No. 22-[redacted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[redacted] [redacted]

Petitioner,

v.

MERRICK B. GARLAND, U.S. Attorney General,

Respondent.

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICUS CURIAE* THE SEX WORKERS PROJECT OF THE URBAN JUSTICE CENTER IN SUPPORT OF THE PETITIONER

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 22-[redacted] Caption: [redacted]-[redacted] v. Garland

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Sex Workers Project of the Urban Justice Center
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Aadhithi Padmanabhan Date: May 15, 2023

Counsel for: Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Sex Workers Project of the Urban Justice Center (SWP of UJC) is a national advocacy and policy organization. In collaboration with impacted communities, SWP of UJC seeks to destigmatize and decriminalize adult consensual sex work while preventing exploitation, including human trafficking, in the sex trades. SWP of UJC provides free immigration legal services to current and former sex workers, including immigration screenings, consultations, and legal representation to secure immigration benefits and defend against deportation. SWP of UJC represents noncitizens in immigration courts across the country, including courts within the Fourth Circuit. SWP of UJC has represented hundreds of individuals who would be rendered inadmissible, deportable, or subject to mandatory immigration detention if prostitution and related offenses are classified as crimes involving moral turpitude.

[1] Counsel for the petitioner consents to the filing of this brief, and counsel for the government takes no position. Neither party's counsel authored this brief in whole or in part, and neither party nor party counsel contributed money intended to fund the preparation or submission of this brief. Only counsel for *amicus curiae* contributed to the preparation and submission of this brief.

INTRODUCTION

Public opinion changes with generations and evolves with the times. Society does not hold the same views that it held one hundred, fifty, or even ten years ago: today, we condemn slavery, believe women have the right to vote, and permit same-sex marriage. Societal attitudes towards sex work have also evolved over time. Many Americans no longer believe that the purchase and sale of sex between consenting adults should be criminalized. Responding to public opinion, several jurisdictions within the United States are declining to enforce anti-prostitution laws, and a movement to decriminalize consensual sex work is gaining momentum.

While commercial sex between consenting adults is increasingly accepted in society, the Board of Immigration Appeals refuses to reconsider agency cases holding that convictions for prostitution and related offenses, like the petitioner's conviction for solicitation of prostitution, are "crimes involving moral turpitude." But the agency cases on which the Board relies are all fifty years or older, and they were decided at a time when many believed it was appropriate for the government to regulate female sexuality and limit sex outside marriage. These antiquated norms—which clash with contemporary values rejecting both gendered double standards and the state's intrusion into private, consensual sexual activity—should not define moral turpitude in the twenty-first century. The Board itself has explained that whether a crime involves moral turpitude turns on "contemporary

moral standards and may be susceptible to change based on the prevailing views of society." *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1192 (B.I.A. 1999). The Board's failure to apply its own framework in this case constitutes reversible error.

ARGUMENT

I. Only offenses that violate contemporary moral standards that prevail in society qualify as crimes involving moral turpitude.

Designating an offense as a "crime involving moral turpitude" or "CIMT" triggers serious immigration consequences. CIMTs can render noncitizens removable from the United States, 8 U.S.C. § 1227(a)(2)(A), § 1182(a)(2)(A)(i)(I), bar access to relief from removal, 8 U.S.C. § 1229b(b)(1)(C), prompt mandatory immigration detention, 8 U.S.C. § 1226(c), and limit the scope of judicial review of removal orders, 8 U.S.C. § 1252(a)(2)(C). This case highlights the severe consequences that flow from a CIMT designation, where the agency below found the petitioner's conviction made him ineligible for cancellation of removal, a form of immigration relief that would allow him to cancel his deportation, keep his family intact, and continue to care for his disabled U.S. citizen son. *See* ECF No. 24, Pet'r's Br. at 6, 7.

