

5-30-2020

## Fight or Flight: The Ninth Circuit's Advancement of Textualism During an Era of Intentionalism in *United States v. Lozoya*

Zachary Remijas

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Criminal Law Commons](#), [Jurisdiction Commons](#), and the [Legislation Commons](#)

### Recommended Citation

Zachary Remijas *Fight or Flight: The Ninth Circuit's Advancement of Textualism During an Era of Intentionalism in United States v. Lozoya*, 2019 Pepp. L. Rev. 89 (2020)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol2019/iss1/5>

This Note is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [Katrina.Gallardo@pepperdine.edu](mailto:Katrina.Gallardo@pepperdine.edu), [anna.speth@pepperdine.edu](mailto:anna.speth@pepperdine.edu), [linhgavin.do@pepperdine.edu](mailto:linhgavin.do@pepperdine.edu).

# **Fight or Flight: The Ninth Circuit’s Advancement of Textualism During an Era of Intentionalism in *United States v. Lozoya***

## *Abstract*

*The modern complexities of global interaction and accessibility have recently forced some federal courts to reconsider standards for determining proper venue for criminal defendants who commit offenses while engaged in transportation, particularly those involving interstate commerce and crimes spanning multiple districts. These courts’ application of two adversarial schools of statutory interpretation—textualism and intentionalism—has driven conflict between textualist jurisdictions adhering to the plain meaning of established constitutional and statutory sources, and intentionalist jurisdictions refraining from the “creeping absurdity” of establishing venue for certain in-transit offenses under the literal meaning of such provisions.*

*This Note endorses the sensibility and superiority of the Ninth Circuit’s textualist approach to statutory interpretation in determining the proper venue for an in-flight assault in *United States v. Lozoya*. Specifically, this Note covers the significance of the *Lozoya* decision in exercising statutory interpretation that was faithful to well-settled traditions of venue law without heeding to the accessible but superficial understanding of 18 U.S.C. § 3237(a) that recently guided other federal circuit courts.*

TABLE OF CONTENTS

I. INTRODUCTION .....	91
II. HISTORICAL BACKGROUND OF VENUE AND STATUTORY INTERPRETATION .....	92
III. FACTS OF <i>LOZOYA</i> .....	95
IV. ANALYSIS OF THE LOZOYA OPINION .....	97
A. Judge Smith’s Opinion .....	97
1. The Inapplicability and Preclusion of the First Paragraph of 18 U.S.C. § 3238.....	97
2. The Superiority of a Textualist Reading of 18 U.S.C. § 3237(a).....	97
B. Judge Owens’s Partial Concurrence and Partial Dissent .....	100
C. Assessing The Risk of Absurdity Resulting From Application of the Majority’s Holding .....	100
V. IMPACT & CONCLUSION.....	101

## I. INTRODUCTION

Recent adjudication concerning the proper jurisdiction for in-flight criminal offenses has taken a permissive approach in authorizing venue, often causing venue to land outside of the scope of well-established constitutional and federal sources.<sup>1</sup> As a central tenet of our republican system, venue primarily pertains to the district where a crime may be brought to trial so as to protect the defendant from a trial in a district inconvenient or unfair to him.<sup>2</sup> Broad readings of statutes such as 18 U.S.C. § 3237(a) and 18 U.S.C. § 3238, while interpreted in the pursuit of justice,<sup>3</sup> have given effect to venue in any number of districts traversed during the course of the flight and the district in which the plane lands. Under circumstances such as those confronted in *United States v. Lozoya*, the Ninth Circuit recognized that such broad statutory interpretation dilutes the plain meaning of these statutes and undermines respected “notions of justice” rooted in practiced constitutional and federal venue provisions.<sup>4</sup>

In *Lozoya*, the Ninth Circuit was confronted with the challenge of determining where the proper venue should be for the trial of a defendant charged with an assault that occurred during a flight from Minneapolis to Los Angeles.<sup>5</sup> The court took a contrasting approach to interpret 18 U.S.C. § 3237(a) and addressed how linchpin clauses, such as offenses “involving the use of . . . transportation in interstate commerce” and “continuing offense[s],” were intended to operate by their plain meaning.<sup>6</sup> Both Judge Smith’s majority opinion and Judge Owens’s dissent contemplated whether the court’s holding aligned with the absurdity doctrine, which instructs courts that statutes “should be interpreted to avoid absurd results, unless a contrary

---

1. See *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004) (finding that venue was proper for crimes committed on an airplane in the district where the airplane lands); *United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) (finding that venue was proper for crimes committed on an airplane in any district through which the plane travels during the flight).

