No. _____

In The
Supreme Court of the United States

UWE ANDREAS JOSEF ROMEIKE, *et al.*,
***Petitioners*,**

v.

ERIC H. HOLDER, JR.,
Attorney General,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Germany enforces its ban on most homeschooling by threatening jail, excessive fines, and the loss of custody of one's children. The Romeikes, a German homeschooling family, fled to the United States and sought asylum when officials threatened to remove their children. Germany openly states that its criminal prosecutions for homeschooling are motivated by a desire to discourage the development of religious minorities into "parallel societies."

1. Whether *prosecution* under a generally applicable law may constitute *persecution* when such a law violates human rights treaty obligations concerning a protected ground?

2. Whether *prosecution* under a generally applicable law may constitute *persecution* when there is direct evidence that one central reason for the government's motive for prosecution is the desire to suppress the applicant on a protected ground?

PARTIES TO THE PROCEEDING

Petitioners in this case are Uwe Andreas Josef Romeike, his wife, Hannelore Romeike, and their five minor children. Petitioners, who are citizens of Germany, are applicants for asylum.

Respondent, Eric H. Holder, is the Attorney General of the United States. The Attorney General and Department of Justice oppose the Romeikes' applications for asylum.

CORPORATE DISCLOSURE STATEMENT

No corporations are parties, and there are no parties who are parent companies or publicly held companies owning stock in any corporation.

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The Sixth Circuit's order denying the Romeikes' Petition for Rehearing *en banc*, issued July 12, 2013, is reproduced at Pet.App. 52a-53a.

STATEMENT OF JURISDICTION

Petitioners, Uwe Romeike, his wife Hannelore, and their five children, filed for asylum on November 11, 2008, pursuant to 8 U.S.C. § 1158(a) (2012). U.S. Immigration Judge Lawrence O. Burman granted asylum to all seven petitioners on January 26, 2010. Pet.App. 49a. Respondent appealed to the Board of Immigration Appeals which reversed Judge Burman's decision on May 4, 2012. Pet.App. 29a.

The Romeikes appealed to the United States Court of Appeals for the Sixth Circuit, which denied the Romeikes' appeal in a published decision on May 14, 2013. The Romeikes timely filed a motion for rehearing *en banc*, which was rejected on July 12, 2013. Pet.App. 52a-53a. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2013).

STATUTORY PROVISIONS AND TREATIES INVOLVED IN THE CASE

8 U.S.C. § 1101(a)(42) (2013) defines "refugee," in pertinent part, as:

> [A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

An asylum applicant's burden of proof is governed by 8 U.S.C. § 1158(b)(B)(ii) (2013):

> In general the burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

The full texts of 8 U.S.C. § 1101 and 8 U.S.C. § 1158 are reproduced in the appendix, as is 8 U.S.C.

§ 1229a (2013), which governed the removal proceedings initiated against the Romeikes.

The Romeikes also assert that Germany's ban on homeschooling is in violation of its own international human rights obligations, as evidenced by Article 26(3) of the Universal Declaration of Human Rights of 1948, 71 G.A. Res. 217 A (III), U.N. Doc A/810 (hereinafter "UDHR"), and Germany's ratification of Article 18(4) of the International Covenant on Civil and Political Rights of 1966, Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter "ICCPR"), and Article 13(3) of the International Covenant on Economic, Social, and Cultural Rights of 1966, Dec. 16, 1966, 993 U.N.T.S. 3 (hereinafter "ICESCR"). These instruments are binding legal commitments which reflect the views of the world community expressed in the UDHR. These three instruments are reproduced, in full, in the appendix.

STATEMENT OF THE CASE

Factual History

Uwe and Hannelore Romeike, German nationals, believe that God requires them to teach their children at home. A.R. 358, 476-78. The Romeikes believe that they, as parents, "can never delegate their responsibility to teach their children to anyone else." A.R. 476 ¶ 10.

Germany's compulsory attendance law requires attendance at a public school or government–approved private school. A.R. 267-68.

Homeschooling is not a legally recognized exception to the compulsory attendance law. *Id.*

The Romeikes object to public school attendance because of their religious beliefs. The Romeikes believe that their Christian values will be undermined in the public school, which teaches evolution, disrespect for authority figures, bullying, and witchcraft, and promotes abortion and homosexuality. A.R. 479. The Romeikes reject "government-approved private schools" on similar grounds, because these schools must use the same textbooks as public schools. A.R. 331.

Prior to the 2006 school year, the Romeikes approached Mr. Kline, Director of the School District in Bissingen, Germany, to obtain a compulsory attendance exemption so they could homeschool. A.R. 309. His reply was that "there is no way to get an exemption." *Id*.

This is not technically true, as German law permits exemptions under the compulsory attendance law when "parents, due to their occupation, do not have a firm residence," A.R. 761 ¶ 12bb, *reproduced at* Pet.App. 218a, or when "the children are circus performers, inland shippers or are simply incapable physically or mentally from going to school." A.R. 913 ¶ 12.

Mr. Kline's denial of an exemption is, however, consistent with how virtually all German authorities respond to applications from parents who homeschool for "reasons of conscience." A.R. 921 ¶ 20. German authorities refuse to grant exemptions

to these parents and "proceed against the parents to compel them to send their children to school," A.R. 913 ¶ 14, with the express purpose, in the words of Germany's highest constitutional court, of preventing homeschoolers from developing into "religiously or philosophically motivated 'parallel societies.'" *Konrad*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] April 29, 2003, 1 BvR 436/03 (F.R.G.), *reproduced at* Pet.App. 216a ¶ 8.

