

No. _____

In The
Supreme Court of the United States

WILLIAM CLARK TURNER,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

DAVID J. COHEN, ESQ.
300 Montgomery Street, Suite 660
San Francisco, California, 94104
Tel. No. (415) 398-3900
Fax No. (415) 398-7500
djcohen@baclpc.com

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Did the inclusion of multiple alternative definitions of “intimidate” within the jury instructions for the charged violation of 49 U.S.C. section 46504 reduce the government’s burden of proof and impermissibly expand the scope of the statute when each of the alternatives failed to state the correct standard by permitting the jury to use a subjective assessment of the flight attendant and conflating the second and third elements of the offense?
2. By adding the language “or to another” in the definition of “intimidate,” did the trial court illegally broaden the scope of the statute by allowing for intimidation of a flight attendant on the basis of a purely verbal dispute between passengers?

LIST OF ALL PARTIES

Petitioner

WILLIAM CLARK TURNER.

Respondent

THE UNITED STATES OF AMERICA.

RELATED CASES

United States v. Turner, No. 1:16-cr-00207-SOM-1, U.S. District Court for the District of Hawaii. Judgment entered February 10, 2017.

United States v. Turner, No. 1:16-cr-00207-SOM-1, U.S. District Court for the District of Hawaii. Judgment entered August 8, 2017.

United States v. Turner, No. 17-10299, U.S. Court of Appeals for the Ninth Circuit. Judgment entered February 27, 2019.

United States v. Turner, No. 1:20-cv-00239-SOM-KJM, U.S. District Court for the District of Hawaii. Judgment entered July 16, 2020.

United States v. Turner, No. 21-16957, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 14, 2023.

United States v. Turner, No. 21-16957, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 22, 2023.

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PETITION FOR WRIT OF CERTIORARI

William C. Turner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**CITATIONS OF THE OFFICIAL AND
UNOFFICIAL REPORTS OF THE OPINIONS
AND ORDERS ENTERED IN THE CASE BY
COURTS OR ADMINISTRATIVE AGENCIES**

The opinion of the Court of Appeals is unreported.
That opinion is attached as an appendix.

**BASIS FOR JURISDICTION
IN THE SUPREME COURT**

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 22, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

**CONSTITUTIONAL PROVISIONS
AND STATUTES INVOLVED**

1. United States Constitution

Fifth Amendment: No person shall be . . . deprived of . . . liberty . . . without due process of law. . . .

2. Federal statutes

18 U.S.C. section 113:

(a) Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

...

(5) Simple assault, by a fine under this title or imprisonment for not more than six months, or both, or if the victim of the assault is an individual who has not attained the age of 16 years, by fine under this title or imprisonment for not more than 1 year, or both.

28 U.S.C. section 1254(1): Cases in the court of appeals may be reviewed by the Supreme Court . . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

49 U.S.C. section 46504: An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act, shall be fined under title 18, imprisoned for not more than 20 years, or both.

3. Federal court rules

Supreme Court Rule 13. Review on Certiorari:
Time for Petitioning: . . . a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by . . . a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. . . .

4. Federal jury instructions

Pattern Criminal Jury Instructions, D. S.C. (2020):

Title 49, United States Code, Section 46504 makes it a crime to interfere with flight crew members or flight attendants. For you to find the defendant guilty, the government must prove each of the following beyond a reasonable doubt:

First: that the defendant was on an aircraft that was within the special aircraft jurisdiction of the United States;

Second: that the defendant assaulted or intimidated a flight crew member or flight attendant; and

Third: that in doing so, the defendant interfered with, or lessened the ability of the flight crew members or flight attendants to perform their respective duties on the flight. [or attempted or conspired to do so]

...

A defendant intimidates a flight attendant or flight crew member if the words and conduct of the defendant would place an ordinary reasonable person in fear [of bodily harm]. The government does not need to prove that the flight attendant or flight crew member was in fact frightened for his or her own [physical] safety.

Pattern Criminal Jury Instructions, 5th Cir. (2019):

Title 49, United States Code, Section 46504, makes it a crime for an individual on an aircraft in the special aircraft jurisdiction of the United States, by assaulting

or intimidating a flight crew member or flight attendant of the aircraft, to interfere with the performance of the duties of the member or attendant or to lessen the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant was on an aircraft in the special aircraft jurisdiction of the United States, as I will define that term for you;

Second: That the defendant knowingly assaulted [intimidated] a flight crew member [flight attendant of the aircraft]; and

Third: That such assault [intimidation] interfered with the performance of the duties of the flight crew member [flight attendant of the aircraft] or lessened the ability of the member or attendant to perform those duties.

...

[The words and conduct of the defendant amount to intimidation if they place an ordinary, reasonable person in fear.]

