

No. 17-50336

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MONIQUE LOZOYA,
Defendant-Appellant.

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 16-598-AB*

**GOVERNMENT'S PETITION FOR PANEL REHEARING
AND/OR REHEARING EN BANC
(Decided April 11, 2019—*M. Smith, Settle; Owens (dissenting)*)**

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I

INTRODUCTION

This is a small case with high stakes. The panel majority held that the government may not prosecute an assault on an airplane unless it pinpoints the jurisdiction over which the plane was flying the instant the assault occurred. *United States v. Lozoya*, 920 F.3d 1231 (9th Cir. 2019). As Judge Owens recognized, that holding is dangerous, unprecedented, and incorrect. *Id.* at 1243-45 (Owens, J., dissenting).

The government cannot, in this case or any other, be required to identify the exact airspace in which an inflight crime was committed. When a defendant gropes the sleeping passenger next to him or steals a laptop from a seatback pocket, the government will rarely be able to prove the plane's location at the moment of the crime. A murder in the lavatory will go unpunished unless the government can establish the jurisdiction over which the plane was flying when the victim was killed. The rule invites criminals to operate with impunity in lawless skies.

The panel majority acknowledged this “creeping absurdity.” *Id.* at 1242. Requiring “the government to pinpoint where precisely in the spacious skies” crimes occurred may prevent the prosecution of “robbery or homicide—or some other nightmare at 20,000 feet.” *Id.*

The law rejects that absurdity. Crimes involving transportation in interstate commerce may be prosecuted in any district from, through, or into which the transportation moves. 18 U.S.C. § 3237(a) ¶ 2. Hence, the Tenth and Eleventh Circuits have held that inflight crimes may be prosecuted in the landing district. *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). No other court has ever disagreed.

Lozoya, 920 F.3d at 1244 (Owens, J., dissenting). The panel majority recognized that its decision creates a circuit split. *Id.* at 1240-41.

No split is warranted. The panel majority reached the wrong result by misapplying *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999). *See Lozoya*, 920 F.3d at 1238-41. That case “relied solely upon the first paragraph of 18 U.S.C. § 3237(a)”; this case is concerned with “the *second paragraph* of § 3237(a).” *United States v. Wood*, 364 F.3d 704, 712 (6th Cir. 2004). Under the second paragraph, defendant’s crime “involv[ed] . . . transportation in interstate . . . commerce” because she committed it on a mode of interstate transportation—and, indeed, in the midst of interstate travel. Landing district venue was proper.

This case satisfies the criteria for panel rehearing or rehearing en banc. Fed. R. App. P. 35, 40; Cir. R. 35-1. The panel majority erroneously resolved a question of exceptional importance in a manner that will prevent prosecution of extremely serious crimes. The panel opinion also directly conflicts with the holdings of two other circuits on an issue for which national uniformity is necessary.

En banc review also should be granted to reconsider this Court’s rule allowing a defendant to withhold a known venue objection until

after the close of the government's case. *Lozoya*, 920 F.3d at 1238.

Where, as here, a defendant has notice of an alleged venue defect before trial, "the basis for the motion is then reasonably available" and "must be raised by pretrial motion." Fed. R. Crim. P. 12(b)(3).

II

BACKGROUND

A. Defendant's Crime and Conviction

In July 2015, defendant and her boyfriend were returning home to the Central District of California on a flight from Minneapolis to Los Angeles (Excerpts of Record ("ER") 428-29, 454-55). *See Lozoya*, 920 F.3d at 1233. The plane "crossed over at least eight different [federal judicial] districts during its flight time." *Id.* at 1242. At some point, defendant argued with another passenger, slapped him in the face, and caused his nose to bleed. *Id.* at 1233-34.

Defendant was charged with misdemeanor assault, 18 U.S.C. § 113(a)(5), within the special aircraft jurisdiction of the United States, 49 U.S.C. § 46506. (ER 313-14.) She was convicted in a bench trial before a magistrate judge and sentenced to a \$750 fine with no term of imprisonment. *Lozoya*, 920 F.3d at 1233.

