Jennifer LeVine, *Over-Exposed? TSA Scanners and the Fourth Amendment Right to Privacy*, 16 J. TECH. L. & PRIV. 175, 176 (2011).

35. *See id.* at 176–77; *TSA Replaces X-Ray Scanners At Some Major Airports*, USA TODAY (Oct. 19, 2012, 4:49 PM), https://www.usatoday.com/story/news/ondeadline/2012/10/19/tsa-x-ray-scanners-replaced-millimeter-wave-airports/1644937/ [perma.cc/ZC6X-DZMQ] [hereinafter *TSA Replaces X-ray Scanners*].

36. *TSA Replaces X-ray Scanners*, *supra* note 35.

37. Homeland Security Act of 2002, Pub. L. No. 107–296, § 403, 116 Stat. 2135, 2178 (2002) (codified as amended at 6 U.S.C. § 203).

automated biometric entry-exit system for international travelers entering the United States.[38] In accordance with this mandate, CBP has required all non-citizens traveling to the United States to get their pictures taken and fingerprints scanned upon arrival to a US airport since 2006.[39] Yet until recently, only limited categories of US citizens have been subject to biometric screening by the TSA: international travelers, who may still opt out,[40] and designated officials with access to secure areas of an airport.[41] Facial biometric screening technology is relatively new—CBP's first use of FRT was in 2016.[42] Today, CBP has implemented FRT into its processes for all international flights.[43] The TSA's first FRT pilot program was conducted with volunteer, internationally-bound passengers at the John F. Kennedy International Airport between October and November 2017; the TSA subsequently entered into an agreement with CBP in April 2018 to jointly develop and implement biometric technologies at airports.[44] Later that same year, the TSA issued the *TSA Biometrics Roadmap for Aviation Security & the Passenger Experience*, which laid out four impending goals regarding its biometric security measures: (1) to partner with CBP on biometrics for international travelers, (2) to operationalize biometrics for TSA PreCheck travelers, (3) to expand biometrics to

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38. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108–458, § 7208, 118 Stat. 3817, 3821 (2004) (codified as amended at 50 U.S.C. § 403-3d (2019) and 42 U.S.C. § 2000ee-1 (2007)).

39. ABIGAIL F. KOLKER, CONG. RSCH. SERV., IF11634, BIOMETRIC ENTRY-EXIT SYSTEM: LEGISLATIVE HISTORY AND STATUS (2020).

40. US citizens arriving in the US may still opt out of biometric screening. *Id.*.

41. This form of biometric screening is explicitly authorized under the ATSA, which provides that the TSA may use biometrics to "positively verif[y] the identity of each employee and law enforcement officer who enters a secure area of an airport." Aviation and Transportation Security Act § 106(a)(4)(E). *See also* Rachel Metz, *Homeland Security Drops Plan to Use Facial Recognition on Traveling US Citizens*, CNN BUS. (Dec. 5, 2019, 3:51 PM), https://www.cnn.com/2019/12/02/tech/homeland-security-facial-recognition-citizens [perma.cc/Y7PX-B73D].

42. At the time, it was only used for international passengers traveling on one daily flight between the United States and Japan. *CBP Deploys Test of Departure Information Systems Technology at Hartsfield-Jackson Atlanta International Airport*, U.S. CUSTOMS BORDER PROT. (June 13, 2016), https://www.cbp.gov/newsroom/local-media-release/cbp-deploys-test-departure-information-systems-technology-hartsfield [perma.cc/PWL2-BU9V].

43. *Say Hello to the New Face of Efficiency, Security, and Safety: Introducing Biometric Facial Comparison Technology*, U.S. CUSTOMS BORDER PROT. (Apr. 25, 2024), https://www.cbp.gov/travel/biometrics [perma.cc/8C3H-JGUZ].

44. Austin Gould, *The Use of Biometric Technology at the Department of Homeland Security*, TRANSP. SEC. ADMIN. (July 10, 2019), https://www.tsa.gov/news/press/testimony/2019/07/10/use-biometric-technology-department-homeland-security [perma.cc/84J9-SR3F].

additional domestic travelers, and (4) to develop support infrastructure for biometric solutions.[45]

The TSA's FRT expansion has been supported by the Obama, Trump, and Biden Administrations.[46] Yet, the implementation of FRT has still been somewhat controversial.[47] In 2019, DHS published a Notice of Proposed Rulemaking aimed at requiring FRT screening of everyone who entered or exited the country, including US citizens.[48] In response to public outcry, and following "consultation with Congress and privacy experts," DHS ultimately determined that it would no longer seek to finalize the rule.[49] Several lawmakers have also criticized the TSA's more recent FRT expansion;[50] some have likened the agency's plan to an intrusion by "Big Brother" and have threatened to ban federal use of FRT altogether.[51]

In 2020, the TSA began implementing its plan to conduct FRT screening at standard airport security checkpoints, and this process has accelerated at a rapid pace.[52] At the end of 2022, sixteen major domestic airports had implemented FRT checkpoint screening;[53] by June 2023, nine others had done the same.[54] That same month, the TSA indicated that it was planning to expand the program even further, hoping to reach approximately 430 US airports over the next "several years."[55] Currently, US citizens can opt out of the FRT scans, and TSA initially

45. *Id.*; *TSA Biometrics Strategy*, *supra* note 9.

46. Metz, *supra* note 41; Santana, *supra* note 4; Emily Birnbaum, *Trump Officials Defend Use of Facial Recognition Amid Backlash*, HILL (July 10, 2019, 9:10 PM), https://thehill.com/policy/technology/452529-trump-officials-defend-use-of-facial-recognition-amid-backlash/ [perma.cc/LJ6G-Y2HJ].

47. Metz, *supra* note 41; Santana, *supra* note 4; Birnbaum, *supra* note 46.

48. Metz, *supra* note 41.

49. *Id.*

50. *See* Britney Nguyen, *Here's Why Senators Want to Ban The TSA's Facial Recognition Screening at Airports*, FORBES (Nov. 29, 2023, 6:46 PM), https://www.forbes.com/sites/britneynguyen/2023/11/29/heres-why-senators-want-to-ban-the-tsas-facial-recognition-screening-at-airports/?sh=1026094f6382 [perma.cc/Z9GA-H86F].

51. Press Release, John Kennedy, U.S. Sen. for La., Kennedy, Merkley Introduce Bill to End Involuntary Facial Recognition Screenings, Protect Americans' Privacy (Nov. 29, 2023), https://www.kennedy.senate.gov/public/press-releases?ID=FA4A0A3C-3383-4FC4-BB05-D6905A75B45D [perma.cc/7R7Z-H8ZH].

52. Van Cleave, *supra* note 1.

53. Geoffrey A. Fowler, *TSA Now Wants To Scan Your Face At Security. Here Are Your Rights*, WASH. POST (Dec. 2, 2022, 7:00 AM), https://www.washingtonpost.com/technology/2022/12/02/tsa-security-face-recognition/ [perma.cc/KN9G-JVSY].

54. Van Cleave, *supra* note 1.

55. Wilfred Chan, *Exclusive: TSA to Expand Its Facial Recognition Program To Over 400 Airports*, FAST CO. (June 30, 2023), https://www.fastcompany.com/90918235/tsa-facial-recognition-program-privacy?partner=rss [perma.cc/LUL5-FSEF].

indicated that this would always be the case.[56] However, TSA Chief Administrator David Pekoske has since admitted that the TSA plans to mandate participation in the future.[57]

II. THE SIGNIFICANCE OF TSA'S FACIAL RECOGNITION PROGRAM

Despite the TSA's insistence that privacy is one of its top priorities,[58] there is reason to be concerned about the FRT program's potential to intrude on privacy and other civil liberties, especially given that there is nothing preventing the TSA from changing its policies in the future.[59] In 2019, Assistant TSA Administrator Austin Gould said that, "[i]mportantly, passengers will always have an option to not be processed through biometrics solutions at our checkpoint."[60] Just a few years later, however, TSA's Chief Administrator said that, in the interest of efficiency, the opt-out option will not always be available.[61] This significant shift in policy illustrates the broad—and largely unchecked—discretion the TSA currently has over how it uses FRT.[62]

The adoption and expansion of the TSA's FRT program exemplifies a global and widespread pattern of government entities expeditiously adopting newly developed surveillance technologies into routine security protocols.[63] The constant collection of personal data is not limited to the public sector; it has become increasingly normalized as people around the world rapidly integrate advanced technologies that collect this data—"smart" phones, "smart" watches, "smart" TVs,

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56. Gould, *supra* note 44.

