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

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether prosecution under a generally applicable law may constitute "persecution" under 8 U.S.C. 1101(a)(42)(A) when the law violates a country's obligations under international human rights treaties.

2. Whether prosecution under a generally applicable law may constitute "persecution" under 8 U.S.C. 1101(a)(42)(A) when a central reason for the prosecution is the desire to harm the applicant on account of a statutorily protected ground.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 718 F.3d 528. The opinions of the Board of Immigration Appeals (Pet. App. 19a-29a) and the immigration judge (Pet. App. 30a-51a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 2013. A petition for rehearing en banc was denied on July 12, 2013 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on October 10, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners in this case are German citizens who seek asylum under the Immigration and Nationality

Act (INA), 8 U.S.C. 1101 *et seq.*, because they fear prosecution in Germany for refusing to send their children to a public or state-approved private school. The Board of Immigration Appeals (BIA or Board) rejected their asylum claim, and the Sixth Circuit denied their subsequent petition for review.

1. The INA provides that the Attorney General may, in his discretion, grant asylum to an alien who demonstrates that he is a "refugee" within the meaning of the INA and is otherwise eligible. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee," in relevant part, as an alien who is unwilling or unable to return to his country of origin "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." 8 U.S.C. 1101(a)(42)(A).

For purposes of asylum, "persecution" refers to serious mistreatment, which must be inflicted either by the government of the applicant's country of nationality, or by groups or individuals that the government is "unable or unwilling to control." *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990). Persecution has been described as an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (Alito, J.). It "does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." *Id.* at 1240. As a general matter, prosecution for violations of fairly administered laws of general applicability does not usually qualify as persecution. See, *e.g.*, *Shardar* v. *Ashcroft*, 382 F.3d 318, 323 (3d Cir. 2004).

An alien bears the burden of demonstrating his eligibility for asylum. 8 U.S.C. 1158(b)(1)(B)(i); 8 C.F.R. 1208.13(a), 1240.8(d). Congress has directed that once an alien has established asylum eligibility, the decision whether to grant him asylum is left to the discretion of the Attorney General. 8 U.S.C. 1158(b)(1).

2. Petitioners Uwe and Hannelore Romeike and their five children are German citizens.[1] Pet. App. 20a-21a. They were admitted to the United States as nonimmigrant visitors under the Visa Waiver Program in August 2008 but failed to depart within 90 days, as required by law. 8 U.S.C. 1187(a).

a. In November 2008, petitioners filed an asylum application with the Department of Homeland Security's United States Citizenship and Immigration Services (USCIS). Administrative Record (A.R.) 463-487. USCIS did not grant relief and referred the matter to an immigration judge (IJ) pursuant to 8 C.F.R. 217.4(b)(1) and 208.2(c). A.R. 922-923.

In the removal proceedings before the IJ, Mr. Romeike contended that he had been persecuted in Germany and had a well-founded fear of future persecution should he be returned there. He explained that he and his wife wished to homeschool their children, but are forbidden to do so under a German law requiring all children to attend public or state-approved private schools. Pet. App. 3a, 21a. He explained their belief that German schools engendered a negative attitude toward family and parents and would tend to turn their children against Christian values. *Id.* at

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[1] Ms. Romeike and the five children are derivative beneficiaries of Mr. Romeike's asylum application. See 8 U.S.C. 1158(b)(3)(A); 8 C.F.R. 1208.21(a). Their claims wholly depend upon his, and references to his claim likewise refer to their derivative claims.

21a, 31a. More specifically, the Romeikes object to the teaching of evolution, the endorsement of abortion and homosexuality, the implied disrespect for parents and family values, the teaching of witchcraft and the occult, sex education, and the ridiculing of Christian values. *Id.* at 32a.