B. Defendant's Belated Venue Challenge

Before trial, defendant received a probable-cause statement alleging she committed assault at least an hour before the plane landed. (ER 54-68.) *See Lozoya*, 920 F.3d at 1238. Estimates varied, however, as to the precise timing. The victim, his wife, and defendant all believed the assault occurred about an hour before landing. (ER 56-59, 66-67.) The lead flight attendant estimated 90 minutes “before landing,” while another flight attendant estimated 90 minutes “after take-off”; those approximations would match each other—but not the passengers’—only if the flight was three hours long. (ER 59-60, 62-63.) Although the lead flight attendant did estimate a three-hour flight, defendant’s boyfriend testified that it was at least four hours and that the assault occurred “[a]bout halfway through.” (ER 377, 443.) A website the panel majority cited reflects an average flight time of four hours and ten minutes. www.airportia.com/flights/dl2321/minneapolis/los_angeles/2018-12-22; *see Lozoya*, 920 F.3d at 1242 & n.6.

Nevertheless, because all witnesses agreed that the assault occurred at least an hour before landing, defendant recognized that she committed her crime before the plane entered California airspace. She

devised a venue challenge but did not raise it until the government rested, at which point she moved for acquittal. (ER 479-81.)

The magistrate judge denied defendant's motion, ruling 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." *Lozoya*, 920 F.3d at 1235. Thus, "to establish venue, the government only needs to prove that the crime took place on a form of transportation in interstate commerce." *Id.* (See also ER 23-35.)

Defendant appealed to the district court, which also rejected her venue claim. (ER 45-49.)

III

REHEARING IS WARRANTED

The panel majority created an incorrect, dangerous, and unworkable rule.

A. The Panel Majority's Decision Is Incorrect

1. *The Second Paragraph of 18 U.S.C. § 3237(a) Permits Prosecution of Inflight Crimes in the Landing District*

Venue was permissible in the Central District of California under the second paragraph of 18 U.S.C. § 3237(a). That paragraph provides

that “[a]ny offense involving . . . transportation in interstate or foreign commerce . . . is a continuing offense and . . . may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves.” 18 U.S.C. § 3237(a) ¶ 2. Congress thus designated crimes involving transportation in interstate commerce to be continuing offenses per se. *United States v. Ramirez*, 420 F.3d 134, 139 n.4 (2d Cir. 2005).

The statute prescribes a simple inquiry: the Court must determine whether defendant’s offense involved transportation in interstate or foreign commerce.

It did. Because “the offense occurred *on* a form of interstate transportation,” it involved transportation in interstate commerce. *United States v. Morgan*, 393 F.3d 192, 200 (D.C. Cir. 2004). That straightforward logic is the rule in the Tenth and Eleventh Circuits: “To establish venue, the government need only show that the crime took place on a form of transportation in interstate commerce.” *Cope*, 676 F.3d at 1225; *Breitweiser*, 357 F.3d at 1253. Thus, the *Cope* defendant was prosecuted in the landing district for piloting a plane while under the influence of alcohol. 676 F.3d at 1221, 1224-25. It did not matter

whether he was still intoxicated at the time of landing; because he “was operating a common carrier in interstate commerce,” he could be prosecuted in any district through which the plane flew. *Id.* at 1225. Similarly, the *Breitweiser* defendant was prosecuted in the landing district for groping a minor. 357 F.3d at 1251-52. The government was not required to prove he touched the child in landing-district airspace; “that transportation in interstate commerce was involved is sufficient.” *Id.* at 1253; accord *United States v. McCulley*, 673 F.2d 346, 348, 350 (11th Cir. 1982) (mail-theft heist in baggage compartment could be prosecuted in the landing district; the crime “took place on a form of transportation in interstate commerce”).

Until now, no court had ever disagreed. *Lozoya*, 920 F.3d at 1244 (Owens, J., dissenting); see also *United States v. Hall*, 691 F.2d 48, 50 (1st Cir. 1982) (Breyer, J.) (refusing to construe statute prohibiting in-flight assaults “in a way that would require proof of precisely where [the defendant’s] threats and assaults took place, in a plane traveling across many states at great speed, high above the earth”); *United States v. Busic*, 549 F.2d 252, 258 (2d Cir. 1977) (“It is incomprehensible . . . that courts must conduct a potentially fruitless search to determine

exactly where a crime is committed when the alleged perpetrators are traveling at 600 m.p.h.”).

