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

APPENDICIES TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. MONIQUE A. LOZOYA, *Defendant-Appellant.*	No. 17-50336 D.C. No. 2:16-cr-00598-AB-1 OPINION

Appeal from the United States District Court
for the Central District of California
Andre Birotte, Jr., District Judge, Presiding

Submitted En Banc May 26, 2020*
San Francisco, California

Filed December 3, 2020

Before: Sidney R. Thomas, Chief Judge, and M. Margaret McKeown, William A. Fletcher, Jay S. Bybee, Sandra S. Ikuta, Jacqueline H. Nguyen, Paul J. Watford, John B. Owens, Mark J. Bennett, Daniel P. Collins and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Bennett;
Partial Concurrence and Partial Dissent by Judge Ikuta

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

SUMMARY[**]

Criminal Law

The en banc court affirmed a conviction for misdemeanor assault within the special aircraft jurisdiction of the United States, in a case in which the defendant, who committed the assault on a commercial flight from Minneapolis to Los Angeles, argued that venue in the Central District of California was improper because the assault did not occur in airspace directly above the Central District.

The en banc court held that the Constitution does not limit venue for in-flight federal crimes to the district sitting directly below a plane at the moment a crime was committed, and that venue thus "shall be at such Place or Places as the Congress may by Law have directed." U.S. Const. art. III, § 2, cl. 3. The en banc court held that the second paragraph of 18 U.S.C. § 3237(a) applies to federal crimes committed on commercial aircraft within the special aircraft jurisdiction of the United States, and that such crimes may be prosecuted in the flight's landing district.

Dissenting in part and concurring in the judgment, Judge Ikuta, joined by Judges Collins and Lee, wrote that under the correct venue statute, 18 U.S.C. § 3238, the trial for an assault on a cross-country flight can be held only where the defendant "is arrested or is first brought," or where the defendant resides.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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OPINION

BENNETT, Circuit Judge:

Defendant Monique Lozoya committed an assault on an airplane. She was traveling on a commercial flight from Minneapolis to Los Angeles when she argued with another passenger and slapped him in the face. Lozoya was convicted of misdemeanor assault in the Central District of California, where the plane landed. On appeal, Lozoya argues that venue in the Central District was improper because the assault did not occur in airspace directly above the Central District. We hold that venue for in-flight federal offenses is proper in the district where a plane lands, and affirm Lozoya's conviction.

FACTS AND PROCEDURAL BACKGROUND

On July 19, 2015, Lozoya and her boyfriend were flying home to California from Minneapolis. Their Delta Airlines flight to Los Angeles was scheduled for about three-and-a-

half hours, the route taking them over Minnesota, Iowa, Nebraska, Colorado, Utah, Arizona, Nevada, and California.

Lozoya wanted to sleep, but claimed the passenger behind her, Oded Wolff, kept jabbing at his touchscreen monitor attached to the back of her seat. Each jab startled her awake. In the middle of the flight—Lozoya estimated an hour before landing, her boyfriend about two hours, and a flight attendant ninety minutes—Lozoya turned to Wolff, who had just returned from the bathroom, and asked him to stop banging on her seat. An argument ensued, and Lozoya slapped Wolff's face. Flight attendants intervened. After the plane landed at LAX, Lozoya and Wolff went their separate ways. Wolff reported the incident to the FBI, which issued Lozoya a violation notice charging her with misdemeanor assault within the special aircraft jurisdiction of the United States. *See* 18 U.S.C. § 113(a)(5); 49 U.S.C. § 46506.

Lozoya's bench trial took place in the flight's landing district, the Central District of California. After the government rested, Lozoya moved for acquittal, claiming the government had not established venue in the Central District. *See* Fed. R. Crim. P. 29. The magistrate judge presiding over the trial denied the motion and ruled that venue was proper because the flight "came to an end" in the Central District. Lozoya was convicted and sentenced to pay a fine of $750. She then appealed to the district court, again arguing that venue was improper in the Central District. The district court found that venue was proper because the plane had landed in the Central District and affirmed the conviction. A divided three-judge panel of our court, however, agreed with Lozoya that venue was improper and reversed the conviction on that ground. *United States v.*

Lozoya, 920 F.3d 1231, 1243 (9th Cir. 2019). We took this case en banc.

We have jurisdiction under 28 U.S.C. § 1291 and review de novo whether venue was proper in the Central District of California. *See United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1059 (9th Cir. 2000). "Venue is a question of fact that the government must prove by a preponderance of the evidence." *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012).

DISCUSSION

The assault took place on a commercial flight in the "special aircraft jurisdiction of the United States." 49 U.S.C. § 46501(2). Decades ago, at the onset of the "age of jet aircraft," Congress recognized that crimes committed in the skies raise difficult questions: "Although State criminal statutes generally cover crimes committed on board aircraft in flight over the State, the advent of high-speed, high-altitude flights of modern jet aircraft has complicated the problem of establishing venue for the purposes of prosecution. In some recent instances, serious offenses have gone unpunished because it was impossible to establish to any reasonable degree of accuracy the State over which the crime was committed." H.R. Rep. 87-958 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2563, 2564. Congress chose to federalize certain offenses committed on airplanes, including murder, sexual assault, and Lozoya's crime—simple assault. *See id.* at 2563; 49 U.S.C. § 46506.

Lozoya contends that venue is proper only in the federal district over which the in-flight assault occurred, which was

not the Central District.[1] We reject that contention. Under 18 U.S.C. § 3237(a), venue is proper in the landing district, here the Central District of California. Thus, we affirm Lozoya's conviction.[2]

I. Constitutional Requirements

Criminal venue mattered to the Framers, who complained in the Declaration of Independence that King George transported colonists "beyond Seas to be tried." The Declaration of Independence, para. 21 (U.S. 1776). The Framers designed a system that requires trial in the vicinity of the crime, "to secure the party accused from being dragged to a trial in some distant state, away from his friends, witnesses, and neighborhood." *United States v. Muhammad*, 502 F.3d 646, 652 (7th Cir. 2007) (quoting Joseph Story, Commentaries on the Constitution § 925 (Carolina Academic Press reprint 1987) (1833)).

The Constitution safeguards a criminal defendant's venue right in two places. The Venue Clause of Article III, Section 2 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." U.S. Const. art. III, § 2, cl. 3. The Sixth

[1] It is undisputed that the assault happened before the plane entered airspace above the Central District, but it is unclear which district was below the plane during the assault.

[2] We exercise our discretion to consider only this issue. *See Summerlin v. Stewart*, 309 F.3d 1193 (9th Cir. 2002); *see also Rand v. Rowland*, 154 F.3d 952, 954 n.1 (9th Cir. 1998) (en banc). Parts I and II.A of the panel majority opinion, concerning the Speedy Trial Act and waiver issues, *United States v. Lozoya*, 920 F.3d 1231, 1236–38 (9th Cir. 2019), are not affected by our en banc review and are not withdrawn.

Amendment's Vicinage Clause further requires that the defendant be tried by an "impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Under these two provisions, criminal trials generally must take place in the same state and district where the crime took place. But if the crime was "not committed within any State," the Constitution provides that "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.

The Constitution does not discuss the airspace over the several states. Nor did the Framers 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." U.S. Const. art. I, § 8, cl. 10. Lozoya's crime would have been alien to the Framers. It happened on an airplane flying almost 600 miles an hour, five miles above the earth. And it occurred over one of several states or districts, depending on the time of the slap.

In Lozoya's view, the Constitution requires trial in the district over which the plane was flying at the exact moment of the assault. Her crime was committed in the airspace above a district, the argument goes, so that district was the location of her crime. Implicit in this reasoning is an interpretation of Article III and the Sixth Amendment that a state or district includes the airspace above it for constitutional venue purposes. Lozoya was not tried in the flyover district but in the Central District of California, where the plane landed and where she lived and worked. Lozoya thus argues that venue was constitutionally improper because her trial did not take place in the state and district where her crime took place.

We disagree. Neither 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.[3] Indeed, the very purpose of the Constitution's venue provisions—to protect the criminal defendant from "the unfairness and hardship to which trial in an environment alien to the accused exposes him"—is thwarted by limiting venue to a flyover district in which the defendant never set foot. *United States v. Johnson*, 323 U.S. 273, 275 (1944).

For crimes committed on planes in flight, the Constitution does not limit venue to the district directly below the airspace where the crime was committed. And thus venue "shall be at such Place or Places as the Congress may by Law have directed."[4] U.S. Const. art. III, § 2, cl. 3.

[3] Our decision in *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973), does not help Lozoya's argument. In *Barnard*, we interpreted 18 U.S.C. § 3237(a), which provides that offenses involving transportation in foreign commerce may be prosecuted in "any district from, through, or into which such commerce . . . moves." *Barnard* concluded that under the statute, a drug-smuggling plane moved "through" a district when the plane flew over it, because "the navigable airspace above that district is a part of the district." 490 F.2d at 911. *Barnard* did not purport to interpret Article III or the Sixth Amendment in reaching that holding.

[4] We are puzzled by the dissent's baggage handler hypothetical, in which a rogue baggage handler, "standing on the tarmac at Los Angeles International Airport," aims a laser at an aircraft during takeoff. Dissent at 37. The dissent concedes that "the baggage handler's offense was committed in California, and because the Venue Clause's exception for offenses 'not committed within any state' is *inapplicable*, it must be tried in California." Dissent at 37 (emphasis added). We agree: the hypothetical crime was committed in California; thus the Constitution requires that it be tried in California. The inquiry ends there. Despite

II. Statutory Requirements

18 U.S.C. § 3237(a) contains two paragraphs, each covering a different type of offense. First, "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." *Id.* Second, "[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." *Id.*

Two of our sister circuits, the Tenth and the Eleventh, have held that the second paragraph of § 3237(a) applies to in-flight crimes because the crimes "took place on a form of transportation in interstate commerce." *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004) ("Congress has provided a means for finding venue for crimes that involve the use of transportation. The violations of the statutes here [abusive sexual contact and simple assault of a minor] are 'continuing offenses' under 18 U.S.C. § 3237."); *see also United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012). In both these cases, the court upheld venue in the district where the airplane landed, rather than requiring the government to show "exactly which federal district was beneath the plane when [the defendant]

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recognizing that Congress's venue statutes do not apply when the Constitution settles the issue, the dissent goes on to apply an inapplicable statute and argues that it does not lead to the correct result. There is of course no requirement to "reconcile" a hypothetical result under an inapplicable statute. *See* Dissent at 38.

committed the crimes." *Breitweiser*, 357 F.3d at 1253; *see also Cope*, 676 F.3d at 1225.

We join the Tenth and Eleventh Circuits and conclude that the second paragraph of 18 U.S.C. § 3237(a) applies to federal crimes committed on commercial aircraft within the special aircraft jurisdiction of the United States. Lozoya's crime "involved" transportation in interstate commerce under a plain meaning reading of the word "involve." *See American Heritage Dictionary* (5th ed. 2019) (defining "involve" as "[t]o relate to or affect"). Not only did the crime take place on a form of interstate transportation, the assault is a federal offense only because it was committed within the special aircraft jurisdiction of the United States. *See* 49 U.S.C. § 46506. But for the interstate transportation, Lozoya could not have committed this crime. An offense whose very definition requires interstate transportation certainly "involves" transportation in interstate commerce.

That the dissent disagrees with Congress's broad definition of "continuing offense" is of no import. The dissent believes that a continuing offense should be defined as "one which was committed in more than one state" or locality. Dissent at 35–36. But that is simply not the definition that Congress adopted in the second paragraph of § 3237(a), which provides that "[a]ny offense involving . . . transportation in interstate or foreign commerce . . . is a continuing offense."[5] Rather, the dissent's definition is almost identical to the first paragraph of § 3237(a), covering

[5] The dissent insists that our interpretation is "strained" and characterizes it as the following: "[T]he majority has interpreted the phrase 'continuing offense' in § 3237 to include any offense . . . involving transportation in interstate or foreign commerce." Dissent at 36, 40. We note that is literally what the statute says.

offenses "begun in one district and completed in another, or committed in more than one district." 18 U.S.C. § 3237(a); *see also United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999). Here, we are not concerned with the first paragraph but with the second. Under the second paragraph of § 3237(a), venue was proper in the Central District of California, through and into which the plane moved.[6]

Our holding is consistent not only with the Tenth and Eleventh Circuits' decisions, but also with the near-universal practice of landing district prosecution. For decades, and since Congress federalized certain offenses committed in the air, federal offenders have been prosecuted and tried in the landing districts. Venue in the landing district is plainly sensible: it is where arrests are made and witnesses interviewed, and is often the defendant's residence or travel

[6] Where the Constitution does not mandate venue in a particular district, Congress has broad latitude to define the locality of a crime. *See, e.g.*, 48 U.S.C. § 644a (providing that "all offenses and crimes committed" on certain Pacific islands, including the Midway Islands, Wake Island, Johnston Island, and Palmyra Island, "shall be deemed to have been consummated or committed on the high seas on board a merchant vessel or other vessel belonging to the United States"). The dissent relies on *United States v. Johnson*, 323 U.S. 273 (1944), to narrow Congress's language in the second paragraph of § 3237(a). *See* Dissent at 33–34. *Johnson* did not interpret the second paragraph of § 3237(a) because it did not exist when *Johnson* was decided. That Congress wrote the second paragraph in response to *Johnson* does not mean that the second paragraph must be limited by *Johnson*'s specific context and discussion. And the *Johnson* Court did not require that Congress adopt any particular definition. *See Johnson*, 323 U.S. at 275. Further, the dissent's analysis of *Johnson* contradicts the dissent's own argument that the second paragraph of § 3237(a) "defines a particular category of offenses" that "fall within the more generally framed rule set forth in the first paragraph." Dissent at 34. If that were true, then Congress would not have needed to add the second paragraph after *Johnson* because both paragraphs would yield the same result.

destination. In our research, we found examples of landing district venue in *every* circuit except the D.C. Circuit (the District of Columbia has no commercial airports), and discovered no court that has prohibited venue in the landing district.[7]

By contrast, flyover prosecution is virtually unheard of, for good reason.[8] To establish venue under Lozoya's theory, the government must determine exactly when the crime was committed, use flight tracking sources to pinpoint the plane's longitude and latitude at that moment, and then look down five miles to see which district lay below. Lozoya dismisses the government's concerns about the difficulty of the task as "hyperbolic," suggesting that the time of the

[7] *See, e.g.*, *United States v. Jahagirdar*, 466 F.3d 149 (1st Cir. 2006) (sexual assault); *United States v. Cohen*, No. 07-cr-5561, 2008 WL 5120669 (2d Cir. Dec. 8, 2008) (sexual assault); *United States v. Aksal*, 638 F. App'x 136 (3d Cir. 2015) (sexual assault); *United States v. Jennings*, 496 F.3d 344 (4th Cir. 2007) (sexual abuse of a minor); *United States v. Stewart*, No. 02-CR-046, 2002 U.S. Dist. LEXIS 20220 (N.D. Tex. Oct. 21, 2002) [5th Cir.] (sexual assault); *United States v. Anderson*, 503 F.2d 420 (6th Cir. 1974) (attempted manslaughter); *United States v. Barberg*, 311 F.3d 862 (7th Cir. 2002) (sexual assault); *United States v. Kokobu*, 726 F. App'x 510 (8th Cir. 2018) (per curiam) (simple assault); *United States v. Lozoya*, No. 16-00598 (C.D. Cal. Sept. 8, 2017), *rev'd*, 920 F.3d 1231 (9th Cir. 2019); *United States v. Johnson*, 458 F. App'x 727 (10th Cir. 2012) (interference with flight crewmember and sexual assault); *United States v. Breitweiser*, 357 F.3d 1249 (11th Cir. 2004) (sexual abuse of a minor and simple assault).

[8] We acknowledge that § 3237(a) theoretically allows venue not just in the landing district, but also the takeoff district as well as the flyover districts. But we are not aware of any cases where the government prosecuted an in-flight crime in a flyover district with which the defendant had no ties. And in the event that a choice of venue implicates concerns about fairness or inconvenience, the defendant can request a transfer of venue. *See* Fed. R. Crim. P. 21(b).

crime can be determined using witness testimony and some math. The witnesses, however, gave different estimates of when the slap occurred. Lozoya's flight from Minneapolis to Los Angeles crossed at least eight districts in about three-and-a-half hours. In the span of an hour—the difference between the estimates of two witnesses—an airplane can easily fly over multiple states and districts.

A flyover venue rule would unreasonably burden the victims of in-flight crimes and the interests of justice. Of particular concern are victims of sexual assault. According to the FBI, reports of sexual assault on commercial flights are at an all-time high.[9] Sexual assaults are most common on long-haul flights when the victim is sleeping and covered by a blanket or jacket. Sometimes there are no witnesses. Victims report waking up disoriented and realizing in horror that they were assaulted by a seatmate. Proving the precise time of an assault could be impossible, and a flyover venue rule could mean no prosecution at all.

The venue statute cited by the dissent, 18 U.S.C. § 3238, is inapplicable here. Section 3238 applies to "offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district," *id.*, and we have held that it applies only if "the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was 'begun' there)." *United States v. Pace*, 314 F.3d 344, 351 (9th Cir. 2002). Lozoya's offense was not committed on the high seas, and

[9] *Sexual Assault Aboard Aircraft*, Federal Bureau of Investigation (Apr. 26, 2018), https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618.

for obvious reasons, we decline to hold that airspace above the United States is "outside the United States."

