No. 13-471

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Solicitor General's reply is premised on two significant analytical errors. We briefly restate our actual claims, then demonstrate how the Government's key arguments are inapplicable to Petitioners' actual contentions. There is a clear split in the circuits on the actual issues presented by the Petition and ample information in the record on appeal for this Court to "properly determine" them (Opp. 15).

As with any asylum application, the Romeikes must show that they will suffer adverse action by the German government "on account of a protected ground," and that such action will be sufficiently severe to constitute "persecution." 8 U.S.C. § 1101(a)(42) (2014). One of Germany's central aims in prosecuting religious homeschoolers under the compulsory attendance law is to prevent 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.Appx.216a ¶ 8. German courts deem it "completely acceptable" to "enforce the handover of children, by force if necessary and by means of entering and searching the parental home" to accomplish this goal. *Plett*, Bundesgerichtshof [BGH] [Federal Court of Justice] October 17, 2007, 173 Entscheidungen des Bundesgerichtschofes in Zivilsachen [BGHZ] 277 (F.R.G.), *reproduced at* Pet.Appx.229-230a ¶ 15c. The German Constitutional Court has expressly recognized the special need to prosecute parents who

homeschool their children for "religious reasons." Pet.Appx.218a ¶ 12bb.

Germany's motives are "critical" to the question of persecution. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992). These statements—from Germany's own courts—are direct evidence of Germany's intent to prosecute religious homeschoolers "on account of" their religion, and the permanent loss of custody to one's child is a severe penalty that rises to the level of persecution. This is a straightforward *prima facie* case for asylum, as evidenced by the Romeikes' success before the Immigration Judge on these grounds (Pet. 8-9). This showing is not dependent on international human rights standards for its success.

The Government does not dispute that the Romeikes will face prosecution, including the threat of permanent loss of custody of their children, if they are removed to Germany and continue to provide religious, home-based instruction to their children (Opp. 4). Instead, the Government raises what amounts to an affirmative defense: ordinary criminal *prosecution* under a generally applicable law is not *persecution*, and thus is not grounds for asylum (Opp. 16). It is obvious, however, that not all criminal prosecutions can defeat a claim of asylum (Opp. 10). This Court should resolve a split in the circuits on the following question: when will the "ordinary prosecution" defense overcome a *prima facie* claim of asylum?

The Government's first key argument is that human rights violations are not an independent

ground for *granting* asylum (Opp. 11). Petitioners advance no such contention. The international law issues arise solely in response to the government's "ordinary prosecution" defense. This defense is only applicable if a foreign law or foreign prosecution is "legitimate" (Pet. 10). The Romeikes urge that this defense should not defeat an otherwise-valid asylum claim where the underlying law itself—or prosecution of the applicant under that law—is "illegitimate" because it violates binding international human rights standards.

The circuits are in disarray on whether international human rights standards—or some other standard—are appropriate for judging the legitimacy of a foreign law or prosecution (Pet. 19-23). Only intervention from this Court can bring unity and uniformity to this disarray among the circuits.

The Government's second key contention—fixating on a lack of statutory text and legislative history (Opp. 15-16, 20)—also misses the mark. This "failure" is only problematic if American courts cannot discern Germany's motive without such evidence. This is not the case here, where Germany's highest courts have held that religious homeschoolers are prosecuted under the law because of their "religious reasons" for homeschooling. Pet.Appx.218a ¶ 12bb. The Romeikes contend that Germany's courts are best positioned to interpret Germany's law and underlying motives. When such pronouncements exist, legislative evidence is at best duplicative. Its absence does not prevent this Court

from "properly determin[ing]" the issues before it (Opp. 15). The Petition should be granted.

I

The Circuits Need Meaningful Guidance for Determining When Prosecution under a Foreign Statute Rises to the Level of Persecution

In the asylum context, lower courts must often "differentiate between a fear of legitimate criminal prosecution and illegitimate persecution for purposes of [asylum] eligibility...." *Cruz-Samayoa v. Holder*, 607 F.3d 1145, 1146 (6th Cir. 2010). There is significant variance among the circuits on the proper standard for determining the "legitimacy" of foreign laws and prosecutions (Pet. 19-23).

