UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

UWE ANDREAS JOSEF ROMEIKE,	)	
HANNELORE ROMEIKE,	)	
D.R.,	)	
L.R.,	)	
J.R.,	)	**Case No. 12-3641**
C.R.,	)	
D.D.R.,	)	
Appellants,	)	
	)	
	)	
vs.	)	
	)	
	)	
ERIC C. HOLDER, Attorney General,	)	
Appellees.	)	

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-3641 Case Name: Uwe Romeike, et. al v. Eric Holder

Name of counsel: Michael P. Farris, Esq.

Pursuant to 6th Cir. R. 26.1, Uwe,Hannalore,D[redacted],L[redacted],J[redacted],C[redacted],&D[redacted] R[redacted]
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on October 29, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michael Farris
Michael P. Farris, Esq.
Home School Legal Defense Ass'n

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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JURISDICTIONAL STATEMENT

Pursuant to 8 U.S.C. § 1158(a) (2012), the Romeikes (Appellants) filed individual applications for asylum, Forms I-589, on November 11, 2008. R. at 463-74, 940-51, 970-4. The case was assigned to U.S. Immigration Judge Lawrence O. Burman (hereinafter "Immigration Judge") under 8 U.S.C. § 1229a(a) (2012), who granted asylum to all seven appellants in an oral decision on January 26, 2010. Appx. at 19a.[1] Pursuant to 8 U.S.C. §1003.1(b)(1) (2012), the United States Attorney General (Appellee) appealed the Immigration Judge's decision to the Board of Immigration Appeals ("the Board"), on February 25, 2010. R. at 224-6.

The Board reversed the decision of the Immigration Judge, denied asylum to all seven appellants, and dismissed the appeal in a written order dated May 4, 2012. R. at 7. The Board's order of removal constitutes a final, appealable order. 8 C.F.R. § 1241.1 (2012). Appellants timely filed with this Court a Petition for Review on May 23, 2012. This Court has jurisdiction to review the Board's order of removal pursuant to 8 U.S.C. § 1252(a) (2012).

[1] The Oral Decision of Lawrence O. Burman, in Asylum Proceedings A-087-368-600 to 606, is not reproduced in the record produced by the Government for this appeal. It is reproduced for the convenience of the Court in the Appendix, at 2a-20a.

STATEMENT OF THE ISSUES

1. Whether the Board of Immigration Appeals improperly reversed the Immigration Judge's finding of fact that German homeschoolers are selectively prosecuted and disproportionately punished because of their religious beliefs.

2. Whether the Board of Immigration Appeals erred in concluding, as a matter of law, that Germany's compulsory attendance law is a religiously-neutral law of general applicability, which does not result in persecution against religious homeschoolers.

3. Whether Germany's compulsory school attendance law, which is applied to prohibit the development and growth of religiously- or philosophically-motivated "parallel societies," is a gross violation of international human rights standards.

4. Whether Religious Homeschoolers in Germany are a "particular social group" within the meaning of the Immigration and Nationality Act.

STATEMENT OF THE CASE

Uwe Romeike (pronounced "roh-MY-kee"), his wife Hannalore, and five of their minor children ("the Romeikes") appeal the decision of the Board of Immigration Appeals, which overturned the order of Immigration Judge Lawrence O. Burman granting the Romeikes asylum on January 20, 2010. The Immigration Judge granted the petitions because the Romeikes (1) had a well-founded fear of future persecution on account of religion, and (2) were members of a particular social group – German parents who homeschool for religious reasons. Appx. at 19a. The government appealed, and the Board of Immigration Appeals ("the Board") reversed on May 4, 2012. R. at 7.

The Board reversed for two stated reasons. First, the Board held that the Romeikes had not shown that "the compulsory attendance law is selectively applied to homeschoolers," or that "homeschoolers are more severely punished than others whose children do not comply with the compulsory school attendance law." R. at 5. Second, even if the Romeikes had prevailed on this point, their application would fail because German homeschoolers "lack the social visibility required to constitute a particular social group." R. at 7. The Romeikes timely filed a Petition for Review on May 23, 2012.

STATEMENT OF FACTS

In the fall of 2006, Uwe and Hannelore Romeike withdrew their children from the public schools in Bissingen, Germany, and began teaching them at home. The Romeikes have chosen to homeschool because they believe that the public school curriculum – particularly elements that they believed were anti-Christian and sexually inappropriate elements – would harm their children, and because they are responsible to God for the education of their children. When the Romeikes asked local officials about homeschooling, they were told no exemptions were available. Accordingly, they did not request an exemption. R. at 309.5-21.

The Romeikes were visited by the local school principal, Wolfgang Rose. Principal Rose stated that homeschooling was illegal, and could result in fines and police action. R. at 307.23-308.17. On September 10, 2006, the Romeikes received a letter from Mayor Kuemmerle of Bissingen, stating that "homeschooling and not attending the public elementary school in Bissingen is illegal" and that the authorities were "willing to forcefully take the students to school." R. at 539-40. Principal Rose also sent a letter to the Romeikes, dated September 21, 2006, which stated that the Romeikes were "obligated to take your children to the public school in Bissingen," and that failure to comply would result in "legal action against you." R. at 535. Despite these threats, the Romeikes continued homeschooling.

On Friday, October 20, 2006, just before 7:30 A.M., armed and uniformed police officers entered the Romeike home. R. at 310.13-311.20. Without a written order or other authorizing paperwork, R. at 311.21-22, 312.6-11, the officers forcibly removed the Romeike children from the home and drove them, crying and traumatized, to school. R. at 311.8-14; 355.23-356.25. Mrs. Romeike later picked them up. She took the children, hid with her sister, and was afraid to return home. R. at 312.20-313.3; 357.4-7.

The next Monday, October 23, armed and uniformed police officers again came to the Romeike home to forcibly remove the children, and would have succeeded but for an organized group of other German homeschoolers, who protested outside the Romeike home. R. at 313.4-18; 545-6 ¶¶ 5-12; 547 ¶¶ 5-6; 549 ¶¶ 5-6; R. at 551. Instead, the Romeikes were given a copy of a letter from Mayor Kuemmerle, ordering the police to forcibly take the children to school. R. at 543.

The Romeikes continued to receive threats and fines until November 2006, when they obtained a doctor's letter recommending that the children be excused from school because attendance would cause them undue stress with possible psychosomatic consequences. R. at 556. The children were excused from physically attending the local public school for the semester, but the Romeikes were still prohibited from providing any instruction; instead, the children were taught by a government teacher. R. at 346.1-8. In December, Mr. Kline, Director of the local

School District Office, insisted that the children be enrolled in the local public school in January 2007. R. at 346.9-11. The Romeikes refused to comply.

In February 2007, the Romeikes challenged these notices in court. R. at 346.17-21. The State Court rejected their appeal and upheld the convictions:

> The school law does not allow for an exemption, when schools, as they exist, are refused, just on the basis of their curriculum or educational goals, or when parents want to protect their children from the influences of other students, which they deem harmful. . . . Neither the parents law to freely educate (raise) their children ... nor the law of freedom to follow faith and conscience and the right to practice one's religion ... are sufficient grounds for parents to be entitled to get an exemption for their children from the general school attendance requirement and the related permission to homeschool.

R. at 580. The Romeikes appealed this decision to the Federal Constitutional Court. R. at 346.22-347.1. Their appeal was rejected. R. at 584; R. at 347.2-4.

During these proceedings, the Romeikes incurred staggering fines of € 6,000 to € 7,000. R. at 323.4-9. Mr. Romeike's total monthly income during this time was between € 1,000 and € 1,200. R. at 322.20-22. The Romeikes paid the first round of fines, about € 400, but could not pay the rest. R. at 343.2-5; 323.10-12. Mr. Kline also told the Romeikes that the fines would continue to grow, and they must either pay them or leave the country. R. at 355.11-19.

In August of 2008, the Romeikes fled to the United States, where they applied for asylum. If returned to Germany, they firmly believe that they will not only be fined and prosecuted, but also that they may lose custody of their children if they continue with homeschooling. R. at 325.20-326.5; R. at 358.23-359.8.

SUMMARY OF THE ARGUMENT

The Romeikes fled Germany because they were criminally prosecuted, fined, and threatened with the loss of their children for the "crime" of teaching their children at home in accordance with their religious convictions. Religious freedom and the right of parents to direct the education of their children are basic human rights, yet German homeschoolers who seek to exercise these rights are uniformly punished. If forced to return to Germany, the Romeikes will face persecution unless they conform to the wishes of the state.

The Board overturned the decision of the Immigration Judge because it concluded that the Romeikes will not suffer future "persecution" in Germany. This determination is reversible on two grounds, one procedural and one substantive. Procedurally, the Immigration Judge's factual determinations are entitled to deference, absent a showing of clear error. *Tran v. Gonzales*, 447 F.3d 937 (6th Cir. 2006). Because the Board overturned key factual findings without a showing of clear error, the Board's decision is reversible error. Substantively, a "prosecution" becomes "persecution" when the law is prosecuted selectively, penalties are disproportionate to the crime, and the government's motivations are improper. Here, the weight of the evidence shows that Germany's compulsory attendance law is selectively enforced against homeschoolers, homeschoolers are disproportionately punished, and the law itself is a *per se* violation of basic human rights.

The Immigration Judge found that Germany selectively enforces its compulsory attendance law against religious homeschoolers in an attempt to "circumscribe their religious beliefs" through the compulsory attendance law. The Board, which marshals no evidence to challenge this finding, ignores both Germany's highest constitutional court and the Romeikes' expert witnesses, which show that secular "school skippers" are granted exemptions for reasons like "employment" or "travel," but religious homeschoolers are denied exemptions precisely because of their religious motivation. This is persecution.

The Immigration Judge found that Germany exhibits "animus and vitrol" toward homeschoolers. The Board argues that the goal of the compulsory attendance law is really "tolerance" and "pluralism," even though this claim is belied by the authoritarian pronouncements of Germany's own courts. The true purpose of the law is to compel "integration" between social majorities and religious minorities, to prevent "parallel societies" from forming in Germany. Germany may *praise* tolerance, but it does not *practice* tolerance. Animus, solely based on religious motivation, is persecution.

The Immigration Judge found that homeschoolers are subject to disproportionate punishment, ranging from criminal prosecution, to crushing fines, to jail sentences, to the loss of custody of their children. Appx. at 18a. The Board's response focuses solely on the issue of whether *all* compulsory attendance violators

receive the same punishment. The Board ignores the more fundamental issue: whether these punishments, including the break-up of the family unit itself, are disproportionate to the nature of the "crime." Germany imposes draconian penalties on parents who commit the "crime" of choosing to educate their children at home, according to the dictates of their own conscience. This punishment is disproportionate, and amounts to persecution.

Germany's compulsory attendance law is a *per se* violation of the basic human rights because it makes the exercise of basic human rights a criminal offense. It is beyond dispute that religious homeschooling is a valid exercise of basic human rights, not just in the United States but also under international human rights norms. Germany is obligated to *protect* these rights under both its own Constitution and its voluntary adoption of international human rights treaties. Instead, Germany punishes homeschoolers for acts of conscience. The Romeikes will suffer such persecution if they are forced to return to Germany.

