UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

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

REPLY BRIEF OF PETITIONERS

Michael P. Farris
James R. Mason III
Darren A. Jones
Home School Legal Defense Association
One Patrick Henry Circle
Purcellville, VA 20132
Phone: (540) 338-5600
Fax: (540) 338-1952
E-mail: michaelfarris@hslda.org
Attorneys for the Petitioners

STATEMENT REGARDING ORAL ARGUMENT

The Romeikes disagree with the Government's contention that oral argument would be unnecessary and unprofitable in this case. This case presents important questions of law, involving not only the legal rights of homeschoolers and the applicability of international human rights law. Additionally, the question arises whether the government may deliberately seek to counteract religious minorities without persecuting its citizens, and whether the Board of Immigration Appeals' "social visibility" test is entitled to *Chevron* deference.

These important issues not only have important ramifications for future asylum cases, but are all issues of first impression in this Circuit. The Romeikes request oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Federal Statutes

Federal Regulatory Provisions

International Declarations and Treaties

Secondary Sources

ARGUMENT

I

STANDARD OF REVIEW

The Government claims the standard of review is substantial evidence. Resp. Br. 22, citing 8 U.S.C. § 1252(b)(4)(B). This is wrong as a matter of law.

While this Court treats the Board's opinion as the final agency determination, *Morgan v. Keisler*, 507 F.3d 1053, 1057 (6th Cir. 2007), only the *Immigration Judge's* findings are "administrative findings of fact" under § 1252(b)(4)(B). The Board may not "engage in factfinding in the course of deciding appeals." 8 C.F.R. § 1003.1(d)(3)(iv). All facts are "determined by the immigration judge." 8 C.F.R. § 1003.1(d)(3)(i).

The Romeikes argued at length that the Board's decision relies on the *Board's* factual findings. Pet. Br. 14-34. The Government dismisses this argument with a cursory assertion that "the Board did not reverse any of the dispositive factual findings of the immigration judge." Resp. Br. 23.

The remainder of the Government's brief, however, belies this assertion. The Government identifies no fewer than eleven *factual* findings made by the *Board,* all of which are either original, or conflict with the IJ's findings:

(1) "The Board found that Germany had the authority to require school attendance." Resp. Br. 18. The IJ made no such finding.

(2) "The Board found . . . that the law itself was one of general application." Resp. Br. 18. The IJ found that "there is animus and vitriol involved here," and that the Government "wishes to suppress" homeschoolers.[1] S014.

(3) The Board found 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." Resp. Br. 40-41. The IJ found that Germany enforces this law because it "purely seems to detest [homeschoolers] because of their desire to keep their children out of school." S014-15.

(4) The Board found that the law is aimed at "integrating minority religious voices," instead of "silencing dissent." Resp. Br. 19. But the Government acknowledges that the *IJ* found Germany "was 'attempting to *circumscribe* [the Romeikes'] religious beliefs' and that their religious beliefs were 'being frustrated.'" Resp. Br. 16-17 (emphasis in original), citing S014.

(5) The Board found that "the [compulsory attendance] law was being enforced simply because the Romeikes were violating it." Resp. Br.

[1] An actor's "intent" is a question of fact. *U.S. v. Hopkins*, 357 F.2d 14, 18 (6th Cir. 1966).

20. The IJ found that Germany enforced the law to "circumscribe" the Romeikes' religious beliefs. S014.

(6) "[T]he Board found that the law did not disproportionately burden any one particular religious minority." Resp. Br. 19. The IJ made no finding about "religious minorities," but did find that the *Romeikes'* beliefs were circumscribed and frustrated. S016.

(7) The Board found that "homeschoolers were not more severely punished than others whose children violate the law." Resp. Br. 20. The IJ made no such finding.

(8) The Board found that there was "relatively little evidence regarding the association and networking of homeschoolers." Resp. Br. 42. The IJ made no findings about associations or networks, but did find that homeschoolers have "been fined, imprisoned, had the custody of their children taken away from them," and have "a desire to overcome" these grievances. S016.

(9) The Board found "that German society at large was not aware of 'German homeschoolers' as a group." Resp. Br. 44. The IJ made no findings about "German society," though it did find that Germany's state policy is to stamp out religiously- or philosophically-motivated "parallel societies." S008, S014, S016.

(10) "[T]he Board reasonably found that German society at large would have difficulty identifying 'homeschoolers' as a unified group." Resp. Br. 48-49. Again, the IJ made no findings about "German society at large."