Mr. Romeike testified that the German authorities had already fined him and his wife for failing to comply with the law; that on one occasion, two of their children had been physically taken to the public school by police officers; and that he had been warned that future violations of the law could result in the loss of custody. Pet. App. 2a, 3a, 4a, 21a. He argued that Germany's enforcement of the law constitutes persecution on account of religion, political opinion, and membership in a particular social group, and that he and his family accordingly are refugees eligible for asylum in the United States under the INA, 8 U.S.C. 1101(a)(42)(A) and 1158(b)(1)(A). He did not, however, place either the text of the German law—or any of the history or proceedings surrounding its enactment—into the record.

The IJ concluded that Mr. Romeike and his wife were credible, and he granted the asylum application. Pet. App. 22a, 41a. The IJ found that they had not suffered past persecution and were therefore not entitled to a presumption of a well-founded fear of persecution in the future. *Id.* at 22a, 42a. The IJ also found that petitioners had not established a claim based on political opinion. *Id.* at 22a, 43a. But the IJ concluded that they had established a claim based on their religion and their membership in a particular social group, defined as "homeschoolers." *Id.* at 46a-47a. He concluded that Germany's enforcement of the

compulsory-school-attendance law involved "animus and vitriol" and reflected "not traditional German doctrine," but rather "Nazi doctrine" that is "utterly repellant to everything we believe in as Americans." *Id.* at 44a, 47a. Further, the IJ found that petitioners had a well-founded fear of persecution, based on the potential for increasing fines, loss of custody of their children, and jail time if they returned to Germany and continued to defy the compulsory-attendance law. *Id.* at 47a-48a.

b. The Board reversed the IJ's grant of asylum. It noted that the German government "has the authority to require school attendance and enforce that requirement with reasonable penalties," and that the law in question had been upheld by the European Court of Human Rights. Pet. App. 22a. The Board explained that the compulsory-attendance law was a law of general application, and that prosecution for violating the law could not be considered "persecution" under the INA unless it were selectively enforced—or used to inflict disproportionate punishment—on account of a protected ground, thereby revealing the prosecution to be a "pretext for persecution." *Ibid.* (citing cases).

The Board determined that there was insufficient record evidence by which to conclude that the law had been selectively or more harshly applied against homeschoolers as opposed to other violators, such as truants. Pet. App. 23a-25a. It also found that the record did not establish that the law disproportionately burdens religious minorities (or the Romeikes' practice of Christianity), and that there was no evidence that petitioners were targeted because of their political beliefs. *Id.* at 24a. The Board then rejected

petitioners' contention that the law's purpose is to suppress religious or philosophical views. In doing so, it cited a German court decision explaining that the law's purpose is to promote pluralism, tolerance, and integration by "counteracting the development of religiously or philosophically motivated 'parallel societies." *Id.* at 25a-26a (quoting *In re Konrad*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 29, 2003, 1 BvR 436/03 (Ger.)); see *id.* at 216a-217a. The Board also rejected as clearly erroneous the IJ's statements that "animus and vitriol" are responsible for enforcement of the law, or that the law itself was motivated by Nazi philosophy or religious bigotry. *Id.* at 26a. The Board explained that "[t]he record does not contain the text or legislative history of the compulsory school law at issue to support the inflammatory suggestion that it is a Nazi-era law." *Ibid.*

The Board concluded that petitioners had failed to show "that their religion, their religious-based desire to homeschool, or their status as homeschoolers is a central reason that the compulsory school attendance law was or will be enforced against them." Pet. App. 27a. It therefore found that they had not established a "well-founded fear of persecution" on account of a protected ground under 8 U.S.C. 1101(a)(42)(A) and were not eligible for asylum. Pet. App. 28a-29a.[2]

c. The court of appeals denied the Romeikes' petition for review of the removal order. The court

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[2] The Board also concluded that, in any event, "German homeschoolers" do not constitute a viable "particular social group" under the INA. Pet. App. 27a. This alternative and independent basis for denying petitioners' asylum claim is not before this Court, as the court of appeals had no need to address it. *Id.* at 7a.