Pattern Criminal Jury Instructions, 8th Cir. (2023):
The crime of assaulting or intimidating a flight crew member or attendant on an aircraft in flight in the

United States as charged in [Count ____ of] the Indictment has [three] . . . elements, which are:

One, the defendant was on an aircraft in flight in the special aircraft jurisdiction of the United States;

Two, the defendant knowingly [assaulted] [intimidated] a flight-crew member or flight attendant of the aircraft; and

Three, the [assault] [intimidation] interfered with or lessened the ability of the crew member or flight attendant to perform [his] [her] duties. . . .

. . .

[The term “intimidate” means to place a person in reasonable apprehension of bodily harm to himself or herself or to another.]

Pattern Criminal Jury Instructions, 11th Cir. (2003):

Title 49, United States Code, Section 46504, makes it a Federal crime or offense for anyone to [assault] [intimidate] a flight crew member or attendant on an aircraft in flight in the United States.

The Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt:

First: That the Defendant was on an aircraft in flight in the United States;

Second: That the Defendant knowingly [assaulted] [intimidated] a flight crew member or flight attendant of the aircraft; and

Third: That such [assault] [intimidation] interfered with the performance of the duties of the flight crew member or flight attendant of the aircraft or lessened the ability of the member or attendant to perform those duties.

...

[The term “assault” is any intentional and voluntary act or attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the act or attempt or threat is directed in fear of immediate bodily harm.]

[The term “intimidate” has several meanings: It means the use of words or actions to place another person in reasonable apprehension of bodily harm either to that person or to another. It also means the use of words or actions to make another person fearful or make that person refrain from doing something that the person would otherwise do, or do something that the person would otherwise not do.]

Pattern Criminal Jury Instructions, 11th Cir. (2016):
It's a Federal crime to [assault] [intimidate] a flight-crew member or attendant on an aircraft in flight in the United States.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant was on an aircraft in flight in the United States;

- (2) the Defendant knowingly [assaulted] [intimidated] a flight-crew member or flight attendant of the aircraft; and
- (3) the [assault] [intimidation] interfered with or lessened the ability of the crew member or flight attendant to perform [his] [her] duties.

...

[An “assault” may be committed without actually touching or hurting another person. An assault occurs when a person intentionally attempts or threatens to hurt someone else and has an apparent and immediate ability to carry out the threat, such as by pointing or brandishing a dangerous weapon or device.]

[To “intimidate” someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It’s also to say or do something to make another person fearful or make that person refrain from doing something that the person would otherwise do—or do something that the person would otherwise not do.]

Pattern Criminal Jury Instructions, 11th Cir. (2022):
It’s a Federal crime to [assault] [intimidate] a flight-crew member or attendant on an aircraft in flight in the United States.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

- (1) the Defendant was on an aircraft in flight in the United States;
- (2) the Defendant knowingly [assaulted] [intimidated] a flight-crew member or flight attendant of the aircraft; and
- (3) the [assault] [intimidation] interfered with or lessened the ability of the crew member or flight attendant to perform [his] [her] duties.

...

[To “intimidate” someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It’s also to say or do something to make another person fearful or make that person refrain from doing something that the person would otherwise do—or do something that the person would otherwise not do.]

STATEMENT OF THE CASE

1. Specification of Stage in the Proceedings in Which the Federal Questions Sought to Be Reviewed Were Raised, the Manner of Raising Them, and the Way in Which They Were Passed On.

On February 10, 2017, a jury for the United States District Court for the District of Hawaii found Petitioner guilty of one count of interfering with a flight attendant, 49 U.S.C. section 46504 and 18 U.S.C. section 3238, and found him not guilty of two counts of

simple assault under 18 U.S.C. section 113(a). The court sentenced Petitioner to three years probation with a condition that he spend six months on an ankle monitor.

On July 28, 2017, Petitioner filed a motion for bail pending his appeal. In that motion, Petitioner raised the issue of the erroneous jury instruction provided in his case for 49 U.S.C. section 46504. On August 8, 2017, the District Court denied Petitioner's motion for bail and his argument concerning the jury instruction.

Petitioner filed an appeal to the United States Court of Appeals for the Ninth Circuit. Petitioner raised four points of error on appeal: (1) the court's instruction defining intimidation misstated the law; (2) the court's instruction on the elements of Count I should have indicated that Petitioner had to "knowingly" interfere with a flight attendant; (3) the court should have given a limiting instruction telling the jury to disregard the testimony about the copilot's actions once the court granted Petitioner's oral motion for judgment of acquittal as to the portion of Count 1 that related to interference with a copilot, and (4) trial counsel was ineffective because he failed to object to the court's instruction defining "intimidation," an element of the interference charge. The Ninth Circuit affirmed his conviction. *See United States v. Turner*, 754 F. App'x 664, 665 (9th Cir. 2019).