The Romeikes advocate the adoption of the position taken by the Third and Ninth Circuits: that binding international human rights norms are the most consistent and effective standard for determining the legitimacy of foreign laws, while also remaining true to Congress's intent in creating asylum relief (Pet. 13-14, 23-24). The Government prefers the approach of the Second, Sixth, and Tenth Circuits, where "legitimacy" depends exclusively on whether the law is "fairly administered," regardless of the repressiveness of the underlying law itself (Opp. 2). The fate of an asylum applicant should not hinge on which standard her circuit of residence adopts.

A

The "Ordinary Prosecution" Defense Should not Overcome a Prima Facie Claim of Asylum when the Underlying Statute or Prosecutorial Motive is Illegitimate

Neither Congress nor the Board has defined "persecution," and "courts have not 'settled on a single, uniform definition'" of persecution (Pet. 12). *Mei Fun Wong v. Holder*, 633 F.3d 64, 71-72 (2d Cir. 2011). Courts "have given the term some content, but mostly by identifying what does *not* count." *Japarkulova v. Holder*, 615 F.3d 696, 699 (6th Cir. 2010) (emphasis in original). "Ask ten people to define 'persecution,' and you will get eleven dramatically different answers." *Id.* at 703 (Martin, J., concurring in part and dissenting in part). The result is "disarray" among the circuits (Pet. 12).

The Government tries to mitigate the magnitude of this division by arguing that no circuit equates "human rights violations" with asylum (Opp. 12-14). This defense is both incontrovertible and irrelevant. The Romeikes do not argue that international human rights violations are independent grounds for asylum; rather, these violations offer guidance in determining the "legitimacy" of a foreign law or prosecution. On *that* issue, there is clear division among the circuits (Pet. 19-23).

There are three standards courts can use to parse the difficult legal distinction between legitimate prosecution and illegitimate persecution.

They can turn—as the Third and Ninth Circuits do—to international human rights norms, where applicable and binding on the alleged persecutor (Pet. 12-13, 23-24). They can turn to American jurisprudence to define "legitimate" government action. *See*, *e.g.*, *Syed v. Mukasey*, 288 F. App'x. 273, 276 (7th Cir. 2008) (unpublished) (defining "persecution" as punishment for "political, religious, or other reasons that this country does not recognize as legitimate"). Or they can turn to their own conceptions of "legitimacy"—or comfort-level with the foreign law or prosecution—as the Second, Sixth, and Tenth Circuits have done (Pet. 20-21, 22-23).

Judge Kane's dissent in *Sadeghi* illustrates how these choices can dramatically alter the viability of asylum claims. Judge Kane used international human rights norms to determine that Iran's prosecution of Sadeghi amounted to persecution. *Sadeghi v. I.N.S.*, 40 F.3d 1139, 1145-47 (10th Cir. 1994). The majority, relying instead on its own amorphous standard for "persecution," applied the "ordinary prosecution" defense without inquiring into the "legitimacy" of the underlying law. In these admittedly close cases, the choice of standard may dramatically alter the applicant's fate.

It is of no moment that these instruments are not "self-executing" or ratified in the United States (Opp. 15). The Romeikes do not claim that the legitimacy of German law is determined by *American* law or jurisprudence,[1] but rather that Germany's prosecution of religious homeschoolers

[1] Some courts have suggested such a standard. *Syed*, 288 F. App'x. at 276.

violates human rights instruments which are binding on *Germany*. Germany has ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and is bound by their terms (Pet. 16). *See also* Grundgesetz fur die Bundesrepublik Deutschland [Basic Law of Germany], Art. 25 ("The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory"). Germany has prevented parents from choosing educational options that conform to the religious convictions of the parent. The ICCPR and ICESCR are explicitly clear: parents have a prior right "to ensure the religious and moral education of their children [is] in conformity with their own convictions." International Covenant on Economic, Social, and Cultural Rights, Art. 13(3), Dec. 16, 1966, 993 U.N.T.S. 3.

"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" (Pet. 23-24). Germany's prosecution of religious homeschoolers, which contravenes these international obligations, is not "legitimate."