57. Kristian, *supra* note 13.

58. *Facial Recognition Technology*, *supra* note 1 ("TSA is committed to protecting passenger privacy, civil rights, civil liberties and ensuring the public's trust as it seeks to improve the passenger experience through its exploration of identity verification technologies.").

59. *See* Samantha Lehman, *Some Questions About the TSA's New Facial-Recognition Program*, NAT'L REV. (Aug. 25, 2023, 3:50 PM), https://www.nationalreview.com/corner/some-questions-about-the-tsas-new-facial-recognition-program/ [perma.cc/G3AQ-JTUE].

60. Gould, *supra* note 44.

61. Alexandra Skores, *TSA Boss: Biometrics, Tech Could Ease Stress of Travel*, GOV'T TECH. (Mar. 15, 2023), https://www.govtech.com/transportation/tsa-boss-biometrics-tech-could-ease-stress-of-travel [perma.cc/57DE-Z7X3].

62. *See id.*

63. *See* Berg, *supra* note 14; U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-526, FACIAL RECOGNITION TECHNOLOGY: CURRENT AND PLANNED USES BY FEDERAL AGENCIES (2021) [hereinafter FRT: CURRENT AND PLANNED USES]; Ian Carlos Campbell, *Moscow Adds Facial Recognition Payment System to More Than 240 Metro Stations*, VERGE (Oct. 15, 2021, 3:56 PM), https://www.theverge.com/2021/10/15/22728667/russia-face-pay-system-moscow-metro-privacy [perma.cc/39U7-XDYS]; Grady McGregor, *The World's Largest Surveillance System is Growing—And So is The Backlash*, FORTUNE (Nov. 3, 2020, 9:38 AM), https://fortune.com/2020/11/03/china-surveillance-system-backlash-worlds-largest/ [perma.cc/YD9G-ESRM].

"smart" homes, and the like—into their private, everyday lives.[64] Yet, as government entities implement these new technologies, there are different risks involved than there are with consumer products.[65] Indeed, advanced technologies have served to empower authoritarian regimes to commit egregious human rights violations.[66] While civil rights are better protected in the United States than they are in most other countries,[67] the potential for similar misuse, and subsequent degradation of civil rights, is too significant to ignore.[68] Internal documents made public in March 2023, for example, reveal that the Federal Bureau of Investigation and the Defense Department have spent years researching and developing FRT with the goal of

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64. *See Mobile Fact Sheet*, PEW RSCH. CTR. (Jan. 31, 2024), https://www.pewresearch.org/internet/fact-sheet/mobile/ [perma.cc/HN9P-ZPFA]; Victor Oluwole, *Sub-Saharan Africa Embraces 5G And Smartphone Adoption Soars, GSMA Report Reveals*, BUS. INSIDER AFR. (June 9, 2023, 10:49 AM), https://africa.businessinsider.com/local/markets/sub-saharan-africa-embraces-5g-and-smartphone-adoption-soars-gsma-report-reveals/9xnt95l [perma.cc/N7QG-YSKN]; Emily Vogels, *About One-in-Five Americans Use a Smart Watch or Fitness Tracker*, PEW RSCH. CTR. (Jan. 9, 2020), https://www.pewresearch.org/short-reads/2020/01/09/about-one-in-five-americans-use-a-smart-watch-or-fitness-tracker/ [perma.cc/B2KR-K4Q3]; Meridith Hirt & Samantha Allen, *10 Smart Home Trends This Year*, FORBES HOME (July 4, 2023, 10:19 AM), https://www.forbes.com/home-improvement/internet/smart-home-tech-trends/ [perma.cc/64NX-ZZ8Q].

65. Carrie Cordero, *Corporate Data Collection and U.S. National Security: Expanding the Conversation in an Era of Nation State Cyber Aggression*, LAWFARE (June 1, 2018, 11:09 AM), https://www.lawfaremedia.org/article/corporate-data-collection-and-us-national-security-expanding-conversation-era-nation-state-cyber [perma.cc/BJ2L-PE7H] ("Specifically, the government can investigate you, prosecute you, and even potentially jail you if found guilty of a crime. Companies, on the other hand, might collect a lot of data, but they can't take those specific actions that restrict your liberties and can change your life.").

66. *See China's Algorithms of Repression: Reverse Engineering a Xinjiang Police Mass Surveillance App*, HUM. RTS. WATCH (May 1, 2019), https://www.hrw.org/report/2019/05/01/chinas-algorithms-repression/reverse-engineering-xinjiang-police-mass [perma.cc/GQ9L-8XSJ]; Dave Davies, *Facial Recognition And Beyond: Journalist Ventures Inside China's 'Surveillance State'*, NPR, (Jan. 5, 2021, 12:50 PM), https://www.npr.org/2021/01/05/953515627/facial-recognition-and-beyond-journalist-ventures-inside-chinas-surveillance-sta [perma.cc/QV8F-RARK]; Paul Mozur & Aaron Krolik, *A Surveillance Net Blankets China's Cities, Giving Police Vast Powers*, N.Y. TIMES (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/technology/china-surveillance.html [perma.cc/9W59-AXNE]; Johana Bhuiyan, *US Sanctioned China's Top Facial Recognition Firm Over Uyghur Concerns. It Still Raised Millions*, GUARDIAN (Jan. 7, 2022, 1:00 PM), https://www.theguardian.com/world/2022/jan/06/china-sensetime-facial-recognition-uyghur-surveillance-us-sanctions [perma.cc/HG76-7S3F]; Natalie Kitroeff & Ronen Bergman, *He Was Investigating Mexico's Military. Then the Spying Began.*, N.Y. TIMES (May 22, 2023), https://www.nytimes.com/2023/05/22/world/americas/mexico-spying-pegasus-israel.html [perma.cc/RN39-D666]; Natalie Southwick, *Surveillance Technology Is on the Rise in Latin America*, AMERICAS Q. (June 5, 2023), https://www.americasquarterly.org/article/surveillance-technology-is-on-the-rise-in-latin-america/ [perma.cc/PEQ7-U2CM].

67. *See Human Rights and Democracy*, U.S. DEP'T ST., https://www.state.gov/policy-issues/human-rights-and-democracy/ [perma.cc/3J2W-KEV4] (last visited Feb. 22, 2024).

68. *See* Berg, *supra* note 14.

implementing the technology in public spaces to track citizens without their consent.[69]

This gives rise to the fundamental question of whether the use of FRT by the federal government is even constitutional. Christopher Slobogin, a prominent scholar on surveillance technologies and their constitutional deployment by law enforcement, argues that the use of FRT is not necessarily unconstitutional so long as the correct authorization procedures have been followed.[70] His scholarship posits that the constitutional "question is not *whether* these images may be collected, but *when* the government may use them to seek criminal database matches."[71] In other words, the federal government may be able to use FRT to collect data with appropriate authorization, but its use of such data is constitutionally constrained by a reasonableness inquiry.[72]

Beyond such substantive constitutional concerns, the implementation of FRT by federal agencies also raises the fundamental procedural question of whether Congress has properly authorized the agencies to adopt this technology.[73] The element of proper congressional authorization is essential, both as a constitutional and a policy requirement.[74] Through the lens of constitutional law, requiring proper congressional authorization prevents executive agencies from usurping the legislative power vested in Congress.[75] Analyzed through the lens of governmental policy, this requirement also prevents federal agencies from ignoring the democratic will of the people.[76] Examining the use of FRT by federal agencies necessitates both considerations. Even if the use of FRT by federal agencies is substantively constitutional, the US

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69. Drew Harwell, *FBI, Pentagon Helped Research Facial Recognition for Street Cameras, Drones*, WASH. POST (Mar. 7, 2023, 6:00 AM), https://www.washingtonpost.com/technology/2023/03/07/facial-recognition-fbi-dod-research-aclu/ [perma.cc/8XQN-F7P7].