(11) The Board found that there are "[a] wide variety of reasons for homeschooling" and that "parent[s] might homeschool one child while sending other children to public school." Resp. Br. 48. The IJ made no such findings, but did find that the *Romeikes* homeschool for religious reasons. S013-14.

Given the above, both the Romeikes and the Government agree: the Board made its own factual findings. This is both impermissible, 8 C.F.R. § 1003.1(d)(3)(iv), and constitutes reversible error. The only exception is if this Court determines, *de novo*, that the IJ's contrary factual findings were clearly erroneous. *Tran v. Gonzales*, 447 F.3d 937, 942 (6th Cir. 2006).

The Romeikes argued that the Board failed to even *invoke* the "clear error" standard for all but two disputed findings ("animus and vitriol" and "Nazi-era law"), and that the Board failed to carry this burden even when it was invoked. Pet. Br. 14-34. In response, the Government offers a threadbare assertion that the Board found the IJ's conclusions about "animus and vitriol" and "Nazi-era law" to be clearly erroneous. Resp. Br. 23-24.

This is insufficient. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). Because the IJ's decision was clearly supported by substantial evidence, Pet. Br. 14-34, the Board's decision is reversible error. *Tran*, 447 F.3d at 942.

II

GERMANY'S BAN OF HOMESCHOOLING CONSTITUTES A *PER SE* VIOLATION OF RELIGIOUS FREEDOM

A

The Romeikes' Human Rights Arguments Are Not Improper "New Issues"

At every stage of this dispute, the Romeike family has contended that Germany's ban of homeschooling as applied to them violated their religious freedom; they are religious refugees within the meaning of our law on asylum. The Immigration Judge found that the Romeikes' religious freedom would be violated if forced to return to Germany and live under this ban: "the rights that are being violated in this case are basic to humanity, they are basic human rights which no country has a right to violate, even a country that is in many ways a good country, such as Germany." S017.

The Romeikes' opening brief offered a detailed analysis of international human rights law regarding the religious freedom rights of parents to direct the education of their children. While these cited authorities were new, the issue and

the argument was not. These authorities buttressed the conclusion of the IJ that Germany's homeschooling ban violated "basic human rights which no country has a right to violate".

The Government replies to the Romeikes' extensive human rights argument by raising two brief claims in a footnote. Resp. Br. 26 n. 6. First, it contends that the argument relying on international human rights law was being presented for the first time and had not been properly preserved for appeal. Second, the Government asserts that these "arguments are outside the scope of this case." *Id.* Both of these undeveloped arguments are erroneous as a matter of law.

The Romeikes do not offer this analysis of international human rights law as a new claim of any sort. This analysis of international human rights law is nothing more than the citation of additional legal authorities in support of a position which has been argued at every level, and which was specifically adopted by the IJ. Germany has violated the religious freedom rights of the Romeikes. International human rights law supports this conclusion.

The Supreme Court has announced the controlling rule: "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, California*, 503 U.S. 519, 534 (1992). In *Yee*, the Petitioner argued at the Supreme Court level that the taking of his property was either a

regulatory taking or a physical taking. While it was not clear whether the "regulatory taking" argument had been made in the lower courts, the Supreme Court held that it did not matter, because a *new argument* can be made in support of any *claim* that has already been preserved:

> Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims.* They are, rather, separate *arguments* in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.

Id. at 534-535.

Other courts have followed this principle. Citing *Yee*, the D.C. Circuit permitted a litigant to argue the applicability of HIPAA regulations for the first time on appeal. *Koch v. Cox*, 489 F.3d 384 (D.C. Cir. 2007). The court held that, rather than raising a new issue, "Koch is adducing additional support for his side of an issue upon which the district court did rule, much like citing a case for the first time on appeal." *Id.* at 392; *accord*, *Weitz Co., LLC v. Lloyd's of London*, 574 F.3d 885, 890-1 (8th Cir. 2009).

The Immigration Judge correctly understood the nature of the Romeikes' religious freedom claims against Germany. He concluded that Germany's ban of homeschooling was a human rights violation. The Romeikes are entitled to supply additional legal authority to buttress a claim which has been present and argued throughout this case.

The Government's second claim in this footnote is equally erroneous. The Government contends that human rights arguments are "outside the scope of this case, which relates only to Romeike's immigration status in the United States, and whether he qualified for relief from removal in the form of asylum." Although the Government does not explain its meaning, it seems apparent that its contention is that human rights treaty violations are irrelevant in the determination of asylum claims.

