No. 18-1209

In The
Supreme Court of the United States

NICHOLAS J. BONACCI,

Petitioner,

v.

TRANSPORTATION SECURITY ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents an ideal vehicle for this Court to examine judicial deference models such as *Chevron*, and the ability to reconcile them with Sec. 706 of the Administrative Procedures Act (APA). Unlike Sec. 706 of the APA, which is law, judicial deference models are products of the judiciary, and the subject of scorn in the administrative law realm, and recently the Congress.

Moreover, a lack of any uniform framework to trigger *Chevron*, or other deference models has created a judicial no man's land for litigants such as Bonacci. Unlike currently pending cases, which only glance the growing tension, *Bonacci* directly confronts the lack of due process accorded aggrieved parties in administrative law matters, thereby sparing this Court yet again fitful examination.

Bonacci respectfully presents these questions for examination by this Court:

1. Whether Sec. 706 of the APA is compatible with *Chevron*, or other deference models when a Court is faced with a significant question of statutory law.
2. Whether a *de novo*, or *stare decisis* review standard is better suited for statutory law cases than judicial deference models.
3. Whether this Court is better apt to address due process concerns of *Chevron* deference than the Congress.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicholas J. Bonacci respectfully petitions for a writ of certiorari to review the judgment from the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The Court of Appeals panel opinion is reproduced at (App. *infra*, A1-A14). The order of the Court of Appeals denying panel rehearing, and rehearing en banc is reproduced at (App. *infra*, A15-A16).

JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 2018. A petition for rehearing was denied on January 16, 2019. This Court's jurisdiction rests on 28 U.S.C. §1254(1). Likewise, 49 U.S.C. §46110(e) grants separate statutory authority for judicial review from this Court.

STATUTORY LAW AND REGULATIONS INVOLVED

5 U.S.C. §702. – Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning

of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein

(1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or

(2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. §706. – Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the

terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

49 U.S.C. §114. – Transportation Security Administration

(a) In General. –

The Transportation Security Administration shall be an administration of the Department of Homeland Security.

(b) Leadership. –

(1) Head of transportation security administration. –

(A) Appointment. –

The head of the Administration shall be the Administrator of the Transportation Security Administration (referred to in this section as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate.

* * *

(f) Additional Duties and Powers. – In addition to carrying out the functions specified in subsections (d) and (e), the Administrator shall –

(1) receive, assess, and distribute intelligence information related to transportation security;

(2) assess threats to transportation;

(3) develop policies, strategies, and plans for dealing with threats to transportation security;

(4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government;

(5) serve as the primary liaison for transportation security to the intelligence and law enforcement communities;

(6) on a day-to-day basis, manage and provide operational guidance to the field security resources of the Administration, including Federal Security Managers as provided by section 44933;

(7) enforce security-related regulations and requirements;

(8) identify and undertake research and development activities necessary to enhance transportation security;

(9) inspect, maintain, and test security facilities, equipment, and systems;

(10) ensure the adequacy of security measures for the transportation of cargo;

(11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities;

(12) require background checks for airport security screening personnel, individuals with access to secure areas of airports, and other transportation security personnel;

(13) work in conjunction with the Administrator of the Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations;

(14) work with the International Civil Aviation Organization and appropriate aeronautic authorities of foreign governments under section 44907 to address security concerns on passenger flights by foreign air carriers in foreign air transportation;

(15) establish and maintain a National Deployment Office as required under section 44948 of this title; and

(16) carry out such other duties, and exercise such other powers, relating to transportation security as the Administrator considers appropriate, to the extent authorized by law.

49 U.S.C. §44901. – Screening passengers and property

(a) In General. –

The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation.

49 U.S.C. §46110. – Judicial review

(a) Filing and Venue. –

Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

* * *

(e) Supreme Court Review. –

A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

49 CFR §1520.5. – Sensitive security information

(a) In general. In accordance with 49 U.S.C 114(s), SSI is information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would –

(1) Constitute an unwarranted invasion of privacy (including, but not limited to, information contained in any personnel, medical, or similar file);

(2) Reveal trade secrets or privileged or confidential information obtained from any person; or

(3) Be detrimental to the security of transportation.

(b) Information constituting SSI. Except as otherwise provided in writing by TSA in the interest of public safety or in furtherance of transportation security, the following information, and records containing such information, constitute SSI:

(1) Security programs and contingency plans. Any security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including any comments, instructions, or implementing guidance, including –

(i) Any aircraft operator, airport operator, fixed base operator, or air cargo security program, or security contingency plan under this chapter;

(ii) Any vessel, maritime facility, or port area security plan required or directed under Federal law;

(iii) Any national or area security plan prepared under 46 U.S.C. 70103; and

(iv) Any security incident response plan established under 46 U.S.C. 70104.