Although the dissent disagrees with *Pace*'s conclusion that § 3238 applies to crimes outside the United States, our interpretation in *Pace* is consistent with that of our sister circuits and the legislative history of § 3238.[10] As the dissent notes, Congress most recently amended § 3238 in 1963, to address (1) crimes committed by more than one offender, and (2) crimes committed by an offender who remains abroad. Dissent at 27. The Senate Report accompanying the 1963 amendments expressly stated that § 3238 was intended to cover extraterritorial crimes: "The purpose of the bill is to (1) permit the indictment and trial of an offender or joint offenders who commit *abroad* offenses against the United States, in the district where any of the offenders is arrested or first brought; (2) to prevent the statute of limitations from tolling in cases where an offender or any of the joint offenders remain *beyond the bounds of the United States* by permitting the filing of information or indictment in the last known residence of any of the

[10] *See United States v. Miller*, 808 F.3d 607 (2d Cir. 2015) (concluding that "the history and text of § 3238 do make clear, at the very least, that the statute focuses on offense conduct outside of the United States," *id.* at 619, and "[s]ection 3238 may apply even when certain offense conduct occurs in the United States, if the criminal acts are nonetheless 'essentially foreign,'" *id.* at 621); *United States v. Holmes*, 670 F.3d 586, 594 (4th Cir. 2012) ("We begin, as we must, with the text of § 3238, which establishes that venue for extraterritorial offenses 'shall be in the district in which the offender . . . is arrested or is first brought.'"); *United States v. Layton*, 519 F. Supp. 942, 944 (N.D. Cal. 1981) ("The apparent purpose of [§ 3238], however, is simply to provide an arbitrary rule of venue for offenses committed outside of the United States.").

offenders."[11] S. Rep. No. 88-146 (1963), *reprinted in* 1963 U.S.C.C.A.N. 660, 660 (emphases added).

Moreover, § 3238 by its terms applies to crimes committed "out of the jurisdiction of any particular State or district," but the states routinely assert jurisdiction over crimes committed in airspace. *See, e.g.*, N.J. Stat. Ann. § 6:2-9 ("All crimes, torts, and other wrongs committed by or against an airman or passenger while in flight over this state shall be governed by the laws of this state."); Fla. Stat. § 860.13 (criminalizing the "[o]peration of aircraft while intoxicated or in careless or reckless manner"); *Marsh v. State*, 620 P.2d 878, 879 (N.M. 1980) ("Although the Federal Aviation Act of 1958 was amended to extend federal criminal laws to certain acts committed on board aircraft, this legislation was not intended to preclude state prosecution for the same crimes." (citation omitted)).

There is no indication that Congress, when it amended § 3238 in 1963, believed that airspace above a state is "out of the jurisdiction" of that state. Indeed, when Congress amended the Federal Aviation Act in 1961 to federalize certain in-flight criminal acts, it recognized that crimes

[11] The dissent admits that the two amendments exclusively address extraterritorial crimes, but insists that the new language added in 1963, irrelevant here, provides the extraterritoriality requirement. Dissent at 31. This is wrong. For example, one of the two amendments added the following italicized language: "The trial of all offenses begun or committed . . . out of the jurisdiction of any particular State or district, shall be in the district in which the offender, *or any one of two or more joint offenders*, is arrested or is first brought[.]" 18 U.S.C. § 3238 (emphasis added). The added language clearly refers to the number of offenders and not to the extraterritorial location of the crime. Thus, *Pace* and our sister circuits correctly interpreted "out of the jurisdiction of any particular State or district"—the relevant language here—as referring to places outside of the United States.

committed in airspace are *within* the jurisdiction of the states:

> The offenses punishable under this legislation would not replace any State jurisdiction but would, where both Federal and State law provided for punishment for the same act, be in addition to the State criminal law.
>
> * * *
>
> We wish to emphasize that it is not our intent to divest the States of any jurisdiction they now have. This legislation merely seeks to give the Federal Government concurrent jurisdiction with the States in certain areas where it is felt that concurrent jurisdiction will contribute to the administration of justice and protect air commerce.

H.R. Rep. 87-958 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2563, 2564–65.[12] We think it unwise to divest states of their

[12] At that time, the Federal Aviation Act included a special venue provision containing language almost identical to § 3238: "[I]f the offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought." 49 U.S.C. § 1473(a) (repealed 1994). Legislative history shows that Congress understood "committed out of the jurisdiction of any particular State or district" to mean "where . . . offenders commit an offense abroad"—just as it understood § 3238. H.R. Rep. 87-958 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2563, 2577. In the context of aviation, "abroad" naturally refers to foreign airspace and not United States airspace.

jurisdiction, and dangerous to do so by holding that the airspace above them is not within the United States.

The dissent insists that its interpretation does not divest states of their jurisdiction, despite that it requires concluding that airspace is "out of the jurisdiction of any particular State" in order for § 3238 to apply. According to the dissent, such a paradoxical reading is required because the "text and statutory history of § 3238 show that its scope is coextensive with the Venue Clause." Dissent at 29–30. The text is certainly not coextensive. 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." The dissent ignores the statute's clear text and argues that the word "jurisdiction" actually means "territory," relying on a 170-year-old Supreme Court decision interpreting a predecessor statute. Dissent at 26, 29–30. Untethering the word from its meaning turns the statute upside down, leading to the dissent's perplexing conclusion that a state can retain jurisdiction to prosecute crimes that are committed "out of the jurisdiction of any particular State."[13]

The dissent contends that legislative history, our decision in *Pace*, and our sister circuits' decisions are all wrong, unreasoned, or dicta. *See* Dissent at 29 n.9. In the dissent's view, we need not consult any of these sources

[13] According to the dissent, § 3238's "offenses begun or committed . . . elsewhere out of the *jurisdiction* of any particular State" has nothing to do with "whether the State has the authority to prosecute the offense." Dissent at 30 (emphasis added). The dissent claims that "the text" compels this interpretation. Dissent at 30. This interpretation, in turn, is the basis of the dissent's equally perplexing argument that *we* rewrote the statutory text by reading "jurisdiction" to mean "jurisdiction." Dissent at 25.

because the statutory text clearly supports the dissent's interpretation. *See* Dissent at 25. 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.[14] Dissent at 26 (emphasis added), 29, 30 n.10. We cannot find such a peculiar place in the statute's clear text, and we are unaware of any court that has.[15]

We hold that under 18 U.S.C. § 3237(a), venue for in-flight federal crimes is proper in the landing district. We adopt here a venue rule that is tethered to the Constitution, comports with the decisions of our sister circuits, and is consistent with common sense and the interests of justice.

CONCLUSION

The Constitution does not limit venue for in-flight federal crimes to the district sitting directly below a plane at the moment a crime was committed. Such in-flight crimes are covered by 18 U.S.C. § 3237(a) and may be prosecuted in the flight's landing district. We therefore conclude that

[14] The dissent's interpretation requires concluding that all of these things are simultaneously true about airspace (and that all contrary legal authority is wrong). Otherwise, the dissent would have to conclude that United States airspace is extraterritorial or that states can no longer assert jurisdiction over airspace.

[15] Nor does the government's petition for rehearing en banc—which relies exclusively on § 3237(a)—argue for the dissent's interpretation of § 3238.

venue was proper in the Central District of California and affirm the district court.

AFFIRMED.

IKUTA, Circuit Judge, with whom COLLINS and LEE, Circuit Judges, join, dissenting in part and concurring in the judgment:

This case requires us to determine where a criminal case must be adjudicated when a discrete federal offense occurs on an aircraft flying through the airspace above a particular state. Under 49 U.S.C. § 46506, Congress has made simple assault a federal crime if the assault occurs "on an aircraft in the special aircraft jurisdiction of the United States." 49 U.S.C. § 46506; 18 U.S.C. § 113(a)(5). The majority holds that venue for this crime is proper in any district the airplane traveled from, through, or into, meaning that the trial for an assault on a cross-country flight can be held in any flyover state. *See* Maj. at 12 n.8 (acknowledging that 18 U.S.C. § 3237(a) "theoretically allows venue not just in the landing district, but also the takeoff district as well as the flyover districts"). Congress did not direct such an absurd result; rather, under the correct venue statute, the trial for an assault on a cross-country flight can be held only where the defendant "is arrested or is first brought," or where the defendant resides. 18 U.S.C. § 3238. Therefore, I dissent from the majority's reasoning.

I

Article III's Venue Clause provides that: "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed," U.S. Const. art. III, § 2,

cl. 3, and the Sixth Amendment further specifies that crimes committed within a state must be tried in the "district wherein the crime shall have been committed, which district shall have been previously ascertained by law," U.S. Const. amend. VI. There is only one exception to this general rule: when the crimes are "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.[1] Monique Lozoya assaulted a fellow passenger while on an aircraft in flight, and it is undisputed that Lozoya did not commit this offense in California. Therefore, the Venue Clause does not allow Lozoya's trial to be held in California, unless: (1) Lozoya's offense was "not committed within any state," and (2) Congress directed that the trial could be held in California.

II.

To determine whether the exception to the Venue Clause's general rule applies, we first ask whether Lozoya's offense was "not committed within any State." For the reasons explained below, when criminal conduct occurs in navigable airspace, the crime is "not committed within any State," U.S. Const. art. III, § 2, cl. 3, and Congress may

[1] The Venue Clause provides, in full:

> 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. art. III, § 2, cl. 3.

designate the venue for such a crime, Maj. at 8, at least when the crime has no effect on the ground below.[2]

The Venue Clause is ambiguous when applied to an offense that took place in an airplane flying over the United States, and some of our usual tools for interpreting legal texts are not helpful here. We can be confident that, 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. While some contemporaneous sources indicate that "the jurisdiction of a state is co-extensive with its territory," *United States v. Bevans*, 16 U.S. 336, 386–87 (1818), and therefore a crime committed within the jurisdiction of a state might be deemed to be committed within that state's territory for purposes of the Venue Clause, these sources do not indicate whether a state's jurisdiction extended to offenses occurring exclusively at 30,000 feet. To be sure, "at common law ownership of the land extended to the periphery of the universe," *Causby*, 328 U.S. at 260, but this principle must be understood against the backdrop of the sorts of above-the-ground activities contemplated at

[2] For present purposes, we need not resolve the question whether crimes on airplanes that have an on-the-ground effect within a state's territory are committed within the state, such as when a plane is used for unlawfully spraying agricultural pesticides over land, *see* Charles F. Krause, *Aviation Tort and Reg. Law* § 14:49 (2d ed. 2020), when flyover activities affect residents, *see United States v. Causby*, 328 U.S. 256, 258 (1946), or when an offense occurs partly on the ground and partly on an aircraft, *see, e.g.*, 49 U.S.C. § 46505 (criminalizing carrying concealed weapons or explosives aboard aircraft, which may also violate state laws). An offense such as the one at issue here, committed wholly within a plane flying miles above any state, has no impact on the territory of the state below, and therefore does not raise this question.

the time.[3] Given that technology has changed dramatically since the founding—in addition to aircraft, both satellites and spaceships now regularly invade the airspace between the land below and "the periphery of the universe," *id.*—this common law principle is not entitled to much weight in this context. Indeed, the Supreme Court has indicated that this common law principle may not be relevant to the modern use of navigable airspace. *See id.* at 261.

We are left to rely on what the Framers' contemporaries would have understood to be the purpose of the Venue Clause. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806–08 (1995). Historical sources indicate that the central purpose of the Venue Clause's requirement that trials be held in "the state where the said crimes shall have been committed" was to prevent criminal suspects from being tried in arbitrary locations, far away from witnesses. *See* Joseph Story, *Commentaries on the Constitution* § 1775 (1833). This was an important issue for the Framers. The Declaration of Independence had criticized the Crown "[f]or transporting us beyond Seas to be tried for pretended offences." The Declaration of Independence para. 21 (U.S. 1776). In Federalist No. 84, Alexander Hamilton argued that the Constitution contained "various provisions in favor of particular privileges and rights," including the Venue

[3] The first human flight occurred on November 21, 1783, in Paris, France, in a hot air balloon made of paper and silk. *History of Ballooning*, National Balloon Museum, https://www.nationalballoonmuseum.com/about/history-of-ballooning/ (last visited Sept. 23, 2020). The balloon reached an altitude of 500 feet and traveled 5.5 miles before landing 25 minutes later. *Id.* The first manned flight in America occurred on January 9, 1793. *Id.* A balloon carrying one man ascended from a prison yard in Philadelphia, Pennsylvania, reaching an altitude of 5,800 feet. *Id.* President Washington observed the launch of the balloon, which later landed in Gloucester County, New Jersey. *Id.*

Clause's general rule that a trial be held in the state where the crime was committed. The Federalist No. 84 (Alexander Hamilton). As the Supreme Court subsequently explained, the Framers drafted the Venue Clause with an awareness "of the unfairness and hardship to which trial in an environment alien to the accused exposes him." *United States v. Johnson*, 323 U.S. 273, 275 (1944).

Given the inadequacy of our usual interpretive tools, we should interpret the Venue Clause in a manner consistent with its evident purpose. A 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. *See* Story, *Commentaries*, § 1775. Otherwise, prosecutors would be required to establish where a criminal act occurred in airspace over a state, and defendants would have to be tried in flyover states. Accordingly, under the Venue Clause, a crime is "not committed within any State" when the criminal conduct occurs in navigable airspace.[4]

[4] The conclusion that a crime is not committed within any state if it is committed in navigable airspace requires us to overrule *United States v. Barnard*, which held that "navigable airspace above [a] district is a part of the district." 490 F.2d 907, 911 (9th Cir. 1973). Under federal law, if a crime is committed in a judicial district, it is also committed in a state. *See* 28 U.S.C. §§ 81–131 (defining judicial districts as comprising all or part of a state, with few exceptions). If the navigable airspace above a district is part of that district and part of a state, then the trial of an offense in such airspace must take place within that district and state. *See* U.S. Const. art. III, § 2, cl. 3; U.S. Const., amend VI. The majority attempts to distinguish *Barnard* on the ground that it "did not purport to interpret Article III or the Sixth Amendment." Maj. at 8 n.3. This is irrelevant, however, because we are bound by the constitutional significance of *Barnard*'s ruling whether or not *Barnard* referenced the

The majority agrees that in-flight crimes are "not committed within any State" within the meaning of the Venue Clause and are not committed within a "district" for purposes of the Sixth Amendment. According to the majority, neither the relevant text of either provision nor the Framers' understanding of them supports Lozoya's view that "a state or district includes the airspace above it for constitutional venue purposes." Maj. at 7. The majority thus concludes that, when crimes are "committed on planes in flight, the Constitution does not limit venue to the district directly below the airspace where the crime was committed." *Id*. at 8. Accordingly, the majority explains, "venue 'shall be at such Place or Places as the Congress may by Law have directed.'" *Id.* (quoting U.S. Const. art. III, § 2, cl. 3).

III

Because Lozoya's offense was "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. Congress provided this direction in 18 U.S.C. § 3238,[5] which mirrors and implements the exception in the

Venue Clause or Sixth Amendment. If *Barnard* remains good law, then we must deem the assault here to have "occurred *entirely* within the jurisdiction of a particular district" and a particular state, and Lozoya must be tried in that district and state. *See United States v. Lozoya*, 920 F.3d 1231, 1241 (9th Cir. 2019) (emphasis added), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019).

[5] As currently drafted, 18 U.S.C. § 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such

Venue Clause. The majority's argument to the contrary is based almost entirely on legislative history, which it uses to rewrite the text of § 3238. But as explained below, the language of § 3238 refutes the majority's claims, and the majority's selective quotations from committee reports do nothing to alter that. *See United States v. Mendoza*, 244 F.3d 1037, 1042 (9th Cir. 2001) ("If the text of the statute is clear, this court looks no further in determining the statute's meaning."). Indeed, the text and statutory history of both § 3238 and § 3237 strongly confirm that the majority relies upon the wrong venue provision in upholding the conviction here.

A

Section 3238 is the direct descendant of the statute enacted by the First Congress to implement the Venue Clause. In the Crimes Act of 1790, Congress provided:

> [T]he trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought.

Ch. 9, § 8, 1 Stat. 112, 114 (1790).

As the Supreme Court explained over a century ago, Congress enacted this venue provision in the Crimes Act to

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> offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

implement the Venue Clause's exception for crimes "not committed within any State." *United States v. Dawson*, 56 U.S. 467, 487–88 (1853). The First Congress used the phrase "crimes committed . . . in any place out of the jurisdiction of any particular state" to refer to crimes "not committed within any State." *Id.* at 488. This makes clear that the "place" referred to in the Crimes Act is a place outside of any state's territory, which is where the state would normally have jurisdiction to adjudicate offenses.

In 1873, Congress passed An Act to Revise and Consolidate the Statutes of the United States, 18 Stat. 138, which moved and renumbered the Crimes Act's venue provision and made minor revisions to its language as follows:

> The trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.[6]

Congress revised the phrase "or in any *place* out of the jurisdiction of any particular state" to "or *elsewhere*, out of the jurisdiction of any particular State or district." 1 Stat. 112, 114; 18 Stat. 138 (emphasis added). The context makes clear, however, that the word "elsewhere" continues to refer to a "place" that is not within a state. *See Cook v. United States*, 138 U.S. 157, 181–82 (1891) (continuing to interpret this provision as directing venue for "offenses not committed within any state" under the Venue Clause). Congress made limited stylistic amendments to this provision again in 1911.

