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 TO THE ATTORNEY GENERAL'S RESPONSE TO PETITION FOR REHEARING EN BANC

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The Attorney General's ("AG") response does not address the central argument for rehearing *en banc*: contrary to controlling precedent, the panel resorted to an "easy way, hard way" dichotomy, instead of analyzing Germany's *motive* for prosecuting homeschoolers. "[A] critical element of persecution is motive." *Al-Ghorbani v. Holder*, 585 F.3d 980, 997 (6th Cir. 2009), citing *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

A. Germany Enforces its Compulsory Attendance Law as a Pretext for Persecution on the Basis of a Protected Ground.

The AG says, "Germany punishes *all* parents who fail to comply with the law, regardless of the reasons parents may provide for failing to comply." Resp. at 8 (emphasis in original). This is inconsistent with the record on appeal. As the Panel decision itself recognized, Germany provides *exemptions* for parents if their children are "incapable physically or mentally [of] going to school," or their "occupations require them to 'constantly change their abode.'" *Romeike v. Holder*, __ F.3d __, 2013 WL 1955679, at *6 (6th Cir., May 14, 2013), citing A.R. 913, 761.

Exemptions provide valuable insight into the true motive behind a "general" law. As Judge Sutton, author of the Panel decision, recognized in the context of the First Amendment, "if the law appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions, or worse is a veiled cover for targeting a belief or faith-based practice, the law satisfies the First Amendment only if it advances[s] interests of the highest order." *Ward v. Polite*, 667 F.3d 727, 738

(6th Cir. 2012) (alteration in original) (internal quotations omitted). It is well-established that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 884 (1990). Similarly, a "general" law may be employed to persecute a social group or religious minority, in the parlance of the INA, if the law allows for individual "hardship" exemptions, but does not grant exemptions to members of a particular social group or religious minority. In such cases, any ensuing "prosecution" is truly "on account of" a protected ground.

This is precisely how Germany enforces its compulsory attendance law: *practical hardship* is a reason of sufficient merit to obtain a compulsory attendance exemption, but *religious hardship* is not. *In re Konrad*, A.R. 760 ¶ 12bb; *see also Romeike* at *6, citing A.R. 913, 761. Germany readily admits that its system of individual exemptions results in "unequal treatment." *Konrad*, A.R. 760 ¶ 12 bb. Its justification for this unequal treatment is chilling: it is "reasonable" to "encroach[]" upon the "basic rights" of religious parents, in order to "counteract[] the development of religiously or philosophically motivated 'parallel socities'" by denying them exemptions, *id.* at ¶ 8, but it is not reasonable to deny exemptions to parents "who, due to their occupations, have to constantly change their abode, [because requiring public school attendance] can only be achieved through the separation of

the children from their parents." *Id.* at ¶ 12bb. In other words, Germany's interest in achieving a "pluralistic society" justifies taking children from parents who homeschool for religious reasons, but that interest is readily waived *to prevent* the taking of children from parents who have transient occupations.

Contrary to the AG's assertion, Resp. at 8, Germany's *true* motive in enforcing its compulsory attendance law is not strictly "law enforcement." By selectively granting *practical* exemptions, while aggressively prosecuting *religious* objectors (specifically the Romeikes), Germany uses the compulsory attendance law as "a veiled cover for targeting a belief or faith-based practice." *Ward*, 667 F.3d at 738. This is a pretext for persecution "on account of a protected ground" under the INA.

B. Germany's Compulsory Attendance Law is the Opposite of "Pluralism."

The AG relies heavily on Germany's stated reason for its unequal treatment of religious homeschoolers – achieving an "open, pluralistic society." Resp. at 8. Targeting religious minorities for the purpose of suppressing "parallel societies," however, is the antithesis of pluralism. "Pluralism," rightly defined, is "a state of society in which members of diverse ethnic, racial, religious, or social groups maintain an autonomous participation in and development of their traditional culture or special interest within the confines of a common civilization." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 896 (10th ed. 1999). Germany's goal is not pluralism, properly understood. It is, instead, homogeneity.

The AG parrots Germany's Orwellian use of the word pluralism: "It is scarcely feasible, with those stated goals in mind, to tease from the [*Konrad*] opinion, a persecutory motive on the part of those who enforce the law." Resp. at 8. On the contrary, it can scarcely be argued that Germany allows homeschoolers to "maintain an autonomous participation in and development of their traditional culture or special interest," when it denies them legal exemptions to provide private, religious instruction to their children, and forcibly removes their children when they try to do so. *Romeike* at *6; *Konrad*, A.R. 760 ¶¶ 8, 12 bb.

American legal academics have made the argument that American homeschooling should be banned or curtailed to promote tolerance. The AG's argument marches to the dangerous cadence of the drumbeat of these scholars. Silencing the "intolerant" to promote tolerance is not only illogical; it is antithetical to any theory of freedom of conscience. Michael Farris, *Tolerance and Liberty: Answering the Academic Left's Challenge to Homeschooling Freedom*, Peabody Journal of Education 88: 1-14. (2013).

