

No. 20-7900

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

REPLY BRIEF FOR PETITIONER

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Reply Brief for Petitioner

A federal criminal defendant has the constitutional right to a trial in the State and district where the alleged crime(s) “shall have been committed[.]” U.S. Const., Art. III, § 2, cl. 3; U.S. Const., Amend. VI; *see* Pet. 4-5, 17-18. To deprive those charged with airplane crimes of that right, the government implicitly endorses the Ninth Circuit en banc panel’s claim that the airspace above this country is within the United States, and yet no part of it is within any particular State (or district) for purposes of the Constitution’s venue provisions, even though each State retains jurisdiction over its airspace. App. 7a-9a, 20a-25a; BIO 10-13. The government’s failure to offer any meaningful argument to support that claim reflects that the Ninth Circuit’s position is indefensible. Regardless, this Court—not the Ninth Circuit—should decide whether to judicially create such an entirely new and bizarre hybrid area in the sky where parts of the Constitution do not apply.

The Court should also provide guidance on how its *locus delicti* / essential-conduct-elements test and Congress’s venue statutes apply to airplane crimes. Although the government defends the Ninth Circuit’s opinion allowing it to prosecute an airplane crime in any district through which the plane traveled during the flight, regardless of where the offense was actually committed, its arguments do not withstand scrutiny.

This case is an excellent vehicle to address these constitutional and statutory venue issues. And if the Court grants review to do so, also resolving the circuit

conflict on the related question of the appropriate remedy for insufficient evidence of venue would be appropriate. Because airplane crimes and prosecutions thereof are increasing, determining the appropriate venue for such cases and the consequences for prosecuting them in the wrong districts is of the utmost importance.

1. Review is necessary to address the Ninth Circuit en banc panel’s problematic holding that airspace within a State for jurisdictional purposes can nevertheless be deemed *not* within a State for purposes of the Constitution’s venue requirements because the Framers could not anticipate airplanes.

The en banc majority and dissent both invoked the constitutional provision stating that for a crime “*not committed within any State*, the Trial shall be at such Place or Places as the Congress may by Law have directed.” U.S. Const., Art. III, § 2, cl. 3 (emphasis added). App. 7a-9a, 20a-25a. The government also asserts that “[n]othing in the text of the Constitution” indicates that navigable airspace is “‘within’ a state” for venue purposes. BIO 10. In other words, it—like the Ninth Circuit—improperly concludes from the Framer’s failure to anticipate and expressly address issues presented by aircraft technology not created until the 20th century that the Constitution’s venue requirements do not apply to the airspace above the United States. App. 8a-9a, 22a-23a. As discussed in the petition, that approach is inconsistent with Congress’s actions in 1961 (when it created a later-repealed

airplane-crime-specific venue provision), the Court’s precedent applying other constitutional provisions to new technologies, and a Third Circuit opinion applying the Constitution’s venue provisions to computer crimes. Pet. 19-23. The government cursorily dismisses the Third Circuit case as distinguishable, and it ignores the 1961 legislation entirely. BIO 12-13. To get around this Court’s precedent rejecting the idea that the Constitution reaches only problems familiar to 18th century technology, the government insists that the Ninth Circuit only “made a considered judgment about how the terms ‘State’ and ‘district’ in the relevant constitutional provisions should be understood in light of the Founders’ understanding.” BIO 13. But it makes no attempt to support that assertion by scrutinizing what the Ninth Circuit actually wrote. Nor does it refute that, in this context, the focus on “the Founder’s understanding” boiled down to airplane crimes “would have been alien to the Framers.” App. 8a.

