NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

BOARD OF IMMIGRATION APPEALS

IN THE MATTER OF

XXXXXXXXXXXXXX,

AXXX-XXX-XXX

Respondent,

Appeal From an Immigration Judge Decision

BRIEF OF AMICUS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

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Introduction

Oregon, like the majority of jurisdictions in the United States, including the federal jurisdiction, proscribes conduct that is equivalent to common law simple assault and battery. Oregon, also like many jurisdictions, codifies the simplest of simple assaults, apprehension-only assault, in a separate statutory provision from that which proscribes battery. While there is no question that common law battery does not involve moral turpitude, *see Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006), the Immigration Judge here and unpublished Board of Immigration Appeals ("BIA") dispositions[1] have ignored historical context and existing precedent in finding that a conviction under Oregon's apprehension-only assault statute categorically constitutes a conviction for a crime involving moral turpitude ("CIMT").

The Immigration Judge in this case determined that respondent's conviction for menacing under Or. Rev. Stat.

[1] Carlos Rivas Solas, A076 638 391 (BIA June 4, 2014); Francisco Guadalupe Burboa-Rocha, A095 776 843 (BIA Sept. 9, 2014).

§ 163.190[2] constitutes a CIMT for purposes of sections 212(a)(2) and 237(a)(2) of the Immigration and Nationality Act. However, historical analysis makes clear that the conduct proscribed by Oregon's menacing statute, and its counterparts in other jurisdictions, constitutes a subtype of common law simple assault. Originally conceived only as a civil tort, this form of simple assault was a latecomer to the criminal law due to the lessened culpability implicated where the defendant neither attempts, intends, nor causes any physical contact, harm, or injury whatsoever to another. Like Oregon, almost every jurisdiction has retained a version of this "apprehension-only" simple assault[3] as a misdemeanor, either within the jurisdiction's simple assault provisions or within a separate "menacing" provision.

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[2] A person commits the misdemeanor offense of menacing under Oregon law "if by word or conduct the person intentionally attempts to place another person in fear of imminent serious physical injury." Or. Rev. Stat. § 163.190.

[3] This brief refers throughout to this form of simple assault as "apprehension-only assault," to distinguish it from both assaults resulting in physical touching or injury and assaults involving attempt or intent to cause physical touching or injury. *See* discussion in Section A.2. Historical Background, *infra.*

Although both Circuit and BIA case law establish that simple assaults, including apprehension-only assaults are not CIMTs, unpublished BIA decisions—including two decisions interpreting Oregon's menacing statutes—have conflated apprehension-only simple assault with non-assault crimes which are entirely distinct as a historical and substantive matter.

Amicus, the American Immigration Lawyers Association, explains in this brief why the BIA should correct the Immigration Judge's error in this case by published decision clarifying that apprehension-only simple assaults like those proscribed under Oregon's menacing statute, requiring no physical contact of any kind, let alone harm or injury, do not categorically constitute crimes involving moral turpitude. Amicus takes no position on the merits of respondent's claim.

Statement of Interest of Amicus Curiae

The American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality

law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court.

Argument

A. Apprehension-Only Assaults Are Simple Assaults and Are Not Crimes Involving Moral Turpitude.

BIA precedent establishes that while the crime of assault may or may not involve moral turpitude, *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988), "[s]imple assault is not considered to be a crime involving moral turpitude." *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996); *see also Matter of Ahortalejo-*

Guzman, 25 I&N Dec. 465, 466 (BIA 2011) ("Simple assault or battery is generally not considered to involve moral turpitude for purposes of the immigration laws."); *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007) ("[O]ffenses characterized as 'simple assaults' are generally not considered to be crimes involving moral turpitude."); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989) ("Simple assault is not considered to be a crime involving moral turpitude."); *Matter of E-*, 1 I&N Dec. 505 (BIA 1943) ("[M]ere assault and battery does not involve moral turpitude"); *United States ex rel. Morlacci v. Smith*, 8 F.2d 663, 664 (W.D.N.Y 1925) ("Mere assault and battery . . . does not involve such a degree of depravity [to constitute a crime involving moral turpitude.]").