The Board also overturned the Immigration Judge's decision because it concluded that German homeschoolers are not a "particular social group" within the meaning of the Immigration and Nationality Act (INA). The Board found that homeschoolers are not "socially visible" in Germany, even though there is considerable division among the federal circuits as to whether this standard is entitled to *Chevron* deference. The Third and Seventh Circuits have rejected the standard as

unworkable in practice, inconsistent in application, and inherently arbitrary. Application of the "social visibility" standard would also be inapposite to *Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009), where this Court found an asylum applicant to be a member of a particular social group without any reference to the "social visibility" standard.

Furthermore, homeschoolers in Germany are "socially visible." Homeschooling families are readily identifiable – their children are visibly found at home, where instruction and teaching takes place, not in the public schools. In addition, German homeschoolers have formed local and national associations, put on conferences, and have been recognized as a "movement" by German scholars, reporters, and international advocacy groups. Even the German government recognizes that homeschoolers are a "particular social group" by singling them out for prosecution and punishment because of their religious beliefs.

Because the Romeikes have a reasonable fear of future persecution, and are members of a particular social group, they are entitled to asylum under the INA. The Board's decision should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

The Board's determinations of fact are not entitled to the normal standards of deference because the Board reversed the decision of the immigration judge.

This Court has extended deference when the Board summarily affirms or adopts the decision of the Immigration Judge, *Koliada v. I.N.S.*, 259 F.3d 482, 486 (6th Cir. 2001), *Sarr v. Gonzales*, 485 F.3d 354, 359 (6th Cir. 2007), or where the Board "adopts the Immigration Judge's decision with additional commentary." *Ceraj v. Muskasey*, 511 F.3d 583, 588 (6th Cir. 2007).

Where the Board disagrees with the decision of the Immigration Judge, however, the Board may only set aside factual determinations – including the credibility of witnesses – if the Immigration Judge's determination is clearly erroneous. *Tran v. Gonzales*, 447 F.3d 937, 942 (6th Cir. 2006); see also 8 C.F.R. § 1003.1(d)(3)(i) (2012). The Board must not "pointedly ignore[] the corroborative evidence" submitted by the petitioners. *Perkovic v. I.N.S.*, 33 F.3d 615, 623 (6th Cir. 1994). "A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Tran*, 447 F.3d at 943.

The question of whether the Board used the correct standard of review on these factual determinations is a question of law. *Id.* As such, this Court reviews the Board's decision *de novo* to determine whether the Board properly held that the Immigration Judge's factual findings were clearly erroneous. *Id.*; see also *Sad v. I.N.S.*, 246 F.3d 811, 814 (6th Cir. 2001). The Board does not meet the requirements of the clear error standard when it simply states that there are "deficiencies

in the evidence," or that the testimony of an expert witness is "too speculative." *Tran*, 447 F.3d at 943-4. The Board's decision constitutes reversible error if, after reviewing the entire record, this Court is not "left with the definite and firm conviction that a mistake has been committed" by the immigration judge. *Id.* at 943.

The Board's decision also constitutes reversible error if this Court concludes, *de novo*, that there is "no substantial evidence in the record to support the conclusion that a reasonable person in the petitioners' position would not have a well-founded fear of being persecuted." *Perkovic*, 33 F.3d at 623. The Board must provide reasons for any contrary factual findings, and these reasons must be "based on substantial evidence" in the record. *Id.*

II. IN GERMANY, THE ROMEIKES WILL FACE PERSECUTION BECAUSE OF THEIR RELIGIOUS BELIEFS, NOT PROSECUTION UNDER A NEUTRAL LAW OF GENERAL APPLICABILITY.

The record establishes that German parents are routinely granted exemptions to homeschool if their occupations require them to travel, but that parents are denied exemptions if they wish to homeschool because of their disagreement with the philosophy of the German public schools. Religious homeschoolers are, for all practical purposes, the only parties who are routinely denied. Importantly, the reason the government advances to justify this denial is entirely philosophical in nature: religious homeschoolers must not be allowed to teach their children because

the government believes this poses a danger of "parallel societies" – that is, subcultures that rejects the majoritarian views promulgated by the public schools.

A government ceases to "prosecute" a law of general applicability when it exempts some citizens but prosecutes others solely because of their religious motivation. See *Matter of S-P-*, 21 I&N Dec. 486, 493 (BIA 1996) (examining the nature of the crime, severity of punishment, the nature and motives of the prosecution, and the nature of the law at issue, for evidence of pretextual prosecution). Our own constitutional jurisprudence recognizes the difference between neutral laws that are generally applied and those that are aimed at religion in either a *de jure* or *de facto* manner. Compare, *Employment Div. v. Smith*, 494 U.S. 872 (1990) and *Church of Lukumi Babalu Aye, Inc., v. Hialeah*, 508 U.S. 520, 533 (1993) ("if the object of a law is to infringe upon or restrict practices *because of their religious motivation*, the law is *not neutral*") [emphasis added]. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884; see also *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality) (holding that when the state creates "good cause" exemptions to a law of general applicability, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent"). "Prosecution" under such statutes is, *ipso facto*,

pretextual when some are granted exemptions and others are not. See Restatement (Third) of Foreign Relations Law of the United States, § 702(m) (1987).

The Immigration Judge concluded below that religious homeschoolers are selectively prosecuted based on improper motives, Appx. at 15a, and are subject to severe penalties which are disproportionate to their "crime." Appx. at 18a. As such, they suffer persecution within the meaning of the INA.

The Board fundamentally disagreed with the Immigration Judge's factual findings, and replaced them with its own, concluding that Germany's compulsory attendance law does "not reflect a governmental objective to restrict or suppress religious or philosophic practice." R. at 6. The Board committed reversible error because it failed to show that the findings of the Immigration Judge were clearly erroneous, *Tran*, 447 F.3d at 942, or that its own findings were supported by substantial evidence in the record. *Perkovic*, 33 F.3d at 623. The Board's decision should also be reversed because it erroneously concluded that Germany's compulsory attendance law is not motivated by an improper purpose.

A. The Board Committed Reversible Error By Rejecting the Immigration Judge's Findings of Fact Without a Showing of Clear Error, and Advancing Findings Unsupported by, and Contrary to, the Record.

The Board's legal decision rests on four disputed factual findings: (1) "The record does not show that the compulsory attendance law is selectively applied to homeschoolers," R. at 5; (2) Germany's compulsory attendance law is not predi-

cated on "animus and vitrol," R. at 6; and (3) The record does not show that homeschoolers are disproportionately punished under the compulsory attendance law. R. at 5. The Board failed to follow the correct standard for making these new factual findings, and erroneously substituted its own weighing of the evidence in lieu of the findings of the Immigration Judge.

1. The Board Erred when it Found that Germany's Compulsory Attendance Law is Not Selectively Applied to Homeschoolers.

The Board asserts that "the record does not show that the compulsory school attendance law is selectively applied to homeschoolers." R. at 5. The Board argues that "the only evidence" in support of this point is "two sentences in the affidavit by a Germany lawyer [Gabrielle Eckermann]" that "truants are allowed to be schooled at home or through correspondence school," R. at 5, although the Board grudgingly acknowledges in a footnote that the Romeikes also presented the testimony of expert witness Michael Donnelly in support of this point. R. at 5 n. 4. The Board dismisses the testimony of Ms. Eckermann as purely "anecdotal evidence," R. at 5, and Mr. Donnelly's testimony as a simple citation of Ms. Eckermann's affidavit. R. at 5 n. 4. The Board also claimed that there is contrary evidence in the record, which shows that truants "are not allowed to be homeschooled in the manner [sic] the applicants homeschooled their children" because their distance learning programs are "administered by the school, not by the child's par-

ents." R. at 5. Because *no parent* is permitted to teach her own child in Germany, the Board reasons, the law is not selectively applied.

a. The Board Failed to Show that Clear Error was Committed.

The Board's discussion fails to adhere to the "clear error" standard. The Immigration Judge specifically ruled that "the Romeikes, and Mr. Donnelly, and all of their evidence is entirely credible and believable." Appx. at 12a. Nothing in the Board's decision even attempts to challenge this finding of credibility, much less show that it was clearly erroneous. *Tran*, 447 F.3d at 942; 8 C.F.R. § 1003.1(d)(3)(i). Instead, the Board itself acknowledges that "the Immigration Judge found the witnesses, including the adult applicants, credible." R. at 4.

Having acknowledged the credibility of these witnesses as a factual matter, the Board cannot declare the Immigration Judge's reliance on these witnesses as "clearly erroneous," simply by stating that there are "deficiencies in the evidence," or by summarily dismissing the testimony of an expert witness as "too speculative." *Tran*, 447 F.3d at 943-4. Because the Board failed to apply the correct standard of review, its decision should be reversed.

The record contains credible evidence of selective prosecution. The Board unjustifiably reversed the Immigration Judge's conclusion on this factual matter.

b. The Board's Decision is Unsupported by, and Contrary to, Substantial Evidence in the Record.

Assuming, *arguendo*, that the Board's disputed factual findings were necessitated by a proper showing of clear error, the Board's decision is only justified if there is "substantial evidence in the record to support the conclusion that a reasonable person in the petitioners' position would not have a well-founded fear of being persecuted." *Perkovic*, 33 F.3d at 623. By contrast, the Board's argument "pointedly ignor[es]" substantial evidence in the record, which was corroborated by the statements of the Romeikes' expert witnesses. *Perkovic*, 33 F.3d at 623.

Contrary to the Board's claim, the record is replete with evidence that Germany selectively prosecutes homeschoolers under its compulsory attendance law. In addition to the credible expert testimony of Ms. Eckermann and Mr. Donnelly, one need look no further than the pronouncements of Germany's own Federal Constitutional Court, in *Konrad*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] April 29, 2003, 1 BvR 436/03 (F.R.G.). R. at 758-62.

In *Konrad*, as in this case, a religious homeschooling family sought an exemption from the German compulsory attendance law. The Court noted that German authorities routinely grant exemptions to children under the law when "their parents, due to their occupation, do not have a firm residence." R. at 761 ¶ 12bb. The court found this class of exemptions to be "reasonable" because the alternative

– requiring the children to attend a state-approved school – "can only be achieved through the separation of the children from the parents." *Id.*

The Court then noted that these same "hardship" exemptions both *are not* granted to religious homeschoolers, and *should not* be granted to religious homeschoolers. "The encroachment into the basic rights of the complainants," the Court explained, was both justified and necessitated by the general public's "justified interest in counteracting the development of religiously or philosophically motivated 'parallel societies' and in integrating minorities in this area." R. at 760 ¶ 8. It is not enough for the majority of the population to not "exclude religious or ideological minorities," the Court said. The State has an affirmative obligation to ensure – through the coercive force of law – that "minorities do not segregate themselves and that they do not close themselves off to a dialogue with dissenters and people of other beliefs." *Id.*

Because only a government-approved school can achieve the "goal of conveying social and civic competence," R. at 760 ¶ 7, *Konrad* concluded that it was "reasonable" to compel religious homeschoolers to attend public schools, even though it would be "unreasonable" to compel non-religious "school skippers" to attend. *Id.* Thus, as Ms. Eckermann and Mr. Donnelly testified, the German government liberally grants exemptions when a family's motivation is not religious in nature, in an effort to keep those families together. But the government would ra-

ther forcibly separate children from their parents than grant a religious exemption to homeschoolers, for fear that it could lead to the impermissible development of "religiously or philosophically motivated 'parallel societies.'" *Id.*

This is a stunningly candid admission that Germany's compulsory attendance law is selectively enforced against religious homeschoolers. A government selectively prosecutes its citizens if it conditions an exemption from a law of "general application" solely on the religious beliefs and motivations of the applicants. "[W]here the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884; see also *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality) (holding that when the state creates "good cause" exemptions to a law of general applicability, "its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent").