On May 22, 2020, Petitioner filed a motion to vacate his conviction under 28 U.S.C. section 2255. Petitioner was, however, not in custody at the time he filed

his motion, therefore the Ninth Circuit dismissed this motion. Once the court declined to issue a certificate of appealability with respect to its order dismissing Petitioner's section 2255 motion, Petitioner sought a certificate of appealability from the Ninth Circuit, which declined his request.

In August 2022, Petitioner filed the writ of error *coram nobis* with the Ninth Circuit Court of Appeals. On June 8, 2023, the United States Court of Appeals for the Ninth Circuit denied Petitioner's writ of *coram nobis*, filing its order on June 14, 2023.

In July 2023, Petitioner filed a petition for a rehearing on the issues raised in his original writ of error *coram nobis* to the Ninth Circuit Court of Appeals.

On August 22, 2023, the Ninth Circuit denied the petition for a rehearing.

This petition for writ of certiorari is filed within 90 days of the Ninth Circuit's final judgment and is therefore timely under Supreme Court Rule 13.

2. Statement of Facts.

a. District Court trial.

On March 23, 2016, the Government charged Petitioner Dr. William Turner in an Indictment containing one count of interfering with a flight attendant, in violation of 49 U.S.C. section 46504 and 18 U.S.C. section 3238, and two counts of simple assault, in violation of

18 U.S.C. section 113(a). Trial commenced on February 7, 2017 and concluded on February 10, 2017.

Petitioner testified on his own behalf at trial, offering a version of events that differed in material respects from the narratives provided by flight attendant Lena Goralska and the two women involved in the altercation with Petitioner, Christina Mulberry and Robin Adams. The jury also heard testimony from the plane's pilot, Captain Chris Maracchini, Special Agent Joel Rudow, and Petitioner's girlfriend, Tamara Thompson.

At the conclusion of the trial, the jury found Petitioner guilty of interference with a flight attendant—a felony—but not guilty of the two misdemeanor assault charges. 4-ER-678-680. The court sentenced Petitioner to three years probation with a condition that he spend six months on an ankle monitor.

b. Court of Appeals' decision.

In August of 2022, Petitioner filed a writ of error *coram nobis* in the Ninth Circuit Court of Appeals. In this writ, Petitioner argued that his trial counsel was ineffective in agreeing to the jury instruction defining “intimidation” under 49 U.S.C. section 46504. He argued that trial counsel’s failure to object to or correct the erroneous instruction fell below the standard of a reasonable attorney, the inclusion of the “or to another” language was improper, and the District Court’s erroneous analysis illustrates the reasons why. Lastly, Petitioner argued he suffered prejudice as a result of

the erroneous jury instruction because it impermissibly broadened the scope of the statute and reduced the government's burden of proof, thereby permitting the jury to convict him based on acts that were not intended to fall within the reach of 49 U.S.C. section 46504.

On June 8, 2023, the Ninth Circuit Court of Appeals denied Petitioner's writ of error *coram nobis*. The panel rejected Petitioner's ineffective-assistance-of-counsel claim, and the panel rejected Petitioner's arguments concerning the jury instruction.

In July of 2023, Petitioner filed a petition for a panel rehearing or a rehearing en banc as the Ninth Circuit's decision in his appeal conflicted with at least two opinions from that court: *Eid v. Alaska Airlines*, 621 F.3d 858 (9th Cir. 2010) and *United States v. Meeker*, 527 F.2d 12 (9th Cir. 1975). Further, the Ninth Circuit's decision presented a question of exceptional importance and conflicted with at least two opinions from outside the Ninth Circuit: *Wallaesa v. FAA*, 824 F.3d 1071 (D.C. Cir. 2016) and *United States v. Cafiero*, 292 F. Supp. 2d 242 (D. Mass. 2003). Petitioner asserted the panel's holding(s) substantially affect a rule of national application in which there is an overriding need for national uniformity.

On August 22, 2023, the Ninth Circuit denied Petitioner's request for a rehearing.

c. Jury instructions.

Though acquitted of the two misdemeanor assault charges, the jury convicted Petitioner of the single felony count of interference with a flight attendant in violation of 49 U.S.C. section 46504, which states, “An individual on an aircraft in the special aircraft jurisdiction of the United States who, by assaulting or intimidating a flight crew member or flight attendant of the aircraft, interferes with the performance of the duties of the member or attendant or lessens the ability of the member or attendant to perform those duties, or attempts or conspires to do such an act, shall be fined under title 18, imprisoned for not more than 20 years, or both.” 49 U.S.C. § 46504.

