No. _____

IN THE

Supreme Court of the United States

MONIQUE A. LOZOYA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Is the airspace above a State part of that State, and thus the federal district or districts including that State, for purposes of the Constitution's provisions permitting venue only in the State and district where a crime was committed?

2. For crimes committed on aircraft within domestic U.S. airspace, do the Constitution and 18 U.S.C. §§ 3237 and 3238 permit venue in the district where the plane lands, regardless of where the plane was when the crime was committed?

3. When the government fails to meet its trial burden to prove venue in the district where the trial occurs, is the remedy a judgment of acquittal or only dismissal without prejudice to refiling in the proper district?

Related Proceedings

United States District Court (C.D. Cal.):

United States v. Lozoya, Case No. CR-16-00043-AS (August 12, 2016).

United States v. Lozoya, Case No. CR-16-00598-AB (September 11, 2017).

United States Court of Appeals (9th Cir.):

United States v. Lozoya, Case No. 17-50336 (December 3, 2020).

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Petition for a Writ of Certiorari

Petitioner Monique A. Lozoya respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The en banc opinion of the United States Court of Appeals for the Ninth Circuit, with an opinion dissenting in part and concurring in the judgment (App.[1] 2a-42a), is published at 982 F.3d 648. The order granting rehearing en banc (App. 44a) is published at 944 F.3d 1229. The original panel's opinion, with a dissenting opinion (App. 46a-75a), is published at 920 F.3d 1231. The district judge's order affirming the magistrate judge's judgment (App. 77a-94a) was not published. The magistrate judge's order denying a motion for judgment of acquittal (App. 96a-108a) also was not published.

Jurisdiction

The court of appeals entered its judgment on December 3, 2020. App. 2a. On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] "App." refers to the appendices filed concurrently in a separate volume.

Constitutional and Statutory Provisions Involved

U.S. Const., Art. III, § 2, cl. 3 provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

U.S. Const., Amend. VI provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law[.]"

An appendix to this petition includes 18 U.S.C. § 3237(a), 18 U.S.C. § 3238, and Fed. R. Crim. P. 18. App. 109a-11a.

Introduction

To circumvent the Constitution's venue provisions requiring a criminal trial in the State and district where the offense conduct occurred, a Ninth Circuit en banc panel held that they do not apply to the domestic airspace above the continental United States. The Ninth Circuit acknowledged that this area lies within the United States but found that the airspace above a State is not "within" the State for purposes of the Constitution, even as it conceded that each State has jurisdiction to prosecute crimes in the airspace above its terrain. App. 7a-9a, 14a-18a.

This inconsistent and illogical conclusion was rooted in the en banc panel's belief that it could disregard the Constitution in U.S. airspace because aircraft would have been "alien" to the Framers. App. 8a-9a. But this Court has firmly rejected the premise that constitutional rights are limited by the technology existing in the 18th century. *See*, *e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). And there is no exception to this rule for the Constitution's venue provisions. *See United States v. Auernheimer*, 748 F.3d 525, 541 (3d Cir. 2014).

After sidestepping the Constitution, the Ninth Circuit interpreted 18 U.S.C. § 3237(a)—which pertains to continuing offenses—to permit venue for crimes committed on aircraft within domestic U.S. airspace in any district through which the plane traveled during the entire flight, regardless of where the plane was when the crime was committed and even where (as here) the offense consisted of a single act completed in an instant. App. 10a-14a. Doing so conflicted with the Court's precedent allowing venue only in the district(s) where an essential conduct element was committed, such that a continuing offense occurs only when a crime consists of distinct acts done in different localities. *See*, *e.g.*, *United States v. Rodriguez-Moreno*, 526 U.S. 275, 278-82 (1999). The Ninth Circuit's broad reading of "involving" in § 3237(a) also conflicts with how other circuits have interpreted that term. *See United States v. Morgan*, 393 F.3d 192, 196-201 (D.C. Cir. 2004); *United States v. Brennan*, 183 F.3d 139, 144-49 (2d Cir.1999). Furthermore, the Ninth Circuit en banc dissent recognized that the majority's interpretation of § 3237(a)

"will apply in a range of circumstances that raise significant constitutional concerns." App. 38a.

The appropriate venue for the increasing number of airplane crimes involves important constitutional and statutory questions that have not been, but should be, settled by this Court. This case presents an excellent vehicle for doing so. It was undisputed that the alleged crime—a simple assault consisting of a single slap—occurred at a discrete moment before the airplane entered the district where the case was tried. App. 7a n.1, 21a, 38a, 62a, 71a. It was therefore also undisputed that venue would not be proper in that district if the Court's constitutional venue test applies to U.S. airspace. App. 61a-62a. Thus, granting the writ will allow the Court to provide necessary guidance so Congress—not judges—can craft a constitutional statute concerning venue for airplane crimes.

Statement of the Case

A. Legal Background.

This case concerns the proper venue for prosecuting crimes committed on aircraft flying in the domestic airspace of the United States.

1. Because "[p]roper venue in criminal proceedings was a matter of concern to the Nation's founders[,]" the "Constitution twice safeguards the defendant's venue right[.]" *United States v. Cabrales*, 524 U.S. 1, 7 (1998). Article III requires that a trial "shall be held in the State where the said Crimes *shall have been committed*[.]"

U.S. Const., Art. III, § 2, cl. 3 (emphasis added). And the Sixth Amendment guarantees the right to trial by a "jury of the State and district wherein the crime *shall have been committed*[.]" U.S. Const., Amend. VI (emphasis added); *see also* Fed. R. Crim. P. 18. The Court has a long-established test for determining where a crime was committed for venue purposes: "the *locus delicti* of the charged offense must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (citing *Cabrales*, 524 U.S. at 6-7, and *United States v. Anderson*, 328 U.S. 699, 703 (1946)) (quotation marks and brackets omitted). This standard applies to any crime committed within the United States because the "constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed." *Anderson*, 328 U.S. at 704-05. For a crime "not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const., Art. III, § 2, cl. 3.

2. Two general venue statutes cover crimes committed within the United States (18 U.S.C. § 3237(a)[2]) and crimes committed outside the country (18 U.S.C. § 3238).

Section 3237(a) has two paragraphs. The first provides that a crime "committed in more than one district" may be prosecuted in any of those districts. 18 U.S.C. § 3237(a). That rule has been in place for well over a century. *See* Pub. L. No. 61-

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[2] This statute's only other subsection concerns venue for certain violations of the Internal Revenue Code. 18 U.S.C. § 3237(b).