[6] With the 1873 amendments, Congress renumbered the provision to Title XIII, Ch. 12, § 730 of the U.S. Code. 18 Stat. 138.

36 Stat. 1100. In 1948, Congress recodified the provision as 18 U.S.C. § 3238 and amended the statute to apply to offenses "begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district." 62 Stat. 826. Again, this language refers to places that are not within a state.

In 1963, Congress amended § 3238 to clarify where venue would be proper when an offense involved two or more joint offenders, or when the offender or offenders were not arrested or brought into any district. 77 Stat. 48. Congress retained the prior language of the statute, but added the following italicized language:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, *or any one of two or more joint offenders*, is arrested or is first brought; *but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia*.

18 U.S.C. § 3238 (emphasis added). According to a contemporaneous legislative report, Congress amended the statute in response to two concerns expressed by the Attorney General. First, the previous version of § 3238 created a "most awkward situation in certain instances when two or more joint offenders [were] involved." H.R. Rep. No.

86-199, at 2 (1959) (Judiciary Committee Report); *see also* S. Rep. No. 88-146 (1963), *as reprinted in* 1963 U.S.C.C.A.N. 660. For example, if two or more individuals jointly committed acts of treason abroad and were then found in different districts within the United States, the previous version of § 3238 would require them to be tried in different jurisdictions. H.R. Rep. No. 86-199, at 2. Second, the prior version of § 3238 lacked language that would allow the government to indict "an offender who commits an offense beyond the bounds of the United States and [who] remains beyond those bounds."[7] *Id*. The amendment to § 3238 addressed both concerns. *Id.* at 1.[8] While the 1963 amendment gave the government more flexibility to try cases involving defendants who committed offenses against

[7] When defendants committed crimes against the United States abroad, the statute of limitations for commencing criminal prosecution against such defendants continued running while they remained living abroad. *See* H.R. Rep. No. 86-199, at 3; *see also Donnell v. United States*, 229 F.2d 560, 565 (5th Cir. 1956). The Attorney General wanted the authority to indict such defendants in the United States in order to toll the statute of limitations.

[8] According to the House Judiciary Committee Report, the purpose of this amendment to § 3238 was to:

> (1) permit the indictment and trial of an offender or joint offenders who commit abroad offenses against the United States, in the district where any of the offenders is arrested or first brought; (2) to prevent the statute of limitations from tolling in cases where an offender or any of the joint offenders remain beyond the bounds of the United States by permitting the filing of information or indictment in the last known residence of any of the offenders.

H.R. Rep. No. 86-199, at 1; *see also* S. Rep. No. 88-146, at 1, 1963 U.S.C.C.A.N. at 660.

the United States abroad, it did not change the original text of § 3238, which continued to apply to offenses committed "elsewhere out of the jurisdiction of any particular State," just as it had since the Crimes Act.

Given the text and history of § 3238, the majority's claim that § 3238 applies only to offenses "committed entirely on the high seas or outside the United States" lacks merit. Maj. at 13 (quoting *United States v. Pace*, 314 F.3d 344, 351 (9th Cir. 2002)). The majority's interpretation has no support in the text of § 3238. Although Congress could have limited § 3238 to offenses committed "outside the United States," it instead chose to reference offenses "committed upon the high seas, *or elsewhere* out of the jurisdiction of any particular State or district." 18 U.S.C. § 3238 (emphasis added).[9] The majority is likewise mistaken in claiming that the reference in § 3238 to offenses that are committed "elsewhere out of the jurisdiction of any particular State" applies only to offenses that a state lacks the authority to prosecute. Maj. at 17. The text and statutory history of § 3238 show that its scope is coextensive with the Venue

[9] The majority's reliance on dicta in nonbinding cases provides no support for concluding otherwise. The unreasoned statement in *Pace* that "§ 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was 'begun' there)" is mere dicta given that the offense in *Pace* was "partially 'committed' in the District of Ohio." 314 F.3d at 351. The two other cases cited by the majority are likewise unreasoned and unpersuasive. *See United States v. Miller*, 808 F.3d 607, 621 (2d Cir. 2015) (stating, without support, that § 3238 "*focuses* on offense conduct outside of the United States" (emphasis added)); *United States v. Layton*, 519 F. Supp. 942, 943–44 (N.D. Cal. 1981) (stating without support or reasoning that "[t]he *apparent* purpose of [§ 3238], however, is simply to provide an arbitrary rule of venue for offenses committed outside of the United States" (emphasis added)).

Clause exception, and applies to crimes committed outside the territory of a state.

The majority contends that this construction of § 3238 is wrong. According to the majority, if § 3238 applies to in-flight offenses, then such offenses would be deemed to have been committed "elsewhere out of the jurisdiction of any particular State," and that interpretation would divest states of their prosecutorial jurisdiction over in-flight crimes. Maj. at 15–16. The text of the statute refutes the majority's reading. By using the word "elsewhere," § 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. This means there is no daylight between § 3238 and the Venue Clause because both focus on whether the place in which the offense occurred is within a state. And because the majority agrees that the airspace at issue here is not a place within any State for purposes of the Venue Clause, *see supra* at Part II, it follows that the airspace is also not a place within the jurisdiction of any State for purposes of § 3238. Thus, nothing about § 3238 could be said to "divest states of their jurisdiction." Maj. at 16–17. The question whether a state can prosecute a crime committed outside a state's territory in navigable airspace is exactly the same under § 3237(a) or § 3238.[10]

[10] The majority merely assumes that a state has jurisdiction to prosecute crimes committed at cruising altitude in navigable airspace, and supports its assumption only with the legislative history of the 1961 amendments to the Federal Aviation Act. Maj. at 15–16 & n.12. The views of legislators regarding a state's jurisdiction provide no guidance for our analysis of such a legal question, and of course the legislative history of a "completely separate statute[] passed well after" the statute

Nor does legislative history support the majority's interpretation. The majority relies on legislative history explaining the 1963 amendment to § 3238, Maj. at 14–17, which added language covering offenders committing criminal acts abroad. This amendment did not affect the language in § 3238 relevant here, which directs that offenses committed "elsewhere out of the jurisdiction of any particular State or district" must be tried in the district in which the offender is arrested or first brought. Therefore, the 1963 legislative history sheds no light on whether the relevant language in § 3238 is limited to offenses committed abroad.

In short, § 3238 implements the Venue Clause: it provides where a crime shall be tried if it is "not committed within any State." Because an assault in navigable airspace is "not committed within any State," the trial must be held where § 3238 directs, namely, "in the district" where the offender is "arrested or . . . first brought," or if there is no such district, in the district where the offender resides. 18 U.S.C. § 3238. This is consistent with the purposes behind the Venue Clause because the trial of an offender who committed an assault on an airplane will generally be held where the offender is arrested, typically in the district where the plane lands.[11] Such a venue is not arbitrary, because the defendant, the witnesses, and the victims are more likely to be found in that district than any other.

being construed, has little persuasive power even to those who rely on legislative history. *Doe v. Chao*, 540 U.S. 614, 626 (2004).

[11] This is consistent with the "near-universal practice of landing district prosecution." Maj. at 11.

Because Lozoya committed an assault in navigable airspace, § 3238 applies, and she is subject to trial in the Central District of California.[12]

B

To recap, the majority agrees that a crime committed on a plane in flight is "not committed within any State" for purposes of the Venue Clause. Maj. at 8. And as the Venue Clause's exception provides, if a crime is not committed within a state, it may be tried wherever Congress directs.[13] But instead of relying on § 3238, which expressly directs where an offense committed outside of a state must be tried, the majority relies on the second sentence in § 3237(a), which addresses a different issue: ensuring that continuing offenses can be tried "in any district from, through, or into which . . . commerce . . . moves."[14]

[12] The record indicates that Lozoya's residence was in Riverside, California. Therefore, even if Lozoya was not arrested when she was summoned to appear before the magistrate judge, venue was proper in the district of her last known residence, the Central District of California. *See* 18 U.S.C. § 3238.

[13] For instance, the majority points to 48 U.S.C. § 644a, which provides that all offenses committed on certain Pacific islands "shall be deemed to have been consummated or committed on the high seas on board a merchant vessel or other vessel belonging to the United States." Maj. at 11 n.6. Because these islands are not "within any State," Congress may direct where crimes on such islands may be tried.

[14] 18 U.S.C. § 3237(a) provides, in full:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired

The text and statutory history make clear that § 3237(a) does not implement the Venue Clause, but rather provides for the trial of offenses committed in more than one state or district. The second sentence in § 3237(a) was enacted in response to the Supreme Court's decision in *United States v. Johnson*, 323 U.S. at 273–74.[15] *Johnson* construed a criminal statute making it unlawful to "use the mails or any instrumentality of interstate commerce" to send or receive certain dentures across state lines. 323 U.S. at 273–74. Given a defendant's constitutional right to be tried in the state and district where the crime was committed, U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI, the Supreme Court construed the denture statute narrowly as permitting trial only in the state and district where the sender put the dentures in the mail or into which the importer brought the

> of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> 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.

[15] Prior to *Johnson*, the statute which is now § 3237(a) read:

> When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

36 Stat. 1100 (1911).

dentures. *Id.* at 277–78. The Court indicated, however, that it would have reached a different result had Congress used "the doctrine of a continuing offense" and expressly provided that the crime extended over the whole area through which the dentures were transported. *Id.* at 275. Congress could, if it chose, enact "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.

Rather than add a specific venue provision to the denture statute itself, as *Johnson* had suggested, Congress responded to *Johnson* by adding the second sentence of what is now § 3237(a), which expressly referred to a "continuing offense" and provided that such a continuing offense in the use of the mails or interstate commerce could be prosecuted "in any district from, through, or into which such commerce or mail matter moves." This amendment to § 3237(a) thus directly implemented *Johnson*'s guidance that Congress could use "the doctrine of a continuing offense" in order to "provide that the locality of a crime shall extend over the whole area through which force propelled by an offender operates," and therefore "an illegal use of the mails or of other instruments of commerce may subject the user to prosecution in the district where he sent the goods, or in the district of their arrival, or in any intervening district." *Id.* at 275.

The second paragraph of § 3237(a) is not surplusage, as the majority wrongly suggests. *See* Maj. at 10–11. Rather, the 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. Given the overlap between these two paragraphs, and the fact that the first paragraph of § 3237(a) standing

alone was insufficient to forestall the outcome in *Johnson*, the majority's suggestion that the two paragraphs must be read as applying to two different categories of offenses is clearly wrong. *Id.* It is not uncommon to have a situation "in which a general authorization and a more limited, specific authorization exist side-by-side." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012). In that situation, there is no violation of the canon against superfluity, because the canon that "the specific governs the general" governs the analysis. *Id.* (citation omitted). Rather than being superfluous, the specific authorization (rather than the more general one) controls in the cases where it applies. *Id.* Further, the majority's notion that, in order to avoid surplusage, the second paragraph of § 3237(a) must be read in a way that raises grave constitutional concerns ignores the equally, if not more important, constitutional-avoidance canon. *See infra* at Part III.B. Even if there were redundancy in the proper reading of § 3237(a) set forth above, that reading is natural and preferable compared to the majority's oxymoronic and constitutionally problematic notion of a non-continuing continuing offense.

The doctrine of "continuing offenses" discussed in *Johnson* is not related to the Venue Clause's exception for offenses "not committed within any State," which is addressed in § 3238. Rather, the doctrine is a specific application of the constitutional requirements that crimes be tried in the state and district where they were committed. As interpreted by the Supreme Court, 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." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (quoting *United States v. Lombardo*, 241 U.S. 73, 77 (1916)). In other words, a "continuing offense" is one which was committed

in more than one state, and so can be tried in more than one state. For instance, crimes that persist during the course of transportation between states, such as interstate drug smuggling or kidnaping, are continuing offenses, which can be tried wherever the transportation occurred. *See Rodriguez-Moreno*, 526 U.S. at 279–81 (holding that kidnaping is a continuing offense because the "conduct constituting the offense" continues throughout the journey and "does not end until the victim is free").

Congress cannot avoid the strictures of the Sixth Amendment and Venue Clause merely by labeling a point-in-time offense as a "continuing offense." "Crimes consisting of a single noncontinuing act are 'committed' in the district where the act is performed." *Pace*, 314 F.3d at 350 (quoting *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994)). Any Congressional enactment that purported to allow the trial of such a point-in-time offense outside the state and district where it occurred, whether or not the offense was labeled "continuing," would be constitutionally impermissible. Therefore, the term "continuing offense" in § 3237(a) must be interpreted as referring to the sort of crime that "extend over the whole area through which force propelled by an offender operates," *Johnson*, 323 U.S. at 275, where the "process of wrongdoing" is "a continuing phenomenon," *id.* at 276–77.

Contrary to the Supreme Court's definition of the continuing offense doctrine, the majority has interpreted the phrase "continuing offense" in § 3237 to include any offense (including point-in-time offenses) involving transportation in interstate or foreign commerce. *See* Maj. at 10 (rejecting the argument that the "definition that Congress adopted" requires that the offense be continuing or persisting in any way). Therefore, under the majority's interpretation, any

offense (including a discrete slap) that "take[s] place on a form of interstate transportation" meets the criteria in the second sentence of § 3237(a): it is a continuing offense "involving" transportation in interstate commerce under § 3237(a), at least when the offense is one "whose very definition requires interstate transportation." Maj. at 10. Indeed, the majority acknowledges that no part of the offense at issue here occurred in the Central District of California. Maj. at 6 n.1 ("It is undisputed that the assault happened before the plane entered airspace above the Central District . . . .").

The majority's interpretation is wrong on its face and raises potential constitutional problems. By its terms, § 3237(a) is not limited to offenses that fall within the Venue Clause's exception for crimes not committed within any state. As a result, as interpreted by the majority, § 3237 will apply in a range of circumstances that raise significant constitutional concerns. A simple hypothetical shows why. Consider a rogue baggage handler standing on the tarmac at Los Angeles International Airport. As an airplane takes flight on its way to New York's John F. Kennedy International Airport, the baggage handler aims the beam of a laser pointer at the aircraft in violation of 18 U.S.C. § 39A(a), which punishes "[w]hoever knowingly aims the beam of a laser pointer at an aircraft in the special aircraft jurisdiction of the United States." Under the Venue Clause, the baggage handler's offense was committed in California, and because the Venue Clause's exception for offenses "not committed within any state" is inapplicable, it must be tried in California. And Congress cannot circumvent the Venue Clause by relabeling the baggage handler's noncontinuing action as a "continuing offense." *See Rodriguez-Moreno*, 526 U.S. at 279; *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998). Indeed, the majority agrees that the Constitution

requires this hypothetical offense to be tried in California. Maj. at 8 n.4.

But under the majority's interpretation, § 3237(a) applies to the baggage handler's crime. Like the slap in this case, the baggage handler's laser pointing "'involved' transportation in interstate commerce under [the majority's] reading of the word 'involve.'" *See* Maj. at 10. Accordingly, it is a "continuing offense," per the majority's interpretation of § 3237(a). And, likewise, § 39A(a)'s "very definition requires interstate transportation." Maj. at 10. Therefore, under the majority's reading of § 3237(a), the baggage handler has committed a "continuing offense," and he may be tried in any district "from, through, or into which such commerce . . . moves." 18 U.S.C. § 3237(a). This includes (depending upon the airplane's exact route) the District of New Mexico, the District of Kansas, the Central District of Illinois, and the Eastern District of New York. The majority agrees that such a result is inconsistent with the Venue Clause because "[t]he provision for offenses 'not committed within any state' is inapplicable," but does not reconcile this conclusion with its interpretation of § 3237(a). Maj. at 8 n.4.[16]

Because many discrete offenses "relate to or affect" interstate transportation, the majority's mistaken interpretation of § 3237(a) has a widespread effect. Maj. at 10. Even if the majority interprets § 3237(a) as applying only to statutory offenses that reference interstate

[16] The majority says it is "puzzled" by this hypothetical, because it is clear that the Venue Clause requires the baggage handler to be tried in California. Maj. at 8 n.4. Given that § 3237(a), as interpreted by the majority, applies to the baggage handler's offense, this amounts to an implicit acknowledgment that under the majority's reading, § 3237(a) would be unconstitutional in many applications.

transportation or an instrumentality of interstate transportation, Maj. at 10, Congress has created numerous point-in-time offenses that include such a reference, *see, e.g.*, 18 U.S.C. § 1992 (criminalizing various discrete acts against and/or involving railroad equipment and mass transportation systems); 18 U.S.C. § 33(a) (criminalizing destruction of motor vehicles or motor vehicle facilities "used, operated, or employed in interstate or foreign commerce"). Although these offenses would generally be committed within a particular state, under the majority's interpretation of § 3237(a), defendants may be tried wherever the relevant instrumentality of commerce has moved.