The trial court articulated the elements of interference with a flight attendant as follows:

The defendant is charged in Count 1 of the indictment with interference with a flight attendant on or about March 14, 2016, in violation of Section 46504 of Title 49 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant was on an aircraft in flight in the special aircraft jurisdiction of the United States;

Second, that the defendant intimidated a flight attendant of the aircraft; and

Third, that such intimidation interfered with the performance of the duties of the flight attendant of the aircraft or lessened the ability of the attendant to perform those duties.

4-ER-626-627. The trial court then instructed what it means for a flight attendant to be “intimidated”:

A flight attendant may be “intimidated” by the use of words or actions that place the flight attendant in reasonable apprehension of bodily harm, either to the flight attendant or to another, or by the use of words or actions that make the flight attendant fearful or make that flight attendant refrain from doing something that the flight attendant would otherwise do, or do something that the flight attendant would otherwise not do, or interfere with or lessen the flight attendant’s ability to do something. One person in a group can be intimidated by threats directed at the group in general. The government does not have to prove that the flight attendant was in fact frightened for her own physical safety in order to prove that the defendant performed the criminal act of intimidation. It is sufficient that the conduct and words of the defendant would place an ordinary, reasonable person in fear.

4-ER-627.

ARGUMENT

This case arises from a verbal altercation between the Petitioner, Dr. William Turner, and two female passengers aboard a flight to Hawaii on March 14, 2016. Upset by the volume of the women's conversation, Petitioner confronted them. The conflict escalated but remained verbal. Although Petitioner never assaulted or threatened any member of the flight crew, one flight attendant, Lena Goralska, claimed to have feared Petitioner, despite conceding that he was not hostile toward her.

Ultimately, Petitioner has been convicted of a crime he did not commit as a result of an erroneously broad jury instruction that permitted his conviction for conduct insufficient to satisfy the offense statute. The facts of this case are seemingly unique in the context of 49 U.S.C. section 46504. There does not appear to be any case in which a non-physical argument between passengers has given rise to a conviction for intimidating a flight attendant. The explanation for this apparently unprecedented extension of the statute's scope lies in the erroneous instruction the trial court provided to the jury defining the term "intimidate."

That instruction worked to Petitioner's detriment in several ways. First, it provided multiple alternatives for defining "intimidate," all of which failed to convey the correct meaning, enabling the jury to find Petitioner guilty if the flight attendant altered her actions because of the altercation, irrespective of whether she was the target of Petitioner's anger. The instruction

also improperly failed to cast the flight attendant as an “ordinary person,” as required by the case law, which permitted the jury to consider Ms. Goralska’s subjective response to the incident.

Another major error in the trial court’s definitional instruction was the inclusion of the phrase “or to another,” which allowed for a finding of guilt in a situation, like this one, where the flight attendant feared not for herself, but strictly for another passenger. Again, there seems to be no case applying 49 U.S.C. section 46504 to a situation like this one.

The Court of Appeals’ decision in this case highlights a circuit split on the question of whether the jury instruction offered in this case is proper in similar contexts. That conflict, in conjunction with the increasing prevalence of altercations of variegated sorts on everyday commercial flights in the modern era, warrants the Court’s review.

1. The Decision Below Implicates Both a Conflict Amongst the Courts of Appeals and an Increasingly Prevalent Issue in American Society That Warrants Review.

Not only does a conflict amongst the circuits warrant this Court’s review of Petitioner’s claims, but such a salient issue in today’s society warrants review and clarification on the standard to be applied when prosecuting 49 U.S.C. section 46504 claims.

a. The Circuits are in disagreement on the jury instruction for 49 U.S.C. section 46504.

By rejecting Petitioner's previous claim that his counsel rendered deficient performance in failing to challenge the jury instruction at issue, the panel did not cite, but did rule in conflict with, *Eid v. Alaska Airlines*, 621 F.3d 858 (9th Cir. 2010) and *United States v. Meeker*, 527 F.2d 12 (9th Cir. 1975). Further, the panel's opinion likewise conflicts with out-of-Circuit opinions issued in *Wallaesa v. FAA*, 824 F.3d 1071 (D.C. Cir. 2016) and *United States v. Cafiero*, 292 F. Supp. 2d 242 (D. Mass. 2003). Although violations of 49 U.S.C. section 46504 do not appear to have been frequently charged in the past, such charges have become more prevalent, and are expected to only further increase in prevalence. When the United States files charges under 49 U.S.C. section 46504, it is imperative that lower courts have guidance regarding the appropriate jury instructions to give in connection therewith, rather than conflicting opinions regarding the evidence that is sufficient to satisfy such a charge.

There is, therefore, an overriding need for national uniformity regarding the sort of conduct that comprises a violation of section 46504 and that which does not, not only for purposes of correctly instructed juries, but also for notice to prosecutors and prospective defendants.