acknowledged the general principle that, for purposes of the asylum statutes, "[t]here is a difference between the *persecution* of a discrete group and the *prosecution* of those who violate a generally applicable law." Pet. App. 3a (emphasis added). It concluded that the Board permissibly found that German authorities have not singled out petitioners in particular—or homeschoolers in general—for persecution. *Ibid.*

The court of appeals began by acknowledging that prosecution under a statute that explicitly targets citizens based on their religion or membership in a social group can constitute "persecution" under the INA. Pet. App. 5a. It then recognized that prosecution under a "neutral" and "generally applicable law" can also sometimes constitute "persecution," *id.* at 5a-6a, such as, "for example," when the foreign government selectively enforces the law or imposes harsher punishments "based on a protected ground." *Id.* at 6a. It also noted that if the foreign government "enact[s] a seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground," enforcement of that law could constitute "persecution." *Id.* at 6a-7a.

The court of appeals then held that petitioners had not established that the Board had erred in determining that they did not qualify for refugee status under these standards. Pet. App. 7a. In doing so, it applied the deferential standard of review set forth in the INA, under which the Board's "findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary" and the Board's decision that an alien is ineligible for asylum is "conclusive unless manifestly contrary to law." *Ibid.* (quoting 8 U.S.C. 1252(b)(4)(B) and (C)). The

court explained that the record did not establish that Germany's compulsory-attendance law was selectively applied to homeschoolers or that homeschoolers had been more severely punished than others who violated the law, and it concluded that the Board had permissibly found that Germany's enforcement of the law "reflect[s] appropriate administration of the law, not persecution." *Id.* at 10a (quoting Board); see generally *id.* at 7a-13a.

The court of appeals also upheld the Board's rejection of the IJ's determination that the compulsory-attendance law was motivated by "animus" and "vitriol." Pet. App. 12a. It highlighted the absence of proof that the law targeted "faith-based homeschoolers in general or the Romeikes in particular," noting that "the record does not include the language of the original law, the history that led to its adoption or any contemporary understanding of what motivated it." *Id.* at 12a-13a.

The court of appeals also addressed petitioners' argument that enforcement of Germany's compulsory-attendance law is inherently "persecution" under the INA because the law "violates their fundamental rights and various international standards." Pet. App. 13a. The court noted that "[t]he United States has not opened its doors to every victim of unfair treatment," emphasizing that "[a]sylum provides refuge to individuals persecuted *on account of* a protected ground" specifically set forth in 8 U.S.C. 1101(a)(42)(A). Pet. App. 13a. Thus even if the law violates human rights instruments, "that by itself does not require the granting of an American asylum application." *Id.* at 14a. It also addressed the court's prior decision granting asylum in *Perkovic* v. *INS*, 33 F.3d 615 (6th

Cir. 1994), explaining that the human rights violations at issue there were "neither a necessary nor a sufficient predicate to [the aliens'] status as refugees," and noting that "a petitioner cannot obtain asylum merely by proving a treaty violation." Pet. App. 14a.

Judge Rogers joined the court of appeals' opinion and also wrote a separate concurrence emphasizing that the court's role was *not* to determine whether Germany's law violated its treaty obligations to other nations, but rather to enforce United States statutes governing asylum claims. Pet. App. 16a-17a.

d. The court of appeals denied petitioners' petition for rehearing en banc. Pet. App. 52a-53a.

ARGUMENT

Petitioners urge (Pet. 13-24) this Court to grant review because the courts of appeals are allegedly split on the question whether a prosecution under a generally applicable law can constitute "persecution" under the INA if the law violates international human rights standards. Petitioners also contend (Pet. 24-39) that there is "substantial confusion" among the circuits concerning the need to establish the foreign government's motive when "refugee" status turns on the alien's claim that he will be prosecuted in his home country for violating a generally applicable law.

Petitioners are mistaken. The decision below is correct, and there is no conflict or confusion in the courts of appeals worthy of this Court's review. The courts below—including the Sixth Circuit—recognize that a finding of refugee status ultimately turns on whether the foreign government persecuted the alien "on account of [his or her] race, religion, nationality, membership in a particular social group, or political opinion," as required by 8 U.S.C. 1101(a)(42)(A).

