

No. 07-60712

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

**ALEXEY KORNEENKOV and
OLESYA KORNEENKOV,**

Petitioners

V.

**MICHAEL B. MUKASEY,
U.S. Attorney General,**

Respondent

APPEAL FROM THE
BOARD OF IMMIGRATION APPEALS
NOS. A99 635 784 and A99 635 785

**AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS AND URGING
REVERSAL, ON BEHALF OF THE ARC OF THE UNITED STATES, THE
NATIONAL DISABILITY RIGHTS NETWORK, ADVOCACY, INC., THE
ADVOCACY CENTER, THE MISSISSIPPI PROTECTION AND
ADVOCACY SYSTEM, INC., THE BURTON BLATT INSTITUTE AT
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(1) No. 07-60712; *Alexey Korneenkov and Olesya Korneenkov v. Michael B. Mukasey*.

(2) The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. **Amici curiae in support of Petitioners:** The Arc of the United States; the National Disability Rights Network; Advocacy, Inc.; The Advocacy Center; The Mississippi Protection and Advocacy System, Inc.; The Burton Blatt Institute at Syracuse University; and The Disability Law Clinic at Indiana University and its Director, Prof. Carwina Weng.
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INTEREST OF THE AMICI CURIAE

This case involves the extent to which this country's asylum laws protect persons with disabilities. Amici include national organizations, and statewide organizations in this Circuit, that advocate on behalf of people with disabilities. Many of the members and clients of these organizations are people with intellectual disabilities and their families. Amici have a strong interest in making sure that courts and public policymakers are familiar with the history of discrimination against people with such disabilities, in order to end such discrimination and ensure that people with intellectual disabilities receive appropriate treatment under law. Amici are concerned about the implications that this Court's decision will have on asylum applications by person with disabilities generally, and with intellectual disabilities in particular. (A description of each of the amici appears in the Appendix.)

SUMMARY OF THE ARGUMENT

In order to qualify for asylum, the Petitioners must show that they are in a protected class, and that they have a well-founded fear of persecution. Amici write to address the first issue only, that Petitioners are both members of a “particular social group,” namely Russians with intellectual disabilities.¹

Intellectual disabilities are immutable characteristics, as the Supreme Court and numerous other authorities recognize. The evidence is overwhelming that Petitioners have such disabilities. These facts alone satisfy this Court’s test for membership in a particular social group, but there are additional facts that support such a finding in this case. People with intellectual disabilities are also members of a particular social group because virtually all societies, including both Russian and American, treat them in the same way. This shared history includes abuse, segregation, and broad deprivation of civil rights, and this is certainly the experience of persons with intellectual disabilities in Russia. It is also the Petitioners’ own experience, and in many ways parallels the legal definition of persecution.

¹ Except when quoting from statutes, cases, or other sources, this brief uses the term “intellectual disability” to refer to the condition sometimes known as mental retardation, in recognition of the fact that the new terminology is less stigmatizing and more accurate. This change has also been made by the President’s Committee on Intellectual Disability (formerly the President’s Committee on Mental Retardation, renamed by President Bush in Executive Order 13309 (July 25, 2003)), the International Association for the Study of Intellectual Disability, and the American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation (AAMR)).

ARGUMENT

Petitioners’ Intellectual Disabilities Satisfy the Definition of “Particular Social Group”

I. Definition of “Particular Social Group”—Immutable Characteristics

To establish membership in a “particular social group,” an applicant must show that he or she was a member of a group of persons that share a common immutable characteristic that they either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. *Mwembie v. Gonzales*, 443 F.3d 405, 414–415 (5th Cir. 2006). Petitioners satisfy that test.

II. Persons with Intellectual Disabilities Share Immutable Characteristics

Courts in a variety of contexts expressly recognize the immutability of disability, particularly mental and intellectual disabilities. For example, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985), the Supreme Court observed that persons “who are mentally retarded have a reduced ability to cope with and function in the everyday world . . . They are thus different, immutably so . . .”