The petition explained that the Ninth Circuit’s theory that a criminal act in the airspace above a State is somehow not committed within the State (or the related federal district) for constitutional venue purposes and yet is still within the jurisdiction of the State is illogical and undermines state sovereignty. Pet. 23-27. The government responds that the Ninth Circuit “expressly disclaimed” that it was “undermining the jurisdiction of states over their own airspace” because it “recognized the constitutional geographic question to be distinct from the scope of state criminal jurisdiction.” BIO 13. Missing from the government’s brief is any

defense of that position, which makes no sense. Each State exercises criminal jurisdiction within its territory, so if it has such jurisdiction over its airspace, it follows that that airspace is within the State. To baldly assert that “the constitutional geographic question [is] distinct” simply avoids the question—why can territory within a State nevertheless be deemed *not* within a State for purposes of the Constitution’s venue requirements? The only answer proffered by the Ninth Circuit and the government is that the Framers did not know about airplanes. The Court’s precedent does not permit that mode of analysis, so it should grant review to address this important constitutional issue.

2. Review is necessary to address the government’s rejection of the Court’s *locus delicti* / essential-conduct-elements test as a constitutional limit on venue.

As explained in the petition, venue did not exist in the district where this case was tried—and would not exist in the landing district for any airplane crime committed entirely within another district—under the Court’s *locus delicti* / essential-conduct-elements test. Pet. 17-19. The government does not contest that the petitioner’s prosecution failed that test. BIO 11-13. Rather, it contends that the test is not “rigid[]” because the “Constitution does not universally and categorically require venue where an essential conduct element occurs.” BIO 12. Ignoring the Court’s opinions saying otherwise, *see* Pet. 18-19, the government points to dictum in *Whitfield v. United States*, which cites decades-old cases for the proposition that

“venue is proper in any district in which an overt act in furtherance of the conspiracy was committed, even where an overt act is not a required element of the conspiracy offense.” 543 U.S. 209, 218 (2005) (citing cases from 1927 and 1940). The Court apparently did not consider those older cases in light of the *locus delicti* standard later identified in *United States v. Anderson*, 328 U.S. 699 (1946). But *Whitfield* does not help the government, even assuming that the conspiracy rule stated therein is valid and is inconsistent with the essential-conducts-elements test articulated in *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999). Where an overt act is not an element of a particular conspiracy offense, such acts still arguably fall within *Anderson*’s focus on “the nature of the crime alleged and the location of the act or acts constituting it.” 328 U.S. at 703. There is no similar basis for extending airplane-crime venue to districts where no part of the offense was actually committed.

The government also asserts that “the *locus delicti* test carries the most weight when Congress has not defined the place where a particular crime is committed.” BIO 12. It relies entirely on a footnote in *Rodriguez-Moreno*, which mentioned that the statute at issue in *Anderson* did not include a crime-specific venue provision. 526 U.S. at 279 n.1. There is no such provision for airplane crimes either; the government relies on general venue statutes. BIO 9-18. It primarily invokes 18 U.S.C. § 3237(a)’s second paragraph, which was added in 1948 to “make[] unnecessary special venue provisions [for continuing offenses] except in cases where

Congress desires to *restrict* the prosecution of offenses to particular districts[.]”

H.R. Rep. No. 80-304, at A161 (1947) (emphasis added); *see* Pet. 6, 28-30. Thus, the *locus delicti* standard establishes the outer constitutional limit on venue, but Congress can *narrow* venue to one or more of the constitutionally-permissible districts.

Lower courts have correctly interpreted this Court’s *locus delicti* / essential-conduct-elements test as establishing a constitutional limit on venue. *See, e.g., United States v. Myers*, 854 F.3d 341, 350 (6th Cir. 2017) (“Two constitutional provisions limit venue in criminal prosecutions to the *locus delicti*, the place where the crime was committed.”); *United States v. Geibel*, 369 F.3d 682, 696-97 (2d Cir. 2004) (“In determining the constitutionally appropriate venue for an action, the *locus delicti* must be determined[.]”) (quotation marks omitted). The government’s belief that the Court’s precedent nevertheless leaves room to argue otherwise demonstrates the need for the Court to review the matter.

3. Review is necessary to address the en banc majority’s misinterpretation of 18 U.S.C. § 3237(a).

The government defends the Ninth Circuit en banc majority’s interpretation of 18 U.S.C. § 3237(a)’s second paragraph to apply to airplane crimes. BIO 11, 14-18. As noted by the en banc dissent, however, applying that provision instead of 18 U.S.C. § 3238 (which establishes venue for offenses not committed in any district) is incompatible with the majority’s conclusion that airplane crimes do not occur within

a State for constitutional venue purposes. App. 25a-42a. That logical inconsistency alone undermines the majority’s interpretation.