This is simply not true. On the contrary, this Court's decision in *Perkovic v. Immigration and Naturalization Service,* 33 F.3d 615 (6th Cir. 1994), used human rights treaties to resolve a very similar claim. Moreover, *Perkovic* gives considerable guidance concerning the resolution of a central issue in this case.

In *Perkovic*, the petitioner made a claim that he was a "refugee" because of persecution for his political opinion. Perkovic had been found guilty of violating a generally applicable law of Yugoslavia, which prohibited political protests. This Court said:

> Yugoslavia outlaws and punishes peaceful expression of dissenting political opinion, the mere possession of Albanian cultural artifacts, the exercise of citizens' rights to petition their government, and the association of individuals in political groups with objectives of which the government does not approve. Although international law allows sovereign countries to protect themselves from criminals and revolutionaries, it does not permit the prohibition and punishment of peaceful political expression and activity, the very sort of conduct in which the petitioners engaged here. *Universal Declaration of Human Rights*, U.N.G.A.Res. 217A(III), U.N.Doc. A/810 (1948); Helsinki Final Act, Conf. on Security and Cooperation in Europe, 14

> I.L.M. 1292 (1975). The United Nations Protocol on the Status of Refugees specifically speaks to the protection of aliens from punishment for such activities, and the provisions of the Protocol (a binding treaty to which the United States is a party) are deemed to have been incorporated into U.S. law. See *Cardoza-Fonseca*, 480 U.S. at 436-37, 107 S.Ct. at 1215-16. Since international law and the U.S. asylum statute explicitly seek to shelter activities such as those in which the petitioners engaged, the Board's construction of the statute to render such conduct outside its scope conflicts with the statute and must be reversed.

Id. at 622.

Two things are apparent from this passage from *Perkovic*. First, it is entirely appropriate to consider international human rights law when determining an asylum issue. In *Perkovic*, the asylum claim was based on persecution for political opinion. Here, it is religious freedom. In an asylum claim, when a court seeks to determine the scope of protected activity for either "political opinion" or "religious belief," use of international law sources is entirely appropriate.

B

A Law Which Facially Violates a Protected Human Rights Standard Constitutes Persecution *Per Se*

The second lesson from *Perkovic* goes to the heart of this case. Even though the law of Yugoslavia was one of general applicability, it was condemned by this Court: "Although international law allows sovereign countries to protect themselves from criminals and revolutionaries, it does not permit the prohibition and punishment of peaceful political expression and activity, the very sort of conduct in which the petitioners engaged here." *Perkovic*, 33 F.3d at 622.

The Romeikes' have made an essentially indistinguishable claim. Although international law permits nations to enact compulsory attendance laws, it does not permit nations to fashion these laws in a manner that violates the protected right of parents to choose an alternative education that is consistent with their own convictions.

International law provides broad protection for all parents. Article 26(3) of the Universal Declaration of Human Rights (UDHR) states: "parents have a prior right to choose the kind of education that shall be given to their children."[2] Art. 18(4) of the International Covenant on Civil and Political Rights[3] (ICCPR) provides that states shall "undertake to have respect for the liberty of parents . . . to ensure the religious and moral education of their children [is] in conformity with their own convictions." Art. 13(3) of the International Covenant on Economic Social and Cultural Rights[4] (ICESCR)[5] requires:

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

---

[2] 71 G.A. Res. 217A (III), U.N. Doc A/810 (1948).

[3] Dec. 16, 1966, 999 U.N.T.S. 171.

[4] Dec. 16, 1966, 993 U.N.T.S. 3.

[5] While the United States is not a party to the ICESCR, Germany is a party to all of these conventions, and is bound thereby. Pet. Br. 37-39.

This human rights and individual liberty approach to religious freedom is buttressed by a relevant federal statute, the International Freedom Act of 1998, (22 U.S.C. § 6401 *et seq.*) (IFA), which defines the term "violations of religious freedom" within the context of international law:

> The term "violations of religious freedom" means violations of the internationally recognized right to freedom of religion and religious belief and practice, as set forth in the international instruments referred to in section 6401(a)(2) of this title and as described in section 6401(a)(3) of this title, including violations such as—
>
> (A) arbitrary prohibitions on, restrictions of, or punishment for—. . .
>
> (v) raising one's children in the religious teachings and practices of one's choice. . . .