475, ch. 231, § 42, 36 Stat. 1100 (1911) (replacing similar earlier provision). The second paragraph provides:

> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

18 U.S.C. § 3237(a). Congress added this paragraph in 1948. Pub. L. No. 80-772, ch. 645, 62 Stat. 826 (1948).[3] It did so in response to a decision from this Court a few years earlier to "remove[] all doubt as to the venue of continuing offenses and make[] unnecessary special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts[.]" H.R. Rep. No. 80-304, at A161 (1947); *see* App. 34a-35a (discussing this amendment).

The other general venue statute, § 3238, provides that a crime "begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district" must be prosecuted in the district in which the offender is arrested or is first brought, except in certain circumstances where the case may be filed in

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[3] The phrase "or the importation of an object or person into the United States" was added later. *See* Pub. L. No. 98-473, Title II, § 1204(a), 98 Stat. 2152 (1984).

the district of the offender's last known residence or in the District of Columbia. 18 U.S.C. § 3238; *see* App. 26a-30a (discussing statute's history).

3. In 1961, Congress expanded federal jurisdiction for airplane crimes. *See* Pub. L. No. 87-197, 75 Stat. 466 (1961). It provided that certain acts committed while aboard an aircraft in flight—including, as relevant here, assault as defined in 18 U.S.C. § 113—could be prosecuted in federal court to the same extent as if they had been committed within the special maritime and territorial jurisdiction of the United States. *Id*. at 466 (enacting new provision then at 49 U.S.C. § 1472(k)(1)). The substance of this provision remains in the U.S. Code, now found in 49 U.S.C. § 46506, which extends § 113 and other criminal statutes to the special aircraft jurisdiction of the United States, and 49 U.S.C. § 46501(2), which defines such jurisdiction to include aircraft in flight. *See* Pub. L. No. 103-272, § 1(e), 108 Stat. 1240, 1245 (1994).

Congress took this step because it recognized the potential difficulties associated with determining where a plane was at the time of an in-flight crime, and it concluded that the Federal Bureau of Investigation was better suited than state law enforcement to investigate such matters. *See* H.R. Rep. No. 87-958, at 3-5 (1961); S. Rep. No. 87-694, at 2-4 (1961). At the same time, Congress emphasized that federal jurisdiction would supplement, not replace, a State's jurisdiction to prosecute crimes committed in its own airspace. H.R. Rep. No. 87-958, at 3-4; S. Rep. No. 87-694, at 3.

4. Congress also addressed the proper venue for airplane crimes in its 1961 legislation. It provided that the "trial of any offense under this Act shall be in the district in which such offense is committed;" but it also parroted the language found in § 3237(a)'s first paragraph (dealing with crimes committed in multiple districts) and § 3238 (dealing with crimes committed out of the jurisdiction of any State or district). Pub. L. 87-197, 75 Stat. 467 (amending what was then at 49 U.S.C. § 1473(a)). Even as it did so, Congress acknowledged that this provision would not "solve the difficulties involved in establishing jurisdiction which may exist in the case of an offense committed in only one jurisdiction" because, under the constitutional provisions noted above, "the place where the crime was committed must still be determined in order to assure a trial in the State or district in which the crime was committed." H.R. Rep. No. 87-958, at 18. In 1994, Congress eliminated the airplane-crime venue provision enacted in 1961. Pub. L. No. 103-272, 108 Stat. 1390 (1994). It recognized that the provision was unnecessary given that it merely repeated what was already in § 3237(a)'s first paragraph and § 3238. H.R. Rep. No. 103-180, at 587 (1993).

5. Before and after Congress took this step in 1994, the Tenth and Eleventh Circuits—with little analysis and without applying the Court's *locus delicti* test—interpreted § 3237(a)'s *second* paragraph (which Congress has never applied to airplane crimes) to permit venue for an offense occurring on a form of transportation in interstate commerce, such as a plane, in any district through

which it traveled, regardless of where the crime actually occurred. *See United States v. Cope*, 676 F.3d 1219, 1224-25 (10th Cir. 2012); *United States v. Breitweiser*, 357 F.3d 1249, 1253-54 (11th Cir. 2004); *United States v. McCulley*, 673 F.2d 346, 349-50 (11th Cir. 1982).

B. Factual Background and Proceedings Below.

In 2015, Monique Lozoya was on a commercial-airline flight from Minneapolis to Los Angeles. App. 4a-5a, 49a. At one point, she allegedly slapped another passenger's face. App. 5a, 50a-51a. Later, the plane landed in Los Angeles. App. 5a. Although the government did not prove exactly when the slap occurred, evidence established that it happened sometime around the middle of the 3½-hour flight. App. 4a-5a. The government also failed to prove where the airplane was at the time of the slap, but it was undisputed that it had not yet entered the airspace of the Central District of California. App. 7a n.1, 21a, 38a, 62a, 71a, 105a.[4] The government nevertheless charged Lozoya in that district with misdemeanor simple

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[4] Although witnesses estimated that the slap occurred between one and two hours before landing (App. 5a), the plane did not even enter the State of California until 33 minutes before it landed. ER 532-33.

The following abbreviations refer to documents filed in the Ninth Circuit: "ER" refers to the appellant's excerpts of record (docket no. 7); "AOB" refers to the appellant's opening brief (docket no. 6); "PFR" refers to the government's petition for panel rehearing / rehearing en banc (docket no. 41).

assault based on the single slap that occurred elsewhere. App. 4a-5a, 51a, 54a, 96a. Whether the Central District was the proper venue for the prosecution was litigated at Lozoya's trial before a magistrate judge, during her first-tier appeal to a district judge, and during her second-tier appeal to the Ninth Circuit Court of Appeals, which reheard the matter en banc after a divided three-judge panel reversed her conviction on venue grounds.

1. At trial, Lozoya moved for a judgment of acquittal when the government rested without proving that the alleged crime occurred in the Central District. App. 54a-55a. The magistrate judge denied that motion. App. 96a-108a. Among other things,[5] that judge accepted the government's argument that, under § 3237(a), airplane-crime venue is proper in any district through which the plane traveled during the entire flight, regardless of where the crime actually occurred. App. 104a-108a. The magistrate judge subsequently sentenced Lozoya to pay a $750 fine and a $10 special assessment; no jail time or probation was imposed. App. 5a, 55a.

