No. 12-3641

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UWE ANDREAS JOSEF ROMEIKE, et al.,
Petitioners,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS
Agency Nos. 087-368-600, et seq.

BRIEF FOR RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Sixth Circuit Rule 34(a), Respondent believes that the issues presented can be determined upon the record and that oral argument would not benefit the panel. Should the Court consider oral argument appropriate, counsel for Respondent will attend and present Respondent's position.

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STATEMENT OF JURISDICTION

In this immigration case, Petitioner Uwe Andreas Josef Romeike ("Romeike")[1] seeks review of the May 4, 2012, order of the Board of Immigration Appeals ("Board") sustaining the Department of Homeland

[1] Romeike is the lead Petitioner, and the only member of his family who applied for asylum in this case; Romeike's wife and five children are derivative applicants. Certified Administrative Record ("A.R."), Board Decision, A.R. 4.

Security's appeal from a January 26, 2010, immigration judge decision. In the January 26, 2010, decision, the immigration judge granted Romeike's application for asylum. *See* Decision of the Immigration Judge, Supplement to A.R., S001 *et seq*.[2] DHS appealed, and the Board sustained the appeal and ordered the Romeikes' removal to Germany. Board Decision, A.R. 7. The Board had jurisdiction over the appeal pursuant to 8 C.F.R. §§ 1003.1(b)(3) and 1240.15.

The Court's jurisdiction in this case is governed by Immigration and Nationality Act ("INA") section 242, 8 U.S.C. § 1252. Romeike timely petitioned the Court to review the Board's decision on May 31, 2012, within thirty days of the Board's May 4, 2012, decision. *See* INA § 242(b)(1), 8 U.S.C. § 1252(b)(1). Venue is proper in this Court because Romeike's proceedings before the immigration judge were completed in Memphis, Tennessee. *See* INA § 242(b)(2), 8 U.S.C. § 1252(b)(2); *see also* Decision of the Immigration Judge, S001-S018.

[2] The decision of the immigration judge was inadvertently omitted from the certified administrative record. On December 21, 2012, undersigned counsel for Respondent filed an unopposed motion to supplement the record with the 18 pages of the immigration judge's decision, numbered S001 through S018.

ISSUES PRESENTED

I. Whether the record compels the conclusion that Germany selectively enforces its compulsory school attendance law, or disproportionately punishes those who violate it, such that the law is a mere pretext for persecution on account of a protected ground.

II. Whether the record compels the conclusion that Romeike belongs to a cognizable social group of homeschoolers where the group lacks social visibility and particularity.

STATEMENT OF THE CASE AND RELEVANT FACTS

I. The Romeikes' entry into the United States.

Romeike, his wife Hannelore Romeike, and their five children, ages 15, 14, 12, 10, and 7, all natives and citizens of Germany, entered the United States on August 17, 2008, pursuant to the visa waiver program. Immigration Judge Decision, S001; Notice of Referral to Immigration Judge, A.R. 922, Asylum Application Cover Letter, A.R. 460. On November 17, 2008, Romeike filed with DHS an affirmative application for asylum and withholding of removal.[3]

[3] Asylum is available through two administrative routes. An applicant who is not in removal proceedings may file an asylum application with DHS. *See* 8 C.F.R. §§ 208.4(b)(1)-(2). This "affirmative" application is adjudicated by a trained asylum officer in a non-adversarial interview. 8 C.F.R. § 208.9. In 2010, DHS granted over 11,000 applications. *See* DHS Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics, Table 16, p.43, available at

Asylum Application, A.R. 463-87. DHS referred the application to immigration court on January 13, 2009. Notice of Referral to Immigration Judge, A.R. 922.

II. Romeike's written asylum application and oral testimony of Romeike and his wife, Hannelore Romeike, in immigration court.

Romeike alleged in his written asylum application that he was afraid to return to Germany because, as a result of his decision to remove his children from Germany's public schools, the German government would subject him to fines, possibly remove his children from his custody, or arrest him. Asylum Appl. Decl., A.R. 475. Romeike and his wife worked as music teachers in

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http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2010/ois_yb_2010.pdf. If DHS does not grant the application, the case is referred to the Department of Justice's Executive Office for Immigration Review ("EOIR") where the applicant receives a de novo hearing before an immigration judge. 8 C.F.R. §§ 208.14(c)(1), 208.19, 1208.13, 1240.1(a)(1)(ii), 1240.11(c). In 2011, immigration judges granted 66% of the affirmative applications referred by DHS. *See* U.S. Dept. of Justice, EOIR, FY 2011 Statistical Yearbook, at Figure 18, page K2, available at http://www.justice.gov/eoir/statspub/fy11syb.pdf. In addition, an applicant who is in removal proceedings may file a "defensive" asylum application as relief against removal. In 2011, immigration judges granted 34% of defensive applications. *Id*. at Figure 19, page K2. The overall grant rate by immigration judges in 2011 for all asylum applications (affirmative and defensive) was 52%. *Id*. at Figure 17, page K1. An applicant has an opportunity to appeal an adverse decision to the Board, where a decision may be rendered by either one or three Board members. 8 C.F.R. § 1240.15. Thus, by the time an applicant seeks judicial review of the denial of asylum in the court of appeals, the application has been heard, considered, and rejected by two or three different agency adjudicators.

Germany. *Id.* at A.R. 475. His two oldest children attended public school before Romeike and his wife determined that they were "bombarded with negative influences" from both the school curriculum and their fellow students. *Id.* at A.R. 475. Romeike and his wife concluded that the children had been turned against the family's Christian values, and in 2006, the parents removed the children from school. *Id.* at A.R. 475. Romeike testified that he did not belong to any particular Christian denomination, but felt that it was his responsibility to educate his own children and teach them the Bible. Transcript, A.R. 321-22. He believed that Germany disfavored homeschooling because the government did not want Christians to teach Christian values. Transcript, A.R. 325. Although Romeike knew that homeschooling in Germany was illegal, he had heard that families who homeschooled their children only paid small fines. Transcript, A.R. 305.

In his written application, Romeike offered a lengthy recitation of Biblical quotes in support of his claim that "God requires me and my wife to educate our children at home ourselves." Asylum Appl. Decl., A.R. 476-78. Romeike specifically objected to the German public schools' alleged teaching of evolution, abortion, homosexuality, disrespect for parents, teachers, and other authority figures, disrespect for students, bullying, witchcraft, disrespect for family values, and ridicule of Christian values. *Id.* at A.R. 479. Romeike

worried that "[a] teacher, especially a fun or popular teacher, who tells my child that I am wrong, will steal the heart of my child away from me and my wife as parents." *Id.* at A.R. 479.

Romeike acknowledged that the German public schools offered a course in religion, but his children did not enroll in it during their time in public school. Transcript, A.R. 328. He objected to the course because his children might be "taught about other religion[s] and things other than the Bible." Transcript, A.R. 329. Instead of taking the religion course, his children had a free period during the time the course was offered. Transcript, A.R. 329.

Romeike also felt that the one of the school's textbooks was antithetical to Christian values because it taught that children "don't have to do what the teacher says, they can make fun of teachers and principals." Transcript, A.R. 329-30. Romeike further objected to the curriculum at public school because he claimed that one of the textbooks featured a story suggesting that "the devil can help you if you ask the devil, but God would not help you." Transcript, A.R. 330. Romeike could not recall the title of the story, or its author. Transcript, A.R. 331. According to Romeike, he could not send his children to a private Christian school because they would use the same textbooks as the public schools. Transcript, A.R. 331.