Prosecution under a generally applicable law can sometimes (but will not necessarily) constitute persecution when enforcement of that law violates human rights treaties, and the foreign government's motive is always relevant to the Section 1101(a)(42)(A) analysis. In any event, the court of appeals' factbound application of these standards to the Board's decision here was correct, and petitioners' failure to introduce the text or history of Germany's compulsory-attendance law into the record makes this case a poor vehicle for review of the questions presented. The petition should be denied.

1. Petitioners argue that the courts of appeals are divided over whether prosecution under a generally applicable law "may constitute persecution when such a law violates human rights treaty obligations concerning a protected ground[.]" Pet. i, 13-24 (emphasis omitted). But there is no split of authority, and this case is a poor vehicle for review of that question.

a. The INA defines a "refugee" to include aliens who are unwilling or unable to return to their home countries "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." 8 U.S.C. 1101(a)(42)(A). By its terms, this definition does not condition refugee status on whether the alien is subject to a violation of international human rights treaties. Rather, the statutory condition is that the persecution be "on account of" one of the specified statutory grounds, *i.e.*, "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A); see also 8 U.S.C. 1158(b)(1)(B)(i) (requiring one of the

protected grounds to be "at least one central reason for persecuting the applicant").

This is not to say that a violation of international obligations cannot inform the determination whether an alien qualifies as a refugee. Nor is it to say that an alien subject to persecution in violation of international human rights treaties is categorically *in*eligible for refugee status. On the contrary, if the conduct involved rises to the level of persecution and occurs "on account of" one or more of the protected grounds set forth in the statute, such human rights violations *will* satisfy Section 1101(a)(42)(A). But the dispositive fact under the statute is not that the alien's home government has violated a human rights treaty, but rather that the government has acted in a way that constitutes persecution on a *statutorily* protected ground.[3]

The answer to the first question presented in the petition (Pet. i)—"[w]hether *prosecution* under a generally applicable law may constitute *persecution* when such a law violates human rights treaty obligations concerning a protected ground"—is therefore yes. Such a prosecution "may" trigger refugee status in circumstances where the prosecution creates objectively serious harm or suffering (thereby constituting "persecution") and is "on account of [the alien's] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). But a prosecution that violates a human rights treaty

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[3] Petitioners suggest (Pet. 23) that the proper inquiry is into whether the foreign government is enforcing a law that is "[il]-legitimate." But the INA does not authorize a free-form examination of legitimacy; rather, it requires courts to consider whether the prosecution is "on account of" the various protected grounds set forth in Section 1101(a)(42)(A).

will *not* trigger refugee status under the INA if it was *not* "on account of" a protected ground.

All of the decisions that petitioners cite in support of their alleged split are consistent with this analysis. In this case, for example, the Sixth Circuit did not deny that a treaty violation can give rise to "refugee" status in appropriate cases, as petitioners suggest (Pet. 21). Rather, the court explained that the fact of a human rights violation "*by itself* does not require the granting of an American asylum petition," noting also that "a petitioner cannot obtain asylum *merely* by proving a treaty violation." Pet. App 14a (emphasis added). In doing so, the court expressly recognized that some persons whose rights under a treaty were violated *do* qualify as refugees under the INA, while also observing that such violations are "neither a necessary nor a sufficient predicate to [aliens'] status as refugees." *Ibid.* (discussing *Perkovic* v. *INS*, 33 F.3d 615 (6th Cir. 1994)).[4]

The other decisions that petitioners cite (Pet. 21-23) are consistent with the Sixth Circuit's view that a treaty violation can trigger "refugee" status when it constitutes persecution "on account of" a protected