In *Wallaesa v. FAA*, 824 F.3d 1071 (D.C. Cir. 2016), the D.C. Circuit held that “[s]ection 46504 pertains

only to interference by way of assault or intimidation, a much narrower slice of conduct than the Interference Rule’s comprehensive prohibition on interference with crewmember duties.” *Id.* at 1082. Under *Wallaesa*, the jury instruction used by the trial court in this case unlawfully permitted conviction upon the commission of conduct which does not suffice for section 46504.

Furthermore, in *United States v. Cafiero*, 292 F. Supp. 2d 242 (D. Mass. 2003), a Massachusetts district court held that section 46504 “cannot be expanded to mean that interference with a flight crew member occurs every time a flight crew member becomes concerned or apprehensive about an individual’s behavior and conduct aboard a flight.” *Id.* at 246-47. Yet that is precisely what the jury instruction at issue here permitted.

Most circuits do not provide a model jury instruction for 49 U.S.C. section 46504. Among the circuits that do have a Pattern Criminal Jury Instruction for 49 U.S.C. section 46504, however, these circuits vastly disagree as to how a jury is to be instructed on the issue of what it means to “intimidate” someone.

The Fourth Circuit, which has adopted the District Court for the District of South Carolina’s jury instructions, provides that “[a] defendant intimidates a flight attendant or flight crew member if the words and conduct of the defendant would place an ordinary reasonable person in fear [of bodily harm]. The government does not need to prove that the flight attendant or flight crew member was in fact frightened for his or her

own [physical] safety.” Eric Wm. Ruschky, *Pattern Jury Instructions for Federal Criminal Cases*, District of South Carolina 49 U.S.C. § 46504 (2020 Online Edition).

The Fifth Circuit requires that “the words and conduct of the defendant amount to intimidation if they place an ordinary, reasonable person in fear.” *Pattern Criminal Jury Instructions*, 5th Cir. (2019).

The Eighth Circuit defines “intimidate” as “plac[ing] a person in reasonable apprehension of bodily harm to himself or herself or to another.” *Pattern Criminal Jury Instructions*, 8th Cir. (2023).

Lastly, the Eleventh Circuit provides “[t]o ‘intimidate’ someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It’s also to say or do something to make another person fearful or make that person refrain from doing something that the person would otherwise do—or do something that the person would otherwise not do.” *Pattern Criminal Jury Instructions*, 11th Cir. (2022).

In this case, the District Court chose the instruction from the Eleventh Circuit with the broadest interpretation of the statute, inasmuch as the Ninth Circuit does not have a model instruction for section 46504. This Eleventh Circuit instruction, unlike all the other model instructions, and the Ninth Circuit case law in *United States v. Meeker* and *Eid v. Alaska Airlines*, permitted Petitioner to be convicted simply based upon whether his actions caused flight attendant Ms.

Goralska to alter the course of her duties in any way based upon the complaints of two passengers concerning a dispute they had with Petitioner.

b. Similar incidents are increasingly prevalent in American society.

What can be described as in-flight passenger unruliness has become more present, and prosecutions for similar actions are on the rise. Those in the field have noticed an uptick in the alleged unruliness of passengers on airplanes. Prior to the COVID-19 pandemic, those familiar with the issue cited full aircrafts, alcohol, and increased security checks as the reasons why passengers on airplanes were becoming increasingly more unruly. During the height of the COVID-19 pandemic, when passengers were mandated to wear face masks as a precautionary measure, passengers acting out became more common as well. Francesca Street, DREAD AT 30,000 FEET: INSIDE THE INCREASINGLY VIOLENT WORLD OF US FLIGHT ATTENDANTS CNN (2021), <https://www.cnn.com/travel/article/flight-attendants-unruly-passengers-covid/index.html> (last visited Nov. 14, 2023).

Unruly passenger incidents on flights from one per 835 flights in 2021 to one per 568 flights in 2022. Unruly behavior, including a failure to comply with crew member instruction, verbal abuse, and intoxication, were the most common categories of incidents in 2022. While rare, physical abuse of crew has increased by 61% globally since 2021, occurring

once every 17,200 flights. . . . The FAA recorded 1,161 unruly passenger incidents in 2019, 889 in 2018, and 544 in 2017. Overall, the trend is on the rise.

