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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

Crime Involving Moral Turpitude Due Date: December 8, 2021	Amicus Invitation No. 21-17-11

REQUEST TO APPEAR AS *AMICUS CURIAE* AND BRIEF FOR *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE

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REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 21-17-11 (BIA 2021). The *amicus curiae* brief is submitted with this request.

INTEREST OF *AMICUS CURIAE*

IRLI is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens and lawful permanent residents, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies. For more than twenty years, the Board of Immigration Appeals (the "Board") has solicited *amicus* briefs, drafted by IRLI staff, from the Federation for American Immigration Reform, of which IRLI is a supporting organization, because the Board considers IRLI an expert in immigration law.

ISSUE PRESENTED

In *Hernandez v. Whitaker*, 914 F.3d 430 (6th Cir. 2019), the United States Court of Appeals for the Sixth Circuit concluded that section 750.82 of the Michigan Compiled Laws is not divisible and that the minimum conduct at

issue therein—*i.e.*, the intent to place a victim in reasonable fear or apprehension of an immediate battery—could not satisfy the definition of a crime involving moral turpitude. *See Hernandez v. Whitaker*, 914 F.3d at 434 (citing *Hanna v. Holder*, 740 F.3d 379 (6th Cir. 2014) for proposition that section 750.82 "is not categorically a [Crime of Moral Turpitude]").

Considering that the respondent's statute of conviction (section 750.81a(1) of the Michigan Compiled Laws) shares the same *mens rea* requirement as the statute addressed in *Hernandez v. Whitaker*, *i.e.*, the intent to injure or to place a victim in reasonable fear or apprehension of an immediate battery, address whether the respondent's conviction is a crime involving moral turpitude, considering and analyzing the effect of our decisions in *Matter of Wu*, 27 I&N Dec. 8 (BIA 2017) and *Matter of J-G-P-*, 27 I&N Dec. 642 (BIA 2019) and the Sixth Circuit's decisions in *Hernandez v. Whitaker*, *supra*, and *Hanna v. Holder*, *supra*.

Additionally, address the application of the "realistic probability" inquiry to the question of the respondent's removability under section 237(a)(2)(A)(i) of the Immigration and Nationality Act, in light of *Matter of Salad*, 27 I&N Dec. 733 (BIA 2020) and other binding decisions of the Board and/or the Sixth Circuit.

SUMMARY OF THE ARGUMENT

It is settled law that a crime of battery that requires intent to cause serious injury is a crime of moral turpitude. Aggravated assault under Michigan law

requires something just as grave: *actually causing* serious or aggravated injury, while (at the minimum) intending to make the victim reasonably fear an imminent battery. This requirement of actual serious injury distinguishes aggravated assault from the crime at issue in *Hernandez v. Whitaker*, 914 F.3d 430 (6th Cir. 2019), and puts aggravated assault in the category of a crime involving moral turpitude under persuasive case law. A survey of aggravated assault convictions in Michigan, moreover, shows there is no reasonable probability that a person would be prosecuted for aggravated assault for conduct that may fall short of a crime involving moral turpitude, such as intending to instill fear of an immediate battery in a victim, and also unintentionally battering the victim in a way that causes serious injury. In Michigan, convictions for aggravated assault are obtained in conjunction with convictions for other crimes, which often are crimes involving moral turpitude, or when the defendants' conduct is depraved.

ARGUMENT

I. *Hernandez v. Whitaker*'s holding of indivisibility of Mich. Comp. Laws § 750.82 does not apply to Mich. Comp. Laws § 750.81a(1) because the latter requires the actual infliction of a severe injury.

Mich. Comp. Laws § 750.82 defines the crime of assault with a weapon while § 750.81a(1) defines the crime of aggravated assault (without a weapon). Applying Michigan case law, the Sixth Circuit found:

> The elements of this crime [assault under § 750.82], as interpreted by Michigan courts, are: (1) an assault, (2) with a dangerous weapon, and

> (3) with the **intent to injure or place the victim in reasonable fear or apprehension of an immediate battery**.

Hanna v. Holder, 740 F.3d 379, 389 (6th Cir. 2014) (emphasis added). The court then held that the conjunction "or" in the intent element created two separate and divisible crimes. 740 F.3d 379, 389–90 (6th Cir. 2014) (following *Singh v. Holder*, 321 F. App'x 473, 481 (6th Cir. 2009). The first is the crime of using a weapon to instill fear of injury. *Id*. The second is the crime of attempted battery. *Id*. The Sixth Circuit held that the former (instilling fear) was not a crime of moral turpitude while the latter (attempted battery) was. *Id*. at 390. Therefore, § 750.82 did not categorically define a crime of moral turpitude. *Id*. At that time, however, the Sixth Circuit held that the statute was divisible. *Id*. Later, in *Hernandez v. Whitaker*, the Sixth Circuit applied intervening Supreme Court interpretation to hold that § 750.82 is not divisible and thus it did not define a crime of more turpitude. 914 F.3d 430, 435 (6th Cir. 2019).