But more important, if § 3237(a) governs crimes that "relate to or affect" transportation in interstate commerce, Maj. at 10, and is not limited to offenses that are "continuing" because the "process of wrongdoing" continues during interstate transportation, *Johnson*, 323 U.S. at 276, then the language of the statute provides no basis to limit § 3237(a) to offenses "whose very definition requires interstate transportation." *See* Maj. 10. 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." *United States v. Morgan*, 393 F.3d 192, 200 (D.C. Cir. 2004); *see also United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) ("[T]he government need only show that the crime took place on a form of transportation in interstate commerce." (quoting *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004))). 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," *Morgan*, 393 F.3d at 200, the

majority's reading of § 3237(a) will swallow the Venue Clause.

Even when an offense is not committed within any state, like Lozoya's offense in navigable airspace, the majority acknowledges that its interpretation of § 3237(a) leads to absurd results that are inconsistent with the purposes of the Venue Clause. *See* Maj. at 12 n.8 ("We acknowledge that § 3237(a) theoretically allows venue not just in the landing district, but also the takeoff district as well as the flyover districts."). Under the majority's interpretation, for example, Lozoya 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. We should not lightly assume that Congress enacted a venue rule so contrary to the Framers' intent. *Johnson*, 323 U.S. at 276; Story, *Commentaries*, § 1775.

In short, the majority's reading of § 3237(a) as providing the venue for point-in-time offenses that could occur in a single state is not plausible. It conflicts with the most natural reading of § 3237(a), which is that it provides the venue for a trial of "continuing offenses," meaning offenses that occurred in multiple states. When "choosing between competing plausible interpretations of a statutory text," we must employ the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Interpreting § 3237(a) in a strained manner that renders it unconstitutional in many instances and contrary to the Venue Clause's purposes in others violates this principle. Nor can we overlook these constitutional problems simply because applying § 3237(a) in the case before us does not violate the Venue Clause. The Supreme Court 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. Doing so "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382.

IV

It is a mystery why the majority relies on a venue statute that obviously does not apply to discrete criminal offenses in navigable airspace, instead of a statute that has provided venue for offenses "not committed within any State" since the beginning of our nation. Section 3238's text and history indicate that it governs those offenses, and applying § 3238 is more consistent with Article III's purposes than applying § 3237(a). Because the majority's interpretation of § 3237(a) creates serious constitutional problems that could easily be avoided, we should adopt the construction "more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes." *Johnson*, 323 U.S. at 276. Therefore, I dissent.

Appendix B

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U.S. COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MONIQUE A. LOZOYA, Defendant-Appellant.	No. 17-50336 D.C. No. 2:16-cr-00598-AB-1 Central District of California, Los Angeles **ORDER**

THOMAS, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel disposition in this case shall not be cited as precedent by or to any court of the Ninth Circuit.

Judge Hunsaker did not participate in the deliberations or vote in this case.

Appendix C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MONIQUE A. LOZOYA, *Defendant-Appellant.*	No. 17-50336 D.C. No. 2:16-cr-00598-AB-1 OPINION

Appeal from the United States District Court
for the Central District of California
André Birotte Jr., District Judge, Presiding

Argued and Submitted March 7, 2019
Pasadena, California

Filed April 11, 2019

Before: MILAN D. SMITH, JR. and JOHN B. OWENS,
Circuit Judges, and BENJAMIN H. SETTLE,[*]
District Judge.

Opinion by Judge Milan D. Smith, Jr.;
Partial Concurrence and Partial Dissent by Judge Owens

[*] The Honorable Benjamin H. Settle, United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY[**]

Criminal Law

The panel reversed for improper venue a conviction for assaulting a fellow passenger on a commercial flight from Minneapolis to Los Angeles, and remanded.

The panel found it unnecessary to determine whether the government's prolonged prosecution of the defendant constituted a violation of the Speedy Trial Act. The panel explained that because the district court did not abuse its discretion when determining that a dismissal pursuant to the Speedy Trial Act would have been without prejudice, any erroneous application of the Speedy Trial Act would not have changed the outcome, as the government would have been left free to file the superseding information on which the defendant was eventually convicted.

Because venue was proper on the face of the superseding information, the panel held that the defendant was permitted to move for acquittal on venue grounds following the government's case-in-chief, and did not waive the issue.

The panel held that venue was not proper in the Central District of California in this case in which there is no doubt that the assault occurred before the flight entered the Central District's airspace. The panel held that the first paragraph of 18 U.S.C. § 3237(a), which concerns continuing offenses that occur in multiple districts, does not confer venue. The

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel held that the second paragraph of § 3237(a), which pertains to offenses involving transportation in interstate commerce or foreign commerce, does not confer venue. The panel held that because the assault occurred entirely within the jurisdiction of a particular district, 18 U.S.C. § 3238—which pertains to offenses begun or committed on the high seas, or elsewhere out of the jurisdiction of any particular state or district—does not confer venue.

The panel directed the district court, on remand, to dismiss the charge without prejudice, unless the defendant consents to transfer the case to the proper district. The panel held that the proper venue for an assault on a commercial aircraft is the district in whose airspace the alleged offense occurred. The panel wrote that it seems wholly reasonable, using testimony and flight data, for the government to determine where exactly the assault occurred by the preponderance of the evidence necessary to establish venue.

Concurring in part and dissenting in part, Judge Owens wrote that while he agrees with much of the majority opinion, he disagrees with its ultimate holding on venue, which creates a circuit split and makes prosecuting crimes on aircraft (including cases far more serious than this one) extremely difficult. Judge Owens wrote that he agrees with the Tenth and Eleventh Circuits that the "transportation in interstate . . . commerce" language in § 3237(a) covers the conduct in this case.

COUNSEL

James H. Locklin (argued), Deputy Federal Public Defender; Hilary Potashner, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellant.

Karen E. Escalante (argued), Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

M. SMITH, Circuit Judge:

Defendant-Appellant Monique A. Lozoya was convicted of assaulting a fellow passenger on a commercial flight from Minneapolis to Los Angeles. Following several months of pretrial activity, the government filed a superseding information charging Lozoya with simple assault, a Class B misdemeanor. At a bench trial, the magistrate judge rendered a guilty verdict, and the district court subsequently affirmed the conviction. We hold that venue was not proper in the Central District of California, and therefore reverse Lozoya's conviction.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

On the evening of July 19, 2015, Lozoya and her boyfriend, Joshua Moffie, flew on Delta Airlines Flight 2321 from Minneapolis to Los Angeles. Lozoya sat in the middle

seat of the second-to-last row on the aircraft's starboard side; Moffie occupied the aisle seat to her left, while another passenger, Charles Goocher, sat in the window seat to her right. Oded Wolff, traveling with his wife Merav and their family, sat immediately behind Lozoya in the middle seat of the last row, with Merav in the window seat to his right.

As Flight 2321 soared above the Great Plains, Lozoya wanted to sleep. However, her attempts at slumber were foiled because the passenger behind her—Wolff—repeatedly jostled her seat. This purported annoyance was verified by Goocher, who recalled that "the people that were behind us were causing commotion behind—behind our chairs, wrestling around with their stuff . . . . hitting the chairs, the tray up and down, up and down, up and down." Wolff denied causing a commotion; instead, he claims that, after tapping the TV screen on the back of Lozoya's seat in a vain attempt to turn it off, he and Merav went to sleep.

The incident that led to this appeal occurred later in the flight, when Wolff and his wife left their seats to use the lavatory. While the pair was away, Lozoya told Moffie about the jostling. Although Moffie offered to say something, Lozoya opted instead to speak to Wolff herself when he returned to his seat. Lozoya claimed that when Wolff returned, while she was still seated, she turned to her left to address the standing Wolff and politely asked him to stop hitting her seat, to which Wolff abrasively shouted "What?" and "quickly" moved his hand to within a half-inch of her face. Lozoya testified, "I got really scared and nervous, and I didn't know what was going on, and it felt like he was about to hit me," and so "without even thinking . . . pushed him away" with an open palm, which made contact with Wolff's face. Wolff and Merav, by contrast, testified that Wolff's hands were resting on the seats behind

and in front of him, and that Lozoya yelled at him to stop tapping his TV screen and then hit him with the back of her hand, causing his nose to bleed.

As the various parties responded in shock to the incident, flight attendant Divone Morris approached them to calm the situation, and lead flight attendant Terry Sullivan began to investigate. Sullivan spoke with Lozoya and Wolff, and asked the latter if he preferred to file charges or would instead accept an apology from Lozoya. Wolff agreed to meet with Lozoya at the airport after the flight, and indicated that he would listen to her explanation before deciding whether to accept an apology. However, after discussing the issue with Moffie, Lozoya decided against meeting with Wolff, and left the airport without apologizing.

II. Procedural Background

A. Pretrial

In August 2015, about three weeks after the incident on Flight 2321, FBI special agent Meredith Burke, who had investigated the assault and interviewed the participants, issued Lozoya a violation notice charging her with assault pursuant to 18 U.S.C. § 113(a)(4). Because the maximum custodial status of this offense is one year, it is classified as a Class A misdemeanor. 18 U.S.C. § 3559(a)(6). Burke also prepared a fourteen-page statement of probable cause detailing her investigation. She dated the statement August 7, 2015.

On September 16, 2015, Lozoya was arraigned before a magistrate judge. Although the judge granted Lozoya's request for counsel, he also required a monthly contribution of $200 towards attorneys' fees. Lozoya pleaded not guilty, and the magistrate judge set a trial date of February 4, 2016.

The judge warned Lozoya, "[I]f you fail to appear on the date of your trial, that will result in the issuance of an arrest warrant," but set no bond.

On January 14, 2016, approximately four months after the arraignment, Lozoya moved to dismiss the case. She argued that the government failed to comply with the Federal Rules of Criminal Procedure, which require that "[t]he trial of a misdemeanor [] proceed on an indictment, information, or complaint," Fed. R. Crim. P. 58(b)(1), and that under the Speedy Trial Act (the Act), the government should have filed an indictment or information within thirty days of her arraignment. The government opposed the motion, arguing that the Act had not been triggered because "the issuance of a violation notice does not trigger the Speedy Trial Act." It also claimed that the procedure it employed in Lozoya's case was consistent with standard practices, which Lozoya countered was incompatible with both the Act and the Central District of California's internal guidelines.

On February 1, 2016, before the magistrate judge heard Lozoya's motion to dismiss, the government filed an information charging her with the Class A misdemeanor.

Three days later—the date set for trial—the magistrate judge first addressed Lozoya's pending motion. The judge denied the motion, determining that, under *United States v. Boyd*, 214 F.3d 1052 (9th Cir. 2000), the issuance of a notice violation

> did not constitute a complaint and did not start the running of the 30-day clock. . . . The fact that there was arguably an arrest as that term is used under the Speedy Trial Act Plan here in the Central District does not meet the requirement for a complaint, which is a

> separate requirement from the issue of an arrest.

Even if there had been a violation of the Act, the judge continued, he would not have dismissed the case with prejudice. Because the government had filed the subsequent information, the judge granted its motion to dismiss the violation notice without prejudice.

Lozoya was arraigned on the Class A misdemeanor information on February 9, 2016, at which time she pleaded not guilty.[1]

Subsequently, Lozoya filed two additional motions to dismiss the information with prejudice, again arguing that the Act had been violated. At a February 29, 2016 hearing on the motions, the government offered to "file a superseding information and make it a Class B" misdemeanor, which would "eliminate all the Speedy Trial Act problems." The magistrate judge then indicated that she would reject Lozoya's request to dismiss the case with prejudice, noting that "consideration of the seriousness of the offense, the facts and circumstances of this case, and the impact of the reprosecution, particularly in light of the fact that it's now going to be a Class B misdemeanor, does not warrant a dismissal with prejudice." The judge ultimately decided to defer ruling on the issue until after the government responded to Lozoya's third motion to dismiss and filed a new information.

[1] Although Magistrate Judge Alexander F. MacKinnon presided over the first hearing, Magistrate Judge Alka Sagar presided over the second arraignment and subsequent proceedings.

Soon thereafter, the government filed the superseding information charging Lozoya with simple assault in violation of 18 U.S.C. § 113(a)(5), a Class B misdemeanor. The magistrate judge then denied Lozoya's outstanding motions to dismiss, and arraigned Lozoya on the superseding information on April 5, 2016.

B. Trial

At the bench trial, the government called Wolff and Merav, as well as Sullivan (the lead flight attendant) and Burke (the FBI special agent who investigated the incident). After the government rested, Lozoya moved for acquittal pursuant to Federal Rule of Criminal Procedure 29, arguing that venue in the Central District of California was improper. The magistrate judge denied the motion, stating that "[a]ny offense that involves transportation in interstate or foreign commerce is a continuing offense and may be prosecuted in any district from, through or into which such commerce moves," and concluding that "to establish venue, the government only needs to prove that the crime took place on a form of transportation in interstate commerce." As part of her defense, Lozoya called Morris (another flight attendant), Goocher (the passenger who sat next to Lozoya on the flight), and Moffie (her boyfriend), and testified on her own behalf.

Before pronouncing judgment, the magistrate judge acknowledged that "[t]his is really an unfortunate situation borne out of a misunderstanding in a situation that I think almost anybody that flies commercially can relate to." Nevertheless, she concluded that "in this case there was sufficient evidence to establish that the defendant struck the victim on his face, and . . . striking the victim would be sufficient to meet the standard for simple assault."

She also found that

> defendant's testimony and her statements to the special agent and to the flight attendants contained inconsistencies regarding her perceived threat from the victim, and also the Court found that the testimony of the defendant's witnesses were themselves inconsistent and failed to establish beyond a reasonable doubt that the defendant was in a position where she felt threatened.

Thus, the magistrate judge concluded that, as to the issue of self-defense, "based on the testimony presented [] the defendant used more force than what was reasonably necessary to defend herself against what she perceived to be a threat to her physical safety." The judge therefore found Lozoya guilty of simple assault.

C. Post-Trial

Following the trial, Lozoya again moved for a judgment of acquittal under Rule 29, based on an argument relating to venue. The magistrate judge denied the motion, finding her challenge to venue waived and her motion therefore untimely. The judge further concluded that the venue challenge was meritless in any event, as "[18 U.S.C.] § 3237(a)'s broad language and the difficulties inherent in pinpointing the exact location of a crime occurring on an aircraft traveling in interstate commerce gave rise to venue in the arriving district."

Lozoya was ultimately sentenced to pay a fine of $750 and a special assessment of $10; she was not sentenced to any custodial term.

On August 11, 2016, Lozoya appealed to the district court, raising the same three claims now before us. In an eighteen-page order, the district court rejected her arguments and affirmed the conviction. This timely appeal followed.

STANDARD OF REVIEW AND JURISDICTION

"We review de novo a district court's application of, and questions of law arising under, the Speedy Trial Act. We review for abuse of discretion a district court's decision to dismiss an indictment without prejudice for a violation of the Speedy Trial Act." *United States v. Lewis*, 611 F.3d 1172, 1175 (9th Cir. 2010) (citations omitted). We review de novo whether venue was proper. *United States v. Hui Hsiung*, 778 F.3d 738, 745 (9th Cir. 2015). We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

I. Speedy Trial Act

Lozoya was initially charged with a Class A misdemeanor, to which the Act applies. *See Boyd*, 214 F.3d at 1055.

The Act requires that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges." 18 U.S.C. § 3161(b). Subsequently,

> [i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence

> within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

Id. § 3161(c)(1). Failure to adhere to these limits results in dismissal, which may be with or without prejudice. *Id.* § 3162(a). Because §§ 3161(b) and 3162(a)(1) "must be read together," the latter's dismissal provision only applies "when a suspect is formally charged at the time of, or immediately following, arrest, or when a suspect is subject to some continuing restraint on liberty imposed in connection with the charge on which the subject is eventually tried." *Boyd*, 214 F.3d at 1055 (footnote omitted).

Congress passed the Act to effectuate the Sixth Amendment right to a speedy trial. *United States v. Pollock*, 726 F.2d 1456, 1459–60 (9th Cir. 1984). We noted in *Pollock* that "Congress was concerned about a number of problems—such as disruption of family life, loss of employment, anxiety, suspicion, and public obloquy—that vex an individual who is forced to await trial for long periods of time." *Id.* at 1460. Lozoya justifiably concludes that "[b]y the time [she] appeared in court and was ordered to return for trial, at the latest, these concerns were implicated." It would therefore be somewhat disconcerting if, as the magistrate judge and district court concluded, the government could hale Lozoya into court—which, it noted in its answering brief, was consistent with its standard practice of prosecuting misdemeanors—without triggering the Act's protections, even though the Act indisputably applies to Class A misdemeanors.

However, we find it unnecessary to determine whether the government's prolonged prosecution of Lozoya constituted a violation of the Act. Even if she were correct that either her initial September 16, 2015 appearance before a magistrate judge or the purported restraint on her liberty[2] triggered the Act's thirty-day clock—and that therefore dismissal pursuant to § 3162(a)(1) was required, because the government did not file the required information until more than four months later, on February 1, 2016—the magistrate judge offered an alternative ruling that dismissal would have been *without* prejudice:

> Although this is a misdemeanor, I think the allegations of an assault on a commercial airliner are not necessarily minor charges. . . .
>
> There's an interest in justice. The court finds in a resolution on the merits.
>
> The only—the only evidence of prejudice is this issue of contribution of attorney's fees, which the court doesn't find that that is a form of prejudice I think of the type that would apply here to seeking a dismissal with prejudice. And there's no bad faith by the government in terms of its actions here.