(2) Security Directives. Any Security Directive or order –

(i) Issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority;

(ii) Issued by the Coast Guard under the Maritime Transportation Security Act, 33 CFR part 6, or 33 U.S.C. 1221 et seq. related to maritime security; or

(iii) Any comments, instructions, and implementing guidance pertaining thereto.

(3) Information Circulars. Any notice issued by DHS or DOT regarding a threat to aviation or maritime transportation, including any –

(i) Information circular issued by TSA under 49 CFR 1542.303, 1544.305, 1548.19, or other authority; and

(9) Security screening information. The following information regarding security screening under aviation or maritime transportation security requirements of Federal law:

(i) Any procedures, including selection criteria and any comments, instructions, and

implementing guidance pertaining thereto, for screening of persons, accessible property, checked baggage, U.S. mail, stores, and cargo, that is conducted by the Federal government or any other authorized person.

(ii) Information and sources of information used by a passenger or property screening program or system, including an automated screening system.

(iii) Detailed information about the locations at which particular screening methods or equipment are used, only if determined by TSA to be SSI.

STATEMENT

I. Congressional History and Statutory Background

Shortly after the terrorist attacks of September 11, 2001, the 107th Congress enacted the Aviation and Transportation Security Act (ATSA), or hereinafter "the Act" (Public Law 107-71) which created the Transportation Security Administration (TSA). The Act provided the newly formed agency with broad statutory rights, and authority to ensure transportation security for aviation, railroad, ferry, highway, maritime, pipeline, public transportation, over-the-road bus, and other transportation infrastructure assets.

The 107th Congress undertook this historical law making in reaction to the attacks while a nation was

still coming to grips with the horrific attacks. Consequently, a proposed House version (October 2001) drafted would have required screening of any person, including airport personnel and vendors, accomplished by the Justice Department prior to entering any secure area of an airport and read as follows:

> §44901. Screening passengers, individuals with access to secure areas, and property.
>
> (a) IN GENERAL. – The Attorney General, in consultation with the Secretary of Transportation, shall provide for the screening of all passengers, and property, including checked baggage, and other articles that will be carried aboard an aircraft * * * * The Attorney General in consultation with the Secretary, shall provide for the screening of all persons, including airport, and airport concessionaire employees, before they are allowed into the sterile or secure areas of the airport. . . .

Later, after differences were reconciled between the House and Senate versions, an enrolled final bill (S1447 November 16, 2001) included a significant statutory reversion. The 107th Congress mandated background checks for "airline employees," presumably after "cooler heads" prevailed by fashioning forward-looking policies, and law to transcend the moment.

Albeit, the trail "runs cold" from the October 2001 timeframe when S1447 reemerges in November 2001. The congressional record, and final law memorialize a

Congress that had envisioned new technologies to foster future enhancements, and innovations to aviation security for the coming generations. Hence, an agreement realized between the two chambers resulted in an unambiguous, and plainly worded statute. The Congressional record further amplifies this bicameral resolution in a conference report referred to on the Senate floor during Senate debate.

November 16, 2001 S11981: Remarks of then Senator Kohl (WI) prior to the final-enrolled bill, being enacted:

> Mr. KOHL: " . . . I am also pleased that all who have access to aircrafts [*sic*] will be required to pass a background check. We have reached this very important agreement and now these new regulations and safety standards must be implemented fairly and consistently.
>
> Again, I congratulate Chairman HOLLINGS and Senator McCAIN on their leadership on this issue and strongly support this conference report."

Thus, in November 2001, a revised version of the bill (which is the current law in force) as contained within the Senate Conference Report SEC. 110. SCREENING read as follows:

> 49 U.S.C. §44901. – Screening passengers and property
>
> (a) In General. –

> The Under Secretary of Transportation for Security shall provide for the screening of all passengers and property, including United States mail, cargo, carry-on and checked baggage, and other articles, that will be carried aboard a passenger aircraft operated by an air carrier or foreign air carrier in air transportation or intrastate air transportation.

Likewise included in the final version of the Act was Section 114, which defined the duties of the TSA Administrator, and other key personnel who were to be appointed by the President with the advice and consent of the Senate. Broad powers were granted to the Administrator in order to accomplish the many congressional mandates outlined within the Act. Among the powers granted was the ability to designate many agency actions, or information as "Sensitive Security Information" (SSI). Additionally, the Administrator was granted powers to promulgate "Security Directives" (SD's) which carry the force of law, and would be mostly exempt from the public-notice requirements of the Administrative Procedures Act (APA), but not judicial review.