2. See Megan O’Neill, Comment, *Extra Venues for Extraterritorial Crimes? 18 U.S.C. § 3238 and Cross-Border Criminal Activity*, 80 U. CHI. L. REV. 1425, 1448 (2013).

3. See *United States v. McCulley*, 673 F.2d 346, 349–350 (11th Cir. 1982) (“We construe any violation of this statute which occurs on some form of transportation in interstate or foreign commerce to be a ‘continuing violation’ under 18 U.S.C. § 3237[.] . . . [The statute] is a catchall provision designed to prevent a crime which has been committed in transit from escaping punishment for lack of venue.”).

4. See Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 146 (1994).

5. *United States v. Lozoya*, 920 F.3d 1231, 1233 (9th Cir. 2019).

6. *Id.* at 1239–40.

outcome was fully anticipated and clearly manifested by the statutory language or its legislative history.”<sup>7</sup>

This Note argues that the Ninth Circuit reached the correct holding in *Lozoya* in comparison to recent decisions concerning venue decided by the Tenth and Eleventh Circuits which allowed speculative congressional intent to take precedence over the plain meaning of pivotal statutory provisions. While the meaning of key clauses in § 3237(a) is not “plain” in the sense that it can be ascertained without effort, the effort given by the Ninth Circuit in *Lozoya* was necessary in order to buck the trend of allowing flawed catchall statutory interpretation to unjustly expand the grasp of venue determinations under circumstances that are already properly addressed by constitutional norms.

## II. HISTORICAL BACKGROUND OF VENUE AND STATUTORY INTERPRETATION

The Sixth Amendment of our Constitution laid the foundation for venue as a principle designed to protect a criminal defendant’s right to a fair and impartial trial, stating that the defendant must be prosecuted in “the state and district wherein the crime shall have been committed.”<sup>8</sup> In recent years, the plain meaning of this fundamental concept has been unnecessarily complicated by courts seeking to determine the proper venue for crimes committed during airplane flights.<sup>9</sup> Modern complexities of global accessibility have forced some courts to reconsider standards for providing venue to criminal defendants charged with committing offenses while engaged in transportation, particularly transportation that involves interstate commerce and spans multiple districts.<sup>10</sup> Courts have focused on two federal statutes—18 U.S.C. § 3237(a) and 18 U.S.C. § 3238—in deciding venue for criminal offenses involving interstate transportation and crimes spanning multiple districts.

18 U.S.C. § 3237(a) states that:

---

7. Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1006 (2006).

8. U.S. CONST. amend. VI; *see also* FED R. CRIM. P. 18 (stating that “[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.”).

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

10. *Lozoya*, 920 F.3d at 30 (quoting S. REP. NO. 87-694, at 2–3 (1961)).

Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.<sup>11</sup>

Meanwhile, 18 U.S.C. § 3238 states that “[t]he trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought . . . .”<sup>12</sup>

While the statutes themselves present no conflict of law, the federal court’s application of two adversarial traditions of statutory interpretation have created absurd results under certain circumstances, which has given rise some to jurisdictional concerns. The first school of thought, intentionalism, is premised on the presumption that Congress always acts rationally when creating legislation.<sup>13</sup> “By presuming that the legislature would not intend absurd consequences, the court avoids the appearance that it is infringing on legislative supremacy when it rejects a plain meaning that would result in absurdity.”<sup>14</sup> The other school of thought, textualism, refers to the principle that statutes should be read with strict literalism, as “only through a system of interpretation limited to the words of the statute can we hope to have clear and predictable rules . . . .”<sup>15</sup> Nevertheless, textualism does not proceed without some of the flexibility expressed in intentionalism, as textualists interpret statutory language “by asking how ‘a skilled, objectively reasonable user of

---

11. 18 U.S.C. § 3237(a) (1948).