Although brief, this analysis indicates that the magistrate judge considered the relevant factors—specifically, "the seriousness of the offense; the facts and circumstances of the

[2] At her initial court appearance, the magistrate judge ordered Lozoya to contribute $200 per month towards attorneys' fees, and warned her of the possibility of an arrest warrant if she did not appear for trial.

case which led to the dismissal; and the impact of a reprosecution on the administration of [the Act] and on the administration of justice," 18 U.S.C. § 3162(a)(1)—and did not rely on any clearly erroneous factual assumptions.

Therefore, the court did not abuse its discretion when making this determination,[3] and any erroneous application of the Speedy Trial Act would not have changed the outcome. Even if the Act had been violated in this case, dismissal would have been without prejudice, leaving the government free to file the superseding information on which Lozoya was eventually convicted.

II. Venue

Although the government's conduct did not violate the Act, we conclude that reversal of Lozoya's conviction is

[3] The parties dispute which standard of review to apply to the magistrate judge's prejudice determination, but our precedent is clear: "We review for abuse of discretion a district court's decision to dismiss an indictment without prejudice for a violation of the Speedy Trial Act." *United States v. Lewis*, 611 F.3d 1172, 1175 (9th Cir. 2010) (citing *United States v. Taylor*, 487 U.S. 326, 332 (1988)). Lozoya suggests that "the Supreme Court actually requires something more than typical abuse-of-discretion review," and cites language from the Court's decision in *Taylor*. *See* 487 U.S. 336–37 ("A judgment that must be arrived at by considering and applying statutory criteria . . . constitutes the application of law to fact and requires the reviewing court to undertake more substantive scrutiny to ensure that the judgment is supported in terms of the factors identified in the statute."). But this language merely offers color and content to guide our review. It does not suggest that abuse of discretion is an inappropriate standard of review, and it certainly does not, as Lozoya concludes, require de novo review. Abuse of discretion remains, consistent with our pronouncement in *Lewis*, the correct standard to apply.

nonetheless required because venue was improper in the Central District of California.

A. Waiver

As an initial matter, the government maintains that Lozoya waived her venue argument by failing to raise it until *after* the government's case-in-chief. Our decision in *United States v. Ruelas-Arreguin*, in which we "decide[d] whether [a defendant] preserved his objection to venue when he moved for a judgment of acquittal on grounds of improper venue at the close of the government's case," is directly on point. 219 F.3d 1056, 1060 (9th Cir. 2000). There, we held that "[i]f a defect in venue is clear on the face of the indictment, a defendant's objection must be raised before the government has completed its case." *Id.* However, "if the venue defect is not evident on the face of the indictment, a defendant may challenge venue in a motion for acquittal at the close of the government's case." *Id.*

Here, the superseding information alleged that Lozoya, while "in Los Angeles County, within the Central District of California and elsewhere," assaulted another passenger on Flight 2321. Therefore, on the face of the information, the venue defect was not apparent. If true, the scant allegations in the information would have proven that at least part of the offense occurred in the Central District, and so venue there would have been proper. *See id.* ("The indictment alleged that [the defendant] was 'found in' the United States 'within the Southern District of California.' On its face, therefore, the indictment alleged proper venue because it alleged facts which, if proven, would have sustained venue in the Southern District of California."). That Lozoya might have known that venue was incorrect—and, as the government notes, "possessed [the] Statement of Probable Cause, which set forth that the assault took place about one-hour to one-

hour-and-a-half before landing"—is immaterial, since "only the indictment may be considered in pretrial motions to dismiss for lack of venue, and [] the allegations must be taken as true." *United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir. 1997).

Because venue was proper on the face of the superseding information, Lozoya was permitted to move for acquittal on venue grounds following the government's case-in-chief, and did not waive the issue. And, because she preserved the issue for appeal, we review it de novo. *See United States v. Hernandez*, 189 F.3d 785, 787 (9th Cir. 1999).

B. Whether Venue Was Proper in the Central District of California

The government asserts that because "[t]he evidence at trial showed—and [Lozoya] does not dispute—that Flight 2321 landed in Los Angeles," and "also showed that [she] assaulted the victim while the plane was in flight heading toward Los Angeles," it was therefore "entirely proper for the government to bring the case in the Central District." Given our case law, as well as the Supreme Court's guidance on the proper determination of venue, we disagree.

"Article III of the Constitution requires that '[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed.'" *United States v. Rodriguez-Moreno*, 526 U.S. 275, 278 (1999) (alterations in original) (quoting U.S. Const. art. III, § 2, cl. 3); *see also United States v. Lukashov*, 694 F.3d 1107, 1119–20 (9th Cir. 2012) (exploring the interests underlying venue and noting that it is "a question of fact that the government must prove by a preponderance of the evidence"). To ascertain venue,

> 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.'" In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.

Rodriguez-Moreno, 526 U.S. at 279 (alteration in original) (footnote and citation omitted) (quoting *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998)).

Here, Lozoya correctly asserts that "[t]he only essential *conduct* element here is the assault," and so the first prong of this inquiry is straightforward. The second prong—the location of the assault—is a trickier matter.

Lozoya demonstrates, and the government does not dispute, that the trial evidence established that the brief assault occurred *before* Flight 2321 entered the Central District's airspace. Therefore, there is no doubt that the assault did not occur within the Central District of California, since we have held that "the navigable airspace above [a] district is a part of [that] district." *United States v. Barnard*, 490 F.2d 907, 911 (9th Cir. 1973).

In response, the government argues, and the magistrate judge and district court agreed, that either of two statutes conferred venue in the Central District. We consider each statute in turn.

i. Section 3237(a)

The government first argues that 18 U.S.C. § 3237 provided the needed statutory conferral of venue. The relevant provision reads,

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States *begun in one district and completed in another, or committed in more than one district*, may be inquired of and prosecuted *in any district in which such offense was begun, continued, or completed*.
>
> 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) (emphases added).

We agree with Lozoya that the first paragraph of § 3237(a) does not apply here. By its plain text and obvious meaning, it concerns *continuing offenses* that occur in multiple districts. *See Barnard*, 490 F.2d at 910–11 (applying § 3237(a) in a case where the defendant imported marijuana from Mexico into the Central District, and concluding that venue in the Southern District of California was proper because the offense continued through its airspace). Here, by contrast, Lozoya's offense—the

assault—occurred in an instant and likely in the airspace of only one district, and the government did not prove that *any part* of that assault occurred once Flight 2321 entered the airspace over the Central District; indeed, it concedes that the assault ended before then. Section 3237(a) does not provide a basis for extending venue into the Central District simply because Flight 2321 continued into its airspace after the offense was complete. Once the assault had concluded, any subsequent activity was incidental and therefore irrelevant for venue purposes. *See United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011) ("Venue is not proper when all that occurred in the charging district was a 'circumstance element . . . [that] occurred after the fact of an offense begun and completed by others.'" (alterations in original) (quoting *Rodriguez-Moreno*, 526 U.S. at 280 n.4)).

The magistrate judge also determined that § 3237(a)'s second paragraph supported the government's position. But that paragraph, in relevant part, pertains to "offense[s] involving the . . . transportation in interstate or foreign commerce." 18 U.S.C. § 3237(a). The government maintains that "[b]ecause the charged offense involved transportation in interstate commerce, it was a continuing offense" for purposes of § 3237(a). This assertion is untenable, however, because although the assault occurred on a plane, the offense itself did *not* implicate interstate or foreign commerce. *Cf. United States v. Morgan*, 393 F.3d 192, 200 (D.C. Cir. 2004) ("[R]eceipt of stolen property . . . is not an 'offense involving' transportation in interstate commerce, for it does not require any such transportation for the commission of the offense."). Here, the conduct constituting the offense was the assault, which had nothing to do with interstate commerce. As Lozoya notes, "[T]he *jurisdictional* element requiring the offense to have occurred on an aircraft does not convert the offense to one that

involves transportation in interstate commerce," and even if it could be so construed, if would not be a *conduct* element of the offense, but rather a "circumstance element" that does not support venue. *Stinson*, 647 F.3d at 1204; *see also United States v. Auernheimer*, 748 F.3d 525, 533 (3d Cir. 2014) ("Only 'essential conduct elements' can provide the basis for venue; 'circumstance elements' cannot." (quoting *United States v. Bowens*, 224 F.3d 302, 310 (4th Cir. 2000))).

It is true, as recognized by the district court, the magistrate judge, and the government, that other circuits have rejected our interpretation of § 3237(a) in cases with similar facts. However, the reasoning in those cases is not persuasive. In *United States v. Breitweiser*, 357 F.3d 1249 (11th Cir. 2004), the Eleventh Circuit determined that an inflight assault could be prosecuted where the aircraft landed, but it did not analyze the conduct of the charged offense, as required by *Rodriguez-Moreno*. Instead, the court merely emphasized that "[i]t would be difficult if not impossible for the government to prove, even by a preponderance of the evidence, exactly which federal district was beneath the plane when [the defendant] committed the crimes." *Id.* at 1253. In reaching this decision, the *Breitweiser* court relied primarily on a pre-*Rodriguez-Moreno* case, *United States v. McCulley*, 673 F.2d 346 (11th Cir. 1982), which had concluded that § 3237 "is a catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue" without citing any authority for that proposition. *Id.* at 350.[4] Similarly, the Tenth Circuit in *United States v.*

[4] Certain aspects of the legislative history suggest that § 3237 might have been intended as something of a catchall provision. As part of Congress's revision of Title 18 during the 1940s, the venue provisions for several enumerated crimes were omitted because they were "covered

Cope, 676 F.3d 1219 (10th Cir. 2012), simply relied on *Breitweiser*, without considering *Rodriguez-Moreno* or the conduct of the offense with which the defendant was charged. *Id.* at 1225. Accordingly, we decline to adopt the reasoning or holding of these opinions.

ii. Section 3238

Alternatively, the district court concluded that venue was proper under § 3238, which provides that "[t]he trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought . . . ." 18 U.S.C. § 3238. To support application of

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by section 3237." H.R. Rep. No. 79-152, at A109, A112, A120, A133–35 (1945); *see also* H.R. Rep. No. 80-304, at A161 (1947) (indicating that § 3237 "was completely rewritten to clarify legislative intent and in order to omit special venue provisions from many sections"). But one relevant report also explained that

> [t]he phrase "committed in more than one district" may be comprehensive enough to include "begun in one district and completed in another", but the use of both expressions precludes any doubt as to legislative intent. . . . The revised section removes all doubt as to the venue of *continuing offenses* and makes unnecessary special venue provisions . . . .

H.R. Rep. No. 80-304, at A161 (emphasis added). If the purpose of § 3237 were to "make[] unnecessary special venue provisions," then a catchall intent might be inferred, but this report also clarified that § 3237 was directed at *continuing offenses*, not to offenses generally. And at any rate, even if the legislative history were more conclusive, the text of § 3237 is not ambiguous, and "we do not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994).

this statute to the facts here, the district court relied on *United States v. Walczak*, 783 F.2d 852 (9th Cir. 1986), which is readily distinguishable. There, the defendant made a false statement in Canada—an offense committed outside U.S. borders—and so the court concluded that venue was proper in the U.S. district where the defendant was later arrested. *Id.* at 853–55. That holding was consistent with the rule that "§ 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was 'begun' there)." *United States v. Pace*, 314 F.3d 344, 351 (9th Cir. 2002). Although the government argues that "[j]ust as offenses committed on the 'high seas' are considered to be outside the jurisdiction of any particular state or district, offenses committed in the 'high skies' are similarly not committed," that position is at odds with our binding precedent, which holds that "the navigable airspace above [a] district *is a part of the district*." *Barnard*, 490 F.2d at 911 (emphasis added). Here, the assault occurred *entirely* within the jurisdiction of a particular district. It neither began nor was committed entirely outside the United States, and so § 3238 is inapplicable.

C. Remedy

"When venue has been improperly laid in a district, the district court should either transfer the case to the correct venue upon the defendant's request, or, in the absence of such a request, dismiss the indictment without prejudice." *Ruelas-Arreguin*, 219 F.3d at 1060 n.1 (citation omitted) (citing Fed. R. Crim. P. 21(b); *United States v. Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988)).[5] We therefore direct

[5] Lozoya observes that there is a circuit conflict concerning the appropriate remedy when the government fails to prove venue at trial,

the district court, on remand, to dismiss the charge without prejudice, unless Lozoya consents to transfer the case to the proper district.

The proper district is, pursuant to our reasoning and holding, the district above which the assault occurred. The government stressed at oral argument that it would be "impossible" to pinpoint this location, but we are not so pessimistic. There is no doubt that such an undertaking would require some effort. At the time Flight 2321 made its Minneapolis-to-Los Angeles run in December 2018, it apparently traveled at an average speed 368 miles-per-hour, and its route map suggests that is crossed over at least eight different districts during its flight time.[6] But Sullivan, Flight 2321's lead flight attendant, testified (for the government, incidentally) that the flight lasted "[a]pproximately three hours," that he received word of "an assault of some sort" "at least an hour" after takeoff, that he spent "30 to 45 minutes at least" investigating the incident, and that the captain made the announcement that the aircraft would soon be landing—which usually occurs "[t]wenty-five minutes before landing"—after Sullivan finished his investigation. Accordingly, it seems wholly reasonable, using this and other testimony as well as flight data, for the government to determine where exactly the assault occurred by the

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and urges us to adopt the approach taken by the Fifth and Eighth Circuits—remanding for 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). But we are bound by *Ruelas-Arreguin*, and will follow the remedy prescribed in that opinion.

[6] *See DL2321 Delta Air Lines Flight: Minneapolis to Los Angeles 22/12/2018*, Airportia, http://www.airportia.com/flights/dl2321/minneapolis/los_angeles/2018-12-22 (last visited Apr. 4, 2019).

preponderance of the evidence necessary to establish venue. *See Lukashov*, 694 F.3d at 1120.

We acknowledge a creeping absurdity in our holding.[7] Should it really be necessary for the government to pinpoint where precisely in the spacious skies an alleged assault occurred? Imagine an inflight robbery or homicide—or some other nightmare at 20,000 feet—that were to occur over the northeastern United States, home to three circuits, fifteen districts, and a half-dozen major airports, all in close proximity. How feasible would it be for the government to prove venue in such cluttered airspace? And given that the purpose of venue is to prevent "the unfairness and hardship to which trial in an environment alien to the accused exposes him," *United States v. Johnson*, 323 U.S. 273, 275 (1944), is it not fair to conclude, as the First Circuit did, that setting venue in a district where a plane lands "creates no unfairness to defendants, for an air passenger accused of a crime of this type is unlikely to care whether he is tried in one rather than another of the states over which he was flying"? *United States v. Hall*, 691 F.2d 48, 50–51 (1st Cir. 1982).

However valid these questions and the practical concerns that underlie them might be, they are insufficient to overcome the combined force of the Constitution, *Rodriguez-Moreno*, and our own case law. These authorities compel our conclusion: that the proper venue for an assault

[7] The dissent suggests that the Supreme Court's admonition that "interpretations of a statute which would produce absurd results are to be avoided" requires that we reach a contrary conclusion, Dissent at 28 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)), but that canon does not permit us to ignore the plain texts of the statutes at issue. *See United States v. Ezeta*, 752 F.3d 1182, 1184 (9th Cir. 2014) ("In interpreting a criminal statute, we begin with the plain statutory language.").

on a commercial aircraft is the district in whose airspace the alleged offense occurred. The dissent contends that common sense supports the positions of the Tenth and Eleventh Circuits, as well as its own conclusion. Dissent at 28–29. Fair enough. But while "there is no canon against using common sense in construing laws as saying what they obviously mean," *Roschen v. Ward*, 279 U.S. 337, 338 (1929), the statutes at issue here are *not* obviously applicable, and we cannot ignore the binding effect of precedent and the Constitution.

Congress can—consistent with constitutional requirements, of course—enact a new statute to remedy any irrationality that might follow from our conclusion. Indeed, we share the dissent's hope, considering the "significant increase" in inflight criminal activities and the myriad federal offenses that can occur on an aircraft, Dissent at 26–27, 29, that Congress will address this issue by establishing a just, sensible, and clearly articulated venue rule for this and similar airborne offenses. For now, though, if the government wishes to reprosecute Lozoya, it will need to dust off its navigational charts and ascertain where in U.S. airspace her hand made contact with Wolff's face. We know that it did not happen in the Central District of California. That conclusion provides sufficient ground to reverse Lozoya's conviction.[8]

[8] Lozoya also contends that the magistrate judge applied the wrong legal standard for self-defense when rendering the guilty verdict. The parties agree that "[t]he government must prove beyond a reasonable doubt that [a] defendant did not act in reasonable self-defense," which becomes an element of the charged offense. Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit § 6.8 (Ninth Cir. Jury Instructions Comm. 2010). But because improper venue

CONCLUSION

We conclude that the proper venue for Lozoya's prosecution is the district in whose airspace the assault occurred. Because the parties do not dispute that the assault ended before Flight 2321 entered the airspace of the Central District of California, venue in that district was improper. We therefore REVERSE Lozoya's conviction and REMAND for further proceedings consistent with this opinion.