In the fall of 2006, Uwe and Hannelore Romeike withdrew their children from the public schools, in accordance with their religious beliefs, and began homeschooling. Almost immediately, they were visited by the local school principal, who declared their homeschool illegal and threatened them with fines and police action. A.R. 307-308. On September 10, 2006, the Romeikes received a letter from the mayor, who stated that "homeschooling and not attending the public elementary school in Bissingen is illegal" and that he was "willing to forcefully take the students to school." A.R. 539-40. Eleven days later, the Romeikes received a letter from the principal, stating 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." A.R. 535. Despite these threats, the Romeikes continued to homeschool, in accordance with their faith.

On Friday, October 20, 2006, just before 7:30 a.m., the Romeikes' doorbell rang. A.R. 310. Mr. Romeike peeked through the door and saw a huge police van. A.R. 310-311. One uniformed police

officer was talking with neighbors, who were gathering outside. A.R. 311. Another officer told Mr. Romeike that they were going to take the children to the public school. *Id*. Some of the children began to cry, and Mr. Romeike told the officer that the children were homeschooled. A.R. 311-12. The officer insisted that the children had to attend the public school. A.R. 312. The officer was armed, and his weapon was visible. A.R. 310.

The officers came into the Romeike home and threatened to go upstairs to seize the children. A.R. 355-356. The officers then rounded up the crying children, seized their school bags, forced them into the police van, and drove away. A.R. 311.

While German Courts have issued orders depriving parents of custody of their children solely because the parents homeschool, *see*, *e.g.*, *Plett*, A.R. 775, *reproduced at* Pet.App. 229a-230a ¶ 15, the Romeikes were never provided with a written order authorizing the removal of their children. A.R. 311-12.

On the day their children were seized, Mrs. Romeike went to the school during recess, collected her children, and hid with them at her sister's home until the end of the school day, afraid that the police would return. A.R. 312-313, 357. They returned home over the weekend.

The following Monday, armed and uniformed police officers once again came to the Romeike home to forcibly remove the children. A.R. 313, 546. This time, the police met other German homeschoolers

who were peacefully protesting outside the Romeike home, as well as a member of the press. A.R. 545-46. The officers once again came into the Romeike home and threatened to go upstairs to gather the children but the Romeikes refused. A.R. 546. The officers were eventually ordered by the mayor to leave the home without the Romeike children. A.R. 546-47.

The Romeikes were summoned to another meeting with Mr. Kline in December 2006 and were informed that they had to return to public school or they would face fines and "further legal action." A.R. 315. The Romeikes continued to homeschool. They were fined between €6,000 to €7,000, which far exceeded Mr. Romeike's total monthly income of between €1,000 and €1,200. A.R. 322-23. The Romeikes paid the first round of fines, about €400, but could not pay the rest. A.R. 323, 343.

In February 2007, the Romeikes challenged these fines and notices in court. A.R. 346. 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.

A.R. 580. The Romeikes appealed this decision to the Federal Constitutional Court of Germany, but their appeal was rejected. A.R. 346-347, 584.

The Romeikes came to the United States in August 2008 and applied for asylum. If returned to Germany, the Romeikes intend to homeschool in accordance with their religious beliefs, even though they fear further prosecution, fines, and the permanent loss of custody of their children. A.R. 325-26, 358-59.

Procedural History

On November 11, 2008, petitioners filed individual applications for asylum, Forms I-589. A.R. 463-74, 940-51, 970-74. On January 26, 2010, U.S. Immigration Judge Lawrence O. Burman granted asylum to the Romeikes, because they had a well-founded fear of future persecution on account of religion and were members of a particular social group—German parents who homeschool for religious reasons. Pet.App. 46a-47a. Judge Burman found the Romeikes, their expert witnesses, and all their evidence to be entirely credible. He was particularly disturbed by the oral testimony and written evidence from German officials that demonstrated that Germany's stance against

homeschoolers in general, and the Romeikes in particular, was motivated by a desire to prevent the development of religiously and philosophically-motivated "parallel societies." Pet.App. 44a, 47a.

The Board of Immigration Appeals ("the Board") reversed on May 4, 2012, holding 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." Pet.App. 25a. The Board also concluded that German homeschoolers "lack the social visibility required to constitute a particular social group." Pet.App. 27a.

The Romeikes timely filed a Petition for Review on May 23, 2012, with the Sixth Circuit Court of Appeals, which affirmed the Board's ruling in a published decision issued on May 14, 2013. *Romeike v. Holder*, 718 F.3d 528, 534 (6th Cir. 2013), *reproduced at* Pet.App. 1a-17a. The court dismissed, as *dicta*, the Romeikes' reliance on *Perkovic v. I.N.S.*, 33 F.3d 615 (6th Cir. 1994), and held that a generally applicable law does not amount to persecution simply because it violates fundamental international human rights norms. *Romeike*, 718 F.3d at 534. The court also held that direct evidence of Germany's motive for enforcing the compulsory attendance statute against religious homeschoolers—to prevent the development of religiously and philosophically motivated "parallel societies"—"add[ed] little," if anything, to the issue of persecution. *Id.* at 534.

ARGUMENT

I

Introduction

This case presents two important questions regarding the meaning of "persecution" for the purposes of the United States law on asylum. On the first question, there is a clear split in the Circuits. On the second, we ask this Court to "resolve confusion in the Circuits." *Burnett v. Grattan*, 468 U.S. 42, 46 (1984).

The general rule is that prosecution under a generally applicable legitimate law does not constitute persecution for the purposes of our asylum law. While every Circuit recognizes that there are exceptions to this general rule, the grounds for granting exemptions vary from Circuit to Circuit.

The first question is whether prosecution under a generally applicable statute that violates human rights standards touching on a protected ground constitutes persecution. After *Romeike*, the Sixth and Tenth Circuits now reject international human rights instruments as an aid to identifying persecution in asylum cases. The Third and Ninth Circuits, on the other hand, contend that prosecution under a generally applicable law can constitute persecution if the law violates fundamental human rights standards that touch on a protected ground.