This is precisely how Germany enforces its compulsory attendance law under *Konrad*: Religious homeschoolers are denied exemptions from the compulsory attendance law *precisely because* they are religious. The Court found it "unreasonable" to compel non-religious "school refusers" to attend public schools because their forced attendance "can only be achieved through the separation of the children from the parents." R. at 761 ¶ 12bb. But based on the danger of "parallel societies" and the need for state-enforced ideological interaction, *Konrad* deemed

it "reasonable" to compel religious homeschoolers to attend public schools to achieve the "goal of conveying social and civic competence." R. at 760 ¶ 7. Put more simply, Germany liberally grant exemptions when a family's motivation is non-religious, but denies exemptions for religiously-motivated families, even though the only way to compel their compliance is through the forcible separation of the children from the parents. R. at 761 ¶ 12bb. *Id.* The Immigration Judge correctly found, based on the weight of the evidence, that Germany's compulsory attendance law is selectively applied against religious homeschoolers.

Germany's philosophically-coercive motive for denying exemptions for religious homeschoolers reveals a policy that is neither general nor neutral.

2. The Board Erred when it Found that Germany's Compulsory Attendance Law is Not Predicated on Animus and Vitrol.

The Board also dismissed the Immigration Judge's factual conclusion that "'animus and vitriol' underlie the compulsory school attendance law" as clearly erroneous. R. at 6. The Board relied on its earlier conclusion that "the record does not show that the law is selectively enforced." R. at 6. The Board also cited the decision of Germany's Federal Constitutional Court in *Konrad*, R. at 760, the decision of Germany's Federal Court of Appeals in *Plett*, Bundesgerichtshof [BGH] [Federal Court of Justice] October 17, 2007, 173 Entscheidungen des Bundesgerichtschofes in Zivilsachen [BGHZ] 277 (281-2) (F.R.G.), as reproduced in R. at 773, and a letter from the German Secretary of the Permanent Conference of

the State Ministers for Cultural Affairs, R. at 298. According to the Board, these sources show that the law's purpose "includes supporting tolerance and pluralism." R. at 6. Based on this discussion, consisting of half of one paragraph, the Board found that a finding of "animus and vitriol" was clearly erroneous, because "this case does not involve a totalitarian government enforcing separation of children from parents for the purpose of ideological indoctrination." R. at 6.

a. The Board Failed to Show that Clear Error was Committed.

While the Board invokes the correct standard of review, its lament about the "deficiencies in the evidence" does not give rise to a conclusion of clear error. *Tran*, 447 F.3d at 943-4. Instead, the Board's argument for clear error rests or falls on whether the evidence it cites leaves this Court "with the definite and firm conviction that a mistake has been committed" by the immigration judge. *Id.* at 943. The Board's evidence, in fact, does the opposite.

The sources offered by the Board clearly praise the virtues of tolerance and pluralism. *Konrad* declares that the State has an "educational mandate" to develop "responsible citizens, who should be able to take part in the democratic processes of a pluralistic society." R. at 760 ¶ 7. Similarly, *Plett* praises public education as "important for the development of the children in a pluralistic society," R. at 773 ¶ 7, and the German Secretary affirms the "legislative value decision" that "learning

together in school fosters the learning of social competence" by being able to "practice dealing with those who think differently on a daily basis." R. at 800.

The Board errs, however, in mistaking Germany's *praise* of tolerance for a *practice* of tolerance. Liberal states are expected and commanded to be tolerant of their citizens: in the United States, our constitutional commitment to free exercise of religion and freedom of speech reflect the basic proposition that government can never proscribe the beliefs of its citizens. Germany likewise guarantees in its Basic Law that "freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable." Grundgesetz fur die Bundesrepublik Deutschland (federal constitution) [GG], Art. 4(1).

A liberal state, however, necessarily abandons its duty to *be* tolerant when it seeks to *compel* "tolerance" or "pluralism" among its citizens through the operation and force of law. A truly "tolerant" state cannot prohibit its citizens from holding beliefs which it views as objectionable, dangerous, or even intolerant, nor can it punish citizens for holding such beliefs. As Justice Holmes famously stated, freedom of thought is not truly "free" unless it also extends to "the thought that we hate.'" *Christian Legal Soc., Chapter of the University of California, Hastings, v. Martinez*, 130 S.Ct. 2971, 2994 n. 26 (2010), quoting *United States v. Schwimmer,* 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

While Germany may *praise* the virtues of tolerance in the sources that the Board cites, what Germany actually *practices* is coercion. *Konrad*, *Plett*, and the German Secretary all affirm and embrace an active "educational mandate," which requires children to "take part in the democratic processes," R. at 760 ¶ 7, where they "practice dealing with those who think differently on a daily basis." R. at 800. The state can only achieve this "integration" and "tolerance," however, if "religious or philosophical minorities do not isolate themselves and do not close themselves off to dialogue with dissenters and people of other beliefs." R. at 773 ¶ 9. Thus, compliance with this educational mandate justifies "the encroachment into the basic rights" of German homeschoolers, because the state has a "justified" and "rightful" interest in counteracting the development of religiously or philosophically motivated 'parallel societies.'" R. at 760 ¶ 8; 773 ¶ 9.

The practical import of these statements is clear from *Plett*: based on the need for "pluralism," "tolerance," and "integration," it is "completely acceptable" for German courts to "enforce the handover of the children, by force if necessary and by means of entering and searching the parental home," in order to "effectively protect the children from parental abuse and enforce the state's educational mandate." R. at 775 ¶ 15c. If one views the Board's evidence in the context of the entire record, it is clear that the Immigration Judge did not commit clear error when

he concluded that Germany's compulsory attendance law violates "basic human rights which no country has a right to violate." Appx. at 18a.

b. The Board's Decision is Unsupported by, and Contrary to, Substantial Evidence in the Record.

The Board's decision is undermined not only by the very evidence it cites, but also by the balance of substantial evidence available in the record. Both Ms. Eckermann and Mr. Donnelly testified at length that parents who do not have religious motivations are "permitted to participate in home based instance learning or correspondence schools," R. at 913 ¶ 14, whereas parents who "homeschool for reasons of conscience" face "uniform and systemic hostility." R. at 921 ¶ 20.[2]

Ms. Eckermann testified that exemptions are routinely granted when they are not religiously-motivated, such as when "the children are circus performers, inland shippers or are simply incapable physically or mentally from going to school." R. at 913 ¶ 12. Instead of facing prosecution under the compulsory attendance law, these families are sometimes "permitted to participate in home based instance learning or correspondence schools." R. at 913 ¶ 14. This treatment differs profoundly from the treatment that religious homeschoolers receive. "[I]n substantially all of the cases where parents homeschool for reasons of *conscience*," Ms. Eckermann testified, "the authorities proceed against the parents to compel them to send their children to school." R. at 913 ¶ 14. The state employs "a variety of co-

[2] At trial, the government did not object to the introduction of Ms. Eckermann's or Mr. Donnelly's affidavits, nor did the government dispute Mr. Donnelly's qualifications or credibility as an expert.

ercive measures" for this purpose, including "fines, coercive moneys in the tens of thousands of dollars, taking physical custody of children away from parents, and jailing parents (coercive arrest)." R. at 913 ¶ 14.

Similarly, Mr. Donnelly testified that the parents of "school skippers" rarely face crippling fines or imprisonment, as it is virtually unheard of for the parents of a "school skipper" to receive anything more than an initial civil fine. R. at 280.19-281.1; 281.12-14. Mr. Donnelly described in great detail the extent to which the German government will go to place "school skipper" in an alternative learning program, rather than assess a hefty penalty. R. at 281.14-19. The state has gone so far as to develop a distance learning program, through "approved" government schools, specifically so that "school skippers" can study at home, R. at 281.20-23, so as to avoid "the separation of the[se] children from the parents." R. at 761 ¶ 12bb. Mr. Donnelly testified that "Germany is the only country that acts with the uniform and systemic hostility to parents who homeschool. . . . [N]o other country outright bans homeschooling and aggressively persecutes homeschoolers in this way." R. at 921 ¶ 20.

Unlike the Board, which somehow concluded that Germany's compulsory attendance law is a law of "tolerance" and "pluralism," the Immigration Judge saw the statute for what it is: a law that seeks to *coerce* tolerance, not *be* tolerant. Both *Konrad* and the testimony of the Romeikes' expert witnesses demonstrate that

Germany's decision to extend or withhold "hardship" exemptions is motivated by far more than the mere "impracticability of consistent public school attendance for some children." R. at 5. The Immigration Judge rightly found that Germany's compulsory attendance law is motivated by "animus and vitriol" against "a group that the government, for some unknown reason, wishes to suppress," Appx. at 15a, and violates "basic human rights which no country has a right to violate." Appx. at 18a. The Board's decision should be reversed.

3. The Board Erred when it Found that Homeschoolers are Not Disproportionately Punished Under the Compulsory Attendance Law.

The Board concluded that German homeschoolers are not disproportionately punished under the compulsory attendance law. The Board primarily raised concerns about the sufficiency of the Romeikes' evidence. See R. at 4 (finding that the record does not "demonstrate that homeschoolers are more severely punished than others whose children do not comply with the compulsory school attendance law"); see also R. at 6 ("The record does not contain any specific examples of truancy cases to show that parents of truants received smaller fines compared to homeschooling parents"). Such conclusions, however, are insufficient on their own to support a finding of clear error. *Tran*, 447 F.3d at 943-4.

The Board noted that Mr. Donnelly had testified that he was "unaware of any parents of truants being criminally prosecuted as some homeschooling parents have been," but found that this testimony "does not necessarily reflect selective en-

forcement or imposition of disparate punishment." R. at 6 n. 5. "[I]t is possible," the Board claimed, "that parents of truants lack a mens rea required for criminal prosecution, as truants have been described as children who skip school without their parents' knowledge or consent." R. at 6 n. 5. Ultimately, however, the Board was forced to recognize that "without the text of the statute in the record," its assessment of Mr. Donnelly's testimony was mere conjecture. R. at 6 n. 5. The Board also cited Mr. Donnelly's testimony on page 48 of the trial transcript[3] for the proposition that "the punishment the applicants fear most, loss of custody of their children, is a penalty that is also applied to parents of truants." R. at 5-6. The Board once again fails to make the requisite showing of clear error.

a. The Board Failed to Show that Clear Error was Committed.

The Board's citation of Mr. Donnelly's testimony is insufficient to prove that the Immigration Judge committed clear error. The Board misrepresented Mr. Donnelly's testimony when it stated that "the punishment the applicants fear most, loss of custody of their children, is a penalty that is also applied to parents of truants." R. at 5-6. Mr. Donnelly, in fact, testified that "the Courts, I believe, will go after custody [of school skippers], in some cases, and try to take some of these children." R. at 282.11-13. In the very next sentence, however, Mr. Donnelly stated that the children of school skippers are only seized because "there may be issues

[3] Page 48 of the trial transcript is reproduced on page 282 of the record.

with the parents," which prevent the parents from making the child go to school. R. at 282.15-20.