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[4] In *Perkovic*, the Sixth Circuit held that the aliens "[we]re 'refugees' within the meaning of 8 U.S.C. 1101(a)(42)" because they had demonstrated a well-founded fear that the Yugoslav government would persecute them "on account of . . . political opinion." 33 F.3d at 621-623. The court made clear that such persecution would violate various international treaties, but—as the Sixth Circuit pointed out in this case (Pet. App. 14a)—it did not treat such violation as either a necessary or sufficient condition for its Section 1101(a)(42)(A) determination. Nor did *Perkovic* suggest that a treaty violation could trigger refugee status in the absence of persecution "on account of" one of the protected grounds expressly set forth in the statute.

ground. In *Chang* v. *INS*, 119 F.3d 1055 (1997), for example, the Third Circuit concluded that a Chinese alien had established a well-founded fear of persecution "on account of * * * political opinion." *Id.* at 1057, 1059-1065. The court noted that "prosecution under some laws—such as those that do not conform with accepted human rights standards—*can* constitute persecution" under the INA. *Id.* at 1061 (emphasis added). It did not, however, hold that all violations of a human rights treaty would *necessarily* qualify as persecution. Indeed, the court's analysis did not focus on international law, but rather on whether the alien had shown that China would likely persecute him "on account of" his political views, as required by Section 1101(a)(42)(A). Nothing in *Chang* conflicts with the Sixth Circuit's analysis here.

The same is true of the Ninth Circuit's decision in *Chanco* v. *INS*, 82 F.3d 298 (1996). There, the court rejected an asylum claim brought by a Filipino citizen alleging that he would be prosecuted in the Philippines due to his political opinions. The court noted that it had previously held—in a case also involving alleged "persecution on account of political opinion"—that "prosecution for a crime *can* constitute persecution, when the underlying law being enforced is contrary to internationally accepted principles of human rights." *Id.* at 301 n.3 (emphasis added) (citing *Ramos-Vasquez* v. *INS*, 57 F.3d 857, 863 (9th Cir. 1995)). Here again, however, the court merely indicated that a violation of international human rights "can" constitute persecution in certain circumstances, not that it necessarily *would* qualify as such in all cases. And both *Chanco* and *Ramos-Vazquez* involved alleged human rights violations on account of political opinion,

which therefore fell within the express terms of Section 1101(a)(42)(A). Neither decision stated or implied that a human rights violation would qualify as "persecution" even if the violation did not implicate any of the protected grounds set forth in the INA.

Petitioner also cites (Pet. 22-23) the Tenth Circuit's decision in *Sadeghi* v. *INS*, 40 F.3d 1139 (1994). But the court's decision in that case made no mention of any treaty violation, and it is not clear from the opinion whether the alien even sought relief based on such a violation. Although the dissenting opinion declared that Iran was likely to persecute the alien in violation of the Convention on the Rights of the Child and customary international law, *id.* at 1145-1147 (Kane, J.), that statement is plainly insufficient to create a circuit split or require this Court's attention in this case.

In short, there is no conflict among the courts of appeals on petitioners' first question presented. Nothing in the INA prevents an alien from invoking an alleged human rights violation to establish his refugee status, so long as the violation constitutes persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion," as required by Section 1101(a)(42)(A).

b. Even if this Court were interested in examining the interplay between international human rights treaties and the INA's definition of "refugee," this case would be a poor vehicle for doing so. Petitioners' theory would require them to establish that Germany's compulsory-attendance law violates provisions of international human rights treaties. But as the court of appeals observed, "the record does not include the language of the original law, the history that led to its adoption or any contemporary understanding of what

motivated it." Pet. App. 12a; see also *id.* at 21a, 26a (noting that "[t]he record does not contain the text or legislative history of the compulsory school law at issue").