22 U.S.C. § 6402(13).

The instruments "referred to" in § 6401(a)(2) include both the UDHR and ICCPR. Thus, it is the official policy of this nation to protect the religious liberty guarantees found in these instruments in the context of international human rights issues. As was made clear by the ICESCR, a nation may require minimal educational standards to ensure that the parental choice meets appropriate academic standards, but it cannot simply forbid a parental choice that is motivated by religion.

The justification offered by Germany to support its ban of homeschooling not only fails to answer the human rights violations, but actually heightens the

reason for concern. Germany rationale for banning homeschooling in found in the *Konrad* case.[6]

Both sides have quoted the pertinent portion of this decision in their opening briefs. Pet. Br. 18; Resp. Br. 30. While Germany's goal may seem altruistic to some, for religious minorities who are the object of the policy, it is a chilling reminder of the danger of a nation that pursues philosophical homogenization. "The general public has a justified interest in counteracting the development of religious or philosophically motivated 'parallel societies' and integrating minorities in this area." A.R. 760.

In simple words, Germany wants to stop religious minorities from creating pockets of citizens who are out of the mainstream of Germany's state-sanctioned values. Germany's approach to "integrat[e] minorities" is to change how these religious minorities think and what they believe. In the very words of *Konrad*, Germany does not want minorities "to close themselves off to dialogue with dissenters and people of other beliefs." Germany hopes that forcing children to attend school through coercive "tolerance" will, in turn, "develop the ability of all pupils in being tolerant." A.R. 760; see also A.R. 006.

If we step back for a second, what Germany seeks to accomplish is nothing more than the philosophical homogenization of its society. Germany wants to

[6] *Konrad,* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] April 29, 2003, 1 BvR 436/03 (F.R.G.), reproduced at A.R. 758-62.

"include" minorities in the dialogue so that the religious minorities will contribute to the conversation. The hope is that the discussion will change everyone: by sharing their perspective, minorities will change the viewpoint of those who listen, and by exposure to competing viewpoints and values, the children of that minority will, in turn, be influenced and changed. Everyone shares. Everyone changes.

Philosophical homogenization is fine for those who want to participate. But it is an egregious violation of human rights to compel minorities and their children, by force of law, to participate in such system for these purposes. Under Article 18(4) of the ICCPR, and many parallel texts, parents have the right "to ensure the religious and moral education of their children in conformity *with their own convictions*" [emphasis added].

Germany's approach, which the Attorney General defends, Resp. Br. 30-31, is echoed in the approach of Catherine Ross, professor of law at Georgetown, who has called for the radical curtailment of homeschooling in the United States in order to advance "tolerance":

> Many liberal political theorists argue, however, that there are limits to tolerance. In order for the norm of tolerance to survive across generations, society need not and should not tolerate the inculcation of absolutist views that undermine toleration of difference. Respect for difference should not be confused with approval for approaches that would splinter us into countless warring groups. Hence an argument that tolerance for diverse views and values is a foundational principle does not conflict with the notion that the state can and should limit the ability of intolerant homeschoolers to inculcate

> hostility to difference in their children—at least during the portion of the day they claim to devote to satisfying the compulsory schooling requirement.[7]

Professor Ross, the Attorney General of the United States, and Germany all drink from the same dangerous well: a government may operate a coercive "melting pot" to insure that the children of religious minorities are not taught religious "intolerance."

Any religious believer who embraces an absolute truth claim is placed in grave danger by such a policy. For example, many Christians believe that Jesus was literally accurate when He said, "I am the way, the truth, and the life. No one comes to the Father except through Me." *John* 14:6 (New King James). A Christian who believes that Jesus is the only way to God would be considered "intolerant" under *Konrad*.

Neither this country nor the principles of international human rights law were built upon this kind of "tolerance." True tolerance embraces liberty for all. A government committed to true tolerance does not seek to use its power to force religious individuals to give up their beliefs or their desire to remain distinct from all other belief systems. It is government that must be tolerant of religious differences. When a government seeks to prohibit the development of "parallel societies" that are defined by religion and philosophy, it has become a state which

---

[7] CATHERINE ROSS (Professor of Law, George Washington University Law School), *Fundamentalist Challenges to Core Democratic Values: Exit and Homeschooling*, 18 WM. & MARY BILL RTS J. 991, 1005 (2010).

embraces the repression of the mind, even if it pursues that repression in the name of tolerance. A.R. 760.