While Mr. Donnelly testified that the parents of "school skippers" may go to jail because there are "other issues going on" with the family, he also stated that he was unaware of a single case where parents of school skippers were "put in jail just because of the fact that the child's not going to school." R. at 282.21-25. By contrast, religious homeschoolers face exorbitant and coercive fines, as well as criminal trials, R. at 282.8-11, simply because they refuse to send their children to public schools for reasons of religion or conscience. The Board's decision fails to view Mr. Donnelly's statements in the context of his entire testimony.

Viewed in context, Mr. Donnelly clearly testified that homeschoolers receive disparate and disproportionately severe punishments under the compulsory attendance law. When the child *skips* school for no good reason, the state responds with alternative learning programs. R. at 281.12-18. When parents *refuse* to send a child to school for religious or conscientious reasons, however, the parents face "fines, custody, or -- and/or the criminal sanctions." R. 277.14-15. This is consistent with Mr. Donnelly's previous testimony that "school skippers" are treated differently by the authorities than "school refusers." A family is a "school skipper" when the *children* are the ones who do not want to go to school; the parents' only crime is that they fail to compel their children to attend. R. at 281.4-7. In

such cases, "when the school authorities realize that it's not the parents who are keeping the kids home, that it is the kids who are troublemakers or who were school skippers, what they do is they try to get those kids into these alternative learning programs," instead of prosecuting the parents criminally. R. at 281.12-18.

The Board relies on a single, out-of-context sentence in Mr. Donnelly's testimony, while "pointedly ignor[ing]" the balance of Mr. Donnelly's testimony. *Perkovic*, 33 F.3d at 623. This fails to demonstrate that the Immigration Judge committed a clear error, and merits reversal by this court. *Id.*

b. The Board's Decision is Unsupported by, and Contrary to, Substantial Evidence in the Record.

The record is replete with evidence that religious homeschoolers face far more serious punishment under Germany's compulsory attendance statute than non-religious "school skippers," or others who fail to attend public schools for non-religious or non-conscientious reasons.

At the most basic level, religious homeschoolers receive harsher treatment because they are prosecuted while non-religious "school skippers" are exempted. R. at 761 ¶ 12bb. The granting of a "hardship" exemption is not only an absolute bar to prosecution under the Act, but also relieves the state of its obligation to "separate[e] . . . the children from the parents" to ensure that adequate schooling takes place. R. at 769, ¶ 12bb; see also *Plett*, R. at 775 ¶ 15c. According to *Konrad*, Germany extends hardship exemptions to non-religious applicants, but not to

religious homeschoolers. R. at 761 ¶ 12bb. Through this system of exemptions, German government liberally attempts to keep families together by granting exemptions, as long as the motivation for school absences is not religious in nature; but the state would rather forcibly separate children from their parents than grant the family a religious exemption from the compulsory attendance law. Indeed, the German authorities had already seized the Romeike children once, R. at 310.13-311.22; 355.23-356.25, and threatened to continue with their aggressive prosecution unless the Romeikes voluntarily left Germany. R. at 355.11-19.

Once prosecution commences, homeschoolers face far more serious civil and criminal penalties than non-religious "school skippers." The Romeikes' expert witness, Ms. Eckermann, submitted an affidavit in which she explicitly stated that "parents of truant children are treated differently than parents who homeschool." R. at 913 ¶ 14. Ms. Eckermann explained that when *children* refuse to go to school, they "are permitted to participate in home based instance learning or correspondence schools." *Id.* But when "parents homeschool for reasons of *conscience*, the authorities proceed against the parents to compel them to send their children to school" through "a variety of coercive measures including fines, coercive moneys in the tens of thousands of dollars, taking physical custody of children away from parents, and jailing parents." *Id.*

Mr. Donnelly similarly testified that "school officials either initiate a process of fining families increasingly large amounts of money or they seek assistance from the Social Workers from local youth welfare offices (Jugendamt) akin to our Departments of Children and Families." R. at 918 ¶ 12. In most cases, the Jugendamt also initiates actions to "take custody of the children." *Id.* Families have also been "put in jail or sentenced to jail for homeschooling." R. at 913 ¶ 9. Based on his experience, Mr. Donnelly concluded that "there is no safe place anywhere in Germany where parents who wish to homeschool their children may do so without fear of some form of persecution over their decision to exercise their fundamental right to direct the upbringing and education of their children through home education." R. at 918 ¶ 14.

Ms. Eckermann also testified that homeschoolers are facing even greater penalties in the wake of the *Konrad* decision, which "decided that all families who homeschool are to be considered undesirable parallel societies and that society has a legitimate interest in avoiding such." R. at 912 ¶ 9. In reliance on *Konrad*, "the German Courts have held that homeschooling is per se Child Endangerment because homeschooling leads to undesirable parallel societies." R. at 913 ¶ 15. Ms. Eckermann's affidavit made reference to two specific cases, *Plett* and *Pauls*, which both held that "homeschooling is child endangerment" in Germany. R. at 913 ¶ 16.

Ms. Eckermann's assessment is borne out in the language of *Plett* itself, where the German Federal Court of Appeals reaffirmed *Konrad*'s basic holding that "society at large has a rightful interest in working against the formation of religiously or ideologically coloured 'parallel societies' and in integrating minorities." R. at 773 ¶ 9. Implicit in this idea, *Plett* argues, is the assumption that "religious or philosophical minorities do not isolate themselves and do not close themselves off to dialogue with dissenters and people of other beliefs." R. at 773-4 ¶ 9.

Because homeschooling constitutes a "persistent refusal" on the part of parents to "send their children to a state primary school or recognised private school," the court categorized it as "an abuse of parental custody which lastingly endangers the welfare of the children." R. at 774 ¶ 13b. Such abuse necessarily triggers the emergency powers of the German family courts, *id.*, including "the removal of the right [of parents] to determine the residence of the children and to decide on the children's education." R. at 775 ¶ 15c.

As a result, Ms. Eckermann testified that German courts now hold that "homeschooling is per se Child Endangerment because homeschooling leads to undesirable parallel societies." R. at 913 ¶ 15. In *Plett*'s own words, it is "completely acceptable" for courts to "enforce the handover of the children, by force if necessary and by means of entering and searching the parental home," in order to prevent "the damage to the children, which is occurring through the continued ex-

clusive teaching of the children of [sic] the mother at home." R. at 775 ¶ 15c. In the aftermath of *Plett*, the Jugendamt "has the immediate task to take away all home schooled children," and some German states have even changed their local school laws so that there is "no need for the German Jugendamt to justify in a court the taking away of Children out of their families." R. at 740-1 ¶ 11.

Finally, to corroborate the credible testimony of their expert witnesses, the Romeikes also presented numerous affidavits and other exhibits from homeschool families who had fled Germany. These affidavits and exhibits illustrate how homeschoolers are routinely denied exemptions, R. at 591 ¶ 3, assessed crushing fines, R. at 591 ¶ 4; 657 ¶ 4; 658 ¶ 8; 662 ¶ 7; 669 ¶ 4; 755 ¶ 10, arrested, R. at 658-9 ¶ 10; 658 ¶ 10, threatened with criminal prosecution, R. at 591 ¶ 6, or even imprisoned. R. at 654 ¶ 7a-7b; 658 ¶ 10. The State employs these harsh methods as a "way to change [the] 'behaviour' and . . . 'views'" of homeschooling parents. R. at 654 ¶ 7b. Germany has even sought to terminate the parental custody rights of homeschoolers, R. at 587 ¶ 10-11, 15; 655 ¶ 10; 659 ¶ 11c; 659 ¶ 11d; 669-70 ¶ 6, 8; 725.174-7, for fear that the children have too much "contact with [their] parents," R. at 588 ¶ 11, or that the "relationship between the children and the parents was too strong." R. at 725.174-7. Faced with such persecution, many families had no choice but to flee Germany. R. at 591 ¶ 7; 659 ¶ 11c; 755 ¶ 10.

As with the testimony of Ms. Eckermann and Mr. Donnelly, the Immigration Judge specifically found this evidence to be credible. Appx. at 12a. This evidence clearly supports the Immigration Judge's finding that German homeschoolers face "fines that are constantly increased to the point where they cannot be paid," that the Romeikes faced fines which would "destroy [their] economic life," and that they faced the "possibility of jail" or that "the children could be taken away from them." Appx. at 18a. The Immigration Judge's decision was supported by substantial evidence in the record, and was not clearly erroneous.

B. Germany's Home Education Law Persecutes Religious Homeschoolers by Systematically Violating their Basic Human Rights.

In addition to applying the wrong standard of review, and mischaracterizing or ignoring the factual record, the Board also wrongly concluded that Germany's compulsory attendance law does "not reflect a governmental objection to restrict or suppress religious or philosophical practice." R. at 6. In so holding, the Board rejected the notion that the compulsory attendance law, as interpreted by the German Courts, was not a *neutral* law of general applicability, but rather a violation of "basic human rights which no country has a right to violate." Appx. at 18a. Because this is a question of law, this Court reviews it *de novo*. *Sad*, 246 F.3d at 814.

It is well established that "protection from persecution is at the heart of the international refugee regime." *Law of Asylum in the United States*, § 4:1 (2012); see also 8 U.S.C. 1101(a)(42)(A). "Persecution is widely recognized as the sus-

tained or systematic violation of basic human rights demonstrative of a failure of state protection." *Id.*; see also *The Amistad Case*, 40 U.S. 518, 553 (1841) ("Did the people of the United States, whose government is based on the great principles of the Revolution, proclaimed in the Declaration of Independence, confer upon the federal, executive, or judicial tribunals, the power of making our nation accessories to such atrocious violations of human rights?").

If forced to return to Germany, the Romeikes will be victims of persecution, under a compulsory attendance law which will deny them their rights to religious freedom and to direct the upbringing and education of their children. The Romeikes' requests for asylum should be granted.

1. Religious Freedom and the Rights of Parents are Basic Human Rights.

It is beyond dispute that the freedom of religion and the rights of parents are basic human rights. The Universal Declaration of Human Rights, 71 G.A. Res. 217A (III), U.N. Doc A/810 (1948) [hereinafter UDHR], adopted by unanimous vote of the UN General Assembly, is widely considered the cornerstone of modern human rights law. The UDHR recognizes that "parents have a prior right to choose the kind of education that shall be given to their children." UDHR, Art. 26(3).

This aspirational article has been assimilated into binding provisions of two core human rights treaties. Parties to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] "undertake to

have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions." ICCPR, Art. 18(4). Parties to the International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] similarly pledge:

> [R]espect for the liberty of parents . . . to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

ICESCR, Art. 13(3).

Collectively known as the "International Bill of Rights," these treaties establish three truths about the relationship between the state and parents as it pertains to children: 1) parental rights concerning their children are "prior" to any claim of the state, both in time and in rank; 2) parents have the right to ensure that their child's education conforms to their own moral convictions; and 3) parents and others have the right to start schools that are separate from those offered by the state.

The primacy of these basic human rights is of the highest order. The ICCPR, which the United States has also ratified, permits a nation to override certain human rights guarantees in times of "public emergency" when the life of the nation is threatened. ICCPR, Art. 4(1). Article 4(2), however, contains an important exception: "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision." Tellingly, a parent's right to ensure

that her child's education is in conformity with her own religious convictions (Art. 18), is one of these non-derogable rights which may not be contravened even when the future of the nation is at stake.