Despite the monumental consequences for noncitizens and their families, Congress has never defined "moral turpitude"—a term that, over the years, has been criticized as "nebulous," *Matter of Tran*, 21 I. & N. Dec. 291, 292 (B.I.A. 1996), "baffling," *Garcia-Meza v. Mukasey,* 516 F.3d 535, 536 (7th Cir. 2008),

and an "amorphous morass," *Partyka v. Attorney Gen. of U.S.*, 417 F.3d 408, 409 (3d Cir. 2005). Congress instead left moral turpitude's "contours . . . to case-by-case adjudication by administrative and judicial tribunals for over a century." *Zarate v. U.S. Attorney General*, 26 F.4th 1196, 1199 (11th Cir. 2022).

Through such case-by-case adjudication, courts and the agency have identified important limiting standards to which moral turpitude determinations must conform. This Court, for instance, has held that a qualifying crime "must involve conduct that not only violates a [criminal] statute but also independently violates a moral norm." *Mohamed v. Holder*, 769 F.3d 885, 888 (4th Cir. 2014).

The Board of Immigration Appeals has provided further instruction on when a crime that "independently violates a moral norm" involves moral turpitude. First, the Board has held that the violated norm must be one that "'prevail[s] in the United States as a whole, regarding the common view of our people concerning its moral character.'" *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188, 1192 (B.I.A. 1999) (quoting *Matter of G-*, 1 I. & N. Dec. 59, 60 (B.I.A. 1941)). In endorsing this standard, the Board drew on analysis by Judge Learned Hand, who explained that moral turpitude is judged not according to "the standard [that] . . . we personally might set, but 'the commonly accepted mores': i.e. the generally accepted moral conventions current at the time . . . ." *United States v. Francioso,* 164 F.2d 163, 163 (2d Cir. 1947) (cited in *Lopez-Meza*, 22 I. & N. Dec. at 1192). Crimes that

violate the mores of a subset of the national community do not, therefore, involve moral turpitude.

Second, recognizing that the nation's values evolve over time, the Board has held that moral turpitude must be judged by "contemporary moral standards," which "may be susceptible to change based on the prevailing views of society." *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382, 385 (B.I.A. 2018) ("*Ortega-Lopez II*") (quoting *Lopez-Meza*, 22 I. & N. Dec. at 1192). The Board has expressly rejected a "static definition [of moral turpitude] because of the evolving nature of what conduct society considers to be contrary to accepted rules of morality as reflected in criminal statutes." *Matter of Ortega-Lopez*, 26 I. & N. Dec. 99, 101, n.2 (B.I.A. 2013) ("*Ortega-Lopez I*"). An alternative approach—one that does not update the meaning of moral turpitude to keep pace with evolving social norms—would lead to deeply anomalous results, permitting deportations based on outdated, and even offensive, classifications. *See Nunez v. Holder*, 594 F.3d 1124, 1132 (9th Cir. 2010) ("[A]t various times, the BIA and other courts have labeled morally turpitudinous such offenses as consensual oral sex . . . consensual anal sodomy . . . and 'overt and public homosexual activity[.]'" (Internal citations omitted)); *see also* Pet'r's Br. 4 (citing decades-old cases where the Board has held that convictions for "sodomy," "adultery," "cohabitation," and "abortion" are CIMTs).

The limiting standards that this Court and the Board have identified, if applied rigorously, give a "nebulous," "baffling," and "amorphous" immigration statute some more definite and ascertainable meaning. *Cf. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999) (declining to defer to agency that failed to adopt "*some* limiting standard" that is "rationally related to the goals of the Act" (emphasis in original)).[2] Without these limiting standards, adjudicators would assume freewheeling authority to decide issue of public morality, including by taking sides on matters over which there is "'earnest and profound debate' across the country." *Gonzales v. Or.*, 546 U.S. 243, 267 (2006) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)) (declining to interpret the Controlled Substances Act to confer authority to the Attorney General to effectively