70. Christopher Slobogin, *Suspectless Searches*, 83 OHIO ST. L.J. 953, 969 (2022).

71. *Id.* (emphasis added).

72. *See id.*

73. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("This allocation of different sorts of power to different sorts of decisionmakers was no accident. To adapt the law to changing circumstances, the founders thought, the collective wisdom of the people's representatives is needed.").

74. *See id.*

75. *See* U.S. CONST. art. I ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

76. *See Gutierrez-Brizuela*, 834 F.3d at 1149–58 (Gorsuch, J., concurring) ("*[C]an* Congress really delegate its legislative authority—its power to write new rules of general applicability—to executive agencies? The Supreme Court has long recognized that under the Constitution congress cannot delegate legislative power to the president and that this principle is universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution . . . . Not only is *Chevron*'s purpose seemingly at odds with the separation of legislative and executive functions, its effect appears to be as well.").

public may not believe that it appropriately reflects their best interests, and Congress is the federal institution with the authority to articulate that collective sentiment.[77] Yet, with no clear delegation from Congress, federal agencies have asserted problematically broad discretion about when, where, and how to implement this technology.[78]

As related to FRT, the TSA's exercise of broad discretion has significant implications for several reasons. First, these technologies will continue to advance and will ultimately become capable of capturing even more invasive images.[79] Accordingly, the potential for violative intrusions by agencies adopting the technologies will only increase over time. Additionally, there is legitimate concern that "FRT may violate people's privacy by making use of photos that are published on the web without prior consent and acknowledgment from the individuals,"[80] especially because the federal government already engages in this kind of data collection.[81] Many are also concerned that FRT's automated threat-flagging system may discriminate on the basis of race or sex.[82] Finally, there is currently little transparency about how government agencies are using FRT and the data it gathers;[83] many fear that this, in combination with the widespread adoption of FRT surveillance, could serve to suppress fundamental liberties.[84]

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77. *See id.*; U.S. CONST. art. I.

78. *See* FINKLEA ET AL., *supra* note 4, at 12; FRT: CURRENT AND PLANNED USES, *supra* note 63.

79. *See* David Sella-Villa & Michael E. Hodgson, Ph.D., *Privacy in the Age of Active Sensors*, 92 UMKC L. REV. 67 (2023). The rapid advancements in active sensor technology, for example, will make capturing images through walls much easier in the near future. *See id.* at 95 n.239.

80. Shlomit Yanisky-Ravid & Kyle Fleming, *The Tripartite Model of Facial Recognition: Bridging the Gap Between Privacy, Public Safety, Technology and the Fourth and First Amendments*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 163 (2023).

81. A 2016 report by the Center on Privacy & Technology at Georgetown Law found that at least half of American adults—more than 117 million people—are in law-enforcement facial recognition networks based on internet scans. *See Half of All American Adults Are in a Police Face Recognition Database, New Report Finds*, GEO. L. (Oct. 18, 2016), https://www.law.georgetown.edu/news/half-of-all-american-adults-are-in-a-police-face-recognition-database-new-report-finds/ [perma.cc/2HDZ-2MWP].

82. *See* Steve Lohr, *Facial Recognition Is Accurate, if You're a White Guy*, N.Y. TIMES (Feb. 9, 2018), https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html [perma.cc/JB8H-8U68] (explaining that studies have indicated racial disparity when it comes to the accuracy of at least some FRT systems).

83. *See* Yanisky-Ravid & Fleming, *supra* note 80, at 164.

84. Many worry about how these technologies will be used to target those who seek to engage in protests against the government and other public demonstrations. *See id.* ("[T]he technology threatens people's freedom to express themselves by participating in assemblies, demonstrating, and moving freely in public spheres as they are being scanned by constant online surveillance.").

Despite these concerns, FRT is not inherently malicious, and the technology can undeniably function as a valuable tool for some law-enforcement agencies when used appropriately.[85] The question is one of trade-offs. In the United States, however, government decisions about such trade-offs should ultimately be accountable to the will of the people.[86] Allowing executive agencies to have complete discretion over FRT adoption, without input from Congress, serves to undermine that democratic accountability.

III. HISTORICAL DEFERENCE TO AGENCY INTERPRETATIONS

For decades, courts have looked to the 1984 case, *Chevron, United States of America, Inc. v. Natural Resources Defense Council, Inc.*, when resolving questions about the scope of agency authority.[87] In *Chevron*, the Court established a foundational two-step test to determine whether an agency has properly constructed the statute that it administers, which has become known as the *Chevron* deference doctrine.[88] The Court explained the process as follows:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[89]

In other words, when reviewing an executive agency's statutory authority under *Chevron*, courts must ask first whether the statute is

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85. *See generally* Slobogin, *Suspectless Searches*, *supra* note 70. The technology will help agencies prevent some crimes and to find criminals that may not have otherwise been detained, thus making law enforcement more effective and society safer overall. *Id.*

86. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) ("This allocation of different sorts of power to different sorts of decisionmakers was no accident. To adapt the law to changing circumstances, the founders thought, the collective wisdom of the people's representatives is needed.").

87. *See* 467 U.S. 837 (1984); Christopher J. Walker, *Most Cited Supreme Court Administrative Law Decisions*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Oct. 9, 2014), https://www.yalejreg.com/nc/most-cited-supreme-court-administrative-law-decisions-by-chris-walker/ [perma.cc/YER6-AZQ4].

88. *See, e.g.*, Jonathan R. Siegel, *The Constitutional Case for "*Chevron*" Deference*, 71 VAND. L. REV. 937, 944–53 (2018) ("Every law student who has taken a basic course in administrative law is familiar with the principle of '*Chevron* deference,' under which courts must defer to an executive agency's reasonable interpretation of an ambiguous provision of a statute the agency administers.").

89. *Chevron*, 467 U.S. at 842–43.

ambiguous; if it is, then they ask whether the agency's interpretation is reasonable.[90] The reasonableness inquiry, known as "step two," is incredibly deferential; if a court finds that a statute is ambiguous, it will almost always find the agency's interpretation reasonable.[91]

When the Supreme Court decided *Chevron*, it was not intended to be a major case; it was only after the *Chevron* "two-step" was increasingly referenced by the lower courts that it became a landmark.[92] In 1989, Justice Antonin Scalia defended the doctrine, arguing that if Congress wanted to give an agency room to have some discretion, courts should not step in and take that discretion away by imposing their own reading of an ambiguous statute.[93] Nearly twenty years later, Justice Clarence Thomas wrote for the majority in *National Cable & Telecommunications Association v. Brand X Internet Services*,[94] which is considered to be "one of the Court's most robust articulations of the commandment for judges to defer to administrative agencies."[95]

Despite the initial consensus around the decision, however, *Chevron* deference has become more controversial in recent years.[96] Ten years after authoring the "robust" defense of *Chevron* in *National Cable*,[97] Justice Thomas changed his position.[98] In his concurrence in *Michigan v. Environmental Protection Agency,* Justice Thomas

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90. *See id.*

91. *See* Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decision-Making in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 100 (1994) ("At step two, courts almost never overturn agency interpretations as unreasonable.").

92. *See* Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 268, 282 (2014) ("Most landmark decisions are born great-they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later."). *Id.* at 257. Remarkably, the opinion received no substantial comment from any member of the Court when it was circulated in June 1984, and there was no concurrence or dissent. *See id.* at 276; *see also Chevron*, 467 U.S. at 837.

93. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

94. *See* 545 U.S. 967, 973 (2005).

95. Michael Kagan, *Loud and Soft Anti-*Chevron *Decisions*, 1142 SCHOLARLY WORKS 37, 38 (2018), https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2166&context=facpub [perma.cc/L29D-Y2WH].

96. *See* Beerman, *supra* note 20, at 783; Michigan v. Env't Prot. Agency, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("[*Chevron*] wrests from Courts the ultimate interpretative authority to 'say what the law is.'").