Although it is well established that our law on asylum is implementing legislation designed to fulfill

our obligations under the United Nations Protocol Relating to the Status of Refugees, Jan. 31 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 (hereinafter "Protocol"), *Chang v. I.N.S.*, 199 F.3d 1055, 1061 (3d Cir. 1997), the Sixth Circuit refused to consider the Protocol—or any other international source of human rights law—when weighing the Romeikes' persecution claims, even though it had previously relied on the Protocol and its interpretive Handbook[1] to distinguish ordinary *prosecution* from *persecution*. *Perkovic*, 33 F.3d at 22.

On the second question, the circuits generally agree that "[c]riminal prosecution of a fairly administered law does not constitute persecution" within the meaning of 8 U.S.C. § 1101(a)(42) (2013). *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2005).[2] The Circuits also agree that there should be *exceptions* to this general rule, but there is

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[1] Office of the United Nations High Commissioner for Refugees, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1961 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/IP/4/Eng/REV.1 (Geneva: UNHCR 1992) (hereinafter "Handbook").

[2] *See Khalaf v. I.N.S.*, 909 F.2d 589, 591 (1st Cir. 1990); *Long v. Holder*, 620 F.3d 162, 166 (2d Cir. 2010); *Li v. Attorney General*, 633 F.3d 136, 137-38 (3d Cir. 2011); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 452 (4th Cir. 2007); *Tesfamichael v. Gonzales*, 469 F.3d 109, 117 (5th Cir. 2006); *Stserba v. Holder*, 646 F.3d 964, 977 (6th Cir. 2011); *Guchshenkov v. Ashcroft*, 366 F.3d 554, 559 (7th Cir. 2004); *Li v. Holder*, 559 F.3d 1096, 1108 (9th Cir. 2009); *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1142 (10th Cir. 1994); *Scheerer v. Attorney General*, 445 F.3d 1311 (11th Cir. 2006).

considerable disagreement on what exceptions are available.

The law in the Circuits is best described as "in disarray." Although there is a majority rule followed clearly in five Circuits, and implicitly in three others, applicants who claim persecution under generally applicable laws face vastly different outcomes, depending on the Circuit in which they find themselves. Had the Romeikes applied for asylum in one of these eight Circuits, their proffered direct evidence of Germany's persecutory motive would not have been summarily dismissed. Conversely, there is little doubt that many of the reported cases which resulted in successful appeals in other circuits would have ended in failure had they been analyzed under the criteria announced by the Sixth Circuit in the case at bar.

This case is exceptionally appropriate for resolving the inconsistencies among the Circuits. Since the Sixth Circuit purported to state a comprehensive rule governing the granting of exceptions. Despite its attempt to announce a comprehensive rule, the Sixth Circuit failed to cite, quote, or construe the controlling statute, or comprehensively review its own prior precedents or those of the sister Circuits. The resulting formula can only be described as idiosyncratic in character. No other decision—including those previously arising in the Sixth Circuit—comes anywhere close to "discovering" the rules announced below.

The correct criteria for granting exceptions to the general rule is easily discerned by consulting the

statutory text, this Court's decisions, the Protocol, and the Handbook, as evidenced by the majority rule in the Circuits. These sources stand in clear opposition to the hastily constructed formulation announced by the Sixth Circuit below.

II

The Circuits are Split on Whether a Prosecution under a Generally Applicable Law may Constitute Persecution if the Law Itself Violates Fundamental International Human Rights Standards

The United States law on asylum was designed as implementing legislation to fulfill our obligations under the Protocol. *See Chang*, 199 F.3d at 1061. Both the Protocol and the Handbook, while lacking the "force of law," nevertheless provide significant guidance in construing the meaning of our asylum statute. *Negusie v. Holder*, 555 U.S. 511, 536-37 (2009); *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).

"[T]he Refugee Act's legislative history reflects that Congress intended the Act to give 'statutory meaning to our national commitment to human rights and humanitarian concerns.'" Michael English, Comment, *Distinguishing True Persecution from Legitimate Prosecution in American Asylum Law*, 60 OKLA. L. REV. 109, 151 (2007) (footnotes and internal citations omitted) (hereinafter "English, Comment"). Thus, prosecution may constitute persecution "when the underlying law the foreign government seeks to enforce violates internationally

accepted human rights principles," even if that law is generally applicable to all of society. *Id.*

The right of parents to direct the education of their children, in accordance with the parents' own religious beliefs, is a fundamental human right clearly recognized by binding human rights treaties. The Sixth Court refused the Romeikes' repeated invitations to consider, much less determine, whether Germany's *prosecution* of religious homeschoolers constitutes *persecution* in the context of international human rights norms.

A

Germany's Ban on Religious Homeschooling Violates International Human Rights Standards

While human rights law permits, and even encourages, nations to adopt compulsory attendance laws and impose reasonable academic standards upon private and home school alternatives, international standards expressly require a nation to permit parents to choose educational alternatives which honor the parents' religious values. Philosophical control by governments over private education is expressly forbidden.

It is beyond dispute that the UDHR arose "out of the desire to respond forcefully to the evils perpetrated by Nazi Germany." Kathleen Renee Cronin-Furman, *60 Years of the Universal Declaration of Human Rights: Toward an Individual Responsibility to Protect*, 25 AM. U. INT'L L. REV. 175,

176 (2009). The UDHR's provisions on parents and children are no exception. Dr. Lisa Pine, who specializes in Holocaust Studies and Nazi Germany at London South Bank University, writes that Germany's ban on private education in that era was designed for the express purpose of achieving philosophical uniformity: "division—separation into different schools according to religious belief—cannot continue. . . . Children should be together in order to understand and appreciate the further unit of the community, our *Volk*." LISA PINE, EDUCATION IN NAZI GERMANY 29 (2009) (ellipses in original). This theory is clearly repudiated by Article 26(3) of the UDHR, which states that "parents have a prior right to choose the kind of education that shall be given to their children."