The Immigration Judge in this case and the unpublished BIA decisions failed to recognize that the menacing conviction at issue in this case is not only a conviction for simple assault, but a conviction for the simplest of assaults—an apprehension-only assault resulting in no physical contact whatsoever and involving no intent to cause physical injury or harm. As the analysis below demonstrates, apprehension-only assault is a subtype of common

law simple assault and therefore does not constitute a crime involving moral turpitude.

1. Historical Background: Simple Assault

At common law, assault and battery were two separate misdemeanor crimes. Battery, defined briefly as "the unlawful application of force to the person of another," required culpable conduct resulting in bodily injury or offensive touching of the victim. *See* 2 LaFave & Scott, Jr., *Substantive Criminal Law* § 16.2, at 552 (2d ed. 2003); Perkins, "Non-Homicide Offenses Against the Person," 26 B.U.L.Rev. 119, 120 (1946); *United States v. Vallery*, 437 F.3d 626, 631 (7th Cir. 2006) ("Under the common law, physical contact is the line of demarcation between simple assault and battery"). The original common law concept of criminal assault was that of an attempted battery. Perkins, 26 B.U.L.Rev. at 133 (stating that "in the early law [an attempt to commit a battery] was the only basis for a criminal assault"). However, the early law also recognized a civil tort action to

recover damages from one who had "intentionally placed another in apprehension of an immediate battery." *Id.* at 132. Over time, the common law in most jurisdictions incorporated, in addition to the attempted battery concept of criminal assault, the tort concept.[4] *Id.* at 134.

At the same time, the case law shows "early ambivalence about whether the criminal assault statute included the tort based meaning." *State v. Garcias*, 679 P.2d 1354, 1355-56 (Or. 1984). This ambivalence was based on upon uncertainty that criminal liability should attach at all in cases where the defendant's conduct placed another in apprehension only of injury, without any intent to actually injure. *See, e.g., State v. Godfrey*, 17 Or. 300 at 305, 20 P. 625 (Or. 1889) (stating that "mere menaces, whether by words or acts, without intent or ability to injure, are not

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[4] This appears to have been a result less of a determination that criminal liability properly applied to one who placed another in apprehension of a battery without intending any injury than a muddling and confusion of the criminal and civil concepts. *See Lamb v. State*, 613 A.2d 402, 408-09 (Ct. Spec. App. Md. 1992) (stating that the "merger of two concepts of assault has been in process for at least 200 years" and that "metamorphosis of an old tort into a new aspect of an old crime was a purely semantic accident").

punishable crimes, although they may often constitute sufficient ground for a civil action for damages" and that "the test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or in creating alarm in the mind").

Despite this early uncertainty about whether criminal liability ought to attach in cases involving apprehension-only assault, over time it has been incorporated into the common law concept of simple assault. LaFave, § 16.3(a), at 568. Thus, federal law, which defines simple assault by reference to the common law and not by statute, identifies simple assault at common law as including both attempted-battery assault and apprehension-only assault. *See United States v. Rivera-Alonzo,* 584 F.3d 829, 834 (9th Cir. 2009) ("Under the common law, "[s]imple assault 'is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm.' ") (citations omitted); *see also United States v. Lewellyn*, 481 F.3d 695, 697n.5 (9th Cir. 2007) (noting that "[n]early all of the other

circuits apply these same common-law definitions of assault" and collecting cases).

In addition to the inclusion of apprehension-only assault into the criminal assault concept, over time the term "assault" has also come to refer to the crime of battery itself, through a shorthand elision of the concept of an "assault and battery." *See Lamb v. State*, 613 A.2d 402, 404-07 (Ct. Spec. App. Md. 1992). Thus, at the time of the drafting of the Model Penal Code, the drafters noted that the "word 'assault' is . . . commonly used to describe any physical attack, or physical menacing, with or without an actual battery." 2 Am. Law Inst., *Model Penal Code and Commentaries* § 211.1 cmt. 1, at 174-75 & n.1 (1980); *see also Lamb*, 613 A.2d at 408-09 (stating that the term "assault" has come to refer to "1. A consummated battery or the combination of a consummated battery and its antecedent assault; 2. An attempted battery; and 3. A placing of a victim in reasonable apprehension of an imminent battery.").