12. 18 U.S.C. § 3238 (1948).

13. Dougherty, *supra* note 4, at 136–37.

14. *Id.* The absurdity doctrine, which entails that statutes should be interpreted to avoid absurd results, will be discussed in Part IV in regard to the likelihood of reaching absurd results when determining venue if other courts adhere to the Ninth Circuit’s holding in *Lozoya*. See Staszewski, *supra* note 7, at 1006.

15. Dougherty, *supra* note 4, at 133–34.

words' would have understood the statutory text.”<sup>16</sup> Both of these approaches to statutory interpretation will be explored within the scope of *Lozoya*, particularly in relation to 18 U.S.C. § 3237(a).

Recent federal decisions concerning the proper venue for an offense committed during a cross-county flight have authorized a broader scope in establishing venue than that landed upon by the Ninth Circuit in 2019. In *United States v. Breitweiser*, the Eleventh Circuit held that venue for mid-air crimes is proper in the district where the airplane lands.<sup>17</sup> There, in the wake of a sexual assault against a minor that occurred over the course of a flight from Houston to Atlanta, the Eleventh Circuit broadly interpreted § 3237(a) without inquiring as to what it truly means for an offense to “involve” the use of transportation.<sup>18</sup> According to the court’s reading of the statute, “[t]o establish venue, the government need only show that the crime took place on a form of transportation in interstate commerce,” which it accomplished by demonstrating that the defendant committed the sexual assault on an airplane that ultimately landed—and consequently established venue—in Atlanta.<sup>19</sup> The court opined that “[i]t would be difficult if not impossible for the government to prove . . . exactly which federal district was beneath the plane when Breitweiser committed the crimes.”<sup>20</sup>

In *United States v. Cope*, the Tenth Circuit clarified what a “continuing offense” is under § 3237(a), holding that venue for in-flight crimes is proper in any district through which the plane travels during the flight, including the district in which it lands.<sup>21</sup> There, after navigating a flight from Austin, Texas to Denver, Colorado, a pilot was charged with operating a common carrier while under the influence of alcohol.<sup>22</sup> The Tenth Circuit found that, as a result of his intoxication, the pilot had violated 18 U.S.C. § 3237(a) and committed a “continuing offense” by operating transportation in interstate commerce that began in one district and was completed in another.<sup>23</sup> Therefore, the court held that “[v]enue is proper in any district through which

---

16. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2458. In short, even if a statutory text does not spell out every detail, textualists interpret that statute “according to the legal system’s accepted procedures, evidentiary rules, burdens of persuasion - and defenses.” *Id.* at 2469.

17. *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004).

18. *Id.*

19. *Id.*

20. *Id.*

21. *United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012).

22. *Id.* at 1222.

23. *Id.* at 1225.

[the pilot] traveled on the flight, including the District of Colorado,” the district in which the flight landed.<sup>24</sup>

However, in 2019 the Ninth Circuit’s decision in *United States v. Lozoya* created a circuit split when the court departed from the persuasive authority of the Tenth and Eleventh Circuits.<sup>25</sup> In response to an assault committed during a flight, the Ninth Circuit adequately clarified what it means for an offense to “involve” transportation in interstate commerce, and whether or not such an offense should be designated as a “continuing offense.”<sup>26</sup> The court held that the only proper venue for a crime committed during an airplane flight is the district in which the crime took place.<sup>27</sup> The Ninth Circuit’s ruling has given rise to concerns as to whether a court can convincingly ascertain the *locus delicti* of the committed offense,<sup>28</sup> and therefore whether *Lozoya* arbitrarily complicates the task of determining the proper venue for trial.<sup>29</sup> At the same time, the Ninth Circuit’s adherence to a textualist reading of § 3237(a), while taking the care to determine the plain meaning of the statute’s key language, should be lauded as an exercise of proper judicial restraint.<sup>30</sup> The court properly refused to implement the kind of intentionalist perspective of venue provisions that has begun to erode well-established principles in determining where venue properly lies.<sup>31</sup>

### III. FACTS OF *LOZOYA*

On a July 2015 Delta Airlines flight from Minneapolis to Los Angeles, Monique Lozoya settled into a middle seat in the rear of the plane with her boyfriend, Joshua Moffie, and another passenger, Charles Goocher, seated on either side of her.<sup>32</sup> Oded Wolff sat directly behind Lozoya, while his wife Merav occupied the accompanying window seat.<sup>33</sup>

24. *Id.*

25. *United States v. Lozoya*, 920 F.3d 1231, 1240–41 (9th Cir. 2019).