Indeed, a crime committed miles above the earth on a plane flying hundreds of miles per hour “is precisely th[e] sort of situation that 18 U.S.C. § 3237 was meant to deal with.” *McCulley*, 673 F.2d at 350. The statute was enacted in 1948 as part of a broad revision to the criminal code and was intended to eliminate the need for “special venue provisions except in cases where Congress desires to restrict the prosecution of offenses to particular districts.” H.R. Rep. No. 80-304, at A161 (1947); Reviser’s Note to 18 U.S.C. § 3237(a) (1948); *see also* Charles Alan Wright et al., 2 Fed. Prac. & Proc. Crim. § 303 (4th ed.) (discussing history of § 3237(a) ¶ 2).¹ “It is a catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue.” *McCulley*, 673 F.2d at 350.

¹ Among the venue provisions Congress deemed “covered by section 3237” was the provision relating to stolen aircraft, which permitted venue “in any district in or through which such . . . aircraft has been transported or removed.” H.R. Rep. No. 80-304, at A145; 18 U.S.C. § 408 (1940 ed., fifth supp.).

That is how the statute should have operated here. Defendant committed a crime on an interstate flight. The government was entitled to prosecute her in the jurisdiction into which the plane moved when it landed.

2. *The Panel Majority Misconstrued the Second Paragraph of 18 U.S.C. § 3237(a) by Relying on Precedents Interpreting Its First Paragraph*

The panel majority created a circuit split by misapplying *Rodriguez-Moreno* and its progeny. *See Lozoya*, 920 F.3d at 1238-41.

Rodriguez-Moreno held that the charge of using or carrying a firearm during and in relation to kidnapping could be prosecuted in any jurisdiction through which the kidnapping victim was transported. 526 U.S. at 281-82. The Court based its holding on the first paragraph of § 3237(a), which provides “that continuing offenses can be tried ‘in any district in which such offense was begun, continued, or completed.’” *Id.* at 282. Under that paragraph, a crime is a continuing offense if “begun in one district and completed in another, or committed in more than one district.” 18 U.S.C. § 3237(a) ¶ 1.

To determine whether the crime qualified as a continuing offense under the first paragraph of § 3237(a), *Rodriguez-Moreno* applied the

“*locus delicti*” test. 526 U.S. at 279. That test “identif[ies] the conduct constituting the offense (the nature of the crime) and then discern[s] the location of the commission of the criminal acts.” *Id.* Using or carrying a firearm during and in relation to kidnapping qualified as a continuing offense under § 3237(a) ¶ 1 because “[a] kidnaping, once begun, does not end until the victim is free.” *Id.* at 281.

The problem with the panel majority’s analysis is that *Rodriguez-Moreno* “relied solely upon the first paragraph of 18 U.S.C. § 3237(a).” *Wood*, 364 F.3d at 712. This case, by contrast, is “concerned . . . with the *second paragraph* of § 3237(a).” *Id.* That paragraph displaces the *locus delicti* test for crimes involving transportation in interstate commerce. Instead of asking whether the offense occurred in a particular district, the court must ask whether the “offense occurred *on* a form of interstate transportation.” *Morgan*, 393 F.3d at 200. If it did, it is a continuing offense *per se*, *Ramirez*, 420 F.3d at 139 n.4, prosecutable in any district into which the transportation moves, 18 U.S.C. § 3237(a) ¶ 2. Because *Rodriguez-Moreno* neither considered nor analyzed offenses that are continuing *per se*, it does not govern here. *See United States v. Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014)

(*locus delicti* test applies where Congress has *not* prescribed other venue requirements).

The panel majority's reliance on *United States v. Stinson*, 647 F.3d 1196 (9th Cir. 2011), suffers from the same flaw. *Lozoya*, 920 F.3d at 1240. *Stinson* evaluated whether VICAR "can be a continuing offense under § 3237." 647 F.3d at 1204. It, too, quoted the first paragraph of § 3237(a), concluding that a VICAR count is a continuing offense when "begun in one district and completed in another, or committed in more than one district." *Id.* Here, despite correctly holding "that the first paragraph of § 3237(a) does not apply," the panel majority failed to recognize that *Rodriguez-Moreno* and *Stinson* were cases that concerned only that first paragraph. *Lozoya*, 920 F.3d at 1239-40.