Marisa Garcia, AIR RAGE IS GETTING WORSE, AND AIRLINES CAN'T FIX IT Forbes (2023), <https://www.forbes.com/sites/marisagarcia/2023/10/20/air-rage-is-getting-worse-and-airlines-cant-fix-it/?sh=3aa82a666404> (last visited Nov. 14, 2023). The FAA has now referred more than 250 of the most serious cases to the FBI since late-2021 under a partnership agreement aimed at ensuring unruly airline passengers face criminal prosecution when warranted. Natalie O'Neill, WILD AIRPLANE PASSENGER MELTDOWNS HAVE SOARED NEARLY 50% WORLDWIDE—HERE'S WHY New York Post (2023), <https://nypost.com/2023/08/04/former-air-marshall-reveals-whats-fueling-the-surge-in-passenger-meltdowns-violence-on-planes/> (last visited Nov. 14, 2023).

Whatever the reason may be for the increased unruliness on airplanes, the statistics demonstrate this behavior has increased and will continue to increase. With such an issue arising in America, this Court should grant review to create uniformity in the law and allow the Circuits to properly navigate how juries are to be instructed in these cases.

2. The Decision from the Ninth Circuit Court of Appeals Is Incorrect.

The erroneous instructions permitted Petitioner to be found guilty of interference with a flight attendant

even if the jury found that he only engaged in a heated dispute with other passengers, and that a flight attendant was forced to move those passengers to another seat, without any actual threatening behavior directed at the flight attendant or a group that included the flight attendant.

In support of the proposed jury instructions, the parties cited the case of *United States v. Meeker*, 527 F.2d 12, 15 (9th Cir. 1975) and *Pattern Criminal Jury Instructions*, 11th Cir. (2003). However, the case of *United States v. Meeker* specifically cautions against the application of the phrase “intimidation,” as well as application of the crime of interference with a flight attendant, to situations where the intimidation is not directed at, or does not include, the flight crew member or flight attendant. Similarly, the parties did not provide the trial court with the correct Eleventh Circuit *Pattern Criminal Jury Instructions* version at the time, which does not include the above-cited language of the jury instruction. See *Pattern Criminal Jury Instructions*, 11th Cir. (2016) (“To ‘intimidate’ someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It’s also to say or do something to make another person fearful or make that person refrain from doing something that the person would otherwise do—or do something that the person would otherwise not do.”).

In *United States v. Meeker*, the defendant, convicted of interfering with a flight crew member, challenged the sufficiency of the evidence, arguing that he did not directly intimidate the pilot. 527 F.2d 12. The

Ninth Circuit, in addressing the sufficiency challenge, cautioned that application of a charge of interfering with a flight crew member in precisely this type of case, a case in which a defendant assaults another passenger or where a flight crew member intervenes in a heated dispute between passengers. The Ninth Circuit stated:

The sufficiency of the evidence for Count I is attacked by contending that Meeker did not directly intimidate the pilot. The possible ramifications of this argument raise a difficult issue of some significance. One could conjure up the spectre of the government's employing a section 1472(j) charge for acts which would normally be considered assaults on passengers proscribed under section 1472(k)(1). This would escalate an act normally punishable by imprisonment up to six months and a fine not to exceed \$500 to a possible penalty of up to 20 years in prison and a \$10,000 fine. The contention might warrant careful scrutiny were this a case of a pilot unnecessarily sauntering back to the cabin to intermeddle officially in a heated dispute between passengers. Meeker's case, however, presents no such troublesome scenario.

The pilot initially left the cockpit to assess the riotous conditions that the co-pilot and stewardesses had reported to him. The normally sedate DC-10 passengers and flight attendants were standing up and screaming, with some shouting "kill him [Meeker]!" One casualty had already been stretched out across

some seats. Upon entering the cabin the pilot saw Meeker menacingly rising up out of his seat, despite the efforts of three men to contain him. Meeker followed by knocking his wife into the pilot's direction. The pilot responded by searching for a restraining device in the cockpit. He returned with the co-pilot's belt and, with the aid of many passengers, managed to strap Meeker down. The pilot had to proceed with caution in order to avoid getting hurt as Meeker was kicking and flailing out in all directions, while spewing forth a stream of threatening invectives. The testimony of the pilot indicated that he was frightened by the unprecedented flight conditions and feared for the safety of all those on board.

It may be conceivable to conclude on the basis of the evidence that Meeker did not "directly" intimidate the pilot in a one-to-one type of confrontation. Such a conclusion, if made, however, would not foreclose our inquiry. One person in a group can be intimidated by threats directed at the group in general. Nor is proof that the victim was in fact frightened for his own physical safety required in order to find that a defendant performed the criminal act of intimidation. It is sufficient that the conduct and words of the accused would place an ordinary, reasonable person in fear. *United States v. Alsop*, 479 F.2d 65, 66-67 (9th Cir. 1973) (construing "intimidation" in the bank robbery statute, 18 U.S.C. § 2113(a); accord, *United States v. Jacquillon*, 469 F.2d 380, 385 (5th Cir. 1972), cert. denied,

410 U.S. 938, 35 L. Ed. 2d 604, 93 S. Ct. 1400 (1973).

Meeker, 527 F.2d at 15.