2. Modern Codification of Apprehension-Only Simple Assaults

During the codification process of the Model Penal Code, the drafters defined "simple assault" to include both conduct known as battery at common law, as well as apprehension-only assault. Section 211.1 defines simple assault as follows:

> Assault. (1) Simple Assault. A person is guilty of assault if he:
>
> (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
> (b) negligently causes bodily injury to another with a deadly weapon; or
> (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Model Penal Code § 211.1. The drafters indicated that section 211.1(c), which closely resembles Oregon's menacing statute, "incorporates the civil notion of assault into the criminal law, as had been done in a majority of jurisdictions at the time the Model Code was drafted." Model Penal Code and Commentaries, § 211, at 173.

In Oregon, the drafters of the revised criminal code made the schematic choice not to follow the Model Penal Code approach of locating apprehension-only assault within Oregon's simple assault provisions:

> A number of recent codes include the "placing of another in fear of imminent serious bodily injury" within the provisions relating to simple assault. . . . Such conduct, though culpable, does not constitute either assault or attempted assault under the proposed draft for 'physical injury is neither inflicted nor intended.' Accordingly, the separate offense of menacing. . . has been created to cover such conduct. In so doing, the draft follows the schematic arrangement of the New York Revised Penal Law and the Michigan Revised Criminal Code.

Oregon Criminal Law Revision Committee, Proposed Criminal Code, Final Draft and Report, § 94, at 95 (1970), *available at* http://arcweb.sos.state.or.us/doc/records/legislative/legislativeminutes/crimlaw/final/ART9.pdf. This explicit choice to locate apprehension-only assault in a separate provision was based on recognition that such tort based assaults were, while undeniably simple assaults according to the common law, the least culpable form of simple assault. *See id.* § 95, at 96 (explaining that, while under the Model Penal Code conduct proscribed under Oregon's menacing statute would constitute simple assault, "[u]nder the proposed draft and the New York and Michigan codes such conduct would constitute the *lesser crime* of menacing") (emphasis added); *see also* Byrn "Assault, Battery and Maiming in New York: From Common Law Origins to Enlightened Revision," 34 Fordham

L. Rev. 613, 644 (1966) (providing history of adoption of 1965 revisions to New York Penal Code and noting that decision to treat tort based simple assault in separate menacing provision involved recognition that "an intent to injure is more serious than an intent to cause apprehension of injury, even if the latter be considered a crime").

While the apprehension-only assault crime proscribed in Oregon's menacing statute and similar menacing statutes may not be *titled* "simple assault," it is unequivocally simple assault. *See Garcias*, 679 P.2d at 1356 (noting that legislature "could have included the offense in the general assault provisions" as the Model Penal Code does"); Kentucky Crime Commission/LRC Commentary at Ky Rev. Stat. Ann. § 508.050 (Banks-Baldwin 2015) (stating with regard to menacing statute nearly identical to Oregon's that "[t]he offense defined by this statute serves to replace an offense previously known at common law as simple assault and defined as "an unlawful act which places another in reasonable apprehension of receiving an immediate battery"); LaFave, *Substantive Criminal Law*, § 16.3, at 565 (stating that

almost all jurisdictions that classify as "assault" only conduct that has traditionally been called battery, cover apprehension-only assault "by some other statute, usually called 'threatening' or menacing' "). Indeed, a number of jurisdictions include identical or nearly identical conduct to that defined in Oregon as "menacing" under their simple assault provisions.[5]

Based on a survey of the fifty states and the federal jurisdiction included in the Appendix accompanying this brief, ten jurisdictions, including Oregon, include apprehension-only assault within separate statutes entitled "menacing" or "threatening."[6] Twenty-five jurisdictions include apprehension-only common law assault within their simple or misdemeanor assault statutory

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[5] *See, e.g.,* N.J. Stat. Ann. § 2C:12-1a(3) (simple assault includes "attempts by physical menace to put another in fear of imminent serious bodily injury"); Miss. Code Ann. § 97-3-7 (same); Pa. Cons. Stat. tit. 18, § 2701(a)(3) (same); Vt. Stat. Ann. tit. 13, § 1023 (same). *See* Appendix for statutory language.

