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DETERMINING JURISDICTIONAL VENUE FOR CRIMES ON COMMERCIAL CARRIERS

Madeline Pinto

I. INTRODUCTION

The scene is all too familiar. Airline passengers cramped in narrow economy cabin seats in uncomfortable proximity to strangers. The stresses of travel have created a palpable atmosphere of heightened emotions, short fuses, and general irritation. Throughout the flight, one particularly long-legged passenger kicks the seat of the passenger in front of him, foiling her plans to take a nap. The female passenger turns around to confront her rude cabin mate, but instead of the brief exchange of polite apologies one expects from such an encounter, the conversation grows heated and one passenger strikes the other. What was once an ordinary commercial flight has instantly become a constitutional conundrum on the issue of venue.

Venue is an essential component of every criminal defendant's constitutional right to a fair trial.¹ Venue is a legal term that refers to the place where an individual's trial will be held.² Drawing from their own experience with colonial trials in England, the Framers of the Constitution ("Framers") were concerned that forcing a criminal defendant to be tried in an unfamiliar state would create undue hardship and undermine the criminal defendant's fundamental right to a fair trial.³ To guard against this potential injustice, Article III of the Constitution mandates that all crimes be tried "in the State where the said Crimes shall have been committed."⁴ The Sixth Amendment reiterates the importance of venue, requiring that "in all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the state and district wherein the crime shall have been committed."⁵ The Federal Rules of Criminal Procedure reflect this constitutional mandate, specifying that "the government must prosecute an offense in a district where the offense was committed" and "the court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the

1. United States v. Cope, 676 F.3d 1219, 1224 (10th Cir. 2012).

2. *Venue*, MIRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/venue> [<https://perma.cc/H7UP-UK77>].

3. United States v. Auernheimer, 748 F.3d 525, 532 (3d Cir. 2014).

4. U.S. CONST. art. III, § 2.

5. U.S. CONST. amend. VI.

witnesses, and the prompt administration of justice.”⁶ Congress has the power to enact individual venue statutes that pre-determine venue decisions for particular categories of crimes.⁷ However, Congress has exercised this power only sparingly.⁸ Determinations of proper venue for the vast majority of crimes hinge on the district in which the crime was committed.⁹

The constitutional importance of venue in criminal prosecutions is clear. But thinking back to the commercial flight example, in what venue can the female passenger be properly tried for the assault? In exactly which state and district did the female passenger strike the male passenger as the airplane moved at high speed across the country? Does it even matter under these strange circumstances? Can the government simply prosecute the female passenger where the flight took off or where it landed? As the world grows increasingly interconnected and the frequency and volume of commercial airline travel skyrockets, these questions of proper venue for in-flight crimes will only grow in importance.¹⁰

The federal circuit courts are split as to whether the proper venue for an in-flight crime is the specific district above which the crime occurred or any district “from, through, or into which” the flight moved.¹¹ This Casenote reviews the Tenth and Eleventh Circuits’ interpretation of 18 U.S.C. § 3237(a) (“section 3237(a)”) as conferring venue for in-flight crimes in any district through which the flight traveled and the Ninth Circuit’s determination that an in-flight crime can be properly prosecuted only in the specific district above which the crime occurred.¹² Part II analyzes relevant statutes and prior case law related to the issue of determining venue. Part III explains why the Ninth Circuit adopted the correct interpretation of section 3237(a).

II. BACKGROUND

The Supreme Court has addressed venue in a few instances. Section A of this part reviews the Supreme Court’s treatment of venue in

6. FED. R. CRIM. P. 18.

7. CHARLES DOYLE, CONG. RESEARCH SERV., RL33223, VENUE: A LEGAL ANALYSIS OF WHERE A FEDERAL CRIME MAY BE TRIED 12-14 (2018).

8. *See id.* at 12.

9. *See id.*

10. Bureau of Transp. Statistics, *2018 Traffic Data for U.S. Airlines and Foreign Airlines U.S. Flights*, U.S. DEP’T OF TRANSP., <https://www.bts.dot.gov/newsroom/2018-traffic-data-us-airlines-and-foreign-airlines-us-flights> (March 21, 2019) [<https://perma.cc/PY9A-K9FW>].

11. 18 U.S.C. § 3237(a).

12. *See United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004); *United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012); *United States v. Lozoya*, 920 F.3d 1231, 1240 (9th Cir. 2019).

*United States v. Johnson*¹³ and Congress's decision to enact section 3237(a) as a direct response to the *Johnson* decision. Section B then details the Supreme Court's decisions in *United States v. Rodriguez-Moreno*¹⁴ and *Ashcroft v. ACLU*¹⁵ following the passage of section 3237(a). Section C summarizes the federal circuit courts' various interpretations of section 3237(a). Lastly, Section D details and compares the Eleventh Circuit's decision in *United States v. Breitweiser*,¹⁶ the Tenth Circuit's decision in *United States v. Cope*,¹⁷ and the Ninth Circuit's decision in *United States v. Lozoya*.¹⁸

A. An Early Look at Venue: The Supreme Court's Decision in United States v. Johnson and Congress' Legislative Response

In *United States v. Johnson*, the Supreme Court was tasked with determining the outcome of a rarely litigated issue: venue.¹⁹ The issue in *Johnson* was whether several defendants charged with violating the Federal Denture Act were properly tried in Delaware.²⁰ While located in Illinois, the defendants violated the Act by mailing dentures to Delaware that were cast by a person not licensed to practice dentistry in Delaware.²¹ The Court reasoned that Congress possesses the authority to insert venue provisions into criminal statutes that define the underlying crime as a continuing offense.²² The continuing offense may then be tried in any district through which the offense moved.²³ However, the Court noted that determinations of venue in criminal cases “are not merely matters of formal legal procedure” but involve “deep issues of public policy.”²⁴ Thus, when the venue provision of a criminal statute equally permits a defendant to be tried in the specific district where the crime occurred and in every district through which the crime moved, courts must interpret the venue provision narrowly to permit trial only in the specific district where the crime was committed.²⁵ The more restrictive interpretation of venue provisions

13. 323 U.S. 273 (1944).