In *Meeker*, the Ninth Circuit clearly indicates that a flight crew member can be intimidated either directly or by threats directed generally at the group they are a part of, but the court drew a distinction between that situation and a situation where one passenger assaults another passenger, or where one passenger is engaged in a heated dispute with other passengers. The court was specifically critical of the potential for a situation where passengers engage in a heated dispute to morph into a charge of interfering with a flight crew member.

In Petitioner's case, the jury instruction stated that intimidation can be accomplished by words or actions that place the flight attendant in reasonable apprehension of bodily harm not only to the flight attendant, but also "to another." This language does not draw the distinction that the Ninth Circuit outlined in *Meeker*, which required the intimidating conduct to be directed either at the flight attendant, or at a group of people that included the flight attendant. The language permits a conviction upon no more than the heated dispute between passengers in which a flight attendant is worried that one passenger might assault the other. This broad application was rejected by the Ninth Circuit in *Meeker*.

The joint proposed jury instructions provided to the District Court also cited an outdated version of the

Eleventh Circuit's Pattern Criminal Jury Instructions. The newer versions of the Eleventh Circuit's instructions eliminated the phrase "to another," focusing instead on whether it would cause that person fear of bodily harm, stating:

To 'intimidate' someone is to intentionally say or do something that would cause a person of ordinary sensibilities to fear bodily harm. It's also to say or do something to make another person fearful or make that person refrain from doing something that the person would otherwise do—or do something that the person would otherwise not do.

Pattern Criminal Jury Instructions, 11th Cir. 118 (2010); 118 (2016).

Additionally and separately, the language included in the instruction is so broad that it includes situations in which the flight attendant does not, and would not reasonably, fear bodily harm or even maintain any fear at all. The language of the instruction includes multiple mutually exclusive alternatives to satisfy the requirement of intimidation, including "the use of words or actions that . . . make the flight attendant refrain from doing something that the flight attendant would otherwise do, or do something that the flight attendant would otherwise not do, or interfere with or lessen the flight attendant's ability to do something." This language is overly broad, it does not include any requirement that the words or conduct be of the type to reasonably provoke fear of any kind, it applies to any interaction with a flight attendant, and

it generally does not comport with the notion of intimidation.

The instructions' all-encompassing language results in its unduly flexible requirements being satisfied anytime the third element of the offense is satisfied. When referencing the third element of the offense, the instruction states that "such intimidation interfered with the performance of the duties of the flight attendant of the aircraft or lessened the ability of the attendant to perform those duties." If any interference occurred in satisfaction of element three, that interference, by the definition provided, constitutes intimidation under element two. This is because intimidation is defined as any words or actions that "interfere with or lessen the flight attendant's ability to do something." The language of the Eleventh Circuit's instruction therefore effectively eliminates the requirement that the Government prove the second element—that the defendant intimidate a flight attendant—beyond a reasonable doubt because that definition of intimidation includes the third element of the offense—that there was some interference with the flight attendant's duties.

In the present case, a heated dispute between passengers, as discussed in *Meeker*, is precisely what transpired, and what the jury must have found occurred. The jury, after hearing testimony from the alleged victims of the assault, the flight attendant, and Petitioner himself, acquitted Petitioner of both counts of assault on the other passengers. Therefore, the jury's findings must be such that they did not believe that he

assaulted the other two passengers beyond a reasonable doubt. The Government's trial memorandum described the flight attendant's version of events as Petitioner "in a 'rant,' yelling at two women who were seated directly in front of [Petitioner]." According to the flight attendant, Petitioner was "swearing and telling the women to shut up." The flight attendant claimed that she witnessed Petitioner spitting in the face of these two women, but the jury acquitted him of the assault charges and must have found fault with this assertion. The flight attendant was able to get Petitioner to return to his seat, and described him as irrational and unreasonable, but compliant. The flight attendant stated that she believed that Petitioner was ready to attack the other passengers. It also appears that the flight attendant moved the two female passengers to other seats on the airplane.

The instructions provided in Petitioner's case permitted, and required, the jury to convict him based solely upon the flight attendant's belief that Petitioner was engaged in a heated dispute with other passengers, and that the dispute might turn into a physical altercation. Unlike *Meeker*, where the passenger was in fact physically assaulting other passengers, threatening a large group of people including the pilot, throwing people at the pilot, and kicking in the pilot's direction while he attempted to physically restrain him, the evidence in this case does not support a conviction based upon the claim that Petitioner intimidated the flight attendant. Petitioner was engaged in a heated dispute that the flight attendant believed

might become physical between the passengers, but not that Petitioner was prepared to become violent with her or with a group that included her. There is no evidence that Petitioner threatened the flight attendant or a group that included the flight attendant. The flight attendant intervened and ushered Petitioner to his seat, describing Petitioner as compliant with her instructions. Finally, the jury found that no assault took place between the passengers. Ultimately, the entire affair was one in which a heated dispute erupted between a few passengers, and a flight attendant separated the two groups and resolved the situation. *Meeker* cautioned against applying a 49 U.S.C. section 46504 charge to precisely this type of situation.