Without the relevant text or history of the German law at issue, it is hard to see how this Court (or the Board) could properly determine whether petitioners are correct in claiming (Pet. 14-19) that the law is inconsistent with the Universal Declaration of Human Rights, or violates the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Petitioners had the burden of proving the facts necessary to establish their status as refugees, 8 U.S.C. 1158(b)(1)(B)(i), and the content of foreign law is a question of fact in immigration proceedings, see, *e.g.*, *Abdille* v. *Ashcroft*, 242 F.3d 477, 489 n.10 (3d Cir. 2001) (citing cases); *In re A-G-G-*, 25 I. & N. Dec. 486, 505 n.19 (B.I.A. 2011). Petitioners' failure to introduce the facts relevant to their claim that the law violates international treaties makes this case an inappropriate vehicle for review.

The nature of the particular international instruments on which petitioners rely also weighs against further discretionary review. The Declaration of Human Rights "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004). The ICCPR was ratified by the United States "on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts." *Id.* at 735. And the United States is not a party to the ICESCR. Notably, moreover, the European Court of Human Rights has upheld the

German compulsory-attendance law against allegations that it violates the European Convention on Human Rights and its Protocol No. 1, *Konrad* v. *Germany*, 13 Eur. Ct. H.R. 355, 363-368 (2006), and Germany's Federal Constitutional Court has upheld the law against a human rights challenge based on Germany's Basic Law, *In re Konrad*, *supra*; see Pet. App. 212a-219a.

2. Petitioners also argue (Pet. 25-26) that certiorari is warranted because there is "substantial confusion" among the courts of appeals as to whether an alien may establish "persecution" for INA purposes by showing that a foreign government acted with an "illegitimate motive" in prosecuting him under a generally applicable law. But there is no such confusion, and the factbound determination that petitioners have not established that Germany had an improper motive in enforcing the compulsory-attendance law here is unworthy of further review.

a. As petitioners correctly observe, "'prosecution' may amount to 'persecution' [under the INA] if an *illegitimate motive* is one central reason for the * * * prosecution." Pet. 25-26 (emphasis added). The improper-motive requirement stems from the plain text of Section 1101(a)(42)(A), which requires that any persecution be "on account of" the alien's "race, religion, nationality, membership in a particular social group, or political opinion." See also 8 U.S.C. 1158(b)(1)(B)(i). This Court has made clear that, in this context, "on account of" means "because of," and requires the alien to provide either direct or circumstantial proof "of his persecutors' motives." *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992).

Petitioners argue that the courts of appeals use different standards when applying the "motive" requirement to asylum claims involving prosecution under a generally applicable law. In particular, they assert that (1) the First, Third, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits treat "evidence of motive" as "critical to whether 'prosecution' amounts to 'persecution'"; (2) the Second Circuit requires a showing that a prosecution under a generally applicable law is "pretextual"; (3) the Seventh Circuit requires proof of "nefarious purpose"; and (4) the Sixth Circuit requires either selective prosecution, unequal punishment, or prosecution under a "seemingly neutral law that no one would feel compelled to break except on the basis of a protected ground." Pet. 28-34. They further assert (Pet. 26) that the approaches taken by the Second, Seventh, and Sixth Circuits "reject" this Court's analysis of the motive requirement in *Elias-Zacarias*.

Petitioners are wrong to suggest that the courts of appeals apply meaningfully different standards when assessing motive in the context of prosecutions under generally applicable laws. All of the approaches described above focus on whether the foreign government's motive for the prosecution is legitimate or impermissibly discriminatory because it is "on account of" one or more of the protected grounds set forth in Section 1101(a)(42)(A). The fact that the courts have occasionally used different words to describe this inquiry is not evidence of confusion, and it provides no basis for further review.

Petitioners' assertion (Pet. 26) that the Second, Seventh, and Sixth Circuits "reject" the motive inquiry set forth in *Elias-Zacarias* is equally without

merit. The only Second Circuit case petitioners rely upon is *Jin Jin Long* v. *Holder*, 620 F.3d 162 (2010). There, the court explained that to qualify for asylum, the alien "must demonstrate that his persecutors acted or will act in sufficient part because of his political opinion (either real or imputed), and not from some other impetus." *Id.* at 166 (citing *Elias-Zacarias*, 502 U.S. at 482-483). The court then applied this motive requirement to the alien's claim based on his prosecution under a generally applicable law. In doing so, the court cited circuit precedent requiring that an alien show "'that the persecutor's motive to persecute arises from the [alien]'s political belief,'" and it observed that "prosecution that is pretext for political persecution" would reflect an impermissible motive because the prosecution "is not on account of law enforcement." *Ibid.* (citing *Zhang* v. *Gonzales*, 426 F.3d 540, 545 (2d Cir. 2005)). The Second Circuit's explanation of the test does not depart from this Court's guidance or the approach taken by other circuits.[5]