The circuits' division over the proper standard for "legitimacy" is compounded by the failure of several circuits to meaningfully consider the motives of the alleged persecutor. The Government argues there is no division because the word "motive" appears in each case (Opp. 17-19), but that does not

mean motive played a "critical" role. *Elias-Zacarias*, 502 U.S. at 483. The Second Circuit may quote the correct test, but its actual decision hinges on an absence of *pretext*—the persecutor's *actual* motive—not whether an illegitimate motive was "*one* central reason" for the prosecution (Pet. 31). *Jin Jin Long v. Holder*, 620 F.3d 162, 166 (2d Cir. 2010). Similarly, *Sharif* holds that applicants must carry two separate burdens—proving an "objectively reasonable" fear of persecution, and that "the persecution in question stems from one of five enumerated motives"—but deemed motive relevant only to the second (protected ground), not the first (persecution). *Sharif v. I.N.S.*, 87 F.3d 932, 935 (7th Cir. 1996).

The Government's defense of the Sixth Circuit's *Romeike* decision is even less persuasive. Assuming, *arguendo*, that *Romeike*'s bifurcated analysis is merely a non-exclusive "example" of the proper approaches available to courts (Opp. 19-20), the Sixth Circuit still fails to make the persecutor's motive a "critical" factor. The first "instance" boils down to a burden to prove specific discriminatory government acts which the panel views as the *sine qua non* of persecution—or, more accurately, pretextual prosecution.

The second, where an applicant must prove that "no one would feel compelled to break [the law] except on the basis of a protected ground," focuses solely on the motive of the *applicant*—or, more accurately, the motives of *all potential law-breakers*—not the alleged persecutor. *Romeike v. Holder*, 718 F.3d 528, 531 (6th Cir. 2013). The resulting rule is an absurdity. Even where an

applicant feels compelled to break a generally applicable law solely on protected grounds, her claims can be defeated—and her prosecution excused—if the Government convinces the court that "other lawbreakers" feel "compelled to break" the law based on non-protected motives. *Id.* Motive analysis is now used as a sword against the alleged-victim, not a shield against the alleged-perpetrator. This perversion of Congress's intent is impossible to reconcile with *Elias-Zacarias*.

B

Fixating on "Fair Administration" Fails to Give Full Effect to Congress's Intent in Extending Asylum Relief

The Government, like the Second, Sixth, and Tenth Circuits, fixates on whether Germany's law is "fairly administered" (Opp. 2). But "fair administration" is not a talisman to defeat all allegations of persecution. Congress enacted § 1101(a)(42)(A), in part, to fulfill international obligations under the United Nations Protocol Relating to the Status of Refugees (Pet. 13-14). *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-38 (1987). The *content* of the law—not merely its "administration"—is critical to whether "prosecution" becomes "persecution" under the Handbook. *Chang v. I.N.S.*, 119 F.3d 1055, 1061 (3d Cir. 1997), *superseded by statute, citing* Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ¶ 59

(HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979) (hereinafter "Handbook").

The Handbook, while lacking the force of law, is nevertheless a useful aid in interpreting our obligations under the Protocol. *Negusie v. Holder*, 555 U.S. 511, 536-37 (2009); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 426-27 (1999); *Cardoza-Fonseca*, 480 U.S. at 438-39. The Handbook suggests that recourse be made "to the principles set out in the various international instruments relating to human rights" for distinguishing prosecution from persecution, Handbook ¶ 59-60, with the example of "improper" penal statutes, including a statute with "respect to the 'illegal' religious instruction of a child," which "may in itself amount to persecution." Handbook ¶ 57. It is hard to imagine an example of an improper law that is more akin to Germany's ban on religious homeschooling (Pet. 22). Though not dispositive, the Handbook's guidance is certainly not irrelevant.

The limitations of a myopic fixation on "fair administration" are apparent in this case. The Romeikes face prosecution under a law that prevents *all* German parents from rejecting public schools in favor of religious education for their child that is not approved and controlled by the state. Congress never intended that foreign laws banning protected activity should gain a presumption of validity simply because they ban *all* religious services, forbid the formation of *any* philosophically-motivated commune, close *all* non-government schools, or prosecute *all* parents who provide religious, home-based instruction to their children. That *all* parents

are denied fundamental rights should make a statute *more* suspect—not less.