By importing the *locus delicti* test into the second paragraph of § 3237(a), the panel majority altered the statute's text. Although the majority held that "the offense itself" must "implicate interstate or foreign commerce," *id.* at 1240, that is not what the statute says. Rather, the offense must involve "*transportation* in interstate or foreign commerce." 18 U.S.C. § 3237(a) (emphasis added). It is the transportation, and not the offense conduct, that must implicate

interstate commerce. And the bare requirement that the offense involve transportation in interstate commerce signals Congress's intent "to exercise its commerce power to the full." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001) (alteration adopted). Indeed, the words "involving commerce" are construed so broadly that "involving" serves as "the functional equivalent of 'affecting,'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74 (1995), encompassing all in-flight offenses because domestic air travel, "in the aggregate," affects interstate commerce, *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003). In-flight assaults involve transportation in interstate commerce.

The panel majority's contrary conclusion also fails to account for the unique circumstances defendants exploit to commit in-flight crimes. In the tightly confined space of a plane 30,000 feet up, defendants have easy access to victims who cannot avoid or retreat from an assault. Law enforcement cannot be summoned to the scene. An assault on a plane involves transportation in interstate commerce not only because the crime takes place during interstate transportation but also because the means of transportation facilitates the crime.

3. *The Panel Majority’s Approach Is Not Constitutionally Mandated; In Fact, It Impedes Constitutional Venue Principles*

The panel majority’s suggestion that its conclusion was constitutionally compelled was also incorrect. *See Lozoya*, 920 F.3d at 1238, 1242-43. The Constitution safeguards criminal venue “to secure the party accused from being dragged to a trial in some distant state, away from his friends, witnesses, and neighborhood.” Joseph Story, *Commentaries on the Constitution* § 925 (1833). Trial in a distant jurisdiction risks “subject[ing] a party to the most oppressive expenses, or perhaps even to the inability of procuring proper witnesses to establish his innocence.” *Id.*; accord *United States v. Johnson*, 323 U.S. 273, 275 (1944) (venue protections avoid “the unfairness and hardship to which trial in an environment alien to the accused exposes him”); *Busic*, 549 F.2d at 258 (“The Framers’ mandate for trial in the vicinity of the crime was meant to be a safeguard against the injustice and hardship involved when the accused was prosecuted in a place remote from his home and acquaintances.”). Thus, “[p]rovided its language permits,” a statute should be construed to avoid prosecution “in a remote place.” *United States v. Cores*, 356 U.S. 405, 407 (1958).

The decision here turns constitutional venue doctrine upside-down. *See Lozoya*, 920 F.3d at 1245 (Owens, J., dissenting). Defendant lived and worked in the Central District of California. (ER 428-29, 454-55.) She “suffered none of the harms—distant trial and hostile jury—that the Framers . . . were seeking to prevent.” *United States v. DeLoach*, 654 F.2d 763, 766 (D.C. Cir. 1980). Her claim was devised not to avail herself of the Constitution’s venue protections but to impede them. She persuaded the panel majority to overturn her conviction “*despite* the additional expense, inconvenience, and potential prejudice associated with distant venue.” *Id.* (emphasis added). Unless revisited, the Court’s opinion will require venue transfers that directly undermine the principles for which venue protections exist.

The Constitution does not mandate inversion of its principles. “The use of agencies of interstate commerce enables Congress to place venue in any district where the particular agency was used.” *Travis v. United States*, 364 U.S. 631, 634 (1961). And, “[w]here the language of the Act defining venue has been construed to mean that Congress created a continuing offense, it is held, for venue purposes, to have been committed wherever the wrongdoer roamed.” *Id.*

That is the purpose for which the continuing-offense provisions of 18 U.S.C. § 3237(a) were designed. They were enacted in response to *United States v. Johnson*, 323 U.S. 273 (1944). H.R. Rep. No. 80-304, at A161; Reviser’s Note to 18 U.S.C. § 3237(a). There, the Supreme Court held that although a law criminalizing the mailing of certain dentures permitted prosecution only in the district from which the dentures were sent, the venue limitation was *not* constitutional. 323 U.S. at 275. Congress could use the continuing-offense doctrine to expand venue by statute. *Id.* It did. It provided that certain offenses were continuing based on their *locus delicti*, 18 U.S.C. § 3237(a) ¶ 1, and others were continuing per se, 18 U.S.C. § 3237(a) ¶ 2.