97. *See Nat'l Cable*, 545 U.S. at 973–1003; Kagan, *supra* note 95.

98. *See Michigan*, 576 U.S. at 760–64 (Thomas, J., concurring) ("I write separately to note that its request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes.").

expressed regret over his opinion in *National Cable* and said that he thought *Chevron* needed to be overturned.[99]

Other justices have expressed similar sentiments:[100] in 2016, before Justice Neil Gorsuch was nominated to the Supreme Court, he wrote a concurrence to his own opinion in the United States Court of Appeals for the Tenth Circuit case, *Gutierrez-Brizuela v. Lynch*, in which he too indicated his desire for *Chevron* to be overruled.[101] Gorsuch scolded the *Chevron* decision for allowing "executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."[102]

While lower courts continue to adhere to *Chevron* as precedent,[103] the Supreme Court has become more hesitant to apply it.[104] Since the end of the 2015 term, federal agencies have lost 70 percent of Supreme Court cases that have invoked a *Chevron* analysis.[105] In contrast, in lower courts, the agencies win almost 80 percent of the time.[106] In 2022, the Court decided *West Virginia v. EPA* and doctrinally limited *Chevron* deference by drawing on the major questions doctrine.[107] The major questions doctrine provides that courts should not defer to agency interpretations of ambiguous statutes when those statutes involve "major questions" because the legislative branch cannot delegate its authority to decide "major questions" to the executive branch.[108]

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99. *See id.*

100. *See* Howe, *supra* note 17.

101. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016).

102. *Id*. at 1149. Gorsuch also said that *Chevron* deference is "no less than a judge-made doctrine for the abdication of the judicial duty" to say "what the law is." *Id.* at 1152.

103. *See* Kent Barnett & Christopher Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017).

104. *See Michigan*, 576 U.S. 751–62 (stating that ambiguity should be determined not only by the text but also by statutory context permissible in light of statutory context as well as text); King v. Burwell, 576 U.S. 473, 485–86 (2015) (stating that *Chevron*-deference analysis does not extend to questions of "deep political and economic significance"); West Virginia v. Env't Prot. Agency, 597 U.S. 697, 706–35 (2022) (distilling further the "major questions doctrine").

105. *See* Isaiah McKinney, *The Chevron Ball Ended at Midnight, But the Circuits Are Still Two-Stepping by Themselves*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Dec. 18, 2022), https://www.yalejreg.com/nc/chevron-ended/#:~:text=%5B5%5D%20I%20found%20the%20circuit,were%20decided%20at%20Step%20Two [perma.cc/C27L-K9LA].

106. *See* Barnett & Walker, *supra* note 103.

107. *See generally West Virginia*, 597 U.S. 700, 721–25 (pointing to several examples of previous major questions cases, although the doctrine had not been fully fleshed out until this case) (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109 (2022)).

108. *See West Virginia*, 597 U.S. 697.

Given the Court's reluctance to apply *Chevron* deference in recent years,[109] and its willingness to limit the decision's scope,[110] some legal scholars once speculated that the Court would simply move on from *Chevron* without ever explicitly overruling it.[111] Yet, the tension between the lower courts' continued adherence to the doctrine and the Supreme Court's hesitancy to apply it has made it increasingly apparent that clarity is needed.[112] In May 2023, the Court granted certiorari to hear *Loper Bright Enterprises v. Raimondo* on the specific issue of whether *Chevron* needs to be overruled.[113] In October 2023, it took up a companion case, *Relentless v. Department of Commerce*, on the same issue.[114] While it is still unclear how far the Court will go—whether it will overrule *Chevron* entirely or simply clarify its limitations in light of its other recent decisions—it is clear that the Court is less likely to defer to an agency's interpretation of its statutory authority than it once was.[115]

IV. HOW THE COURT MIGHT REVIEW THE TSA'S INTERPRETATION

Given the Court's growing skepticism toward *Chevron* deference, legal scholars and litigators are well-served to reexamine the statutory bases for agency decisions.[116] Attorneys and legal scholars should be asking how an agency's interpretation of its authority would hold up under heightened judicial scrutiny if challenged. Recognizing the need to evaluate this question for each exercise of agency authority, the TSA's interpretation of the ATSA must undergo the same scrutiny. Ultimately, one must ask whether the TSA is justified in interpreting

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109. *See* McKinney, *supra* note 105.

110. *See West Virginia,* 597 U.S. 697; *Michigan v. Env't Prot. Agency*, 576 U.S. 743 (2015).

111. *See* Kagan, *supra* note 95, at 39.

112. *See* McKinney, *supra* note 105.

113. *See* Loper Bright Enters. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023) (No. 22-451).

114. *See* Relentless, Inc. v. Dep't of Com., 62 F.4th 621 (1st Cir. 2023), *cert. granted*, 144 S. Ct. 325 (2023) (No. 22-1219). The Court likely granted certiorari in *Relentless* in part to give all nine justices an opportunity to weigh-in since Justice Ketanji Brown Jackson has recused herself from *Loper*. *See* Eli Nachmany, *With a Cert Grant in* Relentless, Inc. v. Department of Commerce*,* Loper Bright *Gets Some Company*, YALE J. ON REGUL.: NOTICE & COMMENT BLOG (Oct. 13, 2023), https://www.yalejreg.com/nc/with-a-cert-grant-in-relentless-inc-v-department-of-commerce-loper-bright-gets-some-company-by-eli-nachmany/ [perma.cc/MHV8-8MY6].

115. *See Michigan*, 576 U.S. at 751–62 (noting that ambiguity should be determined not only by the text but also by statutory context permissible in light of statutory context as well as text); King v. Burwell, 576 U.S. 473, 485–86 (2015) (holding that *Chevron*-deference analysis does not extend to questions of "deep political and economic significance"); *West Virginia,* 597 U.S. 697 (distilling further the "major questions doctrine").

116. *See* Nachmany, *supra* note 114.

Section 109(a)(7) of the ATSA as giving it the authority to use FRT to scan all travelers coming through US airports.[117] Given that a court may analyze this question with less deference than was once granted to agency interpretations, it could likely find that the TSA does not have the proper authority to implement such a broad FRT screening program.

A. The TSA's Interpretation of the Statute

To evaluate how a court might scrutinize the TSA's authority to implement its FRT plan, it is important to closely examine how the TSA justifies its authority. There are several provisions within the ATSA that give the TSA authority to implement biometric technologies.[118] For example, one provision states that the TSA "may provide for the use of biometric or other technology that positively verifies the identity of each employee and law-enforcement officer who enters a secure area of an airport."[119] Section 109(a)(7), however, is more ambiguous.[120] It provides that the TSA may use "voice stress analysis, biometric, or other technologies to prevent a person who might pose a danger to air safety or security from boarding the aircraft of an air carrier or foreign air carrier in air transportation or intrastate air transportation."[121] This is the provision upon which the TSA currently rests its authority to implement its FRT plan.[122] The agency interprets the text as giving it the unfettered discretion to essentially use any available biometric technology to screen every traveler coming through a US airport.[123] Such a broad interpretation, however, may reasonably be challenged in court based upon several theories.

117. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 109(a)(7), 115 Stat. 597, 614 (2001) (codified as amended at 49 U.S.C. § 114).

118. *See id.* §§ 106, 109, 137 (codified as amended in scattered sections of 49 U.S.C.).

119. *Id.* § 106 (h)(4)(E). "Secured areas" of airports include "air traffic control operations areas, maintenance areas, crew lounges, baggage handling areas, concessions, and catering delivery areas." Aviation and Transportation Security Act § 106 (g)(2)(G).

120. *See id.* § 109(a)(7).

121. *Id.* § 109(a)(7).

122. *See TSA Biometrics Strategy*, *supra* note 9, at 5.

