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Avoiding Flights of Fancy: Determining Venue for Crimes Committed During Commercial Flights

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Introduction

For many years, commercial air flight existed as a luxury available only to an elite class of travelers.[1] Commercial travel has since evolved into a modern convenience, with nearly three million passengers flying in or out of airports in the United States every day.[2] In recent years, major airline carriers have reduced the number of commercial flights while simultaneously increasing the number of available passenger seats.[3] This changing travel landscape means that more passengers are flying together on larger, jam-packed flights. Unsurprisingly, these conditions can easily create the perfect environment for "air rage" incidents between passengers.[4]

One such incident occurred in 2015 between passengers seated in the back two rows of a plane heading from Minneapolis to Los Angeles.[5] Monique Lozoya, who claimed she was just trying to get some sleep on the flight, confronted the passenger sitting directly behind her after he repeatedly jostled her seat.[6] After a tense confrontation, Lozoya struck the other passenger in the face.[7] Flight attendants intervened and kept the peace between the passengers until the plane landed at Los Angeles International Airport ("LAX").[8] The parties had agreed to meet there to discuss the incident, but Lozoya instead left the airport without meeting with or apologizing to the passenger she had struck.[9] Three weeks later, an FBI agent who had investigated the incident issued a violation notice to Lozoya,

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1. Sam McManis, *When Luxury Ruled the Skies: Flying in the 1950s and '60s*, CHI. TRIB. (Sept. 15, 2014, 7:20 AM), https://www.chicagotribune.com/travel/sns-mct-bc-cns-airlines-sixties-20140915-story.html.

2. FED. AVIATION ADMIN., AIR TRAFFIC BY THE NUMBERS 6 (2019), https://www.faa.gov/air_traffic/by_the_numbers/media/Air_Traffic_by_the_Numbers_2019.pdf.

3. *Id.*

4. Kate Silver, *Air Rage Incidents Are on the Rise. First-Class Sections Aren't Helping*, WASH. POST (Jan. 24, 2017), https://www.washingtonpost.com/lifestyle/travel/air-rage-incidents-are-on-the-rise-first-class-sections-arent-helping/2017/01/23/4e3e6752-dd99-11e6-918c-99ede3c8cafa_story.html.

5. United States v. Lozoya, 920 F.3d 1231, 1233 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).

6. *Id.*

7. *Id.* at 1233–34.

8. *See id.* at 1234.

9. *Id.*

charging her with misdemeanor assault in the Central District of California.[10] The Ninth Circuit ultimately overturned Lozoya's conviction, citing improper venue because the government charged Lozoya in the district where the plane *landed* rather than the district above which the assault actually *occurred*.[11]

Typically, venue in federal criminal cases is proper in only one district—the district in which the accused committed the crime.[12] When the criminal behavior takes place across multiple districts or involves interstate commerce, however, venue is proper in any district in which the behavior was "begun, continued, or completed."[13] Criminal behavior on airplanes presents a novel question related to venue: can the government prosecute the accused in the district where the plane lands, or is the government required to determine the plane's location at the time of the assault and bring charges in the district lying thousands of feet below that point? Following the Ninth Circuit's recent opinion in *Lozoya*, courts are split on the answer.[14]

Importantly, the rule that ultimately prevails will implicate venue rules for all other non-continuous "sky crimes."[15] The prevailing rule will also inform prosecutions for sexual assault on airplanes,[16] conduct which increased by over sixty-five percent from 2014 to 2017.[17] It will also apply to crimes committed against children,[18] hundreds of thousands of whom fly unaccompanied every year.[19] And it will apply to assaults between unruly

10. *Id.*

11. *Id.* at 1243.

12. United States v. Cabrales, 524 U.S. 1, 5 (1998).

13. 18 U.S.C. § 3237(a) (2018).

14. A few days before this Comment was published, the en banc Ninth Circuit issued its opinion without oral argument. *See* United States v. Lozoya, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020). The en banc court held that venue for the assault was proper in the Central District of California where the plane landed. *See id.* at *8. Though this Comment focuses on the Ninth Circuit's original opinion, the crux of the court's en banc opinion—that 18 U.S.C. § 3237(a) applies to crimes committed on commercial aircrafts—is largely consistent with the arguments set forth in this Comment. *See id.* at *4–5.

15. *Lozoya*, 920 F.3d at 1244 (Owens, J., concurring in part and dissenting in part).

16. *Id.*

17. *See This Week: Reports of Sexual Assaults Aboard Aircraft on the Rise*, FED. BUREAU INVESTIGATION (Apr. 26, 2018), https://www.fbi.gov/audio-repository/ftw-podcast-sexual-assault-aboard-aircraft-042618.mp3/view.

18. *See Lozoya*, 920 F.3d at 1244 (Owens, J., concurring in part and dissenting in part).

19. Michelle Higgins, *When Children Fly Alone, Who's in Charge?*, N.Y. TIMES (May 13, 2007), https://www.nytimes.com/2007/05/13/travel/13prac.html.

passengers, where alcohol is often a compounding factor.[20] Therefore, it is imperative that courts choose a workable rule that preserves the integrity of the justice system while protecting an accused person's constitutional right to trial in the district where the crime occurred.

Part I of this Comment discusses the constitutional requirements and underlying policies of venue. Part II illustrates how each of the three branches of government plays a pivotal role in serving these underlying policies. Part III explores the added complexity introduced when courts try to apply the traditional venue framework to criminal activity committed on commercial flights. This section compares the Ninth Circuit's more rigid interpretation of venue requirements in *Lozoya* with the less literal approach of the Tenth and Eleventh Circuits. Part IV articulates the shortcomings of both of these inflexible approaches to determining proper venue for sky crimes. Part V advocates for a functional, flexible approach that will both avoid absurd results and respect underlying venue policies better than either existing approach.

I. Constitutional Requirements and Venue Policies

The significance of venue in criminal proceedings pre-dates the founding of our nation.[21] Early American colonists feared that the British Parliament would attempt to prosecute them for criminal behavior, including treason, in the English courts.[22] The Declaration of Independence articulated their fears, enumerating King George's attempts at "transporting [colonists] beyond Seas to be tried" as one of the twenty-seven grievances in the document.[23]

The Framers valued the concept of venue so highly that they included it in the Constitution twice.[24] Article III of the Constitution guarantees venue protection on a state level.[25] It provides that "the Trial of all Crimes, except

20. *See* INT'L AIR TRANSP. ASS'N, ANNUAL REVIEW 32 (2017), https://www.iata.org/contentassets/c81222d96c9a4e0bb4ff6ced0126f0bb/iata-annual-review-2017.pdf.

21. *See* United States v. Cabrales, 524 U.S. 1, 6 (1998).

22. Paul Mogin, "*Fundamental Since Our Country's Founding":* United States v. Auernheimer *and the Sixth Amendment Right to Be Tried in the District in Which the Alleged Crime Was Committed*, 6 U. DENV. CRIM. L. REV. 37, 40–41 (2016).

23. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776); *see The Declaration of Independence: The Twenty-Seven Grievances*, J. AM. REVOLUTION (July 4, 2019), https://allthingsliberty.com/2019/07/the-declaration-of-independence-the-twenty-seven-grievances/.

24. *See* United States v. Perez, 280 F.3d 318, 327 (3d Cir. 2002) ("Proper venue is a safeguard that is guaranteed twice in the Constitution.").

25. *See* U.S. CONST. art. III, § 2, cl. 3.

in Cases of Impeachment . . . shall be held in the State where the said Crimes shall have been committed."[26] The Sixth Amendment further protects a person accused of a crime, guaranteeing proper venue at a district level.[27] This amendment specifies that the accused has the right to be tried in "the State and district wherein the crime shall have been committed."[28] While the Sixth Amendment originally functioned as a vicinage provision to guarantee a local jury,[29] there is no modern practical distinction between the Sixth Amendment vicinage provision and Article III venue protections.[30]

Venue protections are further codified in Rule 18 of the Federal Rules of Criminal Procedure.[31] Rule 18 requires the government to "prosecute an offense in a district where the offense was committed" unless otherwise permitted by statute or federal rule.[32] This rule does not change the scope of proper venue in a criminal trial, but "simply codifies the constitutional mandates that a defendant be tried in a state where the crime was committed, before an impartial jury of that district."[33]

Although venue was undoubtedly important to the Framers, courts have struggled to clearly articulate the policies that make venue so crucial.[34] Though the Supreme Court has urged courts to respect "the underlying spirit of the constitutional concern for trial in the vicinage,"[35] the Second Circuit has argued this direction falls short.[36] Without precise guidance, courts have tried to balance the interests of the accused, the government,

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26. *Id.*

27. *See* U.S. CONST. amend. VI.