In general, Romeike suggested that his primary objection to public school was the curriculum (Transcript, A.R. 334); he felt that children should not be taught about homosexuality until later in life (Transcript, A.R. 335), and he believed the schools taught witchcraft (Transcript, A.R. 335). This last belief arose from an experience his wife had when she herself was in school; the students had played some sort of game that involved pushing chairs and glasses around, and dangling a pendulum. Transcript, A.R. 335-37. (Romeike's wife later explained that the game was led by students, not by the school faculty, and that the incident took place when she was a seventh grade student. Transcript, A.R. 357-58.) In sum, Romeike claimed that he wished to keep his children away from other students in public school, whom he felt might be a bad influence. Transcript, A.R. 341. Romeike admitted that he was never arrested, beaten, or otherwise mistreated in any way by police in Germany, that he only paid fines once, and that his children were never removed from his custody. Transcript, A.R. 342, 347. Romeike testified that he did not belong to a political party in Germany, and only belonged to "SCHUZH" – the German homeschooling network. Transcript, A.R. 326. He recalled signing petitions and letters, but could not remember the specifics. Transcript, A.R. 327. His only stated political view was that he believed homeschooling should be legal. Transcript, A.R. 325.

As a result of his concerns about the public schools, Romeike opted to enroll his children in a private Christian correspondence school, The Philadelphia School. Asylum Appl. Decl., A.R. 479. The Philadelphia School had previously been an accredited private school, but when the organization moved to a correspondence program, it lost accreditation. Transcript, A.R. 307. On September 20, 2006, five days after cancelling the public school enrollment of his oldest child, the principal of the public school, Wolfgang Rose, contacted Romeike to inform him that his children must attend school or face legal consequences. Asylum Appl. Decl., A.R. 480. The next day, Principal Rose informed the Romeikes that The Philadelphia School was not an accredited academic institution, and that he was obligated to take legal steps to ensure public school attendance. *Id.* On September 25, 2006, Principal Rose visited the Romeikes' home for approximately 90 minutes, during which time the Romeikes explained their reasons for homeschooling, and the principal attempted to convince the Romeikes to return their children to school. *Id.*

The town's mayor also contacted Romeike and expressed some sympathy with the Romeikes' predicament, but ultimately indicated his opinion that homeschooling was not in the best interests of the children. *Id.* at A.R. 481. The mayor later followed up with a letter setting forth the fines that the Romeikes would face if they failed to send their children to school, and

explaining that the children would be taken to school by police if they did not attend voluntarily. *Id.* The Romeikes did not send their children to school, and on October 20, 2006, police arrived to escort them to school. *Id.* The children were scared of the two police officers and cried as they boarded a police van, which drove them to public school. *Id.* At recess, Hannelore Romeike retrieved the children and brought them back home. *Id.*

Hannelore Romeike ("Hannelore") testified consistently with her husband. Transcript, A.R. 352-59. She recalled the incident where police came to the Romeike home and escorted the children to school; she did not realize that police had the authority to take such steps. Transcript, A.R. 356-57. When Hannelore arrived at the school during recess to remove her children, the children's classmates helped them gather their belongings. Transcript, A.R. 357. Hannelore was concerned that someone at the school might try to stop her from picking up her children, but neither the teachers nor the principal intervened, and Hannelore took the children to her sister's house. Transcript, A.R. 357.

Hannelore was worried that if she continued to homeschool her children, they could be removed from her home, and she and her husband might be required to pay fines or possibly even face jail time. Transcript, A.R. 359. Despite these concerns, Hannelore insisted that she would continue to

homeschool her children in Germany, even though it is against the law, because she feels that it is wrong when the Bible tells you to do something, and yet you are obligated to repeat contradictory information in the context of a school exam. Transcript, A.R. 358. Hannelore explained that she believed it would be against her religion to send her children to public school. Transcript, A.R. 358.

The next time the police arrived to bring the children to school, on October 23, 2006, four adults and seven children from the Romeikes' homeschooling support group were present, and the police gave up on bringing the children to school. Asylum Appl. Decl., A.R. 482. Principal Rose sent another letter to the Romeikes on October 24, 2006, informing them that they would need to make a formal request for an exemption from the school attendance policy, and that their failure to send their children to school would be reported to child protective services. *Id.* On October 26, 2006, the school district office issued six notices of hearings, one per parent, per school-age child absent from school, fining the Romeikes for violating the school attendance law. *Id.*

In November 2006, the Romeikes met with the head of the school district office, Dr. Klein, who agreed to excuse the children from school and halt the fines until the end of the calendar year. *Id.* The children's absence from school was secured in part by a note from the children's doctor stating that school

would cause them undue psychological stress. *Id.* at A.R. 483. Romeike acknowledged that the doctor's note was, essentially, a fraud. Transcript, A.R. 314. The school sent a tutor to the home twice a week, for a period of five weeks. Asylum Appl. Decl., A.R. 483. In December 2006, the Romeikes met again with Dr. Klein, who indicated that the children would not be excused from school beginning in January 2007. *Id.*

In December 2006, the school district issued additional notices of fines, and the Romeikes, assisted by counsel, objected to the fines. *Id.* In the end, a civil court rendered a decision on May 21, 2007, finding that the Romeikes had violated the law relating to mandatory public school attendance, and ordered a total fine of 385.92 Euros (approximately $571.00). *Id.* at A.R. 484. The Romeikes were found guilty of not sending their children to school, and the judge refused to accept "homeschooling" as a defense to the charge. Transcript, A.R. 318. The school district issued a new set of notices of fines on May 23, 2007, and through counsel, the Romeikes again objected. Asylum Appl. Decl., A.R. 484. That set of fines was cancelled on July 30, 2007. *Id.* The school district issued more notices of fines in August 2007, again in October 2007, and again in March 2008. *Id.* at A.R. 485-86. After a series of continuances, the district court set a hearing date of October 1, 2008. *Id.* at A.R. 486. Before the hearing date, the Romeikes left Germany and came to the United States in

August 2008. *Id*. According to Romeike, if he returned to Germany, he would still homeschool his children, despite his fears that his children might be sent to foster homes, orphanages, or even a psychiatric ward. Transcript, A.R. 324. By the time he left Germany, Romeike and his wife were facing fines totaling approximately 7,000 Euros (approximately $9,000). Transcript, A.R. 232.

III. Additional evidence presented during the Romeikes' immigration court proceedings.

A. Testimony of Michael Donnelly, staff attorney with the Home School Legal Defense Association ("HSLDA").

Michael Donnelly ("Donnelly"), a staff attorney with the HSLDA, testified that homeschoolers have had a difficult time in Germany over the past ten years, and that no law in Germany specifically permits homeschooling. Transcript, A.R. 258-59. HSLDA is a non-profit organization that advocates on behalf of parents who homeschool.[4] Transcript, A.R. 258. With the help of HSLDA, German homeschoolers set up a parallel organization in Germany, called "SCHUZH." Transcript, A.R. 261. The organization provides legal assistance to parents dealing with homeschooling litigation. Transcript, A.R. 262.

Donnelly testified that sanctions for failing to send children to school might range from fines to imprisonment of parents. Transcript, A.R. 262-63.