Even putting that aside, the en banc majority interpreted § 3237(a) contrary to the Court’s precedent on continuing offenses. Pet. 28-31. The simple assault at issue here (a single slap) was not a continuing offense. Pet. 9, 30-31. The government nevertheless points to the statute establishing jurisdiction for certain crimes committed on an aircraft and jumps to the conclusion that all such crimes—even those committed in a moment—are necessarily *continuing* offenses for as long as the plane is in flight. BIO 11, 14-15, 17 (citing 49 U.S.C. § 46506).¹ The Tenth and Eleventh Circuit cases the government cites are also devoid of meaningful analysis and are rooted in a case that reached the same baseless conclusion that any offense committed on a form of interstate commerce automatically becomes a *continuing* offense that involves interstate commerce for purposes of § 3237(a) because that statute is purportedly a “catchall provision” designed to apply “where venue might be difficult to prove.” *United States v. McCulley*, 673 F.2d 346, 349-50 (11th Cir. 1982); *see also United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004) (citing *McCulley*); *United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) (citing *Breitweiser*); *see* Pet. 31. The Constitution would not permit such a

¹ Jurisdiction and venue are completely different things—every district court has jurisdiction over federal crimes, but venue designates which particular district court may handle a case. *See* W. LaFave, *Criminal Procedure*, § 16.1(a) (4th ed. 2020).

“catchall provision” even if Congress had enacted one, which it did not do. *See* Pet. 5-6, 28-30. Furthermore, the en banc dissent rightly criticized the majority’s “oxymoronic and constitutionally problematic notion of a non-continuing continuing offense.” App. 36a; *see* Pet. 30-31. The dissent also recognized that the majority’s opinion “will apply in a range of circumstances that raise significant constitutional concerns.” App. 38a; *see* Pet. 34-35. The government does not address those legitimate concerns.

According to the government, the “petitioner does not contest that her offense ‘involved interstate or foreign commerce’ under a plain-language interpretation of that phrase” in § 3237(a). BIO 14 (brackets omitted). That is not true. Pet. 27-35. Among other things, she quoted the D.C. Circuit’s holding in *United States v. Morgan* that the “most natural” and “faithful reading of the precise words of [§3237(a)’s second paragraph] in the order in which they are written suggests that an ‘offense involves’ transportation in interstate commerce only when such transportation is an element of the offense.” 393 F.3d 192, 198 (D.C. Cir. 2004) (brackets omitted); *see* Pet. 31-32. Transportation in commerce is not an element of simple assault, so even if such a crime happens to occur on a form of interstate commerce, it does not convert the offense into one that involves interstate commerce for purposes of § 3237(a). The government contends that *Morgan* is wrong because § 3237(a) purportedly “uses the term ‘offense’ in a way that requires an inquiry into the actual circumstances of the defendant’s offense, not just the elements.” BIO 16-

17; *see Morgan*, 393 F.3d at 200 (rejecting government’s actual-circumstances approach as “gobbledygook”). It similarly dismisses the Second Circuit’s supposedly “mistaken” approach that “exclusively focus[ed] on the elements of the crime” in *United States v. Brennan*, 183 F.3d 139 (2d Cir. 1999). BIO 17-18; *see* Pet. 32-33. The government’s arguments are belied by this Court’s holding that even a non-conduct “circumstance *element*” cannot support venue. *Rodriguez-Moreno*, 526 U.S. at 280 n.4 (emphasis added). In any event, the conflicts with *Morgan* and *Brennan* support granting review in this case.

4. The government ignores the scope of the problem presented by the en banc majority’s opinion, which allows it to prosecute an airplane crime in any district through which the plane traveled during the flight, regardless of where the offense was actually committed.