The Romeikes contend that the Third and Ninth Circuit's reliance on international human rights norms, where they are applicable and binding on the foreign government in question, offers the best approach for determining the "legitimacy" of generally applicable foreign laws, while also giving effect to Congress's purpose of fulfilling our international obligations under the Protocol (Pet. 13-14). But even if this Court disagrees on the precise standard to be used, it is clear that lower courts will rely on *some* standard in making these determinations. This Court's intervention is desperately needed to bring uniformity to the disarray among the circuits.

II

This Court can "Properly Determine" the Important Issues on Appeal

The government cites no case in support of its assertion that this Court cannot "properly determine" either the content or effect of a foreign law without its text or legislative history (Opp. 15). On the contrary, federal courts routinely adjudicate claims of persecution under foreign statutes without conducting any textual analysis of the foreign law. *See*, *e.g.*, *Stserba v. Holder*, 646 F.3d 964, 974-75, 978 (6th Cir. 2011) (relying on petitioner's affidavit and a newspaper article to find a persecutory "intent" and "general practice" in Estonian law); *Perkovic v. I.N.S.*, 33 F.3d 614, 617-18, 622 (6th Cir.

1994) (relying on petitioner's testimony and State Department reports to conclude that Yugoslavian law violated the UDHR and U.N. Protocol on the Status of Refugees); *Chang*, 119 F.3d at 1064-65 (relying on the petitioner's testimony, U.N. Handbook, Human Rights Watch report, State Department report, and Ninth Circuit case law to determine China's prosecutorial motive).

The Government's insistence on legislative history is even less persuasive. While courts have used legislative history to construe the INA, *Negusie*, 555 U.S. at 532, or implementing regulations under the INA, *Zhong v. U.S. Dep't of Justice*, 480 F.3d 104, 111 (2d Cir. 2007), the government cites no case—and Petitioners have found none—where a court *requires* the legislative history of a *foreign* statute as a condition of finding "persecution." The absence of foreign legislative history does not prevent a court from "properly determin[ing]" the content of a foreign statute (Opp. 15), particularly where, as here, that nation's highest court has extensively and unambiguously construed the law.

Nor must this Court overturn "highly factbound determinations" by the Board or the Sixth Circuit in order to rule in the Romeikes' favor (Opp. 20). Contrary to the Government's assertion, there is no factual dispute over Germany's "goals" or "motives" in prosecuting religious homeschoolers under this law. The Board found, as fact, that *Konrad* "describes one of the goals of compulsory school attendance as 'counteracting the development of religiously or philosophically motivated "parallel societies,"'" along with additional goals including

"enrichment for an open pluralistic society," and fostering a "sense of experienced tolerance" among children. Pet.Appx.25a. Neither the Sixth Circuit nor the Government dispute that these are Germany's professed motives for prosecuting homeschoolers under the law (Opp. 21-22). *Romeike*, 718 F.3d at 534.

The applicable question of fact—whether Germany "actually harbor[s]" these motives—is not in dispute. *United States v. Cross*, 677 F.3d 278, 291 (6th Cir. 2012). Instead, the Romeikes challenge the Board's *legal* conclusions that these undisputed goals "do not reflect a governmental objective to restrict or suppress religious or philosophical practice," and that prosecutions motivated by these goals cannot be "persecution" unless there are other indicia of "pretext in the enforcement" of the law. Pet.Appx.26a. Whether these goals and motives violate a protected ground is the equivalent of determining "what constitutes a public danger" or whether a regulated activity has a "substantial effect" on interstate commerce. These are indisputably questions of law, not fact. *Staples v. United States*, 511 U.S. 600, 612 n. 6 (1994); *United States v. Hicks*, 106 F.3d 187, 190 (7th Cir. 1997).

What the government actually advocates is a fact-*blind* determination, where direct evidence of Germany's motive—from Germany's highest courts—is read out of the record. The record on appeal contains credible expert testimony, a Report from the United Nation's Special Rapporteur, and the opinion of Germany's highest constitutional court. There is no confusion—among the parties, the

Board, or the Sixth Circuit—as to the requirements, effects, or goals of the law. This Court can and should determine the merits of the Romeikes' claims.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted this 29th day of January, 2014.

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