Petitioners commit the same error with respect to the Seventh Circuit. That court has said that prosecution under a generally applicable law can constitute

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[5] To the extent petitioners claim (Pet. 31) that the Second Circuit's test ignores 8 U.S.C. 1158(b)(1)(B)(i), which states that the impermissible motive must merely be "at least one central reason for persecuting the applicant," they are incorrect. Although the Second Circuit's *Long* decision did not cite Section 1158(b)(1)(B)(i), the court's decisions make clear that it is fully aware of—and regularly applies—the INA's "one central reason" standard, including in cases involving prosecution under generally applicable laws. See, *e.g.*, *Gashi* v. *Holder*, 702 F.3d 130, 135 (2d Cir. 2012); *Varga* v. *Holder*, 366 Fed. Appx. 179, 180-181 (2d Cir. 2010); *Dan Ling Jiang* v. *Mukasey*, 297 Fed. Appx. 40, 41-42 (2d Cir. 2008).

"persecution" if the prosecution is for a "nefarious purpose," *Sharif* v. *INS*, 87 F.3d 932, 935 (1996), but this phrase is merely a shorthand reference to the various improper motivations covered by Section 1101(a)(42)(A). Petitioners claim (Pet. 30-31) that the Seventh Circuit "has not given meaningful guidance on what showing is required to prove a 'nefarious purpose,'" but *Sharif* itself emphasized that to qualify for refugee status, an alien must establish that "the persecution in question stems from one of five enumerated motives" set forth in Section 1101(a)(42)(A). 87 F.3d at 935; see also *Tuhin* v. *Ashcroft*, 60 Fed. Appx. 615, 619 (7th Cir. 2003) ("A facially legitimate prosecution may amount to persecution if the prosecution was motivated by a 'nefarious purpose,' *i.e.*, to punish political opinion.").

Nor is there any reason to conclude—as petitioners do (Pet. 33)—that the Sixth Circuit has "forgotten" the holding of *Elias-Zacarias*, *i.e.*, that "the INA 'makes motive critical' to the question of persecution." On the contrary, the decision below is explicit that prosecution under a generally applicable law can constitute persecution when the prosecution is motivated by discrimination based on the factors enumerated in Section 1101(a)(42)(A). Pet. App. 6a (requiring proof that the prosecution was based on a "protected ground"); *id.* at 13a (emphasizing need to prove persecution "*on account of* a protected ground"); *id.* at 15a (same); *id.* at 16a (similar). And while the court of appeals gave three examples of how a foreign government could use a generally applicable law to persecute its citizens based on the Section 1101(a)(42)(A) factors—by selective prosecution, disproportionate punishment, or enforcement of a "seemingly neutral

law that no one would feel compelled to break except on the basis of a protected ground"—the court did not say these were the *only* ways such persecution could take place. *Id.* at 6a-7a. Petitioners' assertion (Pet. 32, 34) that these three examples are "exclusive" or set forth a "comprehensive standard" for finding persecution in these circumstances is unfounded.

b. Petitioners also argue (Pet. 33-39) that the Sixth Circuit ignored direct evidence of Germany's improper motive in enforcing the compulsory-attendance law, and that their case would have been decided differently in other circuits. But the whole premise of this argument is their assertion that Germany's enforcement of the law against homeschooling families "is born from a desire to suppress religious minorities." Pet. 33; see also Pet. 34-35, 36, 39, 40 (making similar claims). Petitioners offer no reason why this Court should review the court of appeals' highly factbound determination that substantial evidence supported the Board's finding that the compulsory-attendance law was not motivated by a desire to oppress homeschoolers or religious minorities.