14. 526 U.S. 275 (1999).

15. 535 U.S. 564 (2002).

16. 357 F.3d 1249 (11th Cir. 2004).

17. 676 F.3d 1219 (10th Cir. 2012).

18. 920 F.3d. 1231 (9th Cir. 2019).

19. 323 U.S. at 274.

20. *Id.*

21. *Id.* at 273-74.

22. *Id.* at 275.

23. *Id.*

24. *Id.* at 275-76.

25. *Id.*

in *Johnson* is consistent with the policy considerations underlying the venue safeguards included in the Constitution.²⁶ Because Congress did not include a specific venue provision in the Federal Denture Act, the Court concluded that the Federal Denture Act was reasonably susceptible to either interpretation.²⁷ Therefore, the Court held that under the Federal Denture Act, a defendant must be tried in the specific district in which the mailing of the illegal dentures occurred and, thus, in the present case, venue was not proper in Delaware.²⁸

Congress passed section 3237(a) in direct response to the Supreme Court's decision in *Johnson*.²⁹ Section 3237(a) provides that "any offense against the United States begun in one district and completed in another, or committed in more than one district" may be tried in "any district in which such offense was begun, continued, or completed." Additionally, the second paragraph of the statute provides that "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" that may be tried "in any district from, through, or into which such commerce, mail matter, or imported object or person moves."³⁰ Capitalizing on the congressional authority the Court recognized in *Johnson*, Congress passed section 3237(a) as a specific venue provision that would remove all doubt as to whether offenses such as the mailing of dentures in violation of the Federal Denture Act are to be considered continuing offenses that may be tried in any district in which the offense occurred.³¹ In this way, Congress precluded the Court from narrowly interpreting the Federal Denture Act and similar criminal offenses involving the use of the mails or transportation in interstate commerce to only allow a defendant to be tried in the specific district in which the crime began.³²

B. The Supreme Court's Venue Decisions After Section 3237(a)

In *United States v. Rodriguez-Moreno*, the Supreme Court determined whether venue in a prosecution for using or carrying a firearm in a kidnapping was proper in any district in which the

26. *Id.*

27. *Id.* at 276-78.

28. *Id.*

29. *United States v. Brennan*, 183 F.3d 139, 147 (2d Cir. 1999) (citing Reviser's Note, 18 U.S.C. § 3237(a)).

30. *Id.*

31. *Id.*

32. *Id.*

kidnapping was committed, or only in the single district in which the firearm was used during the kidnapping.³³ The defendant, Rodriguez-Moreno, was hired by a disgruntled drug distributor to locate a rival dealer who had stolen the distributor's cocaine.³⁴ The distributor instructed Rodriguez-Moreno to kidnap the dealer's middleman for leverage during the search.³⁵ Rodriguez-Moreno kidnapped the middleman in Texas and held the middleman captive as he drove to Maryland through Texas, New Jersey, and New York.³⁶ While in Maryland, Rodriguez-Moreno took possession of a firearm and put the firearm to the back of the middleman's head, threatening to shoot him.³⁷ Rodriguez-Moreno was charged with using and carrying a firearm in relation to kidnapping.³⁸ Although the government only proved that Rodriguez-Moreno used the firearm in Maryland, he was tried in the District of New Jersey.³⁹ The Court reasoned that to determine the *locus delicti*⁴⁰ of a crime, courts must first determine the nature of the crime by "identify[ing] the conduct constituting the offense ... and then discern the location of the commission of the criminal acts."⁴¹ Applying this standard, the Court determined that the charged offense consisted of two conduct elements: the using of a firearm and the commission of a kidnapping.⁴² The Court reasoned that kidnapping is a continuing offense because kidnapping does not occur within a discrete point in time, but instead, continues until the victim is free.⁴³ In addressing the location element of the venue inquiry, the Court relied on its previous ruling in *United States v. Lombardo*, where the Court reasoned that "'where a crime consists of distinct parts which have different localities, the whole may be tried where any part can be proved to have been done.'"⁴⁴ Therefore, the Court held that venue in New Jersey was proper because the charged offense consisted of both the using of the firearm and the kidnapping.⁴⁵ Kidnapping is a

33. 526 U.S. 275, 276 (1999).

34. *Id.* at 276-77.

35. *Id.*

36. *Id.* at 277.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Locus delicti* is a Latin term meaning the "scene of the crime." It refers to the location where a criminal offense was committed. *Locus delicti*, USLEGAL.COM, <https://definitions.uslegal.com/locus-delicti/> [<https://perma.cc/ZF2F-J5TE>].

41. *Rodriguez-Moreno*, 526 U.S. at 279 (quoting *United States v. Cabrales*, 524 U.S. 1, 6-7 (1998)).

42. *Id.* at 280.

43. *Id.* at 281.

44. *Id.* (quoting *United States v. Lombardo*, 241 U.S. 73, 60 (1916)).