2. Lozoya appealed to a district judge, who affirmed her conviction. App. 77a-94a. That judge concluded that § 3237(a) and § 3238 somehow operated "in

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[5] The magistrate judge also accepted the government's argument that Lozoya's venue claim was untimely (App. 102a-04a), but the Ninth Circuit correctly rejected that argument and found that she preserved the venue issue for appeal, so it applied de novo review. *See* App. 60a-61a (three-judge panel opinion); App. 7a n.2 (en banc panel leaving that part of three-judge panel decision intact).

tandem" such that one or the other permitted venue in the Central District because that is where the plane landed. App. 86a-90a.

3. A divided Ninth Circuit panel reversed Lozoya's conviction, holding that venue was not proper in the Central District. App. 46a-75a.

a. The majority applied this Court's constitutional *locus delicti* test by looking at the essential conduct elements of the charged offense. App. 61a-62a. Because it was undisputed that the only conduct (the brief assault) occurred before the plane entered the Central District's airspace, that test did not permit venue there. App. 62a.

The majority rejected the government's contention that the general venue statutes could nevertheless establish venue in the Central District. App. 62a-67a. It concluded that § 3237(a)'s first paragraph (concerning continuing offenses committed in multiple districts) did not apply because the assault "occurred in an instant" and therefore only in one district. App. 63a-64a. Next, the majority found "untenable" the argument that § 3237(a)'s second paragraph applied "because although the assault occurred on a plane, the offense itself did *not* implicate interstate or foreign commerce." App. 64a (emphasis in original). And the jurisdictional element requiring the offense to have occurred on an aircraft was, at most, a "circumstance element" rather than a "conduct element" for purposes of the *locus delicti* test. App. 64a-65a. The majority declined to adopt the Tenth and Eleventh Circuits' reasoning applying § 3237(a) to airplane crimes because those

courts did not apply that test. App. 65a-66a. Finally, the majority recognized that § 3238 was inapplicable given that the navigable airspace above a district is a part of the district, so the assault did occur entirely within some district. App. 66a-67a.

Because venue was not proper in the Central District, the majority reversed Lozoya's conviction with instructions to dismiss the case without prejudice, unless she consents to transfer the case to the proper district, meaning the district where the assault occurred. App. 67a-68a.[6] It acknowledged that pinpointing where the plane was at that time "would require some effort" from the government, but it is still "wholly reasonable . . . for the government to determine where exactly the assault occurred by the preponderance of the evidence necessary to establish venue." App. 68a-69a. Furthermore, the majority reasoned, any practical difficulties in proving where an airplane crime occurred could not overcome the conclusion compelled by the Constitution and the *locus delicti* test—"that the proper venue for an assault on a commercial aircraft is the district in whose airspace the alleged offense occurred." App. 69a-70a. "Congress can—consistent with constitutional requirements, of course—enact a new statute to remedy any irrationality that might follow from" this conclusion, the majority wrote, and it encouraged Congress to "address this issue by establishing a just, sensible, and

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[6] Lozoya had argued that the proper remedy for insufficient evidence of venue at trial is entry of a judgment of acquittal, but she acknowledged the circuit split on this issue, with Ninth Circuit precedent requiring the remedy granted by the majority. ER 531, 654; AOB 64-65.

clearly articulated venue rule for this and similar airborne offenses." App. 70a. But the existing statutes are inapplicable, so the majority could not "ignore the binding effect of precedent and the Constitution." App. 70a.

b. The dissent adopted the government's interpretation of § 3237(a)'s second paragraph without acknowledging the Constitution's venue requirements. App. 71a-75a. And except for asserting that the second paragraph "could be clearer[,]" it did not quote, let alone analyze, the text of that provision. App. 73a. It merely agreed with the Tenth and Eleventh Circuits while simultaneously acknowledging that their "opinions are not 'tenure track' in their analyses," claiming "not every legal question requires a law review article. Sometimes, common sense is enough." App. 73a-74a. The dissent relied on the absurd-results canon of statutory construction. App. 73a-75a. The majority responded that the absurdity canon does not permit the Court to ignore the plain texts of the statutes at issue; nor can a general reliance on "common sense" be invoked to undermine the Constitution. App. 69a-70a & n.7.

4. The Ninth Circuit reheard the case en banc. App. 44a. Although all the judges on the en banc panel concluded that venue was proper in the Central District, they split 8-3 on the rationale for that conclusion. App. 2a-42a.

a. The en banc majority acknowledged that the Constitution requires a trial in the State and district where the crime was committed, but with little analysis, it concluded that those constitutional requirements do not apply to airplane crimes

because "[n]either Article III nor the Sixth Amendment says that a state or district includes airspace, and there is, of course, no indication that the Framers intended as such" given that such crimes "would have been alien to" them. App. 7a-9a. The majority therefore invoked the constitutional provision stating that for a crime "*not committed within any State*, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const., Art. III, § 2, cl. 3 (emphasis added). App. 9a. At the same time, however, it criticized the dissent for relying on § 3238—which applies to offenses committed "out of the jurisdiction of any particular State or district"—writing, "for obvious reasons, we decline to hold that airspace above the United States is 'outside the United States.'" App. 14a-15a. Furthermore, the majority noted, "states routinely assert jurisdiction over crimes committed in airspace" and Congress recognized in 1961 "that crimes committed in airspace are *within* the jurisdiction of the states[.]" App. 16a-17a (emphasis in original). "We think it unwise to divest states of their jurisdiction," the majority wrote, "and dangerous to do so by holding that the airspace above them is not within the United States." App. 17a-18a. The majority attempted to justify the inconsistency between that position and its constitutional ruling with this assertion: "The text of the Venue Clause is 'not committed within any State,' and the text of § 3238 is 'elsewhere out of the *jurisdiction* of any particular State or district'—the key word is 'jurisdiction.'" App. 18a (emphasis in original).