In any event, the Sixth Circuit's analysis of the Board's factual determinations was plainly correct. The Board determined that the record did not show that the law was improperly motivated or that petitioners' "status as homeschoolers" or "religious-based desire to homeschool" was "a central reason" that the law would be enforced against them. Pet. App. 27a (citing 8 U.S.C. 1158(b)(1)(B)(i)). The Board emphasized petitioners' failure to introduce the law itself or its relevant legislative history into the record; it cited the holding of Germany's Federal Constitutional Court that the law was motivated by a desire to pro-

mote pluralism, tolerance, and integration; and it emphasized that petitioners "are free to practice their religion and provide their children any religious or educational instruction they choose," so long as they do not do so "to the exclusion of school attendance." *Id.* at 26a.

The court of appeals reviewed this analysis and concluded that petitioners had not shown that the Board's findings should be overturned under the deferential standard of review set forth in 8 U.S.C. 1252(b)(4)(B). Pet. App. 7a (noting that Board findings of fact "are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary"). In doing so, the court carefully examined the testimonial evidence and highlighted petitioners' failure to include the "language of the law," the "history that led to its adoption," or "any contemporary understanding of what motivated it" in the record. *Id.* at 7a-13a.

Petitioners nowhere mention the deference due to the Board under Section 1252(b)(4)(B). Instead they simply assert that there was clear evidence of improper motivation. They rely almost exclusively on the German Federal Constitutional Court's statement that the compulsory-attendance law is intended in part to counter the formation of "religiously or philosophically motivated 'parallel societies.'" Pet. 35; see also Pet. 5, 17-18, 19, 33, 36, 39, 40. As the Board explained, however, petitioners ignore the context in which this statement arose. Pet. App. 25a-26a. Far from declaring that the law had a discriminatory purpose, the German court was in fact explaining that

that the law's true goal was to promote socialization, pluralism, tolerance, and democracy. *Ibid.*[6]

In these circumstances, a "reasonable adjudicator" could readily conclude—as the Board did here—that the court's statement "do[es] not reflect a governmental objective to restrict or suppress religious or philosophical practice." Pet. App. 26a; 8 U.S.C. 1252(b)(4)(B). Moreover, petitioners' failure to include the relevant text or history of the compulsory attendance law in the record makes this case an especially poor vehicle for review of this determination. Without such evidence, there is no reliable basis for second-guessing the Board's conclusion that the law is not based on one of the improper motives set forth in Section 1101(a)(42)(A).

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[6] The relevant portion of *In re Konrad*, *supra*, the German court decision that petitioners assert reveals the impermissible motive, reads as follows:

> 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 practicing 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 the democratic decision-making process.

Pet. App. 216a-217a.

c. Finally, petitioners' suggestion (Pet. 37-39) that the decision below is inconsistent with *Menghesha* v. *Gonzales*, 450 F.3d 142 (4th Cir. 2006), and *Shu Han Liu* v. *Holder*, 718 F.3d 706 (7th Cir. 2013), is incorrect. In *Menghesha*, the Fourth Circuit remanded the case after concluding that the IJ "did not consider the uncontested evidence" that the Ethiopian government was prosecuting the alien out of a "political motive." 450 F.3d at 148. In *Shu Han Liu*, the Seventh Circuit remanded the case because the Board had unaccountably "ignored" significant evidence that the Chinese government had stepped up its persecution of Christians after 2002. 718 F.3d at 709-713.

Here, by contrast, the Board fully considered petitioners' evidence of improper motive and concluded that it was insufficient to establish persecution under Section 1101(a)(42)(A). Pet. App. 7a-16a; 23a-27a. The Sixth Circuit's factbound decision upholding that determination does not conflict with *Menghesha* or *Shu Han Liu*, and there is no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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