Because an airplane is an “agency” of interstate commerce, and because defendant “roamed” from Minneapolis to Los Angeles when she flew between those cities, it does not matter that she committed assault in an instant. *See Travis*, 364 U.S. at 634. Congress permissibly designated her offense as “continuing,” such that “it is held, for venue purposes, to have been committed” in any jurisdiction through which she flew. *Id.*; 18 U.S.C. § 3237(a) ¶ 2.

B. The Panel Majority’s Decision Is Dangerous and Unworkable

The “creeping absurdity” of the panel opinion is dangerous; the rule the panel adopts unworkable. As all three judges recognized, the opinion extends to the most serious inflight crimes: homicides, sexual assaults, robberies, and any other offense the Court deems non-continuing. *Lozoya*, 920 F.3d at 1242; *id.* at 1244 (Owens, J., dissenting). To prosecute those crimes, the government must “pinpoint where precisely in the spacious skies an [offense] occurred.” *Id.* at 1242.

That task will ordinarily be impossible. There are 94 federal judicial districts, www.uscourts.gov/about-federal-courts/court-role-and-structure, and planes flying at hundreds of miles per hour cross their boundaries rapidly. Witnesses will not be able to identify the moment a crime took place. Crimes on planes cause commotion. Assault victims look for help, not at their watches. A sleeping passenger whose possessions are stolen will have no idea when the theft was accomplished. One could literally get away with murder in an airplane lavatory by simply waiting a few minutes before coming out. That zone of lawlessness is hardly what Congress, or the Framers, intended. *Lozoya*, 920 F.3d at 1244 (Owens, J., dissenting). Special aircraft

jurisdiction, 49 U.S.C. § 46501—as charged here (ER 313-14)—is designed to eliminate the barriers the panel majority erects.

Even this case demonstrates the problems with the majority’s approach. Although the majority pointed to the lead flight attendant’s testimony regarding the timing of the assault, *id.* at 1242, other witnesses supplied conflicting estimates (*compare* ER 59-60 *with* ER 56-59, 62-63, 66-67, 443). On a flight that “crossed over at least eight different districts,” the majority called it “wholly reasonable” to require “the government to determine where exactly the assault occurred by the preponderance of the evidence necessary to establish venue.” *Lozoya*, 920 F.3d at 1242. On the contrary, the rule is unreasonable. And it is not what the law requires.

Indeed, narrowly construing § 3237(a) ¶ 2 to effect a “creeping absurdity” contravened the canon against interpreting statutes to produce absurd results. *Lozoya*, 920 F.3d at 1244 (Owens, J., dissenting); *see California v. Azar*, 911 F.3d 558, 570 (9th Cir. 2018) (interpreting venue provision not to “defy common sense”). The panel majority’s refusal to apply that canon, *Lozoya*, 920 F.3d at 1242 n.7, disregarded the mandate “that interpretations of a statute which would

produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Here, an alternative interpretation was available; indeed, every other court to consider the question had adopted that alternative interpretation, reasonably concluding that crimes on interstate flights involve transportation in interstate commerce. *See Cope*, 676 F.3d at 1224-25; *Breitweiser*, 357 F.3d at 1253-54. This Court should adopt that interpretation.

The majority’s departure from all prior precedent also disrupts the consensus on an issue of national application for which uniformity is necessary. *See Cir. R. 35-1*. Flights constantly pass between circuits. It “makes no sense” to transfer this case—or any other—to a “flyover state.” *Lozoya*, 920 F.3d at 1245 (Owens, J., dissenting). Moreover, the government’s ability to prosecute crimes on interstate flights should not be flightpath dependent. Rehearing should be granted to avoid a patchwork system of venue law yielding dangerous and illogical complications at the expense of the values venue is designed to protect.