The aspirational articles of the UDHR were translated into the binding provisions of the two core human rights treaties of our era—the ICCPR and the ICESCR. Article 18(4) of the ICCPR pledges that State Parties will "have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions." Article 13(3) of the ICESCR repeats and expands upon this theme:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians 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.

From these three instruments, collectively referred to as the "International Bill of Rights," emerge three truths concerning the relationship between the state and parents in the realm of education. First, parents have rights concerning the education of their children that are "prior" to any claim of the state, both in time and in rank. Second, among these "prior" rights is the right of parents to ensure that the education of the child conforms to the parents' moral convictions. Third, parents and others have the right to start schools that are separate from those offered by the state, in order to provide religious and moral education that conforms to the parents' convictions.

Germany is a party to both the ICESCR and the ICCPR. Thus, while Germany is permitted to exercise reasonable control over private education through the implementation of "minimal educational standards," ICESCR, Art. 13(3), Germany has promised the world that German parents will be free to choose an education for their children that is "in conformity with [the parents'] own convictions." *Id*. Conversely, an education policy that forecloses all opportunities for children to be educated in accordance with parental convictions is neither reasonable nor legitimate.

This, however, is precisely what Germany does in practice. Germany subjects all children to

compulsory attendance at government-approved schools. Exemptions are available when "parents, due to their occupation, do not have a firm residence," *Konrad*, Pet.App. 218a ¶ 12bb, or when children are "circus performers, inland shippers or are simply incapable physically or mentally from going to school." A.R. 913 ¶ 12. Exemptions are *not* granted to parents who homeschool for "reasons of conscience," like the Romeikes. A.R. 309; 921 ¶ 20.

The result is a cruel irony. Germany permits "inland shippers" to school their children on the road in the name of "family unity" but threatens to remove children from their parents if they desire to provide private religious instruction at home.

Why the difference in treatment? What is Germany's motive for this extraordinarily harsh approach toward those who wish to homeschool? While the Nazi regime is gone, "[s]trains of the nationalistic tendencies of Nazi Germany still infect parts of today's German Republic," as "[p]arents no longer have a right to educate their children at home, and procedures for setting up private schools are laborious." Aaron T. Martin, *Homeschooling in Germany and the United States*, 27 ARIZ. J. INT'L & COMP. L. 225, 228-29 (2010).

According to Germany's own Federal Constitutional Court, the ban on homeschooling serves "a justified interest in counteracting the development of religiously or philosophically motivated 'parallel societies' . . . " *Konrad*, Pet.App. 216a ¶ 8. *Konrad* makes it plain that Germany's concern in banning homeschooling (while allowing

"on–the–road" schooling) is religious and philosophical, not academic. "It might be the case that the restriction of the state's educational mandate to the regular supervision of the practicing and success of home education can present a milder and also equally suitable method for serving the purpose of knowledge transfer." *Id.* at 215a ¶ 7. But according to Germany, home education fails to teach "tolerance" when education is allowed solely on the basis of the parents' religious views. *Id.* at 216a ¶ 7. Prosecution of homeschoolers is therefore necessary to "counteract[] the development of religiously or philosophically motivated 'parallel societies.'" *Id.* at 216a ¶ 8.

In *Plett*, the German Federal Court of Appeals further explained Germany's desire to control children's philosophical development "in a pluralistic society." *Plett*, Pet.App. 224a ¶ 7. To achieve the desired philosophical outcome, the *Plett* court held that it is appropriate to order "the removal of the right [of parents] to determine the residence of the children and to decide on the children's education." *Id.* at 229a ¶ 15c. Moreover, *Plett* held 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." *Id.* at 229a-230a ¶ 15c. In the aftermath of *Plett*, the Jugendamt (Youth Office) "has the immediate task to take away all home schooled children." A.R. 740-41 ¶ 11. *See also* Letter from the German Secretary

of the Permanent Conference of the State Ministers for Cultural Affairs, A.R. 298.

Germany's law is not "legitimate" when measured against its own human rights commitments. The express motive of Germany is to suppress parents' minority religious values because it fears the development of a "parallel society"—preferring a society that is uniform in philosophical character.

If human rights standards are applicable, then German homeschoolers are clearly entitled to asylum. The level of punishment is very harsh—permanent loss of custody of one's children. The government's reason for prosecution is clearly connected to a protected ground—Germany wants to suppress religious minorities and a particular social group. And the law employed by Germany is marshaled for a purpose expressly forbidden by human rights standards: philosophical control of private, religious education.

B

There is a Clear Split in the Circuits on the Applicability of Human Rights Standards in Assessing the Legitimacy of General Laws

Despite this clear evidence that Germany's prosecution of religious homeschoolers violates international human rights, the Sixth Circuit declined to find that Germany's systematic prosecution of religious homeschoolers in general, and the Romeikes in particular, amounted to

persecution. In so doing, the Sixth Circuit joined the Tenth Circuit in refusing to consider violations of international human rights norms as a basis for a finding of persecution.

Prior to its decision in *Romeike*, the Sixth Circuit was clearly supportive of the use of international human rights law for this purpose. In *Perkovic*, the Court declared that "asylum laws" have the "intended effect of protecting the exercise of internationally recognized human rights." 33 F.3d at 622-23. *Perkovic* held that the Protocol was "deemed to have been incorporated into U.S. law," and that an applicant was entitled to asylum because he was prosecuted and punished for activities that were protected by the Protocol. *Id. See also Stserba v. Holder*, 646 F.3d 964, 974 (6th Cir. 2011).