26. *Id.* at 1242.

27. *Id.*

28. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (holding that the “*locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946))).

29. *Lozoya*, 920 F.3d at 1244–45.

30. *Id.* at 1243.

31. *Id.*

32. *Id.* at 1233.

33. *Id.*



Lozoya's efforts to sleep during the flight were interrupted as Wolff repeatedly contacted her seat, an account confirmed by Goocher.<sup>34</sup> Later in the flight, when Wolff and his wife left to use the restroom, Lozoya told Moffie that she would address the disturbance with Wolff when he came back to his seat.<sup>35</sup> A turbulent exchange ensued upon Wolff's return, as Lozoya claimed Wolff took exception to her request that he stop hitting her seat and moved his hand uncomfortably near to her face.<sup>36</sup> Lozoya testified that fear and nerves provoked her to push Wolff's face away with an open palm, thereby causing his nose to bleed.<sup>37</sup> Flight attendants then defused the altercation and questioned the parties.<sup>38</sup> Wolff acknowledged that he would meet with Lozoya at the airport following the flight and consider accepting an apology after hearing her perspective on the incident; nevertheless, Lozoya opted against meeting with Wolff, and left the airport without apologizing.<sup>39</sup>

After being issued a violation notice charging her with assault in August 2015, Lozoya was formally charged with a Class A misdemeanor for assault in February 2016, which was later adjusted to a Class B misdemeanor for simple assault in April 2016.<sup>40</sup> At the bench trial, Lozoya moved for acquittal under Federal Rule of Criminal Procedure 29 for improper venue in the Central District of California.<sup>41</sup> The magistrate judge held that venue was proper under 18 U.S.C. § 7(a), finding that "to establish venue, the government only needs to prove that the crime took place on a form of transportation in interstate commerce."<sup>42</sup> The court ultimately found Lozoya guilty of simple assault.<sup>43</sup> On appeal to the United States District Court for the Central District of California under the same claims, Lozoya's conviction was affirmed, and an appeal to the Ninth Circuit followed.<sup>44</sup>

---

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1234.

39. *Id.*

40. *Id.* at 1234–35.

41. *Id.* at 1235.

42. *Id.*

43. *Id.* at 1236.

44. *Id.*

#### IV. ANALYSIS OF THE LOZOYA OPINION

##### A. Judge Smith's Opinion

The Ninth Circuit reached the correct holding in *United States v. Lozoya* because its decision to confront—rather than avoid—the risk of reaching absurd results during venue determinations for offenses involving travel in interstate commerce faithfully adhered to the plain meaning of 18 U.S.C. § 3237(a).

##### 1. The Inapplicability and Preclusion of the First Paragraph of 18 U.S.C. § 3238

In brief, the Ninth Circuit was wise to give little attention to 18 U.S.C. § 3238 and dismiss its pertinence to the facts of *Lozoya*.<sup>45</sup> Application of 18 U.S.C. § 3238 requires that the charged offense was “begun or committed” in international waters or any other location outside of the jurisdiction of any specific U.S. state or district.<sup>46</sup> Judge Smith was straightforward in his discussion on § 3238: “Here, the assault occurred entirely within the jurisdiction of a particular district. It neither began nor was committed entirely outside the United States, and so § 3238 is inapplicable.”<sup>47</sup>

##### 2. The Superiority of a Textualist Reading of 18 U.S.C. § 3237(a)

The crux of the disagreement between Judge Smith's majority opinion and Judge Owens's dissenting opinion concerning the applicability of 18 U.S.C. § 3237(a) to the facts of *Lozoya* rests upon distinct interpretations of two key clauses contained within the statute: what constitutes an offense “involving the use of . . . transportation in interstate or foreign commerce” and, consequently, how this determination gives effect to the understanding of a “continuing offense.”<sup>48</sup>

As previously mentioned, textualism in statutory interpretation subscribes

45. *Id.* at 1241.