The Board's opinion in *Matter of J-G-P-* held that Oregon's crime of menacing was a crime of moral turpitude. 27 I. & N. Dec. 642, 643–644, 2019 BIA LEXIS 15, *4 (B.I.A. October 11, 2019). The provision at issue there criminalized "word or conduct" that "intentionally attempts to place another person in fear of imminent serious physical injury." Or. Rev. Stat. Ann. § 163.190. The obvious distinction between *Matter of J-G-P-* and the Sixth Circuit's holding in *Hanna* and *Singh* that using a weapon to assault by creating apprehension of harm is not a crime of moral turpitude is the level of

injury. The Oregon stature (§ 163.190) requires instilling fear of serious physical injury, while one could be convicted under Michigan's assault with a weapon statute (§750.82) for instilling fear of any unlawful touching.

Michigan's crime of aggravated assault also differs from its crime of assault with a weapon in a way involving serious injury. Mich. Comp. Laws § 750.81a(1). For a conviction for aggravated assault, there actually must be serious physical injury. *Id*. Michigan's model jury instructions for conviction for aggravated assault under § 750.81a(1) (M Crim JI 17.6) are:

> (1) [The defendant is charged with the crime of __] You may also consider the lesser charge of assault and infliction of serious injury. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:
> (2) First, that the defendant tried to physically injure another person.
> (3) Second, that the defendant intended to injure [name complainant] [or intended to make (name complainant) reasonably fear an immediate battery].
> (4) Third, that the assault caused a serious or aggravated injury. A serious or aggravated injury is a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body.

People v. Kendall (In re Kendall), No. 353231, 2021 Mich. App. LEXIS 609, at *6–7 (Ct. App. Jan. 28, 2021); *People v. Geter*, No. 280425, 2009 Mich. App. LEXIS 117, at *2–3 (Ct. App. Jan. 20, 2009).

Thus, the key distinction between armed assault under § 750.82 and aggravated assault under § 750.81a(1) is that conviction under the former does not require causing injury at all while latter requires that the actor "inflicts serious or aggravated injury." § 750.81a(1). Where § 750.82 defines a crime of *assault*, § 750.81a(1) defines a crime of *assault and battery*. The

distinction the Sixth Circuit found between an attempt to instill fear and an attempted battery does not apply to aggravated assault under § 750.81a(1), because the crime of aggravated assault always requires the additional step of the actual commission of a battery that results in serious or aggravated injury. Thus, where the minimum conduct of armed assault under § 750.82 is to place a victim in reasonable fear or apprehension of an immediate battery, the minimum conduct under § 750.81a(1) includes causing serious or aggravated injury to a victim.

II. Michigan's aggravated assault is a crime of moral turpitude because it requires the infliction of a serious injury.

The Sixth Circuit observed that "'crimes committed intentionally or knowingly have historically been found to involve moral turpitude.'" *Lovano v. Lynch*, 846 F.3d 815, 817 (6th Cir. 2017) (quoting *In re Solon*, 24 I. & N. Dec. 239, 240 (BIA 2007)). On one extreme, the Sixth Circuit has also noted that simple batteries involving touching have not been held to be crimes of moral turpitude but crimes involving "'the intentional infliction of serious bodily injury'" have been. *Id.* (quoting *In re Sanudo*, 23 I. & N. Dec. 968, 971 (BIA 2006)). Illustrating the latter, the Sixth Circuit held that an Ohio crime of assault where there was intent to cause injury was a crime of moral turpitude. *Id.* at 818; *see also Matter of Jing Wu*, 27 I. & N. Dec. 8, 2017 BIA LEXIS 6 (B.I.A. April 13, 2017) (holding a battery crime that requires intent to commit serious injury is one of moral turpitude).

Michigan's crime of aggravated assault lies in between the two extremes because it requires serious injury but lacks the requirement that the infliction of the injury be intentional. Mich. Comp. Laws § 750.81a(1). Sixth Circuit precedent does not resolve the question of whether the lack of such intent excludes a crime from being one of moral turpitude.