In *Romeike*, however, the Sixth Circuit abandoned *Perkovic*, holding that its reliance on international human rights law was mere "*dicta*." 718 F.3d at 734. This is difficult to sustain upon both a fair reading of *Perkovic* and its treatment by a major treatise on the law of asylum. DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 357 n. 12 (2013) (citing *Perkovic* for the proposition that "[p]rosecution for violation of laws that directly punish beliefs or actions protected by international human rights principles may also constitute persecution on account of political opinion"). Instead, the Sixth Circuit declined to even address the Protocol and Handbook, much less acknowledge its importance as an interpretive aid in U.S. asylum law.

By assigning *Perkovic*'s embrace of human rights standards to the netherworld of *dicta*, and explicitly rejecting the use of international human rights standards in *Romeike*, the Sixth Circuit now refuses to consider human rights violations in the course of determining the legitimacy of a foreign government's action.

Two sister Circuits have reached the opposite conclusion. The Third and Ninth Circuits consider violations of international human rights norms as potential evidence of "persecution," in accordance with the Protocol. As the Third Circuit has noted:

> [T]he courts have been guided by the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook"), which lacks the "force of law" but nonetheless provides significant guidance in construing the Protocol. [*I.N.S. v.*] *Cardoza–Fonseca*, 480 U.S. [421,] 439 n. 22 [1987]; *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996); *Osorio v. I.N.S.*, 18 F.3d 1017, 1027 (2d Cir. 1994). The Handbook unequivocally provides that persecution is not the same as "punishment for a common law offense," Handbook ¶ 56, but it is equally clear that prosecution under some laws—*such as those that do not conform with accepted human rights standards*—can constitute persecution. *Id.* at ¶ 59.

Chang, 199 F.3d at 1061 (emphasis added). Since *Chang* was decided, this Court has used the Handbook for similar purposes in two subsequent cases. *Negusie*, 555 U.S. at 536-37; *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999).

The Handbook contains several additional observations, which have important bearing on this case. Paragraph 60 suggests that to "evaluat[e] the laws of another country . . . recourse may usefully be had to the principles set out in the various international instruments relating to human rights." The Handbook specifically discusses the distinction between prosecution and persecution, noting that "it is possible for a law *not to be in conformity with accepted human rights standards*" (emphasis added). Handbook ¶ 60. The Handbook also lists, as an example of an improper statute, one that imposes "penal prosecution" in "respect to the 'illegal' religious instruction of a child," which "may in itself amount to persecution." Handbook ¶ 57.

Michael English catalogs a number of cases where the Circuits have failed to consider human rights standards when such considerations were self-evident on the facts, especially with regard to laws that persecute women.[3] The Tenth Circuit's decision in *Sadeghi v. I.N.S.*, 40 F.3d 1139 (10th Cir. 1994), is illustrative. In *Sadeghi*, the court denied asylum to an Iranian high school principal who was prosecuted for counseling a 14 year-old boy to avoid military service in violation of the Iranian law. The majority held that "[p]rosecution for illegal activities 'is a

[3] For further full discussion, see English, Comment, 60 OKLA. L. REV. at 167-73.

legitimate government act and not persecution.'" *Id.* at 1142 (internal citation omitted). Judge Kane filed a stinging dissent, in which he forcefully argued that sending children to war violated clearly established international human rights standards. That the prosecution was pursuant to a generally applicable law was no defense: "to recognize prosecution thereunder as a legitimate exercise of governmental authority would conflict with fundamental human rights under both the Geneva Convention and customary international law." *Id.* at 1147. Such a result not only "ignor[es] the very purpose of our immigration laws as intended by Congress," *id.* at 1148, but is "utterly lacking in justice." *Id*. at 1143.

In the aftermath of *Romeike*, the Third and Ninth Circuits now stand alone in holding that persecution may be proven by demonstrating that the law in question violates human rights standards. *Chang*, 199 F.3d at 1061; *Chanco v. I.N.S.*, 82 F.3d 298, 301 n. 3 (9th Cir. 1996) ("[W]e have held that prosecution for a crime can constitute persecution, when the underlying law being enforced is contrary to internationally accepted principles of human rights."). As we have shown, the Sixth and Tenth Circuits take the opposite view.

There must be some standard by which our courts determine which foreign laws are "legitimate" if we are to follow the rule that prosecutions under a legitimate law of general applicability do not constitute persecution. Using international human rights standards for this purpose avoids both subjective adjudication and any charge of unfairly

judging the actions of a foreign nation by American standards.

This Court should grant *certiorari* not only to resolve this split in the Circuits but to underscore our nation's belief that we grant asylum as a method of fulfilling this nation's commitment to fundamental human rights.

III

There is Substantial Confusion among the Circuits Concerning the Grounds for Finding Persecution Arising from Prosecution under a Generally Applicable Law

Congress explicitly addresses the burden of proof for establishing refugee status:

> In general the burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be *at least one central reason for persecuting the applicant*.

8 U.S.C. § 1158(b)(B)(ii) (2013) (emphasis added).

Congress's inclusion of the "one central reason" requirement, inserted in 2005, is significant. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. 109-13, 119 Stat. 231. As the Ninth Circuit has explained:

> First, an asylum applicant need not prove that a protected ground was the only central reason for the persecution she suffered. The Act requires that a protected ground serve as "*one* central reason" for the persecution, naturally suggesting that a persecutory act may have multiple causes. Second, an applicant need not prove that a protected ground was the most important reason why the persecution occurred. The Act states that a protected ground must constitute "at least one" of the central reasons for persecutory conduct; it does not require that such reason account for 51% of the persecutors' motivation.

Parussimova v. Mukasey, 555 F.3d 734, 740 (9th Cir. 2009) (emphasis added).

As this Court unequivocally held in *I.N.S. v. Elias-Zacarias*, because the Immigration and Nationality Act (INA) "makes motive critical" to the question of persecution, a successful asylum applicant must provide "*some* evidence of it, direct or circumstantial." 502 U.S. 478, 483 (1992) (emphasis in original). A majority of the Circuits embrace the

motive requirement, holding that "prosecution" may amount to "persecution" if an illegitimate motive is one central reason for the government's prosecution. After *Romeike*, at least three Circuits appear to reject this view.