C. The En Banc Court Should Reverse the Rule Permitting Defendants to Withhold Known Venue Objections

En banc review also should be granted to reverse this Court’s rule permitting a defendant who is aware of a venue defect to object for the first time after the government rests. *See Lozoya*, 920 F.3d at 1238.

That holding facially contravenes Federal Rule of Criminal Procedure 12, which mandates that a claim of “improper venue” “be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits.” Fed. R. Crim. P. 12(b)(3). Where a venue defect is known before trial, the basis for a motion is reasonably available. That is why Rule 12 should have applied here. Although estimates varied, all witnesses agreed that the assault occurred well before the plane entered Central District of California airspace. (ER 54-68.) Defendant knew of the purported venue defect: she devised a venue challenge, drafted a pocket brief, and prepared an investigator to testify on the subject. (ER 479-81.)

In these circumstances—where a defendant has notice of a purported venue defect before trial—at least five federal circuits require a pretrial objection. *See United States v. Grenoble*, 413 F.3d 569, 573

(6th Cir. 2005) (venue objection must be raised before trial where the defendant has “notice of the defect”); *United States v. Roberts*, 308 F.3d 1147, 1152 (11th Cir. 2002) (venue objection must be raised before trial unless the defendant was “not aware of the error until the prosecution presents its case”); *United States v. Delgado-Nunez*, 295 F.3d 494, 497 (5th Cir. 2002) (venue objection at the close of trial waived where “the facts underlying” objection “were already known to [the defendant] at the start of trial”); *United States v. Systems Architects, Inc.*, 757 F.2d 373, 378 (1st Cir. 1985) (venue objection at the close of government’s case waived where the defendants “were aware of the alleged venue defect since the filing of the indictment”); *United States v. Price*, 447 F.2d 23, 27 (2d Cir. 1971) (venue objection after prosecution rested waived where defense “counsel was on notice and was in fact aware” of defect before trial).

That notice-waiver rule makes good sense. Permitting a defendant who is aware of her venue objection to lie in wait, objecting only after the government completes its case, encourages perverse gamesmanship. *Delgado-Nunez*, 295 F.3d at 497. “Since defendants may waive venue and since it is not an element of the offense, the

government will not necessarily seek to prove the necessary connection unless the defense warns the government that the matter is at issue.”

United States v. Cordero, 668 F.2d 32, 44 (1st Cir. 1981) (Breyer, J.). A defendant who withholds her venue objection until after trial should bear the consequences of waiver, not reap the reward of a do-over. *See Lozoya*, 920 F.3d at 1241 & n.5.

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IV

CONCLUSION

The panel opinion creates a circuit split by incorrectly deciding a question of exceptional importance with very dangerous consequences. Rehearing should be granted.

DATED: July 9, 2019

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO NINTH CIRCUIT RULE 35-4 and 40-1**

I certify that:

1. Pursuant to Circuit Rules 35-4(a) and 40-1(a), the attached petition for panel rehearing or rehearing en banc contains 4,098 words, excluding the parts of the brief exempted by Fed R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2016.

DATED: July 9, 2019

/s/ Bram M. Alden

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United States v. Lozoya,
920 F.3d 1231 (9th Cir. 2019)

U.S. v. LOZOYA

1231

Cite as 920 F.3d 1231 (9th Cir. 2019)

varro held, the trustee is the real party in interest, and so its citizenship, not the citizenships of the trust's beneficiaries, controls the diversity analysis. Here, HSBC—the trustee of a traditional trust—was sued in its own name and was the real party in interest to the litigation. Under any analysis, therefore, HSBC's citizenship is key for diversity purposes.

CONCLUSION

Americold might have somewhat complicated how we should ascertain the citizenship of a trust, but it upset neither *Navarro* nor our precedent in cases where, as here, the trustee of a traditional trust is sued in its own name. Because HSBC and the other Defendants were not, like Demarest, citizens of California, there was complete diversity, and the district court properly exercised diversity jurisdiction.

AFFIRMED.

**UNITED STATES of America,
Plaintiff-Appellee,**

v.

**Monique A. LOZOYA, Defendant-
Appellant.**

No. 17-50336

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 7,
2019 Pasadena, California

Filed April 11, 2019

Background: Defendant was convicted in the United States District Court for the Central District of California, No. 2:16-cr-00598-AB-1, André Birotte Jr., J., of assaulting fellow passenger on commercial flight, and she appealed.