Likewise in *Lake v. Arnold*, 112 F.3d 682 (3d Cir. 1997), the court observed that “[d]iscrimination based on handicap, including mental handicap, like that based on gender, often rests on immutable characteristics,” *id.* at 687, for which the “person bears no responsibility.” *Id.* at 688. *See also Farber v. City of Paterson*,

440 F.3d 131, 137 (3d Cir. 2006) (“Simply put, some groups, particularly those deemed to be distinguishable from others by immutable characteristics, such as African-Americans, women, and the mentally retarded, are so clearly accepted as objectively identifiable that no extended analysis is needed.”); *Todd Pacific Shipyards Corp. v. Director, Office of Workers’ Compensation Programs*, 913 F.2d 1426, 1433 (9th Cir. 1990) (doctor’s assessment that person was “borderline retarded” and “could not be taught how to take a particular test” supported the conclusion that the person “was suffering from immutable mental limitations.”); *Tyus v. Ohio Dept. of Youth Services*, 606 F. Supp. 239, 246–247 (D.C. Ohio 1985) (“handicapped individuals constitute a class . . . [that has] traditionally been victimized by disabling laws, and even more so by the physical and attitudinal barriers that have pervaded our society. They share an immutable characteristic which has carried a stigma of inferiority . . .”).

Congress, too, has recognized that the “history of purposeful unequal treatment . . . [and] powerlessness” of person with disabilities is “*based on characteristics that are beyond the control of such individuals* and result[] from stereotypic assumptions.” 42 U.S.C. § 12101(a)(7) (ADA) (emphasis added).²

² As logic dictates, and as expressly reflected in *Lake* and *Farber* above, intellectual disabilities are immutable in the same way that race and gender are. Compare *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (describing sex and race as “immutable characteristic[s] determined solely by the accident of birth”); *Matter of Acosta*, 19 I & N Dec. 211, 233 (BIA 1985) (immutable shared characteristics include innate ones like race or sex).

One circuit has already held that children with disabilities in Russia are members of a particular social group. *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1188–1189 (9th Cir. 2005), *vacated and remanded on other grounds*, 127 S. Ct. 57 (2006) (“persons with disabilities are precisely the kind of individuals that our asylum law contemplates by the words ‘members of a particular social group.’”).³ But whether or not *every* disability, singly or collectively, satisfies the “immutable characteristic” test,⁴ intellectual disability certainly does.⁵ “Mental retardation is a permanent, relatively static condition.” *Heller v. Doe*, 509 U.S. 312, 323 (1993).

³ The Court indicated that its holding was also consistent with the position of the I.N.S. in that case. *Id.* at 1190. Amici also note that the B.I.A. has in the past recognized a child with autism as a member of a particular social group. Laura E. Hortas, *Asylum Protection for the Mentally Disabled: How the Evolution of Rights for the Mentally Ill in the United States Created a “Social Group”*, 20 Conn. J. Int’l L. 155, 155 (Fall 2004) (hereafter “*Asylum Protection*”).

⁴ Although one court has held that persons with mental illness are not a particular social group, *Raffington v. I.N.S.*, 340 F.3d 720, 723 (8th Cir. 2003), that case is distinguishable for three reasons. First, it was decided under a different standard from that followed by the I.N.S. and this Court. *See Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006) (discussing the fact that the 8th Circuit is one of two to follow a different analysis). Second, mental illness is a generic term for a variety of very different, yet largely treatable, diagnoses and conditions; in contrast, intellectual disability is a single, immutable condition (albeit of varying severity). Third, there was no evidence cited in *Raffington* supporting a contrary position.

Of course, it is not the size of the group that is the determining factor. In *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007), the court held that half the population (female Somalis) were a particular social group (based on widespread female genital mutilation in that country). In contrast, it is estimated that only one to three percent of the population have an intellectual disability. *See Introduction to Mental Retardation*, p. 2 (The Arc Oct. 2004), available at <http://www.thearc.org/NetCommunity/Document.Doc?&id=143> (last visited Feb. 18, 2008). *See also* Megan A. Murphy, *Give Me Your Tired, Your Poor, Your Disabled?: Why the Disabled Should Qualify for Asylum Under the Immigration and Nationality Act*, 70 Geo. Wash. L. Rev. 854, 861–862 (2002).

⁵ Petitioner Olesya Korneenkov also has cerebral palsy, Record at 225 and 419, a condition shared by the Petitioner in the *Tchoukhrova* case.

It is also uniquely defining because few characteristics are so fundamental to one's lifetime experiences—the condition affects virtually everything, including thought.⁶

III. Petitioners Have Such Immutable Intellectual Disabilities

According to the highly qualified⁷ expert testimony in this case, both Petitioners have “Mild Mental Retardation.” Record at 424. The other evidence in the case—including their IQ scores,⁸ age of onset,⁹ and adaptive delays¹⁰—is fully consistent with this testimony.

IV. Persons with Intellectual Disabilities Have Always been Treated as a Particular Social Group

As shown above, Petitioners' intellectual disabilities are immutable characteristics in both the biological and legal sense. But persons with such

⁶ Arlene Kanter & Kristin Dadey, *The Right to Asylum for People with Disabilities*, 73 Temp. L. Rev. 1117, 1153 (Winter 2000) (hereafter “*Right to Asylum*”).