123. *See id.*

B. Administrative Procedure Act

One potential challenge to the TSA could be brought under the Administrative Procedure Act (APA), which requires that that agencies conduct formal notice-and-comment rulemaking for proposed "legislative rules."[124] The statute provides exceptions, though: the notice-and-comment requirements do not apply "to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[125] Christopher Slobogin has argued that law enforcement decisions to implement "panvasive" searches and seizures should be subject to the APA's notice-and-comment requirements.[126] "Panvasive" searches and seizures are searches that seek to catch or deter "undetected wrongdoing, usually within a designated group, rather than focus on a particular crime known to have already occurred . . . they are purposefully *suspicionless* with respect to any particular individual and thus will almost inevitably affect a significant number of people not involved in wrongdoing."[127] Because it searches everyone, rather than only those whom the agency considers to be threatening suspects, the TSA's airport security screening certainly constitutes such a "panvasive" search.[128] Slobogin has argued that, even if "panvasive" searches are substantively constitutional, administrative law imposes procedural requirements that are meant to prevent agencies from usurping their power.[129]

The TSA, as a federal executive agency, is subject to the requirements of the APA,[130] yet it has not issued any formal rulemaking with regard to its FRT rollout plan.[131] If challenged in court, the agency

124. *See* Administrative Procedure Act § 4, 5 U.S.C. § 553; Elec. Priv. Info. Ctr. v. U.S. Dep't Homeland Sec., 653 F.3d 1, 4–5 (D.C. Cir. 2011).

125. Administrative Procedure Act § 4, 5 U.S.C. § 553; *Elec. Priv. Info. Ctr.*, 653 F.3d at 6–7 ("[T]he purpose of the APA would be disserved if an agency with a broad statutory command . . . could avoid notice-and-comment rulemaking simply by promulgating a comparably broad regulation . . . and then invoking its power to interpret that statute and regulation in binding the public to a strict and specific set of obligations.").

126. *See* Slobogin, *Policing as Administration*, *supra* note 23, at 95–97.

127. *Id.* at 93.

128. *See id.*

129. *Id.* at 93, 120–22 (arguing that the APA's requirements should be extended to police departments generally).

130. *See* Administrative Procedure Act § 2, 5 U.S.C. § 551 ("'Agency means each authority, whether or not within or subject to review by another agency, or the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.").

131. *See* Revision of Agency Information Collection Activity Under OMB Review: TSA Pre✓® Application Program, 82 Fed. Reg. 50663 (Nov. 1, 2017). Back in 2017, the TSA issued a notice of proposed rulemaking to expand biometric screening of TSA's Pre-Check applicants. *Id.*

would likely argue that implementing its FRT program is not a "legislative rule" and that notice-and-comment rulemaking is therefore not required.[132] In fact, the TSA did make this argument when its decision to implement advanced imaging technology (AIT) scanners at airport security checkpoints—without adhering to notice-and-comment rulemaking procedures—was challenged.[133] The United States Court of Appeals for the District of Columbia Circuit ultimately upheld the agency's use of the technology as substantively valid, but it also held that the TSA's decision constituted a legislative rule and therefore needed to be promulgated through notice-and-comment rulemaking under the APA.[134] The court's rationale for why the rule was legislative rather than procedural was based largely on the significant impact the technology had on the privacy of airport travelers.[135] The court wrote that, despite "the precautions taken by the TSA, [the new AIT machines clearly] . . . intrude[] upon [the public's] personal privacy in a way a magnetometer does not . . . the change substantively affects the public to a degree sufficient to implicate the policy interests animating notice-and-comment rulemaking."[136] Although the TSA ended up modifying the AIT machines due to public backlash, it later conducted formal notice-and-comment rulemaking as required by the decision for its new AIT scanners.[137] Given this, it seems likely that a court would find that the agency's current FRT program constitutes a legislative rule subject to the same procedural requirements of the APA.[138]

The agency's failure to issue formal notice-and-comment rulemaking is therefore vulnerable to a legitimate APA challenge in court.[139] However, even if successfully challenged on these grounds, the TSA is ultimately likely to remain undeterred from implementing FRT in a procedurally valid way unless a court also finds that the TSA's FRT plan is an illegitimate interpretation of its Congressional authority.[140]

This proposed rule discussed incorporating "facial images," but not FRT, into the Pre-Check process. *Id.* No similar proposed rule appears to have been issued regarding the expansion of its biometrics program at regular checkpoints. *See id.*

132. *See* Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 5 (D.C. Cir. 2011).

133. *See id.* at 5–11.

134. *See id.* at 11 ("[T]he TSA [had] advanced no justification for having failed to conduct a notice-and-comment rulemaking.").

135. *See id.* at 6–11.

136. *Id.* at 6.

137. *See id.* at 11; *X-Ray Scanners*, *supra* note 35.

138. *See Elec. Priv. Info. Ctr.*, 653 F.3d at 5–7.

139. *See id.* at 5–8.

140. *See id.* at 7, 11 ("[D]ue to the obvious need for the TSA to continue its airport security operations without interruption, we remand the rule to the TSA but do not vacate it, and instruct the agency promptly to proceed in a manner consistent with this opinion.").

C. Chevron Deference

For a court to entirely curtail the TSA's use of FRT, it would have to find that the adoption of the technology is a substantive overreach of the agency's authority.[141] Under the historical *Chevron* analysis, it would be difficult to argue that the TSA's interpretation would be invalidated.[142] The requirement for statutory ambiguity, *Chevron*'s first step,[143] would likely be satisfied when considering that Section 109(a)(7) could be interpreted in several, conflicting ways.[144] If one interprets the provision broadly, as the TSA currently does, then it could mean that the TSA is permitted to use biometrics on anyone boarding an airplane in order to prevent someone who might pose a danger to air safety or security from boarding.[145] Alternatively, the provision could be construed narrowly, in which case it may mean that the TSA is only authorized to conduct biometric screening of someone they have reason to suspect may pose a threat to air safety and security from boarding an aircraft.[146] It is not immediately clear from the text of the section itself which one of these interpretations applies,[147] and *Chevron*'s highly deferential standard tends to favor agency action in the absence of an explicit statement from Congress to the contrary.[148]

After finding statutory ambiguity, courts must defer to an agency's reasonable interpretation of the statute under step two of *Chevron*'s inquiry.[149] Therefore, under these circumstances, if faithfully applying the traditional and highly deferential *Chevron* test, a court would likely accept the TSA's interpretation and actions.[150] That being

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141. *See id.* ("[W]e deny the petition with respect to the petitioners' statutory arguments and their claim under the Fourth Amendment . . . we [therefore] remand the rule to the TSA but do not vacate it.").

142. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

143. *Id.* at 842–43.

144. *See id.* at 844; Aviation and Transportation Security Act, Pub. L. No. 107-71, § 109(a)(7), 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 114).

145. *See id.*; *TSA Biometrics Strategy*, *supra* note 9, at 5.

146. *See* Aviation and Transportation Security Act § 109(a)(7).

147. *See id.* It is not inherently clear whether "a person who might pose a danger to air safety or security" refers to a suspicious individual or anyone at the airport who could potentially pose a threat. *Id.*

148. *See Chevron*, 467 U.S. at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute."); *see also* BENJAMIN M. BARCZEWSKI, CONG. RSCH. SERV., R44954, *CHEVRON* DEFERENCE: A PRIMER 1, 2–4 (2023).

149. Mark Seidenfeld, *A Syncopated* Chevron*: Emphasizing Reasoned Decision-Making in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 100 (1994) ("At step two, courts almost never overturn agency interpretations as unreasonable.").

150. *See id.*

said, the Supreme Court has become far less likely to apply *Chevron*—and may soon overrule it altogether.[151] Thus, a challenge to the TSA's FRT program may be resolved based on an alternative, less-deferential, standard.[152]

D. Major Questions Doctrine

The recent limitations the Court has placed on *Chevron*'s scope offer some insight into how a court may scrutinize the TSA's authority more closely.[153] It is possible that a court could find that the TSA's interpretation falls under the major questions doctrine;[154] this may even be the best legal argument against the TSA's FRT plan.[155] If a court can be convinced that the TSA's plan violates the major questions doctrine, it would be struck down.[156]

In *West Virginia v. EPA*, the Court clarified the scope of the major questions doctrine and struck down the Environmental Protection Agency's (EPA) Clean Power Plan, which had represented a major shift in the structure of the EPA's regulatory scheme.[157] The EPA argued that its authority was justified under a statutory provision that allowed it to establish regulatory standards reflecting "the application of the best system of emission reduction."[158] The EPA read this phrase broadly, interpreting "system" to include restricting certain modes of energy production entirely in order to move the nation toward cleaner energy.[159] Historically, the EPA established environmental standards for new and existing power plants, as it has been clearly authorized to do.[160] The Clean Power Plan, in contrast, sought to limit the amount of coal produced by the energy industry as a whole.[161] The Court invalidated the plan and explained that:

151. *See* Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 365, 370 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023), (No. 22-451); Relentless, Inc. v. U.S. Dep't of Com., 62 F.4th 621, 628 (1st Cir.), *cert. granted*, 144 S. Ct. 325 (2023) (No. 22-1219); Howe, *supra* note 17.