28. *Id.*

29. William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 60 (1944).

30. Robert L. Ullmann, *One Hundred Years After* Hyde*: Time to Expand Venue Safeguards in Federal Criminal Conspiracy Cases?*, 52 SANTA CLARA L. REV. 1003, 1007 (2012).

31. FED. R. CRIM. P. 18.

32. *Id.*

33. United States v. Fry, 413 F. Supp. 1269, 1271 (E.D. Mich. 1976), *aff'd*, 559 F.2d 1221 (6th Cir. 1977).

34. *See* United States v. Reed, 773 F.2d 477, 480 (2d Cir. 1985).

35. Note, *Criminal Venue in the Federal Courts: The Obstruction of Justice Puzzle*, 82 MICH. L. REV. 90, 105 (1983) [hereinafter *Obstruction of Justice Puzzle*] (quoting United States v. Johnson, 323 U.S. 273, 276 (1944)).

36. *See Reed*, 773 F.2d at 480 ("[T]he precise policies to be furthered by venue law are not clearly defined. . . . [T]he Supreme Court has yet to articulate a coherent definition of the underlying policies.").

witnesses, and the courts themselves.[37] As a result, several different policy justifications have guided courts tackling issues of criminal venue.

The first of these broad policy justifications is fairness to the accused.[38] Historically, proper venue ensured a fair trial by guaranteeing to the accused the right to be tried in his community.[39] A local trial ensured the accused had access to relevant evidence to build his case, friends and relatives to act as character witnesses, and local counsel to prepare a defense.[40] Though these policies may seem outdated now,[41] forcing a defendant to travel to a distant district to present his defense still imposes a financial burden.[42] Venue protections also prevent the government from winning a conviction by simply separating a defendant from relevant facts, witnesses, and evidence.[43] Without venue protections, the prosecution could survey unrelated districts to find the jury that would be most sympathetic to its case. Venue protections aim to preclude that precise "governmental abuse[] of power."[44] In determining whether venue is fair to the accused, courts scrutinize whether the government is forum shopping to gain an advantage.[45] In fact, even the mere appearance of governmental abuse in selecting "what may be deemed a tribunal favorable to the prosecution" has troubled the Supreme Court.[46] A prosecutor intentionally cherry-picking an unfair district harkens back to King George's attempts to gain an advantage by trying colonists in England. This parallel clarifies why courts have no patience for even a vestige of governmental abuse.

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37. Ullmann, *supra* note 30, at 1009.

38. *See* United States v. Cores, 356 U.S. 405, 407 (1958) ("The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."); *see also Johnson*, 323 U.S. at 275; United States v. Busic, 549 F.2d 252, 258 (2d Cir. 1977).

39. Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 808–09 (1976).

40. *Id.*

41. *See* United States v. Hart-Williams, 967 F. Supp. 73, 79 (E.D.N.Y. 1997) (criticizing the Sixth Amendment's vicinage clause as "a relic of a bygone era when jurors decided cases on the basis of personal knowledge").

42. *Johnson*, 323 U.S. at 278.

43. *See* Kershen, *supra* note 39, at 809 ("For any accused, trial at a distant location would be inconvenient and expensive. For an accused of limited means, trial at a distant location could, in effect, mean a complete inability to present a defense to the charge.").

44. United States v. Palma-Ruedas, 121 F.3d 841, 861 (3d Cir. 1997) (Alito, J., concurring in part and dissenting in part), *rev'd sub nom.* United States v. Rodriguez-Moreno, 526 U.S. 275 (1999).

45. Mogin, *supra* note 22, at 58.

46. *Johnson*, 323 U.S. at 275.

A second policy justification is fairer administration of justice, which is ensured by better factfinding.[47] Venue is typically only proper in the district in which the accused committed the crime.[48] Because the government must try the crime in the district where the crime occurred, fact witnesses are generally more accessible to both the defense and the prosecution.[49] Similarly, both parties have better access to evidence in the district where the criminal behavior occurred because most relevant evidence is likely to be located there.[50] When both the government and the accused have easy, unobstructed access to evidence and fact witnesses, each can build a case on the merits. On the other hand, holding "trial in a distant state or territory might subject the party . . . to the inability of procuring proper witnesses to establish his innocence."[51]

A third major policy justification courts may consider in venue analyses is convenience.[52] In some cases, this policy promotes broadening the scope of venue to more efficiently administer justice.[53] As federal laws have increased in both quantity and complexity, the government can now charge a person with several different federal criminal offenses predicated upon the same underlying behavior.[54] Trying these complex cases may require the government to bring dozens of different charges in several different districts to ensure proper venue.[55] But this justification likely holds little power on its own. When a prosecutor brings an array of charges based on the same criminal behavior, courts will not authorize improper venue for any single charge, even if it is easier and more cost effective for the government to bring its entire case in one courthouse.[56]

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47. *See Obstruction of Justice Puzzle*, *supra* note 35, at 106.

48. *See* United States v. Cabrales, 524 U.S. 1, 5 (1998).

49. *Obstruction of Justice Puzzle*, *supra* note 35, at 106.

50. *Id.* at 106–07.

51. Mogin, *supra* note 22, at 57 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1775 (Carolina Acad. Press 1987) (1833)).

52. United States v. Lukashov, 694 F.3d 1107, 1119 (9th Cir. 2012) (quoting United States v. Angotti, 105 F.3d 539, 541–42 (9th Cir. 1997), *abrogated by* United States v. Cabrales, 524 U.S. 1 (1998)).

53. *See Obstruction of Justice Puzzle*, *supra* note 35, at 108.

54. Mogin, *supra* note 22, at 59.

55. *See id.* at 59–60.

56. *See* United States v. Auernheimer, 748 F.3d 525, 536–37 (3d Cir. 2014) (clarifying that "substantial contacts" cannot expand the scope of venue but can only limit it); *see also* Christopher W. Pratt, Comment, *"I'm Being Prosecuted Where?" Venue Under 18 U.S.C. § 924(C)(1)*, 37 HOUS. L. REV. 893, 920 (2000) ("The government's having limited resources does not justify a public policy argument for compromising a defendant's constitutional right to a trial in the district where the crime is committed.").

II. Each Branch's Role in Venue

All three branches of government play an important role in determining and enforcing proper venue—either by action or inaction. This section will explore how the legislative, executive, and judicial branches each interpret venue protections generally and as they relate to sky crimes.

A. The Legislative Branch

When writing new legislation, Congress can designate proper venue by including an express venue provision within a statute.[57] In the absence of such a provision, proper venue is instead determined by "the *locus delicti,* or scene of the crime."[58] To establish the *locus delicti*, courts consider the "nature of the crime alleged and the location of the act or the acts constituting it."[59] Because Congress chooses which specific behavior to criminalize when drafting federal statutes, legislators implicitly define the *locus delicti* when they designate the acts constituting a crime. Without an express venue provision, therefore, courts analyzing a venue challenge must instead look to the specific behavior that Congress chose to criminalize.[60] Congress may also expressly define the *locus delicti* of a particular crime.[61] Though technically different than an express venue provision, a defined *locus delicti* similarly eliminates the court's need to determine the criminal acts constituting the offense.

Though Congress has not passed a widely applicable venue statute for crimes committed on airplanes, it has codified jurisdictional requirements for crimes committed in the "special aircraft jurisdiction of the United

57. *See, e.g.*, 18 U.S.C. § 1956(i)(A) (2018) (specifying that money laundering charges may be brought in "any district in which the financial or monetary transaction" occurred); 21 U.S.C. § 17 (2018) (limiting venue for mislabeling dairy or food products to the district in which the mislabeling occurred); 18 U.S.C. § 1512(i) (2018) (specifying that charges for witness tampering "may be brought" either in the district where the proceeding "was intended to be affected" or in the district where the obstructive behavior occurred).

58. 8A BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE: LAWYERS EDITION § 22:64 (2015), 8A Fed. Proc., L. Ed. § 22:64 (Westlaw).

59. *Id.*; United States v. Kirk Tang Yuk, 885 F.3d 57, 69 (2d Cir. 2018), *cert. denied sub nom.* Thomas v. United States, 139 S. Ct. 342 (2018), *and cert. denied*, 139 S. Ct. 342 (2018) (quoting United States v. Tzolov, 642 F.3d 314, 318 (2d Cir. 2011)).

60. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL33223, VENUE: A LEGAL ANALYSIS OF WHERE A FEDERAL CRIME MAY BE TRIED 3 (2018).

61. *See, e.g.*, 18 U.S.C. § 3236 (2018) (defining the *locus delicti* for manslaughter as "the place where the injury was inflicted, or the poison administered or other means employed which caused the death, without regard to the place where the death occurs").

States."[62] This mechanism allows traditional state crimes—like murder[63] and assault[64]—to be tried in federal court, thereby eliminating the need to determine which state has jurisdiction over the crime.[65]

B. The Executive Branch

The executive branch's role in venue determinations is triggered when a prosecutor decides to file federal charges in a particular district. Federal prosecutors, part of the Department of Justice ("DOJ") under the executive branch,[66] carry the burden of proof to show that venue is proper in criminal trials.[67] Because proper venue is typically not viewed as "an 'element' of the crime,"[68] it must only be proven "by a preponderance of the evidence."[69] Whether venue is proper is a question of fact.[70]

Additionally, the DOJ's Justice Manual[71] provides internal guidance to prosecutors by clarifying DOJ policies and procedures.[72] Though it does not carry the force of law, the Deputy Attorney General prepares the Justice Manual under the supervision of the Attorney General.[73] The Justice Manual's Criminal Resource Manual ("CRM") specifically contemplates the issue of venue for sky crimes, arguing that venue should be "proper in

62. 49 U.S.C. § 46506 (2018); *see infra* Section V.A.

63. *See* 18 U.S.C. § 1111 (2018) (federally criminalizing murder on airplanes).

64. *See* 18 U.S.C. § 113 (2018) (federally criminalizing simple assault on airplanes); 18 U.S.C. § 2244 (2018) (federally criminalizing sexual assaults on airplanes).

65. United States v. Georgescu, 723 F. Supp. 912, 913 (E.D.N.Y. 1989).

66. Melissa McNamara, *The Role of U.S. Attorneys*, CBS NEWS (Mar. 19, 2007, 12:22 PM), https://www.cbsnews.com/news/the-role-of-us-attorneys/.

67. United States v. Perez, 280 F.3d 318, 328 (3d Cir. 2002) (citing United States v. Black Cloud, 590 F.2d 270, 272 (8th Cir. 1979)).

68. *See, e.g.*, United States v. Conteh, 2 F. App'x 202, 203 (2d Cir. 2001) ("[V]enue is not an 'element' of the crime in the formal sense." (citing United States v. Smith, 198 F.3d 377, 382 (2d. Cir. 1999), *cert. denied*, 531 U.S. 864 (2000))); United States v. Miller, 111 F.3d 747, 752 (10th Cir. 1997) (outlining the "significant differences between venue and substantive elements of the crime"); United States v. Massa, 686 F.2d 526, 530 (7th Cir. 1982) ("[V]enue . . . is an element more akin to jurisdiction than to the substantive elements of the crime.").

69. United States v. Lukashov, 694 F.3d 1107, 1120 (9th Cir. 2012).

70. *Id.*

71. The Justice Manual was previously known as the United States Attorneys' Manual. Wick Sollers et al., *DOJ Issues Updated U.S. Attorneys' Manual*, AM. BAR ASS'N (Feb. 5, 2019), https://www.americanbar.org/groups/litigation/committees/criminal/practice/2019/doj-issues-updated-us-attorneys-manual/.

72. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 1-1.100–200 (2018), https://www.justice.gov/jm/jm-1-1000-introduction.

73. *Id.* § 1-1.200.

the district in which the aircraft land[s]."[74] Though this guidance is not binding on the courts, judges may still give weight to it by treating the CRM as persuasive authority in sky crime cases.[75]

C. The Judicial Branch

Courts must analyze each individual venue challenge based on the specific statute and facts involved.[76] Even if Congress has included a venue provision in the statute at issue, the court must still ensure that the provision operates within the scope of Article III and the Sixth Amendment.[77] An extra layer of complexity arises when criminal behavior spans across multiple districts. Though several circuit courts and the Supreme Court have addressed this issue, competing standards have emerged and some confusion still remains.

1. The Substantial Contacts Test

The Second Circuit has taken a broader approach to venue when "the acts constituting the crime and the nature of the crime charged implicate more than one location."[78] In *United States v. Reed*, the court grappled with the imprecise policy justifications underlying proper venue.[79] The *Reed* court ultimately concluded that "fairness to defendants cannot be the sole grounds for determining venue because the most convenient venue for them may often have little, if any, connection with the crimes charged."[80] Instead, the court adopted a "substantial contacts rule," which considered four factors: (1) "the site of the defendant's acts," (2) "the elements and nature of the crime," (3) "the locus of the effect of the criminal conduct," and (4) "the suitability of each district for accurate factfinding."[81] After *Reed*, the

74. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 1406 (1999), https://www.justice.gov/archives/jm/criminal-resource-manual-1406-aircraft-piracy-interference-and-other-title-49-aircraft-offenses [hereinafter CRIMINAL RESOURCE MANUAL].

75. *See* Kristie Xian, *The Price of Justice: Deferred Prosecution Agreements in the Context of Iranian Sanctions*, 28 NOTRE DAME J.L. ETHICS & PUB. POL'Y 631, 649 n.123 (2014) ("As internal policy manuals, the U.S. Attorneys' Manual and U.S. Department of Justice Criminal Resource Manual . . . are given weight based upon their power to persuade.") (citations omitted).

76. *See, e.g.*, United States v. Ebersole, 411 F.3d 517, 524 (4th Cir. 2005).

77. *See* United States v. Reed, 773 F.2d 477, 480 (2d Cir. 1985).

78. *Id.*

79. *See id.*

80. *Id*.

81. *Id.* at 481.

Second Circuit "alternately applied and ignored the substantial contacts test."[82] While the Sixth,[83] Fourth,[84] and Seventh[85] Circuits have used or cited the test with approval,[86] the Tenth[87] and Third[88] Circuits have both expressly rejected it. Two decades after *Reed*, the Supreme Court introduced a new test in *United States v. Rodriguez-Moreno*.[89] While the *Rodriguez-Moreno* test did not explicitly overrule the substantial contacts test, the Second Circuit's approach has certainly "lost force as precedent."[90]

2. The Essential Conduct Elements Test

The Supreme Court weighed in on the process for determining proper venue in *Rodriguez-Moreno*.[91] There, an east coast drug dealer stole cocaine from a distributor during a drug deal in Texas.[92] The distributor then hired the defendant and others to track down the drug dealer.[93] In an effort to find the drug dealer, the defendant held a middleman hostage on a trip from Texas to the east coast.[94] After spending several days in New Jersey, the kidnappers then took the middleman to New York, and finally to Maryland.[95] After arriving in Maryland, the defendant obtained a pistol, held the gun to the middleman's head, and threatened to shoot.[96] The middleman eventually escaped and called the police, who arrested the kidnappers.[97] The defendant was charged with conspiring to kidnap the

82. United States v. Coplan, 703 F.3d 46, 80 (2d Cir. 2012).

83. *See* United States v. Zidell, 323 F.3d 412, 423 (6th Cir. 2003); United States v. Williams, 788 F.2d 1213, 1215 (6th Cir. 1986).

84. *See* United States v. Cofield, 11 F.3d 413, 417 (4th Cir. 1993). *But see* United States v. Bowens, 224 F.3d 302, 312 (4th Cir. 2000) ("Our reasoning in *Cofield*, however, cannot be reconciled with the Supreme Court's later decisions in *Cabrales* and *Rodriguez–Moreno*.").

85. *See* United States v. Muhammad, 502 F.3d 646, 652 (7th Cir. 2007).

86. Mogin, *supra* note 22, at 39.

87. United States v. Smith, 641 F.3d 1200, 1208 (10th Cir. 2011).

88. United States v. Auernheimer, 748 F.3d 525, 536–37 (3d Cir. 2014).

89. 526 U.S. 275 (1999).

90. David Spears, *Venue in Federal Criminal Cases: A Strange Duck*, CHAMPION, Jan./Feb. 2019, at 24, 28.

91. 526 U.S. at 279–80. One year earlier, the Court promulgated a similar rule in relation to a money laundering statute in *United States v. Cabrales*, 524 U.S. 1, 6–7 (1998).

92. *Rodriguez-Moreno*, 526 U.S. at 276.

93. *Id.*

94. *Id.* at 276–77.

95. *Id.* at 277.