[6] *See* Ala. Code § 13A-6-23(a); Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-62; Del. Code Ann. tit. 11, § 602; Ky. Rev. Stat. Ann. § 508.050; Me. Rev. Stat. Ann. tit. 17-A, § 209(1); N.H. Rev. Stat. Ann. § 631:4; N.Y. Penal Law § 120.15; N.D. Cent. Code § 12.1-17-05; Or. Rev. Stat. § 163.190. *See* Appendix for statutory language.

provisions.[7] The federal jurisdiction does not provide a statutory definition of simple assault but defines it by reference to the common law to include apprehension-only assault. *See, e.g.*, *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976) (federal common law definition of simple assault includes "threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm"). The remaining jurisdictions either follow the federal jurisdiction in recognizing apprehension-only assault as a matter of common law or, in a few cases, recognize only the attempted-battery species of assault. *See* Appendix (compiling treatment of apprehension-only assault).

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[7] *See* Alaska Stat. § 11.41.230; Ariz. Rev. Stat. § 13-1203; Ark. Code Ann. § 13-1202; Fla. Stat. Ann. § 784.011; Ga. Code Ann. § 16-5-20(a); Idaho Code § 18-901; 720 Ill. Comp. Stat. 5/12-1; Iowa Code § 708.1(2); Kan. Stat. Ann. § 21-5412; La. Rev. Stat. Ann. §§ 14:36 & 38; Minn. Stat. § 609.224; Miss. Code Ann. § 97-3-7; Mo. Rev. Stat. § 565.070.1(3); Mont. Code Ann. § 45-5-201; Neb. Rev. Stat. § 28-310(b); Nev. Rev. Stat. 200.471; N.J. Stat. Ann. § 2C:12-1a(3); N.M. Stat. Ann. § 30-3-1; Pa. Cons. Stat. tit. 18, § 2701(a)(3); S.D. Codified Laws § 22-18-1(4); Tenn. Code Ann. § 39-13-101; Tex. Penal Code § 22.01; Utah Code Ann. § 76-5-102; Vt. Stat. Ann. tit. 13, § 1023 (same); W.Va. Code § 61-2-9(b). *See* Appendix for statutory language.

To summarize, the common law crimes of simple assault and battery have been retained in nearly every jurisdiction. In some jurisdictions, apprehension-only simple assault is found within the jurisdiction's assault provisions or retained common law definition of simple assault, while in others, including Oregon, the same crime is set out in separate provisions. This separate treatment, in addition to the fact that several jurisdictions do not recognize apprehension-only assault at all, is indicative of the fact that apprehension-only assault is in fact the simplest of simple assaults.

3. Apprehension-Only Simple Assault Is Not a Crime Involving Moral Turpitude.

By definition, apprehension-only simple assault involves no intent to physically injure, harm, or even touch another person. It results in no physical injury or harm. *See Frazier v. Northern State Prison, Dept. of Corrections*, 929 A.2d 479, 483 (N.J. Super. App. Div. 2007) (stating with regard to N.J. Stat. Ann. § 2C:12-1a(3), which proscribes "attempts by physical menace to put

another in fear of imminent serious bodily injury," that "an assailant could violate [the statute] by raising a clenched fist in a menacing manner, without hitting or attempting to hit the victim"). Indeed, under some apprehension-only simple assault statutes, including Oregon's menacing statute, a defendant may be convicted of apprehension-only simple assault where no third party suffers any harm *at all*, not even fear of bodily injury. *See State v. Lee*, 23 P.3d 999, 1002 (Or. Ct. App. 2001) (Or. Rev. Stat. § 163.190 does not require proof that actor create actual fear in victim); *State v. Lockwood*, 603 P.2d 1231, 1233 (Or. Ct. App. 1979) ("The victim's subjective state of mind is not a defined element of the crime [of menacing]."); Oregon Criminal Law Revision Committee Report, § 95, at 96 ("Unsuccessful attempts to place another in fear are included within the menacing section"). Further, while most apprehension-only state statutes require some physical action on the part of defendant,[9] others, including Oregon's menacing statute, may be satisfied by words alone. *See*

[9] This reflects the fact that at common law tortious assault and its criminal counterpart required some physical conduct. *See Garcias*, 679 P.2d at 1358.