Notwithstanding, both §114 and §44901 of the Act consist of statutory directives that are expressly delineated to demonstrate the intent of the 107th Congress. The Congress clearly contemplated broad, and sweeping powers to be granted to the newly formed agency. However, Section 114(f)(16) demonstrates that the Congress intended that any delegated powers not be completely unfettered:

> (16) carry out such other duties, and exercise such other powers, relating to transportation security as the Administrator considers appropriate, to the extent authorized by law.

Likewise, within the same Act Section 46110 (a) & (e), the Congress included provisions for judicial review with a specific reference to (§1254 of title 28) which otherwise grants statutory authority of review to this Court. The 107th Congress indeed contemplated such broad, and sweeping powers would at some future date be ripe for Article III judicial review, and as such, clearly memorialized their intent for the Courts to have a role in defining the statutory limits of the TSA as petitioned herein by Bonacci.

II. Background and Proceedings Below

A. Factual Background

Bonacci is currently employed full-time as a pilot for a major airline, and as such is subjected to rules, and policies promulgated by the Transportation Security Administration (TSA). Bonacci's airline is a subscriber to the Known Crewmember Program (KCP), and as such, Bonacci has an airline provided identification badge to participate in the TSA approved, and operated KCP program. The KCP provides any participating airline crewmembers access to the airport secure area, bypassing "passenger screening," after verifying airline credentials, and another government-issued identification.

At the George Bush Intercontinental Airport, Houston Texas, where Bonacci reports for duty, adjacent to the KCP access portal is an employee access door whereby certain other airline employees with appropriate identification media enter the airport secure area. These other airline employees are subject to random inspection by the TSA; however, any such searching is done after the access door, and normally includes the inspection of accessible property, but in no way includes "invasive" or "enhanced" "passenger" screening. At some unknown time, Bonacci, and other crewmembers, were enjoined from further using the aforementioned access door, and compelled to access the airport complex exclusively through the KCP access portal. Because the KCP access portal is located in close proximity to the passenger screening area, the TSA has taken occasion to impose "passenger screening" measures on Bonacci, and other crewmembers, but not other airline employees.

From time to time, when reporting for duty at the KCP access portal Bonacci, and other crewmembers, may be selected for "passenger screening" by a randomly generated arrow displayed on an electronic tablet. Bonacci, and other crewmembers, are compelled to touch the screen of the device in order to determine whether they will be subjected to "passenger screening" measures. Bonacci, or any other crewmember, must then promptly submit to such screening under threat of some manner of discipline or consequences to be meted out by the TSA.

B. Historical Background

Thus, on or about March 2, 2017, the TSA announced publicly an "agency action" in the mainstream press, which proposed "more invasive" searching measures including new "pat down" procedures.[1] According to TSA Public Affairs Manager, Nico Mendez "[t]his change was the result of an in-depth study completed by the TSA after a classified DHS-OIG in 2015." The study criticized amongst other things TSA screening procedures, and "managed inclusion" programs. TSA spokesman Mendez further stated: "'[T]he new policy also applies to airline pilots, and flight attendants, classified as "known crewmembers" who generally receive less scrutiny at checkpoints.'"

The March 2017 public announcement was not the first attempt by the TSA to conduct "enhanced" or "invasive" "pat down" "passenger screening" searches of airline crewmembers. In the fall of 2010, the TSA proposed such searches for airline crewmembers in concert with the newly proposed Advanced Imaging Technology (AIT). The TSA's proposal raised considerable outcry from various airline crewmember organizations; accordingly, it was at this time when Bonacci first contemplated a Petition for Review within the United States Court of Appeals for the District of Columbia (the "D.C. Circuit") ("the Court below").

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[1] App. *infra*, A17-A19, *U.S. Airport Pat-Downs Are About to Get More Invasive. The TSA reacts to a study that found weapons making it past security*, Bloomberg LP, By Justin Bachman, March 3, 2017.

Bonacci first contacted the TSA with the assistance of Congressman K. Brady of Texas in the fall of 2010.[2] Bonacci had intended to use the agency response to formulate a petition that would have included an acknowledgment from the agency to conduct unlawful searching. However, after last-minute discussion between then, Airline Pilot's Association (ALPA) President Captain John Prater, then Department of Homeland Security (DHS) Secretary Janet Napolitano and then TSA Administrator, John Pistole; the policy was amended to exclude airline pilots from "enhanced" or "invasive" pat down searches as originally proposed.[3] Consequently, this "announcement," would have effectively rendered any efforts by Bonacci to seek judicial review moot. Nonetheless, despite this policy shift from two different administrative agency leaders, certain forces within the TSA continued an illicit quest to conduct "enhanced" or "invasive" pat down searches on airline crewmembers, and not other airline employees.