[4] HSLDA represents the Petitioners in this case.

Donnelly noted a German Supreme Court case which he claimed found that the government has an interest in "stamping out parallel societies," and that education in Germany is about socialization, and not just providing information. Transcript, A.R. 267. For example, the educational system focuses on making sure children get along, and learn how to be tolerant. Transcript, A.R. 267. All of the states within Germany have some version of compulsory education. Transcript, A.R. 267. Although private schools exist, they must be approved by the state, and there are relatively few of them. Transcript, A.R. 267-68.

Donnelly offered several examples of how the compulsory education laws were applied; in one case, Germany's criminal Supreme Court held that it was acceptable to remove children from home if their parents failed to send them to school; in another case, children were put in foster care; and in one case, a child was briefly put in a psychiatric clinic. Transcript, A.R. 271-72. In several cases, the courts issued fines to parents. Transcript, A.R. 270, 274. Donnelly acknowledged that the law allows for exceptions to the mandatory school attendance requirement, for medical reasons, or for parents whose unconventional careers require frequent travel. Transcript, A.R. 277-78, 300.

According to Donnelly, truants are treated differently from children who are educated at home. Transcript, A.R. 280. His understanding was that when German authorities realize that the children are absenting themselves from

school of their own volition, the parents are not fined or criminally tried. Transcript, A.R. 280-82. Donnelly did note, however, that parents of truants and homeschoolers could both face a custody challenge. Transcript, A.R. 282. Within the European Union, Germany is the only school with such a dim view of homeschooling. Transcript, A.R. 283-84, 299. Donnelly testified that most homeschoolers who leave Germany do not return, unless they live on the border with Austria, where homeschooling is permitted. Transcript, A.R. 286-87.

Donnelly acknowledged during cross-examination that there were several reasons why people homeschool their children, all laid out in the documentary evidence in the record: one individual did not want to send his children to school with people from welfare homes; others had concerns about bullying; some parents had occupations requiring travel; others opposed social promotion within school; some parents had concerns regarding a lack of respect for authority in school; and still others worried that public school was too liberal, too authoritarian, or just too noisy. Transcript, A.R. 292-93. According to Donnelly, no actual law in Germany prohibits homeschooling *per se*; rather, the law simply requires school attendance. Transcript, A.R. 294. More specifically, when a parent is charged with violating the law, the violation relates to the failure to send children to school, and not to any offense relating to teaching children at home. Transcript, A.R. 294.

B. *Affidavit of Gabriele Eckermann.*

Gabriele Eckermann ("Eckermann"), an attorney for SCHUZH, offered an affidavit in support of Romeike's asylum application. Affidavit of Gabriele Eckermann, A.R. 912-15. In it, she alleged that she had been involved in nearly 100 homeschooling cases, and "not a single family succeeded in their litigation with the state regarding their right to homeschool." *Id.* at 912. She also alleged that based on her study of the history of homeschooling, she discovered that mandatory school attendance was introduced in the Weimar Republic, with exceptions allowed for various reasons, including "[r]easons of conscience." *Id.* She alleged that the exemptions for reasons of conscience were taken away during the regime of Adolf Hitler. *Id.*

Eckermann claimed that parents of truant children were treated differently than homeschoolers, and that, in some situations, truant children were allowed to attend distance learning programs or correspondence schools, whereas parents who homeschooled for purported reasons of conscience were almost always compelled to send their children to school. *Id.* at 913. Eckermann provided examples of parents who attempted to homeschool and were fined, as well as parents who faced the potential loss of child custody. *Id.* at 913-14. She noted that the loss of custody might be full or partial, and

defined a partial loss of custody as "the right to determine the whereabouts of the child during school hours." *Id.* at 914.

IV. Decision of the immigration judge.

On January 26, 2010, the immigration judge rendered a decision granting asylum. Immigration Judge Decision, S001-S018. The immigration judge found, however, that the Romeikes' experiences in Germany "certainly" did not amount to "past persecution" under the INA and the law of the Sixth Circuit. *Id.* at S011-12. The Romeikes had put forward three possible protected grounds for asylum: political opinion, religion, and membership in a particular social group. *Id.* at S012. The immigration judge rejected the political opinion category as a basis for asylum, reasoning that the family was never involved in any political organization, nor had they taken any genuine political stand on any issue. *Id.* at S012-013. As to religion, the immigration judge agreed with the DHS attorney that the Romeikes were vague in their description of their religious beliefs, and did not affiliate with any particular denomination, but found that nonetheless, they had *bona fide* religious beliefs. *Id.* at S013-14. Still, the immigration judge found that the Romeikes failed to establish that the government of Germany was, in any way, attempting to suppress their religious beliefs. *Id.* at S014. The immigration judge did find, however, that the German government was "attempting to *circumscribe* their

religious beliefs" and that their religious beliefs were "being frustrated" insofar as they wanted to homeschool their children for religious reasons. *Id.* at S014, S016 (emphasis added).

Finally, as to their particular social group, the immigration judge noted that "initially, I did not see that either," but after listening to the testimony of Michael Donnelly, counsel to the Home School Legal Defense Association, the immigration judge was persuaded that the government of Germany resents 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." *Id.* at S014. The immigration judge further noted that he would 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." *Id.* at S014. The immigration judge found that "homeschoolers" are a particular social group in Germany despite his explicit finding that the group "do[es] not have any social visibility" in that the group could not be identified if they were "walking down the street." *Id.* at S015. Despite mistakenly conflating the "social visibility" standard with actual ocular visibility, and wondering aloud whether the Sixth Circuit may or may not require deference to the Board's social visibility requirement, the immigration judge decided that homeschoolers in Germany

are a particular social group because, the group "has been fined, imprisoned, had the custody of their children taken away from them," and "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 . . ." *Id.* at S016.

The immigration judge concluded from this that the Romeikes had a well-founded fear of persecution in Germany. *Id.* at S017. Without analyzing whether the Romeikes faced "prosecution" rather than "persecution," the immigration judge found that the possibility of losing custody of their children or facing jail time for homeschooling were severe enough to constitute future persecution. *Id.* at S017. In sum, the immigration judge found that "if Germany is not willing to let [the Romeikes] follow their religion, not willing to let them raise their children, then the United States should serve as a place of refuge for [them.]" *Id.* at S018.

V. Decision of the Board.

On May 4, 2012, the Board overturned the decision of the immigration judge. Board Decision, A.R. 1-7. The Board found that Germany had the authority to require school attendance and that the law itself was one of general application; accordingly, the law could not be considered persecution unless it is selectively enforced or one is disproportionately punished on account of a

protected ground such that enforcement of the law is simply a pretext for persecution. *Id.* at A.R. 4. In this case, the Board found that the record failed to show that the law in question was selectively applied to homeschoolers; the record contained a single statement, from a homeschooling advocate, which indicated that the law was selectively applied to homeschoolers. *Id.* at A.R. 5. The Board noted that this statement was purely anecdotal and insufficient to show selective application of the law. *Id.* at A.R. 5. The Board further noted that the compulsory attendance law is not pretextual simply because the mandatory attendance law is intended to encourage socialization as well as education. *Id.* at A.R. 6. The record does not show that the law is aimed at silencing dissent, but, rather, integrating minority religious voices. *Id.* at A.R. 6. The Board noted that Germany's own assessment is that the purpose of the law is to promote tolerance and pluralism. *Id.* at A.R. 6. Moreover, the existence of exemptions to the law for individuals in professions that prevent the establishment of a fixed residence simply reflected the impracticality of public education for children of such parents, and also did not establish selective application of the law. *Id.* at A.R. 5.