96. *Id.*

97. *Id.*

middleman, kidnapping the middleman, and "using and carrying a firearm in relation to" the kidnapping.[98] The government brought the charges in the District of New Jersey, but the defendant argued that venue for the firearm charge was improper because Maryland was the only place the government could prove "he had actually used a gun."[99]

The Third Circuit, relying on the specific verbs in the statute, agreed with the defendant's argument that venue for the firearms charge was improper in New Jersey.[100] The government had prosecuted the defendant under a statute that barred "us[ing] or carr[ying] a firearm" "during and in relation to any crime of violence or drug trafficking crime."[101] The court reasoned that since the defendant only "used" or "carried" the gun in Maryland, venue would *only* be proper there.[102] Because its ruling would force prosecutors to try the gun crime in a different venue than the kidnapping crime, the court's approach eschewed judicial economy in favor of strict constitutional venue protections.

The Supreme Court disagreed and reversed the Third Circuit, holding that venue was proper in New Jersey for both the kidnapping and the firearm charges.[103] The Court, reasoning that any venue inquiry must begin with determining the *locus delicti* of the crime,[104] set forth a two-prong test for making this determination.[105] First, a court must "identify the conduct constituting the offense," and then it must "discern the location of the commission" of that conduct.[106] While the lower court relied on the specific verbs within the statute to satisfy the first prong of the test, the Supreme Court took a broader approach to identifying the criminalized conduct.[107] Rather than analyzing verbs alone, the Court looked at the "essential conduct elements" of the crime.[108] In the Court's view, the venue inquiry turns on whether the statutory language constitutes an element of the crime the government must prove to win its case, regardless of the words' grammatical properties.[109] Using this lens, the Court found two "essential

98. *Id.*
99. *Id.*
100. *Id.* at 278.
101. 18 U.S.C. § 924(c)(1)(A) (2018).
102. *Rodriguez-Moreno*, 526 U.S. at 278.
103. *Id.* at 281–82.
104. *See id.* at 279; *see supra* Section II.A.
105. *Rodriguez-Moreno*, 526 U.S. at 279.
106. *Id.*
107. *See id.* at 279–80.
108. *Id.* at 280.
109. *See id.*

conduct elements" in the statute at issue: (1) using a firearm and (2) committing a crime of violence—in this case, a kidnapping.[110] The Court reasoned that because the kidnapping began in Texas and continued through New Jersey, New York, and Maryland, it did not make sense to break the kidnapping down into "discrete geographic fragments."[111] Because the statute criminalized using a gun "during and in relation to" the kidnapping, the Court held that venue was proper in any district in which the underlying violent crime—the kidnapping—occurred.[112]

In *Rodriguez-Moreno*, the Court also determined that kidnapping qualifies as a "continuing offense" under 18 U.S.C. § 3237(a).[113] When criminal behavior takes place in more than one district, venue is proper in "any district in which such offense was begun, continued, or completed."[114] Under § 3237(a), crimes involving interstate commerce qualify as continuing offenses.[115] As a result, venue is proper for those crimes in "any district from, through, or into which such commerce . . . moves."[116]

III. Two Approaches to Venue for Crimes Committed on Domestic Commercial Flights

Courts disagree, however, on whether § 3237(a)'s reach extends to every crime committed during a commercial flight. The Ninth Circuit has concluded that the criminal behavior *itself* must implicate interstate commerce in order to qualify as a continuing offense.[117] The Tenth and Eleventh Circuits have held that *any* criminal behavior occurring during interstate travel automatically qualifies as a continuing offense and therefore falls within § 3237(a)'s purview.[118] The Supreme Court has not yet weighed in on the issue, resulting in a circuit split.

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110. *Id.*
111. *Id.* at 281.
112. *Id.*
113. *Id.* at 282.
114. 18 U.S.C. § 3237(a) (2018).
115. *Id.*
116. *Id.*
117. *See* United States v. Lozoya, 920 F.3d 1231, 1240 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).
118. *See* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004); United States v. McCulley, 673 F.2d 346, 349–50 (11th Cir. 1982).

A. Ninth Circuit's Approach: Flyover District Only

The Ninth Circuit has adopted a narrow interpretation of venue in relation to sky crimes. Its approach requires the government to prosecute the crime in the district the plane was flying above when the criminal behavior occurred.[119]

In *Lozoya*, one passenger struck another in the face during a flight from Minneapolis to Los Angeles during a skirmish that began and ended in an instant.[120] The Ninth Circuit relied on the two-prong test set forth in *Rodriguez-Moreno* to determine the *locus delicti* of the criminal offense.[121] In applying that test, the court first established the essential elements of the criminal conduct and then determined where that conduct occurred.[122] *Lozoya* deviated from the norm because the first half of the analysis was very straightforward.[123] The specific conduct criminalized—the slap—was undisputed and clear cut.[124] To satisfy the second prong of the test, the court considered two separate statutes to ascertain the district in which the slap occurred.[125]

The government first contended the crime was a continuing offense under 18 U.S.C. § 3237(a), so venue was proper in the district where the plane landed.[126] Section 3237(a) provides that an offense involving "the use of . . . 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."[127] A continuing offense may be "prosecuted *in any district in which such offense was begun, continued, or completed*."[128]

The crux of the government's argument under § 3237(a) was that the assault charge involved interstate commerce because it occurred on a commercial flight that moved passengers between states.[129] The Ninth Circuit disagreed, noting that even though the assault happened on a plane, nothing about the charged criminal behavior *itself* implicated interstate

119. *Lozoya*, 920 F.3d at 1241.
120. *Id.* at 1233–34; *see also supra* notes 5–11 and accompanying text.
121. *Lozoya*, 920 F.3d at 1238–39; *see supra* Section II.C.2.
122. *Lozoya*, 920 F.3d at 1239.
123. *See id.*
124. *Id.*
125. *Id.* at 1239, 1241.
126. *Id.* at 1239.
127. 18 U.S.C. § 3237(a) (2018).
128. *Id.* (emphasis added).
129. *Lozoya*, 920 F.3d at 1240.

commerce.[130] The court reasoned that the criminalized behavior "occurred in an instant" and was over long before the plane entered the Central District of California for its landing at LAX.[131] Because the plane's subsequent flight activity was separate from the actual criminal behavior, the court concluded it was "incidental and therefore irrelevant for venue purposes."[132] The court deemed the fact that the crime occurred on an airplane merely a "circumstance element," as opposed to an element of the crime.[133] Because only criminalized behavior can support proper venue, the fact that the slap occurred on an airplane did not somehow convert it to a continuing offense under § 3237(a), and venue was therefore improper in the arrival district.[134] The Ninth Circuit acknowledged that its decision created a circuit split with the Tenth and Eleventh Circuits, but it ultimately declined to treat § 3237(a) as a "catchall provision" for all crimes committed on airplanes.[135]

The government next argued that venue was proper because the crime was not committed in any district.[136] When crimes are "begun or committed . . . out of the jurisdiction of any particular State or district," venue is proper "in the district in which the offender . . . is arrested or is first brought."[137] The court quickly disposed of this argument because the statute only applies when an "offense [is] committed entirely on the high seas or outside the United States."[138] The court distinguished the "high skies" from the "high seas" because "the navigable airspace above [a] district *is a part of the district*."[139]

Under the Ninth Circuit's interpretation, venue was proper *only* in the district "above which the assault occurred."[140] Though the government urged that pinpointing the exact location of the plane during the assault would be "impossible," the court rejected that argument.[141] Conceding that it would require some investigation to determine the plane's location, the

130. *Id.* at 1239–40.
131. *Id.* at 1239.
132. *Id.* (citing United States v. Stinson, 647 F.3d 1196, 1204 (9th Cir. 2011)).
133. *Id.* at 1240 (quoting *Stinson*, 647 F.3d at 1204).
134. *Id.* at 1239.
135. *Id.* at 1240 (quoting United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982)).
136. *Id.* at 1241.
137. 18 U.S.C. § 3238 (2018).
138. *Lozoya*, 920 F.3d at 1241 (quoting United States v. Pace, 314 F.3d 344, 351 (9th Cir. 2002)).
139. *Id.* (quoting United States v. Barnard, 490 F.2d 907, 911 (9th Cir. 1973)).
140. *Id.*
141. *Id.* at 1241–42.

court still felt the government's task—proving venue by a preponderance of the evidence—was a "wholly reasonable" one for it to tackle.[142]

The Ninth Circuit did recognize the "creeping absurdity in [its] holding."[143] But rather than adopting what it believed to be the more practical rule, the court instead urged Congress to act by passing legislation to address the issue in a "just, sensible, and clearly articulated" rule.[144]

B. Tenth & Eleventh Circuits' Approach: Departure District, Any Flyover District, or Arrival District

The Tenth and Eleventh Circuits have taken a broader approach to interpreting venue for crimes committed on commercial flights. While the Ninth Circuit limited proper venue to a single flyover district,[145] the Tenth and Eleventh Circuits have held that venue for sky crimes is proper in the landing district, the departure district, and any flyover district.[146]

The Eleventh Circuit first addressed the issue in *United States v. McCulley*.[147] In that case, three men conspired to steal United States mail during a nonstop flight from Los Angeles to Atlanta.[148] One of the men locked himself in a trunk, unbeknownst to airline employees who loaded the trunk near several mail bags in the belly of the plane.[149] During the flight, the man freed himself from the trunk, tore open the bags, and pilfered through the mail.[150] He then loaded stolen mail into his own luggage, which was intended for transfer onto a connecting flight.[151] After the plane landed in Atlanta, however, airline employees discovered the man when his trunk popped open during baggage unloading.[152] The conspiracy

142. *Id.* at 1242.