OWENS, Circuit Judge, concurring in part and dissenting in part:

While I agree with much of the majority opinion, I disagree with its ultimate holding on venue, which creates a circuit split and makes prosecuting crimes on aircraft (including cases far more serious than this one) extremely difficult.

The friendly skies are not always so friendly. You do not need to watch *Passenger 57*, *Flightplan*, *Turbulence*, or even the vastly underrated *Executive Decision* to know that dangerous criminal activity occurs on airplanes. For example, federal law enforcement has tracked a significant increase in sexual assaults on airplanes in recent years

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provides sufficient ground to reverse Lozoya's conviction, we need not determine whether the magistrate judge applied the wrong standard.

(including abuse of children), and yet there remains little ability to combat these crimes 30,000 feet in the air.[1]

Congress recognized this problem over 50 years ago when it passed comprehensive legislation to protect flight crews and passengers from serious crimes. *See* Federal Aviation Act Amendments of 1961, Pub. L. No. 87-197, 75 Stat. 466, 466–68. Congress extended the application of certain federal criminal laws, including the assault statute at issue in this case, to acts on airplanes to combat the "unique problems" involved in determining jurisdiction for state prosecutions:

> In this age of jet aircraft a moment of time can mean many miles have been traversed. Present aircraft pass swiftly from county to county and from State to State. As a result serious legal questions can arise as to the situs of the aircraft at the time the crime was committed. The question as to the law of which jurisdiction should apply to a given offense can be the subject of endless debate, and excessive delay in the prosecution becomes inevitable. The difficulties encountered by the overflown State in

[1] *See Sexual Assault Aboard Aircraft*, FBI (Apr. 26, 2018), https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618 (reporting that sexual assaults aboard aircraft are "on the rise"); Lynh Bui, *Sexual Assaults on Airplanes are Increasing, FBI Warns Summer Travelers*, Wash. Post (June 20, 2018), https://www.washingtonpost.com/local/public-safety/sexual-assaults-on-airplanes-are-increasing-fbi-warns-summer-travelers/2018/06/20/64d54598-73fd-11e8-b4b7-308400242c2e_story.html (FBI in Maryland alerting the public that sexual assaults on commercial flights are "increasing every year . . . at an alarming rate").

> collecting evidence sufficient to support an indictment are obvious . . . . "To contrast, if the offense were also a crime under Federal law, the aircraft would be met on landing by Federal officers. The offender could be taken into custody immediately and the criminal prosecution instituted."

S. Rep. No. 87-694, at 2–3 (1961) (quoting the testimony of Najeeb Halaby, Administrator of the Federal Aviation Agency). Until now, no court has disturbed the ability to prosecute federal offenders in the district where the airplane landed. *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); *cf. United States v. Hall*, 691 F.2d 48, 50–51 (1st Cir. 1982).

I acknowledge that the venue provision at issue—the second paragraph of 18 U.S.C. § 3237(a)—could be clearer. But considering what the majority recognizes as the "creeping absurdity" of its position, Majority Opinion 24, we should heed the advice of our court—and the Supreme Court—that "statutory interpretations which would produce absurd results are to be avoided." *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013) (citation and alteration omitted); *see also Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993) (describing "the common mandate of statutory construction to avoid absurd results"); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (stating that "interpretations of a statute which would produce absurd results are to be avoided"). I agree with the Tenth and Eleventh Circuits that the "transportation in interstate . . . commerce" language in § 3237(a) covers the conduct at issue here. It may be that the Tenth and Eleventh Circuits'

opinions are not "tenure track" in their analyses, but not every legal question requires a law review article. Sometimes, common sense is enough.

The troubling result of this case is not limited to these rather innocuous facts. It applies to any offense that the majority deems non-continuous, which includes sexual assault, murder, and so on. *See* 49 U.S.C. § 46506 (applying certain criminal laws to acts on aircraft, including, but not limited to, 18 U.S.C. §§ 113 (assaults), 114 (maiming), 661 (theft), 1111 (murder), 1112 (manslaughter), 2241 (aggravated sexual abuse), and 2243 (sexual abuse of a minor or ward)).

Nor is the result limited to the smaller states of the Northeastern United States. *See* Majority Opinion 24. Under the majority's rule, the government must prove which district—not merely which state—an airplane was flying over when the crime was committed. A flight from San Francisco to Houston potentially crosses eight judicial districts. A flight from San Francisco to Miami crosses far more. Asking a traumatized victim, especially a child, to pinpoint the precise minute when a sexual assault occurred is something I cannot imagine the Framers intended, or the more recent Congress wished when it enacted our venue and flight laws. Yet without the precision that the majority now requires, prosecutions of violent crimes on board aircraft could be impossible. In fact, the government insists that it cannot pinpoint when the assault occurred in this case, and I doubt that the majority's back-of-the-envelope calculation will be of much assistance. *See* Majority Opinion 23–24.

Venue in criminal cases protects defendants' rights to a fair trial. But here, limiting venue to a "flyover state," where the defendant and potential witnesses have no ties, makes no sense. In contrast, a prosecution in the landing district

"creates no unfairness to defendants." *Hall*, 691 F.2d at 50. And a defendant who is truly inconvenienced may request a transfer of venue. Fed. R. Crim. P. 21(b).

I respectfully dissent, and urge the Supreme Court (or Congress) to restore quickly the just and sensible venue rule that, until now, applied to domestic air travel.

Appendix D

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. MONIQUE LOZOYA, Defendant.	Case No. CR 16-00598-AB **ORDER AFFIRMING MAGISTRATE JUDGE'S ORDER**

Before the Court is Defendant-Appellant Monique Lozoya's ("Appellant") timely appeal of a magistrate judge's August 12, 2016 order, which found Appellant guilty of simple assault on an aircraft. For the following reasons, the Court **AFFIRMS** the magistrate judge's order.

I. BACKGROUND

A. Factual Background

On July 19, 2015, Appellant, Appellant's boyfriend Joshua Moffie ("Moffie"), Oded Wolff, and Wolff's wife Merav, were passengers on Delta Airlines red-eye Flight 2321 ("Flight 2321") from Minneapolis to Los Angeles. Reporter's Transcript of Court Trial ("Rep.'s Tr. of Ct. Trial," Dkt No. 8) at 16, 46, 113, 143-144.

Appellant was in the seat in front of Wolff. (*Id.* at 23.) At trial, Wolff testified

he had minimal contact with the back of Appellant's chair: he touched the television screen once to try to turn it off, and didn't, to his knowledge, kick the seat. (*Id.* at 18-19.) Yet, when Wolff was returning from the restroom, Appellant asked him to "stop tapping on the screen." (*Id.* at 19-20.) He testified that he responded, "What are you talking about?" and that Appellant, who was seated, then turned towards him and hit him in the face. (*Id.* at 20-22.) Wolff also stated he never raised his hand or came towards Appellant. (*Id.* at 23-24.) Merav supported Wolff's characterization of the incident. (*Id.* at 46-61.) Namely, Merav testified Wolff never raised his hands before or after he was hit, rather, they remained on his and Appellant's seats. (*Id.* at 52-53.)

In contrast, Appellant testified she was unable to sleep because her seat was repeatedly disturbed by Wolff, who was sitting directly behind her. (*Id.* at 145-146.) While Wolff was returning from the restroom, Appellant claimed she, seated with her seatbelt on, politely asked Wolff to stop hitting the back of her seat. (*Id.* at 146-148.) Wolff, who was then standing above Appellant, interrupted her by rudely shouting "What?" in a "very loud an abrasive tone." (*Id.* at 148.) Appellant tried to calmly repeat her request, but was again interrupted by Wolff. (*Id.* at 148.) Appellant testified she then observed Wolff's hand move quickly towards her, ultimately coming within a half-inch of her face. (*Id.* at 148, 162-163.) Appellant claimed she feared being hit, and so, she instinctively reacted by attempting to push Wolff away with an open hand. (*Id.* at 149.) Appellant testified she never wanted to get into an altercation with Wolff, and has never been in a physical altercation of any kind prior to this event. (*Id.* at 150-151.) Although she was neither aiming at Wolff, nor intending to make physical contact with him, her open hand made contact with his face. (*Id.* at 149-150, 155.) Had Appellant had time to think, she would have tried to move her head or push his hand away. (*Id.* at 164.) Lastly, Appellant testified she was "very sorry right now" and had she "known that he wasn't going to hit [her] or if he didn't induce that feeling of fear, [she] would have never done that in the first place." (*Id.* at 155-156.) Though Wolff denied being so disruptive, the testimony of Charles Goocher

("Goocher"), a passenger seated to the right of Appellant on Flight 2321, corroborated Appellant's characterization of Wolff's disruptive behavior. (*Id.* at 133-139.) Additionally, Moffie, who was seated to the left of Appellant on Flight 2321, supported Appellant's characterization of the incident, and testified he was able to peripherally observe Wolff's hand move toward her. (*Id.* at 112-131.)

Flight attendants subsequently separated the parties and the lead flight attendant, Terry Sullivan ("Sullivan"), investigated the incident. (*Id.* at 67.) Sullivan testified that Appellant told him Wolff had raised his hand towards her and it was her "natural response" to hit him because she feared being hit herself. (*Id.* at 68-69.) He also described Appellant's demeanor as "visibly shaken and upset." (*Id.* at 75.)

B. Procedural Background

On July 20, 2015, Wolff informed the Federal Bureau of Investigation ("FBI") of the altercation he had with Appellant on Flight 2321, and FBI Special Agent Meredith Burke ("SA Burke") began her investigation into the matter. Excerpts of Record Volume 1 ("Excerpts of R. Vol. 1," Dkt. No. 16-1), Statement of Probable Cause at 7. Through the course of her investigation, SA Burke conducted several interviews, which she provides in pertinent part in her August 7, 2015 "statement of probable cause." (*Id.* at 7-20.) With respect to when the alleged assault occurred, the following was established.

On July 20, 2015 SA Burke interviewed Wolff, who stated that "approximately one hour before landing, [he] and Merav got out of their seats to use the restroom." (*Id.* at 9.) Wolff alleged the incident between him and Appellant occurred when he returned to his seat. (*Id.*) On July 21, 2015, SA Burke interviewed Merav, who also claimed the incident between Wolff and Appellant occurred "approximately an hour before landing," when she and Wolff returned from the restroom. (*Id.*at 11.) On July 31, 2015, SA Burke interviewed Sullivan, who claimed the assault in question "occurred approximately 90 minutes before landing." (*Id.* at 11-12.) That same day, SA Burke also interviewed Divone Morris ("Morris"), another flight attendant on

Flight 2321, who "described himself as a first responder to the physical assault[.]" (*Id.* at 14.) Morris alleged "[a]pproximately 90 minutes after take-off . . . [h]e noticed that there was an altercation going on between passengers." (*Id.* at 15.) Morris also claimed he heard Wolff say, "[s]he just punched me in the nose[,]" but did not personally witness Appellant hit Wolff. (*Id.* at 15.) On August 5, 2015, SA Burke interviewed Appellant who alleged, like Wolff and Merav, that "[a]pproximately one hour before landing, Wolff got up to use the restroom[,]" and the incident occurred when Wolff returned. (*Id.* at 18-19.)

On August 11, 2015, SA Burke issued a Violation Notice (Excerpts of R. Vol. 1, Violation Notice (Violation No. 3998525) at 6) stating the reasons why she believed there was probable cause to allege that "[Appellant] violated Title 18, United States Code, Section 113(a) (4), assault by striking, beating or wounding, when she struck Delta Air Lines passenger [Wolff]." (Excerpts of R. Vol. 1, Statement of Probable Cause at 20.) SA Burke attached the "statement of probable cause" (*Id.* at 7-20) to the Violation Notice. (Excerpts of R. Vol. 1, Violation Notice at 6.) In Appellant's Opening Brief, she alleges SA Burke's "statement of probable cause" (Excerpts of R. Vol. 1, Statement of Probable Cause) is the type of statement "typically used to support a *complaint*," and "the government instead drafted a *citation* that was signed by the agent on August 11, nearly a month after the alleged offense." (Appellant's Opening Br. at 3.)

Appellant made her first court appearance on September 16, 2015. (Excerpts of R. Vol. 1, Transcript of Violation Proceeding at 21-31.) There the government mistakenly informed Appellant she was charged with a Class B misdemeanor, Appellant entered a not-guilty plea, and the magistrate judge set the matter for trial on February 4, 2016. (*Id.* at 29-30.) On January 14, 2016, Appellant filed a motion to dismiss on the grounds that the charge violated the Federal Rules of Criminal Procedure and the Speedy Trial Act. (Excerpts of R. Vol. 1, Appellant's First Motion to Dismiss ("Appellant's First Mot. to Dismiss") at 34-41.) On February 1, 2016, the

government filed an Information that charged Appellant with assaulting Wolff by intentionally striking him while on a civil aircraft within the "special aircraft jurisdiction of the United States (49 U.S.C. Section 46505 and 18 U.S.C. Section 113(a) (4)), a Class A misdemeanor. (Excerpts of R. Vol. 1, Information at 71-72.) On February 4, 2016, the magistrate judge conducted a hearing on Appellant's first motion to dismiss, where the court found the Speedy Trial Act had not been violated, and therefore denied Appellant's motion. (Excerpts of R. Vol. 1, February 4, 2016 Motion Hearing ("Feb. 4, 2016 Mot. Hr'g") at 73-105.)

On February 9, 2016, Appellant was arraigned on the Class A Misdemeanor Information; she pled not guilty and a status conference was scheduled for February 24, 2016. (Dkt. No. 21, Government's Answering Brief at 15.) On February 24, 2016, the court set a motions hearing date of March 29, 2016. (*Id.*) On March 15, 2016, Appellant filed her second motion to dismiss on the grounds that her charge violates the Speedy Trial Act and the Fifth Amendment. (Excerpts of R. Vol. 1, March 15, 2016 Motion to Dismiss ("Appellant's Second Mot. to Dismiss") at 106-122.) Additionally, on March 28, 2016, Appellant filed a third motion to dismiss the Information with prejudice pursuant to Federal Rule of Criminal Procedure 12(b)(3)(A). (Excerpts of R. Vol. 1, March 28, 2016 Motion to Dismiss ("Appellant's Third Mot. to Dismiss") at 140-145.)

A "superseding Information" was filed on March 29, 2016, which charged Appellant with simple assault, a Class B Misdemeanor. (Excerpts. Of R. Vol. 1, Superseding Information at 198-199.) Appellant also had a hearing on her motions on March 29, 2016 (Excerpts of R. Vol. 1, March 29, 2016 Motion Hearing ("March 29, 2016 Mot. Hr'g") at 145-197), and on March 31, 2016, the court denied Appellant's second and third motion to dismiss because it found (1) the "superseding Information" rendered any arguments regarding violations of the Speedy Trial Act "moot" and, (2) there was no defect in instituting the prosecution. (Excerpts of R. Vol. 1, Order on Motion to Dismiss at 200.) On April 5, 2016, Appellant was arraigned on the

superseding information (Rep.'s Tr. of Ct. Trial at 5-9) and fifteen minutes later, her bench trial began. (Rep.'s Tr. of Ct. Trial at 9-197.)

At trial, the government called Wolff, Merav, Sullivan and SA Burke to testify. (*Id.* at 16, 46, 62, 80.) Once the government rested (*Id.* at 98-99), Appellant made a Federal Rule of Civil Procedure Rule 29 ("Rule 29") motion for judgment of acquittal. (*Id.* at 98-99.) Specifically, Appellant argued that in light of all the facts and evidence presented by the government, the government had not proved venue in the Central District of California. (*Id.* at 99.) The court denied Appellant's motion holding that under 18 U.S.C. 3237(a), "venue is proper in any district through which the flight traveled, and that would include the Central District of California where [Flight 2321] came to an end." (*Id.* at 99.)

The defense then called Morris, Moffie, Goocher and Appellant to testify. (*Id.* at 103, 112, 133, 140.) At the close of their case, the defense renewed their Rule 29 motion "on all grounds, all evidence, including venue," which the court again denied. (*Id.* at 176-177.) The court ultimately found Appellant "guilty as charged of the offense" and held, "based on the testimony presented that [Appellant] used more force than what was reasonably necessary to defend herself against what she perceived to be a threat to her physical safety[.]" (*Id.* at 192-193.) Lastly, the court found "inconsistencies regarding her perceived threat from the victim, and . . . that the testimony of the [Appellant's] witnesses were themselves inconsistent and failed to establish beyond a reasonable doubt that the [Appellant] was in a position where she felt threatened." (*Id.* at 193.)

Following trial, Appellant moved for Rule 29 judgment of acquittal on the basis of improper venue. (Dkt No. 16-2, Excerpts of Record Volume 2 ("Excerpts of R. Vol. 2"), April 20, 2016 Motion for Judgment of Acquittal at 209- 243.) The court denied the motion, finding it meritless for the same reasons as before, and untimely. (Excerpts of R. Vol. 2, Order on Appellant's Motion for Judgment of Acquittal at 264-276.)

On August 11, 2016, the court sentenced Appellant to pay a special assessment of $10, a fine of $ 750, and no restitution. (Excerpts of R. Vol. 2, August 11, 2016 Sentencing at 285-287.)