In addition, the Board found that the law did not disproportionately burden any one particular religious minority. *Id.* at A.R. 5. In the Board's view, the record did not suggest that the Romeikes were targeted because of

their philosophical opposition to the law; rather, the law was being enforced simply because the Romeikes were violating it. *Id.* at A.R. 5. In addition, homeschoolers were not more severely punished than others whose children violate the law. *Id.* at A.R. 5.

Considering the evidence, the Board specifically rejected the immigration judge's finding regarding Germany's alleged "animus and vitriol" toward homeschoolers as clearly erroneous. *Id.* at A.R. 6. In addition, the Board noted that the record did not contain the text of the compulsory education law or the legislative history that would support the inflammatory suggestion that the law was a "Nazi-era law," and, importantly, the law was not geared at enforcing separation of children from parents for the purpose of ideological indoctrination. *Id.* at A.R. 6. Thus, the Board observed that while the Romeikes clearly homeschool their children for religious reasons, they failed to show that their religion, or their religious-based decision to homeschool, constitutes "one central reason" for Germany's decision to enforce the mandatory attendance law against them. *Id.* at A.R. 6.

Finally, the Board concluded that even if the Romeikes were able to show selective enforcement or disproportionate punishment, "German homeschoolers" still did not constitute a viable particular social group under the INA. *Id.* at A.R. 7. The group lacks social visibility because society at large is

not generally aware enough of homeschoolers to consider them a group. *Id.* at A.R. 7. Further, the group lacks particularity because "[o]ne becomes or ceases to be a member of the group by a mutable choice[:] sending one's children to school or not." *Id.* at A.R. 7. Moreover, the group of homeschoolers is relatively small, composed of approximately 500 people, and the reasons for homeschooling are disparate. *Id.* at A.R. 7. Accordingly, the Board found the group too indistinct to be considered a particular social group under the INA. *Id.* at A.R. 7. The Board therefore sustained DHS's appeal, found that Romeike had not established his eligibility for asylum or withholding of removal, and ordered the Romeikes' removal to Germany. *Id.* at A.R. 7.

SUMMARY OF THE ARGUMENT

Romeike's petition for review should be denied because the record does not compel the conclusion that he faces a possibility of future persecution in Germany based on a protected ground under the INA. In order to prevail, Romeike must show that the record compels the conclusion that Germany's mandatory public school attendance law is selectively enforced, or that Germany metes out disproportionate punishment, on account of religious affiliation or another protected ground. Here, no record evidence compels the conclusion that Germany selectively enforces its public school attendance

requirement, or that it disproportionately punishes any particular group for failing to comply with the law.

Moreover, as the Board properly found, "German homeschoolers" do not constitute a viable particular social group. The group lacks social visibility and particularity, and this Circuit's asylum law requires both elements for a cognizable "social group." The petition for review should therefore be denied.

SCOPE AND STANDARD OF REVIEW

Where, as here, the Board reviews the immigration judge's decision and issues a separate opinion, this Court reviews the decision of the Board as the final agency determination. *See Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009) (citing *Morgan v. Keisler*, 507 F.3d 1053, 1057 (6th Cir. 2007)). Contrary to Romeike's claim that this Court's review is *de novo*, Pet'r Br. at 10-12, and his suggestion that clear error review may be appropriate, Pet'r Br. at 21, the agency's findings of fact are reviewed under the substantial evidence standard and are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. *See* INA § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B) (codifying the substantial evidence standard of review set forth in *INS v. Elias-Zacarias*, 502 U.S. 478, 483-84 (1992)); *Allabani v. Gonzales*, 402 F.3d 668, 674 (6th Cir. 2005) ("We will reverse only if the evidence presented by [the alien] was such that a reasonable factfinder would have to

conclude that the requisite fear of persecution existed."); *see also Liti v. Gonzales*, 411 F.3d 631, 636-37 (6th Cir. 2005) ("[T]he petitioner must show that the evidence presented was so compelling that no reasonable factfinder could fail to find the requisite persecution or fear of persecution.") (internal quotations and citations omitted). This deferential standard "plainly does not entitle a reviewing court to reverse . . . simply because it is convinced that it would have decided the case differently." *Klawitter v. INS*, 970 F.2d 149, 151-52 (6th Cir. 1992) (internal quotations and citations omitted).

Romeike devotes a significant portion of his brief to this Court to his claim that the Board erred in overturning the immigration judge's factual findings without a showing of clear error, and suggests that the Board somehow exceeded the scope of its review authority. Pet'r Br. at 7, 14, 21. In actuality, however, the Board did not reverse any of the dispositive factual findings of the immigration judge, and set forth essentially the same narrative of undisputed facts that the immigration judge presented. Board Decision, A.R. 4 (noting that "[t]he facts related to the family's experiences in Germany are not disputed"). The Board found that only two factual findings were "clearly erroneous" based on the record evidence – the immigration judge's finding that "animus and vitriol" underlie the mandatory public school attendance law, and the immigration judge's finding that the Germany government was enforcing a

"Nazi era law against people that it purely seems to detest." Board Decision, A.R. 6; Immigration Judge Decision, S014. In this regard, the Board's decision was entirely consistent with federal regulations.[5] *See* 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I. & N. Dec. 493, 496 (BIA 2008) (abrogated by *Huang v. Att'y Gen.*, 620 F.3d 372 (3d Cir. 2010)).

The Board then went on to analyze Romeike's failure to meet his overall burden of proof, in accordance with the regulatory mandate requiring *de novo* review. 8 C.F.R. § 1003.1(d)(3)(ii); Board Decision, A.R. 3-7. This Court has held that the Board appropriately employs *de novo* review when applying facts to the law. *See Nasser v. Holder*, 392 F. App'x 388, 391-92 (6th Cir. 2010) (unpublished) (acknowledging that the Board "'engaged in the appropriate review for clear error [as to the immigration judge's factual determinations]' and a *de novo* review when applying those facts to the applicable burden of

[5] Romeike implies in his brief to this Court that because the Board found the witnesses in his case credible, the Board was somehow obligated to defer to all of their testimony, including their legal conclusions in this case. *See* Pet'r Br. at 16. As the First Circuit wisely noted, however, "The petitioner's belief that he was persecuted on account of one of the five statutorily protected grounds does not make it so." *Amouri v. Holder*, 572 F.3d 29, 34 n.1 (1st Cir. 2009) (citing *Pulisir v. Mukasey*, 524 F.3d 302, 309 n.4 (1st Cir.2008)); *see also Aden v. Holder*, 589 F.3d 1040, 1045 (2009) ("Apparently honest people may not always be telling the truth, apparently dishonest people may be telling the absolute truth, and truthful people may be honestly mistaken or relying on unreliable evidence or inference themselves. Congress has installed a bias toward corroboration in the statute to provide greater reliability.")

proof" (emphasis added, internal citations omitted)). Here, the Board simply applied the standard of review required by regulation, and concluded that Romeike did not meet his burden of proving a well-founded fear of persecution in light of the undisputed facts presented. Because that is the case, this Court's standard of review is no different than any other asylum case: whether the record compels reversal of the Board's decision. *Allabani*, 402 F.3d at 674.