143. *Id.* ("Should it really be necessary for the government to pinpoint where precisely in the spacious skies an alleged assault occurred? Imagine an inflight robbery or homicide—or some other nightmare at 20,000 feet—that were to occur over the northeastern United States, home to three circuits, fifteen districts, and a half-dozen major airports, all in close proximity. How feasible would it be for the government to prove venue in such cluttered airspace?").

144. *Id.* at 1243.

145. *Id.* at 1241.

146. *See* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004); United States v. McCulley, 673 F.2d 346, 349–50 (11th Cir. 1982).

147. 673 F.2d at 349.

148. *Id.* at 348.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

unraveled after employees realized that several mail bags were missing and that there was other luggage resembling the trunk, which investigators used to bait the man's co-conspirators.[153] Police arrested all three men in the Northern District of Georgia—the district where the plane landed.[154] Prosecutors in the Northern District brought charges under several federal statutes,[155] including 18 U.S.C. § 1706, which prohibits injury to mail bags "with the intent to rob or steal any such mail."[156]

Only the two co-conspirators who were not in the trunk raised venue challenges.[157] They argued venue would only be proper in the Northern District of Georgia if the government could prove either that the criminal conduct was a continuing offense under 18 U.S.C. § 3237(a) or that the men injured the bags in that district.[158] The court rejected their argument, holding any violation of § 1706 that "occurs on some form of transportation in interstate or foreign commerce" automatically qualifies as a "continuing violation" under § 3237(a).[159] To hold otherwise would allow "a crime which has been committed in transit from escaping punishment" solely because the government could not satisfy the venue requirement.[160] The court believed the scenario at hand was "precisely [the] sort of situation that 18 U.S.C. § 3237 was meant to deal with."[161] Section 3237(a), the court reasoned, functioned as a "catchall provision" to relieve Congress from "insert[ing] venue provisions in every statute where venue might be difficult to prove."[162]

While the Eleventh Circuit did consider the potential complications presented by the Sixth Amendment and Federal Rule of Criminal Procedure 18,[163] the court ultimately relied on the policy justifications underlying those rules to support its stance.[164] Specifically, venue protections function to "prevent abuses" such as forcing a person who committed a robbery in one state to face a jury trial in a different state.[165] The court distinguished

153. *Id.*
154. *See id.* at 349.
155. *Id.*
156. 18 U.S.C. § 1706 (2018).
157. *McCulley*, 673 F.2d at 349.
158. *Id.*
159. *Id.*
160. *Id.* at 350.
161. *Id.*
162. *Id.*
163. *Id.* at 350 n.2; *see supra* Part I.
164. *McCulley*, 673 F.2d at 350 n.2.
165. *Id.*

the instant case because the conspirators "voluntarily entered the Northern District of Georgia with the intent to further the ends of the conspiracy."[166] Because its broad interpretation of § 3237(a) did not implicate the abuses contemplated by constitutional safeguards, the Eleventh Circuit believed its holding did not undermine the Sixth Amendment or Rule 18.[167]

IV. Both Existing Approaches Are Unworkable for Sky Crimes

The Ninth Circuit's strict interpretation of venue requirements produces absurd results and puts an unreasonably high burden on the government to prove venue for crimes committed on airplanes. While the Tenth and Eleventh Circuits' approach seems more sensible on its face, allowing such a broad range of venue options gives the government too much latitude and infringes upon defendants' constitutional rights.

A. The Ninth Circuit's "Too Narrow" Approach

Under the Ninth Circuit's reasoning in *Lozoya*, venue for noncontinuous sky crimes is only proper in the district above which the plane was flying when the crime occurred. This approach creates unnecessary hardships and produces undesirable results. Specifically, it may pose an insurmountable hurdle for the government, run contrary to constitutional and congressional goals, make it more difficult for victims to get redress, produce inconsistent results, and disregard other procedural safeguards.

The Ninth Circuit's narrow interpretation of venue places a high burden on the government and compels prosecutors to bring charges for crimes committed on airplanes in an arbitrary district. The government must first identify the moment that the criminal behavior occurred and then determine the precise location of the airplane at that point in time.[168] Though technological advances allow relatively easy access to information about a plane's physical location,[169] a narrow interpretation still raises unnecessary hurdles.

Pinpointing the location of the plane at the moment of the crime forces the government to put an exact timestamp on the criminal behavior.

166. *Id.*

167. *Id.*

168. *See* United States v. Lozoya, 920 F.3d 1231, 1242 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).

169. *See* Robert Silk, *All Commercial Aircraft in U.S. Will Soon Have GPS Technology*, TRAVEL WKLY. (Dec. 17, 2019), https://www.travelweekly.com/Travel-News/Airline-News/Commercial-aircraft-GPS-technology.

Admittedly, this requirement did not present a problem in *Lozoya* because the commotion immediately alerted flight attendants and other passengers who were able to document the time.[170] But if a defendant acted less overtly, determining the precise time the behavior occurred could present an insurmountable hurdle.

Imagine that instead of two adults openly brawling on a plane, the crime involved an adult passenger quietly preying on an unaccompanied minor. If the child failed to immediately alert a flight attendant or note the time of the assault, the government may lack the information necessary to prove proper venue.[171] The difficulty of this task would also depend on the plane's flight path. A prosecutor would have a much smaller margin of error for flights traversing the east coast—where federal judicial districts are more densely packed—because the plane would fly over each district for a shorter duration. The hypothetical child's access to justice should not rest on her ability to recall enough details surrounding her assault to determine whether it happened at 6 p.m. or 7 p.m. Though the government carries a lower burden of proof for venue than it does for other elements of the crime,[172] circumstances like these could still make it impossible to meet that burden.

While venue requirements generally protect a defendant from prosecution in an unfair district,[173] a rigid and literal interpretation of venue on airplanes flouts those fairness concerns. A narrow interpretation could actually *force* the government to bring charges in an unfamiliar district hundreds of miles away from relevant evidence, witnesses, or parties. For every cross-country flight between two major cities, it is likely that many of the passengers live in either the city the plane took off from or the city where it landed.[174] While some passengers may be visiting for the first time or catching a connecting flight, most probably have some business or personal connection to either the departure or arrival city. In contrast, far fewer passengers are likely to live in, work in, or be familiar with any given district over which the plane flies. Moreover, forcing proper venue in a

170. *See Lozoya*, 920 F.3d at 1242 (explaining the specific circumstances that allowed flight attendants to determine the time of the assault).

171. Federal jurisdiction is proper for sexual assaults committed on airplanes under 18 U.S.C. § 2244 (2018).

172. United States v. Lukashov, 694 F.3d 1107, 1120 (9th Cir. 2012); Spears, *supra* note 90, at 24.

173. *See supra* Part I.