Germany's campaign against religious minorities who may build parallel societies is akin to a dark episode in Oregon in the 1920s. In 1922, the Grand Lodge of Oregon of the Ancient Free and Accepted Masons, together with the Imperial Council of the Ancient Arabic Order of the Nobles Mystic Shrine, led the efforts to place a measure on the Oregon ballot which banned all private schools. The Masons had a potent ally in the Ku Klux Klan. "The Ku Klux Klan, the Federation of Patriotic Societies and the Scottish Rite Masons were the only groups that aggressively worked for its enactment."[8] This measure made public education a requirement for all children, creating a *de facto* ban on private education.

As is customary in states with ballot initiatives, the proponents of the measure are given an opportunity to explain their justification for the legislation in a voters' pamphlet. This one said:

> Do you believe in our public schools?
> Do you believe they should have our full, complete and loyal support?
> What is the purpose of our public schools, and why should we tax ourselves for their support?
> Because they are the creators of true citizens by common education, which teaches those ideals and standards upon which our government rests.

[8] WILLIAM G. ROSS, FORGING NEW FREEDOMS: NATIVISM, EDUCATION AND THE CONSTITUTION, 1917-1927 at 151 (Lincoln: University of Nebraska Press 1994).

> Our nation supports the public school for the sole purpose of self-preservation.
>
> The assimilation and education of our foreign born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.
>
> We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.
>
> Mix the foreign born with the native born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.

THE MAKING OF MODERN LAW: U.S. SUPREME COURT RECORDS AND BRIEFS, 1832-1978, *Pierce v. Society of Sisters*, 1925, Appx. at 24-25.

Oregon's liberals opposed this bill and the anti-Catholic bias that fueled it. Even the great public school advocate, John Dewey, publicly opposed the efforts of the Masons and the KKK to require all children to attend public schools, arguing that the Oregon measure "seems to strike at the root of American toleration and trust and good faith between various elements of the population and in each other."[9] Columbia University's President, Nicholas Murray Butler, denounced the measure: "this bill should be entitled 'a bill to make impossible the American system of education in Oregon.' It is fundamentally un-American."[10]

---

[9] JOHN T. MCGREEVEY, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J. AM. HIST. 97, 120 (1997).

[10] M. PAUL HOLSINGER, *The Oregon School Bill Controversy, 1922-1925*, 37 PAC. HIST. REV. 327, 333 (1968).

In response to this governmental attempt to homogenize children by banning private education, the United States Supreme Court eloquently proclaimed:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

This fundamental theory of liberty is now embedded in controlling instruments of international human rights, which Germany has pledged to follow. Pet. Br. 37-39. No nation may ban private education in order to homogenize children in the philosophy that seems most suitable to the regime in power.

Germany's efforts to "counteract religious or philosophical minorities" are no less alarming simply because they are principally aimed at controlling *minds* rather than beating *bodies*. America's commitment to fundamental liberty permits no such distinction. Repressive governments use beatings to achieve control of people's thinking and actions. Germany seeks to achieve the same objective in a more sanitized fashion. It sends police vans to haul off children who are kicking and screaming in fear, in hopes that years of philosophical homogenization in the government schools will eliminate the religious minority viewpoint that Germany euphemistically calls a "parallel society."

The United States should not defend such attempts to philosophically control a religious dissenter's children. Rather, we should recognize, as the IJ did, that such actions violate "basic human rights which no country has a right to violate". S017. We demonstrate our commitment to liberty by allowing the oppressed and persecuted to retreat to a land that embraces all forms of liberty – including the liberty of the mind and soul.[11]

C

Germany's Violation of Religious Freedom Constitutes Persecution

Germany, like Yugoslavia in *Perkovic,* seeks to accomplish a goal that is facially incompatible with fundamental human rights. The goal of "counteracting the development of religious or philosophically motivated 'parallel societies,'" A.R. 760, is not a legitimate government objective, whether or not Germany employs unequal treatment in achieving this objective. An equal-opportunity human rights violator is still engaged in unlawful acts of persecution.

---

[11] To the extent that the government suggests that the Romeikes' religious claim requires membership in a church that shares their view, Resp. Br. 16, this idea has been decisively rejected by the Supreme Court. *Frazee v. Illinois Dep't of Employment Security,* 489 U.S. 829 (1989). In *Frazee*, an individual professed to be a Christian, but was not a member of any organized religious group. Reversing a lower court decision which required group identity for a religious liberty claim, the Supreme Court held that Frazee was fully entitled to the protection of the Free Exercise Clause as an individual right. *See also Vinning-El v. Evans,* 657 F.3d 591, 593 (7th Cir. 2011) ("A personal religious faith is entitled to as much protection as one espoused by an organized group").