ARGUMENT

As provided in the INA, asylum is available for an alien who establishes that he is a "refugee." INA § 208, 8 U.S.C. § 1158. The Attorney General may grant asylum to an alien in the United States "if the Attorney General determines that such alien is a refugee within the meaning of [Section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A)]." INA § 208(b)(1), 8 U.S.C. § 1158(b)(1); *see INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 (1987); *Koliada v. INS*, 259 F.3d 482, 486 (6th Cir. 2001). The INA defines a "refugee" as an alien who is unwilling or unable to return to his or her home 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." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); *e.g.*, *Mikhailevitch v. INS*, 146 F.3d 384, 389 (6th Cir. 1998) (quoting *Elias-Zacarias*, 502 U.S. at 481). "If the

ill-treatment was motivated by something other than one of these five circumstances, then the applicant cannot be considered a refugee for purposes of asylum." *Zoarab v. Mukasey*, 524 F.3d 777, 780 (6th Cir. 2008).

Here, as discussed more fully below, the Romeikes' experiences with the police and legal system in Germany were a direct result of their failure to comply with German law prohibiting truancy, and were not the result of the German government's desire to punish them for their membership in a protected group under the INA. Importantly, however, past persecution is not at issue in the present case. The immigration judge found that Romeike failed to establish past persecution, and Romeike did not file a cross-appeal, or challenge that finding before the Board in anything other than a cursory fashion. Immigration Judge Decision, S011; Board Decision, A.R. 4; Brief to the Board, A.R. 156. Accordingly, Romeike failed to exhaust the issue before the Board, and this Court may not consider it. [6] *See Ramani v. Ashcroft*, 378 F.3d 554, 560

[6] Likewise, Romeike argues for the first time in his brief to this Court that Germany's law requiring public school attendance is a violation of "basic human rights" and various international standards, none of which gives rise to cognizable relief from removal under the INA. Pet'r Br. at 35-43. These arguments were not presented to or addressed by the Board (Brief to the Board, A.R. 130-60; Board Decision, A.R. 1-7), and they are outside the scope of this Court's review. *See Ramani*, 378 F.3d at 560. Exhaustion aside, Romeike's arguments are also outside the scope of this case, which relates only to Romeike's immigration status in the United States, and whether he qualifies for relief from removal in the form of asylum. *Cf. Li v. Mukasey*, 515 F.3d 575,

(6th Cir. 2004) ("[O]nly claims properly presented to the [Board] and considered on their merits can be reviewed by this court in an immigration appeal."). In addition, Romeike did not raise the issue of past persecution in his brief to this Court, and he has therefore waived the issue. *See generally* Pet'r Br.; *see Dugboe v. Holder*, 644 F.3d 462, 470 (6th Cir. 2011) (holding that failure to contest an issue before the Court results in waiver).

Simply put, the issues before this Court are: first, whether the record compels the finding that Germany selectively enforces its public school attendance law, or disproportionately punishes parents who violate it, in such a way that the law is merely a pretext for persecution on account of a protected ground; and second, whether homeschoolers are a cognizable social group under the INA. As discussed below, Romeike fails to establish that the record compels a conclusion in his favor. This Court should therefore deny this petition for review.

I. NO RECORD EVIDENCE COMPELS REVERSAL OF THE BOARD'S DENIAL OF ASYLUM WHERE THE ROMEIKES FACE A LAW OF GENERAL APPLICABILITY IN GERMANY REQUIRING PUBLIC SCHOOL ATTENDANCE.

As this Court has repeatedly recognized, there is a clear distinction between "prosecution" and "persecution." *See Perkovic v. INS*, 33 F.3d 615,

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579 (6th Cir. 2008) (noting that Article III of the Constitution prohibits this Court from rendering an advisory opinion).

622 (6th Cir. 1994) ("[i]f he is, say, an armed robber, his government has a legitimate bone to pick with him, regardless of any political views he may hold); *accord Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1151 (6th Cir. 2010) ("[a]s this Circuit has recognized previously, there is a marked distinction between persecution and criminal prosecution") (citing *Perkovic*, other citations omitted). This Court has held that prosecution may rise to the level of "persecution" if it serves as a pretext for persecuting an individual on account of a protected ground. *See Cruz-Samayoa*, 607 F.3d at 1151 (citing *Lakaj v. Gonzales*, 158 F. App'x 678, 683 (6th Cir. 2005) (unpublished)). This Court has also observed that several Circuits have found that persecution does *not* exist where there are laws of "general applicability" or laws that are "fairly administered." *See Cruz-Samayoa*, 607 F.3d at 1151 (citations omitted).

Typically, this Court "has looked at the substance and context of the law that the native country is attempting to enforce" in order to determine whether the law was actually a pretext for persecution. *See Cruz-Samayoa*, 607 F.3d at 1152. Here, unfortunately, Romeike did not submit a copy of the text of the law in question, or legislative history that would have enabled the Board or this Court to consider the context of the law in evaluating the pretext issue. Board Decision, A.R. 6; *see generally* A.R. 1-1098. The evidence that *is* available in the record, however, does not compel the conclusion that Germany is using its

mandatory school attendance law as a pretext for the disproportionate punishment of homeschoolers (whether religiously-motivated or not), or those with deeply-held religious beliefs.

Specifically, the record contains no evidence suggesting that the government of Germany created the mandatory attendance requirement in order to punish homeschoolers or religious people, or that the law is unfairly administered in such a way that homeschoolers or members of any religion are specifically targeted. Rather, as one of Romeike's own witnesses testified, the parents of homeschooled children and truants alike might face the most severe consequence feared by the Romeikes – the loss of child custody – for failing to ensure that their children complied with mandatory public education requirements. Transcript, A.R. 281-82. Furthermore, even the truants who are enrolled in a "distance learning" program receive education based on the government's curriculum; their parents are not permitted to simply create their own course of study. Transcript, A.R. 281-82. As the same witness further admitted, no law explicitly prohibits homeschooling, and there is no criminal offense of "homeschooling." Transcript, A.R. 294. Instead, all parents who remove their children from Germany's public schools may be charged with failing to send their children to school, no matter what reasons the parents provide. Transcript, A.R. 294.

A. The record does not compel the conclusion that Germany selectively enforces its public school attendance law.

Romeike asserts in his brief to this Court that the decision of the German Constitutional Court in the *Konrad* case demonstrates that homeschoolers are selectively prosecuted under the German mandatory school attendance law. Pet'r Br. at 17-19. Romeike offers his view that he is particularly outraged by the *Konrad* court's concern that homeschooling might lead to religiously or philosophically motivated "parallel societies." Pet'r Br. at 19. The full quote from the *Konrad* case, however, offers a more complete picture of the reasoning behind the compulsory attendance law. The *Konrad* court held:

> The general public has a justified interest in counteracting the development of religiously or philosophically motivated "parallel societies" and in integrating minorities in this area. Integration does not only require that the majority of the population does not exclude religious or ideological minorities, but, in fact, that these minorities do not segregate themselves and that they do not close themselves off to a dialogue with dissenters and people of other beliefs. Dialogue with such minorities is an enrichment for an open pluralistic society. The learning and practi[c]ing of this in the sense of experienced tolerance is an important lesson right from the elementary school stage. The presence of a broad spectrum of convictions in a classroom can sustainably develop the ability of all pupils in being tolerant and exercising the dialogue that is a basic requirement of democratic decision-making process.