In 2012, the TSA launched the KCP in an industry partnership. Since its inception, the KCP program has been widely hailed as a success, and has been recognized by the Congress for its successful expedited access of a "low risk" population, therefore permitting the

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[2] App. *infra*, A20-A22, TSA Letter to Congressman K. Brady (TX), December 2010.

[3] App. *infra*, A23-A25, *ALPA Scores Two Big Wins on Security Screening of Pilots*, Air Line Pilot Magazine, December 2010.

TSA to better focus limited resources on unknown fliers.

C. Summary of the Proceedings Below

In March 2017, Bonacci became aware of a TSA announcement to conduct "enhanced" or "invasive" pat down "passenger screening" of crewmembers.[4] On April 11, 2017, Bonacci filed a Petition for Review in the D.C. Circuit. Shortly thereafter, Bonacci moved the D.C. Circuit for a stay pending review. The stay was subsequently denied on September 28, 2017.

Bonacci did not, nor was he able to, include an Agency Order as customarily done with such petitions as the "agency action" was deemed to be SSI[5] by the Administrator of the TSA. Nonetheless, Bonacci was granted review, but to date has not seen the "agency action" which was the underlying cause of action for the Petition for Review.

In the summer of 2017, the D.C. Circuit ordered the TSA to release, and redact certain documents explaining the motivation behind the agency's decision to conduct "enhanced" or "invasive" pat down "passenger screening" of crewmembers. Many of the documents were shocking, detailing "insider" threats that the TSA feared could only be mitigated by conducting "random

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[4] Ibid. App. *Bloomberg*.

[5] 49 CFR §1520.5 – Sensitive security information.

security measures" on Bonacci, and others with unescorted access.

Bonacci's argument before the D.C. Circuit focused solely on a statutory interpretation of 49 U.S.C. §44901, which provides for screening of "passenger" and not "airline employees." The TSA sidestepped the issue, instead urging the Court to consider the urgency of such screening measures to preclude an imminent threat posed by persons with "insider access." Despite obvious flawed logic in the TSA's announcement identifying TSA agency inadequacies at the security screening checkpoint, and accounting of privileged access – the TSA argued its "expert judgment" necessitated "passenger screening" measures on Bonacci, and other airline crewmembers. The TSA, within a voluminous appendix, cited specific instances whereby persons with insider access were "running guns," or used alternate access entry point to bring firearms into the secure area. The TSA even suggested that Bonacci (and other crewmembers) could "self-radicalize," and present an undue threat to commercial aviation.

Despite the latter scurrilous revelation, Bonacci's justiciable claim for relief was not to question the necessity, or wisdom of such searching, only the lawfulness. Thus, only when the TSA provided a Reply Brief to the D.C. Circuit in 2018 was the central issue of statutory authority finally addressed. The TSA cited §114 of the Act as the legal basis, which empowered the agency to conduct "passenger screening" of Bonacci, and other "airline employees."

However, a second, and more aggressive prong of the TSA's argument was to attack Bonacci's right to challenge the "agency action" of March 2017. The TSA argued the petition was neither timely, nor that Bonacci enjoyed standing as a person with a "substantial interest."

In September 2018, the TSA moved the D.C. Circuit to hold arguments *ex parte*, citing a need to divulge SSI before the Court. Despite such efforts, the arguments were publicly held with the issues of standing, and timeliness of the petition dominating the arguments. The TSA asserted that concurrent with the inception of the Known Crewmember Program (KCP) in 2012, an announcement was made satisfying the requirements to begin a 60-day statutory countdown for the purposes of judicial review. This argument, however, was rejected by the D.C. Circuit, and was not supported by the record.

In December 2018, the D.C. Circuit held that Bonacci enjoyed proper standing. Although in what proved to be a surprise, the D.C. Circuit held the statutory law question posed by Bonacci was resolved by the broad powers granted the TSA administrator in §114 of the Act. Consequently, the D.C. Circuit never even examined §44901 of the Act, leaving unanswered the larger question of statutory interpretation for which Bonacci had originally petitioned the Court in April 2017.

REASONS FOR GRANTING THE PETITION

This petition alerts this Court to an obvious juridical drift in the examination of statutory law matters in favor of administrative agencies as occurred in *Bonacci*. This Court has recently warned of "reflective deference," while urging "reconsideration" of the *Chevron*[6] doctrine. This recent revelation reflects a growing consensus that at a minimum, this Court should, in fact, reconsider any usefulness of *Chevron* in the contemporary administrative law domain. Some noted scholars have posited a new approach dubbed the "*Chevron* Domain."[7]

There seems to be a scholarly consensus that a degree of caution[8] may be prudent before lashing out against seemingly obvious targets such as *Chevron* and *Auer*.[9] Accordingly, Bonacci petitions this Court fully cognizant that the complex issues relating to judicial deference models before this Court may, in fact, not be so "cut and dry" as some have suggested. Indeed,

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[6] *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

[7] Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, Georgetown Law Journal, Vol. 89, No. 4, 833, Last Revised July 24, 2013.