State ex rel. Juvenile Dept. of Klamath Cty. v. Dompeling, 17 P.3d 535 (Or. 2000) (conviction of menacing based on verbal threats of harm only); *Garcias*, 679 P.2d at 1358 (stating that "[t]he Commentary [in the Final Report on Oregon's Proposed Criminal Code] leaves no doubt that the crime extends to uttering words alone."); *id.* at n.6 (listing various ways in which crime of menacing may be committed in nine other states with separate menacing statutes).

In addition, apprehension-only assault, like simple battery, may occur within the context of heated but fleeting argument. *See Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465, 466 (D.Mass. 1926) ("[A]n assault is one of those offenses which may, or may not, involve moral turpitude, depending upon the circumstances of the particular case. If one ordinarily law-abiding, in the heat of anger, strikes another, that act would not reveal such inherent baseness or depravity as to suggest the idea of moral turpitude."); *State v. Torres-Rivas*, 26 P.3d 729, 731 (Or. Ct. App. 2011) (defendant convicted of menacing where, based on belief that victim had called defendant's son a racial epithet, defendant

verbally threatened, motioned toward, and made lunging gestures toward victim). Thus, conduct constituting apprehension-only assault by definition stops short of physical harm or contact, and, indeed, may reflect an effort to avoid the use of physical force or violence. *See* LaFave, § 16.3(b), at 570 ("One who fires at another with intent to hit him, though he misses, is, of course, a far more dangerous person than his milder counterpart who goes about intending only to frighten and not to injure").

Because apprehension-only assault results in no physical contact whatsoever, let alone harm or injury, it is in fact the simplest of the simple assaults and not a crime involving moral turpitude.

B. The BIA Should Clarify in a Published Decision that Apprehension-Only Assault Is Not a Crime Involving Moral Turpitude.

1. Existing Circuit and BIA Precedent Establish that Apprehension-Only Assaults Are Simple Assaults and Not Crimes Involving Moral Turpitude.

The Ninth Circuit has recognized that apprehension-only simple assault is the simplest form of assault and not a crime

involving moral turpitude. In *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159 (9th Cir. 2006), the court considered whether Arizona's apprehension-only assault provision, located within Arizona's simple assault statute, defines a crime involving moral turpitude. *Id.* at 1164-67. Under that provision, a person commits misdemeanor assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury." Ariz. Rev. Stat. § 13-1203(A)(2). The court held that a conviction under this provision did not constitute a crime involving moral turpitude because it "contains absolutely no element of injury whatsoever, as it prohibits conduct that merely places another person 'in reasonable apprehension of' physical injury' " and "does not require inflicting bodily injury of *any* kind." *Fernandez-Ruiz*, 468 F.3d at 1159 (emphasis in original).

Fernandez-Ruiz could not be clearer that simple assaults, like that proscribed by Oregon's menacing statute, requiring "no element of injury whatsoever," do not constitute crimes involving moral turpitude: "A simple assault statute which permits a conviction for acts of recklessness, or for mere threats, or for

conduct that causes only the most minor or insignificant injury is not limited in scope to crimes of moral turpitude." *Fernandez-Ruiz*, 468 F.3d at 1167. Indeed, as discussed above, the early case law demonstrates a reluctance to even recognize as criminal assault mere threats or menaces. *See, e.g., Godfrey*, 17 Or. 300, 20 P. 625 (Or. 1889) (stating that "the test . . . in criminal cases, cannot be the mere fact of unlawfully putting one in fear, or in creating alarm in the mind"). That some apprehension-only assault statutes, including Oregon's, specify apprehension of serious physical injury does not alter the analysis because the fact remains that apprehension-only assault does not result in "bodily injury of *any* kind." *Fernandez-Ruiz*, 468 F.3d at 1167 (emphasis in original).