The government frames the question presented as limited to whether prosecution of an airplane crime is constitutionally and statutorily permissible in the district where “the plane landed and petitioner resided[.]” BIO (I), 9. First, it does not matter where any particular defendant resides because the Constitution “fixes the situs of the trial in the vicinage of the crime rather than the residence of the accused.” *Johnston v. United States*, 351 U.S. 215, 220-21 (1956). Second, the government does not, and cannot, contest that the en banc majority acknowledged that its interpretation of the Constitution and § 3237(a) “allows venue not just in the landing district, but also the takeoff district as well as the flyover districts.”

App. 13a-14a & n.8; Pet. 33-34. Thus, while the government insists that the Constitution does not “limit venue” to the particular flyover district where the crime actually occurred, it finds no fault with the Ninth Circuit’s rule giving it the option to prosecute a crime in *any* flyover district. BIO 10-11. Venue provisions “should not be so freely construed as to give the Government the choice of a tribunal favorable to it.” *Travis v. United States*, 364 U.S. 631, 634 (1961) (quotation marks omitted).

The government mentions the purportedly “near-universal practice of landing district prosecution” of airplane crimes. BIO 11 (quoting App. 12a). But just because something has always been done a certain way does not mean that it is correct, that the practice does not merit this Court’s review, or that the Court might not go a different way. *See, e.g., Rehaif v. United States*, 139 S. Ct. 2191, 2201 (2019) (Alito, J., dissenting) (noting that majority “overturn[ed] the long-established interpretation of an important criminal statute” that had “been adopted by every single Court of Appeals to address the question” and had “been used in thousands of cases for more than 30 years”).

The government’s question presented also refers to the “the unknown judicial district over which the plane was passing at the moment the crime occurred.” BIO (I); *see also* BIO (I), 10-11 (referring to the time and place of the offense as “indeterminate”). That district is unknown because the government never tried to determine it. The Ninth Circuit original-panel majority observed that “such an

undertaking would require some effort” but is “wholly reasonable[.]” App. 68a. Easily-obtained flight data shows where the plane was at any moment, so the government only needed to establish the time of the crime with enough precision to determine the appropriate venue. App. 68a-69a. Any ambiguity in the existing record concerning the exact time of the assault—a single slap that immediately drew the flight crew’s attention—stems from the government’s failure to muster evidence about that. App. 5a, 50a-51a. The government’s choice to leave the offense district undetermined does not render it undeterminable.

5. Despite what the government claims, 18 U.S.C. § 3238 does not provide an alternative basis for airplane-crime venue.

The government perfunctorily claims that § 3238 applies here if § 3237(a) does not, asserting (with no supporting authority) that an airplane crime “would be ‘out of the jurisdiction of any particular State’ for purposes of” that statute “if it were deemed to occur solely at an indiscernible point in time, disconnecting it from any identifiable state.” BIO 11 (emphasis added). But an airplane crime committed over the continental United States always occurs within some State’s jurisdiction regardless of whether the government has difficulty meeting its constitutional burden to show which one.

According to the government, the petitioner “makes no effort to rebut” the en banc dissent’s § 3238 analysis. BIO 14. That is wrong. The crux of the dissenting opinion is that airplane crimes are not committed within any State for purposes of

both that statute and the Constitution. App. 20a-42a. The petitioner, however, argued unequivocally (and with supporting authority) that the “premise that the airspace above a State is not within the State is contrary to common law, the intent of Congress, and the precedent of this Court.” Pet. 24; *see generally* Pet. at 23-27.