⁷ See Record, 409–414.

⁸ Both Petitioners have WAIS III “Performance IQ” scores of 57, and none of their scores exceed 60. Record at 421–422. That is consistent with the “MR” diagnosis under the DSM-IV-TR at p. 49 (American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000)); under Social Security law, 20 C.F.R. pt. 404, subpt. P, App. 1 (pt. B), § 12.05 (“verbal, performance, or full scale IQ of 59 or less” is a ‘listed impairment’); and under Supreme Court authority, *Atkins v. Virginia*, 536 U.S. 304, 309 n.5 (2002) (“an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.”); *Id.* at 308 n.3; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 n.9 (1985) (mild mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70).

⁹ See, e.g., Record at 418–420.

¹⁰ See, e.g., Record at 418–425.

cognitive and developmental disabilities are also members of a “particular social group” because they share a common experience—as targets of discrimination and persecution, in this country, in Russia, and around the world.¹¹ Dr. Burton Blatt, a pioneer in the exposure of human abuses, concluded that persons with intellectual disabilities are the “the abused of the abused, the least able to advocate for themselves and the most in need of advocates.”¹²

A. History of Mistreatment in the United States¹³

In enacting the Americans with Disabilities Act in 1990, Congress found that:

individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

¹¹ Amici do not argue that the particular social group was *created* by the alleged underlying persecution, but rather that the historical treatment reflects the common and immutable characteristics shared by persons with intellectual disabilities. Moreover, the shared experience of enduring past persecution supports defining persons with intellectual disabilities as a “particular social group” for purposes of fear of future persecution. *Compare Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003).

¹² Peter Blanck, *The Burton Blatt Institute: Centers of Innovation on Disability at Syracuse University*, 56 *Syr. L. Rev.* 223 (2006) (quoting Burton Blatt, *Exodus From Pandemonium: Human Abuse and a Reformation of Public Policy* at xv–xvi (Allyn & Bacon, Inc., 1970)).

¹³ The historical record of treatment in the United States in many ways rises to the level of persecution, but it is described here not because it proves the persecution Petitioners experienced in Russia, but because it informs the Congressional understanding of this distinct social group.

42 U.S.C. § 12101(a)(7). Congress also found that “despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. § 12101(a)(2). *See also Tennessee v. Lane*, 541 U.S. 509, 526 (2004). The “record assembled by Congress includes many instances to support such a finding,” *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 369 (2001), including “hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions,” most concerning “discrimination in the administration of public programs and services.” *Tennessee v. Lane*, 541 U.S. 509, 526 (2004).

“There can be little doubt, then, that persons with mental or physical impairments are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.” *Garrett, supra*, 531 U.S. at 375 (Kennedy, J., concurring). People with disabilities have traditionally suffered from a “badge of inferiority emplaced by a society that often shuns their presence.” *Lake v. Arnold*, 112 F.3d 682, 688 (3d Cir. 1997). *See also* Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 Va. L. Rev. 397 (April 2000) (arguing that “[t]hrough prejudice, stereotypes, and widespread neglect, society’s attitudes and practices attach systematic disadvantage to particular impairments,” creating an identifiable, subordinated class of “people with disabilities.”).

“[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring), citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 461–464 (1985) (Marshall, J., concurring in part and dissenting in part). “History is replete with misunderstanding and mistreatment of the retarded.” *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 108 n.16 (1984), citing *inter alia* President Kennedy’s statement that “[w]e as a Nation have long neglected the mentally ill and the mentally retarded.”¹⁴

Justice Marshall’s opinion in *Cleburne* contains perhaps the most striking description of the historical mistreatment of person with intellectual disabilities in this country:

[T]he mentally retarded have been subject to a “lengthy and tragic history . . . of segregation and discrimination that can only be called grotesque.

[In the late 19th century,] leading medical authorities and others began to portray the “feeble-minded” as a “menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems.” A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and “nearly extinguish their race.” Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on

¹⁴ See also Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 Cal. L. Rev. 1415, 1420–1422 (Dec. 1995); *Asylum Protection*, *supra*, 20 Conn. J. Int’l L. at 157 *et seq.*

the purported need to protect nonretarded children from them. State laws deemed the retarded “unfit for citizenship.”

Segregation was accompanied by eugenic marriage and sterilization laws that extinguished for the retarded one of the “basic civil rights of man”—the right to marry and procreate. . . .