Holdings: The Court of Appeals, M. Smith, Circuit Judge, held that:

- (1) district court did not abuse its discretion when it determined that dismissal of assault charge on Speedy Trial Act grounds would have been without prejudice;
- (2) defendant did not waive her improper venue argument; and
- (3) district in which assault occurred, rather than district in which plane landed, was proper venue.

Reversed and remanded.

Owens, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Criminal Law ⇌1139

Court of Appeals reviews de novo district court's application of, and questions of law arising under, Speedy Trial Act. 18 U.S.C.A. § 3161.

2. Criminal Law ⇌1151

Court of Appeals reviews for abuse of discretion district court's decision to dismiss indictment without prejudice for violation of Speedy Trial Act. 18 U.S.C.A. §§ 3161(b), 3162(a)(1).

3. Criminal Law ⇌1139

Court of Appeals reviews de novo whether venue was proper.

4. Criminal Law ⇌577.16(2)

Speedy Trial Act's dismissal provision only applies when suspect is formally charged at time of, or immediately following, arrest, or when suspect is subject to some continuing restraint on liberty imposed in connection with charge on which subject is eventually tried. 18 U.S.C.A. § 3162(a)(1).

5. Criminal Law ⇌1166(7)

District court did not abuse its discretion when it determined that dismissal of

misdemeanor assault charge on Speedy Trial Act grounds would have been without prejudice, and thus that any erroneous application of Speedy Trial Act would not have changed outcome, even if Act had been violated, where court considered offense's seriousness, facts and circumstances that led to dismissal, and impact of reprosecution on Act's administration and on administration of justice. 18 U.S.C.A. § 3162(a)(1).

6. Criminal Law ⇌145

If defect in venue is clear on indictment's face, defendant's objection must be raised before government has completed its case, but if venue defect is not evident on indictment's face, defendant may challenge venue in motion for acquittal at close of government's case.

7. Criminal Law ⇌145

Defendant did not waive her improper venue argument in her prosecution for assaulting fellow passenger on commercial flight by failing to raise issue until after government's case-in-chief, even if defendant knew that venue was incorrect, where indictment alleged that assault took place in district.

8. Criminal Law ⇌113

To ascertain venue, locus delicti of charged offense must be determined from nature of crime alleged and location of act or acts constituting it, and in performing this inquiry, court must initially identify conduct constituting offense and then discern location of commission of criminal acts. U.S. Const. art. 3, § 2, cl. 3.

9. Criminal Law ⇌113

District in which assault occurred, rather than district in which plane landed, was proper venue for defendant's prosecution for assaulting fellow passenger on interstate flight, where assault occurred entirely with jurisdiction of particular district before flight entered airspace of district in

which it landed. U.S. Const. art. 3, § 2, cl. 3; 18 U.S.C.A. §§ 113(a)(5), 3237(a), 3238.

10. Criminal Law ⇌113

Once assault has concluded, any subsequent activity is incidental and therefore irrelevant for venue purposes. 18 U.S.C.A. § 3237(a).

11. Criminal Law ⇌130

Indictment and Information ⇌144.1(1)

When venue has been improperly laid in district, district court should either transfer case to correct venue upon defendant's request, or, in absence of such request, dismiss indictment without prejudice. Fed. R. Crim. P. 21(b).

12. Criminal Law ⇌145

Indictment and Information ⇌144.1(1)

Proper remedy for improper venue in assault prosecution was for district court to dismiss charge without prejudice, unless defendant consented to transfer case to proper district, rather than to enter judgment of acquittal. Fed. R. Crim. P. 21(b).

13. Criminal Law ⇌113

Proper venue for assault on commercial aircraft is district in whose airspace alleged offense occurred. 18 U.S.C.A. §§ 113(a)(5), 3237(a), 3238.