This principle is also clearly expressed by Article 18 of the UDHR: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, *either alone or in community with others* and in public or private, to manifest his religion or belief in teaching, practice, worship and observance" [emphasis added].

The Government makes no meaningful attempt to argue that the level of coercion that the Romeikes will face, should they be forcibly returned to Germany, will not rise to the level of persecution. Instead, the IJ found that the Romeikes will likely face heavy fines, jail time, and the loss of custody rights to their children if they return and continue to homeschool. S017-018.

Germany's law banning homeschooling, and the desire to prohibit religious minorities from developing into parallel societies, is just as illicit as the law at issue in *Perkovic*, which banned political dissent. Those who seek to escape from governments that attempt to coerce the heart, mind, or soul should have a safe haven in the United States of America.

III

GERMAN HOMESCHOOLERS CONSTITUTE A "PARTICULAR SOCIAL GROUP"

The Romeikes may also establish their right to asylum if they can demonstrate that their fear of persecution results from actions aimed at a "particular social group." *Pilica v. Ashcroft*, 388 F.3d 941, 950 (6th Cir. 2004). They must establish that at least one of the five protected grounds for asylum "was or will be at least *one central reason* for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i) [emphasis added].

A

Homeschooling is an Immutable Characteristic Which "Should Not Be Changed"

Particular social groups are formed around an immutable characteristic. *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009). An immutable characteristic is a "common characteristic that defines the group . . .[and] 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*." *Id.* [emphasis added].

The Government makes two key assertions concerning immutability. First, it contends that the correct social group to analyze is "German homeschoolers" and not "religious homeschoolers in Germany." Resp. Br. 47-48. Second, it contends that homeschooling is not immutable because one can simply stop homeschooling. Resp. Br. 46-47.

Since we have already demonstrated that Germany has violated the religious freedom of the Romeikes, we agree that at this stage the correct question is whether German homeschoolers are a "particular social group." Thus, the real clash is whether homeschoolers possess a characteristic that they "should not be required to change because it is fundamental to their individual identities or consciences." *Al-Ghorbani*, 585 F.3d at 994.

Religious and political dissenters clearly may qualify upon this ground. If the Government's theory was correct, however, such dissenters would not qualify as a particular social group because one can simply change their political or religious views.

This Court, wisely, has never adopted the Government's approach, holding instead that some characteristics are so important that they *should* not be changed, even if they *can* be changed. Both the identities and consciences of people must be protected from persecution.

The Government suggests that the impact of the law on homeschoolers is too inconsequential for the characteristic to be fundamental. "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." Resp. Br. 46. Since parents could teach their children whatever they wish outside of school hours, one might suspect that 22-26 hours of public instruction would hardly constitute an identity-changing requirement.

To make such a determination, however, this Court must independently find that (1) home education is not fundamental to family identity, and (2) that 22-26 hours of instruction is no great threat to that identity. The U.S. Supreme Court, however, has categorically rejected both propositions: "[i]ndeed it seems clear that if the State is empowered, as *parens patriae*. . .[to require high school attendance

over the objection of religious parents], the State will in large measure influence, *if not determine*, the religious future of the child." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) [emphasis added].

If the Government is correct, then the Amish should have lost in *Yoder*. Their children could have been taught farming and other skills after their public school studies concluded. Instead, the Supreme Court recognized that the Amish had two key beliefs: what their children should *not* be taught, as well as what their children should be taught. No one could claim that this approach to family living and education of children is not important to the Amish.

In the same way, the IJ found that the Romeikes were religiously opposed to the philosophy of what the German public schools teach. S013. The Government makes much of the various reasons parents choose for homeschooling, but the common denominator is a rejection of the approach of the public schools. Resp. Br. 48. German homeschoolers have two common desires—avoid German public schools and teach their own children according to their own philosophy.

By way of analogy, could a nation could force-feed pork products to an Orthodox Jewish child for 22-26 hours a week and claim that there was no interference with the family's beliefs because the family was free to offer that child Kosher food for the balance of the week? Obviously not.