Prejudice, once let loose, is not easily cabined . . . [and the] lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them.

Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461–464 (1985) (Marshall, J., concurring in part and dissenting in part) (footnotes omitted).

Nearly 20 years after *Cleburne*, in *Tennessee v. Lane*, 541 U.S. 509 (2004), the Supreme Court again recognized that many states still categorically disqualified persons with intellectual disabilities—historically referred to in the law by such pejorative terms as “idiots” and “imbeciles”¹⁵—from voting, marriage, attending public schools, and living in the community, and states have also unconstitutionally institutionalized them for life, often in abusive facilities. *Id.* at 524–525.¹⁶ Prisoners with developmental disabilities are also subject to longer terms of imprisonment than other prisoners. *United States v. Georgia*, 546 U.S. 151, 161 (2006) (Stevens, J., concurring). Over 70,000 persons with mental and

¹⁵ See, e.g., *Cleburne Living Ctr., Inc. v. City of Cleburne, Texas*, 726 F.2d 191, 199 (5th Cir. 1984), *vacated in part on other grounds*, 473 U.S. 432 (1985).

¹⁶ See also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (holding that unjustified institutionalization of persons who are “mentally retarded” is discrimination that may violate the ADA).

intellectual disabilities have been involuntarily sterilized by the States,¹⁷ a practice endorsed by the Supreme Court in *Buck v. Bell*, 274 U.S. 200, 205 (1927). States have also permitted the termination of parental rights based on intellectual disability.¹⁸

Congress has recognized that persons with disabilities share a common history of mistreatment, and in addition to the ADA, it has passed laws to combat that history of discrimination in housing,¹⁹ education,²⁰ and travel.²¹ It is inconsistent to argue that Congress recognizes the “plight of the mentally disabled” as a group, and yet rejects their group status for asylum purposes. *Asylum Protection, supra*, 20 Conn. J. Int’l L. at 183.

¹⁷ Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 Cal. L. Rev. 1415, 1425 and n.43 (Dec. 1995) (hereafter “*Parental Rights*”).

¹⁸ Some laws permitted terminations based simply on the diagnosis. *See, e.g., Helvey v. Rednour*, 408 N.E.2d 17 (Ill. App. Ct. 1980). Others include “mental deficiency” or “developmental disability” as potential grounds for termination of parental rights, *Parental Rights, supra*, 83 Cal. L. Rev. at 1434–1435, and termination decisions are often based more on label than ability. Robert L. Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 Harv. L. Rev. 1201, 1235, 1237–1241 (April 1990).

¹⁹ *See Groome Resources Ltd., L.L.C. v. Parish of Jefferson*, 234 F.3d 192, 200–201 (5th Cir. 2000) (Fair Housing Amendments Act of 1988 was designed to respond to a recognized prejudice against . . . “[p]eople with mental retardation [who] have been excluded because of stereotypes about their capacity to live safely and independently.”).

²⁰ *See Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 129 n.4 (5th Cir. 1993) (“to redress a long history of discrimination by public schools against disabled children”).

²¹ *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 570 (8th Cir. 1989).

B. Shared History of Mistreatment Around the World

Around the world people with disabilities have struggled with prejudice and discrimination in many forms, from deprivation of basic material needs, to denial of education, to physical abuse.²²

The United Nations has documented this history of mistreatment,²³ and many of its international human rights treaties were adopted in significant part to protect social groups from human rights violations based on their immutable characteristics.²⁴ Most recently, the UN General Assembly adopted the Convention on the Rights of Persons with Disabilities,²⁵ which recognizes that “persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world.”²⁶

²² See, e.g., UN Enable, “Some Facts about Persons with Disabilities,” (2006), <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf> (last visited February 18, 2008); Megan A. Murphy, *Give Me Your Tired, Your Poor, Your Disabled?: Why the Disabled Should Qualify for Asylum Under the Immigration and Nationality Act*, 70 Geo. Wash. L. Rev. 854, 860–863 (Aug. 2002); *Right to Asylum*, *supra*, 73 Temp. L. Rev. at 1150–1152, 1154 (citing research on the appalling treatment of persons with disabilities, including in Russia); *Asylum Protection*, *supra*, 20 Conn. J. Int’l L. at 180–182.

²³ See, e.g., Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 Syracuse J. Int’l L. and Com. 241, 243 (2003); *Right to Asylum*, *supra*, 73 Temp. L. Rev. at 1118, 1133, 1137–1139.

²⁴ See *Right to Asylum*, *supra*, 73 Temp. L. Rev. at 1151–1152.