[2] The need for limiting standards is particularly pressing in this context. Over a three-justice dissent, the Supreme Court upheld a moral turpitude immigration statute against a void-for-vagueness challenge. *See Jordan v. De George*, 341 U.S. 223, 232 (1951). In that case, the government had offered the same limiting construction that the Board has identified—that "'[crimes] must be measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral'" *Id.* at 237 (Jackson, J., dissenting) (quoting the government's brief). In recent years, a growing "chorus" in the lower courts has called on the Supreme Court to reconsider its holding in *De George*. *E.g., Diaz-Flores v. Garland*, 993 F.3d 766, 770 n.2 (9th Cir. 2021). These concerns about unconstitutional vagueness underscore the need for the agency to scrupulously adhere to its own limiting standards.

criminalize many forms of physician-assisted suicide) (internal quotations omitted).[3]

II. Solicitation of prostitution does not violate contemporary moral standards that prevail in society.

Because moral turpitude determinations are "susceptible to change based on the prevailing views of society," *Ortega-Lopez II*, 27 I. & N. Dec. at 385, precedent alone—especially when it is decades old—cannot definitively resolve whether a particular offense is a crime involving moral turpitude. Instead, adjudicators must inquire into "contemporary moral standards." *Id.* An inquiry into contemporary moral standards in this case reveals that many Americans no longer consider the purchase and sale of sex between consenting adults to constitute immoral behavior. Tracking public opinion, there is growing momentum to change public policy as well. *See infra* § II.A.

In its decision below, the Board, which considered neither contemporary public opinion nor public policy, failed to notice these important developments. Instead, its decision rested in large part on agency precedents from more than half a century ago, which held that prostitution and related offenses are CIMTs. JA 4

[3] An agency's claim to such expansive delegation would stand in considerable tension with the Supreme Court's "major questions" jurisprudence. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2620 (2022) (Gorsuch, J., concurring) (citing *Gonzales* and discussing the circumstances in which the major questions doctrine applies).

(citing agency cases from 1947, 1951, and 1965). These precedents reflect the moral norms of a bygone era, when it was considered appropriate for the state to regulate women's sexual autonomy and limit nonmarital sex. Today, the moral intuitions these cases reflect would be rejected by many Americans as old-fashioned, patriarchal, or, at least, inappropriate targets of government regulation. *See infra* § II.B.

A. Both public opinion and public policy reflect a growing acceptance of commercial sex between consenting adults.

Public opinion, prosecutorial practices, and a growing movement to decriminalize sex work all point in the same direction: large segments of modern society no longer disapprove of the purchase and sale of sex between consenting adults. Beginning with public opinion, national polls consistently show broad support for decriminalizing commercial sex between consenting adults. In 2016, the Marist Institute for Public Opinion found that 49% of respondents believed that prostitution between consenting adults should be legal. *Should Prostitution Be Legalized?* Marist Poll (May 31, 2016), https://maristpoll.marist.edu/polls/531-should-prostitution-be-legalized/. Further, "63% report[ed] that they believe that the person who sells sex for money should not receive any penalty," and "60% . . . sa[id] the individual who pays for sex should not receive any punishment." *Id.* In 2019, Data for Progress found that 52% of respondents would strongly or somewhat support the decriminalization of sex work. *See* Nina Luo,

Decriminalizing Survival: Policy Platform and Polling on the Decriminalization of Sex Work 1,22, Data For Progress, https://www.filesforprogress.org/memos/decriminalizing-sex-work.pdf (last visited Apr. 10, 2023).[4] And between 2020 to 2022, YouGov conducted a series of national polls where it asked respondents whether "buying a prostitute's services" and "working as a prostitute" should be a crime. 44% to 48% of respondents in these surveys said that "buying a prostitute's services" should not be classified as a crime, *Should Buying a Prostitute's Service Be Legal?* YouGov America, https://today.yougov.com/topics/politics/trackers/should-buying-a-prostitutes-services-be-legal (last visited Apr. 10, 2023), and 48% to 52% percent of respondents said that "working as a prostitute" should not be classified as a crime. *Should Working as a Prostitute Be Legal?* YouGov America, https://today.yougov.com/topics/politics/trackers/should-working-as-a-prostitute-be-legal (last visited Apr. 10, 2023).