Further, even if the jury did not believe that the flight attendant feared any bodily injury to herself, or even the other passengers, and did not believe that Petitioner threatened the flight attendant, the jury instructions nevertheless required a conviction because the jury instructions erroneously described intimidation as any words or actions that caused a flight attendant to do something they wouldn't ordinarily do, including resolving a dispute between passengers and moving passengers from one seat to another. As *Meeker* describes, the intimidation required for a conviction is substantially more than the fact that a flight crew member took action to resolve a dispute between passengers. However, the jury instructions provided in the present case permitted a finding of intimidation in precisely this type of situation.

Applying different jury instructions from the different circuits, as described above, to the facts of this case could well have determined its outcome. If the District Court had adopted the Fourth Circuit's jury instruction, the jury in Petitioner's case would have had to acquit him of the 49 U.S.C. section 46504 charge based on the acquittals of the two assault charges under 18 U.S.C. section 113(a). As the evidence demonstrated at trial, Petitioner never threatened the flight attendant and was cooperative with the flight attendant, therefore never placing her in fear of apprehension or bodily harm for herself. *See Eric Wm. Ruschky, Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina 49 U.S.C. § 46504 (2020 Online Edition).*

A similar verdict would have been rendered should the District Court have instructed the jury pursuant to the Eighth Circuit model instruction. As the jury found, Petitioner did not assault the other two passengers under 18 U.S.C. section 113(a) and the evidence was clear that Petitioner did not cause the flight attendant to fear for bodily harm to herself. *See Pattern Criminal Jury Instructions, 8th Cir. (2023).*

Under the Fifth Circuit model instruction, there is no provision for conviction based upon what may or may not have happened to one of the passengers; the instruction focuses only on whether or not the flight attendant, looked at from the perspective of a reasonable person in the flight attendant's circumstances, would have been placed in fear. *See Pattern Criminal Jury Instructions, 5th Cir. (2019).* In this case, since the

evidence did not demonstrate the flight attendant was placed in fear, but rather she simply altered the course of her duties based upon complaints by two other passengers concerning Petitioner, an acquittal would have been required in the Fifth Circuit.

By adopting the Eleventh Circuit's definition of intimidation under 49 U.S.C. section 46504, the District Court permitted a conviction to result when flight attendant Ms. Goralska altered her routine to put into action conflict-resolution tactics. Indeed, the instruction given permitted Petitioner to be convicted if there was *any* deviation from Ms. Goralska's routine. For example, if she halted food service, or otherwise deviated from her ordinary duties, to deal with an argument between passengers, this conceivably led to a conviction in Petitioner's case, or in any case in which the Eleventh Circuit's jury instruction is given—*even if* the flight attendant was not placed in fear or apprehension of bodily harm. *See Pattern Criminal Jury Instructions*, 11th Cir. (2022). Such a reading of section 46504 is overly broad, is not derived from the text of the statute, and is precisely what the Ninth Circuit cautioned against in *Meeker*.

Particularly concerning are circuits—like the Ninth Circuit—where the circuit has not adopted instructions for a charged violation of 49 U.S.C. section 46504 and the judge is left to pick from the existing jury instructions outlined above. This decision will only be made shortly before trial, and, in cases much like Petitioner's, could well determine the jury's verdict.

As they were provided to the jury, the instructions impermissibly lowered the Government's burden of proof by allowing Petitioner to be convicted on the basis of evidence that does not amount to the intimidation of a flight attendant. Rather than require evidence that the flight attendant would reasonably be placed in fear of bodily harm, or fear of any kind, the instructions allowed Petitioner to be convicted upon nothing more than a finding that the flight attendant took some action, including moving several passengers to different seats, that she would not otherwise have taken. The reduction in the evidence required for a conviction in this case is substantial, particularly given the holding in the *Meeker* case and the jury's finding that Petitioner did not assault the other passengers. Thus, Petitioner's conviction should have been reversed on appeal, and the Ninth Circuit's denial of such relief was in error and in violation of Petitioner's due process.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Dated: San Francisco, California, Monday, November 20, 2023.

Respectfully submitted,

DAVID J. COHEN, Esq.
300 Montgomery Street, Suite 660
San Francisco, California, 94104
Tel. No. (415) 398-3900
Fax No. (415) 398-7500
djcohen@baclpc.com

Counsel for Petitioner