152. *See* Howe, *supra* note 17.

153. *See* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 723–24 (2022).

154. *See id.* at 722–23.

155. *See id.*; *supra* Part II.

156. *See West Virginia*, 597 U.S. at 735.

157. *Id.* at 724–29, 732, 734–35.

158. *Id.* at 709.

159. *Id.* at 727–28.

160. *Id.* at 709–10, 728 ("[I]ts role was limited to ensuring the efficient pollution performance of each individual regulated source . . . [and] if a source was already operating at that level, there was nothing more for EPA to do.").

161. *Id.* at 728.

> Both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there . . . To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.[162]

The EPA argued that it had discovered "in a long-extant statute an unheralded power" to "substantially restructure the American energy market."[163] It was significant that the agency "located that newfound power in the vague language of an 'ancillary provision' of the Act . . . one that was designed to function as a gap filler and had rarely been used in the preceding decades."[164] Consequently, without clear authorization from Congress, the Court struck it down as a violation of the major questions doctrine.[165]

The TSA's FRT plan could be struck down on similar grounds.[166] FRT is a new and rapidly advancing technology that promises to radically change how government agencies conduct their responsibilities.[167] The widespread adoption of FRT creates a significant risk of an unjustifiably invasive government intrusion into peoples' personal information.[168] Furthermore, many fear that FRT may have discriminatory effects in practice.[169] It is thus reasonable to consider FRT adoption a pressing political issue that Congress must speak to explicitly.[170] Like the EPA's Clean Power Plan, the TSA's FRT rollout plan represents an unprecedented interpretation that serves to justify a fundamental shift in policy.[171] As such, a court could find that the TSA's plan implicates the major questions doctrine.[172]

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162. *Id.* at 723, 734–35 (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

163. *Id.* at 724 (quoting *Util. Air*, 573 U.S. at 324).

164. *See id.* at 724–25 (quoting Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 468 (2001)).

165. *Id.* at 735 ("[I]t is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

166. *See id.*; *TSA Biometrics Strategy*, *supra* note 9, at 5–6.

167. *See generally* FRT: CURRENT AND PLANNED USES, *supra* note 63; FINKLEA ET AL., *supra* note 4; Berg, *supra* note 14.

168. *See* Van Cleave, *supra* note 1; Hafiz Sheikh Adnan Ahmed, *Facial Recognition Technology and Privacy Concerns*, ISACA (Dec. 21, 2022), https://www.isaca.org/resources/news-and-trends/newsletters/atisaca/2022/volume-51/facial-recognition-technology-and-privacy-concerns [perma.cc/83FH-48C3].

169. *See* Lohr, *supra* note 82.

170. *See West Virginia*, 597 U.S. at 721; Van Cleave, *supra* note 1; Lohr, *supra* note 82; FRT: CURRENT AND PLANNED USES, *supra* note 63, at 26, 28; FINKLEA ET AL., *supra* note 4, at 4.

171. *See West Virginia*, 597 U.S. at 735; *TSA Biometrics Strategy*, *supra* note 9, at 5.

172. *See TSA Biometrics Strategy*, *supra* note 9, at 5–6; *West Virginia*, 597 U.S. at 723.

Assuming the major questions doctrine is implicated, clear congressional authorization would be required.[173] There is no such authorization for the TSA's FRT plan, which means it would have to be struck down.[174] The TSA, like the EPA in *West Virginia*, justifies its plan by pointing to an ambiguous "ancillary provision."[175] This provision allows them to use biometrics not to screen all travelers, but "to prevent *a person* who might pose a danger to air safety or security from boarding the aircraft."[176] The TSA has never before asserted that this provision gives them the expansive authority to collect the biometric information of everyone traveling at US airports.[177] While it could perhaps be argued that the provision gives them that authority, it does not do so with the requisite clarity.[178] At least according to one version of the major questions doctrine,[179] cases that implicate it require more than "a colorable textual basis" for the regulation; they need clear statements of authorization, which the TSA's FRT plan lacks.[180]

Future litigants who seek to challenge the TSA's FRT implementation would thus be well-served to argue that it implicates the major questions doctrine given that it represents a massive shift in policy and threatens the important privacy interests of US citizens.[181] Considering the requirements of this doctrine, the fact that the TSA rests its authority on a catch-all provision of the ATSA—one that does not clearly authorize them to collect the biometric information of all

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173. *See West Virginia*, 597 U.S. at 723.

174. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 109(a)(7), 115 Stat. 597, 614 (2001) (codified as amended at 49 U.S.C. § 114).

175. *See id.* § 109(a)(7); *TSA Biometrics Strategy, supra* note 9, at 5–6; *West Virginia*, 597 U.S. at 724.

176. *See* § 109(a)(7) (emphasis added).

177. *See TSA Biometrics Strategy*, *supra* note 9, at 5–6; Metz, *supra* note 41.

178. *See* § 109(a)(7).

179. It is important to note that the doctrinal nuances of the major questions doctrine are still being worked out. Justice Barrett has, for instance, since indicated that she may support a weaker version of the doctrine's "clear congressional authorization" requirement. *See* Biden v. Nebraska, 600 U.S. 477, 510–11 (2023) (Barrett, J., concurring) ("[T]his 'clear statement' version of the major questions doctrine 'loads the dice' so that a plausible antidelegation interpretation wins even if the agency's interpretation is better . . . . [M]any of our cases express an expectation of 'clear congressional authorization' to support sweeping agency action . . . . But none requires an unequivocal declaration from Congress authorizing the precise agency action.") (quotations omitted).

180. *See West Virginia*, 597 U.S. at 722–23 (suggesting that major questions doctrine cases will be struck down even when there's a "colorable textual basis" for the agency's interpretation, because the doctrine requires a clear statement from Congress); Aviation and Transportation Security Act § 109(a)(7).

181. *See TSA Biometrics Strategy*, *supra* note 9, at 5–6; Metz, *supra* note 41; Ahmed, *supra* note 168.

travelers at US airports—could likely allow for a successful challenge.[182] The TSA's "expansive construction" of the ATSA should be rejected: "'Congress could not have intended to delegate' such a sweeping and consequential authority 'in so cryptic a fashion.'"[183]

E. Traditional Statutory Interpretation

While litigants could likely raise a strong challenge to the TSA's FRT implementation under the major questions doctrine, that challenge is susceptible to a rebuttal from the TSA that its FRT pilot program has been relatively uncontroversial.[184] While that is certainly not entirely true,[185] there is some validity to the argument that people have become more comfortable with FRT and other advanced technologies in recent years.[186] But, even if a major questions challenge fell short, there are additional arguments that litigators could make against the TSA's FRT program, especially if *Chevron* is overruled.[187] Depending on the Court's rulings in the upcoming *Loper* and *Relentless* cases, future courts may analyze a challenge to the TSA's FRT plan using traditional notions of statutory construction rather than under *Chevron* or the major questions doctrine.[188]

If a court were to review the TSA's interpretation of ATSA's Section 109(a)(7) pursuant to traditional statutory interpretation principles, there is still a colorable argument that it could strike down the TSA's FRT rollout plan.[189] In conducting this review, courts must first look to the text,[190] and the text of the ATSA provision does not indicate that it applies to the TSA's general screening procedures.[191]

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182. *See West Virginia*, 597 U.S. at 722–23 ("Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices.'"); *see also* Aviation and Transportation Security Act § 109(a)(7).