174. For example, Lozoya was flying back to California because she had to work the following day. Brief for Appellant at 11, United States v. Lozoya, 920 F.3d 1291 (2019) (No. 17-50336), 2018 WL 1064506, at *11. While her brief does not specify precisely where she lives, it is likely within driving distance of LAX.

random flyover district may impede witnesses' availability to testify in person. In a dissent, Justice Harlan stressed that proper venue "is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."[175] He further urged courts to construe statutes in a way that "respect[s] such considerations."[176] In Justice Harlan's view, courts give more respect to the Sixth Amendment's protections by finding proper venue where "witnesses and relevant circumstances surrounding the contested issues" are most likely to be found.[177]

A narrow interpretation not only fails to promote fairness to the defendant, but also fosters unfairness to victims.[178] By placing such a high burden on the government to bring charges and prove venue in a far-flung district, a narrow interpretation creates a loophole for criminals to avoid prosecution. Under the two-prong *Rodriguez-Moreno* test, courts must: (1) "identify the conduct constituting the offense" and (2) "discern the location of the commission" of the criminal conduct.[179] In *Rodriguez-Moreno*, the uncertainty rested in the first prong as the Court struggled to determine the behavior Congress intended to criminalize.[180] In *Lozoya*, though, the first prong was not at issue since the specific conduct being criminalized—the slap—was not contested.[181] Only the second prong, determining where the slap occurred, was uncertain. Applying the *Rodriguez-Moreno* framework to crimes committed on airplanes requires the government to pinpoint the plane's precise location at a specific, but potentially unknown time. Even if the government can prove all other elements of the crime, its case could still fail if this burden is not met. Additionally, forcing prosecutors to obtain and review flight records just to determine which district has proper venue expends time and resources not required if the defendant is simply charged

175. Travis v. United States, 364 U.S. 631, 640 (1961) (Harlan, J., dissenting) (quoting United States v. Cores, 356 U.S. 405, 407 (1958)).

176. *Id.* (quoting *Cores*, 356 U.S. at 407).

177. *Id.*

178. The Supreme Court has recognized that "[t]he criminal justice system is not operated primarily for the benefit of victims, but for the benefit of society as a whole." Kelly v. Robinson, 479 U.S. 36, 52 (1986). But a glaring loophole in criminal procedure laws that creates a safe harbor for crime on airplanes arguably works to the detriment of all travelers, not just individual victims.

179. United States v. Rodriguez-Moreno, 526 U.S. 275, 279 (1999); *see supra* Section II.C.2.

180. *See Rodriguez-Moreno*, 526 U.S. at 281.

181. *See* United States v. Lozoya, 920 F.3d 1231, 1239 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).

in the district where the plane lands. As a result, requiring the government to pinpoint the plane's physical location may act as an obstacle for victims seeking redress.

The Framers could not possibly have contemplated commercial airflight when they drafted constitutional venue protections. Congress, however, has passed certain legislation that points to its intention to avoid this tricky venue scenario. In his separate opinion in *Lozoya*, Judge Owens suggested that Congress already addressed many of the concerns associated with commercial air travel when it passed the Federal Aviation Act of 1961.[182] At the time, the administrator of the Federal Aviation Administration highlighted the exact concern eventually presented in *Lozoya*:

> [S]erious legal questions can arise as to the situs of the aircraft at the time the crime was committed. The question as to the law of which jurisdiction should apply to a given offense can be the subject of endless debate, and excessive delay in the prosecution becomes inevitable. The difficulties encountered by the overflown State in 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.[183]

Though the factual scenario envisioned by the administrator came to fruition in *Lozoya*, the court's narrow interpretation of venue inhibited the desired and intended result.

A narrow venue rule also produces inconsistent results when the assault occurs above water instead of above land.[184] Thus, the government's ability to satisfy proper venue could hinge on an air traffic controller's fortuitous decision to route an east coast flight over the Atlantic rather than the Beltway.[185] A crime that occurred on a plane flying above water would most likely be tried in the landing district since crimes occurring over the ocean technically do not occur in any district.[186] But if the same behavior occurred on a plane that took the land route, the government would have to

182. *See id.* at 1243–44 (Owens, J., concurring in part and dissenting in part).
183. *Id.* at 1244 (quoting S. REP. NO. 87-694, at 2–3 (1961)); *see infra* Section V.A.
184. CRIMINAL RESOURCE MANUAL, *supra* note 74, § 1406.
185. *Id.*
186. *Id.*; *see also* 18 U.S.C. § 3238 (2018).

pinpoint the location of the plane at the moment of the assault and prosecute the defendant in a potentially unfamiliar district.[187]

Finally, a narrow interpretation needlessly disregards another procedural safeguard that promotes fairness to the defendant—venue transfer. The Federal Rules of Criminal Procedure allow criminal defendants to move to transfer trial proceedings to a different district.[188] The court must grant a transfer if prejudice in the original district eliminates the defendant's ability to "obtain a fair and impartial trial there."[189] Even if the defendant is not facing such prejudice, he can still move to transfer the case for "the convenience of the parties, any victim, and the witnesses, and in the interest of justice."[190] When considering whether to grant a motion to transfer for convenience, courts have "substantial discretion to balance any competing interests."[191] If a defendant successfully moves for a transfer, the judge then selects the transferee district.[192] Rule 21 empowers the court to weigh all relevant factors and decide whether venue would be more appropriate in a different district.[193] Rule 21 does not solve the venue puzzle as it relates to airplane crimes, though, because a defendant retains his constitutional venue protections until he moves for venue transfer.[194] Thus, only *after* a defendant makes a Rule 21 motion does he waive his constitutional right to be tried in the district where the crime occurred.[195]

B. The Tenth & Eleventh Circuits' "Too Broad" Approach

Though a narrow interpretation of venue protections raises concerns, so too does an overbroad interpretation. Specifically, this approach presents opportunities for prosecutorial abuse, weakens already vulnerable constitutional protections, and allows judges to legislate from the bench.

187. CRIMINAL RESOURCE MANUAL, *supra* note 74, § 1406.
188. FED. R. CRIM. P. 21.
189. FED. R. CRIM. P. 21(a).
190. FED. R. CRIM. P. 21(b).
191. FED. R. CRIM. P. 21(b) advisory committee's note to 2010 amendment.
192. FED. R. CRIM. P. 21(b) advisory committee's note to 1966 amendment.
193. *See* FED. R. CRIM. P. 21(b) advisory committee's note to 2010 amendment. Empowering the court to balance interests in a particular factual scenario is reminiscent of the substantial contacts venue rule in *Reed*. *See supra* Section II.C.1.
194. FED. R. CRIM. P. 21(a)–(b) advisory committee's note to 1944 amendment.
195. *Id.*

The Tenth and Eleventh Circuits have held that venue for sky crimes is proper in any district through which a plane travels.[196] Rather than distinguishing between crimes that are ongoing and those that take place in an instant, these courts have held that *all* crimes committed on commercial flights fall under § 3237(a) because they inherently involve interstate commerce.[197] This broad approach to sky-crime venue is ripe for prosecutorial abuse because it allows the government to choose between several districts even though the crime happened in only one location. Since all airplane crimes implicate "the use of . . . interstate or foreign commerce" under § 3237(a), venue is therefore proper "in *any* district from, through, or into which such commerce . . . moves."[198] Under this interpretation, the government could choose to bring charges in the district where the plane departed, in the district where the plane arrived, or in any district in which it flew above.

This approach is troubling because the government's burden to prove proper venue is already lower than its burden to prove the elements of the crime.[199] Though the government must prove the elements of the crime beyond a reasonable doubt, it must only prove proper venue by a preponderance of evidence.[200] Eroding the protection even further risks transforming venue into a mere formality in defiance of Supreme Court guidance.[201] Unlike many other procedural safeguards in the criminal justice system, a defendant may waive his objection to venue if the objection is untimely.[202] Thus, the scope of a defendant's constitutional venue protection is already limited, and the Tenth and Eleventh Circuits' approach constrains it even further.

This broader approach also arguably allows the court to legislate from the bench. The Eleventh Circuit in *McCulley* interpreted § 3237(a) as a "catchall provision" for venue.[203] Its scant analysis, however, relied entirely

196. *See* United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012); United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004); United States v. McCulley, 673 F.2d 346, 349–50 (11th Cir. 1982).

197. *See Cope*, 676 F.3d at 1225; *Breitweiser*, 357 F.3d at 1253; *McCulley*, 673 F.2d at 350.

198. 18 U.S.C. § 3237(a) (2018) (emphasis added).

199. Spears, *supra* note 90, at 24.

200. United States v. Lukashov, 694 F.3d 1107, 1120 (9th Cir. 2012); Spears, *supra* note 90, at 24.

201. *See* United States v. Johnson, 323 U.S. 273, 276 (1944) ("Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure.").

202. *See* United States v. Carreon-Palacio, 267 F.3d 381, 391 (5th Cir. 2001).