Having concluded that the Constitution's venue provisions do not apply in the sky, the en banc majority reasoned that Congress therefore had "broad latitude" to define the locality of airplane crimes for venue purposes. App. 12a n.6. Following the Tenth and Eleventh Circuits, the majority held that § 3237(a)'s second paragraph applies to such crimes because they "involve" transportation in interstate commerce. App. 10a-11a. In doing so, the majority rejected the dissent's position that § 3237(a)'s second paragraph, like its first, applies only to true continuing offenses actually committed in multiple districts. App. 11a-12a. Finally, the majority claimed that prosecuting an airplane crime in the landing district is "plainly sensible" whereas "flyover prosecution is virtually unheard of, for good reason." App. 12a-14a. In a footnote, however, it acknowledged "that § 3237(a) theoretically allows venue not just in the landing district, but also the takeoff district as well as the flyover districts." App. 13a n.8.

b. The en banc dissent concluded that Congress did not intend the "absurd result" of the majority's opinion allowing venue in any flyover district. App. 20a, 33a-42a. The dissent disregarded the Constitution's explicit venue requirements due to the Framers' unfamiliarity with aircraft, instead relying on the "evident purpose" of those requirements. App. 20a-25a. It determined that "ruling that crimes that are committed entirely in navigable airspace (and that have no effect on the ground below) are 'not committed within any State' is consistent with that purpose, because it allows Congress to identify a reasonable place to hold trials for

such crimes." App. 24a. The dissent therefore concluded that § 3238 is the applicable venue statute for airplane crimes, such that venue is appropriate in the district where the defendant is arrested or first brought. App. 25a-33a.

Reasons for Granting the Writ

The proper venue for airplane crimes is an important question of federal law that has not been, but should be, settled by the Court. Although the Constitution requires the government to prosecute an offense in a State and a district where the crime was committed, the Ninth Circuit—in an en banc opinion—held that those constitutional provisions do not apply to domestic U.S. airspace. The Ninth Circuit concluded that it could disregard the Constitution above a certain altitude because the Framers were unfamiliar with aircraft, an approach that conflicts with this Court's precedent and a decision of another circuit. Furthermore, the en banc panel undermined state sovereignty by holding that the airspace above a State is not "within" the State for constitutional purposes, effectively taking such territory away from the States, despite also adopting the inconsistent position that the States still retain jurisdiction over such airspace. Looking past the Constitution, the Ninth Circuit construed 18 U.S.C. § 3237(a), a venue statute for continuing offenses, to apply to all airplane crimes, even those consisting of a single discrete act committed in one brief moment (as in this case). That interpretation conflicts with decisions of this Court and other circuits. This case squarely and cleanly presents these constitutional and statutory issues because it was undisputed below that venue did

not exist in the district where it was tried if the Court's constitutional venue test applies to airplane crimes or if § 3237(a) (or 18 U.S.C. § 3238, the statute invoked by the en banc dissent) does not permit venue for such offenses in the district where the plane lands, regardless of where the plane was when the criminal conduct occurred.

1. The Constitution permits venue only where the crime was committed, as determined by the Court's *locus delicti* / essential-conduct-elements test, and there is no dispute that venue was not proper in the district where this case was tried if that test applies to airplane crimes.

The Constitution requires the government to prosecute an offense in a State and a district where the crime was committed. *See* U.S. Const., Art. III, § 2, cl. 3; U.S. Const., Amend. VI. "Questions of venue in criminal cases . . . are not merely matters of formal legal procedure." *United States v. Johnson*, 323 U.S. 273, 276 (1944). "They raise deep issues of public policy" and implicate "the fair administration of criminal justice and the public confidence in it[.]" *Id.* Congress cannot authorize venue in a district where no part of a domestic crime occurred because the "constitutional specification is geographic; and the geography prescribed is the district or districts within which the offense is committed." *United States v. Anderson*, 328 U.S. 699, 704-05 (1946).

Thus, the "'Constitution makes it clear that determination of proper venue in a criminal case requires determination of *where the crime was committed*.'" *Platt v.*

Minnesota Mining & Manufacturing Co., 376 U.S. 240, 245 (1964) (quoting *United States v. Cores*, 356 U.S. 405, 407 (1958)) (emphasis added). The Court has a long-established standard for determining where a crime was *committed* for constitutional venue purposes: "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703. The last time the Court considered venue in a criminal case, it articulated a two-part test for applying that standard: first, a court must identify the "essential *conduct* elements" of the offense; then it must determine the location(s) where *those* elements occurred. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279-80 (1999) (emphasis added). Conduct elements are different from non-conduct "circumstance elements" that cannot support venue. *Id*. at 280 n.4.

In this case, the Ninth Circuit three-judge panel majority applied the Court's test and concluded that the only essential conduct element for the charged offense—simple assault consisting of a single slap—was the assault, and because it was undisputed that that act did not occur within the Central District of California, the Constitution did not permit venue there. App. 61a-62a. The government did not dispute the conclusion that the trial in the Central District failed to satisfy the Court's *locus delicti* standard; it argued instead that it is not a *constitutional* standard and only applies to one particular venue provision—18 U.S.C. § 3237(a)'s first paragraph. PFR 3, 10-12. That is wrong. *See*, *e.g.*, *Johnston v. United States*, 351 U.S. 215, 220 (1956) ("Article III of the Constitution and the Sixth Amendment

fix venue 'in the State' and 'district wherein the crime shall have been committed.' The venue of trial is thereby predetermined, but those provisions do not furnish guidance for determination of the place of the crime. That place is determined by the acts of the accused that violate a statute."); *Rodriguez-Moreno*, 526 U.S. at 282 (Scalia, J., joined by Stevens, J., dissenting) ("I agree with the Court that in deciding where a crime was committed for purposes of the venue provision of Article III, § 2, of the Constitution, and the vicinage provision of the Sixth Amendment, we must look at 'the nature of the crime alleged and the location of the act or acts constituting it.'"). Although the Ninth Circuit en banc panel did not adopt the position that the *locus delicti* standard is not constitutional, that the government felt it could even make that argument supports granting review to provide guidance on this important issue.

2. The Ninth Circuit en banc panel's holding that the Constitution's venue provisions do not apply to domestic U.S. airspace because planes did not exist in the 18th century conflicts with this Court's precedent and another circuit's opinion.

To avoid the consequences of the *locus delicti* test, the Ninth Circuit en banc majority—with relatively-little analysis—concluded that the Constitution's venue provisions do not apply to airspace. App. 7a-9a. "Neither Article III nor the Sixth Amendment says that a state or district includes airspace," the majority wrote, "and there is, of course, no indication that the Framers intended as such." App. 9a; *see*

also App. 8a ("The Constitution does not discuss the airspace over the several states."). The majority reasoned that the crime at issue—which "happened on an airplane flying almost 600 miles an hour, five miles above the earth"—"would have been alien to the Framers[,]" so they did not "contemplate crimes committed in the 'high skies,' even as they granted Congress the power to 'define and punish Piracies and Felonies committed on the high Seas.'" App. 8a (citing U.S. Const., Art. I, § 8, cl. 10). The en banc dissent similarly dismissed the idea that the Constitution's venue requirements apply to airplane crimes. App. 20a-25a. Because "when the Constitution was adopted in 1789, the public had no view regarding whether a crime committed at cruising altitude in navigable airspace was committed within a state under the Venue Clause[,]" and "[g]iven that technology has changed dramatically since the founding" with regard to aircraft, the dissent too believed that it could ignore the Constitution's venue *requirements* and consider only their "purpose" instead. App. 22a-23a.