²⁵ G.A. Res. 61/106, 76th plen. mtg., U.N. Doc A/RES/61/106 (Dec. 13, 2006).

²⁶ Preamble, (k), http://untreaty.un.org/English/notpubl/IV_15_english.pdf (last visited Feb. 18, 2008).

Amici do not argue that the United States is bound by the UN Convention, its antecedents, or international decisional law.²⁷ Rather, these instruments and decisions are a manifestation of the international community's recognition of the continuing discrimination and mistreatment faced by people with disabilities, and particularly those with intellectual disabilities, and of the efforts to redress that discrimination and mistreatment.

C. History of Similar Mistreatment in Russia

Russians with intellectual disabilities historically, and presently, comprise an identifiable social group—one that shares the common experiences of mistreatment and exclusion in education, health care, employment, and society in general—based upon immutable characteristics of cognitive and adaptive skill impairments that are beyond their control. This mistreatment results from misconceptions and stereotypic assumptions that are not truly indicative of an individual's ability to participate in, and contribute to society, and there is no effective legal recourse to redress these wrongs.

²⁷ Although not required in this case, the authors note that consideration of international law makes sense in asylum cases, in which country-of-origin and other international attitudes and treatment of persons with disabilities help inform decisionmaking. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987). Moreover, American courts increasingly recognize the relevance of customary international law in reviewing domestic claims. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 578 (2005), and *Atkins v. Virginia*, 536 U.S. 302, 316 n.21 (2002). *See also Right to Asylum, supra*, 73 Temp. L. Rev. at 1141–1143.

1. In the Former Soviet Union

The social group of people with intellectual disabilities in the former Soviet Union shared a common history of outright intentional exclusion, purposeful unequal treatment, relegation to lesser services and opportunities, and political powerlessness.

- a. Outright intentional exclusion

The Soviet government emphasized “the norm of strength,” often through artwork that “portrayed the Soviet man and woman as vibrantly strong and sturdy.” Erin Martz, *Rehabilitation in Russia*, 48 Rehab. Counseling Bull. 118, 120 (2005). Soviet Marxists in the scientific community frequently studied Eugenics. Alberto Spektorowski, *The Eugenic Temptation in Socialism: Sweden, Germany, and the Soviet Union*, 46 Comp. Stud. Soc’y & Hist. 84, 102 (2004). The Eugenics movement viewed the ‘weak’ as having no place in society, and believed procreation should be regulated to develop “genetically superior groups” and to discourage “defectives” from replicating their deficiencies. *Id.* at 84. The Russian Eugenics Society was established in 1920 amid Bolshevik support for sterilization of ‘undesirables.’ Walter Gratzer, THE UNDERGROWTH OF SCIENCE: DELUSION, SELF-DECEPTION, AND HUMAN FRAILTY 297 (2001).

Related to this movement, in 1929 Soviet scientists established the Institute of Defectology and Medical Psychology in Moscow. Mental Disability Rights

Int'l, CHILDREN IN RUSSIA'S INSTITUTIONS: HUMAN RIGHTS AND OPPORTUNITIES FOR REFORM 10 (1999). The Institute articulated the policy of the U.S.S.R. from 1930 to 1990, that people with severe disabilities simply did not exist in Soviet society: "By maintaining children with disabilities in separate, segregated facilities, Soviet society was able to exist as if there were no people with disabilities. People with disabilities were invisible." *Id.*; Barbara H. Vann & Jan Siska, *From 'Cage Beds' to Inclusion: The Long Road for Individuals with Intellectual Disability in the Czech Republic*, 21 *Disability & Society* 425, 426 (2006).

b. Purposeful unequal treatment and relegation to lesser services and opportunities

In 1929, the Soviet government issued a Directive mandating early detection of children with intellectual disabilities. U.V. Ul'Enkova & L.A. Metieva, *The Assignment of Children to First-Grade Enrollment in Schools of Type VIII*, 45 *Russian Educ. & Soc'y* 49, 49 (2003). The Directive declared that "[m]ildly retarded and feeble-minded children should be selected for assignment to auxiliary schools for upbringing and instruction." *Id.* at 49.