45. *Id.* at 282.

continuous offense which could be properly tried in any state in which any part of it took place, including New Jersey.⁴⁶ Thus, the entire charged offense could be properly tried in New Jersey because one distinct part of the offense could be tried in New Jersey.⁴⁷

In *Ashcroft v. ACLU*, the Supreme Court determined whether the Child Online Protection Act's ("COPA") use of community standards to identify material that is harmful to minors violated the First Amendment.⁴⁸ Although the case dealt with a legal issue unrelated to venue, Justice Kennedy's concurrence provided a rare glimpse into the Court's interpretation of section 3237(a).⁴⁹ In particular, because COPA does not include an explicit venue provision, Justice Kennedy reasoned that venue under the Act may be governed by section 3237(a).⁵⁰ Justice Kennedy concluded that a violation of COPA does, in fact, fall within the scope of section 3237(a) because "the Act's prohibition includes an interstate commerce element" and, thus, qualifies as an "offense involving ... transportation in interstate ... commerce" that may be tried "in any district from, through, or into which such commerce ... moves."⁵¹ In this way, Justice Kennedy indicated that, in order to constitute an "offense involving . . . interstate ... commerce" within the meaning of section 3237(a), interstate commerce must be one of the elements of the offense.⁵²

C. *The Circuit Courts' Interpretations of Section 3237(a)*

The federal circuit courts are split as to whether an offense involving transportation in interstate commerce as used in section 3237(a) encompasses any offense that takes place on a form of transportation in interstate commerce or only refers to offenses in which transportation in interstate commerce is one of the conduct elements of the offense.⁵³

In *United States v. McCulley*, the Eleventh Circuit determined whether a defendant who had stowed himself away in the cargo hold of an airplane and stolen from the United States mail could be properly tried in the district in which the airplane landed.⁵⁴ The defendant

46. *Id.*

47. *Id.*

48. 535 U.S. 564, 566 (2002).

49. *See id.* at 601-02.

50. *Id.*

51. *Id.*

52. *See id.*

53. 18 U.S.C. § 3237(a).

54. 673 F.2d 346, 348-49 (11th Cir. 1982).

boarded a non-stop flight from Los Angeles to Atlanta by locking himself inside a suitcase.⁵⁵ During the flight, the defendant opened the suitcase and began to loot several United States mail bags located inside the cargo hold.⁵⁶ After being discovered and apprehended in Atlanta, the defendant was tried and convicted of stealing mail in the Northern District of Georgia.⁵⁷ The court concluded that, under section 3237(a), any criminal offense committed on a form of transportation in interstate commerce is a continuing offense that may be properly tried in any district “from, through, or into which” the transportation in interstate commerce moved.⁵⁸ The court reasoned that Congress enacted section 3237(a) to ensure that defendants who commit crimes while traveling in interstate commerce do not avoid prosecution merely because of a lack of venue.⁵⁹ Therefore, the court held that the charged offense fell within the scope of section 3237(a) because the defendant committed the offense while traveling on an airplane.⁶⁰ As such, venue was proper in the Northern District of Georgia, the district in which the airplane had landed.⁶¹

In contrast, the Second Circuit concluded that section 3237(a) applies to an offense only when transportation in interstate commerce is itself an element of the offense.⁶² Specifically, in *United States v. Brennan*, the Second Circuit determined whether defendants charged with mail fraud could be properly tried in the district through which the fraudulent mail traveled.⁶³ The court noted that Congress enacted section 3237(a) in direct response to the Supreme Court’s decision in *Johnson*, which held that the offense of using “the mails or any instrumentality of interstate commerce” to send dentures into a state that were cast by a person not licensed to practice dentistry in that state must be prosecuted in the specific district in which the mailing of the illegal dentures occurred.⁶⁴ Thus, the court reasoned that Congress intended section 3237(a) to address the narrow issue of venue in offenses analogous to the offense at issue in *Johnson*—offenses in which use of the mails or an instrumentality of interstate commerce is an element of the offense.⁶⁵ Therefore, the court held that section

55. *Id.* at 348.

56. *Id.*

57. *Id.* at 348-49.

58. *Id.* at 349-50.

59. *Id.* at 350.

60. *Id.*

61. *Id.*

62. *United States v. Brennan*, 183 F.3d 139, 147 (2d Cir. 1999).

63. *Id.* at 144.

64. *Id.* at 146 (quoting 18 U.S.C. § 1821).

65. *Id.* at 147.

3237(a) did not apply to the offense of mail fraud because the elements of the offense merely involved “acts of depositing or receiving mail, or causing it to be delivered, rather than by the more general and ongoing act of ‘using the mails.’”⁶⁶ As such, the court concluded that mail fraud was not a “continuing offense” within the meaning of section 3237(a) and, thus, the defendants could not be properly tried in any district through which the mail traveled but only in the districts in which the defendants deposited or received the mail.⁶⁷

In *United States v. Morgan*, the D.C. Circuit similarly held that, under section 3237(a), an offense is only an “offense involving the use of the mails [or] transportation in interstate . . . commerce” when use of the mails or transportation in interstate commerce is one of the elements of the offense.⁶⁸ The court reasoned that because section 3237(a) employs the term “offense” which refers to a particular crime, the language of the statute itself instructs courts to look only to the elements of the underlying crime, and not to the circumstances surrounding the crime, to determine whether it constitutes an offense involving transportation in interstate commerce.⁶⁹ Therefore, the court concluded that crimes committed while a defendant travels in interstate commerce, but that do not include transportation in interstate commerce as an element of the crime, are not “offenses involving . . . transportation in interstate . . . commerce” for the purposes of section 3237(a) and, thus, can only be properly tried in the specific district in which the crime occurred.⁷⁰ The court reasoned that an interpretation of section 3237(a) as encompassing any crime that occurs in interstate commerce would result in an untenable expansion of available venue sites under section 3237(a) because almost every criminal offense “involves circumstances in which a person or instrumentality related to the crime” has traveled in interstate commerce.⁷¹

In *United States v. Auernheimer*, the Third Circuit further clarified that to determine whether an offense is a continuing offense within the meaning of section 3237(a), courts must distinguish between the essential conduct elements that constitute the charged offense and the circumstance elements which are merely facts that existed at the time the defendant committed the offense.⁷² The Third Circuit held that only

66. *Id.*

67. *Id.*

68. 393 F.3d 192, 198 (D.C. Cir. 2004).

69. *Id.*

70. *Id.*

71. *Id.* at 200-01.