The fact that Germany's enforcement of its compulsory-attendance law is manifestly contrary to basic norms of international law only heightens the fact that the law is a pretext for persecution, not pluralism. While not every violation of international law constitutes "persecution" under the INA, it is often suggestive. *See* LAW OF ASYLUM IN THE UNITED STATES § 4:1 (2012) ("Persecution is widely rec-

ognized as the sustained or systematic violation of basic human rights demonstrative of a failure of state protection"); *The Amistad Case*, 40 U.S. 518, 553 (1841).

Under binding international human rights norms, Germany must respect the liberty of parents "to ensure the religious and moral education of their children in conformity with their own convictions." International Covenant on Civil and Political Rights (ICCPR), Art. 18(4), Dec. 16, 1966, 999 U.N.T.S. 171. Germany may not override this right, even if its survival hangs in the balance. *Id.*, Art. 4(1), 4(2). The fact that the ICCPR is not "self-executing" in the United States, Resp. at 9, has no bearing on whether *Germany* "persecutes" homeschoolers through the "systematic violation of basic human rights." LAW OF ASYLUM § 4:1. Human rights treaties are *always* self-executing in Germany. Stefan Oeter, "International Human Rights and National Sovereignty in Federal Systems: The German Experience," 47 WAYNE L. REV. 871, 878-79 (2001) ("International human rights instruments ratified by the Federal Republic of Germany thus are applied with the rank of federal statutory law. . . . [and] must be applied as fully binding part of federal law – like any international 'self-executing' treaty provision") (internal footnotes omitted).[1]

Germany's enforcement of its compulsory attendance law – through "practi-

[1] The Supreme Court has employed international law for the purpose of interpreting American guarantees of rights—just as we have argued in this case. In so doing, the Court has used treaties that the United States has not even adopted. See *Roper v. Simmons*, 543 U.S. 551, 556 (2005) Obviously, if unratified treaties may be used for interpretive purposes, a reservation concerning self-execution poses no limitation.

cal hardship" versus "religious hardship" exemptions – is a pretext for persecution. Germany has pledged to respect the liberty of parents "to ensure the religious and moral education of their children in conformity with their own convictions," IC-CPR Art. 18(4), yet categorically prosecutes homeschoolers when they provide private, religious instruction to their children while exempting others. *Konrad*, A.R. 760 ¶¶ 8, 12bb. The result is a "systematic violation of basic human rights." LAW OF ASYLUM § 4:1. As noted in the Romeikes' Petition, "[i]n the aftermath of *Plett*, the Jugendamt 'has the immediate task to take away all home schooled children,' and some German states have even changed their local school laws so that there is 'no need for the German Jugendamt to justify in a court the taking away of Children out of their families.'" A.R. at 740-41 ¶ 11. Germany's persistent prosecution of parents, for exercising their non-derrogable rights, is "demonstrative of a failure of state protection." LAW OF ASYLUM § 4:1. Germany's true motive is to compel religious and philosophical homogeneity, not encourage pluralism.

C. Neither *Stserba* nor *Beskovic* Permit the Panel to Ignore Germany's Motive.

The AG defends the Panel's dichotomy of asylum cases where persecution is "easy" to spot versus "hard" to spot, and claims that *Beskovic v. Gonzales*, 467 F.3d 223 (2d Cir. 2006), and *Stserba v. Holder*, 646 F.3d 964 (6th Cir. 2011), are "easy" cases which support the Panel's decision. Resp. at 4-6. The AG misunderstands the Romeikes' argument, the Panel's dichotomy, and the cases themselves.

The AG's first error is that the Panel unquestionably views *Beskovic* as a "hard" case, because when the Panel *defines* a "hard" case, it quotes the hypothetical "general law" found in *Beskovic*. *Romeike* at *2. In both *Beskovic* and *Stserba,* this Court found that a protected ground was being assaulted by an apparently "general" law. These are, by the Panel's definition, not "easy" cases.

Furthermore, the key legal factor –in both "easy" and "hard" cases – is always the *motive* behind the law, not the degree to which the motive is "obvious." The law in *Stserba*, invalidating diplomas from Russian universities, would have been legitimate if *motivated* by a concern about academic quality (instead of hostility toward Russians). So too, Germany's prosecution of homeschoolers under the compulsory attendance law could be legitimate if *motivated* by concerns of academic quality. Instead, Germany's *true* goal is to coerce homogeneity.

The persecutory motive in *Stserba* might be more *obvious* because it targeted only Russian institutions, but the *rule* is clearly applicable to the Romeikes: when the state brings an illicit motive to bear against *the applicant* on the basis of a protected ground, it commits persecution – even if it might have a legitimate motive for enforcing a similar policy *in other cases*. Germany forces religious homeschoolers to attend public school, not to ensure that they receive education, but to prevent them from forming a "parallel society," and to forcibly include them in the mainstream. This is persecution "on account of a protected ground."

CONCLUSION

For these reasons, the petition for rehearing *en banc* should be granted.

Dated: June 28, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th of June, 2013, a true and accurate copy of the foregoing Petition for Rehearing En Banc 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 June 28, 2013, to:

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Respectfully submitted,

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