A

There is Clear Disagreement among the Circuits as to when "Prosecution" under a Generally Applicable Law Becomes "Persecution"

In general, "[c]ourts uniformly recognize that a state's prosecution of its citizens does not automatically equate with persecution." English, Comment, 60 OKLA. L. REV. at 124. Most courts recognize, however, that there are some exceptions to this general rule, where a prosecution ceases to be "legitimate," and becomes "persecution based on a protected ground." *Id.* There is significant confusion among the Circuits, however, as to what is required to justify an exception.

The Ninth Circuit's discussion of exemptions, in *Li*, illustrates the varied approaches employed by the Circuits. In *Li*, the Ninth Circuit surveyed its precedents and found that it had identified at least five potential exceptions which would turn prosecution into persecution: (1) disproportionately severe punishment; (2) pretextual prosecution; (3) a prosecution that lacked legitimacy; (4) a prosecution that lacked the process normally due; or (5) a prosecution lacking a legitimate prosecutorial

motive. 559 F.3d at 1109-10. The Circuit does not appear to suggest that this list is exhaustive.

The legal literature reflects a similar variance. The most comprehensive treatment is an 81-page law review comment that provides an instructive summary on the state of the law in the Circuits:

> The central inquiry in determining if prosecution equals persecution is whether the governmental conduct stems from an improper motivation. Three factors stand out as the most influential guides in evaluating whether the government has an invidious motivation that transforms legitimate prosecution into persecution: (1) the judicial process received by the alien, (2) the nature of the underlying law the state is enforcing, and (3) the context in which the prosecution occurs. Although not the only factors relied on, these are the most prominently applied, and they often prove crucial in the disposition of an asylum applicant's case.

English, Comment, 60 OKLA. L. REV. at 144.

Although English finds general patterns for distinguishing prosecution from persecution, he adds that "the jurisprudence concerning this distinction reveals two significant barriers to legitimate claims for refuge." *Id.* at 167. Specifically, applicants for

asylum "confront the inconsistent application of the human rights exception and the mixed-motive analysis, both of which are crucial in reaching just outcomes," in addition to the "tendency of many immigration courts to inaccurately apply relevant legal principles and the inability of appellate courts to meaningfully review those flawed decisions." *Id.* at 167. As a result, asylum law is interpreted unevenly, "even where a government has truly persecuted an alien." *Id.*

B

Most Circuits Focus on Motive to Determine if Prosecution is Persecution

The First, Third, Fourth, Fifth, and Ninth Circuits have held explicitly, in accordance with *Elias-Zacarias*, that evidence of motive is critical to whether "prosecution" amounts to "persecution." The Eighth, Tenth, and Eleventh Circuits have suggested that they would have done the same had the applicant presented evidence of an illegitimate government motive.

The Ninth Circuit's formulation is illustrative of this majority rule: "Although legitimate criminal prosecution generally does not constitute persecution, prosecution motivated by a protected ground does." *Bromfield v. Mukasey*, 543 F.3d 1071, 1077 (9th Cir. 2008). The rules in the Third, Fourth, and Fifth Circuits are identical in substance. *See Li*, 633 F.3d at 141 (holding that "the statute makes motive critical" in determining whether the prosecution amounted to persecution); *Menghesha v.*

Gonzales, 450 F.3d 142, 147 n. 2 (4th Cir. 2006) ("In fact, where the motive underlying a purported prosecution is illegitimate, such prosecution is more aptly called persecution."); *Li v. Gonzales*, 420 F.3d 500, 508 (5th Cir. 2005) ("Prosecution for violating laws of general applicability does not constitute persecution, unless the punishment was motivated by one of the enumerated grounds and the punishment was sufficiently serious or arbitrary.").

The Eighth Circuit announced a similar rule, albeit in the negative, when it declined to make a finding of "persecution" absent evidence that the applicant's prosecution was "improperly motivated." *Ngure*, 367 F.3d at 991. Although the Tenth Circuit rejects international human rights violations as potential evidence of persecution, that Circuit does imply that prosecution may become persecution if there is evidence of some other illicit government motive. *See Sadeghi*, 40 F.3d at 1142 (holding that the petitioner "had the burden of proving that the Iranian government sought him for purposes of persecution, rather than for the legitimate purpose of criminal prosecution."). The Eleventh Circuit appears to follow this approach. *Scheerer v. Attorney General*, 445 F.3d 1311, 1316 (11th Cir. 2006) ("If, however, the alien shows the prosecution is based on a statutorily-protected ground, and if the punishment under that law is sufficiently extreme to constitute persecution, the law may provide the basis for asylum or withholding of removal even if the law is generally applicable.").

Just ten days after *Romeike*, the First Circuit issued a decision that brings that Circuit in line with

the motive test required by this Court in *Elias-Zacarias* and the intent of Congress in § 1158(b)(B)(ii). In *Javed v. Holder*, the court reversed a Board decision that a Pakistani lawyer, who advocated on behalf of a minority political sect, had not suffered persecution. 715 F.3d 391 (1st Cir., May 24, 2013). The court correctly examined the record for evidence of the persecutor's *motive* and found that the record established that "[the applicant's] persecutors imputed a political opinion to him (albeit incorrectly), and that this opinion was at least a 'central reason' for their attacks on him." *Id.* at 397. This illicit motive was sufficient to establish persecution because it was "one central reason" for the government's actions. *Id.*

C

The Second and Seventh Circuits Examine Motive Using Different Standards

The Seventh Circuit employs a somewhat different test when a claim of persecution arises out of a state prosecution. In that Circuit, "punishment which results from violating a country's laws of general applicability" does not constitute persecution, "absent some showing that the punishment is being administered for a *nefarious purpose*." *Sharif v. I.N.S.*, 87 F.3d 932, 935 (7th Cir. 1996) (emphasis added). *See also Moosa v. Holder*, 644 F.3d 380, 387 (7th Cir. 2011); *Tuhin v. Ashcroft*, 60 Fed.Appx. 615, 619 (7th Cir. 2003) (UNPUBLISHED); *Qoku v. Ashcroft*, 72 Fed. Appx. 467, 468 (7th Cir. 2003) (UNPUBLISHED). The Circuit has not given meaningful guidance on what

showing is required to prove a "nefarious purpose," and no asylum applicant has yet succeeded in convincing the court that he has made this showing. However, the Seventh Circuit has recently decided a somewhat similar case without either using the "nefarious purpose" standard or clearly lining up with the majority rule. *Li v. Holder*, 718 F.3d 706 (7th Cir. 2013).