72. 748 F.3d 525, 533 (3d Cir. 2014); *see also* *United States v. Stinson*, 647 F.3d 1196, 1204 (9th Cir. 2011).

essential conduct elements can serve as a basis for venue.⁷³ As such, venue is not proper in a district when only a circumstance element of the offense occurred in that district.⁷⁴

D. United States v. Breitweiser, United States v. Cope, and United States v. Lozoya

In *United States v. Breitweiser*, the Eleventh Circuit determined whether a defendant could be properly tried for engaging in abusive sexual contact with a minor and assault of a minor while on an airplane in the district in which the airplane landed.⁷⁵ The defendant, Breitweiser, boarded a flight from Houston to Atlanta and sat next to a fourteen-year-old girl and her eighteen-year-old sister.⁷⁶ During the flight, Breitweiser placed his hand on the fourteen-year-old girl's leg and rubbed it up and down her inner thigh.⁷⁷ Additionally, the fourteen-year-old girl testified that, at some point in the flight, she saw Breitweiser masturbating under pillows and a magazine.⁷⁸ Breitweiser was tried and convicted of abusive sexual contact with a minor and assault of a minor in the Northern District of Georgia, the district in which the plane landed.⁷⁹

Relying on the court's decision in *McCulley*, the Eleventh Circuit held that an offense falls within the scope of section 3237(a) if the offense occurred on an instrumentality of interstate commerce.⁸⁰ The Eleventh Circuit dismissed Breitweiser's argument that venue is only proper in the Northern District of Georgia if the government establishes that he committed the charged offenses in the airspace above the Northern District of Georgia, reasoning that "it would be difficult if not impossible for the government to prove . . . exactly which federal district was beneath the plane when Breitweiser committed the crimes."⁸¹ The Eleventh Circuit concluded that an interpretation of section 3237(a) that imposes such a great burden on the government to establish proper venue for a crime committed in interstate commerce directly contradicts Congress's intent. Namely, Congress intended for section 3237(a) to ensure that crimes committed

73. *Auernheimer*, 748 F.3d at 533.

74. *Id.*

75. 357 F.3d 1249, 1253-54 (11th Cir. 2004).

76. *Id.* at 1252.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1253.

81. *Id.*

in interstate commerce will not escape prosecution for lack of venue.⁸² Therefore, the Eleventh Circuit determined that to establish venue under section 3237(a), the government need only show that the defendant committed the charged offense while traveling in interstate commerce.⁸³ Thus, because Breitweiser committed the charged offenses while flying on an airplane, under section 3237(a), the government could properly prosecute him in “any district from, through, or into which” the airplane moved, including the Northern District of Georgia.⁸⁴

In *United States v. Cope*, the Tenth Circuit similarly held that an “offense involving ... transportation in interstate ... commerce,” as used in section 3237(a), refers to any criminal offense committed on a mode of transportation in interstate commerce.⁸⁵ The defendant, Cope, was a co-pilot on a commercial flight from Texas to Colorado.⁸⁶ During the flight, Cope’s captain smelled alcohol in the cockpit and eventually discovered that the smell was coming from Cope.⁸⁷ After the plane landed in Colorado, Cope took a breathalyzer test that revealed he was inebriated.⁸⁸ Cope was tried and convicted of operating a common carrier while under the influence of alcohol in the District of Colorado.⁸⁹ The Tenth Circuit concluded that because Cope was under the influence of alcohol during a flight traveling in interstate commerce, under section 3237(a), venue was proper in any district through which the flight traveled, including the District of Colorado.⁹⁰ The Tenth Circuit reasoned that because section 3237(a) encompasses any offense committed while traveling in interstate commerce, the government was not required to show that Cope was under the influence of alcohol specifically in Colorado.⁹¹ Rather, the undisputed evidence that Cope was under the influence of alcohol during the flight was sufficient to establish that, under section 3237(a), venue was proper in the District of Colorado.⁹²

In contrast, the Ninth Circuit in *United States v. Lozoya* held that, under section 3237(a), an offense only qualifies as an “offense involving ... transportation in interstate ... commerce” when traveling

82. *Id.* at 1253-54.

83. *Id.*

84. *Id.*

85. 676 F.3d, 1219, 1225 (10th Cir. 2012).

86. *Id.* at 1221.

87. *Id.*

88. *Id.* at 1222.

89. *Id.*

90. *Id.* at 1225.

91. *Id.*

92. *Id.*

in interstate commerce is one of the elements of the offense.⁹³ In *Lozoya*, the Ninth Circuit was asked to determine whether the proper venue for an assault committed on an airplane was the district in which the airplane landed.⁹⁴ During a commercial flight from Minneapolis to Los Angeles, the defendant, Lozoya, was unable to sleep because the passenger sitting behind her, Wolff, constantly bumped her seat.⁹⁵ Later in the flight, Lozoya confronted Wolff and, after a heated exchange, Lozoya hit Wolff in the face with her hand, causing his nose to bleed.⁹⁶ Lozoya was tried and convicted of assault in the district where the flight had landed, the Central District of California.⁹⁷ Applying the two-pronged test set forth by the Supreme Court in *Rodriguez-Moreno*, the Ninth Circuit found that the only essential conduct element of the charged offense was the assault.⁹⁸ Because the assault did not occur within the Central District of California, the Ninth Circuit concluded that, under *Rodriguez-Moreno*, the offense could not be properly tried in that district.⁹⁹

The Ninth Circuit next turned to the government's argument that venue was proper in the Central District of California under section 3237(a).¹⁰⁰ The Ninth Circuit concluded that the first paragraph of section 3237(a) did not confer venue in the Central District of California because that provision applies only to continuing offenses that are committed across multiple districts and Lozoya's assault was a point-in-time offense that "occurred in an instant and likely in the airspace of only one district."¹⁰¹ Further, the Ninth Circuit concluded that the second paragraph of section 3237(a) also did not confer venue in the Central District of California because, although the assault occurred on an airplane, travel in interstate commerce is not itself an element of assault.¹⁰² The court reasoned that, even if the fact that the crime occurred on an airplane is construed as an element of the assault, it would be a circumstance element rather than a conduct element of the offense, which cannot provide a basis for venue.¹⁰³ Therefore, the Ninth Circuit held that Lozoya could be properly tried only in the

93. 920 F.3d 1231, 1239-40 (9th Cir. 2019).