Carrying out this Directive, the Russian medical and educational establishments implemented practices to identify children at birth (or shortly afterward) whose likely intellectual disabilities made them "uneducable," and to pressure families into giving their child up to the state (creating generations of

social orphans). Elena Iarskaia-Smirnova, “*What the Future Will Bring I Do Not Know*”: *Mothering Children with Disabilities in Russia and the Politics of Exclusion*, 20 *Frontiers: J. of Women Stud.* 68, 69, 72–73 (1999); Mental Disability Rights Int’l, *supra*, at 11, 20. In addition, they sought to identify children with intellectual disabilities in early childhood who failed to meet Soviet developmental milestones, and removed them from the classroom, placing them in special institutions called “Internats.” Mental Disability Rights Int’l, *supra*, at 15–16. Children placed in the Internat typically lived for extended periods of time without family contact, and were only minimally engaged in daily living skill tasks. *Id.* at 12. Effectively, Internats performed a warehousing function for Soviet society whereby children with severe disabilities were purposely and easily kept out of sight. *Id.* at 10. *See also Tchoukhrova, supra*, 404 F.3d at 1186–1187, 1193 (describing the function and inhumane conditions of the Internaty). Throughout much of the twentieth century, people with intellectual disabilities were excluded and isolated in institutions without meaningful healthcare, education, or vocational training, absent hope for employment or future participation in society.²⁸

²⁸ *Id.* at 425; Judith Klein & Camilla Parker, *Making Social Inclusion a Reality: The Challenge for People with Mental Disabilities in Central and Eastern Europe*, Eurohealth, at 16 (2003); Rachel Jenkins, et al., *Mental Health Reform in Eastern Europe*, Eurohealth, at 19 (2001). *Cf.* Peter Blanck, et al., *DISABILITY CIVIL RIGHTS LAW AND POLICY*, at 1–2 (2004) (“The medical model focused on the individual, whose disability was conceived as an infirmity that precluded full participation in the economy and society.”).

c. Political powerlessness

Under Soviet law, people with intellectual disabilities and their families officially possessed no rights to redress these wrongs. Human Rights Watch, *Abandoned to the State: Cruelty and Neglect in Russian Orphanages* (Dec. 1998), available at <http://www.hrw.org/reports98/russia2/>, at 75. Soviet law even prohibited the recording of population and healthcare statistics regarding people with disabilities. Mental Disability Rights Int'l, *supra*, at 10. Toward the end of the Soviet era, Russian families of children with intellectual disabilities began to resist the medically endorsed practices of abandonment and institutionalization. The lives of these children, however, largely involved growing up in the isolation of the family home, rarely taken out onto the city street, and still without education or vocational opportunities. Iarskaia-Smirnova, *supra*, at 72–74; Vann & Siska *supra*, at 425–426.

2. People with intellectual disabilities in the Russian Federation continue to share similar experiences today

The conditions described above reflected the societal attitudes, discrimination, and exclusion of people with severe disabilities that the Russian Federation inherited upon the dissolution of the U.S.S.R. in 1991. Coincidentally, in 1990 people with disabilities in the United States finally acquired civil rights through the passage of the Americans with Disabilities Act, after more than a

century of struggling to be recognized as worthy of social inclusion.²⁹ The Russian Federation has not made this leap in its brief seventeen-year existence.³⁰ These challenges have been exacerbated by difficult economic transitions taking place in Russia, and have “had a disastrous effect on many sectors of the population, particularly on children with disabilities and their families.” Eric Rosenthal, *et al.*, *Implementing the Right to Community Integration for Children with Disabilities in Russia: A Human Rights Framework for International Action*, 4 Health & Human Rights 82, 90 (1999).

a. Reforms have not been enforced

Since 1990, some within the Russian medical, educational, and legal communities have made efforts to emancipate the social group of people with intellectual disabilities from institutionalization, denial of educational and employment opportunities, poor healthcare, and political powerlessness. The Russian Federation has enacted legal reforms to the tax code, judicial system, communications industry, pension schemes, and employment laws, frequently taking the form of tax cuts, credits, benefits or exemptions, to promote access,

²⁹ As early as 1862, Congress recognized disability under a limited pension scheme for Civil War veterans with disabilities. Digest of Pension Laws, Decisions, Rulings, Orders, Etc. 494 (Frank Curtis & William Webster eds., 1885) (reviewing the Act of July 14, 1862 referred to as the “General Law” System).