The Ninth Circuit's position is inconsistent with Congress's actions in 1961, when it expanded federal jurisdiction for airplane crimes and included an airplane-crime-specific venue provision (later repealed). *See supra* Statement of the Case, Parts A.3 and A.4. Congress acknowledged that the Constitution requires that "the place where the crime was committed must still be determined in order to assure a trial in the State or district in which the crime was committed." H.R. Rep. No. 87-958, at 18 (1961) (citing U.S. Const., Art. III, § 2, cl. 3 and U.S. Const., Amend. VI).

The en banc panel's categorical disregard of constitutional rights due to technological changes since the 18th century also conflicts with this Court's precedent. Although the Court frequently decides *how* to apply the Constitution's requirements in light of such changes, it does not *ignore* them simply because the Framers could not have anticipated the new developments. For example, the Court has applied the Fourth Amendment's prohibition of unreasonable searches to modern technology. *See*, *e.g.*, *Carpenter v. United States*, 138 S. Ct. 2206, 2213-23 (2018) (cell-site location information); *United States v. Jones*, 565 U.S. 400, 404-13 (2012) (GPS tracking); *Riley v. California*, 573 U.S. 373, 381-403 (2014) (cell phone data); *Kyllo v. United States*, 533 U.S. 27, 31-41 (2001) (thermal imaging). It has also recognized the unique ways the First Amendment applies in the internet age. *See*, *e.g.*, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-38 (2017) (sex offender access to social networking websites); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 664-73 (2004) (protection of minors from exposure to sexually explicit materials online). Similarly, the Court has held that the Second Amendment extends to arms that were not in existence at the time of the founding, so even thoroughly-modern inventions like stun guns are not necessarily beyond its scope. *See Caetano v. Massachusetts*, 577 U.S. 411, 411-12 (2016); *see also District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that

way. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (citations omitted).

Consistent with this line of authority, the Third Circuit applied the Constitution's venue provisions to computer crimes in *United States v. Auernheimer*, 748 F.3d 525 (3d Cir. 2014). It observed that "[t]hough our nation has changed in ways which it is difficult to imagine that the Framers of the Constitution could have foreseen, the rights of criminal defendants which they sought to protect in the venue provisions of the Constitution are neither outdated nor outmoded." *Id.* at 541 (quotation marks omitted). "Just as this was true . . . after the advent of railroad, express mail, the telegraph, the telephone, the automobile, air travel, and satellite communications[,] it remains true in today's Internet age." *Id.* "As we progress technologically," the Third Circuit wrote, "we must remain mindful that cybercrimes do not happen in some metaphysical location that justifies disregarding constitutional limits on venue. People and computers still exist in identifiable places in the physical world." *Id.* The same is even more true of airplane crimes.

The Ninth Circuit en banc panel's contrary approach could have significant consequences beyond airplane-crime venue. "The Constitution would be an utterly impractical instrument of contemporary government if it were deemed to reach only

problems familiar to the technology of the eighteenth century[.]" *Lopez v. United States*, 373 U.S. 427, 459 (1963) (Brennan, J., dissenting); *see also United States v. White*, 401 U.S. 745, 756 (1971) (Douglas, J., dissenting) ("To be sure, the Constitution and Bill of Rights are not to be read as covering only the technology known in the 18th century."). Now that the Ninth Circuit has held that the Constitution's venue requirements disappear at some unspecified altitude, what other constitutional rights might it or other courts find do not exist on airplanes simply because the Framers did not predict such flying machines? And even at ground level, what other constitutional rights might those courts limit or discard entirely because the conduct at issue "would have been alien to the Framers" (App. 8a)? The en banc opinion offers no limiting principles for these important questions. Thus, although the constitutional airplane-venue issues alone merit the Court's attention, the potential broader impact of the Ninth Circuit's flawed reasoning also supports granting the writ.

3. The en banc panel's theory that a criminal act in the airspace above a State is somehow not committed within the State (or the related federal district) for constitutional venue purposes and yet is still within the jurisdiction of the State is illogical and undermines state sovereignty.

The Ninth Circuit's en banc decision also undermines the sovereignty of the States over their own airspace. The majority and dissent both invoked the constitutional provision stating that for a crime "*not committed within any State*,

the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. Const., Art. III, § 2, cl. 3 (emphasis added). App. 8a-9a, 21a-25a. Because this case concerns entirely-domestic air travel above the continental United States, that requires the conclusion that, at some altitude, the sky above a State is no longer part of that State and yet is still part of the United States. *See* App. 14a-15a ("[F]or obvious reasons, we decline to hold that airspace above the United States is 'outside the United States.'"). By the same token, such airspace would be outside all of the federal districts, each of which Congress has defined by reference to the State (or counties thereof) constituting the district. *See* 28 U.S.C. § 81 *et seq.* The premise that the airspace above a State is not within the State is contrary to common law, the intent of Congress, and the precedent of this Court.

"It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*." *United States v. Causby*, 328 U.S. 256, 260-61 (1946). True, "that doctrine has no place in the modern world"—at least as to private citizens—because the "air is a public highway, as Congress has declared." *Id.* (citing predecessor to 49 U.S.C. § 40103(a), which provides: "The United States Government has exclusive sovereignty of airspace of the United States."). That declaration, however, "did not expressly exclude the sovereign powers of the states." *Braniff Airways Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 595 (1954). Rather, the federal laws "regulating air commerce are bottomed on the commerce power of Congress, not on

national ownership of the navigable air space, as distinguished from sovereignty." *Id*. at 596. Thus, just as commerce power over navigable streams does not impair state sovereignty because it does not prevent state action consistent with that power, federal authority over domestic airspace does not preclude state action. *Id*. at 597.