Appeal from the United States District Court for the Central District of California, André Birotte Jr., District Judge, Presiding, D.C. No. 2:16-cr-00598-AB-1

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. Mid-

U.S. v. LOZOYA

1233

Cite as 920 F.3d 1231 (9th Cir. 2019)

dleton, Chief, Criminal Division; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

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

Partial Concurrence and Partial Dissent by Judge Owens

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 mid-

dle 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

* The Honorable Benjamin H. Settle, United States District Judge for the Western District

of Washington, sitting by designation.

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 re prosecution, 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.

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

1. Although Magistrate Judge Alexander F. MacKinnon presided over the first hearing, Magistrate Judge Alka Sagar presided over

the second arraignment and subsequent proceedings.

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

[1–3] “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.

[4] 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 liberty² 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:

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.
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, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988)). Lozoya suggests that “the Supreme Court actually requires something more than typical abuse-of-

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 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.

[5] 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 gov-

discretion review,” and cites language from the Court’s decision in *Taylor*. See 487 U.S. 336–37, 108 S.Ct. 2413 (“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.

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

A. Waiver

[6] 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).

[7] 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.

[8] “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, 119 S.Ct. 1239, 143 L.Ed.2d 388 (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, 119 S.Ct. 1239 (alteration in original) (footnote and citation omitted) (quoting *United States v. Cabrales*, 524 U.S. 1, 6–7, 118 S.Ct. 1772, 141 L.Ed.2d 1 (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).

[9] 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).

[10] 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, 119 S.Ct. 1239)).

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, it 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 in-flight 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

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 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 complete-

ly 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

United States v. 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 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 gov-

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*,

ernment 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

[11, 12] “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-Arrequin*, 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 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

510 U.S. 135, 147–48, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994).

5. Lozoya observes that there is a circuit conflict concerning the appropriate remedy when the government fails to prove venue at trial, 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-Arrequin*, and will follow the remedy prescribed in that opinion.

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 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 in-flight 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, 65 S.Ct. 249, 89 L.Ed. 236 (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).

[13] 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 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 1244–45. 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, 49 S.Ct. 336, 73 L.Ed. 722 (1929), the statutes at issue here are *not* obviously applicable,

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).

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 1244 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (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.”).

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 1243–44, 1244–45, 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 re prosecute 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

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 (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 prob-

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

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”).

lems” 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 overflowed State in 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 1242, 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, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993) (describing “the common mandate of statutory construction to avoid absurd results”); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (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 1242. 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 with-

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Cite as 920 F.3d 1245 (10th Cir. 2019)

out 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 1241–42.

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.



**WILDEARTH GUARDIANS,
Plaintiff-Appellant,**

v.

Tamara CONNER, in her official capacity as District Ranger, Leadville Ranger District, San Isabel National Forest, United States Forest Service; United States Forest Service, a federal agency of the United States Department of Agriculture, Defendants-Appellees.

No. 17-1334

United States Court of Appeals,
Tenth Circuit.

FILED April 15, 2019

Background: Environmental organization brought action against the United States

Forest Service (USFS), alleging it violated the National Environmental Policy Act (NEPA) by not preparing an environmental impact statement (EIS) and not adequately assessing the effects on Canada lynx from project in the San Isabel and White River National Forests to protect the forest from insects, disease, and fire, improve wildlife habitat, and maintain watershed conditions. The United States District Court for the District of Colorado, D.C. No. 1:15-CV-00858-CMA, Christine M. Arguello, J., 2017 WL 5989046, granted judgment in favor of the USFS, and organization appealed.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

- (1) USFS made a reasoned evaluation of how project would affect Canada lynx;
- (2) USFS reasonably decided not to specify, in its environmental assessment (EA), the sizes, locations, and treatment planned for each treatment unit;
- (3) USFS did not violate NEPA by not disclosing in the EA the locations of its preidentified precommercial thinning units;
- (4) USFS did not need to quantify denning habitat to conclude in the EA that the project would not adversely affect Canada lynx;
- (5) it was reasonable for USFS to treat snowshoe-hare availability as the key factor for Canada lynx winter habitat;
- (6) USFS's EA did not have to include more baseline data in order to monitor USFS's commitment not to treat areas of mapped lynx habitat;
- (7) that the project would involve over 2,000 acres of clearcutting and 7,000 acres of thinning did not require an environmental impact statement (EIS); and
- (8) USFS was not arbitrary and capricious in concluding that the project's individ-