³⁰ One commentator observes that in Russia, “the disabled don’t count as people.” Megan A. Murphy, *Give Me Your Tired, Your Poor, Your Disabled?: Why the Disabled Should Qualify for Asylum Under the Immigration and Nationality Act*, 70 Geo. Wash. L. Rev. 854, 860 (Aug. 2002).

employment, services, and education for persons with severe disabilities and their family caregivers.³¹

Unfortunately, these laws have not been enforced, and persons with disabilities like Petitioners continue to experience the denial of educational and employment opportunities, and exclusion from society. U.S. State Dept., *Country Reports on Human Rights Practices—Russia 2006* (Mar. 6, 2007) (hereafter “*Country Reports*”).³² Moreover, the ongoing transition to a market economy has “had a major, negative impact on the rights of children with disabilities and on conditions of all children in the Russia’s institutions.” Mental Disability Rights Int’l, *supra*, at 8–9. Government resources declined in favor of private ownership, and funding to the Internats was reduced significantly. *Id.* Similarly, families began experiencing economic hardships in the absence of state support, and new financial pressures arose to place their children with disabilities in institutions. *Id.*

b. Stigmatization, social exclusion, and segregation from Russian society continues

Pervasive stigma toward people with intellectual disabilities is ongoing in the Russian Federation, largely arising from misconceptions about their true abilities and potential, and perpetuated by the general public’s lack of exposure to

³¹ See Martz, *supra*, at 119.

³² Available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78835.htm> (last visited Feb. 18, 2008).

people with disabilities in the community. Mental Disability Rights Int'l, *supra*, at 43. See also *Tchoukhrova*, *supra*, 404 F.3d at 1185 (Russian government doctor recommended that petitioner be institutionalized, or at least isolated at home, “a recommendation that was understandable given the extreme degree of societal prejudice against the disabled in Russia.”). Studies of societal attitudes, for instance, found almost half of Russians polled believe that persons with intellectual disabilities should be isolated from society, compared with 0% of foreign respondents. Iarskaia-Smirnova, *supra*, at 84. Even Russian healthcare professionals, educators, and disability advocates lack exposure to the varying abilities of individuals with intellectual disabilities to benefit from community inclusion, services, education and training. *Id.* Unaided by these professionals, many parents of children with intellectual disabilities continue to believe their children are best off segregated from society. *Id.*

Inaccurate and prejudicial medical labeling remains pervasive throughout the Russia Federation and sets the stage for the availability or denial of opportunities and services for persons with intellectual disabilities from birth onward. Mental Disability Rights Int'l, *supra*, at 10–11; Rosenthal, *supra*, at 93–95.³³ See also *Tchoukhrova*, *supra*, 404 F.3d at 1185 (petitioner was “permanently

³³ Russian medical professionals use the term *oligophrenia* (meaning “small brain”) to refer to mental impairments that are “hereditary, congenital, or acquired early in life,” and which

labeled as disabled and was consequently banned from receiving any public medical support for his condition.”). In conjunction with these medical labels, societal stereotypes contribute to the exclusion of people with intellectual disabilities, and reinforcing their containment as a social group.

Persons with intellectual disabilities largely are kept out of public view in Russia, leaving the general public unaware of their existence. Olga Drozdova, *Russia: Perspektiva Makes Progress with Mass Media*, *Disability World* (Jul.-Aug. 2001). Massive over-institutionalization is the norm, as primary care services are neither equipped nor expected to manage people with common mental and intellectual disorders. Rachel Jenkins, et al., *Mental Health in Post-Communist Countries*, 331 *BMJ* 173, 173 (2005).³⁴ Although mandatory institutionalization is no longer official government policy, people with intellectual disabilities remain particularly likely to be institutionalized in remote parts of the Russia Federation, and are often subject to violations of their human rights. Vann & Siska, *supra*, at 425–427. *See also Tchoukhrova, supra*, 404 F.3d at 1187 (children diagnosed as “mentally retarded” who grow to adulthood are “interned in another ‘total institution,’ where they are permanently denied opportunities to know and enjoy their civil and political rights.”).

fall into one of “three categories, from mild to severe: *debil*, *imbetsil*, and *idiot*.” Human Rights Watch, *supra*.

³⁴ *See also Right to Asylum, supra*, 73 *Temp. L. Rev.* at 1139.

Conditions in these institutions are extremely inadequate; only three dollars per day is allocated cover all of a patient's treatment and operational costs. Jenkins, *supra*, at 19. Staffing and training is insufficient to provide the individualized attention necessary for a child's physical and intellectual development. Mental Disability Rights Int'l, *supra*, at 32. Placement in a Russian institution "creates serious health risks, particularly for young children." *Id.* Children labeled uneducable often remain in a crib or bed throughout the day without human touch or interaction, re-positioning, regular exercise, or physical therapy, which significantly contributes to deformities. *Id.*

c. Intentional exclusion from educational opportunities still exists

Children with intellectual disabilities in Russia are kept out of mainstream schools. Mental Disability Rights Int'l, *supra*, at 36. In 1998, there were between 400,000 and 600,000 children in Russian institutions. As recently as 1999, Russian medical and educational officials still followed the Institute of Defectology's philosophy that "it is best for a child with any form of deficiency to be separated from normal children and, in many cases, separated from their families." Mental Disability Rights Int'l, *supra*, at 10; Rosenthal, *supra*, at 83. *See also Tchoukhrova, supra*, 404 F.3d at 1194 ("He was also denied the benefits of another right—the right to an elementary education. While Evgueni is an

intelligent and thriving young boy, the disability label the government attached to him served to bar him from attending public schools.”).