[8] Bonacci cites Vermeule to demonstrate even the latest scholarly thought advises "caution" as a growing consensus emerges that this Court is ready to revisit judicial deference doctrines. Professor Vermeule, *Symposium: Tampering with the structure of administrative law*, SCOTUSblog, January 29, 2019.

[9] *Auer v. Robbins*, 519 U.S. 452 (1997).

others (including a sitting justice of this Court[10]) have stated that circumstances may not so handily be resolved with an overly simplified, or uniform approach to all cases of statutory law interpretation. As illustrated by Professor Molot[11]:

> "[T]he conceptual space between specific interpretations and general methodologies is where we find the rules of engagement for judicial review of administrative interpretations."

Nonetheless, Bonacci is able to relate of certain in the instant proceeding of unbounded agency lawlessness, which left untouched by this Court, would bolster other scofflaw agencies. This Court should find ample motivation to overturn *Bonacci* from the Court below, if for no other reason than to signal those agencies lying in wait who may wish to seize upon any confusion with judicial guidance wanting. Here again, with the potentially obvious focus on *Chevron*, the manifest misapplication of law in *Bonacci* could easily be overlooked, and by doing so an even worse state of affairs could exacerbate the current untenable state of judicial deference.

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[10] Associate Justice Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*, Vintage books, December 2007.

[11] Jonathan Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, Stanford Law Review, Vol. 53, No. 1 (Oct. 2000).

I. The TSA Agency Action Carries the Force of Law

Bonacci would show the "agency action" promulgated by the TSA on or about March 2017 does indeed carry the "force of law," with such authority derived from the Act. Accordingly, the "agency action" would be "fair game" to deploy *Chevron*. The *Chrysler* Court[12] in 1979 held for a regulation to have the "force and effect" of law * * * it must be a "substantive" or "legislative" rule * * * affecting [i]ndividual rights and [o]bligations.

Thus, absent any "reasonable" interpretation of Congressional validity, the TSA has imposed – under threat of consequences – a far flung reading of law denying Bonacci a presumed right of refusal to undergo "passenger screening" using a grotesque perversion of judicial decree from the 9th Circuit in *Aukui*.[13,14]

Professor Sunstein describing the "force of law" test as "circular" writes:[15]

> All of the relevant work is being done by an inquiry into congressional intentions, which are typically elicited by an examination of whether the agency has been given the authority to use certain procedures. Second, an

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[12] *Chrysler Corp. v. Brown*, 441 U.S. 28 (1979).

[13] *United States v. Aukui*, 497 F.3d 955 (9th Cir. 2007).

[14] App. *infra*, A34, *ALPA Scores Two Big Wins on Security Screening of Pilots*, Air Line Pilot Magazine, December 2010.

[15] *Chevron Zero*, Cass R. Sunstein, "Chevron Step Zero," 92 Virginia Law Review 187 (2006).

> agency decision may be taken to have the "force of law" when it is binding on private parties in the sense that those who act in violation of the decision face immediate sanctions.

This Court recently reaffirmed this elusive issue in *Perez*.[16] Notwithstanding, Bonacci was due some manner of judicial review as contemplated by the Congress in both Sec. 706[17] and 49 U.S.C. §46110.[18] However, Bonacci's justiciable claim was completely ignored by the Court below, which quite frankly failed miserably to exercise a ministerial duty as the sole competent authority to review the statutory law underlying the original petition. The Court below even went so far as to say:

> "[W]e need not delineate the precise scope of the authority granted by these statutes.[19]"

Bonacci would submit this to be an over-the-top example of "reflective agency" deference.[20] An unacceptable standard highlighted in a recent Dissenting Opinion in *Arlington*[21]:

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[16] *Perez v. Mortgage Banker Ass'n*, 575 U.S. ___ (2015).

[17] Administrative Procedures Act, 5 U.S.C. §701-706.

[18] 49 U.S.C. §46110 – Judicial review.

[19] App. *infra*, A12, Panel Opinion, *Bonacci v. TSA*, D.C. Circuit Court of Appeals.

[20] Retired Justice Kennedy, *Pereira v. Sessions*, 585 U.S. ___ (2018).

[21] *Arlington v. Fed. Commc'n*, 569 U.S. 290 (2013), Dissenting Opinion Chief Justice Roberts with whom Justices Kennedy and Alito joined.

> "[A] court should not defer to an agency until the court decides * * * [C]ourts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency."