Tracking contemporary public attitudes, jurisdictions across the United States, including New York City, Philadelphia, Seattle, and Michigan's Washtenaw County now treat prostitution as a low-level offense that they will no

[4] The survey asked: "Would you [support or oppose] decriminalizing sex work as New Zealand did in 2003? This would remove criminal penalties for adults to sell and pay for consensual sex while also maintaining laws that criminalize violence." Luo, *supra* at 21.

longer enforce. Jonah E. Bromwich, *Manhattan to Stop Prosecuting Prostitution, Part of Nationwide Shift*, N.Y. Times (Apr. 21, 2021), https://www.nytimes.com/2021/04/21/nyregion/manhattan-to-stop-prosecuting-prostitution.html; David Kroman, *To reduce prostitution, Seattle gets experimental*, Crosscut (May 27, 2015), https://crosscut.com/2015/05/to-reduce-prostitution-seattle-gets-experimental; Washtenaw Cnty. Off. of the Prosecuting Att'y, *Policy Directive 2021-08: Policy Regarding Sex Work* 1,4 (Jan. 14, 2021), https://www.washtenaw.org/DocumentCenter/View/27201/Sex-Work-Policy. The prosecuting attorney for Michigan's Washtenaw County, which no longer prosecutes either solicitation or prostitution, explained that he reached this decision in part because "criminalization of sex work is reminiscent of long-discarded 'paternalistic' laws." Washtenaw Cnty. Policy Directive, *supra*.

Also reflecting these evolving social norms, a movement to decriminalize the sale and purchase of sex between consenting adults is gaining traction across the country. *See* Jesse McKinley, *Could Prostitution Be Next to Be Decriminalized?* N.Y. Times (May 31, 2019), https://www.nytimes.com/2019/05/31/nyregion/presidential-candidates-prostitution.html. As the petitioner notes, decriminalization bills have been introduced in ten states and Washington D.C. *See* Pet'r's Br. 30 & n.5 (citing bills).

The decriminalization movement, which might have once seemed radical, has gained mainstream support in recent years. Major human rights organizations like Human Rights Watch and Amnesty International have come out in support of decriminalization. *See* Pet'r's Br. 47. So has the World Health Organization. *See Sex Workers*, Global HIV, Hepatitis and STIs Programmes, World Health Organization, https://www.who.int/teams/global-hiv-hepatitis-and-stis-programmes/populations/sex-workers (last visited Apr. 3, 2023). Decriminalization was also a topic of discussion during the 2020 election cycle, with presidential candidates like Bernie Sanders and Elizabeth Warren explaining they were open to changing the law. *See* Marie Solis, *Bernie Sanders Says He'd Consider Decriminalizing Sex Work*, Vice (June 20, 2019), https://www.vice.com/en/article/nea59d/elizabeth-warren-bernie-sanders-open-to-decriminalizing-sex-work-after-endorsing-tiffany-caban. Similarly, as a presidential candidate, now-Vice President Kamala Harris was asked if "sex work ought to be decriminalized." *Kamala Harris' Criminal Justice Evolution*, The Root (Feb. 29, 2019), https://www.theroot.com/exclusive-kamala-harris-calls-for-decriminalization-of-1832883951. She responded, "I think so, I do," elaborating, "when you're talking about consenting adults . . . we should really consider that we can't criminalize consensual behavior as long as no one is being harmed." *Id.*