Indeed, when Congress expanded federal jurisdiction for airplane crimes in 1961, *see* Pub. L. No. 87-197, 75 Stat. 466 (1961), it emphasized that the States retained jurisdiction to punish criminal acts in their own airspace. H.R. Rep. No. 87-958, at 3-4; S. Rep. No. 87-694, at 3 (1961). The en banc majority acknowledged this and wrote that it was "unwise to divest states of their jurisdiction, and dangerous to do so by holding that the airspace above them is *not within the United States*." App. 16a-18a (emphasis added). Again, the majority had already determined that an airplane crime is "not committed within any State" for purposes of Article III. App. 8a-9a. Thus, the Ninth Circuit judicially created an entirely new and bizarre hybrid area in the sky—one that is within the United States, even though no part of it is within any particular State, and yet each State retains jurisdiction over a part of it.

The majority's only attempt to justify doing so came in response to the dissent's position that § 3238 is the applicable venue statute because U.S. airspace is purportedly "elsewhere out of the jurisdiction of any particular State or district[.]" App. 26a-33a. The majority wrote: "The text of the Venue Clause is 'not committed

within any State,' and the text of § 3238 is 'elsewhere out of the *jurisdiction* of any particular State or district'—the key word is 'jurisdiction.'" App. 18a (emphasis in original). It then accused the dissent of reaching the "perplexing conclusion that a state can retain jurisdiction to prosecute crimes that are committed 'out of the jurisdiction of any particular State.'" App. 18a; *see also* App. 31a (dissent writing: "§ 3238 focuses on whether the place where the offense was committed is 'out of the jurisdiction of any particular State' and not (as the majority would have it) on whether the State has the authority to prosecute the offense."). "That is, the dissent believes that § 3238's 'out of the jurisdiction of any particular State or district' clearly refers to a place (i) *within* the United States (ii) but '*not within* a state,' (iii) yet also *within* the jurisdiction of the states." App. 19a (emphasis in original). "The dissent's interpretation requires concluding that all of these things are simultaneously true about airspace[,]" the majority wrote, because otherwise, "the dissent would have to conclude that United States airspace is extraterritorial or that states can no longer assert jurisdiction over airspace." App. 19a n.18. Unacknowledged by the majority was that its own reasoning suffered from exactly the same flaw.

Despite the Ninth Circuit's logically-inconsistent attempt to let the States retain jurisdiction over their airspace, its ruling that such airspace is not "within any State" undermines their sovereignty. Basically, it divests the States of territory that is rightfully theirs.

At the very least, the Ninth Circuit's opinion creates a jurisdictional morass for airplane crimes. For example, assume that the slap in this case occurred when the plane was flying through Nevada. App. 5a (noting that plane in Nevada's airspace for a while). That State (like others) has a law providing that "[a]ll crimes . . committed by or against an operator or passenger while in flight over this state are governed by the laws of this state." Nev. Rev. Stat. 493.080; *see also* App. 16a (noting similar laws in other states). Under the en banc majority's reasoning, Nevada—and only that State—could prosecute that assault because it occurred there, but the defendant could still be charged federally in any district through which the plane moved during the entire flight. App. 13a n.8.

For all these reasons, the Ninth Circuit's en banc decision warrants review by this Court to forestall the inevitable constitutional and logistical problems that will arise as courts across the county try to apply it.

4. The en banc majority's erroneous interpretation of 18 U.S.C. § 3237(a) conflicts with this Court's precedent and other circuits' opinions, and (as noted by the dissent) it will have unconstitutional effects beyond airplane crimes.

The Ninth Circuit en banc panel's conclusion that the Constitution's venue provisions do not apply in U.S. airspace allowed it to turn to Congress's venue statutes, with the majority relying on § 3237(a) and the dissent relying on § 3238. App. 6a-14a, 20a-33a. Whether that constitutional ruling is correct is an important

question requiring the Court's review for the reasons given above. And if it decides that the Constitution does apply to airplane crimes, that should be the end of the matter because Congress cannot authorize venue for a domestic crime in a district where no part of the crime occurred. *See Anderson*, 328 U.S. at 704-05. But even if the Court concludes that the Constitution does not impose any venue limits for airplane crimes, the additional question of whether either § 3237(a) or § 3238 governs venue for such crimes (and, if so, how) merits attention, as demonstrated by the spirited disagreement between the en banc majority and dissent. The en banc majority's interpretation of § 3237(a) also requires review because it conflicts with this Court's precedent and opinions of other circuits, and it will have unconstitutional effects beyond airplane crimes.

The provision at issue provides, in relevant part, that "[a]ny offense involving . . . transportation in interstate or foreign commerce . . . is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves." 18 U.S.C. § 3237(a). This provision was added in response to the Court's 1944 decision in *United States v. Johnson*, *supra*. *See* Pub. L. No. 80-772, ch. 645, 62 Stat. 826 (1948); H.R. Rep. No. 80-304, at A161 (1947). That case addressed the proper venue for a statute prohibiting "use of the mails or any instrumentality of interstate commerce for the purpose of sending or bringing" certain dentures into a state. 323 U.S. at 274. Because Congress could criminalize the entire conduct of

sending such dentures from one place to another, the Constitution did not prohibit allowing venue in any district through which they moved. *Id*. at 274-75 (citing *Armour Packing Company v. United States*, 209 U.S. 56, 72-77 (1908) (multiple-district venue for improperly transporting freight because "constitutional requirement is as to the locality of the offense" and crime "continuously committed in each district through which the transportation is received at the prohibited rate.")). "By utilizing the doctrine of a continuing offense, Congress may," the Court reasoned, "provide that the locality of a crime shall extend over the whole area *through which force propelled by an offender operates*." *Id*. at 275 (emphasis added). Accordingly, "when Congress desires to give a choice of trial, it does so by specific venue provisions giving jurisdiction to prosecute in any criminal court of the United States *through which a process of wrongdoing moves*." *Id*. at 276 (emphasis added). Because Congress had not done that with regard to the statute at issue, the Court found venue in only the place where dentures were mailed. *Id*. at 275-78. In doing so, it applied the still-valid rule that if a statute "equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it." *Id*. at 276. Congress added the provision at issue four years later to "remove[] all doubt as to the venue of continuing offenses and make[] unnecessary special venue provisions except where Congress desires to

restrict the prosecution of offenses to particular districts[.]" H.R. Rep. No. 80-304, at A161.