Post-judgment analysis from the Court below shows Bonacci urged a *Chevron*[22] step one analysis, while the TSA, though not directly, in effect requested step two analysis suggesting deference to the agency's "expert judgment." Although in the end, Bonacci was left 'standing at the altar' as the Court on the fly held: "[a]pplying this deferential standard of review,"[23] referring to the TSA's "informed judgment." This manner of review suggests deference is automatic, or even worse somehow obliged in such circumstances.

The Court below manifestly confuses "second guessing"[24] an agency(s) with the unique judicial charge to review, and interpret statutory law from time to time when posed a significant question of statutory law. "Reflective deference" has somehow spiraled out-of-control somehow to be settled upon as the standard norm;

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[22] *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[23] App. *infra*, A13, Panel Opinion, *Bonacci v. TSA*, D.C. Circuit Court of Appeals.

[24] Id. at 13.

therefore, with such reasoning, no party would be entitled to judicial review. Consequently, with *Bonacci* this Court has a unique, and timely, occasion to "stop this train." *Chevron* was never intended to "rubber stamp" agency actions, but to merely provide a reasonable means for judicial deference with fitting circumstances.

This Court, since the advent of *Chevron*, has sedulously held "how" to deploy *Chevron*, but not "when." The majority opinion in *Arlington* reaffirmed the time-honored *Chevron* doctrine yet again:

> "[A]s this case turns on the scope of the doctrine enshrined in Chevron, we begin with a description of that case's now-canonical formulation. "When a court reviews an agency's construction of the statute which it administers * * * [F]irst, applying the ordinary tools of statutory construction, the court must determine "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."

Perhaps, it is high time for this Court to take a comprehensive review of judicial deference models after generations of non-uniform application. Bonacci would direct this Court to the exhaustive, and highly authoritative study of Professors Eskridge and Baer

from the *Continuum of Deference*.[25] This insightful, and meaningful study is "eye opening," and at the very least demonstrates that judicial deference models are "all over the place." The dearth of any workable, or consistent methodologies has created a bazaar of "self help" remedies proffered eagerly by administrative law scholars covering the gamut – and some quite noteworthy.

Professor Starkey[26] has raised the prospects of what she calls the *Chevron-State Farm* framework. As the name suggests a hybrid version of days bygone where a more "robust" analysis of the arbitrary, and capricious standards would be reactivated. Professor Sharkey suggests a third step to *Chevron* analysis in lieu of "jettisoning" *Chevron* altogether.

Another scholarly suggestion is a "return to *Skidmore*;[27]" a worthy consideration should this Court find *Chevron* inoperative. A robust *Skidmore* approach to statutory interpretations arguably an impediment to "reflective deference;" nonetheless, the thorny issue of judicial deference persists, albeit somewhat

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[25] Professors William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, Yale Law School, 2018.

[26] Catherine M. Sharkey, *The Chevron-State Farm Framework: A New Age for Hard Look at Step Two*, Harvard Law Review Blog, January 2018.

[27] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

"repackaged," and perhaps less repugnant to those seething over abdication of Article III powers.

II. Section 706 is Law and What Congress Intended

Prior to *Chevron*, it was more wonted for a reviewing Court to apply an arbitrary or capricious test when faced with questions of statutory interpretations. Most scholars demark this epoch with *State Farm*[28] and *Overton Park*,[29] serving as milestones before the *Chevron* Doctrine upended previous methodologies. For example, the "hard look" doctrine, a judicial instrument pre-dating *Chevron*, has mostly fallen by the wayside.

Since the 1970's, numerous agencies have generated innumerable agency actions, while the federal courts with limited resources, are able only to adapt when cases present challenging the validity of such agency actions. Accordingly, the current row over deference may in fact not be wholly attributable to *Chevron*, but more owing to some manner of "judicial Darwinism" as federal courts (and the Congress) attempt to keep pace with unfettered growth in administrative agencies, and endless promulgations therefrom.

Chevron was viewed as a victory in the 1980's for an administration seeking less restraint to cutback agency rules; however, subsequent administrations

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[28] *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual*, 483 U.S. 29 (1983).

[29] *Citizen to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

have used the same deference doctrines to expand agency rules, and mandates. This has effectively created a juridical wasteland in which neither the Congress, nor litigants can fairly appraise the domain of the federal courts.