6. This case is an excellent vehicle to address these issues.

The petition explained that this case presents an excellent vehicle for the Court to address the constitutional and statutory venue questions because it is undisputed that the alleged conduct—an assault consisting of a single slap—occurred at a discrete moment in time someplace outside the district where this case was charged such that prosecution there was inconsistent with the *locus delicti* / essential-conduct-elements test. Pet. 37-38. The government does not dispute any of those facts but contends that the case is a poor vehicle because the petitioner purportedly forfeited her venue claim by not filing a pretrial venue motion under Fed. R. Crim. P. 12(b)(3)(A)(i). BIO 19-20. It concedes that the original Ninth Circuit panel, following circuit precedent, held otherwise, and the en banc panel left that ruling intact. BIO 19; App. 7a n.2, 60a-61a. And the government does not contend that the Ninth Circuit misapplied that precedent; rather, it suggests (without discussion) that that precedent is wrong. BIO 4-5, 19. It ignores that the Ninth Circuit adopted a rule “[c]onsistent with the uniform decisions of [its] sister circuits[.]” *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 (9th Cir. 2000) (citing cases from the Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits). Even if this

Court were to consider the issue, adopt the government’s novel interpretation of Rule 12, and overrule that line of authority, that would not affect the outcome of this case because the petitioner would have “good cause” under Rule 12(c)(3) for not filing a pretrial venue motion—her reliance on circuit precedent that allowed her make a timely venue objection at the close of the government’s case-in-chief. *Id.*; see *United States v. Maez*, 960 F.3d 949, 956 (7th Cir. 2020) (intervening change in precedent amounts to good cause for purposes of Rule 12); *United States v. Garcia-Lopez*, 903 F.3d 887, 895 (9th Cir. 2018) (same). Accordingly, there is no viable argument that she forfeited the venue claim.

7. The circuit conflict concerning the appropriate remedy for insufficient evidence of venue merits the Court’s attention.

The government does not dispute that a circuit conflict exists concerning the appropriate remedy when it fails to prove venue at trial. Pet. 38. But it contends that the Court should not resolve this conflict if it grants review to address the airplane-venue issues because the en banc court did not reach the remedy question. BIO 18. Ninth Circuit precedent dictates the lesser dismissal-without-prejudice remedy, however, and the original panel applied that precedent before the matter was heard en banc. Pet. 12, 38; App. 67a-68a. If the Court finds that venue was improper in the Central District of California, remanding just so the Ninth Circuit could apply this precedent would result in another certiorari petition again presenting this circuit conflict, thereby wasting judicial resources. Even if the

Ninth Circuit en banc panel reconsidered that precedent and changed its position, the circuit conflict would persist. Pet. 38. That conflict therefore merits the Court’s attention now.

The government proffers that the petitioner is “unlikely” to be retried “irrespective of the remedy” but does not foreclose the possibility that it might prove where the slap occurred and prosecute her in the corresponding district if given a chance to do so. BIO 18-19. Thus, this speculation neither moots the issue in this particular case nor eliminates the need for the circuit conflict to be resolved.

8. Addressing these venue issues is particularly important given an increase in airplane crimes.

The government does not contest that determining where airplane crimes may be prosecuted is of the utmost importance given the frequency of such offenses. Pet. 36-37. Since instituting a “zero-tolerance policy” earlier this year, the “FAA has seen a disturbing increase in incidents where airline passengers have disrupted flights with threatening or violent behavior.” *See* Federal Aviation Administration, *Zero Tolerance for Unruly and Dangerous Behavior Toolkit*;² *see also* Federal Aviation Administration, *Unruly Passengers Data*.³ And at “a Senate hearing in

² https://www.faa.gov/data_research/passengers_cargo/unruly_passengers/toolkit/ (visited Aug. 18, 2021).

³ https://www.faa.gov/data_research/passengers_cargo/unruly_passengers/ (visited Aug. 18, 2021).

June, Attorney General Merrick Garland said the Justice Department takes the recent onboard assaults ‘extremely seriously.’” M. Laris, *Unruly Airplane Passengers are Straining the System for Keeping Peace in the Sky*, WASHINGTON POST, 2021 WLNR 23280086 (July 18, 2021). He is currently considering a letter from “a consortium of airline industry and labor groups” asking the “Department to ‘direct federal prosecutors to dedicate resources for egregious cases.’” *Id.* It is therefore imperative that the Court address the constitutional and statutory venue issues pertaining to airplane crimes now so the Department can pursue these prosecutions in accordance with the law, and so Congress can craft a constitutional venue statute for such cases.

* * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition.

August 19, 2021

Respectfully submitted,

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