94. *Id.* at 1238.

95. *Id.* at 1233.

96. *Id.* at 1233-34.

97. *Id.* at 1235-36.

98. *Id.* at 1239.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 1240.

103. *Id.*

specific district above which the assault occurred.¹⁰⁴ Thus, because the assault did not occur above the Central District of California, venue in that district was improper.¹⁰⁵

The Ninth Circuit recognized that its interpretation of section 3237(a) conflicted with that of the Tenth and Eleventh Circuits but concluded that the reasoning of the other circuits was flawed because both circuits failed to evaluate the nature of the conduct constituting the offense as required by the two-pronged *Rodriguez-Moreno* test and, instead, focused on the practical difficulties of requiring the government to prove exactly which district the plane was flying over when the crime occurred.¹⁰⁶

Although the Ninth Circuit recognized the “creeping absurdity in [its] holding,” the court concluded that the clear mandate of the Constitution and the Supreme Court’s decision in *Rodriguez-Moreno* trumped the practical concerns expressed by the Tenth and Eleventh Circuits.¹⁰⁷ The Ninth Circuit noted that it is within the authority of Congress, rather than the courts, to address “any irrationality that might follow from the [court’s] conclusion” by enacting legislation that establishes a more practical and workable standard for determining venue when a crime occurs during a flight.¹⁰⁸

The dissent in *Lozoya* disagreed with the majority’s interpretation of the second paragraph of section 3237(a), arguing that the Tenth and Eleventh Circuits were correct in holding that an “offense involving ... transportation in interstate ... commerce” encompasses any crime committed while traveling in interstate commerce.¹⁰⁹ The dissent reasoned that the majority’s construction of section 3237(a) makes prosecuting in-flight crimes nearly impossible and may even result in the infliction of further harm to victims by requiring them to recount the exact moment when a traumatic crime occurred.¹¹⁰ Additionally, the dissent argued that requiring the prosecution of an in-flight crime in “a ‘flyover state’ where the defendant and potential witnesses have no ties” does not serve the fundamental purpose of venue to protect a defendant’s right to a fair trial.¹¹¹ Further, allowing an in-flight crime to be prosecuted in the district in which the flight lands does not necessarily disadvantage the defendant or undermine the defendant’s

104. *Id.* at 1243.

105. *Id.*

106. *Id.* at 1240-41.

107. *Id.* at 1242-43.

108. *Id.* at 1243.

109. *Id.* at 1244.

110. *Id.* at 1244-45.

111. *Id.*

right to a fair trial.¹¹² Thus, the dissent concluded that the majority's interpretation of section 3237(a) is entirely inconsistent with Congress's intent in enacting the statute.¹¹³

III. DISCUSSION

The Ninth Circuit adopted the correct interpretation of section 3237(a) in *Lozoya*. Although the Ninth Circuit's reasoning misidentified the difference between its own determination of proper venue for in-flight crimes and that of the Tenth and Eleventh Circuits', the Ninth Circuit's interpretation of an offense involving the use of transportation in interstate commerce is consistent with Congress's legislative purpose in enacting section 3237(a). Further, the Ninth Circuit's interpretation of section 3237(a) adheres to the narrow construction of venue provisions set forth by the Supreme Court in *Johnson*. Justice Kennedy's concurrence in *Ashcroft v. ACLU* also lends support to the Ninth Circuit's interpretation of section 3237(a) by suggesting that the Supreme Court tends to interpret the term "any offense involving the use of ... transportation in interstate ... commerce" in accordance with the Ninth Circuit's decision in *Lozoya*. Lastly, the Ninth Circuit's interpretation of section 3237(a) adheres to the distinction between circumstance elements and essential conducts elements of a criminal offense drawn by the Third Circuit for the purposes of establishing proper venue. Although the dissent in *Lozoya* raises valid concerns regarding the feasibility of the majority's interpretation of section 3237(a), Congress—not the judiciary—has the authority to amend the language of the statute or enact a new venue statute to address the practical difficulties of establishing proper venue for point in time offenses committed while traveling in interstate commerce.

A. The Ninth Circuit's reasoning in Lozoya misidentifies the source of the current circuit split

The Ninth Circuit's reasoning in *Lozoya* regarding the difference between its own determination of proper venue for in-flight crimes and that of the Tenth and Eleventh Circuits' is erroneous. In *Lozoya*, the Ninth Circuit acknowledged that its holding contradicted that of the Tenth and Eleventh Circuits' but concluded that neither the Tenth Circuit's reasoning in *Cope* nor the Eleventh Circuit's reasoning in

112. *Id.* at 1245.

113. *Id.* at 1244-45.

Breitweiser was persuasive. The Ninth Circuit argued that neither the Tenth nor Eleventh Circuits analyzed the essential conduct elements of the charged offense when determining the *locus delicti* of the crime and, thus, failed to comply with the first prong of the *Rodriguez-Moreno* test. However, the difference between the Tenth and Eleventh Circuits' conclusion and the Ninth Circuit's conclusion regarding proper venue for in-flight crimes is not, in fact, attributable to differences in the Circuits' application of the *Rodriguez-Moreno* framework. Even if the Tenth and Eleventh Circuits had been more explicit about their application of the *Rodriguez-Moreno* framework, the result in *Breitweiser* and *Cope* would have been the same because the charged offenses at issue in *Breitweiser* and *Cope* were continuing offenses while the charged offense at issue in *Lozoya* was a point-in-time offense.