183. *See West Virginia,* 597 U.S. at 721 (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

184. *See TSA Biometrics Strategy*, *supra* note 9, at 6.

185. *See* Van Cleave, *supra* note 1; Santana, *supra* note 4.

186. *See TSA Biometrics Strategy*, *supra* note 9, at 6.

187. *See* Howe, *supra* note 17.

188. *See id.*; Christina Pazzanese, *'Chevron Deference' Faces Existential Test*, HARV. GAZETTE (Jan. 16, 2024), https://news.harvard.edu/gazette/story/2024/01/chevron-deference-faces-existential-test/ [perma.cc/7F9W-HFWS].

189. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 109(a)(7), 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 114).

190. ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012); LARRY M. EIG, CONG. RSCH. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2014).

191. *See* Aviation and Transportation Security Act § 109(a)(7).

While other sections in the statute have more textual clarity,[192] the same is not true of Section 109(a)(7), which gives the TSA authority to implement "enhanced security measures," including biometric screening, to prevent "*a person* who might pose a danger to air safety or security from boarding the aircraft."[193] The is admittedly ambiguous, but the language used in Section 109(a)(7) seems to indicate that the TSA may use biometrics to screen someone that they have reason to suspect might pose a threat to air safety or security.[194] The argument that the provision allows the TSA to screen every single airport passenger, regardless of suspicion, using these "enhanced security measures," on the other hand, seems to stretch its plain meaning.[195]

In other statutory provisions, Congress has explicitly indicated when it wanted agencies to use biometrics to screen a wider class of travelers.[196] For example, when Congress ordered DHS to create a registered entry-exit biometrics program, it clearly stated that the biometrics screening for that program extended to all international travelers, including US citizens.[197] The language between these statutes are strikingly different, and it is far from clear that the ATSA's Section 109(a)(7) is meant to apply to checkpoint screening at all.[198] Finally, when Congress passed the Federal Aviation Administration Reauthorization Act in 2018, it asked the CBP Administrator to provide Congress with an investigative report on "the operational and security impact of using biometric technology to identify travelers," but also explicitly stated that this Act should not be read to expand the deployment of biometric technologies beyond what had already been

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192. Section 109 is titled "Enhanced Security Measures." *Id.* § 109. It immediately precedes § 110, which is titled "Screening" and provides that the agency "shall provide for the screening of *all passengers and property* . . . that will be carried aboard a passenger aircraft." *Id.* § 110(b)(2)(a) (codified as amended at 49 U.S.C. § 44901(a)) (emphasis added). Section 110 is quite clear that its mandate to the TSA to conduct airport security screening extends to *all* airport passengers. *See id.* (emphasis added).

193. *Id.* § 109(7) (emphasis added).

194. *See id.*

195. *Id.*

196. *See* 8 U.S.C. § 1365b(k)(3)(A) ("[DHS] shall establish an international registered traveler program that incorporates available technologies, such as biometrics and e-passports, and security threat assessments to expedite the screening and processing of international travelers, including United States Citizens and residents, who enter and exit the United States.").

197. *Id.*

198. *Compare id.* (DHS "shall establish...biometrics...to expedite the screening and processing of international travelers, including United States citizens and residents, who enter and exit the United States."), *with* Aviation and Transportation Security Act § 109(a)(7) (the TSA may use "biometric, or other technologies to prevent a person who might pose a danger to air safety or security from boarding the aircraft.").

authorized.[199] If the TSA had already been given complete discretion to implement FRT screening of all travelers, this later provision in the Reauthorization Act would seem unnecessary.[200]

Still, the TSA would have some counterarguments. It could argue that the historical context that led to the enactment of the ATSA supports a broad interpretation of their authority.[201] A court could agree, given that the ATSA was passed immediately after September 11, and find that a catch-all provision would have been understood as delegating broad authority when enacted.[202] Additionally, in the Intelligence Reform and Terrorism Prevention Act of 2004, Congress authorized appropriations to the TSA for the "research and development of advanced biometric technology applications to aviation security, including mass identification technology."[203] While there was nothing in that law that explicitly authorized that technology to be implemented on such a massive scale, it does seem to imply a congressional desire to expand biometric screenings within airports.[204] If a court were to find these arguments persuasive, it may uphold the TSA's broad interpretation of Section 109(a)(7).[205]

Ultimately, there are several legitimate reasons for a court utilizing these tools of statutory interpretation to invalidate the TSA's FRT plan, and it would certainly be more likely to do this than under a traditional *Chevron* analysis.[206] That being so, the strongest ground that a court could rely on to invalidate the TSA's FRT plan is likely the major questions doctrine.[207] Both approaches, if successful, would prevent the agency from being able to re-implement it, while a

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199. Federal Aviation Administration Reauthorization Act of 2018, 6 U.S.C. §§ 1118(b), (c)(1).

200. *See id.* § 1118(b).

201. On the other hand, there are some legitimate arguments that a court should go the other way, too. The ATSA was passed in the aftermath of September 11, the largest terror attack in American history, with the intent of giving the TSA broad authority to oversee airport safety and keep flyers safe. *See Text: President Bush Signs Aviation Security Bill*, *supra* note 29.

202. *See* SCALIA & GARNER, *supra* note 190, at 33; Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984).

203. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-45, § 4011(b), 118 Stat. 3638 (2004) (codified as amended at 49 U.S.C. § 44903).

204. *See id.*

205. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, § 109(a)(7), 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 114); *Chevron*, 467 U.S. at 843–45.

206. *Compare Chevron*, 467 U.S. at 843–45 (giving deference to an agency's interpretation of an ambiguous statute), *with* Aviation and Transportation Security Act § 109(a)(7) (where the text of the statute does not clearly apply to all passengers).

207. *See generally* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 724 (2022)

procedural challenge under the APA would do more to delay, rather than stop, the program.[208]

V. WHY CONGRESS SHOULD STILL ACT

Although the discussion thus far suggests that the TSA's current interpretation of its authority would be vulnerable if challenged, there is still no guarantee that the TSA's FRT program will be challenged in court. Regardless of any hypothetical judicial action or outcome, there is a guaranteed way for the TSA's FRT plan to be immediately invalidated: Congress.

Congressional input regarding FRT adoption is urgently needed. To date, Congress has passed no laws that explicitly govern the use of FRT by federal agencies.[209] In light of this legislative vacuum, agencies have wielded unchecked control over whether, how, and when to use FRT.[210] This is unlikely to change without intervention from the judiciary, but Congress should not wait for those hypothetical legal challenges to work their way through the court system. The surest way to prevent any agency's FRT plans from violating the privacy interests of US citizens would be legislation.[211] Congress should do this by passing a law that either bans the TSA's use of FRT altogether or creates explicit limits for its use.

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208. *See* Elec. Priv. Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 4 (D.C. Cir. 2011).

209. FINKLEA ET AL., *supra* note 4, at 15.

210. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-518, FACIAL RECOGNITION TECHNOLOGY: FEDERAL LAW ENFORCEMENT AGENCIES SHOULD BETTER ASSESS PRIVACY AND OTHER RISKS, 2 (2021); U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105607, FACIAL RECOGNITION SERVICES: FEDERAL LAW ENFORCEMENT AGENCIES SHOULD TAKE ACTIONS TO IMPLEMENT TRAINING, AND POLICIES FOR CIVIL LIBERTIES, 2 (2023).

211. *See* Traveler Privacy Protection Act of 2023, S. 3361, 118th Cong. (2023).