In *Long v. Holder*, 620 F.3d 162 (2d Cir. 2010), the Second Circuit held that applicants must show that their prosecution "is *pretext* for political persecution [and therefore] is not on account of law enforcement." *Id.* at 166. Absent proof of a "pretextual" prosecution, however, the court held that "the enforcement of generally applicable law cannot be said to be on account of the offender's political opinion, even if the offender objects to the law." *Id.*

Although a showing of "pretext" touches the motive of the persecutor, it goes further than the showing that Congress has imposed on asylum applicants. Pretext requires a showing that the *true* or *real* motive of the government is illicit. Congress, on the other hand, requires a showing that an illicit or illegitimate motive is "one central reason" for the government's actions, even if there are multiple motives at play. 8 U.S.C. § 1158(a).

D

The Sixth Circuit Requires Proof of Particular Governmental Actions as the *Sine Qua Non* of Persecution

The Sixth Circuit has uniquely adopted a test for "persecution" that relies on proof of particular actions rather than an illicit motive. The Sixth Circuit now requires proof that a government has *acted* in one of three specified manners, before it will deem prosecution under a general law to amount to persecution.

In *Romeike*, the Sixth Circuit held that when "it comes to showing that a foreign country's enforcement of a law will persecute individuals on the basis of religion, membership in a social group, or for that matter any other protected ground, there is an easy way and a hard way." 718 F.3d at 531. The "easy way" is "available when the foreign government enforces a law that persecutes on its face along one of these lines." *Id.* The hard way—"showing persecution through the enforcement of a generally applicable law"—was held to offer three options: (1) selective prosecution; (2) unequal punishment; or (3) "the government might enact a seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." *Id.* It is clear that the Circuit intends this to be a comprehensive standard governing all cases involving prosecutions under general laws. It is also clear that the "hard way" analysis is the applicable standard in this case since the Romeikes were prosecuted under a generally applicable law.

The legal discussion that surrounds the announcement of this new, comprehensive distillation of an important area of federal law was not marked by the kind of legal scholarship that one would reasonably expect. The Sixth Circuit failed to cite, quote, or construe the controlling statute, even though Congress recently amended § 1158 to include the "one central reason" test. Nor did the Circuit undertake a comprehensive review of either its own prior decisions on the issue or those of the sister circuits. A few scant references are found. The final "*Romeike*" rule—regarding a "seemingly neutral law"—cites but one case, *Beskovic v. Gonzales*, 467 F.3d 223, 226 (2d Cir. 2006), and the holding of that case has nothing to do with the "rule" for which it is cited.

It is obvious that the Sixth Circuit has forgotten the most relevant holding of this Court in *Elias-Zacarias*: the INA "makes motive critical" to the question of persecution. 502 U.S. at 483. Accordingly, a successful asylum applicant must provide "*some* evidence of it, direct or circumstantial." *Id.* In this case, the proof of an improper motive is direct. Germany's highest courts and its education officials have stated, clearly and unambiguously, that the prosecution of homeschooling families (with home invasions and use of force) is born from a desire to suppress religious minorities.

In the rare case (including this one) when the government clearly announces its motive to suppress a protected class, it is unnecessary to also supply indirect evidence through proof of some form of

improper actions. Moreover, the three forms of improper actions that the Sixth Circuit enumerates cannot be said to be the exclusive methods of proving an improper motive through improper actions.

Actions may speak louder than words in some contexts. But when Germany says that it is suppressing religious minorities by prosecuting them for homeschooling, those words are loud enough.

In sum, eight Circuits require a successful asylum applicant to show that a motive relating to the suppression of a protected ground constitutes one central reason for the prosecution. The Second and Seventh Circuits also focus on the motive of the government but require a showing that the government's sole motive is either a pretextual prosecution (Second) or a prosecution brought for a "nefarious purpose" (Seventh). The Sixth Circuit stands alone by requiring proof of particular discriminatory actions rather than seeking to determine the motive of the prosecuting government.

E

The Different Rules in the Circuits Yield Disparate Results

1

The Romeikes Would Likely Have Prevailed in Most Circuits

In this case, there is no doubt that one of Germany's "central" motives in enforcing its

compulsory attendance law against homeschoolers is to prevent them from forming "religiously or philosophically motivated 'parallel societies.'" *Konrad*, Pet.App. 216a ¶ 8. This is clearly "evidence sufficient to establish an inference that [the Romeikes] would be persecuted '*because of*'" a protected ground. *Li*, 633 F.3d at 147. Thus, it is reasonably clear that the Third Circuit (using the *Li* approach) would have considered the statements of the German courts and education officials to be highly relevant in determining the motive of that nation in prosecuting homeschoolers like the Romeikes. The Sixth Circuit, however, found such evidence to be of little value. 718 F.3d at 534.