2. Germany is Obligated to Respect and Protect the Freedom of Religion and the Rights of Parents as a Party to the ICCPR and ICESCR, and as a Member of the International Community.

It is beyond dispute that Germany is obligated to guarantee these basic, non-derogable human rights. As a party to the ICCPR and ICESCR, Germany has publically pledged to "have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions," ICCPR, Art. 18(4), and the liberty of parents "to choose for their children schools, other than those established by the public authorities . . . to ensure the religious and moral education of their children in conformity with their own convictions." ICESCR, Art. 13(3).

The sole question before this Court is whether *Germany* is violating binding norms of international law through its treatment of homeschoolers. Germany adopted both treaties without reservations or limitations concerning the issues of religious parental liberty. This sets Germany apart from the United States, which declared the ICCPR to be "non-self-executing" when it ratified the treaty. See *U.S. Senate Resolution of Advice and Consent to Ratification of the International Cove-*

nant on Civil and Political Rights, 138 Cong. Rec. 8068, 8071 (1992); see also *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003).

Furthermore, Germany has additional obligations to honor basic human rights under the rules of customary international law. It is well-established that rules of customary international law are binding upon all nations regardless of their individual consent. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-5 (2004); *Taveras v. Tavaraz,* 477 F.3d 767, 776-7, 780 (6th Cir. 2007). Indeed, Germany's Basic Law (federal constitution) states that the "general rules of international law" are immediately incorporated into and take precedence over its domestic law:

> The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.

Grundgesetz fur die Bundesrepublik Deutschland (federal constitution), Art. 25.

In *Sosa*, the Court dealt with a claim that kidnapping was a violation of customary international law. However, the court ultimately held that there was no violation of customary international law because there was no evidence of a "state policy" of kidnapping. *Sosa*, 542 U.S. at 737. In the case of German homeschooling, there is absolutely no doubt that the persecution being experienced by religious homeschoolers is the result of state policy. Indeed, the high court of Germany not only reveals the existence of the state policy, in unmistakeable terms it demonstrates that the motivation for the state policy is a motive that is barred by

both binding treaties and the customary international law of human rights. R. at 760 ¶ 8; 761 ¶ 12bb Germany seeks to coerce parents to submit their children to the state's education for the very purpose of ensuring that the state's, not the parent's viewpoint is taught to these children. The language of the ICESCR is explicit. While Germany can ensure that minimum academic standards are attained, the ICESCR guarantees that parents have the right "to ensure the religious and moral education of their children [is] in conformity with their own convictions."

In light of the above, it is beyond dispute that Germany has an affirmative obligation to protect the rights of religious parents to direct the education of their children. International law recognizes that parental rights are nonderogable even in times of national emergency. ICCPR, Art. 4(2). This right is at the very pinnacle of human rights protections.

3. Germany's Homeschool Law Systematically Violates the Rights of Parents who Homeschool for Religious Reasons.

The right to homeschool is unquestionably a legitimate application of the basic, fundamental rights of parents. The United States Supreme Court has long held that parents, not the state, have the right to choose the education of their children, *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), and that the right of religious parents to direct the education of their children is a fundamental right. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Similarly, the UN Human Rights Council's Special Rapporteur issued a report in February of 2006,[4] in which he not only determined that homeschooling is a valid application of the rights of parents contained in the ICESCR, but also that Germany is violating core human rights obligations by banning homeschooling:

> Distance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children. . . . The promotion and development of a system of public, government-funded education should not entail the suppression of forms of education that do not require attendance at a school. In this context, the Special Rapporteur received complaints about threats to withdraw the parental rights of parents who chose home-schooling methods for their children.

R. at 844 ¶ 62. Because Germany's treatment of religious homeschoolers clearly violated its international obligations under the ICESCR, the Special Rapporteur called for "necessary measures" to "uphold[] the right of parents to employ this form of education." R. at 851 ¶ 93(g).

The Special Rapporteur's findings are not surprising, given the German Federal Constitutional Court's pronouncements in *Konrad* and the Federal Court of Appeal's decision in *Plett*. As has already been discussed in detail, *Konrad* specifically commends the compulsory attendance act as a necessary tool to prevent the development of "religiously or philosophically motivated 'parallel societies.'" R. at 760 ¶ 8. To prevent these societies from forming, *Plett* holds that it is "com-

[4] The Romeikes submitted the text of this report to the Immigration Judge, who accepted it as a pre-trial exhibit. As with the rest of the Romeikes' evidence, the Immigration Judge found it to be credible. Appx. at 12a. The report is reproduced, in full, in the record, R. at 829-51.

pletely acceptable" for German courts to "enforce the handover of the children, by force if necessary and by means of entering and searching the parental home," in order to "effectively protect the children from parental abuse and enforce the state's educational mandate." R. at 775 ¶ 15c.

While *Konrad* and *Plett* provide a telling glimpse into the rationale and purpose of Germany's *practical* treatment of religious homeschoolers, this Court need not accept Germany's *legal* conclusion that the statute does not violate basic human rights. An international court's pronouncement on the existence of potential human rights violations are not binding on U.S. courts. *Medellín v. Texas*, 552 U.S. 491 (2008). Indeed, it is not uncommon for one sovereign nation to challenge the human rights commitments of another. See, e.g., *LaGrand (Germany v. United States)*, 2001 ICJ 27 (June 27). This is especially true in cases like this one, where the explicit justification of Germany's homeschool ban – forcing religious minorities to act contrary to their religious beliefs – is antithetical to basic human rights, as recognized by both international human rights treaties and our own Constitution. This "consistent pattern of gross violations of human rights" is an *ipso facto* indicator of "gross" international law violations. Restatement (Third) at § 702(m).

4. Germany Persecutes its Citizens when it Systematically Violates Basic, Non-Derrogable Human Rights, Whether or not it "Selectively Prosecutes" only Religious Offenders.

The Board argued that "selective prosecution" was the only basis for a violation of basic human rights. This view mistakenly and needlessly limits the values implicit in international human rights laws. Human rights law protects two values: liberty and equality. While selective prosecution violates the value of equality, there is overwhelming evidence that the German homeschooling law *on its face* violates both American and international human rights standards of liberty. The Immigration Judge rightly concluded that prosecuting the Romeikes would amount to persecution precisely because "the rights that are being violated in this case are basic to humanity, they are basic human rights." Appx. at 18a.

A neutral law of general applicability is still persecutory in nature if it systematically violates basic human liberties, even if enforced in a rigid, even-handed manner. If, for example, Germany demanded that every parent turned their child over to the state at age two to be raised in state compounds, the law would violate basic human rights – even if it was generally applicable – because *liberty* would be at stake. Closer to the facts of this case, it would make little difference under the American Constitution if the state required both religious and non-religious parents to place their children in public schools: violence would still be done to the basic

human rights of religious freedom and parental liberty. Parents have the right to choose alternative education for their children.

While there is substantial evidence in the record that Germany selectively prosecutes *religious* homeschoolers and withholds exemptions from them, see *supra* at 10-21, the Romeikes' claim of persecution does not rise or fall on the question of selective prosecution. Even if this Court concludes that Germany enforces its compulsory attendance law equally, without reference to the religious motivations or beliefs of applicants, that law is, *ipso facto*, a "gross" violation of international human rights norms, and its enforcement is persecution *per se* within the meaning of the law on refugees and asylum. Restatement (Third) at § 702(m). Denying parents the right to choose an alternative education for their children that conforms to their own moral convictions is the denial of a protected human right, no matter how uniformly the state denies this right. Even-handed tyranny is still tyranny.

The Board wrongly denied asylum to the Romeikes. Germany violates human rights standards of liberty by forcing parents to send their children to public schools in violations of their conscience. The United States grants asylum to victims of human rights violations. The Roemikes merit our protection as a matter of fundamental human rights.

III. THE ROMEIKES ARE MEMBERS OF THE "PARTICULAR SOCIAL GROUP" OF GERMAN RELIGIOUS HOMESCHOOLERS.

In this case, the Board used on the "social visibility" standard to hold that "German homeschoolers are not a particular social group." App. at 184a. "[W]hile the record contains some evidence of association and networking" among homeschoolers, "there is not sufficient evidence that society at large is generally aware of such association to consider homeschoolers a group." App. at 184a.

The Romeikes contend that the Board's "social visibility" standard is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In the alternative, the Board's decision regarding "social visibility" was not supported by substantial evidence.

A. The "Social Visibility" Standard is not Entitled to Chevron Deference.

Despite the prominence of the term "particular social group" in the INA, the Board has long struggled to capture its meaning. From 1985 until 2006, the Board issued many decisions dealing with the meaning of "particular social group," beginning with *Matter of Acosta,* 19 I. & N. Dec. 211 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi,* 19 I. & N. Dec. 201 (BIA 1985). It was only in 2006 that the Board added the "social visibility" standard to the definition of "particular social group." See *Matter of C–A–,* 23 I. & N. Dec. 951, 951 (BIA 2006), *aff'd sub nom., Castillo–Arias v. Attorney General,* 446 F.3d 1190 (11th Cir.2006)

(stating that "social visibility of the members of a claimed social group is an important consideration in identifying the existence of a 'particular social group'").

In the aftermath of these decisions, there is a considerable split among the federal circuits over whether the social visibility standard is entitled to *Chevron* deference. Faced with a circuit split, the Immigration Judge declined to exclusively apply the social visibility standard, relying in part on this Circuit's general commentary in cases like *Kante v. Holder*, 634 F.3d 321 (6th Cir. 2011) and *Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009). The Immigration Judge concluded that "the Sixth Circuit certainly believes that there are particular social groups that do not have social visibility." Appx. at 16a.

The Immigration Judge then found that German homeschoolers are a particular social group because they have "been fined, imprisoned, had the custody of their children taken away from them," and evince a "desire to overcome something." Appx. at 17a. The Board disagreed, concluding that religious homeschoolers in Germany lack "social visibility." R. at 7.

1. The Circuits are Split Regarding Whether the "Social Visibility" Standard is Entitled to *Chevron* Deference.

There is a considerable split among the circuits regarding the social visibility standard. The First, Second, Eighth, Ninth and Eleventh Circuits have accorded *Chevron* deference to the "social visibility" requirement. *See Scatambuli v. Holder,* 558 F.3d 53, 59-60 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey,* 509 F.3d 70, 74

(2nd Cir. 2007); *Davila-Mejia v. Mukasey,* 531 F.3d 624, 629 (8th Cir. 2008); *Santos-Lemus v. Mukasey,* 542 F.3d 738, 746 (9th Cir. 2008); *Castillo-Arias,* 446 F.3d at 1196.

The Third and Seventh Circuits have explicitly held that the social-visibility standard is *not* entitled to *Chevron* deference. *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 603 (3rd Cir. 2011); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009); *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). Contrary to the Board's assertion, this Court has yet to formally "endorse" either side of the debate.