Applying the first prong of the *Rodriguez-Moreno* test to the facts in *Breitweiser*, the essential conduct elements of the charged offenses of abusive sexual contact with a minor and assault of a minor occurred continuously throughout the flight rather than in one particular instant and, thus, constituted continuous offenses. Therefore, under the second prong of the *Rodriguez-Moreno* test, the charged offense occurred across multiple districts and, thus, falls within the scope of the first sentence of section 3237(a). As such, the defendant could be properly tried in any district in which the offense was begun, continued, or completed. Because the defendant engaged in the prohibited conduct throughout the flight, the Eleventh Circuit correctly concluded that venue was proper in any district from, through, or into which the flight traveled.

Similarly, in *Cope*, the essential conduct elements of the charged offense consisted of operating a commercial airplane while under the influence of alcohol which occurred continuously throughout the flight as opposed to within a particular instant in time. As such, the charged offense was a continuous offense that occurred across multiple districts. Therefore, the offense fell within the scope of the first sentence of section 3237(a) and venue was proper in any district in which the offense was begun, continued, or completed. Because, by definition, the charged offense continued throughout the duration of the flight, the Tenth Circuit correctly held that the defendant could be tried in any district from, through, or into which the flight traveled.

In contrast, the charged offense of assault in *Lozoya* was a point-in-time offense rather than a continuous offense because the essential conduct element of the assault, the defendant's act of punching her fellow passenger in the nose, occurred in a single instant in time and, thus, in a single location and district. Unlike in *Breitweiser* and *Cope*,

the charged offense in *Lozoya* did not fall within the scope of the first sentence of section 3237(a). Therefore, the Ninth Circuit was mistaken in attributing the Tenth and Eleventh Circuits' decisions regarding the proper venue for in-flight crimes to their failure to apply the two-pronged *Rodriguez-Moreno* test. Even if the Tenth and Eleventh Circuits had more explicitly employed the *Rodriguez-Moreno* test, the circuits would have arrived at the exact same conclusions.

The difference between the Tenth and Eleventh Circuits' conclusion and the Ninth Circuit's conclusion is actually attributable to the circuits' varied interpretations of what is required to invoke the second sentence of section 3237(a). Specifically, in *Lozoya*, the Ninth Circuit determined that, in order to be considered an offense involving interstate commerce under section 3237(a), it is not sufficient for the charged offense to have merely occurred on an airplane, but rather, travel in interstate commerce must be one of the elements of the charged offense itself. In contrast, in *Cope and Breitweiser*, the Tenth and Eleventh Circuits determined that to qualify as an offense involving interstate commerce under section 3237(a), the charged offense need only have occurred on an instrument of interstate commerce. Had the Ninth Circuit in *Lozoya* applied the Tenth and Eleventh Circuits' interpretation of an offense involving interstate commerce, the Ninth Circuit would have reached the same conclusion as the Tenth and Eleventh Circuits. Because the charged offense of assault occurred on an airplane traveling in interstate commerce, the defendant could be properly tried in any district from, through, or into which the airplane traveled. Therefore, rather than originating from the circuits' differing applications of the *Rodriguez-Moreno* framework, the circuit split created by the Ninth Circuit's decision in *Lozoya* originates from the circuits' distinct interpretations of what constitutes an offense involving interstate commerce within the meaning of section 3237(a).

B. The Ninth Circuit's interpretation of section 3237(a) in Lozoya is consistent with Congress's legislative intent

Although the Ninth Circuit's reasoning as to the source of the current circuit split is erroneous, the Ninth Circuit, nonetheless, adopted the correct interpretation of section 3237(a) in *Lozoya*. In particular, the Ninth Circuit's interpretation of section 3237(a) best serves Congress's legislative intent in enacting the statute. Congress passed section 3237(a). As noted by the Second Circuit in *United States v. Brennan*, because use of the mail or an instrumentality of interstate commerce was an element of the charged offense at issue in

Johnson, it appears that Congress intended section 3237(a) to apply only to offenses in which interstate commerce or use of the mail is actually an element of the offense rather than to any criminal offense that happens to be committed on a mode of transportation in interstate commerce. As such, the Ninth Circuit's conclusion that the in-flight assault charged in *Lozoya* was not an offense involving interstate commerce is consistent with Congress's intent that section 3237(a) applies only where traveling in interstate commerce is one of the elements of the offense. Traveling in interstate commerce is not an element of assault, so assault was not in the purview of the crimes contemplated by Congress when enacting section 3237(a).¹¹⁴

In contrast, the Tenth and Eleventh Circuits' interpretation of section 3237(a) is entirely inconsistent with Congress's legislative intent in enacting the venue statute. In *Cope* and *Breitweiser*, the Tenth and Eleventh Circuits' conclusion that an offense involving interstate commerce—as used in section 3237(a)—encompasses any criminal offense committed on a mode of transportation in interstate commerce wholly overlooks the direct relationship between *Johnson* and Congress' decision to enact section 3237(a). In addressing the legislative intent behind section 3237(a), neither the Tenth nor Eleventh Circuit discussed the legislative history of the statute as a direct reaction to the Court's decision in *Johnson*, but rather blindly relied on the reasoning provided in the Eleventh Circuit's decision in *United States v. McCulley*. In *McCulley*, the Eleventh Circuit concluded that Congress intended section 3237(a) to serve as a “catchall provision” designed to ensure that crimes committed while traveling in interstate commerce did not avoid prosecution simply because of a lack of venue.¹¹⁵ However, the Eleventh Circuit provided no substantive evidence from the statute's plain language or legislative history to support this assertion. Instead, in support of its interpretation, the Eleventh Circuit merely provided citations to analogous venue statutes enacted by state legislatures which are largely irrelevant to the specific question of Congress's intent in enacting section 3237(a).

Further, in *Breitweiser*, the Eleventh Circuit not only blindly adhered to the reasoning provided in *McCulley*, but also mistakenly relied on pure policy-based reasoning to support its interpretation of section 3237(a). Specifically, the Eleventh Circuit reasoned that section 3237(a) must apply to any crime that occurs during travel in interstate commerce because an interpretation of section 3237(a) that

114. “An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.” CAL. PENAL CODE § 240 (Deering 2019).