This Court has reconciled *Chevron* with Sec. 706 previously, but in doing so again, this Court should undertake a whole-hearted, and comprehensive review. To that end, Bonacci would cite again the useful insight of Merrill and Hickman to describe the present day situation:

> "[T]he Courts have paid little attention to the problem of defining the scope of the *Chevron* doctrine. [T]he Chevron doctrine has solidified, and as government lawyers have relentlessly push for Chevron deference in new contexts, disputes have inevitably erupted over what kinds of statutes, and what kinds of agency action trigger this strong deference[30]"

III. Interpreters of the Law Ought to be Faithful Agents to the Lawmakers

Thus, at issue in the instant proceeding is plainly worded law that Bonacci maintains is unambiguous, and clearly states the intent of the 107th Congress. This Court has before attempted to grapple with interpretative canon over time, and applied the *ejusdem generis* doctrine when faced with similar questions of

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[30] Ibid. Merrill & Hickman.

statutory interpretation.[31] Irrespective of the methodology used, Bonacci is perplexed how any reasonable reading could conclude otherwise: screening "airline employees" as "passengers" is an *ultra vires* agency act entirely contrary to the letter of law, and any congressional intent. Then again, Bonacci holding no illusions ought to consider any statutory law creation, and subsequent interpretation fallible at best, and moreover, subject to the manifold whims of those judicial agents tasked with interpretation.[32]

Notwithstanding, this Court ought to be able to fashion some manner of predictability, and uniformity with a cardinal predilection to the legislature, who after all created the statute, and like the litigant is owed some manner of rightful deliberation. Bonacci would cite Professor Gluck for the complexities of statutory interpretation[33]:

> "[i]f the text of the statute is clear, deviation from the clear import of the text cannot be justified on the ground that it better promotes fidelity to legislative purpose . . . "

A persuasive argument is made for the so-called "common-sense" approach to statutory construction originally proposed by Blackstone in the *Commentaries of*

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[31] *Circuit City v. Adams*. 532 U.S. 105 (2001).

[32] *N. & W. Ry. v. Train Dispatchers*, 499 U.S. 117 (1991).

[33] Abbe R. Gluck. *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*. The Yale Law Journal. Vol. 119. No. 8. 2010.

the Laws of England.[34] Likewise, a more enduring norm thought to inspire confidence in the laws of the land is the legal axiom: the law is most worthy of approval when it is consonant to reason.[35] Absent such reason, public confidence is potentially sapped; to wit, a legitimate efforts by Bonacci to exercise his rights afforded him by law under Sec. 706 were thwarted by misguided judicial precepts.

The panel opinion from the Court below completely breaks ranks with conventional norms, and canon requiring judicial officers to be "faithful agents" to the legislature. For this worthy consideration, Bonacci would cite Professor Barrett:[36]

> [A] court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent.

Hence, as a judicial deference model the *Chevron* doctrine appears to be fully operative; however, when it comes to everyday practical application, Bonacci would show it be an expired judicial instrument, sorely in need of an update.

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[34] Sir William Blackstone. *Commentaries on the Laws of England*, Originally published by the Clarendon Press at Oxford, 1765-1769.

[35] *Lex plus laudatur quando ratione probatur*.

[36] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, Boston Law Review, Vol. 90:109, 2010.

IV. *Bonacci* Exacerbates an Already Untenable Situation

However, there's an even "bigger elephant" in the room, which ought to give this Court ample concern to overrule *Bonacci*: a judicial "all clear signal" was recently given to scofflaw agencies who seek to meme illicit authority found in *Bonacci* with a seemingly innocuous, or inconsequential favorable agency ruling, thereby opening the floodgates for other like-minded agencies. This ought to strike at the conscious of this Court, and add urgency to this petition, which has happily found its way to this Court.

All the while this juridical vacuum festers, it effectively denies even more litigants due process in the resolution of Section 706 controversies making *Bonacci* worthy of this Court's timely attention.

Bonacci has suffered an institutional insult of *Chevron* being used on a non-uniform basis – while usefully serving some matters – it oftentimes ignores others, thereby effectively denying some aggrieved party's rightful adjudication. Those advocating *de novo* review, such as the Congress, may in fact really be favoring a case-by-case examination, which from the proposed legislation reads in part:

> "[a]nd decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies. Notwithstanding any other provision of law, this subsection shall apply in

> any action for judicial review of agency action authorized under any provision of law.[37]

Nonetheless, any reexamination of *Chevron* should be undertaken with Due Process as the foremost consideration. As Professor Cass[38] stated in a review of Mashaw's *Due Process in the Administrative State*[39]:

> [t]he division between administration and adjudication is artificial, and that application of these categories is far from mechanical. "The determination that a decision is allocable to any particular process model is obviously to construct reality, not to find it. . . ."

V. Bonacci Provides an Excellent Vehicle for This Court to Examine Judicial Deference Head On

The deference controversy is nothing new, and was early identified by the philosophers of law, and founders of the republic. Montesquieu's work on the *Rule of Law* outlines the absolute necessity for the separation of powers – particularly the separation of judicial power from executive and legislative authority.[40] Montesquieu's ideas on separation of powers inspired

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[37] Separation of Powers Restoration Act of 2016 (SOPRA), H.R. 4768 of the 114th Congress.