In *Benitez* and *Gatimi*, The Seventh Circuit rejected the "social visibility" standard as unworkable in practice, inconsistent in application, and inherently arbitrary. In both decisions, Judge Posner concluded that the standard was unworkable in practice because it implies that membership in a group is only possible "if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic." *Benitez Ramos*, 589 F.3d at 430. Judge Posner argues that this approach is contrary to how American law and society categorizes legal groups: "In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be." *Id.*

A focus on the "visibility" of a group is therefore confusing and misleading: "'visibility' in the literal sense in which the Board has sometimes used the term

might be relevant to the likelihood of persecution, but it is irrelevant to whether if there is persecution it will be on the ground of group membership." *Id.* There are many situations where an "invisible" group may nevertheless endure persecution:

> Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as a heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population."

Gatimi, 578 F.3d at 615.

The court has also criticized the Board for applying the "visibility" standard inconsistently. Judge Posner noted that the Board has in fact extended asylum to members of the groups discussed above, even though they do not meet the "social visibility" standard; other Board decisions classified "'particular social groups' without reference to social visibility," or refused to "classify socially invisible groups as particular social groups, without repudiating the other line of cases." *Id.* at 615-16. Ultimately, it is "unclear whether the Board is using the term "social visibility" in the literal sense or in the "external criterion" sense, or even whether it understands the difference." *Benitez Ramos*, 589 F.3d at 430. Faced with such inconsistency, "a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate." *Gatimi*, 578 F.3d at

616. To do otherwise "condone[s] arbitrariness and usurp[s] the agency's responsibilities." *Id.*

The Third Circuit has similarly rejected the "social visibility" standard as "inconsistent with a number of the Board's prior decisions" and therefore "not entitled to deference under *Chevron*." *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 603 (3rd Cir. 2011). The court openly questioned the standard's usefulness, *id.* at 606, as well as the Board's many decisions which found "persecution" "even though the group in question was not 'socially visible.'" *Id.* at 607. Given this fundamental inconsistency, the court refused to defer to the Board's application of the "social visibility" standard, holding that *Chevron* deference does "not give the agency license to thereafter adjudicate claims of social group status inconsistently or irrationally." *Id.* at 604. The standard ultimately proves to be "an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group." *Id.*

2. This Court has Determined that Asylum Applicants are Members of a Particular Social Group, Even When that Group is Not "Visible."

The Board's decision claims that "the United States Court of Appeals for the Sixth Circuit has *endorsed* the social visibility requirement," citing this Court's decisions in *Kante* and *Al-Ghorbani*. R. at 7. The Board's choice of words – "endorsed" – is both noteworthy and legally significant. Contrary to the Board's assertion, this Court in *Kante* and *Al-Ghorbani* recognized that the *Board* sometimes

employs this standard, but stopped well-short of either applying the standard itself or holding that it is entitled to *Chevron* deference.

In *Kante*, this Court referenced the "social visibility" standard only once, listed it among the Board's potential approaches for determining whether a candidate for asylum is part of a "particular social group." *Kante*, 634 F.3d at 327 (emphasis added). Similarly, *Al-Ghorbani* did not hold that the "social visibility" standard was entitled to deference under *Chevron*, but simply recognized that the Board had adopted that standard in some cases:

> Since *Acosta,* the BIA has stated that the two key characteristics of a particular social group are particularity and social visibility. . . . [which] requires "that the shared characteristic of the group should generally be recognizable by others in the community." The shared characteristic "must be considered in the context of the country of concern and the persecution feared."

Al-Gharboni, 585 F.3d at 994.

Al-Ghorbani, however, went on to apply a completely different standard, holding that the petitioners were a "particular social group," not because they were "socially visible," but because they possessed "common, immutable characteristics of kinship, regional background, and class," *id.*, and because they "actively oppose[d] the suppression of their core, fundamental values or beliefs." *Id.* at 996.

Thus, while this Court has *recited* the "social visibility" standard in previous cases, this Court has not specifically applied this standard or determined that it is entitled to *Chevron* deference.

Despite the Board's assertion to the contrary, R. at 7, this Court has been hesitant to employ the "social visibility" standard in cases like *Kante*, and *Al-Ghorbani* strongly suggests that this Court has adopted a standard that differs considerably from the Board's "social visibility" inquiry.

While *Al-Ghorbani* recognized that the Board uses the "social visibility" standard, this Court chastised both the immigration judge and the Board for simply citing the standard, rather than analyzing the core issue before them: whether the petitioners actually "belonged to a particular social group." *Al-Ghorbani*, 585 F.3d at 995. This Court then found that the petitioners were, in fact, part of a social group – not by focusing on whether they were "socially visible," but rather on the "common, immutable characteristics of kinship, regional background, and class" shared by the Al-Ghorbani family, and their collective opposition to "the suppression of their core, fundamental values or beliefs." *Id.* at 995-6. It was this second ground – opposition to fundamental human rights violations – which swayed this Court:

> In this country, the right to marry is considered fundamental. *Loving v. Virginia*. . . . Persons who are forbidden to marry, or those who oppose discriminatory restrictions on marriage, may therefore constitute a particular social group. . . . Abdulmunaem and Salah belong to a social group that opposes the repressive and discriminatory Yemeni cultural and religious customs that prohibit mixed-class marriages and require paternal consent for marriage.... Because of the fundamental nature of marriage, this is a characteristic that Abdulmunaem and Salah should not be required to change.... The "opposition" aspect of their actions places them in an identifiable social group.

Id. at 996-7.

Al-Ghorbani is of particular interest in this case, because the Romeikes are also part of a group – religiously-motivated homeschoolers in Germany – who are united in their opposition to the denial of their fundamental right to educate their children at home, in accordance with their own religious convictions. In light of *Al-Ghorbani*, as well as the reasoning of Third and Seventh Circuits, this Court should not give *Chevron* deference to the Board's social visibility standard.

B. Even if the "Social Visibility" Standard is Entitled to Chevron Deference, the Board's Conclusion is not Supported by Substantial Evidence.

Even if this Court extends *Chevron* deference to the "social visibility" standard, the Board's decision below is not supported by substantial evidence. In *Matter of C-A-,* the Board explained that social visibility means "the extent to which members of a society perceive those with the characteristic in question as members of a social group." 23 I. & N. Dec. at 957; see also *Matter of E-A-G,* 24 I. & N. Dec 591, 594 (BIA 2008). This court has described the standard this way: "'the shared characteristic of the group should generally be recognizable by others in the community,'" based on "the context of the country of concern and the persecution feared." *Al-Ghorbani*, 585 F.3d at 994, citing *Matter of S-E-G-,* 24 I. & N. Dec. 579, 586-587 (BIA 2008). German homeschoolers meet this standard.

There is considerable evidence in the record that German homeschoolers are socially visible. Homeschoolers are not an "amorphous" group under the INA, as

the Board suggests. Instead, homeschoolers are easily identified: their children can be found at home during times of instruction, not in the public schools. This characteristic is evident to homeschoolers themselves, society at large, and even to the German courts and authorities, who characterize homeschoolers as a potentially dangerous, religiously-motivated movement, and target them for selective prosecution and disproportionate punishment.

1. German Homeschoolers have "Particularity" under the Immigration and Nationality Act.

The Board found that "German homeschoolers lack the particularity required to be a cognizable social group under the Act" because they are few in number and are "amorphous," with motivations that vary from family to family. App. at 184a. This is contrary both to prior Board decisions and to decisions of this Court.

Under the INA, a group is "amorphous" only when it cannot be easily defined, not when the motivations of its individual members vary. *See Matter of A-M-E & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007) (wealth and affluence too amorphous); *Davila-Mejia v. Mukasey*, 531 F.3d 624 (8th Cir. 2008) (competing family business owners); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (BIA 2008) (male children who lack stable families and are subject to gang recruitment). Homeschoolers, on the contrary, are easy to define – their children not found in the public schools because their parents teach them at home.

Furthermore, even though homeschoolers in Germany are largely cohesive (as indicated by groups and networking), cohesion is not a criterion for a "particular group." *Acosta* does "not require a 'voluntary associational relationship' among group members. Nor do we require an element of 'cohesiveness' or homogeneity among group members." *Matter of C-A-*, 23 I. & N. at 956-7; see also United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership in a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, ¶ 15, HCR/GIP/02/02 (May 2002) ("[T]here is no requirement that the group be 'cohesive.' The relevant inquiry is whether there is a common element that group members share").

Similarly, *Al-Ghorbani* held that opposition to a Yemeni social norm can sufficiently identify a social group, without ever considering the particular motivation of those who are opposed. 585 F.3d at 995-6. German Homeschoolers similarly share a common element – the conscientious burden to teach their children at home – even if their individual motivations for homeschooling vary from family to family. This characteristic is specific, particular, and visible.

2. The Romeikes Specifically Identify Themselves as Members of the Particular Social Group of Religious Homeschoolers, and their Membership is Recognized Both in German Society and Internationally.

The Romeikes have specifically identified themselves as religious homeschoolers by de-registering their children from school and by informing the authorities that they were homeschooling. R. at 320.13-24, 321.22-322.7. As a result, they were persecuted. The Romeikes were identified by their fellow homeschoolers as members of this particular social group when the police came to remove their children a second time, as neighbors and friends of homeschoolers stood by them in protest. R. at 313.4-18; 545-6 ¶¶ 5-12; 547 ¶¶ 5-6; 549 ¶¶ 5-6; R. at 551. This meets at least the same level of visibility as *Al-Ghorbani*. 585 F.3d at 996-97 ("Abdulmunaem and Salah have been identified by their community as persons opposing Yemen's traditional, paternalistic, Islamic marriage traditions," pointing to their recognition by family members, neighbors, and local authorities).

There is substantial evidence in the record that German society recognizes homeschoolers as a particular social group. German homeschoolers have specific organizations in which they join to support their specific cause, which include local and national support groups where membership and attendance are specifically designed for homeschoolers. R. at 260.9-261.13; R. at 545 ¶ 2; R. at 547 ¶ 2; R. at 549 ¶ 2; R. at 551; see also Appx. at 6a. Homeschoolers have identified themselves as a movement through letter writing campaigns, R. at 545 ¶ 4; R. at 547 ¶

4; R. at 549 ¶ 4; R. at 551, and the German government has identified homeschoolers as a group in numerous policy papers, ministerial correspondence, court opinions, and statements at the local, state and federal level. See, e.g., *Konrad*, R. at 761 ¶ 12bb; R. at 264.1-265.17; R. at 278.20-280.18.

Homeschoolers have also been recognized by German academia. Thomas Spiegler, professor of sociology at Friedensau University in Germany, has written that homeschoolers are a "movement" that "has been slowly growing. Different networks have developed and now a process of professionalization and networking *is visible*." R. at 901. Professor Spiegler specifically identifies "two different milieus: conservative, religious oriented parents who considered the public school as too liberal and antiauthoritarian, were on one side, while, on the other side were liberal supporters of children's rights for whom school was still too authoritarian and rigid." R. at 901. Dr. Hans A. Schieser similarly identifies German homeschoolers as a "movement," in a 2008 position paper. R. at 885-6.

The plight of German homeschoolers has also gained international recognition. Germany's treatment of homeschoolers has been investigated by international tribunals and critiqued by the United Nations, which has stated that homeschooling represents a valid educational option, R. at 844 ¶ 62, and has called upon Germany to take "necessary measures" to "uphold[] the right of parents to employ this form of education." R. at 851 ¶ 93(g).