203. United States v. McCulley, 673 F.2d 346, 350 (11th Cir. 1982).

on analogous state statutes rather than constitutional guidance or federal precedent.[204] The court reasoned that the statute was "designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue," though it did not cite any legislative history to support that claim.[205] The Ninth Circuit took issue with the *McCulley* court's reliance on state statutes.[206] The Supreme Court has cautioned that "[q]uestions of venue in criminal cases . . . raise deep issues of public policy in the light of which legislation must be construed."[207] A court's interpretation of a statute "should go in the direction of constitutional policy even though not commanded by it."[208] In the context of proper venue, this guidance may encourage courts to favor a narrower construction—one that adheres to the "underlying spirit of the constitutional concern for trial in the vicinage"—over a broader construction that may more sensibly justify venue in another district.[209] Thus, if the legislative history of § 3237(a) is genuinely unclear regarding congressional intent, courts should hesitate to interpret it broadly.

While the Tenth and Eleventh Circuits' approach helps avoid absurd results, it may also defy the explicit protections guaranteed by the Sixth Amendment, Article III, and the Federal Rules of Criminal Procedure. Without clear direction from Congress, judicial decisions about proper venue must be guided by constitutional protections and federal rules.

V. A Functional Approach: § 3237(a) Encompasses All Sky Crime

It is clear that courts are not free to disregard the plain text of the Constitution or the Federal Rules of Criminal Procedure based solely on policy or good sense.[210] While the default rule under both of these sources requires a crime to be tried in the district where it was committed, Congress has the authority to statutorily fix venue for a crime, either by including a specific venue provision or expressly defining the *locus delicti* of the crime.[211] Title 18 U.S.C. § 3237(a) provides statutory authority for courts to take a sensible approach to criminal venue on airplanes.

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204. *See id.*
205. *Id.*
206. *See* United States v. Lozoya, 920 F.3d 1231, 1240 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).
207. United States v. Johnson, 323 U.S. 273, 276 (1944).
208. *Id.*
209. *Id.*
210. *See supra* Part I.
211. *See supra* Section II.A.

Congress's intent to close the venue loophole in these scenarios is evidenced by legislative history, the statutory scheme, and existing comprehensive legislation evidencing a sensible approach to criminal procedure on airplanes. With this groundwork in mind, courts should adopt a functional interpretation of § 3237(a). For sky crimes, this interpretation allows courts to balance competing policy concerns, avoid absurd results, and shield defendants with the protections envisioned by the Constitution and the Federal Rules of Criminal Procedure. Though the Tenth and Eleventh Circuits have adopted a similar approach, they did so without thorough analysis and without expressly tempering § 3237(a)'s scope as it relates to non-continuous sky crimes. This section provides those missing pieces.

A. Legislative History

The *Lozoya* majority, lamenting the absurd result it had reached, stressed that the venue problem for sky crimes could only be solved by congressional action, not judicial interpretation.[212] But a functional approach to criminal venue on airplanes flows logically from the legislative history of § 3237(a). Under that statute, "any offense involving the use of . . . interstate or foreign commerce . . . 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 . . . or imported object or person moves."[213] While the Ninth Circuit rejected § 3237(a)'s application in *Lozoya* because the criminal offense did not involve interstate commerce,[214] the Tenth and Eleventh Circuits opted to treat it as a catchall provision, finding proper venue in any district through which the plane traveled.[215] The statute's legislative history tips in favor of the latter position.

In closing the *jurisdictional* loophole that once existed for airplanes, Congress made clear its intent to also close the corresponding *venue* loophole. In the early 1960s, Congress amended the Federal Aviation Act ("FAA") to address "gaps in existing law which can operate to provide

212. *See* United States v. Lozoya, 920 F.3d 1231, 1242–43 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).

213. 18 U.S.C. § 3237(a) (2018).

214. *See supra* Section III.A.

215. *See supra* Section III.B.

criminals with a haven from prosecution."[216] It accomplished this goal by bringing certain violent state crime offenses—like murder and assault—under federal jurisdiction, thereby eliminating the need to determine which state court had jurisdiction over the crime.[217] The accompanying House Report clarified that "it is necessary and appropriate for the legislation to have this broad coverage if it is to operate as an effective deterrent to crime and promote safety in air commerce."[218] Congress identified the issues posed by trying state crimes after "the advent of high-speed high-altitude flights of modern jet aircraft [] complicated the problem of establishing venue for the purposes of prosecution."[219] As a result, it amended the FAA primarily to "provide federal criminal laws to cover the commission of certain acts occurring on board an aircraft, thereby *solving problems of venue and jurisdiction* which had become complicated by" the emergence of commercial air travel.[220] Just like the jurisdictional complications recognized by Congress, issues of venue on airplanes similarly allow "serious offenses [to go] unpunished because it" may be "impossible to establish to any reasonable degree of accuracy the State over which the crime was committed."[221]

Courts can accomplish this legislative goal while remaining faithful to the foundational policy concerns which underlie criminal venue. While a functional approach may potentially give the court a range of venue options, venue should *only* be proper in a district where those policies are served,[222] similar to the substantial contacts test advanced by the Second Circuit in *Reed*.[223] Like that test, the functional balancing approach here should only serve to limit venue options. To determine proper venue for non-continuous sky crimes, courts should consider factors like where the defendant resides, whether he will have access to relevant evidence and witnesses in the chosen district, and whether the government is forum shopping to gain an advantage. Because these policy goals are most likely to be served in the departure or arrival district, courts could begin the

216. United States v. Flum, 518 F.2d 39, 42 (8th Cir. 1975) (quoting H.R. REP. NO. 87-958, at 3 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2563, 2563).

217. *Id.* (citing H.R. REP. NO. 87-958, at 4, 1961 U.S.C.C.A.N. at 2563–65).

218. *Id.* (quoting H.R. REP. NO. 87-958, at 4, 1961 U.S.C.C.A.N. at 2564).

219. United States v. Moradi, 706 F. Supp. 2d 639, 643–44 (D. Md. 2010) (quoting H.R. REP. NO. 87-958, at 3–4, 1961 U.S.C.C.A.N. at 2564).

220. *Id.* at 644 (quoting 8A AM. JUR. 2d *Aviation* § 220) (emphasis added).

221. *Id.* at 643–44 (quoting H.R. REP. NO. 87-958, at 3–4, 1961 U.S.C.C.A.N. at 2564).

222. *See supra* Part I.

223. *See supra* Section II.C.1.

inquiry with the presumption that one of those two districts would satisfy these goals.

This analysis would not necessarily foreclose venue in any flyover district if the judge determined that the factors weighed in favor of venue there. This sensible approach allows for judicial discretion, avoiding the pitfalls of the Ninth Circuit's rigid interpretation. Unlike the Tenth and Eleventh Circuits' approach, where venue is statutorily proper in *every* flyover district,[224] this approach prioritizes a criminal defendant's constitutional rights by empowering courts to detect and deter prosecutorial abuse or other types of unfairness.

B. Statutory Interpretation

The statutory scheme further evidences Congress's intent to eliminate venue loopholes. When interpreting an ambiguous statute, courts "must [] interpret the relevant words not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'"[225] The statutes surrounding § 3237 similarly aim to eliminate venue loopholes. For example, § 3238 regulates criminal behavior committed "out of the jurisdiction of any particular State or district" or those "begun or committed upon the high seas."[226] Section 3240 fixes venue when offenses are committed prior to a new district's creation.[227] Section 3242 resolves venue issues when members of tribes commit certain offenses on reservations.[228] These statutes all target situations like the one in *Lozoya*: outliers where standard venue rules do not quite fit.

Interpreting § 3237's scope to encompass all sky crimes also produces the most sensible result. Consider again the hypothetical scenario where an unaccompanied minor is quietly assaulted by an adult passenger.[229] If this assault occurred in a bathroom at LAX prior to takeoff, determining venue would be a nonissue. The perpetrator would be charged and prosecuted in the judicial district where LAX is located, and the case would fit neatly into the *Rodriguez-Moreno* framework. But if the assault instead took place an

224. *See supra* Section III.B.

225. Abramski v. United States, 573 U.S. 169, 179 (2014) (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013) (resolving a statutory interpretation question using these three tools and "common sense, which is a fortunate (though not inevitable) side-benefit of construing statutory terms fairly").

226. 18 U.S.C. § 3238 (2018).

227. *Id.* § 3240.

228. *Id.* § 3242.

229. *See supra* Section IV.A.

hour or two later, while the plane was midflight, the perpetrator could slip through the *Lozoya* loophole. In that case, the adult's prosecution would rely on the child's ability to recall enough details of the assault to determine the time at which it occurred—a fact required to prove proper venue under the Ninth Circuit's approach—by a preponderance of the evidence.