Konrad, A.R. 760. Ultimately, the *Konrad* court sought to ensure that the contributions of religious minority groups are made part of the public sphere, so that all students benefit from robust discussion of different beliefs. Romeike

urges in his brief that this Court ought not mistake "praise of tolerance" for "practice of tolerance." Pet'r Br. at 22-24. Here, where the record contains numerous pieces of documentary evidence indicating that the German government seeks to include minority voices, the Board was not free to simply ignore the evidence and conclude that the German government was merely trying to appear tolerant, nor does the record compel this conclusion.

Romeike also asserts in his brief to this Court that "[r]eligious homeschoolers are, for all practical purposes, the only parties who are routinely denied" the right to homeschool. Pet'r Br. at 12. The record makes clear, however, that public school attendance is required for all children, and failure to comply with the compulsory attendance law results in fines or other consequences, regardless of the reasons behind the decision to remove children from school. In one example, parents who homeschooled their children in Germany did so because of concerns about bus rides, classroom noise, and a lack of challenging material, and the parents were fined for failing to ensure that their children attended school, just as the Romeikes were fined for removing their children from public school when they did so for religious reasons. Article from World Net Daily, A.R. 647; Affidavits of the Neubronners, A.R. 591-92.

Another affidavit similarly indicated that parents may homeschool because their children are highly gifted, bullied in school, or have other special educational needs that the parents believe can be best handled at home. Affidavit of Jorg Grosselman, A.R. 658. According to that affidavit, these individuals are just as likely to face sanctions for homeschooling as those who homeschool for religious reasons; they simply give up on homeschooling more easily because their convictions are not based on their religious beliefs. *Id.* at 657-58. The affiant further noted that the German judiciary has equated homeschooling with truancy, and, in both situations, has suggested a danger to the child and implied the possible loss of child custody. *Id.* at 658. This evidence supports the Board's conclusion that the law requiring public school attendance is one of general applicability, and is simply enforced against those who violate it.

Donnelly, the staff attorney at HSLDA who testified on Romeike's behalf, similarly acknowledged a wide variety of reasons for homeschooling in Germany, including parents who did not wish to send their children to school with children from welfare homes, a lack of respect for authority in public schools, concerns about too much authority in public schools, and opposition to social promotion within public school. Transcript, A.R. 292-93. Importantly, Donnelly *not* testify that religious homeschoolers were somehow treated

differently from those who homeschooled for other philosophical reasons, and, in fact, he claimed that it was "well understood" that there were "no exceptions" to the mandatory attendance requirement. Transcript, A.R. 258-302, 277. He reiterated this last point on re-direct examination, stating that there were no exceptions to the German public school requirement for philosophical or religious reasons. Transcript, A.R. 302.

The record therefore does not support, let alone compel, Romeike's assertion that the public education law is selectively enforced against those who homeschool. *See* Pet'r Br. at 17. The law is enforced against those who violate it. It is similar to neutral laws requiring citizens to pay taxes; the tax laws are enforced regardless of an individual's reason for objection to payment (religious, political, or otherwise), and the fact that there are exemptions for low-income individuals or others does not automatically mean that the law is selectively enforced or that it constitutes persecution. *Cf. Zhang v. Gonzales*, 136 F. App'x 930 (7th Cir. 2005) (unpublished) (finding no persecution where the Chinese government sought taxes from the asylum applicant, even where the "taxes" were possibly a form of corruption).

Romeike also argued before the Board and this Court that parents who homeschool were treated more harshly than parents whose children were simply absent from school. Romeike's Br. to the Board, A.R. 152; Pet'r Br. at 24-25.

Romeike based these arguments on the testimony of Donnelly and a separate witness affidavit from Gabriele Eckermann, both of whom are homeschooling advocates, and one of whom is a staff attorney affiliated with the non-profit organization defending his immigration case. *Id.*, *see also* Affidavit of Gabriele Eckermann, A.R. 912-15; Transcript, A.R. 258. Still, Donnelly testified that although truant children may enroll in a "distance learning" program, it is administered by the school authorities, so no student is truly exempt from the mandatory curriculum. Transcript, A.R. 281. This observation was corroborated by Romeike's own experience; when his children were briefly allowed to receive their education at home, they still received twice-weekly visits from a public school teacher. Transcript, A.R. 346. Thus, the record does not compel the conclusion that the mandatory public education law is simply a pretext for persecution, insofar as all children in Germany are subject to it. The Board's decision should therefore be upheld.

B. The record does not compel the conclusion that Germany might disproportionately punish Romeike for homeschooling his children.

It is worth noting that nothing in the record suggests that parents would be punished for simply providing additional instruction in the home, and, in fact, the District Court decision in the Romeikes' case explicitly noted that the public school requirement was limited to 22 to 26 hours per week, and that the parents would therefore "have sufficient time to influence the education of their

children." German District Court Judgment Against the Romeikes, A.R. 581. As the German District Court noted in its decision setting forth the fines for Hannelore and Uwe Romeike, the Romeikes were also "free to enroll their children in government approved private substitute schools, which conform more to their religious ideas." German District Court Judgment Against the Romeikes, A.R. 581. Nothing in the judgment against the Romeikes indicated that the German government sought to punish them for any reason that would be protected under the INA; rather, the German court's decision laid out the facts of the Romeikes' case and concluded that the parents had failed to send their children to school and would be fined as a result. German District Court Judgment Against the Romeikes, A.R. 577.

Indeed, the judgment indicated that the fines would be lessened in part because the Romeikes were simply acting in accordance with their religious beliefs, a factor that was seen as sympathetic, rather than deserving of punishment. A.R. 581. Moreover, the judgment noted that there were no exceptions to the compulsory public education requirement unless the parents could demonstrate that attendance at school would be impossible, or would require undue effort. A.R. 580. Accordingly, the record makes quite clear that the school district was merely trying to enforce the law requiring public education, and the German government did not seek to punish the Romeikes for

their religious beliefs or the fact that they chose to provide supplementary education beyond the public school's curriculum.

The record is devoid of evidence that the German government specifically sought to punish the Romeikes for homeschooling rather than because they failed to send their children to public school, as required by law. In fact, school authorities repeatedly engaged the Romeikes in discussions regarding the education of their children, and, at one point, granted an exemption from the public school requirement. Transcript, A.R. 344-46. The evidence suggests that the Romeikes were given every opportunity to comply with the law: authorities spoke with the Romeikes on at least five separate occasions to encourage the Romeikes to return their children to school (Transcript, A.R. 344-45), and sought to return the Romeikes to a state of compliance with local school rules regarding mandatory attendance.

Moreover, the exemptions that Romeike cites as evidence of pretext merely show that there is no desire of the German government to punish those who homeschool when parents provide a basis for doing so that complies with German law. For example, in the *Konrad* case, the court noted that homeschooling might be permissible for parents whose occupations do not permit them to remain in one place and maintain a fixed residence. *Konrad*, A.R. 761. The affidavit of Gabriele Eckermann suggested that there were

limited exceptions to mandatory school attendance for "circus performers, inland shippers" or those who are "incapable physically or mentally" of attending school. Affidavit of Gabriele Eckermann, A.R. 913. Both Romeike and his wife admitted that they had never sought a written exemption from the mandatory school requirement, and it is therefore impossible to know whether such a formal request would have been granted. Transcript, A.R. 341-42, 360. The existence of exemptions does not show that the law is a pretext for persecution, however, because it is broadly enforced against all individuals except those for whom it would be utterly impractical to comply.