Many current and former sex workers are spearheading advocacy efforts around decriminalization. *See* Marie Solis, *This is How Sex Workers Will Change the Law*, Vice (May 8, 2019), https://www.vice.com/en/article/7xgx8b/this-is-how-sex-workers-lobby-will-change-new-york-law-decriminalization. Leading anti-trafficking organizations, including the Global Alliance Against Trafficking in Women and Freedom Network USA, also support decriminalizing consensual adult sex work. *See* Global Alliance Against Trafficking in Women, *GAATW-IS Statement on Attack on UN Research Calling for the Decriminalisation of Sex Work*, Global Alliance Against Trafficking in Women (Dec. 16, 2013), https://www.gaatw.org/component/content/article?id=754:gaatw-is-statement-on-attack-on-un-research-calling-for-the-decriminalisation-of-sex-work (calling for decriminalization and the "conceptual de-linking of sex work and trafficking in persons"); Freedom Network USA, *FNUSA Position Paper: Preventing Sex Trafficking Requires the Full Decriminalization of Sex Work* 1 (Sept. 2021), https://freedomnetworkusa.org/app/uploads/2021/09/FNUSAStatementDecrimSept2021.pdf (supporting "the decriminalization of sex work that involves the participation of consenting adults").

That directly-impacted people are leading the movement for decriminalization matters because resistance to sex work is frequently expressed—as it was by the Board in this case—as concern about "exploitati[on]." *See* JA 4.

Many sex workers and their advocates reject this characterization as incomplete at best and misleading at worst. They urge instead for a more nuanced understanding that acknowledges how sex work (like many other forms of labor, both legal and illegal) exists along a spectrum of choice, circumstance, and coercion. Luo, *supra* at 4. Acknowledging this spectrum better reflects the diverse experiences of sex workers. *Cf.* Pet'r's Br. 44-45 (citing research showing how working conditions, job satisfaction, and self-esteem vary amongst different categories of sex workers.)

Some sex workers also emphasize the meaningful and rewarding nature of their work. RJ Thompson-Rodriguez, attorney and managing director of *amicus* The Sex Workers Project of the Urban Justice Center, has described working as an escort as "profoundly meaningful," because he could help clients "feel seen and validated and cared for in ways that they have never felt or not felt in years." Sam Dorman, *Nationwide push to liberalize prostitution laws prompts concerns about human trafficking*, Fox News (Jan. 28, 2022) https://www.foxnews.com/us/nationwide-deregulate-prostitution. Others have expressed similar sentiments. *See* Emily Bazelon, *Should Prostitution Be a Crime?* N.Y. Times Mag. (May 5, 2016), https://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html (quoting former sex workers who said that their work could be "powerful"). This perspective provides a real-life counterpart to the cinematic

examples described in the petitioner's brief. *See* Pet'r's Br. 34-35. Labeling the broad range of human interactions that anti-prostitution and anti-solicitation statutes criminalize as "exploitative" risks invalidating the agency of the very people who are the presumed subjects of exploitation.

None of this is meant to imply that a society-wide consensus exists on the issue. Even within advocacy communities, deep disagreements persist. *See* Bazelon, *supra* (describing areas of debate and discussion). This Court need not take sides on the decriminalization debate to resolve this case in the petitioner's favor. Instead, the Court could simply recognize that the very existence of a robust national conversation—an "earnest and profound debate across the country" *Gonzales*, 546 U.S. at 267-68 (internal quotation marks omitted)—defeats any notion that offenses related to prostitution meet the high bar the Board has set for "moral turpitude." No one aware of this ongoing national conversation could reasonably conclude that the petitioner's conviction for solicitation of prostitution violates moral norms that "prevail[] in the United States *as a whole*, regarding *the common view of our people* . . . ." *Matter of G*, 1 I. & N. Dec. at 60 (emphasis added). Today, a "common view" on the matter simply does not exist.

B. The agency precedents on which the Board relied reflect outdated, gendered norms.

Even as it acknowledged that "there is an evolving understanding of what society considers contrary to the accepted rules of morality," the Board made no

attempt to measure modern society's views, instead relying on agency precedents from 1947, 1951, and 1965. JA 4 (citing *Matter of P-*, 3 I. & N. Dec. 20 (B.I.A. 1947), *Matter of W-*, 4 I. & N. Dec. 401 (C.O. 1951), and *Matter of Lambert*, 11 I. & N. Dec. 340 (B.I.A. 1965)). The Board's error is not simply that these half-century-old agency cases fail to capture the evolution in societal views on sex work. These cases also treat as a self-evident proposition that prostitution involves moral turpitude—a conclusion that is consistent with a type of gendered and patriarchal thinking that was popular at the time and that many in modern society would reject.