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

requires the government to prove exactly which federal district was underneath the plane precisely when the defendant committed the crime would impose a great burden on the government in establishing proper venue for in-flight crimes that Congress could not have possibly intended when enacting the statute. Regardless of whether the practical difficulties raised by the Eleventh Circuit are valid, these issues of policy are for the legislature, rather than the courts, to decide.¹¹⁶ By explicitly enacting section 3237(a) in direct response to the Court's decision in *Johnson*, Congress signaled that it has decided that the great public interest in maintaining venue as a constitutional protection for criminal defendants outweighs policy concerns regarding the practical difficulties imposed on the state in determining proper venue for in-flight crimes. In this way, the Tenth and Eleventh Circuits' interpretation of section 3237(a) is not founded on actual evidence of legislative intent but merely on the unsubstantiated conclusions set forth in *McCulley* and various policy concerns better suited for the legislature than the judiciary. Therefore, in neglecting to consider the relationship between Congress's enactment of section 3237(a) and the Court's decision in *Johnson*, the Tenth and Eleventh Circuits adopted an interpretation of section 3237(a) that is wholly inconsistent with Congress's true legislative intent in enacting the venue statute.

C. The Supreme Court's decision in Johnson and Justice Kennedy's concurrence in Ashcroft v. ACLU support the Ninth Circuit's interpretation of section 3237(a)

The Ninth Circuit's interpretation of section 3237(a) best comports with the narrow construction of venue provisions set forth by the Supreme Court in *Johnson*. Applying the Supreme Court's restrictive interpretation of venue provisions to section 3237(a) suggests that courts should not interpret the statute to apply broadly to any crime that occurs during travel in interstate commerce, but only to the narrow class of offenses in which travel in interstate commerce is an element of the offense itself. Specifically, because the term offense involving the use of transportation in interstate commerce is ambiguous and undefined, the statute can reasonably be interpreted to apply either to any crime that occurs during travel in interstate commerce or only to crimes in which travel in interstate commerce is an element of the offense.¹¹⁷ Because the language of 3237(a) is reasonably susceptible

116. See *United States v. Johnson*, 323 U.S. 273, 275-77 (1944).

117. See Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, CONGRESSIONAL RESEARCH SERVICE 8 (2014), <https://fas.org/sgp/crs/misc/97-589.pdf> [<https://perma.cc/Z3GM-E2BK>].

to either interpretation, the Supreme Court's decision in *Johnson* instructs courts to interpret the statute narrowly as applying only where travel in interstate commerce is an element of the underlying criminal offense. As explained by the Court in *Johnson*, this restrictive interpretation of section 3237(a) best ensures that the venue safeguards the Framers' included in the Constitution continue to protect the rights of criminal defendants.

In contrast, the Tenth and Eleventh Circuits' decision to adopt a broad interpretation of offense involving transportation in interstate commerce as referring to any crime committed during travel in interstate commerce entirely disregards the Supreme Court's mandate in *Johnson*. Consequently, the Tenth and Eleventh Circuits' decisions undermine the constitutional policy underlying the venue safeguards the Framers' intended to protect the rights of criminal defendants. Thus, in light of *Johnson*, the Ninth Circuit, rather than the Tenth and Eleventh Circuits, adopted the correct interpretation of section 3237(a).

Justice Kennedy's concurrence, joined by Justice Souter and Justice Ginsburg, in *Ashcroft v. ACLU* lends additional support to the narrow interpretation of section 3237(a) adopted by the Ninth Circuit in *Lozoya*. Like the Ninth Circuit, Justice Kennedy evaluated whether section 3237(a) governed venue for a violation of COPA by looking to the elements of a COPA offense and determining whether they expressly included transportation in interstate commerce. Contrary to the Tenth and Eleventh Circuits' decisions in *Cope* and *Breitweiser*, Justice Kennedy's inquiry into the application of section 3237(a) to a COPA violation included no consideration of whether a COPA offense may happen to occur during transportation in interstate commerce. Additionally, Justice Kennedy concluded that a violation of COPA constitutes an offense involving the use of transportation in interstate commerce within the meaning of section 3237(a) specifically because travel in interstate commerce is an element of the offense. Justice Kennedy's concurrence supports the Ninth Circuit's conclusion that courts should interpret section 3237(a) to apply only where travel in interstate commerce is an element of the charged offense itself. Although Justice Kennedy's concurrence in *Ashcroft v. ACLU* only provides insight into a few of the justice's interpretations of section 3237(a), when considered in conjunction with the foregoing evidence, it nonetheless suggests that, should the Court decide to review this circuit split, the Court is more likely to adopt the Ninth Circuit's restrictive interpretation of section 3237(a) than the Tenth and Eleventh Circuit's expansive interpretation of section 3237(a) as correct.

D. The Ninth Circuit's interpretation of section 3237(a) ensures that only the essential conduct elements of a criminal offense serve as a basis for venue

The Ninth Circuit's interpretation of section 3237(a) is also consistent with the Third Circuit's holding in *Auernheimer* that only the essential conduct elements of an offense may serve as a basis for venue. Specifically, the Ninth Circuit's interpretation of section 3237(a) requires courts to determine whether an offense constitutes an offense involving the use of transportation in interstate commerce by looking to the essential conduct elements of the underlying criminal offense and determining whether travel in interstate commerce is one of those essential conduct elements. Consistent with the Third Circuit's decision in *Auernheimer*, the Ninth Circuit's interpretation of section 3237(a) ensures that only the essential conduct elements of the underlying criminal offense serve as a basis for venue.