What, then, is the proper approach to determine whether a characteristic "should not be changed" by governmental coercion? While this might be a difficult question in some cases, it is easily resolved here. The right of parents to direct the education of their children is a fundamental, *prior* right that is enshrined in virtually all of the major human rights instruments of our time, including the UDHR, ICCPR, and ICESCR. Pet. Br. 35-37. Exercise of a "prior right," which is first in time and first in rank, "should not be changed" by governmental coercion.

German homeschooling parents have endured threats, jail sentences, heavy fines, police vans that haul away their children, and threats of loss of custody. S016. They have left their jobs, families, and homeland to have the freedom to be able to homeschool their children. S017. The Government's mutability argument is remarkably callous in light of these sacrificial commitments and the significant weight placed on parental educational freedom in international human rights law. The ability of parents to educate their children in accordance with their own convictions, and not those of the government, is a characteristic that should not be coercively changed.

B

The Government's "Social Visibility" Arguments Are Factually and Legally Erroneous

The Government contends that there is an additional criterion that must be demonstrated: "German society at large" must recognize homeschoolers as a

"particular social group." The Government defends the Board's conclusion that German homeschoolers "lack[] social visibility because [German] society at large is not generally aware enough of homeschoolers to consider them a group." Resp. Br. 20-21, citing A.R. 7.

Setting aside the fact that the Board made an impermissible factual finding, 8 C.F.R. § 1003.1(d)(3)(iv), there are two key legal impediments to this argument: (1) Has social visibility been adopted as a proper criterion in this Circuit; and (2) if social visibility is a required element, does this Court examine the views of society at large or the views of the government?

1

Social Visibility has Not Been Adopted by this Circuit

This Court has never used the social visibility standard, in a published or unpublished decision, to hold that an asylum applicant is a member of a particular social group. This Court has acknowledged that the *Board* sometimes employs this standard, but has stopped well-short of applying the standard or extending *Chevron* deference to it. *See Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011); *Al-Ghorbani*, 585 F.3d at 994-6. This was discussed in full in the Romeikes' opening brief. Pet. Br. 48-51.

The Government barely responds to these arguments. There is no discussion of *Kante*, and while the Government argues that *Al-Ghorgani* cited the social

visibility standard "with approval," Resp. Br. 42, it does not dispute that this Court never actually *employed* the standard in that case. The Government also string cites to two new cases from this Court, *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137 (6th Cir. 2010) and *Castro-Paz v. Holder*, 375 F. App'x 586, 590 (6th Cir. 2010). Neither case is persuasive.

In *Bonilla*, the asylum applicant faced two hurdles: was she a member of a particular social group, and was there a sufficient nexus between her membership in that group and the mistreatment that she suffered? *Bonilla*, 607 F.3d at 1137. In discussing the "particular social group" issue, this Court did state (as the Government quotes in its string cite) that an "alleged social group must be both particular and socially visible," but immediately followed this statement with a colon and a citation to *Al-Gharboni*, which stated as follows:

> The 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. Social visibility, on the other hand, requires that the shared characteristic of the group should generally be recognizable by others in the community.

Id.

Bonilla's citation to *Al-Ghorbani* is significant because this Court merely recognized that the "social visibility" standard exists in the Board's repertoire, but chose not to use it. Pet. Br. 49-50. Moreover, the Court's use of the phrase "on the other hand" serves to confirm the actual *holding* and *reasoning* of *Al-Ghorbani*,

which is that the "social visibility" inquiry and the "particularity requirement" are both distinct and separable.

Furthermore, to the extent *Bonilla* discusses "social visibility," it is *dictum.* Immediately after reciting the language above, this Court held that it "need not reach these two issues" because the "asylum claim clearly fails on the nexus requirement." *Bonilla*, 607 F.3d at 1137. As this Court has recognized, "one panel of [the Sixth Circuit] is not bound by dicta in a previously published panel opinion." *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 602 F.3d 742, 750 (6th Cir. 2010).

Similarly, the Government's string cite to this Court's unpublished decision in *Castro-Paz* is not persuasive. First, as an unpublished decision, *Castro-Paz* cannot declare law in the Sixth Circuit, because an unpublished decision "is not precedentially binding on this panel," though it "may be considered for its persuasive value." *Longaberger Co. v. Kolt*, 586 F.3d 459, 468 (6th Cir. 2009). In addition, the court in *Castro-Paz* – just like *Kanti*, *Al-Ghorbani*, and *Bonilla* – stopped well-short of actually applying the "social visibility" standard, even if it acknowledged that the Board uses it.