46. 18 U.S.C. § 3238 (1948); *see also* O'Neill, *supra* note 2, at 1429.

47. *Compare* *United States v. Lozoya*, 920 F.3d 1231, 1241, (9th Cir. 2019), *with* *United States v. Walczak*, 783 F.2d 852, 855 (9th Cir. 1986) (finding that 18 U.S.C. § 3238 permitted venue in the district in which the offender was first brought because his offense had been committed “out of the jurisdiction of any particular state or district”).

48. 18 U.S.C. § 3237(a) (1948).

to the notion that statutes should be read with strict literalism and give precedence to the common, reasonable understanding of the words contained in the statute's text.<sup>49</sup> Meanwhile, intentionalism in statutory interpretation emphasizes the presumption that a rational governing body such as Congress would not enact legislation with the intent of creating absurd results, and therefore courts are justified in rejecting the plain meaning of a statute and imparting the supposed sensible intentions of Congress to avoid the absurd results that would stem from a rigid, literal reading of the same statute.<sup>50</sup>

Where the circuit courts in *Breitweiser* and *Cope* used an intentionalist reading of § 3237(a) that entailed an admirable, although subjective, effort to implement Congress's intent to supply a means of efficiently determining venue for crimes committed during flight,<sup>51</sup> both decisions strayed from the sensible, superior textualist reading of § 3237(a) used by the Ninth Circuit in *Lozoya*. An offense genuinely "involving the use of . . . transportation in interstate or foreign commerce" goes beyond an incidental relationship between the crime and the fact that transportation is present at the time of the crime's commission.<sup>52</sup> This phrase does not boil down to a crime's coincidence with transportation in interstate commerce to implicate any given offense that took place on a form of transportation in interstate commerce. Instead, as *Lozoya* demonstrates, the offense is not always so inextricably bound to the use of transportation in interstate commerce so as to make it a "continuing offense" by definition under § 3237(a).<sup>53</sup> Indeed, the transportation—the flight—in *Lozoya* was not at all requisite to the advancement or completion of the assault. In fact, it was in no way contemplated as a means of successfully facilitating the crime, nor was the flight "involved" as a quintessential condition or circumstance of the crime.<sup>54</sup>

Moreover, an exploration of the fundamental purpose of § 3237(a)

---

49. Manning, *supra* note 16, at 2390–91.

50. *Id.* at 2389–90.

51. *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).

52. *Compare* *Lozoya*, 920 F.3d at 1240, with *Breitweiser*, 357 F.3d at 1253. *But see* *Cope*, 676 F.3d at 1225 (finding venue to be proper in multiple districts because the defendant, a pilot, flew a plane under the influence of alcohol across multiple districts). Unlike *Lozoya*, *Cope* involved an offense that legitimately implicated "transportation in interstate commerce." *Id.* *Lozoya*'s assault was not an offense truly "involving the use of . . . transportation in interstate commerce" in the same manner as *Cope* because the occurrence of an assault on an airplane does not jeopardize the stability of air travel the same way the impairment of a pilot would.

53. *Lozoya*, 920 F.3d at 1240.

54. *Id.*

effectively reveals how the phrase “involving” relates to the relationship between the transportation and the crime. Section 3237(a) was designed to “prevent a crime which has been committed in transit from escaping punishment” for lack of ascertainable venue.<sup>55</sup> As such, it was not created to exert control over venue for crimes implicating transportation in interstate commerce for the sake of interstate commerce itself, but to prevent the fraying of justice for crimes that elude traditional means of pinpointing the commission of the crime for purposes of determining proper venue.<sup>56</sup> Section 3237(a) sets forth in broad strokes an ambitious vision for ascertaining venue, but it is not a statute that merits gap-filling when the facts of a given situation do not coincide with the plain meaning of the statute’s text.<sup>57</sup> Broad standards for determining venue are not unconstitutional so long as courts take caution to properly establish parameters to the statute’s application.<sup>58</sup> The commonly understood meaning of “involving” provides the proper parameters in this case.