Other authorities have held that the mere causation of severe injury in a crime otherwise requiring intent is sufficient to define a crime of moral turpitude. The Board has recognized that "[t]he fact that bodily injury is an essential element indicates that sufficient force must have been employed to cause harm to the victim's person." *In re Danesh*, 19 I. & N. Dec. 669, 673, 1988 BIA LEXIS 27, *10 (B.I.A. June 20, 1988). The Eleventh Circuit has directly addressed this question, holding that "any intentional battery that includes, as an element of the offense [] that it caused great bodily harm, permanent disability, or permanent disfigurement … constitutes a crime of moral turpitude." *Sosa-Martinez v. United States AG*, 420 F.3d 1338, 1342 (11th Cir. 2005).

The Board's non-precedential decision in *Matter of Donn Millang Muceros*, 2000 Immig. Rptr. LEXIS 2186, *14-15, 22 Immig. Rptr. B1-44., is not to the contrary. In that opinion, the Board held battery under California Penal Code section 243(d) is not categorically a crime of moral turpitude. That crime requires the infliction of serious injury but does not require intent to cause that injury. *Id*. The structure of the California and Michigan crime

definitions are different, however. Under California Penal Code § 243, infliction of serious injury is an aggravating factor for a simple battery. The Board observed that a simply touching that somehow caused a serious injury could result in a conviction under § 243(d). *Muceros*, 2000 Immig. Rptr. LEXIS 2186, *15–16. The intent requirement of Michigan's crime of aggravated assault (§ 750.81a(1)) goes way beyond a simple battery because, at a minimum, it require putting the victim in fear of a battery. A simple unwanted touching could not result in a conviction under the Michigan statute.

III. Michigan case law shows there is no realistic probability that conduct that is not a crime of moral turpitude would be prosecuted as an aggravated assault.

One could image a hypothetical scenario under Michigan law in which an actor who assaulted a victim by intending to instill fear and inadvertently battered the victim, causing a serious injury, could be prosecuted for an aggravated assault that would arguably not be a crime of moral turpitude. *Cf. Matter of Donn Millang Muceros*, *supra*. An examination of Michigan case law, however, shows that the probably of such a prosecution is not realistic.

Convictions under § 750.81a(1) have frequently occurred concurrently with multiple convictions, often where another conviction was for a crime of moral turpitude. *E.g.*, *People v. Warren*, No. 191979, 1998 Mich. App. LEXIS 1969, at *1 (Ct. App. July 24, 1998) (defendant was convicted of first-degree criminal sexual conduct, third-degree criminal sexual conduct, assault with

intent to commit criminal sexual conduct involving penetration, aggravated assault, and entering without breaking); *People v. Davis*, No. 235368, 2002 Mich. App. LEXIS 2955, at *1 (Ct. App. Nov. 22, 2002) (defendant was convicted of armed robbery, first-degree home invasion, and aggravated assault). There are also many examples where the defendant was charged with multiple assault crimes and the jury convicted the defendant of the lesser offense of aggravated assault § 750.81a(1). *E.g., People v. Tekishaia Lashawn Winters*, No. 260640, 2006 Mich. App. LEXIS 1517, at *2–3 (Ct. App. May 2, 2006) (defendant slashed victim's face with broken glass but was convicted of the lesser crime of aggravated assault); *People v. Chapman*, No. 339085, 2018 Mich. App. LEXIS 3015, at *5 (Ct. App. Aug. 14, 2018) (victim was knocked unconscious and left alone in a parking lot and defendant was convicted of the lesser crime of aggravated assault).

There is little Michigan case law that involves isolated convictions for aggravated assault. Such prosecutions, however, have involved depraved behavior. *E.g.*, *People v. Peoples*, No. 344372, 2019 Mich. App. LEXIS 7110 (Ct. App. Nov. 14, 2019) (defendant punched victim several times and pushed victim causing injury requiring surgery); *People v. Cleatus Isreal Crenshaw*, No. 245685, 2004 Mich. App. LEXIS 1003, at *2 (Ct. App. Apr. 20, 2004) (defendant choked, dragged, and threatened to kill victim); *In re Adams*, No. 292697, 2010 Mich. App. LEXIS 1844, at *1 (Ct. App. Sep. 30, 2010) (defendant had punched one victim in the face and then body slammed him

and ran head first into a police officer and tackled her); *Michigan v. Golden*, No. 282604, 2009 Mich. App. LEXIS 1092, at *2 (Ct. App. May 19, 2009) (defendant repeatedly struck the victim in the face and head after the victim was lying on the ground and rendered unconscious). *Amicus* has been unable to identify any prosecution for aggravated assault in Michigan case law where a defendant attempted to instill fear in a victim, unintentionally battered the victim, and caused severe injury.

CONCLUSION

For the reasons stated above, the Michigan crime of aggravated battery should be considered a crime of moral turpitude.

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