[38] Ronald A. Cass, Professor of Law, Boston University, Book Review of *Due Process in the Administrative State*.

[39] Jerry Mashaw, *Due Process in the Administrative State*, New Haven, Conn., Yale University Press, 1985.

[40] Montesquieu 1748: Bk. 11, Ch. 6.

the American founders, especially James Madison.[41] Perhaps the essence of the issue is best summarized by the late Justice Billings Learned Hand in his 1911 patent opinion (a tedious read) concerning numerous patent disputes, but ends with this thoughtful idea:

> [I]n Germany * * * [T]he court summons technical judges * * * who can intelligently pass upon the issues without blindly groping among testimony upon matters wholly out of their ken. How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.[42]

Any notion of judicial deference incites contempt from those who cherish a distinct separation of powers between the judiciary, and executive branches. However, Bonacci would suggest the antithesis to be a potentially overbearing judiciary that would be in the unsavory role of running agency(s), for which more often than not, the judicial officers would have little, or no expertise. Thereafter, under such fictitious circumstances, another set of voices may then decry a form of "reverse deference," claiming the executive branch is

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[41] *Federalist Papers*, §47.

[42] *Parke-Davis & Co. v. H. K. Mulford Co.*, Circuit Court, S.D. New York, 189 F. 95, 1911 U.S. App. LEXIS 5245, April 28, 1911, Billings Learned Hand (1872-1961), also *Learned Hand*.

being undermined of its Article II powers by the Courts.

With this perplexing quandary, there may only be one obvious, but regretfully not simply realized, but reasoned approach: balance. Somehow to strike an elusive balance of judicial independence juxtaposed with what this Court may deem in *Bonacci* to be tolerable, yet reasonable deference. Quite simply, the Courts cannot micro-manage the agencies, just like the agencies cannot adjudicate the law. This problem is nothing new, and it may never be solved – but evolved – to contemporary and fitting solutions as agencies, and regulations develop over time.

Bonacci's worthy consideration for this Court would then be: the time and place has come; nonetheless, it is most proper that such resolution come forthwith from this Court, and not the Congress. And any such resolution ought to be lasting, and as well inspirational for the many awaiting meaningful guidance in administrative law jurisprudence. Absent any such resolution, an undesirable *status quo* remains in force, which at the very least contributes to an underlying consternation in the legal mainstream, but worse, the potential for, or the actual wholesale undermining of the rule of plainly-worded law as highlighted in *Bonacci*.

It is simply not reasonable to expect this Court's yester remedies to be good for tomorrow – as new rules, and agencies evolve – or are even created as was the TSA since this Court decreed *Chevron*. Perhaps the

only basis for agreement is that the manifold government agencies, and their multitudinous agency actions have outgrown the various deference doctrines, some dating back to the 1940's. Here again Bonacci would again cite Sunstein:

> "[S]ometimes legal epicycles are necessary to ensure against the arbitrariness introduced by inflexible rules."[43]

This Court is simply not able *sua sponte* to reconsider such profound matters of law, but has over the last few years welcomed (by pronouncement) the opportunity to revisit such grave matters, and perhaps may well do so in this term with such cases as *Bonacci, PDR Networks*[44] and *Kisor*.[45]

This Court has before risen to the occasion in times of tumult, and as such, there really is scant reason to think this Court heedless to the changing administrative law realm today. In that vein, Bonacci avers the situation at hand not to be present day crisis for this Court, but a bona fide opportunity.

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[43] Cass R. Sunstein, *Chevron Step Zero*, University of Chicago Law School, Chicago Unbound, 2006.

[44] *PDR Networks, LLC v. Carlton & Harris Chiropractic, Inc.*, Supreme Court Case No. 17-1705, Certiorari Filed June 21, 2018, Certiorari Granted November 13, 2018, Arguments set for March 25, 2019.

[45] *Kisor v. Wilkie*, Supreme Court Case No. 18-15, Certiorari Filed June 29, 2018, Certiorari Granted December 10, 2018, Arguments set for March 27, 2019.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 2018
Decided December 4, 2018

No. 17-1116.

NICHOLAS J. BONACCI,
PETITIONER

v.

TRANSPORTATION SECURITY ADMINISTRATION,
RESPONDENT

On Petition for Review of Orders of the
Transportation Security Administration

Nicholas J. Bonacci, *pro se*, argued the cause and filed the briefs for petitioner.

Michael Shih, Attorney, U.S. Department of Justice, argued the cause for respondent. With him on the brief were *Jessie K. Liu*, U.S. Attorney, and *Sharon Swingle*, Attorney.

Before: TATEL, *Circuit Judge*, and EDWARDS and GINSBURG, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* EDWARDS.