Subsequently, the Court continued to hold that "use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used" because the "constitutional requirement is as to the locality of the offense[.]" *Travis v. United States*, 364 U.S. 631, 634 (1961) (quotation marks omitted). Thus, *offense conduct* must involve *use* of interstate-commerce agencies *in multiple districts* to extend venue into those places. That conclusion is reinforced by the Court's additional observation that "[m]ultiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act.'" *Id*. at 636.

The en banc majority's interpretation of § 3237(a) is inconsistent with this precedent. It concluded that any airplane crime "involves" transportation in interstate commerce because it "take[s] place on a form of interstate transportation" and "is a federal offense only because it was committed within the special aircraft jurisdiction of the United States." App. 11a. The majority conceded that a discrete-act crime like the one at issue here is not a "continuing offense" in the traditional sense that it was committed over time in more than one district, but it believed that Congress could and did define a new class of "continuing offenses" that need not have that characteristic. App. 11a-12a.

The en banc dissent righty criticized this "oxymoronic and constitutionally problematic notion of a non-continuing continuing offense." App. 36a; *see also* App.

41a (describing majority's reading of § 3237(a) as "strained" and "not plausible"). It recognized that § 3237(a)'s "second paragraph defines a particular category of offenses that constitute continuing offenses and thereby fall within the more generally framed rule set forth in the first paragraph." App. 35a. The dissent also noted that the majority's ruling conflicts with this Court's precedent holding that "a 'continuing offense' is an offense that 'consists of distinct parts' that occur in 'different localities,' and 'the whole may be tried where any part can be proved to have been done.'" App. 36a (quoting *Rodriguez-Moreno*, 526 U.S. at 281). Furthermore, "Congress cannot avoid the strictures of the Sixth Amendment and Venue Clause merely by labeling a point-in-time offense as a 'continuing offense.'" App. 37a.

The en banc majority joined the Tenth and Eleventh Circuit in applying § 3237(a)'s second paragraph to airplane crimes. *See United States v. Cope*, 676 F.3d 1219, 1224-25 (10th Cir. 2012); *United States v. Breitweiser*, 357 F.3d 1249, 1253-54 (11th Cir. 2004); *United States v. McCulley*, 673 F.2d 346, 349-50 (11th Cir. 1982). App. 10a-11a. But the three-judge panel majority considering this case correctly concluded that the reasoning in those cases—which looks nothing like the en banc majority's—"is not persuasive" because they did not apply the *locus deliciti* / essential-conduct-elements test. App. 65a-66a.

The en banc majority's interpretation of § 3237(a) conflicts with the D.C. Circuit's opinion in *United States v. Morgan*, 393 F.3d 192 (D.C. Cir. 2004).

Although not an airplane-crime case, that opinion holds that receipt of stolen property is not "an 'offense involving' transportation in interstate commerce" for purposes of that provision because "it does not require any such transportation for the commission of the offense." *Id*. at 200. The D.C. Circuit correctly observed that the "most natural" and "faithful reading of the precise words of [§3237(a)'s second paragraph] in the order in which they are written suggests that an 'offense involves' transportation in interstate commerce only when such transportation is an element of the offense." *Id*. at 198 (brackets omitted). That court therefore rejected as "gobbledygook" the government's claim that it should look to the circumstances of the particular crime, rather than the elements of the offense. *Id*. at 200. Because it's "rare that a crime does not involve circumstances in which a person or instrumentality related to the crime has not passed through interstate commerce[,]" the government's "obviously untenable" theory "would apply to almost every offense." *Id*.

The en banc majority's opinion also conflicts with *United States v. Brennan*, 183 F.3d 139 (2d Cir.1999). The Second Circuit considered whether § 3237(a)'s second paragraph—which covers offenses "involving the use of the mails" as well as those involving "transportation in interstate or foreign commerce"—covered a mail-fraud prosecution under 18 U.S.C. § 1341. *Id*. at 144-49. Applying the *locus delicti* / essential-conduct-elements test, it concluded that "the mail fraud statute does not proscribe conduct involving 'the use of the mails' within the meaning of § 3237(a)[,]"

so prosecution under that statute "is permissible only in those districts in which a proscribed act occurs, *i.e.*, in which the defendant 'places,' 'deposits,' 'causes to be deposited,' 'takes,' or 'receives' mail or 'knowingly causes' mail 'to be delivered.'" *Id.* at 144-47; *see also Morgan*, 393 F.3d at 198-200 (relying on *Brennan*).

Notably, there is a circuit conflict on this particular point, with the Sixth Circuit expressly rejecting *Brennan* and holding that § 1341 is an offense "involving the use of the mails" for purposes of § 3237(a)'s second paragraph such that the crime can be prosecuted in any district through which the mail moves. *United States v. Wood*, 364 F.3d 704, 709-13 (6th Cir. 2004). Even in that case, the dissent concluded that the majority's holding could lead to unconstitutional results and therefore would have followed *Brennan*. *Id.* at 721-24 (Gwin, DJ, dissenting in part). These conflicting opinions highlight the need for this Court's guidance on the proper interpretation of § 3237(a).

Furthermore, as recognized by the Ninth Circuit en banc dissent, the consequences of the majority's ruling are "absurd." App. 20a, 41a. Even though the majority noted that a "flyover venue rule" is unwise, it acknowledged that its interpretation of § 3237(a) "allows venue not just in the landing district, but also the takeoff district as well as the flyover districts." App. 13a-14a & n.8. Under that interpretation, the dissent noted, petitioner "could be tried in any district over which the airplane flew while traveling from Minneapolis to Los Angeles. She could have faced trial in a state where she, her accuser, and witnesses never set foot."

App. 41a. The dissent refused to "lightly assume that Congress enacted a venue rule so contrary to the Framers' intent." App. 41a.

The en banc dissent also recognized that because "§ 3237(a) is not limited to offenses that fall within the Venue Clause's exception for crimes not committed within any state[,]" that statute, as interpreted by the majority, "will apply in a range of circumstances that raise significant constitutional concerns." App. 38a-39a (providing a hypothetical example); *see also* App. 41a-42a (dissent noting that this Court's precedent "forbids us from interpreting a statute one way in this case and another way when the constitutional problems we have invited show up at our doorstep."). "Because many discrete offenses 'relate to or affect' interstate transportation, the majority's mistaken interpretation of § 3237(a) has a widespread effect." App. 39a-40a (giving examples). "But more important," the dissent went on, "if § 3237(a) governs crimes that 'relate to or affect' transportation in interstate commerce and is not limited to offenses that are 'continuing' because the 'process of wrongdoing' continues during interstate transportation, then the language of the statute provides no basis to limit § 3237(a) to offenses 'whose very definition requires interstate transportation." App. 40a. "And absent such a limiting principle, '*any* offense involves transportation in interstate commerce so long as the interstate transportation is among the circumstances related to the commission of the offense.'" App. 40a (emphasis in original) (quoting *Morgan*, 393 F.3d at 200). "Given that it is 'rare that a crime does not involve circumstances in which a person

or instrumentality related to the crime has not passed through interstate commerce,' the majority's reading of § 3237(a) will swallow the Venue Clause." App. 40a-41a (citation omitted) (quoting *Morgan*, 393 F.3d at 200).