A. Current Efforts

Lawmakers have already taken steps to regulate or ban the use of FRT by federal agencies and some have even proposed bills aimed at the TSA's FRT plan.[212] In March 2023, Senator Ed Markey and several other lawmakers cosponsored a bill to ban the use of FRT by any federal agency without explicit authorization from Congress.[213] That same month, five senators signed onto a letter to TSA Chief Administrator David Pekoske urging the TSA to halt the implementation of its FRT rollout and to respond to specific questions they had about the accuracy of the technology and the procedures the agency had put in place to protect peoples' rights.[214]

Most recently, in November 2023, Senators Merkley and Kennedy introduced a bipartisan bill, the Traveler Privacy Protection Act of 2023, that would prohibit the TSA from using FRT without clear congressional approval.[215] The Act, if passed, would bring an immediate end to the TSA's FRT program and would require the TSA to dispose of any facial biometric information or images collected so far within ninety days of its enactment.[216] So far, the proposed bills have not garnered much momentum,[217] and the TSA Administrator has offered no response to lawmakers' concerns; instead, the agency has only continued to progress, seemingly undeterred, with its FRT rollout.[218]

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212. *Id.*

213. *See* Press Release, Ed Markey, U.S. Sen. For Mass., Markey, Merkley, Jayapal Lead Colleagues on Legislation to Ban Government Use of Facial Recognition and Other Biometric Technology, OFF. SEN. ED MARKEY (Mar. 7, 2023), https://www.markey.senate.gov/news/press-releases/markey-merkley-jayapal-lead-colleagues-on-legislation-to-ban-government-use-of-facial-recognition-and-other-biometric-technology [perma.cc/ZEJ4-4S59].

214. Letter from Jeffrey A. Merkley, Cory A. Booker, Bernard Sanders, Edward J. Markey & Elizabeth Warren, U.S. Senators, to David Pekoske, Administrator, Transp. Sec. Admin. (Feb. 9, 2023), https://www.merkley.senate.gov/wp-content/uploads/imo/media/doc/tsa_facial_recognition_technology_letter.pdf [perma.cc/N4R5-YL4M].

215. Traveler Privacy Protection Act of 2023, S. 3361, 118th Cong. (2023).

216. *Id.*

217. *Id.* Currently, the Senate has only taken one action on this bill. *See S. 3361 – Traveler Privacy Protection Act of 2023*, CONGRESS.GOV, https://www.congress.gov/bill/118th-congress/senate-bill/3361/all-actions [https://perma.cc/ZPR5-R6NV] (last visited Mar. 22, 2024).

218. In April 2023, the TSA awarded a $128 million contract to the FRT company Idemia to further expand the FRT screening program at airports across the country. Matt Berg, *The Possibly-Unstoppable March of Facial Recognition*, POLITICO (May 17, 2023, 4:05 PM), https://www.politico.com/newsletters/digital-future-daily/2023/05/17/the-possibly-unstoppable-march-of-facial-recognition-00097476 [perma.cc/F6G9-DW5X].

B. Moving Forward

The efforts by these lawmakers reveal that Congress has some appetite to respond to the growing concerns about the TSA's and other agencies' use of FRT. It is worth considering which kind of legislative proposal would provide the best way forward. While a total ban on FRT would be the surest way of preventing the government from abusing the technology, Congress could also promulgate explicit guideposts to instruct FRT use and prevent abuse, while also preserving the benefits the technology can offer.

Although banning federal use of FRT would prevent the government from using the technology to violate peoples' civil liberties, it also sacrifices the benefits the technology could offer.[219] Regarding the TSA in particular, however, it is not actually clear how much the implementation of FRT benefits the agency's mission.[220] Although the TSA "works closely with the intelligence and law enforcement communities to share information,"[221] it is not their job to find and arrest criminals;[222] TSA agents do not have the authority to make arrests.[223] Rather, the TSA has a much simpler task: its job is to safeguard airline passengers.[224] The TSA argues that FRT "represents a significant security enhancement and improves traveler convenience" by increasing "operational efficiency."[225] Given the TSA's limited mission, however, it appears efficiency is the agency's strongest justification—and efficiency is not its primary objective.[226] Therefore, even if the TSA's justifications prove to be factually true, it is not clear that the benefits of FRT are so significant that they are worth the risk.

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219. *See* Sheldon H. Jacobson, *The Future of Airport Security Is Facial Recognition*, HILL (Nov. 9, 2023, 11:30 AM), https://thehill.com/opinion/technology/4301825-the-future-of-airport-security-is-facial-recognition/ [perma.cc/XS37-H9D2].

220. *See Mission*, TRANS. SEC. ADMIN., https://www.tsa.gov/about/tsa-mission [perma.cc/B3JV-ZUVA] (last visited Feb. 10, 2024).

221. *Security Screening*, *supra* note 25.

222. *Know Your Rights: Enforcement at the Airport*, ACLU, https://www.aclu.org/know-your-rights/what-do-when-encountering-law-enforcement-airports-and-other-ports-entry-us#:~:text=TSA%20screeners%20can%20search%20you,police%2C%20are%20present%20at%20airports [perma.cc/B6YL-AJMP] (last visited Dec. 14, 2023).

223. *Id.*

224. *See Mission*, *supra* note 220. While the TSA does check IDs at its security checkpoints, this mainly serves to confirm the identity of the traveler, and to ensure they are the same person who bought the ticket, not to ensure that they are not a criminal. *See Acceptable Identification at the TSA Checkpoint*, TRANSP. SEC. ADMIN. (last visited Feb. 10, 2024), https://www.tsa.gov/travel/security-screening/identification [perma.cc/7A28-TBVH].

225. *See Facial Recognition Technology*, *supra* note 1.

226. *See* Van Cleave, *supra* note 1.

In the end, however, it may not be politically feasible to pass a total ban.[227] But, even if lawmakers are not convinced that banning TSA's use of FRT is appropriate, there are other measures they should take to ensure that the privacy interests and civil liberties of airline passengers are protected. Congress should, at the very least, establish guideposts for how the TSA may collect, use, and store biometric information obtained through FRT.[228] Congress should require that the TSA's FRT program remain voluntary and that the biometric information collected by the TSA be deleted within a specified period of time.[229] Moreover, Congress should establish appropriate auditing procedures to monitor the implementation of the program.[230] While a total ban of FRT would guarantee that the agency does not abuse travelers' civil liberties, Congress should, at a minimum, provide these restrictive limits to guarantee that the TSA does not use the technology in a way that inappropriately infringes on peoples' privacy.[231]

VI. CONCLUSION

The TSA was created to address the airline passenger security vulnerabilities exposed by the September 11 terrorist attacks.[232] In establishing the agency, air travel in the United States was forever changed.[233] Despite its legitimate purpose of ensuring passenger safety, the TSA was not given unlimited power to conduct screenings however they see fit.[234] Accordingly, the TSA's current FRT plan goes too far, exceeding the agency's authorization and endangering the privacy and civil liberties of airport travelers by collecting biometric data on an unprecedented scale.[235] This plan is an inappropriate exercise of the TSA's power that goes beyond the scope of the agency's statutory authority. Given the evolving state of *Chevron* deference, it appears

227. *See* Jacobson, *supra* note 220.

228. *See* James Andrew Lewis & William Crumpler, *Facial Recognition Technology: Responsible Use Principles and the Legislative Landscape*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 29, 2021), https://www.csis.org/analysis/facial-recognition-technology-responsible-use-principles-and-legislative-landscape [perma.cc/QBF3-JSFY]; FINKLEA ET AL., *supra* note 4.

229. *See* Lewis & Crumpler, *supra* note 228.

230. *See id.*

231. *See id.*

232. *See TSA History*, TRANSP. SEC. ADMIN., https://www.tsa.gov/history [perma.cc/T38Z-BBKW] (last visited Feb. 4, 2024).

233. Gerace, *supra* note 26.

234. *See* Aviation and Transportation Security Act §109(a)(7), 49 U.S.C. § 114 (2001); *Text: President Bush Signs Aviation Security Bill*, *supra* note 29; *see also* King v. Burwell, 576 U.S. 473, 474 (2015); West Virginia v. Env't Prot. Agency, 597 U.S. 697, 706–35 (2022).

235. *See* Lewis & Crumpler, *supra* note 228.

likely that the program could be judicially invalidated if challenged. Yet, in the absence of such litigation, the best way to ensure the TSA does not use FRT to abuse the civil liberties and privacy interests of travelers is for Congress to act. Congress should thus either ban the TSA's use of FRT or limit its use to prevent abuse. Some legislators have already expressed a willingness to take action on this issue.[236] They should follow through—and do so sooner rather than later.

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236. *See* Traveler Privacy Protection Act of 2023, S. 3361, 118th Cong. (2023).

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