A secondary consequence of Judge Smith’s reinterpretation of what “involving” means within the scope of § 3237(a) was the limitation placed on the statute’s representation of a “continuing offense,” as well as the statute’s reach in providing venue across multiple districts.<sup>59</sup> According to 18 U.S.C. § 3237(a), a “continuing offense” is defined as one “begun in one district and completed in another, or committed in more than one district,” whereas a non-continuing offense would be one begun and committed in a single district, and therefore limited solely to the jurisdiction of that district.<sup>60</sup> Upon the given facts, Lozoya began and completed the assault rather instantaneously.<sup>61</sup> Because there was no pause between the initiation, commission, and completion of the offense, it is likely that the assault began and terminated in the same single district. In other words, there was no continuation of the offense into another district so as to attach to the assault the label of a “continuing offense” under which § 3237(a) would properly apply.<sup>62</sup> Instead,

---

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

56. *Id.*

57. *See O’Neill*, *supra* note 2, at 1447.

58. *See Staszewski*, *supra* note 7, at 1056.

59. 18 U.S.C. § 3237(a) (1948).

60. *Id.*

61. *Lozoya v. United States*, 920 F.3d 1231, 1240 (9th Cir. 2019).

62. *See United States v. Cope*, 676 F.3d 1219, 1225 (10th Cir. 2012) (finding venue to be proper in multiple districts because the defendant, a pilot, flew a plane under the influence of alcohol across multiple districts). As Judge Smith noted, “[o]nce the assault had concluded, any subsequent activity

Lozoya's assault was a "point-in-time" offense, committed and terminated prior to crossing into the airspace of the Central District of California.<sup>63</sup> Consequently, as Judge Smith discerned, the Central District was not the proper venue for Lozoya's trial.

### B. Judge Owens's Partial Concurrence and Partial Dissent

In contrast to Judge Smith's textualist take on 18 U.S.C. § 3237(a)'s applicability to the venue issue in *Lozoya*, Judge Owens's dissent took a traditional intentionalist stance when interpreting the statute's relationship to the case.<sup>64</sup> While conceding that 18 U.S.C. § 3237(a) is not without ambiguity, he recognized the challenge posed by a stipulation to determine the *locus delicti* of the charged offense before venue may be established, as "[i]n this age of jet aircraft a moment of time can mean many miles have been traversed."<sup>65</sup> He argued for an intentionalist perspective on § 3237(a), invoking the practicality of the absurdity doctrine because the legislature could not have reasonably intended for the prosecution to "pinpoint the precise minute" when a criminal offense occurred mid-flight in order to properly establish venue.<sup>66</sup>

### C. Assessing The Risk of Absurdity Resulting From Application of the Majority's Holding

The decisions of Judge Smith and Judge Owens come to a head upon consideration of the likelihood of reaching absurd results through the application of the majority's literal interpretation of 18 U.S.C. § 3237(a). The absurdity doctrine submits that "if a particular application of a clear statute produces an absurd result, the Court understands itself to be a more faithful agent if it adjusts the statute to reflect what Congress would have intended

---

was incidental and therefore irrelevant for venue purposes." *Lozoya*, 920 F.3d at 1239.

63. *But cf.* *United States v. Rodriguez-Moreno*, 526 U.S. 275, 281 (1999) (holding that "[w]here 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." (quoting *United States v. Lombardo*, 241 U.S. 73 (1916))); *United States v. Barnard*, 490 F.2d 907, 910–11 (9th Cir. 1974) (finding that essential conduct elements were committed in multiple districts so as to properly permit venue in each of the given districts).

64. *Lozoya*, 920 F.3d at 1244–45.

65. *Id.* (quoting S. REP. NO. 87-694, at 2–3 (1961)).