Existing BIA case law further makes clear that apprehension-only assaults are not crimes involving moral turpitude. In *Matter of Solon*, in the course of determining that a conviction for assault in the third degree in violation of New York

Penal Law § 120.00(1) is a crime involving moral turpitude,[10] the BIA observed that "the legislative history of the New York statute reflects an intent to amend the assault laws, *which included some mere common-law assaults*, to establish that every assault offense requires a battery that produces actual physical injury." *Solon*, 24 I&N Dec. at 244 (emphasis added). The BIA noted that "[o]ther New York State criminal statutes continue to prohibit some of the lesser conduct traditionally encompassed within common-law assault" and cited N.Y. Penal Law § 120.15 (menacing in the third degree). *Solon*, 24 I&N Dec. at 244 n.5. In acknowledging that N.Y. Penal Law § 120.15 prohibits "the lesser conduct traditionally encompassed within common-law assault," the BIA recognized that apprehension-only assault constitutes common law simple assault, which does not constitute a crime involving moral turpitude. The reference to New York's menacing statute is

[10] Amicus takes the position that *Solon* incorrectly decided that New York Penal Law § 120.00(1) constitutes a CIMT because section 120.00(1) includes common law battery lacking any aggravating elements. In any event, because *Solon* is consistent with the view that apprehension-only assaults are not crimes involving moral turpitude, that issue is not squarely presented here.

especially pertinent because, as discussed above, the drafters of Oregon's criminal code specifically indicated that "menacing is adapted from New York's Revised Penal Law, § 120.15." Oregon Criminal Law Revision Committee Report § 95, at 96. Thus, *Solon* is consistent with *Fernandez-Ruiz*, and together the cases support the conclusion that apprehension-only assault is not a crime involving moral turpitude.

2. The IJ and Unpublished BIA Decisions Erroneously Conflate Apprehension-Only Simple Assault with Distinct and Unrelated Crimes.

Despite the guidance provided by the Circuit and BIA precedent discussed in the preceding section, the Immigration Judge in this case and the BIA in two unpublished decisions erroneously conflated the simple assault statute at issue in this case with entirely distinct statutes found to define crimes involving moral turpitude in three cases: *Latter-Singh v. Holder*, 668 F.3d 1156 (9th Cir. 2012), *Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004), and *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999).

In *Latter-Singh v. Holder*, the Ninth Circuit determined that the criminal threatening crime defined under Cal. Penal Code § 422 constituted a crime involving moral turpitude. The court acknowledged its holding in *Fernandez-Ruiz* that "criminal threats alone, without any attendant harm, do not necessarily implicate moral turpitude," *Latter-Singh*, 668 F.3d at 1161, but found the California statute distinguishable because it "criminalizes only that conduct which results in substantial harm by being 'so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat,' as to 'cause[] the threatened person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety.' " *Id.* at 1162 (quoting Cal Penal Code § 422). In *Chanmouny*, the Eighth Circuit upheld the agency's determination that a conviction for "terroristic threats" under Minn. Stat. § 609.713, subd. 1 constitutes a crime involving moral turpitude and did not constitute simple assault based on the statute's requirement of an intent to "terrorize." *Chanmouny*, 376 F.3d at 814-15. Finally, in

Matter of Ajami, the BIA found that the petitioner's conviction under Michigan's aggravated stalking statute, Mich. Comp. Laws Ann. §§ 750.411h & i, constituted a crime involving moral turpitude because "[a] violator of the statute must act willfully, must embark on a course of conduct, as opposed to a single act, and must cause another to feel great fear." *Ajami*, 22 I&N Dec. at 952.

Latter-Singh, *Chanmouny*, and *Ajami* are all distinguishable. First, the California statute at issue in *Latter-Singh* requires both an intent to cause "sustained and imminent grave fear," *Latter-Singh*, 668 F.3d at 1163, and proof of resulting harm—namely, that the threat *in fact* "caused the victim to be in sustained fear." *Id.* at 1160 (citation omitted). Apprehension-only assault lacks both these elements. The history of Cal. Penal Code § 422 also demonstrates that it does not define an assault crime. Section 422 was enacted only in 1988 in conjunction with statutes aimed at "punishment of crimes committed by members of street gangs" due to legislative findings that "the State of California is in a state of crisis which has been caused by violent street gangs

whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." *See* 1988 Cal. Legis. Serv. 1256 (West). Indeed, the legislative history relating to enactment of section 422 makes clear that it does not define an assault because "existing laws prescribe the penalties for criminal assault." *Id.* These "existing laws" are California's simple assault and battery provisions, enacted in 1872, and found at Cal. Penal Code §§ 240 and 242.