In contrast, the Tenth and Eleventh Circuits' interpretation of section 3237(a) allows courts to determine that an offense constitutes an offense involving transportation in interstate commerce by merely looking to the circumstance elements surrounding the commission of the crime and discerning whether the crime took place on an instrument of interstate commerce. Thus, contrary to the Third Circuit's decision in *Auernheimer*, the Tenth and Eleventh Circuits' interpretation of section 3237(a) permits a finding of proper venue in a district in which only a circumstance element of the offense—travel in interstate commerce—occurred in that district. The Ninth Circuit's interpretation of the statute adheres to this distinction between circumstance elements and conduct elements of a criminal offense for the purpose of venue.

Therefore, the Ninth Circuit adopted the correct interpretation of section 3237(a) in *Lozoya*. The Ninth Circuit's interpretation best serves Congress's legislative intent in enacting section 3237(a) and is most consistent with the restrictive interpretation of venue provisions set forth by the Supreme Court in *Johnson*. Additionally, Justice Kennedy's concurrence in *Ashcroft v. ACLU* indicates that the Supreme Court is more likely to interpret section 3237(a) in accordance with the Ninth Circuit's decision in *Lozoya*. Further, the Ninth Circuit's interpretation of section 3237(a) is consistent with the Third Circuit's holding in *Auernheimer* that only essential conduct elements of an offense may provide a basis for venue.

E. The practical concerns raised by the dissent in Lozoya must be resolved by legislative, rather than judicial, action

The dissent in *Lozoya* raises valid issues regarding the feasibility and “creeping absurdity” of the majority’s interpretation of section 3237(a). For example, under the Ninth Circuit’s narrow construction of an offense involving transportation in interstate commerce, in order to properly prosecute a crime that occurred on a flight from New York to Los Angeles, the state would have to pinpoint exactly which out of the hundreds of districts the flight flew over the plane was flying above at the exact moment when the crime was committed. In cases involving crimes of sexual abuse or misconduct, like *Breitweiser*, this would require victims to relive their traumatic experiences in order to recount exactly when the crime occurred. Further, in instances where the state is unable to pinpoint the exact location of the crime or lacks the resources to engage in the extensive investigation necessary to determine the exact location, serious criminal offenses will go unprosecuted merely because they happened to occur while traveling in interstate commerce.

However, these policy considerations are within the purview of Congress, not the courts. As evidenced by the Supreme Court’s decision in *Johnson*, the legislature, not the judiciary, has the authority to enact venue provisions that define particular crimes as continuing offenses that may be tried in any district from, through, or into which the offense was committed. In fact, the Supreme Court’s decision in *Johnson* indicated that in cases where the language of a venue provision is ambiguous, the role of the courts is limited to strictly construing the venue provision as enacted by Congress in order to protect criminal defendants’ constitutional right to a fair trial. Further, the relationship between the Supreme Court’s decision in *Johnson* and Congress’s subsequent enactment of section 3237(a) suggests that where Congress perceives that the courts’ strict interpretation of a venue provision creates practical difficulties or policy concerns, it is Congress’s role to pass a new venue provision that addresses and resolves these concerns. It is this pattern that should be followed here.

Due to the practical difficulties that arise when the state is required to prosecute in-flight offenses that fall outside the scope of section 3237(a) in the exact district above which the offense occurred, Congress should enact a new venue statute or amend section 3237(a) to address proper venue for crimes that merely occur while traveling in interstate commerce. However, until Congress decides to address this venue issue, it is the role of the courts to strictly construe the language of section 3237(a) and apply it only to offenses in which traveling in interstate commerce is an element of the offense itself.

Therefore, although the dissent raises valid concerns regarding the practical effects of the majority's decision, the Ninth Circuit correctly adopted a narrow interpretation of section 3237(a) regardless of its own concerns regarding the "creeping absurdity" of its decision, and properly invited Congress to address the issue of venue for in-flight crimes.

IV. CONCLUSION

The Ninth Circuit adopted the correct interpretation of 18 U.S.C. § 3237(a) in *Lozoya* because Congress, not the courts, possesses the authority to legislate. Therefore, courts must apply legislation as written and conclude that all in-flight offenses should be treated as continuing offenses that may be properly tried in any district from, through, or into which the airplane traveled.

Although the Ninth Circuit correctly adopted an interpretation that adheres to Congress's legislative intent in enacting section 3237(a), Congress should take heed of the legitimate practical difficulties that arise from the statute's limited application and take action either to amend section 3237(a) or enact a new venue statute that addresses the venue issues created by in-flight criminal offenses. For example, insisting that an in-flight crime be prosecuted in the exact district above which the offense occurred does not actually protect criminal defendants' rights as contemplated by the Framers; instead, this is actually more likely to result in the very infringement of a criminal defendant's rights that the Framers sought to avoid, forcing criminal defendants to defend themselves in foreign districts where they have no ties. Further, not only does the current legislative regime provide insufficient protection to criminal defendants, but it also allows criminal offenses to go unprosecuted merely because of the great difficulty of establishing proper venue. Because of the sheer number of districts over which an airplane flies during a single flight, pinpointing the exact district over which an offense occurred is extremely difficult and may require the prosecutor to ask victims of violent crimes or sexual assault and misconduct to recall painful events in excruciating detail. The difficulty of this task combined with the limited resources and time possessed by most prosecutor's offices¹¹⁸ almost ensures that a great deal of in-flight crimes will avoid prosecution for lack of proper venue. In the future, this issue will become more prevalent if the number of in-flight crimes committed

118. Daniel S. Lawrence et al., *Prosecutor Priorities, Challenges, and Solutions*, RAND, 4-5 (2019), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2800/RR2892/RAND_RR2892.pdf [<https://perma.cc/6LPM-WTVG>].

continues its upward trend.¹¹⁹

For these reasons, although the Ninth Circuit correctly adopted an interpretation that adheres to Congress's legislative intent in enacting section 3237(a), Congress should take action either to amend section 3237(a) or enact a new venue statute that addresses the venue issues created by in-flight criminal offenses.

119. See Bureau of Transp. Statistics, *supra* note 10.