3. The German State Recognizes Homeschoolers through Persecution.

The most persuasive evidence that German homeschoolers are a particular social group comes from the German government itself. "[P]ersecutory action toward a group may be a relevant factor in determining the *visibility* of a group in a particular society." *Matter of C-A-*, 23 I. & N. at 960 [emphasis in original]. Germany views homeschoolers as a social group, has made ministerial statements about homeschooling at both the Federal and State level, and explicitly suppresses homeschooling to "counteract the development of religiously or philosophically motivated 'parallel societies.'" R. at 760 ¶ 8.

Konrad explicitly singles out religious homeschoolers as a particular, identifiable group whose actions must be subverted. R. at 760 ¶ 8. Homeschoolers are denied exemptions, and categorized as per se child abusers, precisely because they seek, as a movement, to educate their children apart from the influence and control of state schools. R. at 913 ¶ 15. *Plett* states that it is "completely acceptable" for courts to "enforce the handover of the children, by force if necessary and by means of entering and searching the parental home," in order to prevent "the damage to the children, which is occurring through the continued exclusive teaching of the children of [sic] the mother at home," R. at 775 ¶ 15c, and German states have passed laws which permit the local Jugendamt to remove children from their families without having to justify this decision in court. R. at 740-1 ¶ 11.

Based on the entire record presented at trial, the Immigration Judge appropriately found that homeschoolers "constitute a group that the government, for some unknown reason, wishes to suppress" and that they share "a desire to overcome something, in the homeschooling movement." Appx. at 15a. Homeschoolers are a particular social group under the Immigration and Nationality Act.

When a state selectively and systematically enforces its laws to target religious practitioners, such actions plainly amount to persecution within the meaning of the INA and the law of asylum and refugees. "The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Hialeah*, 508 U.S. at 543.

The Immigration Judge rightly concluded, on the basis of the evidence in the record, that German homeschoolers are a particular social group, and that the Romeikes will be persecuted for their religiously-motivated decision to homeschool if they are forced to return to Germany. The Board's decision fails to show that the Immigration Judge's factual findings were clearly erroneous, and fails to support its own factual assumptions and legal conclusions with substantial evidence in the record. As such, the Board's decision constitutes reversible error.

CONCLUSION

For the foregoing reasons, the decision of the Board of Immigration Appeals should be reversed, the Immigration Judge's order granting asylum to the Romeikes under the Immigration and National Act should be reinstated. In the alternative, this Court should remand to the Board of Immigration Appeals, with regards to whether the Board properly applied the clearly erroneous standard to the Immigration Judge's disputed factual findings, and whether German homeschoolers are a particular social group in light of this Court's precedent in *Al-Ghorbani*.

Dated: October 29, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th of October, 2012, a true and accurate copy of the foregoing Brief of Appellants was electronically filed via this Court's Electronic Case Filing (ECF) system. Notice of this filing was provided through ECF to Eric J. Holder, Jr.

Respectfully submitted,

/S/ Michael P. Farris
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Dated: October 29, 2012

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Memphis, Tennessee

File Nos.: A 087 368 600
A 087 368 601
A 087 368 602
A 087 368 603
A 087 368 604
A 087 368 605
A 087 368 606

January 26, 2010

In the Matter of)
)
UWE ANDREAS JOSEF ROMEIKE)
HANNELORE ROMEIKE)
DANIEL ROMEIKE)
LYDIA JOHANNA ROMEIKE)
JOSHUA MATHIAS ROMEIKE)
CHRISTIAN IMMANUEL ROMEIKE)
DAMARIS DOROTHY ROMEIKE) IN ASYLUM PROCEEDINGS
)
Respondents)

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENTS:

William Henry Humble, III, Esquire

ON BEHALF OF DHS:

John F. Cook, II
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

The Romeikes are a family from Germany that arrived in the United States August 17, 2008, and were admitted under the visa waiver program. They failed to depart within the 90 day time limit of that program.

The asylum application is based primarily on religion, but

also political opinion and particular social group. The background facts are as follows. The two adult Romeikes, Uwe and Anna Laura, are both music teachers. In the summer of 2006, they made the decision to take their children out of school and to homeschool their children. The children involved in that particular decision were Daniel and Lydia, who were currently in school, and Joshua who was about to start school. The adult respondents are both 38 years of age, Daniel is 12, Lydia is 11, Joshua is 9, Christian is 7, and Damaris is 2 years of age.

The reasons they decided to homeschool their children was the fear that there were negative influences in school. They felt that school engendered a negative attitude toward family and parents and would tend to turn children against Christian values, as the Romeikes saw it.

Specifically, the Romeikes objected to the teaching of evolution, the endorsement of abortion and homosexuality, the implied disrespect for parents and family values, teaching of witchcraft and the occult, ridiculing Christian values and sex education.

Although the Court is still not exactly sure what the witchcraft and occult studies are, in German public schools, the other aspects are fairly typical criticisms of public schools in the United States as well.

The Romeikes decided to enroll their children in the Philadelphia School. The Philadelphia school was, at one time, a

government sanctioned private school, but it no longer has classes as such, it operates as a private Christian correspondence school, assisting homeschoolers throughout Germany. Daniel, Lydia and Joshua were enrolled in the Philadelphia School.

Once the notification to the local school was received, respondents began to get attention from the government of their municipality. They actually cancelled he enrollment of their three children on September 15, 2006, and on September 20, 2006, Principal Rose came to visit them. Mr. Rose informed them that homeschooling is illegal in Germany and on the next day after they informed him that they were actually attending the Philadelphia School, he returned and told them that the Philadelphia School is not an approved government school.

October 9, 2006, they got a letter from the mayor informing them that they would suffer a fine of about $45 per child, per day, and, if necessary, the government would use force. The Romeikes ignored that. On October 20, 2006, two armed police officers came to the house to take the children to school. This produced a very upsetting scene for the children, the children were crying and were upset, as the three children that were of school age were herded off to go to school. Apparently, the police had no warrant or other authorization to do this, however, the Romeikes were not aware that they had any basis to resist legally, so they allowed the children to go to school. However,

Mrs. Romeike retrieved the children at lunch hour.

On October 23, 2006, the police appeared in force this time to take the children to school. However, the neighborhood apparently had been alerted and neighbors blocked the police from taking action. At that point, the government backed off for a while, obviously they were not sure what to do. Apparently these situations are fairly rare and apparently had not occurred in this town previously.

In December of 2006, the government began to get tough, they informed the Romeikes that the children must attend school and there would be a fine of about $672 initially, which would only escalate in the future if they continued to resist.

Also the mayor informed them that in addition to the fines, which would escalate, that they might lose custody of the children. There is a social work organization, in Germany, called the Jugendamt, which apparently means youth office in German, and they have the authority to remove children from parents under certain circumstances.

Respondents did go to Court over this and explained the situation. The Judge did not accept their explanation, he found them guilty of not sending their children to school, which is a crime.

Respondents took various legal measures over the ensuing months and they were not successful at any level. They faced escalating fines which would eventually be more than they could

afford to pay. The applicant makes about 12,000 Euros a month, and the family had been fined about 7,000 Euros at the time they left the country and the fines would only increase. If they were not able to pay the fines, they also stood to lose their property, but most importantly, they stood to lose custody of their children, and that was their main fear. There also is a possibility that they could have been sent to jail, as these are criminal statutes.

Michael Donnelly, a staff attorney, with the Homeschooling Legal Defense, testified very compellingly. He not only is an expert who has made intense study of the homeschooling situation worldwide, but he in fact has actually spoken to nearly all of the German parents who have been mentioned in the background evidence, and has virtually personal knowledge of their situations. He testified that there are very few homeschoolers in Germany, and it is not allowed by law. Further, the German Courts are not at all friendly towards homeschoolers. He testified that there are associations, that exist in Germany, about four of five of them, none of them very large. The problems started in the 1990's and they have accelerated as more people, such as the Romeikes, found out that it was possible to homeschool their children, if not legal. Mr. Donnelly stated that the fines could run from 50 Euros all the way up to 50,000 Euros, obviously a crushing fine, that the Jugendamt, would, in certain circumstances, take custody of the children, place them

in foster homes or orphanages, and send them to public school from there. Although some people have been sentenced to imprisonment, not very many have actually served in jail. The Schmidt family served 14 days in jail. The Dudek family was sentenced to 90 days in jail, but they appealed, and apparently their case has been remanded. Once again the Dudeks and the Schmidts were found guilty of not sending children to school, and are considered to be school refusers. Mr. Donnelly further testified that there are private schools, in Germany, but the private schools must be government approved, and they must use the government curriculum, which contains the items which the Romeikes find offensive. Although there may be some places in Germany where the law is not enforced at the local level, that is not a legal place of refuge, that is merely just a case of the local officials not taking action, so there is actually no safe place in Germany for the Romeikes, or people like them, to live without having these problems. Mr. Donnelly also testified that if fines are levied, which cannot be paid, property is attached and seized and the Jugendamt does take children into foster homes and orphanages. He discussed the case of the Gorbers, whose child was placed in a foster home for six months, and placed in public school, and they could not visit the child for six months. Even more disturbing, is the case of Melissa Vusekros. When her parents kept her out of school, she was treated as if she had a psychiatric affliction known as school phobia and she was

actually placed in an asylum for the mentally ill while she was tested. This frankly is reminiscent of the Soviet Union treating political opposition as a psychiatric problem, not only a human rights violation, it is a misuse of the psychiatric profession. He discussed the Gile family, who were attempting to hide their children, having an underground school essentially, rather than something like the Philadelphia School, however, the social workers found them out and threatened them with a 75,000 Euro fine, which is well over $100,000 U.S. When asked if some people were able to escape these penalties, Mr. Donnelly said yes they have, but it is only because they have fled from Germany, and he proceeded to list the various homeschoolers who have fled to many other countries, both in Europe and elsewhere, to escape fines, loss of custody of their children, and criminal sanctions. When asked whether there were any exceptions, he indicated the only real exception would be medical reasons, that if the child could be diagnosed with some psychological problem that would prevent being around other children, it might be possible to homeschool, although, in that case, what the government does is send in their own teachers who teach from the government curriculum. So even if that would work, and there is no evidence, in this case, that any of the children have any psychological problems, it would not achieve the goal.

The scariest thing that Mr. Donnelly testified to is the motivation of the German government in this matter. I certainly

would have assumed that the motivation would be concern for the children. We certainly do some odd things, in the United States, out of concern for children, but the explanation is always given that the Government has a right and an interest to look after children in their country. However, that does not seem to be the explanation. Mr. Donnelly described the judicial decisions, in Germany, not so much being interested in the welfare of the children, as being interested in stamping out groups that want to run a parallel society, and apparently there is a fair amount of vitriol involved in this attempt to stamp out these parallel societies. I found that odd. Another interesting fact, is the fact that this law has not always existed in Germany, it was enacted in 1938, when Adolph Hitler and the Nazi Party was in power in Germany, and it was enacted specifically to prevent parents from interfering with state control of their children, and we all know what kind of state control Hitler had in mind. It certainly was not for the good of the children, not even facial.

Now obviously Germany has changed since 1938. Germany is a Democratic country, Germany is an ally of the United States, and Germany does provide due process of law. However, this one incidence of Nazi legislation appears to still be in full force and effect, and that is the situation that Mr. Donnelly described, and the Romeikes fear.