5. This case presents an excellent vehicle for the Court to address important constitutional and statutory questions, thereby providing necessary guidance so Congress—not judges—can craft a constitutional statute concerning the appropriate venue for airplane crimes.

Over the years, the Court has considered criminal venue in various circumstances. In the late 19th century and the first part of the 20th, many of those cases concerned use of the mail. *See Travis*, 364 U.S. at 632-37; *Johnson*, 323 U.S. at 273-78; *United States v. Lombardo*, 241 U.S. 73, 74-79 (1916); *Burton v. United States*, 202 U.S. 344, 381-89 (1906); *Horner v. United States*, 143 U.S. 207, 213-14 (1892); *Palliser v. United States*, 136 U.S. 257, 265-68 (1890). After construction of the railroads, the Court considered the appropriate venue for crimes using that new technology. *See United States v. Midstate Horticultural Co.*, 306 U.S. 161, 162-67 (1939); *Armour Packing*, 209 U.S. at 72-77. And after World War II, it considered venue for violations of the Selective Service Act. *See Johnston*, 351 U.S. at 220-23; *Anderson*, 328 U.S. at 701-06. The Court has also delved into venue for continuing offenses. *See Rodriguez-Moreno*, 526 U.S. at 278-82; *United States v. Cabrales*, 524 U.S. 1, 6-10 (1998); *Cores*, 356 U.S. at 407-10. But more than a century since the

first flight at Kitty Hawk, the Court has never considered the proper venue for airplane crimes. It should do so now.

In the year before the pandemic, more than a billion passengers flew on more than 16 million flights within the United States. *See* Federal Aviation Administration, *Air Traffic by the Numbers*, at 6-7 (Aug. 2020).[7] "At any given minute during peak operational times, almost 5,400 flights were en route in U.S. airspace[.]" *Id*. at v. This traffic has resulted in a significant increase in in-flight crimes, particularly sexual assault. App. 13a n.7, 14a, 70a-72a. Prosecution of such crimes will undoubtedly surge even more now that a government task force has completed a report with recommendations to enhance awareness, reporting, data collection, and training on the matter. *See* Department of Transportation's National In-Flight Sexual Misconduct Task Force, *A Report on Sexual Misconduct on Commercial Flights* (Mar. 2020).[8] Indeed, even before implementation of those recommendations, FBI investigations of in-flight sexual misconduct significantly increased each year. *Id*. at 40. Of course, as this case demonstrates, even non-sexual assaults occur on airplanes. Theft and robbery are also among the other crimes within the special aircraft jurisdiction of the United States. *See* 49 U.S.C. § 46506(1) (citing 18 U.S.C. §§ 661 and 2111). Unruly passengers can also be

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[7] https://www.faa.gov/air_traffic/by_the_numbers/media/Air_Traffic_by_the_Numbers_2020.pdf (visited Apr. 27, 2021)

[8] https://www.transportation.gov/sites/dot.gov/files/2020-03/Task%20Force%20Report.pdf (visited Apr. 27, 2021).

charged with a felony for interfering with the duties of a flight crew. *See* 49 U.S.C. § 46504. Determining where all these crimes may be prosecuted is of the utmost importance.

Equally important is who makes that determination. The en banc panel majority and dissenting opinions illustrate the conflicting and illogical judicial reasoning required to circumvent the Constitution and force airplane crimes into general venue statutes that Congress plainly designed for other circumstances. The proper approach would be for this Court to explain exactly how the Constitution's venue provisions apply to airplane crimes so Congress—not judges—can then craft a constitutional venue statute for such cases. *See* App. 70a (three-judge panel majority encouraging Congress to "establish[] a just, sensible, and clearly articulated venue rule for this and similar airborne offenses.").

This case presents an excellent vehicle for the Court to address the constitutional and statutory questions presented in this petition. First, the alleged conduct—an assault consisting of a single slap—occurred at a discrete moment in time. App. 5a, 50a-51a. Second, it is undisputed that that act did not occur in the Central District of California, where this case was charged and tried. App. 7a n.1, 21a, 38a, 62a, 71a, 105a. Third, the Ninth Circuit three-judge panel majority concluded that prosecution in that district was inconsistent with the *locus delicti* / essential-conduct-elements test (App. 61a-62a), and none of the other Ninth Circuit judges considering the case disputed that. App. 2a-42a, 71a-75a. Thus, if the

Constitution and 18 U.S.C. §§ 3237 and 3238 do not permit venue for crimes committed on domestic aircraft in the district where the plane lands, regardless of where the plane was at the time the crime was committed, then petitioner's conviction must be reversed.

6. If the Court grants review to address the airplane-crime venue issues, it should also resolve a circuit conflict concerning the appropriate remedy when the government fails to prove venue at trial.

There is a circuit conflict concerning the appropriate remedy when the government fails to prove venue at trial. In the Fifth and Eighth Circuits, the remedy is a judgment of acquittal. *See United States v. Strain*, 407 F.3d 379, 379-80 (5th Cir. 2005); *United States v. Greene*, 995 F.2d 793, 801 (8th Cir. 1993); *see also Burks v. United States*, 437 U.S. 1, 18 (1978) (once reviewing court has found evidence legally insufficient, only just remedy is judgment of acquittal). But in the Sixth and Ninth Circuits, the remedy is reversal of the conviction and dismissal of the charge without prejudice. *See United States v. Moran-Garcia*, 966 F.3d 966, 971-72 (9th Cir. 2020); *United States v. Petlechkov*, 922 F.3d 762, 771 (6th Cir. 2019). In fact, the Ninth Circuit three-judge panel majority did that before rehearing en banc was granted. App. 67a-68a. If the Court grants review to address the airplane-crime venue issues, it should also resolve this circuit conflict.

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant her petition for a writ of certiorari.

April 28, 2021

Respectfully submitted,

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