The three agency cases that the Board cites do not explain why the agency concluded that "prostitution and/or acts in furtherance of prostitution," JA 4, are CIMTs. Instead, the cases treat that conclusion as so obvious that no explanation is necessary. *Matter of W-*, for instance, says only that "[i]t is well established that the crime of practicing prostitution involves moral turpitude." *See* 4 I. & N. Dec. 401, 402 (C.O. 1951).[5] Similarly, *Matter of P-* concludes without analysis that keeping or living in a "house of ill fame . . . palpably involves moral turpitude." 3 I. & N. Dec. 20, 22 (B.I.A. 1947). And *Matter of Lambert*, sheds no further light

[5] As the petitioner notes, *Matter of W-* was issued by then-INS's Central Office. *See* Pet'r's Br. 19 n.3. *Amicus* agrees with the petitioner that Central Office decisions do not carry the force of law, *see* 8 C.F.R. § 1003.1(g)(2), and therefore should not trigger *Chevron* deference.

on the matter, stating simply that "renting rooms with knowledge that the rooms were to be used for the purposes of lewdness, assignation, or prostitution were crimes involving moral turpitude." 11 I. & N. Dec. 340, 342 (B.I.A. 1965).

Another agency case decided contemporaneously provides some of the missing context for these cases. *Matter of A-*, decided after *Matter of P-* and *Matter of W-* but before *Matter of Lambert*, held that "keeping a brothel" is a CIMT because "it is a form of commercial vice involving the practice of immorality of hire." 5 I. & N. Dec. 546, 549 (B.I.A. 1953). As support for this proposition, *Matter of A-* cited a 1923 Texas state court case, *Dosset v. State*, *id.*, which was itself one in a long line of cases holding that a woman's conviction for "conducting a bawdy house" "imput[ed] moral turpitude" and could be used to impeach her credibility as a witness. 94 Tex. Crim. 145, 146 (1923). (citing cases).[6]

Legal scholar Julia Simon-Kerr has excavated how the concept of "moral turpitude," as it was used in evidence law, functioned differently when applied to men than when applied to women: "[M]oral turpitude in men was characterized by oath-breaking and disloyalty . . . while in women it connoted failure to comply with norms of sexual conduct." Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1014 (2012). "Women's sexual virtue was of such paramount

[6] The decision in *Dosset* can be found at http://www.ecases.us/case/texcrimapp/c4109871/dossett-v-state.

importance to perceptions of their integrity that attorneys routinely sought to impeach women with evidence of their lack of chastity, a practice that did not extend to men." *Id.*. *Dosset* is a textbook example of this principle at work. *Cf. id.* at 1026 (describing how Texas was one of the states which had, "[b]y the late nineteenth century . . . agreed that moral turpitude and credibility were related.") By adopting the reasoning in *Dosset*, the Board appears to have unquestioningly incorporated these "[g]endered honor norms," *id.* at 1028, into the immigration context.

The influence of gendered norms is also readily apparent in important immigration cases from the early twentieth century. The Supreme Court's decision in *United States v. Bitty*, for example, illustrates how preoccupations with female sexual purity—rather than concerns about the exploitation of sex workers or the commodification of sex—drove morality assessments in immigration law. *See* 208 U.S. 393 (1908). The statute at issue in *Bitty* forbade "the importation into the United States of an alien woman or girl for the purpose of prostitution, *or for any other immoral purpose* . . . ." *Id.* at 398 (quotations omitted, emphasis in original). Writing for a unanimous Court, Justice Harlan explained that women who engage in "prostitution" or "concubinage" "must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from a standpoint of morality, exist

between man and woman in the matter of sexual intercourse." *Id.* at 402. The Court in *Bitty* made explicit that moral concern over female sexuality is what animated its decision: the Court described women who "offer their bodies to indiscriminate intercourse with men" "for hire or *without hire*" as "degraded in character." *Id.* at 401 (emphasis added).