On cross-examination, the Government attorney discussed,

with Mr. Donnelly, his claim that there was a petition, before the European Union, that was still open. Apparently there was a case that had been fought in the European High Court of Human Rights, in Strasbourg, which was rejected. Mr. Donnelly stated that it was rejected on some unknown ground. Mr. Cook, the Government attorney, pointed out that apparently it had been rejected on jurisdictional grounds. Regardless of who is right about that, it does not really affect the basic situation, that the European government is no more willing, than the German government, to make an exception for homeschooling for religious or philosophical reasons.

Oddly enough, although European countries are significantly less interested in the family than we are here in the United States, there is no other country, in Europe, that flat out bands homeschooling. Some of the other countries make it difficult, but the problems that I have been describing, that were described, by Mr. Donnelly, are largely restricted to Germany, they are nowhere near as bad in other European countries.

In the United States, no state bands homeschooling. There has been a lot of litigation regarding homeschooling, obviously the educational establishment, in many cases, wants to have control of children. However, the State Supreme Courts have, without exception, ruled in favor of the parents. For that reason no case has gone to the Supreme Court. However, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Supreme Court made

very clear how it would rule in this matter. That was a case of Amish parents who, for religious reasons, wanted their children taken completely out of the school, after just getting basic reading, writing and arithmetic. That was not homeschooling; that was no school. And in that case, the Supreme Court found that there was a fundamental right of a parent to establish a home and bring up the children and worship God according to the dictates of his own conscious.

This is a central right, in America. Justice Brandeis described it as part of the greater right, the right to be let alone, that the Government does not own people, that people should control the Government. So, in the United States, obviously, the Romeikes would have no problem with their homeschooling.

However, our Constitution is not in effect everywhere in the world. Maybe the world would be a better place if it were, but it is not, and we do not necessarily have any right to expect other countries to do exactly the way we do in everything. It is not just the homeschooling, religion is not free in other countries, the United Kingdom, obviously, has an established religion, which is prohibited by our Constitution, but is central to theirs, it is not an unfree country, the right to freedom of speech, that we take for granted, is not nearly as strong, in the United Kingdom, or other parts of Europe, many things that we would consider to be perfectly acceptable and protected are not

protected, and that is not necessarily persecution.

ASYLUM LAW

To qualify for asylum, pursuant to Section 208 of the Act, the applicant must show that he is a refugee within the meaning of Section 101(a)(42)(A) of the Act; that is that he suffered past persecution, or that he has a well-founded fear of future persecution in his country, on account of race, religion, nationality, membership in a particular social group or political opinion. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

To qualify for withholding of removal, under Section 241(b)(3) of the Act, the applicant must show a clear probability that his life or freedom would be threatened on account of one of those factors. This is a higher burden of proof than for asylum.

The applicant is not applying for Convention against Torture protection.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

First of all, as to credibility, I find that the Romeikes, and Mr. Donnelly, and all of their evidence is entirely credible and believable. They are clearly honest and decent people. Mr. Donnelly, although he certainly is a partisan in this dispute, has been a highly credible expert witness, and the Court was very impressed with his testimony.

As to what happened to the respondents, in Germany, I do not find that it is past persecution. This Court sits in the Sixth Circuit and the mistreatment that they suffered, as scary as it

might be, certainly does not rise to the level of persecution. See Ali v. Ashcroft, 366 F.3d 407 (6th Cir. 2004). So no presumption arises, respondents have to demonstrate that they have a well-founded fear of persecution, or a likelihood of persecution, to qualify for asylum or withholding of removal.

As I stated, persecution is an extreme concept that normally does not include harassment, discrimination, or similar things, as morally reprehensible, as that may be. See Sako v. Gonzales, 434 F.3d 857 (6th Cir. 2006).

Normally economic deprivation, and employment discrimination fall short of persecution. Matter of H-M-, 20 I&N Dec. 683 (BIA 1993). However, severe economic deprivation, which constitutes a threat to the life or freedom of the applicant, would be persecution. Kovac v. INS, 407 F.2d 102 (9th Cir. 1969).

The central issue, in this case, is whether this situation, where a family is denied the right to homeschool their children, denied the right to educate their children in their religious faith, and in their way of thinking, would necessarily be persecution under the Act.

Respondents' counsel argues that there are three factors which constitute a nexus to the factors for which asylum can be granted. Those factors are political opinion, religion and membership in a particular social group.

As to political opinion, I do not really see a political opinion here. Obviously any opinion could be a political

opinion, if you look at it that way, however, applicant and his family have never been involved in any kind of political organization, they have never taken a formal stand on anything, other than the homeschooling, they have never spoken out and I do not believe there is any political opinion in this case.

As to religion, the Government attorney argues that their religion is a bit on the vague side. They do not appear to belong to any particular church whose rigid doctrines they are attempting to enforce. In fact, almost all Christians, in Germany, do send their children to public school, or at least government private schools. Applicant has been somewhat vague as to his religious beliefs. He has not really identified a denomination that he belongs to. Nonetheless, there is no way the Court can look at this record and say the Romeikes do not have a religion. They clearly have a religion. It may be vague and unformed in some aspects, but it is quite specific in other aspects. Specifically the raising of their children, and Mr. Romeike made it very clear that this is not just his opinion, that he feels this is God's opinion, that he wants to raise his family and also his wife wants to raise the family, in accordance with God's wishes as they understand them. There is no religious test, in the United States, and this Court is not going to have a religious test. There is certainly no reason to believe that the religious beliefs, that the Romeikes have, are anything other than entirely genuine and they certainly seem the basis of a

problem here. However, is the government attempting to suppress their religion? Not really, the government is not acting against their religion, the government is only acting against their activities, which are very simple, not sending their children to school. The government is not trying to overcome their religious beliefs, however, the government is attempting to circumscribe their religious beliefs, and if the Romeikes remained in Germany, they would not be able to exercise their religion as they see it.

As to particular social group, initially I did not see that either. However, after listening to Mr. Donnelly's testimony, it does appear that there is animus and vitriol involved here, that the government of Germany really resents the homeschoolers, not just because they are not sending the children to school, but because they constitute a group that the government, for some unknown reason, wishes to suppress. I do not attempt to understand exactly what the government would mean by suppressing a parallel society, because it is so silly, obviously there are parallel societies in Germany, as everywhere. There are different ethnic groups, there are different religions, there is a large Turkish population, in Germany, that has been there many generations. Clearly they are somewhat of an alternate society than made of Christian Germans. Yet, for some reason the government is not focused on that, the government is attempting to enforce this Nazi era law against people that it purely seems to detest because of their desire to keep their children out of

school.

A problem with finding a particular social group is that whatever this particular social group is, parents who choose to homeschool, or however you define it, do not have any social visibility. There is no way you could tell a homeschoolers from an un-homeschooler walking the street. Therefore, under the Board's case law this would not constitute a particular social group for that reason.

However, the Board's social visibility standard has been harshly criticized in the Seventh Circuit, which held that it is actually nonsensical. I certainly do not think it is nonsensical, but the Seventh Circuit does. The Sixth Circuit, in which we sit, has never specifically impeached the social visibility standard, however, in a very recent case, Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009), the Sixth Circuit held that membership in a group opposing the repressive and discriminating customs governing marriage, in Yemen, would be considered to be a particular social group. Now the Sixth Circuit, as I stated, did not really address the social visibility issue, although clearly, in the Al-Ghorbani case, there was no social visibility, so it does appear that in the Sixth Circuit, whether or not it has actually followed the Seventh Circuit all the way, the Sixth Circuit certainly believes that there are particular social groups that do not have social visibility.

Since the group of homeschoolers, that respondents belong to, has been fined, imprisoned, had the custody of their children taken away from them, in case after case after case, and since there actually seems to be a desire to overcome something, in the homeschooling movement, even though the Court cannot really understand what that might be, I do find that the homeschoolers are a particular social group for the purpose of asylum law, in the Sixth Circuit. Currently it more than meets all the requirements set out in Al-Ghorbani. In fact, Al-Ghorbani was largely a personal situation involving a particular marriage, whereas in this case we are dealing with principle and opposition to the government policy.

So, therefore, although I do not find that there is a political opinion in this case, I do find that the religious beliefs of the Romeikes are being frustrated, and the practice of their religion will not be permitted under current German law, dealing with homeschooling, and also I find that they belong to a particular social group of homeschoolers who, for some reason, the government chooses to treat as a rebel organization, a parallel society, for reasons of its own.

As I stated above, this is not traditional German doctrine, this is Nazi doctrine, and it is, in this Court's mind, utterly repellant to everything that we believe in as Americans.

Religious freedom is in many ways the most basic freedom in this country, certainly most of the original refugees that came

to the United States, in colonial times, and in the early days of the republic, were religious refugees, many of them from Germany, such as the Amish and the Mennonites and many other groups and, therefore, I find that it is not just a question of enforcing our Constitution on a foreign country, but rather the rights that are being violated in this case are basic to humanity, they are basic human rights which no country has a right to violate, even a country that is in many ways a good country, such as Germany.

Therefore, I find that respondents do have a well-founded fear of persecution if they returned to Germany. Although the fines could be considered to be not severe enough to be persecution, it does appear that the fines are constantly increased to the point where they cannot be paid, and that would destroy the economic life of the Romeikes. The possibility that the children could be taken away from them, I find, to be persecution. I think most parents would rather serve two or three years in jail than to lose custody of their children during their minority. So the loss of custody is a very scary sanction, which is persecution. Then there is a possibility of jail as well, although it has not been imposed in too many cases, partly because people have fled the country. The very fact that some many of the homeschoolers have fled the country, after taking the legal system in Germany as far as they could, is certainly proof that this is no frivolous position. The Romeikes have uprooted themselves. They have not moved from a third world, they have

moved from a country just as wealthy as the United States, with a very nice welfare system, free medical care, many things that some people think we need in this country. But if Germany is not willing to let them follow their religion, not willing to let them raise their children, then the United States should serve as a place of refuge for the applicants.

There is nothing in the exercise of discretion that would bar asylum to the applicants. The biometrics have been checked and there are no problems. Therefore, the Court will grant asylum in the exercise of discretion to Mr. Romeike and, as derivatives, to his wife and children.

In the light of an asylum grant, I am not going to make any ruling on withholding of removal.

The Court's orders are as follows:

(1) Asylum is granted to all respondents;

(2) any order of removal that has been entered by the Department of Homeland Security is vacated;

(3) these proceedings will be terminated.

LAWRENCE O. BURMAN
United States Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE LAWRENCE O. BURMAN, in the matter of:

UWE ANDREAS JOSEF ROMEIKE, A 087 368 600

HANNELORE ROMEIKE, A 087 368 601

DANIEL ROMEIKE, A 087 368 602

LYDIA JOHANNA ROMEIKE, A 087 368 603

JOSHUA MATHIAS ROMEIKE, A 087 368 604

CHRISTIAN IMMANUEL ROMEIKE, A 087 368 605

DAMARIS DOROTHY ROMEIKE, A 087 368 606

Memphis, Tennessee

is an accurate, verbatim transcript of the recording as provided by the Executive Office for Immigration Review and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Cindy B. Whitlock

Cindy B. Whitlock, Transcriber
Free State Reporting, Inc.

March 23, 2010
(completion date)

By submission of this CERTIFICATE PAGE, the Contractor certifies that a Sony BEC/T-147, 4-channel transcriber or equivalent and/or CD, as described in Section C, paragraph C.3.3.2 of the contract, was used to transcribe the Record of Proceeding shown in the above paragraph.