66. *Id.*

had it confronted the putative absurdity.”<sup>67</sup>

While Judge Smith is aware of a “creeping absurdity” resulting from a decision requiring prosecutors to “pinpoint” the location above which an in-flight offense occurred so as to properly prove venue in that district, he takes a textualist stance in insisting that the court “cannot ignore the binding effect of precedent and the Constitution.”<sup>68</sup> He does not waver from the force of these sources of law in suggesting that Congress might “enact a new statute to remedy any irrationality that might follow from our conclusion.”<sup>69</sup> Judge Owens posits that “limiting venue to a ‘flyover state’” would be irrational and untenable for the efficiency of the legal system, because “[u]nder the majority’s rule, the government must prove which district—not merely which state—an airplane was flying over when the crime was committed.”<sup>70</sup>

However, Judge Owens fails to account for the complex technology embedded in planes and the firmly-established procedures for recording flight data that can be comprehensibly distilled for accurate determinations of venue. It is important to articulate that Judge Smith’s textualist interpretation of 18 U.S.C. § 3237(a) is not incompatible with the absurdity doctrine—the principle simply does not apply when the prospect of generating absurd results is so speculative.<sup>71</sup> History suggests that, “even if one rejected a free-floating absurdity doctrine, one could expect the judiciary’s enforcement of constitutional values to address many putative injustices that, in a system of unqualified legislative supremacy, might compel resort to principles of absurdity.”<sup>72</sup>

## V. IMPACT & CONCLUSION

The Ninth Circuit was correct to depart from the holdings of the Tenth and Eleventh Circuits for failure of those courts’ intentionalist interpretation of 18 U.S.C. § 3237(a) to encompass the factual distinctions of *Lozoya*. The Ninth Circuit’s holding bridges the gap between constitutional norms that formed the bedrock of venue determination procedures and a recent trend

---

67. Manning, *supra* note 16, at 2394.

68. *Lozoya*, 920 F.3d at 1243.

69. *Id.* This very recommendation contradicts the opinion that “the absence of such a doctrine might compel Congress to legislate at an excessive level of detail, thereby raising the procedural costs of bargaining over legislation.” Manning, *supra* note 16, at 2438.

70. *Id.* at 1244–45.

71. See Dougherty, *supra* note 4, at 159.

72. Manning, *supra* note 16, at 2393.

towards permitting venue based on unrefined standards of what constitutes a “continuing offense” or an offense “involving the use of . . . transportation in interstate commerce.” The *Lozoya* decision is especially significant because it confronted circumstances that did not easily lend to precedential definitions of such terms, and therefore exercised statutory interpretation that was faithful to well-settled traditions of venue law without heeding to the accessible but superficial understanding of § 3237(a) that has recently guided courts.<sup>73</sup>

This is not to say that challenges will not arise from this decision; nonetheless, the Ninth Circuit’s holding in *Lozoya* was a demonstration of the court putting its foot down on a pattern of overinclusive statutory interpretation threatening to disturb the balance of power between the legislature and the judiciary. Concerns of reaching absurd results under the Ninth Circuit’s decision, while not entirely impractical, are outweighed by the advancements in statutory interpretation made during the court’s deliberation. “[A]bsurdity, being apparently more a common-sense concept than a legal one, is arguably no more within the special knowledge and training of the legal community than it is within the common knowledge and instinct of the community at large.”<sup>74</sup> The Ninth Circuit was prudent to prioritize and embrace common sense in reaching a decision in accord with society’s common understanding of the relationship between a crime and the tangential circumstance of transportation in interstate commerce. Instead of stepping on the toes of Congress based upon a presumption of its legislative intent, the Ninth Circuit shrewdly left the door open to Congress to readdress and refine statutes such as 18 U.S.C. §§ 3237(a) and 3238 to satisfactorily provide venue for the complex reality of in-flight criminal activities.

Zachary Remijas\*

---

73. *Lozoya*, 920 F.3d at 1239–41.

74. Dougherty, *supra* note 4, at 163.

\* Juris Doctor Candidate, Pepperdine Caruso School of Law; Bachelor of Arts, University of Wisconsin-Madison. Thank you to the members of Pepperdine Law Review for your exemplary work throughout the publication process. To my family, friends, and professors—your inspiration has moved me brightly, and I am forever grateful for your abiding love and support.