This hostility to the idea of women's sexual autonomy was never repudiated by the Board. To the contrary, the Court's decision in *Bitty* continued to inform the Board's decisions well into the twentieth century. In *Matter of M-,* for example, the Board distinguished the conduct of a Canadian woman traveling to the United States to visit her American fiancé from the conduct at issue in *Bitty*. 3 I. & N. Dec. 218, 219 (B.I.A. 1948) (citing *Bitty*, 208 U.S. at 403). The Board discussed the Supreme Court's reasoning in *Bitty* without ever calling into doubt its moral—and moralizing—foundations. *Id.*

To be sure, the Board in this case did not rely on either *Matter of A-* or *Matter of M-*. But these two cases were decided in 1948 and 1953, around the same time as the agency cases the Board *did* cite below. In the absence of any explanatory analysis in the cited cases, it is at least possible, if not likely, that these same concerns about female sexual autonomy influenced the conclusion that

prostitution and related offenses were obviously— "palpably," *Matter of P-*, 3 I. & N. Dec. at 22—morally turpitudinous.[7]

However popular such views may have been at the time, they are deeply contested today. Many in modern society would reject the notion that sexual independence and sex outside marriage are inherently immoral. *See Most Americans say premarital sex is at least sometimes acceptable,* Pew Research Center (Aug. 14, 2020), https://www.pewresearch.org/social-trends/2020/08/20/nearly-half-of-u-s-adults-say-dating-has-gotten-harder-for-most-people-in-the-last-10-years/psdt_08-19-20_dating-relationships-00-6/; *see also* David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution*, 127 U. Pa. L. Rev. 1195, 1249 (1979) ("[I]n matters of sexual choice, the range of reasonable personal ideals is wide, various, and acutely sensitive to personal context and individual

[7] This preoccupation with female sexual purity is also consistent with "early criminal law, [which] treated sex as particularly pernicious because of ancient sexist, moralist, and racist norms about appropriate sexuality, not because of modern concerns over equality and bodily integrity." *See* Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 Stan. L. Rev. 755, 845-46 (2023). Criminal law served to "control[] sexuality [] not outlaw[] violence" as demonstrated by the many forms of consensual sex that were criminalized. *Id.* at 776 (explaining how fornication, adultery, sodomy, and lewdness were criminalized). Notably, the 2012 version of the Virginia statute under which the petitioner was convicted reflected this preoccupation in early criminal law, with its references to the crimes of "adultery" and "fornication." Va. Code Ann. 18.2-346 (2012). The Virginia legislature has since amended its criminal code to remove these references to adultery and fornication. *See* Va. Code Ann. 18.2-346.01 (2021).

idiosyncrasy."). Others would reject gendered double standards that treat female, but not male, sexual promiscuity as a moral failing. *Cf.* Richards, *supra* at 1253-55 (noting that modern society "reject[s]" a "model of compulsory female chastity" in many parts of our "social life"). And still others would prefer that the government get out of the business of regulating private, consensual sexual conduct through our criminal laws. *See id.* at 1278-79 (arguing that even those whose personal moral ideals would lead them to reject commercial sex should not want "legal enforcement of such [] ideal[s]"); *see also supra* section II.A.

Against this backdrop, the agency cases on which the Board relied stand out as relics of the past. "Since these older cases were decided, the fluid boundaries of our nebulous 'moral turpitude' standard have moved away from the rigid imposition of austere moral values on society as a whole and substantially in the direction of affording tolerance and individual liberty[.]" *Nunez*, 594 F.3d at 1132 (suggesting that earlier decisions finding that consensual oral sex and consensual sodomy were morally turpitudinous would no longer be valid today). The Board erred when it failed to acknowledge and grapple with this transformation.

CONCLUSION

Ignoring salient details about both the present and the past, the agency below concluded that solicitation of prostitution categorically involves moral turpitude.

The Sex Workers Project of the Urban Justice Center respectfully asks the Court to vacate the decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the length requirement of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), because it is 4503 words excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font.

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