Appellant appeals on the grounds that: (1) the government failed to comply with the Speedy Trial Act, which would have required dismissal of the case with prejudice, and thus would have precluded the trial that led to Appellant's conviction;(2) the government failed to prove venue, which would have required dismissal of the case; and, (3) the magistrate judge committed legal error by requiring Appellant to establish beyond a reasonable doubt that she acted in reasonable self-defense, rather than requiring the government to establish beyond a reasonable doubt that she did not. (Appellant's Opening Br. at 1.)

II. LEGAL STANDARD

For petty offenses and other misdemeanors, the scope of an appeal from a magistrate judge's order or judgment "is the same as in an appeal to the court of appeals from a judgment entered by a district judge." Fed. R. Crim. P. 58(g)(D).

The Ninth Circuit reviews a "district court's interpretation and application of the Speedy Trial Act de novo, and review[s] the district court's findings of facts for clear error." *United States v. Medina*, 524 F.3d 974, 982 (9th Cir. 2008); *see also United States v. Martinez-Martinez*, 369 F.3d 1076, 1084 (9th Cir. 2004). The burden of proving the Speedy Trial Act was violated "generally lies with the defendant." *Medina*, 524 F.3d at 982.

As the Fifth Circuit has pointed out, "[t]he issue of venue continues to create confusion when challenged on appeal, particularly because of the differing waiver rules applicable to venue[.]" *United States v. Carreon-Palacio*, 267 F.3d 381, 390 (5th Cir. 2001). The Ninth Circuit "address[es] the existence of venue as a question of law reviewed de novo." *United States v. Hernandez*, 189 F.3d 785, 787 (9th Cir. 1999). This standard of review extends to an appeal of a court's denial of a motion for judgment of acquittal on the basis of improper venue. *United States v. Delgado*, 545

F.3d 1195, 1200 (9th Cir. 2008) (quoting *United States v. Lee*, 472 F.3d 638, 641 (9th Cir. 2006)) (applying a de novo standard of review where the defendant challenged the district court's denial of his motion for judgment of acquittal due to improper venue); *accord United States v. Knox*, 540 F.3d 708, 713 (7th Cir. 2008) ("The general rule is that we review de novo a district court's denial of a motion for judgment of acquittal due to improper venue.").

Lastly, "[w]hether the magistrate judge improperly shifted the burden of proof to the defendant is reviewed de novo[.]" *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Cir. 2001); *see also United States v. Brobst*, 558 F.3d 982, 998 (9th Cir. 2009).

III. DISCUSSION

A. Speedy Trial Act

On August 11, 2016, Appellant was issued a Violation Notice (Violation No. 3998525) which charged her with violating "Title 18, United States Code, Section 113 (a) (4), assault by striking, beating or wounding, when she struck Delta Air Lines passenger [Wolff]." (Excerpts of R. Vol. 1, Statement of Probable Cause at 20.) The maximum sentence for this offense is one year in jail, and is therefore classified as a Class A misdemeanor. 18 U.S.C. § 3559(a)(6) (Classifying "one year or less but more than six months, as a Class A misdemeanor."). Appellant therefore argues, under 18 U.S.C. § 3172(2), the Speedy Trial Act applies to her charge. (Appellant's Opening Br. at 24.) Yet, Appellant alleges, magistrate judges improperly denied her motions to dismiss the charge. (Excerpts of R. Vol. 1, Feb. 4, 2016 Mot. Hr'g at 73-105; Excerpts of R. Vol. 1, Order on Motion to Dismiss at 200.) Specifically, Appellant challenges the magistrate judges' decisions to deny both her motions on the grounds that the Speedy Trial Act was inapplicable in this instance because Appellant "was never arrested or summoned." (Appellant's Opening Br. at 24.)

The Speedy Trial Act requires that "a defendant be brought to trial within seventy days from the filing date . . . of the information or indictment, or from the date

the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." *Medina*, 524 F.3d at 978 (internal quotation marks omitted). However, the Ninth Circuit has explicitly stated that "[a] brief detention and the issuance of a [V]iolation [N]otice do not trigger the Speedy Trial Act[,]" and therefore, a Violation Notice without a brief detention cannot either. *United States v. Boyd*, 214 F.3d 1052, 1054 (9th Cir. 2000) (holding that an issuance of a Violation Notice cannot be considered a "complaint" issued at the time of "arrest," and thus, that the government did not violate the Speedy Trial Act) (internal quotation marks omitted); *accord United States v. Candelaria*, 214 F.3d 1052, 1055 (9th Cir. 2000). In *Boyd*, the Ninth Circuit looked to their prior holding in *Candelaria*, the words of the statute, and the legislative history of the Speedy Trial Act to determine whether or not the Act applies to a Violation Notice and brief detention. *Boyd*, 214 F.3d at 1055 ("We ruled [in *Candalaria*] that the Act had not been violated because §3161(b)'s 30-day limitation applies only to persons who are arrested *and charged* or otherwise restrained."). Additionally, it referenced the Sixth Circuit's decision in *United States v. Graef*, which stated the Speedy Trial Act provided no remedy for the Defendant who was put in a cell overnight and released on a Violation Notice. *United States v. Graef*, 31 F.3d 362, 364 (6th Cir. 1994) ("[T]he arrest 'trigger' for § 3161(b) applies only to arrests made either on a complaint or which were immediately followed by a complaint.") In *Graef*, the court ultimately held "because no complaint was ever filed against [defendant], there could be no arrest for the purposes of beginning the 30-day pre-indictment clock." *Id.* (internal quotation marks omitted).

In *Boyd*, the Ninth Circuit agreed "with the Sixth Circuit that a complaint must be issued at the time of arrest in order to trigger the 30-day limitation." *Boyd*, 214 F.3d at 1056. Importantly, the court "specifically [held] that a [V]iolation [N]otice will *not* be equated with a complaint to begin the Speedy Trial Act's clock." *Id.* (alterations in original); *accord United States v. Mills*, 964 F.2d 1186, 1189 (D.C. Cir.

1992) ("The remedial provision of the Speedy Trial Act also suggests that the Act is triggered only by arrests that are accompanied by the filing of a *federal* complaint against the defendant."). Lastly, the Ninth Circuit stated that if a Violation Notice started the Act's "time clock[, that] would create a substantial and undue burden on the government." *Boyd*, 214 F.3d at 1057.

On August 11, 2015, SA Burke issued Appellant a Class A misdemeanor Violation Notice. (Excerpts of R. Vol. 1, Violation Notice at 6.) Appellant made her first court appearance on September 16, 2015. (Excerpts of R. Vol. 1, Transcript of Violation Proceeding at 21-31.) The government filed an Information on February 1, 2016, and on February 9, 2016, Appellant was arraigned. (Excerpts of R. Vol. 1, Information at 71-72; Government's Answering Brief at 15.) The government then filed a "superseding Information" on March 29, 2016. (Excerpts. Of R. Vol. 1, Superseding Information at 198-199.) On April 5, 2016, Appellant was both arraigned on the "superseding Information" (Rep.'s Tr. of Ct. Trial at 5-9) and tried for her charge. (Rep.'s Tr. of Ct. Trial at 1-197.) At no point was Appellant arrested, detained or summoned. The Ninth Circuit has unambiguously held that the Speedy Trial Act does not apply to individuals in Appellant's situation. *Boyd*, 214 F.3d at 1056; *Candelaria*, 214 F.3d at 1055.

B. Improper Venue

Next, Appellant challenges her conviction on the grounds that the government failed to establish the Central District of California was the proper venue. (Appellant's Opening Br. at 42.) As Appellant correctly points out, the government "bears the burden of proving the requisite connection to a district by a preponderance of the evidence." *United States v. Angotti*, 105 F.3d 539, 541 (9th Cir. 1997).

Appellant did not raise an objection to venue until after the government rested its case, at which point Appellant made a Rule 29 motion, specifically on the grounds that the government failed to prove proper venue. (Rep.'s Tr. of Ct. Trial at 99.) The court denied her motion finding that "18 United States Code, Section 3237, states that,

'[a]ny offense that involves transportation in interstate or foreign commerce is a continuing offense and may be prosecuted in any district from, through or into which such commerce moves.'" (*Id.* at 99-100.) In light of this statute, the court found it sufficient that the government had established the alleged offense took place "on a commercial airline flight in interstate commerce," because "to establish venue, the government only needs to prove that the crime took place on a form of transportation in interstate commerce." (*Id.* at 100.)

Once Appellant rested her case, she renewed the Rule 29 motion, which the court again denied, holding that, in looking at the "evidence in the light most favorable to the prosecution, as the [c]ourt must do in ruling on a Rule 29 motion, the Court finds that the government has met its burden of proving the elements of the offense beyond a reasonable doubt." (*Id.* at 176-177.) Again, the court stated "the government only needs to show to establish venue that the crime took place on a form of transportation in interstate commerce." (*Id.* at 175.)

Lastly, Appellant filed a post-trial Rule 29 motion for judgment of acquittal on the basis of improper venue. (Excerpts of R. Vol. 2, April 20, 2016 Motion for Judgment of Acquittal at 209-243.) Among other things, Appellant argued venue did not appear defective on the face of the Violation Notice. (*Id.* at 212.) The court denied this motion as meritless, for the same reasons it was previously denied, and as untimely. (Excerpts of R. Vol. 2, Order for Appellant's Motion for Judgment of Acquittal at 264-276.)

On appeal, Appellant claims that because the government failed to prove "*any part* of the alleged assault in this case —which consisted of a single discrete act — occurred after the plane entered the airspace of the Central District, venue does not exist [there]." (Appellant's Opening Br. at 45.) Namely, Appellant argues the government failed to offer testimony about which district the plane was flying over when the incident in question occurred, or what time it was. (*Id.* at 43.) Appellant also alleges the magistrate judge wrongfully concluded that venue was proper under

18 U.S.C. § 3237(a) for airplane crimes on any district through which the plane travels, regardless of where the crime is actually committed. (*Id.* at 44.)

According to the Ninth Circuit, "[i]f a defect in venue is clear on the face of the [information], a defendant's objection must be raised before the government has completed its case." *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 (9th Cir. 2000); *see Hanson v. United States*¸ 285 F.2d 27, 28 (9th Cir. 1960). On the other hand, "[i]f the venue defect is not evident on the face of the [information], a defendant may challenge venue in a motion for acquittal at the close of the government's case." *Ruelas-Arreguin*, 219 F.3d at 1060.

When examining issues of improper venue, the Court "must initially identify the conduct constituting the offense . . . and then discern the location of the commission of the criminal acts." *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000) (quoting *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999)). Although in continuing crimes, "venue may lie in any district in which the continuing conduct has occurred," *Ruelas- Arreguin*, 219 F.3d at 1061, "[v]enue is not proper when all that occurred in the charging district was a circumstance element . . . [that] occurred after the fact of an offense[.]" *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011) (internal quotation marks omitted).

However, 18 U.S.C. §§ 3237(a) and 3238 cover offenses begun in one district and completed in another and offenses not committed in any district, respectively. As the magistrate judge in Appellant's trial pointed out, § 3237(a) provides in pertinent part:

> [A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> 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).

Additionally, § 3238 provides in pertinent part:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought

18 U.S.C. § 3238.

The Ninth Circuit has specifically applied 18 U.S.C. § 3238 to matters that occur outside a particular district. In *United States v. Walczak*, the defendant was charged with putting false information on a customs form in Canada before boarding a flight that ultimately landed in the Western District of Washington. *United States v. Walczak*, 783 F.2d 852, 855 (9th Cir. 1986). The Ninth Circuit held that § 3238 enabled the government to prosecute the defendant in the district "where the offender * * * [was] arrested or first brought." (*Id.*) (citing 18 U.S.C. § 3238).

Other circuit courts have referenced 18 U.S.C. §§ 3237 and 3238 in tandem when adjudicating cases where defendants are prosecuted for crimes committed in the course of interstate transportation. *See, e.g.*, *Haddad v. United States*, 349 F.2d 511, 515 (9th Cir. 1965); *United States v. Miller*, 808 F.3d 607, 612 (2d Cir. 2015); *United States v. Pendleton*, 658 F.3d 299, 302-05 (3d Cir. 2011); *United States v. Zabeneh*, 837 F.3d 1249, 1255-57 (5th Cir. 1988); *United States v. Hassanshahi*, 185 F. Supp. 3d 55, 56 (Dist. Ct. D.C. 2016). More specifically, circuit courts have relied on 18 U.S.C. § 3237 to hold that, with respect to charging a defendant with an offense

occurring in the course a flight, venue is proper in the district in which the aircraft landed. *See, e.g., United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) ("Mr. Cope was under the influence of alcohol during the flight. Because he was operating a common carrier in interstate commerce, it is immaterial whether he was under the influence of alcohol [where the plane landed]."") (internal quotation marks omitted); *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004) ("To establish venue, the government need only show that the crime took place on a form of transportation in interstates commerce[;] . . . [t]he government met its burden by showing that Breitweiser committed the crimes on an airplane that ultimately landed in Georgia.") (internal quotation marks omitted).

To establish a charge for simple assault in violation of 18 U.S.C. § 11385, the government had to prove Appellant one "committed a simple assault, and, two, that the assault took place within the special aircraft jurisdiction of the United States." (Rep.'s Tr. of Ct. Trial at 191.) Therefore, the essential conduct constituting the offense in question was the contact Appellant made with Wolff, and the location of the contact was Flight 2231, while it was en route to Los Angeles International Airport ("LAX"). (Excerpts of R. Vol. 1, Statement of Probable Cause at 7-20.)

Regardless of whether the simple assault in question falls under 18 U.S.C. § 3237(a) insofar as the assault can be characterized as an offense that is "committed in more than one district," or 18 U.S.C. § 3238 insofar as the assault can be characterized as one that began or was committed "out of the jurisdiction of any particular State or district," the outcome is the same. Circuit courts have cited to both sections of the statute when holding that a defendant was properly prosecuted in the district in which the person "moved," surrendered, first arrived subsequent to the offense, or was arrested subsequent to the offense. In light of the foregoing, the Court finds that under either 18 U.S.C. § 3237(a) *or* § 3238, venue was proper in the Central District of California because that is the district in which Flight 2321 landed.

C. Improper Burden-Shifting

Lastly, Appellant argues that the magistrate judge committed legal error by requiring Appellant to establish, beyond a reasonable doubt, that she had acted in reasonable self-defense, rather than requiring the government to establish, beyond a reasonable doubt, that she did not. (Appellant's Opening Br. at 1.)

Appellant relies on the statements the magistrate judge made when returning the verdict to support her argument. Upon returning the verdict, the magistrate judge explained:

> With respect to whether the assault was committed in self-defense, the [c]ourt finds based on the testimony presented that the [Appellant] used more force than what was reasonably necessary to defend herself against what she perceived to be a threat to her physical safety, and in that regard, the [c]ourt finds that the [Appellant's] testimony and her statements to the special agent and to the flight attendants contained inconsistencies regarding her perceived threat from the victim, and also the [c]ourt found that the testimony of the [Appellant's] witnesses were themselves inconsistent and failed to establish beyond a reasonable doubt that the [Appellant] was in a position where she felt threatened . . . the [c]ourt finds the explanation that the defendant gave for why she didn't stick around and provide the apology, as she had agreed to do, the explanation she gave here in court, which was inconsistent with what she had told the FBI special agent, and then the – and then the testimony of Mr. Moffie as to why he surmised that it was in the [Appellant's] best interest to not wait at the jetway, all of those explanations the [c]ourt finds implausible and does not credit them, and so that is the judgment of the [c]ourt.

(Rep.'s Tr. of Ct. Trial at 191-194.)

Specifically, Appellant alleges, in rendering the verdict, the magistrate judge "rejected" Appellant's argument that she acted in reasonable self-defense because of the inconsistencies the court found in her testimony and the testimony of some of Appellant's witnesses. (Appellant's Opening Br. at 55.) Appellant believes the magistrate judge's statement that "the testimony of the [Appellant's] witnesses were themselves inconsistent and failed to establish beyond a reasonable doubt that the [Appellant] was in a position where she felt threatened" (Rep.'s Tr. of Ct. Trial at 192-193), clearly shows she improperly shifted the burden of proof onto Appellant. (Appellant's Opening Br. at 55.)