Like the California statute in *Latter-Singh*, the Minnesota "terroristic threat" statute in *Chanmouny* is distinguishable in substance and origin from apprehension-only simple assault. The relevant statute is violated where a defendant "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another." Minn.Stat. § 609.713, subd. 1. Unlike statutes defining apprehension-only simple assault, the Minnesota statute at issue in *Chanmouny* requires an intent to "terrorize," which Minnesota courts define to mean to "cause *extreme fear* by use of violence or threats," *State v. Schweppe*, 237 N.W.2d 609, 614 (Minn. 1975) (emphasis added), and does not apply in cases

involving "transitory anger" *State v. Jones*, 451 N.W.2d 55, 63 (Minn. Ct. App. 1990). No such requirements inhere in Oregon's menacing statute and other apprehension-only simple assault statutes, which may be violated in the course of fleeted and heated argument. Further, the terroristic threat statute in *Chanmouny* is based on section 211.3 of the Model Penal Code, *see Jones*, 451 N.W.2d at 63, *not* section 211.1, which, as discussed above, includes apprehension-only simple assault.[11] Indeed, Minnesota law includes apprehension-only simple assault as the entirely separate crime of assault in the fifth degree. *See* Minn. Stat. § 609.224 (defining misdemeanor assault in the fifth degree to include a person who "commits an act with intent to cause fear in another of immediate bodily harm or death"). This latter apprehension-only assault statute, not the terroristic threat statute, is the analogue of the menacing statute in this case.

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[11] Model Penal Code § 211.3, titled "Terroristic Threats," targets conduct which was, unlike assault, not criminalized at common law, such as "letters or anonymous telephone calls threatening death, kidnapping, or bombing." Model Penal Code and Commentaries, § 211.3, cmt 1 at 205 & n.5; *see also id.* at 206 (stating that "physical menacing was assimilated to the crime of assault" at common law but "terrorizing by verbal threat" was not).

Finally, the stalking statute at issue in *Ajami* is also clearly distinguishable because "[a] violator of the statute must act willfully, must embark on a course of conduct, as opposed to a single act, and must cause another to feel great fear." *Ajami*, 22 I&N Dec. at 952. Michigan's stalking statute, codified at Mich. Comp. Laws Ann. §§ 750.411h & i, was not enacted until 1992, *see* 1992 Mich. Legis. Serv. P.A. 260 (H.B. 5472) (West), while simple assault and battery are proscribed at Mich. Comp. Laws Ann. § 750.81 and include, by reference to the case law, apprehension-only simple assault. *See People v. Terry*, 553 N.W.2d 23, 25 (Mich. Ct. App. 1996) ("A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.").

As the discussion above demonstrates, the provisions at issue in *Chanmouny*, *Latter-Singh*, and *Matter of Ajami* differ in their content, non-common-law historical origin, and aim from apprehension-only simple assault statutes like the one at issue in this case.

3. A Published Decision Is Needed to Clarify that Apprehension-Only Simple Assault Is Not a Crime Involving Moral Turpitude.

As discussed above, the Immigration Judge decision in this case and the unpublished BIA decisions that hold that menacing under Oregon law is a crime involving moral turpitude are in clear conflict with BIA and Circuit precedent. These decisions fail to acknowledge that apprehension-only simple assault, which requires no physical contact at all, is both historically and substantively the least serious form of simple assault crime, and instead mistakenly analogize apprehension-only simple assault to entirely distinct crimes requiring causation of extreme and sustained fear.

Amicus therefore respectfully seeks clarification in a published decision that apprehension-only simple assault—the simplest form of simple assault—does not constitute a crime involving moral turpitude.

Conclusion

The decision by the Immigration Judge in this case and the BIA's unpublished decisions fail to recognize that Oregon's

menacing statute, Or. Rev. Stat. § 163.190, concerns the simplest of simple assault and instead conflate it with distinct and unrelated statutes. Amicus respectfully requests clarification in a published decision that menacing in Oregon, specifically, and apprehension-only simple assault generally, are not crimes involving moral turpitude.

Respectfully Submitted,

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Certificate of Service

I, Emily Gumper, certify that on June 25, 2015, I served a true and correct copy of the attached brief on the parties below by first class regular mail.

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