Furthermore, despite the fact that certain exemptions exist that allow homeschooling for practical reasons, nothing in the record suggests that this select group of homeschoolers may come up with their own curriculum, as the Romeike family wished to do. Rather, Donnelly explicitly testified that the public school actually administers the distance learning program for truants. Transcript, A.R. 281. In the absence of pretext, Romeike cannot establish a well-founded fear of persecution on account of a protected ground, and the Court need not reach the issue of whether homeschoolers are a "particular social group," discussed below, because the determination that the Romeikes face prosecution for a generally applicable law that is enforced for all German parents, rather than persecution, is dispositive.

Ultimately, this Court cannot pick a new conclusion to this case simply because it might be possible for a reasonable factfinder to have decided the case differently. *See Karimijanaki v. Holder*, 579 F.3d 710, 714 (6th Cir. 2009) ("In other words, '[u]nder this deferential standard, we may not reverse the Board's determination simply because we would have decided the matter differently.'" (citing *Koliada v. INS*, 259 F.3d 482, 486 (6th Cir. 2001)). In order for Romeike to prevail, he must establish that the record evidence would compel "any reasonable adjudicator" to reach a conclusion in his favor. *Huang v. Mukasey*, 523 F.3d 640, 651 (6th Cir. 2008). Here, Romeike has explained why he prefers the immigration judge's decision in this case, and how that outcome might also be supported by the record. The fact that two conclusions might be possible, however, does not mean that the record compels the conclusion that Germany's enforcement of its compulsory attendance law is a mere pretext for persecution. Accordingly, the Court should deny the petition for review.

II. ROMEIKE FAILED TO ESTABLISH THAT A PROTECTED GROUND IS "ONE CENTRAL REASON" FOR THE GERMAN GOVERNMENT TO MISTREAT ROMEIKE IN THE FUTURE.

The remaining broad issue is whether the record compels reversal of the Board's conclusion that Romeike failed to establish a well-founded fear of future persecution on account of a protected ground. Generally, an alien may establish a well-founded fear of *future* persecution by demonstrating: (1) a fear

of persecution in one's home country on account of race, religion, nationality, membership in a particular social group, or political opinion; (2) a reasonable possibility of suffering such persecution if one were to return to that country; and (3) that one is unable or unwilling to return to that country because of such fear. *Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004).

In enacting the REAL ID Act of 2005, Congress amended the burden of proof in asylum cases filed on or after May 11, 2005. *See* REAL ID Act § 101(a)(3), codified at 8 U.S.C. § 1158(b)(1)(B). Specifically, the REAL ID Act of 2005 requires that an asylum applicant bears the burden establishing that one of the five protected grounds "was or will be at least *one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) (emphasis added). In this case, Romeike filed his asylum application on November 17, 2008, after the effective date of this provision. Asylum Application, A.R. 463-87. Therefore, the REAL ID Act amendments apply to this case.

The Board has interpreted the amended burden of proof standard to mean that the asylum applicant must present direct or circumstantial evidence of a motive that is protected under the INA, and the protected ground "cannot play a minor role in the [applicant's] past mistreatment or fears of future mistreatment." *Matter of J-B- & S-M-*, 24 I. & N. Dec. 208, 214 (BIA 2007). The Board concluded that the protected ground "cannot be incidental,

tangential, superficial, or subordinate to another reason for harm." *Id*.; *see also Lleshi v. Holder*, 460 F. App'x 520, 525 (6th Cir. 2012) (unpublished) (citing *Matter of J-B- & S-M-*, and noting that the petitioner failed to provide evidence "from which it is reasonable to believe that the harm was . . . motivated in part by an actual or imputed protected ground" (internal quotation marks omitted)).

A. The record does not compel the conclusion that the German government seeks to enforce its mandatory public education law because of Romeike's religious beliefs or status as a German homeschooler.

As the Board reasonably concluded in the present case, Romeike failed to meet his burden of proof on this point because he failed to show German desire to persecute homeschoolers or those who homeschool for religious reasons, that would constitute "one central reason" for the mandatory public school attendance law or its enforcement. Board Decision, A.R. 6. In fact, the record contains a response to an inquiry regarding homeschooling in which the German Federal Ministry for Education and Research explained that the reason behind the mandatory public school attendance law was that "learning together in school fosters the learning of social competence[,] and being able to practice dealing with those who think differently on a daily basis forms the basis of a democratic society." Letter from Federal Ministry for Education and Research, A.R. 799-800. The German government made clear that the mandatory public education requirement was not specifically intended to punish any religious

group, or to punish homeschoolers as a group, but rather, to ensure that German citizens learn the skill of discourse with those who think differently.

The *Konrad* decision offered similar reasoning, noting that "[t]he presence of a broad spectrum of convictions in a classroom can sustainably develop the ability of all pupils in being tolerant and exercising the dialogue that is a basic requirement of democratic decision-making." *Konrad*, A.R. 760. The decision in the Romeike's court case offered a consistent approach, and explicitly stated that the relatively small fine of 50 Euros per parent and child was appropriate in light of the parents' religious reasons for homeschooling, suggesting that the fines were relatively minimal because they withdrew their children from public school based on religious conviction (rather than neglect or some other reason). German District Court Judgment Against the Romeikes, A.R. 581. Based on this evidence, the record does not compel the conclusion that the Romeikes' status as homeschoolers or their religious beliefs formed "one central reason" for the German government's past or future enforcement of its mandatory public school attendance law.

B. In any event, German homeschoolers are not a cognizable "particular social group" under the INA.

The Board has made clear that "membership in a purported social group requires that the group have particular and well-defined boundaries, and that it possess a recognized level of social visibility." *Matter of S-E-G-*, 24 I. & N.

Dec. 579, 582 (BIA 2008). In *Al-Ghorbani*, this Court cited *Matter of S-E-G-* with approval, and agreed that "*[s]ocial visibility* . . . requires 'that the shared characteristic of the group should generally be recognizable by others in the community' [and] 'must be considered in the context of the country of concern and the persecution feared.'" *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (citation omitted) (emphasis added). The Court also agreed that "'[t]he essence of the '*particularity*' requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.'" *Al-Ghorbani*, 585 F.3d at 994 (citations omitted) (emphasis added). At no time has this Court rejected the Board's social visibility or particularity requirements.

Here, as the Board reasonably found, and the record reflects, "homeschoolers" are not socially visible within the meaning of asylum law. Their "shared characteristic" would not be generally recognizable in German society. Indeed, the record contains relatively little evidence regarding the association and networking of homeschoolers. Donnelly noted that Germany has about 4 or 5 homeschooling organizations, one of which – SCHUZH – was founded by HSLDA. Transcript, 260. SCHUZH was approximately 8 or 9 years old at the time of the immigration court hearing, and the organization

largely handled cases involving fines for homeschooling. Transcript, A.R. 260-62. Romeike belonged to SCHUZH. Transcript, A.R. 326. Apart from that brief discussion of loosely organized homeschooling associations, the record sheds little light on the subject of how it would be possible for German citizens at large to perceive homeschoolers as a group.