In determining whether magistrate judges have improperly shifted the burden of proof onto a defendant, the Ninth Circuit has stated that the judge's words "need not be read so literally." *United States v. Coutchavlis*, 260 F.3d 1149, 1156 (9th Circuit 2001). "That the magistrate judge did not orally explain his reasoning with the precision that might be expected from a written decision is not sufficient reason to conclude that he placed the burden on the defendant[.]" *Coutchavlis*, 260 F.3d at 1157. Rather than looking at one particular statement and the purported inaccuracies therein, the Ninth Circuit has read the judge's words "in the context of the entire trial" to determine whether a judge's words in a particular instance are indicative of a misstatement or an improper shift of the burden of proof. *Id.*

Immediately before trial, the magistrate judge conducted an arraignment on the Superseding Information. (*Id.* at 5.) There the court explicitly stated that "[i]t is the burden of the government to prove [Appellant's] guilt beyond a reasonable doubt[,]" and that "[i]f the government fails to do that, [Appellant] will be acquitted of the charge." (*Id.* at 7.) Additionally, in denying Appellant's renewed Rule 29 motion, the magistrate judge stated that in looking at the "evidence in the light most favorable to the prosecution, as the [c]ourt must do in ruling on a Rule 29 motion, the Court finds that the government has met its burden of proving the elements of the offense beyond a reasonable doubt." (*Id.* at 176-177.) Lastly, in its closing remarks, the government

expressly argued it "has proven beyond a reasonable doubt that the [Appellant] has committed a simple assault and that the amount of force used to deflect the hand that she saw that was on the headrest was not reasonable[.]" (Rep.'s Tr. of Ct. Trial at 191.) The court subsequently took a fifteen-minute recess and returned with its judgment, provided in pertinent part above. (*Id.*)

Facially, it may appear that the magistrate judge had improperly shifted the burden onto the Appellant when she stated the testimony offered by Appellant and her witnesses "failed to establish beyond a reasonable doubt that the [Appellant] was in a position where she felt threatened." (Rep.'s Tr. of Ct. Trial at 192-193.) However, when put in the context of the entire trial, the Court finds it more reflective of a misstatement than improper burden-shifting. All things considered, it is reasonable that the magistrate judge found, in light of the testimony presented, the government had met its burden in proving beyond a reasonable doubt that Appellant acted with unreasonable force. It is also reasonable to construe the verdict as concluding that the court found the government met its burden of proving, beyond a reasonable doubt, that Appellant did not act in reasonable self-defense, and the testimony of Appellant and her witnesses failed to prove otherwise. Other than that particular excerpt, Appellant does not provide any other examples from the record to demonstrate improper burden-shifting on the part of the magistrate judge, and the Court does not find any other parts of the trial transcript that even remotely show the magistrate judge improperly shifted the burden onto Appellant. Thus, the Court finds the magistrate judge properly understood the elements of the offense and that the government had the burden of proof. Therefore, Appellant's appeal on the ground that the magistrate judge improperly shifted the burden of proof fails.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **AFFIRMS** the magistrate judge's order, which found Appellant guilty of simple assault on an aircraft.

IT IS SO ORDERED.

Dated: September 8, 2017

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE

Appendix E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MONIQUE A. LOZOYA, Defendant.	No. CR 16-0043-AS **ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL [DKT. NO. 32]**

INTRODUCTION

On March 29, 2016, Defendant was charged in a Superseding Information with one count of simple assault aboard an aircraft in violation of 49 U.S.C. § 46506 and 18 U.S.C. § 113(a)(5), a Class B Misdemeanor. (Docket Entry No. 21). Following a one-day bench trial on April 5, 2016, Defendant was convicted of the sole count charged in the Superseding Information. (Docket Entry No. 26).

Defendant now moves for the entry of a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 ("Rule 29"), arguing that the Government failed to prove venue ("Motion")(Docket

Entry No. 32). The Government has filed an Opposition ("Opposition") (Docket Entry No. 33), and the Court has taken the Motion under submission without oral argument (Docket Entry No. 34). For the reasons discussed below, Defendant's Motion is DENIED as untimely and meritless.

PROCEDURAL BACKGROUND

On February 1, 2016, the Government filed an Information charging Defendant with one count of assault by striking aboard an aircraft in violation of 49 U.S.C. § 46506 and 18 U.S.C. § 113(a)(4).[1] (Docket Entry No. 1). The Information read:

> On or about July 19, 2015, in Los Angeles County, within the Central District of California and elsewhere, [Defendant], while on a civil aircraft within the special aircraft jurisdiction of the United States, namely, Delta Airlines flight 2321, en route to Los Angeles International Airport, assaulted passenger O.W. by intentionally striking him.

(Id.).

Following a hearing on issues not relevant to the instant Motion, the Government filed a Superseding Information charging

[1] Prior to the filing of the Information, Defendant had been arraigned on a violation for the same conduct. (See Docket Entry No. 12 at Mem. at 2).

Defendant with one count of simple assault aboard an aircraft in violation of 49 U.S.C. § 46506 and 18 U.S.C. § 113(a)(5). (Id.). The Superseding Information read:

> On or about July 19, 2015, in Los Angeles County, within the Central District of California and elsewhere, [Defendant], while on a civil aircraft within the special aircraft jurisdiction of the United States, namely, Delta Airlines flight 2321, en route to Los Angeles International Airport, assaulted passenger O.W.

(Id.).

A bench trial was held before the undersigned Magistrate Judge on April 5, 2016, and Defendant was convicted of simple assault aboard an aircraft as charged in the Supersediung Information. (Docket Entry No. 26). Defendant made motions for acquittal under Rule 29, and the Court denied Defendant's motions without prejudice to the filing of a written Rule 29 motion addressing the Government's alleged failure to prove venue.[2] (Id.). During trial, the Court precluded Defendant from presenting testimony that the assault had not occurred within the airspace of the Central District of California, but invited Defendant to submit a declaration to that

[2] In addition to the venue issues upon which the Court requested briefing, the instant Motion seeks acquittal "as to all elements," primarily "to ensure all issues are adequately preserved." (Motion at 1). To the extent that the instant Motion re-asserts Defendant's arguments for acquittal on grounds other than improper venue, it is DENIED.

effect in support of any motion challenging venue. (See Motion at 2 n.2, 12, 13; Exhs. A-D).

On April 20, 2016, Defendant filed the instant Motion, which is now fully briefed and under submission before the Court. (Docket Entry Nos. 32-34).

THE PARTIES' ARGUMENTS

Defendant contends that the Government failed to prove that the Central District of California is a proper venue for this prosecution. First, Defendant claims that the government was required, and failed, to prove that the flight was within the airspace of the Central District of California when the assault occurred. (Motion at 2-3). In support of this claim, Defendant alleges that the assault must have taken place between 55 and 70 minutes before landing because the lead flight attendant testified that: (1) immediately after the assault occurred, he spent at least 30 to 45 minutes discussing the assault with Defendant, the victim, and the victim's wife; (2) after the discussion was complete, he and other flight attendants were told to prepare for landing; and (3) flight attendants are told to prepare for landing 25 minutes prior to landing. (Motion at 2). Defendant attaches a declaration and exhibits tending to show that the flight did not cross the California-Nevada border until approximately 33 minutes before landing.[3] (Id. at 12-13 & Exh. C).

[3] The flight travelled from Minneapolis, Minnesota, to Los Angeles, California. (Motion at 2 & Exh. A).

Second, Defendant claims that the venue provision in 18 U.S.C. § 3238, "Offenses not committed in any district,"[4] is not applicable because the flight never left the airspace of the United States and the assault therefore occurred in some district. (Motion at 5-6). Third, Defendant contends that the venue provisions in 18 U.S.C. § 3237(a), "Offenses begun in one district and completed in another,"[5] do not apply because the "conduct" elements of the assault did not occur in the Central District of California (because the flight was not in the airspace of the Central District of California) and do not themselves pertain to transportation in interstate commerce. (Motion at 6-8). Finally, Defendant asserts that the Motion is timely because the defect in venue was not apparent on the face of the Superseding Information. (Motion at 1 & n.1).

In its opposition, the Government contends that the Motion is untimely because the Government's venue allegation, i.e., that the

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[4] 18 U.S.C. § 3238 reads: "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender . . . is arrested or is first brought . . . ."

[5] 18 U.S.C. § 3237(a) is divided into two paragraphs. The first provides: "[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." The second 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 . . . may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves."

flight was "en route to Los Angeles International Airport," was stated in the Information and Superseding Information. (Opposition at 3). Next, the Government asserts that venue is proper under 18 U.S.C. § 3237(a) because the assault occurred aboard an aircraft that was traveling in interstate commerce such that the offense "involv[ed] . . . transportation in interstate or foreign commerce" and may therefore be "inquired of and prosecuted in any district from, through, or into which such commerce . . . moves." (Opposition at 5-6). The Government also argues that venue is proper under 18 U.S.C. § 3238 because it is "nearly impossible" to pinpoint the particular place where an offense occurring in the "high skies" occurs. (Opposition at 8-9).

STANDARD OF REVIEW

Under Federal Rule of Criminal Procedure 29, a defendant may move for a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29. A judgment of acquittal is improper if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See United States v. Ramos-Atondo, 732 F.3d 1113, 1121 (9th Cir. 2013) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

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DISCUSSION

For the following reasons, the Court DENIES Defendant's Motion as untimely and without merit.

A. Defendant's Motion Is Untimely

The Sixth Amendment guarantees criminal defendants the right to be tried in the state and district in which the crime was committed. See U.S. CONST. amend. VI; see also Fed. R. Crim. P. 18 (stating that, except as otherwise permitted by rule or statute, "the government must prosecute an offense in a district where the offense was committed"). However, if a defect in venue is clear on the face of the charging instrument, a defendant's objection to venue must be raised before the Government has completed its case, or the objection will be waived. See United States v. Johnson, 297 F.3d 845, 861 (9th Cir. 2002).

Here, Defendant claims that alleged defects in venue were not apparent on the face of the Superseding Information because it charged Defendant with committing assault "in Los Angeles County, within the Central District of California and elsewhere." (Motion at 1 n.1). The Government claims that alleged defects in venue were apparent on the face of both the Information and Superseding Information, which stated that Defendant's conduct occurred "while on a civil aircraft within the special aircraft jurisdiction of the United States, namely, Delta Airlines flight 2321, en route to Los Angeles International Airport." (See Opposition at 2-3).

The Court finds that the alleged defects in venue were clear on the face of the charging instrument. As the Government points out, both the Information and Superseding Information stated that the aircraft was within the special aircraft jurisdiction of the United States, identified the flight, and stated that the aircraft was "en route to Los Angeles International Airport." (Docket Entry Nos. 1, 21). There were no other specific allegations addressing venue. Therefore, Defendant was on notice that the Government's theory of venue relied upon the flight's destination, rather than any allegation that the assault occurred in the airspace over the Central District of California.[6]

The fact that the Information and Superseding Information also stated that the Defendant's actions occurred "within the Central District of California and elsewhere" is not dispositive. In Johnson, the Ninth Circuit found waiver where an indictment stated that acts supporting various counts of conviction occurred "in the District of Arizona and elsewhere." 297 F.3d at 861. The Ninth Circuit ruled that this language had to be read "in conjunction with" the rest of the indictment, which contained a grid making it clear that certain counts did not involve any activity within the District of Arizona. Id. Here, the allegation that Plaintiff's actions occurred "within the Central District of California and elsewhere,"

[6] The fact that Defendant was prepared to have an investigator testify regarding venue during trial also suggests that Defendant was actually aware of a potential defect in venue prior to the presentation of the Government's case-in-chief. See United States v. Price, 447 F.2d 23, 28 (2d Cir. 1971) (waiver of defect in venue was "manifest" where defendant had "clear notice and actual knowledge of the presumed defect" but did not move to dismiss the indictment).

when read in concert with the only venue-related statement in the Information and Superseding Information, make clear that the Government did not allege that the assault actually occurred in airspace of the Central District of California. If anything, the allegation that an instantaneous assault occurred both "within the Central District of California" and "elsewhere" might reasonably have put Defendant on notice that the Government would rely on, for example, the "continuing offense" theory of venue that is the partial subject of the instant Motion. (See Motion at 6-7; Opposition at 5-6).

Because the defects in venue alleged in the instant Motion were clear on the face of the charging instrument, Defendant's challenge to venue are waived, and the Court denies the Motion as untimely.

B. Defendant's Motion Is Meritless

Although the untimeliness of the Motion provides sufficient grounds for denying it, the Court also concludes that the Motion is without merit.

The Supreme Court has formulated guidelines for determining criminal venue. In the absence of a specific venue provision in the charging statute, the "locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it." United States v. Anderson, 328 U.S. 699, 703 (1946). In undertaking this inquiry, a court must "identify the conduct constituting the offense (the nature of the crime) and then

discern the location of the commission of the criminal acts." United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999). "Although the focus of this test is on the conduct comprising the offense, the Supreme Court has rejected the so-called 'verb test'-the notion that action verbs reflected in the text of the statute should be 'the sole consideration in identifying the conduct that constitutes an offense.'" United States v. Salinas, 373 F.3d 161, 164 (1st Cir. 2004) (citing Rodriguez-Moreno, 526 U.S. at 280). "Rather, an inquiring court should 'peer at the conduct elements comprising the crime through a wider-angled lens.'" Salinas, 373 F.3d at 164 (citing Rodriguez-Moreno at 280 & n. 4); see also United States v. Muhammad, 502 F.3d 646, 652 (7th Cir. 2007) (nature of crime and location of act to be used as a "guide" to determine venue, not a "rigid test"; the standard is "best described as a substantial contacts rule that takes into account a number of factors - the site of the defendant's acts, the elements and nature of the crime, the locus and effect of the criminal conduct, and the suitability of each district for suitable fact-finding.").

Here, the parties appear to agree on the general elements of simple assault committed within the special aircraft jurisdiction of the United States. 18 U.S.C. § 113(a)(5); 49 U.S.C. § 46506(1); (see Motion at 4-5; Opposition at 5). The Government also does not appear to dispute that the assault may not have occurred in California's airspace. The parties dispute whether, after considering the elements of the crime and its location, either 18 U.S.C. § 3237(a) or 18 U.S.C. § 3238 gives rise to venue in the Central District of California. (Motion at 5-8; Opposition at 2, 4-12). Defendant

contends that § 3237(a) does not apply because the "conduct" elements of the assault did not occur in the Central District of California and do not themselves pertain to transportation in interstate commerce. (Motion at 7-8). The Government argues that § 3237(a) applies because Defendant's flight was traveling in interstate commerce and therefore "involves" interstate commerce such that it may be prosecuted in "any district from, through, or into which such commerce . . . moves." (See Opposition at 5-6).

The Court concludes that venue is proper under § 3237(a). As the Government points out, United States v. Breitweiser, 357 F.3d 1249 (11th Cir. 2004), is instructive. (Opposition at 6-7). In Breitweiser, the defendant was convicted of abusive sexual contact with a minor and simple assault of a minor in Atlanta, within the Northern District of Georgia. 357 F.3d at 1251. The defendant's actions took place during a flight from Houston to Atlanta, and the defendant challenged a finding that venue was proper in the Northern District of Georgia. Id. at 1251-53. The Eleventh Circuit found that venue was appropriate under § 3237(a) because the Government had shown "that the crime took place on a form of transportation in interstate commerce" that "ultimately landed in Georgia." Id. at 1253. The Eleventh Circuit found that the Government was not required to show that the defendant touched the victim while in the Northern District of Georgia's airspace, and observed that it would be "difficult if not impossible" to prove where the plane was when the defendant committed his crimes. Id. at 1253-54; see also United States v. Cope, 676 F.3d 1219, 1224-25 (10th Cir. 2012) (defendant operated a commercial airplane under the influence of alcohol during

a flight from Austin, Texas to Denver, Colorado; venue under § 3237(a) was proper in "any district through which [the defendant] traveled on the flight," and it was "immaterial" whether the defendant was actually under the influence of alcohol in district of prosecution).

In Breitweiser, as here, the defendant's *criminal conduct* may not have occurred in the prosecuting district and did not necessarily involve interstate commerce. (See Motion at 7-8). Nevertheless, § 3237(a)'s broad language and the difficulties inherent in pinpointing the exact location of a crime occurring on an aircraft traveling in interstate commerce gave rise to venue in the arriving district. The same conclusion is warranted here.

Defendant's reliance on the "essential-conduct-elements test" in Rodriguez-Moreno, 526 U.S. 275, 276 (1999), and United States v. Stinson, 647 F.3d 1196 (9th Cir. 2011), (Motion at 8), is unavailing. As the Government notes, neither Rodriguez-Moreno nor Stinson[7] purported to analyze venue when a crime "involv[es] . . . transportation in interstate or foreign commerce" such that it may "be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves." Unlike Breitweiser, these cases also do not address the specific practical challenges associated with prosecuting crimes occurring on an aircraft traveling in interstate

[7] Rodriguez-Moreno held that venue in a prosecution for using or carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. § 924(c) is proper in any district where the "continuing crime of violence" is committed. Id. at 281-82. Stinson held the commission of a violent crime in aid of racketeering was a continuing offense for which venue was proper in any district in which any element of the offense occurred or continued. Id. at 1204.

commerce. See Salinas, 373 F.3d at 164; Muhammad, 502 F.3d at 652 (venue test to be interpreted flexibly). Defendant also has not demonstrated that the conduct elements of an offense must involve interstate commerce in order to give rise to venue under § 3237(a), and Defendant's reliance on United States v. Morgan, 393 F.3d 192 (D.C. Cir. 2004), for this proposition is unjustified. Morgan, 393 F.3d at 200 (ruling that receipt of stolen property was not offense "involving" transportation in interstate commerce because such transportation was not an element of the offense; also observing, however, that courts have applied § 3237(a) where there was otherwise "a tight connection between the offense and the interstate transportation" and citing Breitweiser).

Therefore, the Court finds that venue exists under § 3237(a) and declines to reach the parties' arguments regarding venue under § 3238.

CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal is DENIED as untimely and without merit.

IT IS SO ORDERED.

Dated: July 1, 2016.

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

Appendix F

18 U.S.C. § 3237(a) provides:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> 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. § 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such

residence is known the indictment or information may be filed in the District of Columbia.

Fed. R. Crim. P. 18 provides:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.