Under the two-prong test set forth in *Rodriguez-Moreno*, the government must first identify the criminal behavior and then identify the district where that behavior occurred.[230] In this hypothetical, even if the government had ample evidence to prove that the perpetrator assaulted the child, the case would still fail on the second prong of the test. The perpetrator would evade prosecution based solely on the lack of evidence about the position of the plane in relation to some specific instance in time. The Framers included venue protections in the Constitution in two separate instances in an effort to prevent the government from unfairly prosecuting its citizens in an unfamiliar district.[231] That intention is not served by allowing crime to go unpunished simply because it occurs in the skies rather than on the ground. As the Supreme Court has recognized, "interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."[232] Here, a more flexible interpretation of § 3237(a) heeds that guidance.

Admittedly, these tools of statutory interpretation are only applicable when ambiguity exists in the statute.[233] The Ninth Circuit in *Lozoya* argued that the plain language of § 3237(a) forecloses a functional approach because the slap itself was not an "offense involving the use of . . . interstate or foreign commerce."[234] This textualist argument hinges on what it means for a crime to "involv[e] the use of . . . interstate commerce," which may not be as straightforward as the court assumes. The statute does not require the offense to go so far as to affect or impact interstate commerce, but merely to "involv[e]" it. To be sure, the slap *itself* did not implicate interstate commerce. But Congress adopted legislation which transformed traditional state crimes (like murder and assault) into federal

230. *See supra* notes 105–99 and accompanying text.

231. *See supra* notes 24–30 and accompanying text.

232. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).

233. *See* BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) ("Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.").

234. 18 U.S.C. § 3237(a); United States v. Lozoya, 920 F.3d 1231, 1240 (9th Cir.), *reh'g en banc granted*, 944 F.3d 1229 (9th Cir. 2019), *and on reh'g en banc*, No. 17-50336, 2020 WL 7064635 (9th Cir. Dec. 3, 2020).

crimes when they are committed on airplanes,[235] and commercial flights undoubtedly implicate interstate commerce. The government charged the plaintiff in *Lozoya* under a statute specific to assaults committed in the special aircraft jurisdiction of the United States.[236] In this way, the crime involves—or "relate[s] closely"[237]—to interstate commerce.

Courts disagree about how closely the offense must relate to interstate commerce before § 3237(a) is triggered. Some courts have applied § 3237(a) when the criminal behavior has a more attenuated connection to interstate commerce.[238] Other courts have taken a more stringent approach, requiring a direct connection between the criminal behavior and interstate commerce.[239] The former approach, however, is the best interpretation for sky assaults like the one at issue in *Lozoya*. It empowers courts to produce sensible results that are still grounded in the text of the statute and supported by canons of statutory interpretation.

C. A Comprehensive Legislative Solution

Existing legislation regarding venue on airplanes also evidences congressional intent to comprehensively address the problem. When criminal behavior interferes with a crew member—even briefly—under certain federal statutes,[240] venue is proper in any district in which the

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235. *See supra* Section II.A.

236. *See* 18 U.S.C. § 113(a)(3) (2018).

237. *Involve*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/involve (last visited Oct. 21, 2020).

238. *See, e.g.*, United States v. Cope, 676 F.3d 1219, 1225 (10th Cir. 2012) ("As we explain below, Mr. Cope was 'under the influence of alcohol' during the flight. Because he was operating a common carrier in interstate commerce, it is immaterial whether he was "under the influence of alcohol" in Colorado."); United States v. Breitweiser, 357 F.3d 1249, 1253 (11th Cir. 2004) ("To establish venue, the government need only show that the crime took place on a form of transportation in interstate commerce.").

239. *See, e.g.*, United States v. Morgan, 393 F.3d 192, 200 (D.C. Cir. 2004) (finding § 3237(a) inapplicable based solely on the fact that a stolen computer was transported from the District of Columbia to the defendant's home in Maryland); United States v. Ayo, 801 F. Supp. 2d 1323, 1332 (S.D. Ala. 2011) (finding § 3237(a) inapplicable after a defendant in Louisiana received cash from an undercover police officer in Alabama to settle a gambling debt, while also distinguishing *McCulley* and *Breitweiser*: "[T]he defendant did not accept the proceeds of credit while it was in transit. Nor is this a case where no venue exists outside of Section 3237(a).").

240. *See* 49 U.S.C. § 46504 (2018) (applying to any person who "assault[s] or intimidat[es] 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"); 49 U.S.C. § 46506 (2018) (applying certain criminal

accused's behavior was disruptive.[241] If the behavior is so disruptive that it forces an unscheduled emergency landing, venue would certainly be proper in the district in which the plane landed.[242] But even behavior that did not interrupt the flight plan could cause flight crew to monitor the passenger's behavior for the remainder of the journey.[243] In that case, the accused's behavior still disrupted the flight, and venue would therefore be proper in the arrival district.[244]

Additionally, questions of criminal venue related to airplane crimes often involve assaults against other passengers. Title 49 U.S.C. § 46506 criminalizes many such offenses under the "special aircraft jurisdiction of the United States."[245] From an equity standpoint, it would make sense to bring the "enclave offenses in the same venue as the interference charge and join them for trial there."[246] The legislative history of the predecessor to § 46506 further indicates the statute was "originally enacted to deal with the problem that states could not prosecute these offenses because it could not be proved that the offense took place over the prosecuting state."[247] Thus, a functional approach to interpreting proper venue for sky crimes minimizes the problem that Congress specifically passed these statutes to address.[248]

Indeed, a narrow interpretation of § 3237(a) runs contrary to legislative goals by causing unnecessary inefficiency and complexity in prosecuting the behavior.[249] Many assaults on other passengers or crew members can also be tried as federal interference, and venue is proper for those crimes in the district in which the plane lands.[250] But a narrow interpretation of venue would force the government to pinpoint the precise location of the aircraft

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laws to defendants who commit crimes "in the special aircraft jurisdiction of the United States").

241. CRIMINAL RESOURCE MANUAL, *supra* note 74, § 1406.

242. *Id.*

243. *Id.*

244. *Id.*

245. 49 U.S.C. § 46506.

246. CRIMINAL RESOURCE MANUAL, *supra* note 74, § 1406.

247. *Id.* (citing H.R. REP. NO. 87-958, at 1–4, 9–11 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2563, 2563–65, 2570–71).

248. *Id.*

249. *Id.*

250. *Id.*; *see also* United States v. Hall, 691 F.2d 48, 50 (1st Cir. 1982) ("By contrast, [defendant] would have us construe § [46506] in a way that would require proof of precisely where his threats and assaults took place, in a plane traveling across many states at great speed, high above the earth. Such an interpretation would often make § [46506] difficult to enforce—precisely the opposite of Congress's intention in passing it, and the related venue section.").

to determine proper venue for the accompanying assault charge.[251] Thus, the government may be forced to prosecute two crimes predicated on the same behavior, with the same witnesses, and the same evidence in two different districts. Taking this existing legislation together with the statutory scheme and legislative history, courts would best effectuate congressional intent by interpreting § 3237(a) to cover all sky crimes, including the one at issue in *Lozoya.*

Conclusion

Criminal venue on airplanes adds a new twist on a foundational principle of the American criminal justice system. Courts addressing the problem have tried to preserve a defendant's constitutional right to be tried where a crime occurred without creating a loophole for otherwise guilty parties to escape legal consequences. These efforts, however, have created inflexible rules that make the administration of justice more difficult for defendants, victims, and prosecutors.

While the universe of noncontinuous sky crimes may seem small, the potential implications are not. Though *Lozoya* involved a simple assault between two adults, the Ninth Circuit's narrow, textual approach could have devastating implications for sexual assault cases involving unaccompanied minors. But the Tenth and Eleventh Circuit's broad approach, which would empower prosecutors to bring the case in their preferred flyover district, would impermissibly infringe upon a defendant's right to be tried where the crime occurred. This unchecked prosecutorial power directly implicates the fairness concerns the Sixth Amendment was designed to protect.

This Comment has argued that courts faced with novel venue questions on airplanes should focus instead on the underlying policy concerns that prompted the Framers to enshrine venue protections in the Constitution over 200 years ago. Under § 3237(a), judges should consider the specific facts and circumstances in each case to select a district that serves those policies—most likely the district in which either the arrival or departure airport is located. When judges employ this functional, flexible analysis, they can protect a defendant's constitutional rights, ensure the operability of the criminal justice system in the skies, and close the *Lozoya* loophole for good.

Allyson Shumaker

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251. CRIMINAL RESOURCE MANUAL, *supra* note 74, § 1406.