Romeike argues emphatically that homeschoolers are socially visible, citing the existence of homeschooling organizations in Germany, the German government's reference to homeschoolers in various policy papers and court documents, the investigation of homeschooling by international tribunals, and the discussion of homeschooling in academic papers. Pet'r Br. at 54-55. While homeschooling may be the subject of much discussion, the record still does not compel the conclusion that German society at large recognizes "people who homeschool" as a group. In fact, the record indicates that only 500 people in Germany practice homeschooling, USA Today Article, A.R. 621, in a country with a population of 82 million people, 2008 Department of State Human Rights Report: Germany, A.R. 603. Romeike argues that homeschoolers are also socially visible because they are the parents whose children are home, during the day, and not at school. Pet'r Br. at 52. As the Board noted, however, parents may choose to homeschool one child and send another to public school, or homeschool only for some years and not others. Board

Decision, A.R. 7. With such flexible boundaries, the Board reasonably found, based on the record, that German society at large was not aware of "German homeschoolers" as a group.

Romeike argues that this Court should not offer *Chevron* deference to the Board's social visibility requirement, based on Third and Seventh Circuit case law that has called the social visibility requirement into question. Pet'r Br. at 45-48. This ignores this Court's decisions deferring to the Board's interpretation of the INA and its social visibility requirement, as well as this Court's explicit recognition that the Board's interpretation is entitled to *Chevron* deference. *See e.g.*, *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137 (6th Cir. 2010) (holding that "[a]n alleged social group must be both particular and socially visible"); *Castro-Paz v. Holder*, 375 F. App'x 586, 590 (6th Cir. 2010) (unpublished) ("In addition to an immutable or fundamental characteristic, a particular social group must have 'particularity' and 'social visibility.' . . . The Board's construction is reasonable and entitled to deference." (internal citations omitted) (citing, *inter alia*, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984))).

Further, the Board reasonably found that German homeschoolers lacked the requisite particularity for a "particular social group" under asylum law. As

this Court has noted, particularity relates to "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Bonilla-Morales*, 607 F.3d at 1137 (citations omitted). Members of the group must share a "common, immutable characteristic." *Id.* at 1137 (citations omitted). A common, immutable characteristic may be "an innate one such as sex, color, or kinship ties . . . or a past experience such as former military leadership or land ownership" and "it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Castellano-Chacon v. INS*, 341 F.3d 533, 547 (6th Cir. 2003) (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)) (abrogated on other grounds by *Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2003)).

Here, the characteristic in question is entirely mutable. A parent may choose to send a child to public school, or decline to do so. The Romeikes themselves offer a clear example of the mutability of the characteristic – their children attended public school (Transcript, A.R. 305-06), then did not attend public school (Transcript, A.R. 306), and then returned to public school for a single morning before their mother removed them at recess, (Transcript, A.R. 356-57). The characteristic is therefore not an "innate" one like sex, color, or

kinship ties, nor is it immutable in the way that past military service or land ownership might be. Nor is it the type of fundamental characteristic that the Board has recognized as one that individuals should not be required to change. *See, e.g.*, *Matter of Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (recognizing the particular social group of young women who are members of the Tchamba-Kunsuntu tribe of northern Togo who have not been subjected to female genital mutilation, and who oppose the practice, and noting that "the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it"). In short, the "changed characteristic" in the present case would mean sending children to a German public school for 22 or 26 hours per week. This is a mutable choice, and the Romeikes themselves were not members of the group of "homeschoolers" until 2006, when they objected to the public school curriculum and voluntarily chose to remove their children from public school in violation of German law.

Romeike states that this Court in *Al-Ghorbani* found that "opposition to a Yemeni social norm can sufficiently identify a social group, without ever considering the particular motivation of those who are opposed." Pet'r Br. at 53 (citing *Al-Ghorbani*, 585 F.3d at 995-96.) In fact, the *Al-Ghorbani* Court identified the particular social group as having "two facets, one familial, and the

other based on their opposition to a particular Yemeni social norm." *Al-Ghorbani*, 585 F.3d at 995. The group was cognizable as a "particular social group" because it had an immutable characteristic – kinship ties – in addition to the group members' stated opposition to certain social norms. *Id.* The asylum applicants were also members of a lower-class sub-group of the family, the "meat-cutter class," which was the "lowest class of persons in Yemen." *Id.* The ideological position of the asylum applicants in that case – their opposition to Yemeni social norms – was then considered a "second characteristic" of the proposed social group, *in addition to* the immutable kinship and social class identifiers. *Id.* at 995-96. The petitioners in that case therefore had an innate characteristic that they could not change, as well as a westernized point of view that the Court found they should not be required to change. *Id.* No such immutable characteristic is present in the Romeikes' case, however, and their case is therefore distinguishable. Further, the varied motivation of homeschoolers suggests that not everyone within the group has an identifiable "fundamental" belief that they should not be required to change.

At one point in his brief to this Court, Romeike attempts to inject immutability into the social group by arguing that the German government specifically targets "religious homeschoolers." Pet'r Br. at 44. Romeike never made this argument in his brief to the Board, however, and instead repeatedly

identified his social group as "German homeschoolers." Brief to the Board, A.R. 130-60. In turn, the Board discussed Romeike's "religious-based desire to homeschool" in the context of its analysis of the German government's potential pretextual motives for enforcing its truancy laws, but did not consider "religious homeschoolers" as a proposed social group, and, instead, used the formulation supplied by Romeike in his brief and discussed "German homeschoolers." Board Decision, A.R. 6. Romeike's failure to exhaust on this point deprives this Court of the ability to review it. *Ramani*, 378 F.3d at 560.

As the Board reasonably found, Romeike's proposed group of "German homeschoolers" is amorphous. Witness testimony and documentary evidence make clear that parents homeschool for many reasons. Some parents homeschool to avoid the negative influences of peers, others dislike the public school curriculum, still others object to bus rides, noisiness, authoritarianism, or the absence of authority, and some wish to homeschool for medical reasons, or because of a perceived lack of challenging material in public school. Transcript, A.R. 292-93, 334; Article from World Net Daily, A.R. 647; Affidavit of Gottfried Claus Hermann, A.R. 688. Given the wide variety of reasons for homeschooling, and the possibility that a parent might homeschool one child while sending other children to public school, the Board reasonably found that German society at large would have difficulty identifying

"homeschoolers" as a unified group. This is unlike the situation of the asylum applicants in *Al-Ghorbani*, who were readily identifiable based on their family membership, their lower-class status, and their opposition to the Yemeni social norm prohibiting mixed-class marriages. *Al-Ghorbani*, 585 F.3d at 996.

In sum, Romeike's asylum claim unravels at every level. He objects to Germany's mandatory public school law, but the record does not contain evidence compelling the conclusion that the law is a pretext for persecution on account of any protected ground under the INA. Accordingly, the record does not compel reversal of the Board's decision in this case, and this petition for review should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.

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Dated: January 4, 2013

DESIGNATION OF RELEVANT DOCUMENTS

The following documents in the record are relevant to the Court's review.

Citations refer to the page of the Certified Administrative Record or the

Supplement to the Certified Administrative Record (S001-S018).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the attached answering brief is proportionally spaced using Times New Roman 14-point typeface and contains 10,604 words of text, exclusive of tables and certificates. Respondent has used Microsoft Word to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2013, Petitioner's Attorney was served with Respondent's Brief through this Court's CM/ECF Electronic Filing System.

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