The same outcome could be expected in the Fourth Circuit, which found persecution where it was shown that an "illegitimate" motive was "underlying the prosecution." *Menghesha*, 450 F.3d at 148 n. 2. In *Menghesha*, an Ethiopian security officer warned student protestors of an impending arrest, based on his belief as a government security guard that the arrests were both inappropriate and might lead to the immediate execution of the students. Even though Menghesha was threatened with prosecution for obstruction of justice in Ethopia, the Immigration Judge and the Board denied asylum on the grounds that he was being prosecuted under a legitimate law of general applicability.

The Fourth Circuit reversed by looking to the totality of circumstances to conclude that the motive of the government was clearly persecutory in nature. The IJ erred in "discontinuing his inquiry" after

identifying an "arguably legitimate motive" behind the prosecution. *Id.* at 147. Instead, the IJ should have considered "uncontested evidence" of an illicit motive, found in the explicit threats made against Menghesha, and the close scrutiny he was subjected to on account of his sympathy for the student protestors. *Id.* at 148. In the Fourth Circuit, "even assuming that the . . . government had a lawful non-political motive for prosecuting [the applicant], the IJ had an obligation to consider the evidence of political motive" when proffered by the applicant. *Id.*

Here, the Romeikes proffered clear evidence of an illicit government motive behind their prosecution. Where the Fourth Circuit would have considered this argument, the Sixth Circuit ignored both the evidence and the argument, finding that Germany's prosecution of the Romeikes was not "motivated by anything other than law enforcement." *Romeike*, 718 F.3d at 533. The Sixth Circuit acknowledged that the Romeikes relied on direct statements by the German government that it sought to repress religious minorities, but summarily rejected these statements as "add[ing] little to the case." *Id.* at 534. This would have been reversible error in the Fourth Circuit, under *Menghesha*.

For similar reasons, the Romeikes' evidence would have received serious consideration before the First, Fifth, Eighth, Ninth, and Tenth Circuits, where motive remains the central inquiry. In the Ninth Circuit especially, where a "[p]ersecutors' motivation should not be questioned when the persecutors specifically articulate their reason for

attacking a victim," *Li*, 559 F.3d at 1111-12, it is hard to imagine the court summarily dismissing the express pronouncements of Germany's highest constitutional court as "add[ing] little" to the discussion of the motive behind Germany's compulsory attendance statute. *Id.* at 534.

2

The Sixth Circuit's Rule Would Yield Different Conclusions on Asylum Cases Favorably Decided by Other Circuits

The facts from *Menghesha* provide an extraordinarily clear example of the legal fissure created by the Sixth Circuit's opinion in the case at bar. If we lay the facts of *Menghesha* on the Procrustean bed of the Sixth Circuit's *Romeike* criteria, the security officer's fear that he might be executed would almost certainly come to pass. The Sixth Circuit would return this man to Ethiopia to face the death penalty for obstruction of justice. The Ethiopian law banning obstruction of justice is certainly not persecutory on its face. There was no showing that the rulers of Ethiopia subjected Menghesha to either unequal punishment or selective prosecution. Moreover, it is plain that the law against obstruction of justice was not structured as a "seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." The *Romeike* criteria clearly would result in a different outcome on the facts of *Menghesha.*

Similarly, the Sixth Circuit's current formula would not even permit a finding of persecution when

the punishment was manifestly disproportionate to the crime. *See*, *e.g.*, *Li*, 633 F.3d at 151 (noting that the Second and Ninth Circuits have also devoted "considerable attention" to the theory that punishment "disproportionate to the crime" constitutes persecution).

There is even a question as to whether the Sixth Circuit has gone further than other circuits that require more than just a central illicit motive. In *Li v. Holder*, for example, the Seventh Circuit considered an asylum claim by a Chinese Christian, who was associated with the house churches of that nation. 718 F.3d 706 (7th Cir. 2013). The generally applicable laws of China forbid both unregistered churches and proselytization. The requirement of church registration was examined on its substance by the Seventh Circuit and found to be a relic of religious persecution that resembled historic patterns of religious intolerance. *Id.* at 710-711.

It is difficult to see how Li could have convinced the Sixth Circuit that this Chinese requirement would be improper under its *Romeike* criteria. All those who attended unregistered churches were punished. Prosecutions were not demonstrably selective, nor was there evidence of unequal punishments. Moreover, it is not apparent why the church registration law would satisfy the standard of a "seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." The Seventh Circuit did not hold that church registration laws are facially invalid. It looked at the situation as a whole and implicitly concluded that the motivation behind the

laws amounted to persecution of a certain kind of Christian practice. China was seeking to repress religious minorities for philosophical reasons. Li made a good decision to reside in the Seventh Circuit, not the Sixth.

The Sixth Circuit has apparently become so accustomed to ferreting out circumstantial evidence of motive that it has forgotten this Court's holding in *Elias-Zacarias*: evidence of motive can be either "direct or circumstantial." 502 U.S. at 483. Germany's forthright statements that it seeks to repress the development of religious minorities are all that is needed.

IV

This Case is a Superior Vehicle for Addressing the Questions Presented

Before the decision below, there was already confusion among the Circuits as to the application of international law in granting asylum, as well as the proper standards for determining when to grant an exception to the general rule that prosecution under a law of general applicability is not persecution. The comprehensive rules announced by the Sixth Circuit move the law in the Circuits from confused to fractured.

This case presents an optimal opportunity for this Court to clarify the importance of international law in the United States' law of asylum. The Romeikes do not assert a "trivial" violation of international human rights standards, but "core"

human rights protections that are essential to liberty: religious freedom, an educated citizenry, and the parent-child relationship.

This is also the rare case where the motive of the government is stated, plainly and unambiguously, by the government itself in official statements. There is no need to find selective prosecution, unequal punishment, or punishment that is disparate to the crime as a means of determining the government's motive, when the government forthrightly announces its motive *and* plainly admits that it is seeking to repress the applicant on a protected ground.

Those who seek escape from governments that would coerce the heart, mind, or soul should have a safe haven in the United States of America.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted this 10th day of October, 2013.

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