2

Homeschoolers Are Socially Visible to the Group that Matters – the German Government

Even under the social visibility inquiry, homeschoolers are visible. Pet. Br. 51-58. The Government claims that "the record still does not compel the conclusion that German society at large recognizes 'people who homeschool' as a group, since "only 500 people in Germany practice homeschooling ... in a country with a population of 82 million people." Resp. Br. 43, citing A.R. 621. Nothing in logic, law, or plain justice justifies the conclusion that a group cannot qualify as a "particular social group" just because they are small in number. See, e.g., *Al-Gharboni*, 585 F.3d at 994-7 (holding that members of one biological family constituted a particular social group).

The Government's contention that "German society at large" is the relevant indicator of social visibility should be rejected. It is rare indeed when persecution by "society at large" will justify a claim for asylum. It is far more appropriate to ask the question: does the *government*'s policy reflect that *it* recognizes the relevant people as a "particular social group"? Since it is government persecution that matters, the visibility of the group in the government's eyes is the relevant inquiry.

The Government cites a "Letter from Federal Ministry for Education and Research, A.R. 799-800," to buttress its claim that homeschoolers are not a particular social group. Resp. Br. 40. This letter reveals just the opposite.

The letter is written by the "Secretary of the Permanent Conference of the State Ministers for Cultural Affairs in the Federal Republic of Germany," and is intended to represent "a uniform position of the [German] states." A.R. 799. The letter acknowledges that similar letters have been received by a number of State Ministries, but is written in response to a request from the Federal Chancellor of Germany. The Chancellor, in turn, had received the letter from homeschoolers, who communicated a "demand for the introduction of Homeschooling in Germany." *Id.* This request from German homeschoolers received sufficient attention that the Federal Chancellor directed her education ministry to obtain a response from the collective group of the state ministers, who in turn obliged with a uniform response.

There is absolutely no doubt that all levels of the German government recognize homeschooling as a group, and that homeschoolers will be treated in exactly the same way by all agencies of government. The Permanent Conference cites *Konrad* (referencing the court and date of the decision), to buttress its conclusion that it was appropriate to override the group's petition for the right to homeschool. A.R. 800.

As this Court is now well familiar, *Konrad* reveals that the policy of the German government is to "counteract[] the development of religious or philosophically motivated 'parallel societies.'" A.R. 760. It is impossible to have a more clear declaration that a government policy is improperly aimed at a particular social group.

The fact that there are 500 Germans with sufficient courage to attempt to homeschool in the face of a repressive government policy to "counteract" their religion and philosophy is remarkable. The German government is fully aware of this group. The government's actions are uniform, organized and aimed at "counteracting" this group. This is *per se* persecution: "the infliction of harm to overcome a characteristic," and a responsive opposition to the government's efforts to overcome a characteristic. *Al-Ghorbani*, 585 F.3d at 997. This "places [petitioners] in an identifiable social group." *Id*.

German homeschoolers are recognized by their government as a particular social group, and there is no doubt that the government's desire is to "counteract" their religion and philosophy, lest it grow into an even larger movement. This is clearly "one central reason" for the government's policy of criminally prosecuting, fining, jailing, and removing children from homeschool families. S017-018.

CONCLUSION

For the foregoing reasons, the decision of the Board of Immigration Appeals should be reversed, the Immigration Judge's order granting asylum to the Romeikes under the Immigration and National Act should be reinstated.

Dated: February 5, 2013 Respectfully submitted,

/S/ Michael P. Farris
Michael P. Farris
James R. Mason III
Darren A. Jones
Home School Legal Defense Association
One Patrick Henry Circle
Purcellville, VA 20132
Phone: (540) 338-5600
Fax: (540) 338-1952
E-mail: michaelfarris@hslda.org
Attorneys for the Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 5th of February, 2013, a true and accurate copy of the foregoing Reply Brief of Petitioners was electronically filed via this Court's Electronic Case Filing (ECF) system. Notice of this filing was provided through ECF to Eric J. Holder, Jr., and a true and accurate copy of the foregoing was mailed on February 6, 2013, to:

U.S. Department of Homeland Security
Immigration and Customs Enforcement
Office of the Chief Counsel
167 North Main, Room 1036
Memphis, TN 38103
(901) 544-0630

Respectfully submitted,

/S/ Michael P. Farris
Michael P. Farris

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

   X This brief contains 6,806 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   X This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Fourteen (14) Point Times New Roman Font.

Dated: February 5, 2013

/S/ Michael P. Farris
Michael P. Farris
Attorney for Appellants