Children with severe intellectual disabilities, labeled “uneducable,” are institutionalized in an Internat operated by the Ministry of Labor and Social Development and receive no educational services. *Id.* at 12; Rosenthal, *supra*, at 93. The conditions there are appalling. Mental Disability Rights Int’l, *supra*, at 20.

Children with moderate intellectual disabilities, those labeled “debil” and “imbetsil,” though not considered uneducable, are removed from mainstream schools and placed in Internats run by the Ministry of Education. In these Internats, children are provided with minimal vocational training and only occasionally provided with daily living skill training. Mental Disability Rights Int’l, *supra*, at 17–18. Segregation in these Internats tends to foster further “developmental delays and psychological deficits,” Rosenthal, *supra*, at 88, having the opposite effect of the desired “purpose of an education—to promote social integration and to maximize individual development.” Mental Disability Rights Int’l, *supra*, at 36.

For families earnestly trying to care for their child with an intellectual disability, there is a general lack and inadequacy of community-based care in Russian society. Iarskaia-Smirnova, *supra*, at 79. “Lacking supportive social

policy and access to education, a family rearing a child with special needs in a cultural environment that traditionally institutionalizes people with disabilities faces innumerable obstacles.” *Id.* at 78. Children with disabilities effectively become trapped at home due to these insufficient services and societal pressures to keep them out of public view, or are at increased risk for homelessness, foster care, and foreign adoption. David Tobis, MOVING FROM RESIDENTIAL INSTITUTIONS TO COMMUNITY-BASED SOCIAL SERVICES IN CENTRAL AND EASTERN EUROPE AND THE FORMER SOVIET UNION 33–35 (World Bank, 2000).

- d. Persons with intellectual disabilities are still relegated to lesser vocational training, employment opportunities and benefits

Employment for people with intellectual disabilities in the Russian Federation is rarely an option. By adulthood, those labeled uneducable will have spent their whole lives in an Internat, and provided with “little or no systematic effort to habilitate, rehabilitate, or educate [them.]” Mental Disability Rights Int’l, *supra*, at 12–13. Consequently, “it is virtually assured that they will go on to live in an institution for adults with disabilities.” *Id.* at 12.

Those labeled “educable” will have spent the majority of their lives in an Internat, separated from family for 5-day weeks, or for several months at a time, and provided with minimal vocational and daily-living-skill training. *Id.* at 17–18.

At adulthood, individuals leaving these settings struggle to reintegrate with society, and community services are largely absent to provide support for finding a job or housing. Tobis, *supra*, at 33.

In the absence of employment, adults with intellectual disabilities are afforded a disability pension to pay for basic needs. The Russian Law on Labor Pensions classifies people into three categories of eligibility (I, II, or III) depending on severity and permanency of the disability, with category III being the most permanent and severe. Irina Merkuryeva, *The System of Disability Benefits in Russia, Estimation of Targeting Accuracy, Economics Education and Research Consortium Working Paper Series*, No 07/04, at 11 (2007).

Persons with Category II disabilities, for instance, are entitled to approximately 522.38 Rubles in monthly state disability pensions (less than \$23 U.S.D.). *Id.* at 11. For those with Category III intellectual disabilities, and Category II individuals incapable of employment, their pensions are applied to cover the cost of their on-going institutionalization. Mental Disability Rights Int'l, *supra*, at 17. Additionally, persons with disabilities may be eligible for unemployment benefits for a limited period of time, if they can complete the required application materials, and pass a job interview or complete a training program. Merkuryeva, *supra*, at 12. In Russia today, a person with a Category II disability may receive both a disability pension and unemployment benefits

totaling approximately 994.38 Rubles (\$40 U.S.D.) per month. However, these benefits are significantly less than the minimal retiree subsistence level of 1605 Rubles. *Id.* at 11.

Although the Russian government has enacted a quota system that directs larger employers to fill approximately three percent of their workforce with “disabled persons,” Martz, *supra*, at 119, Russians with disabilities remain largely unemployed. Valentina Lupanova, *Employment Opportunities for Disabled Russians: An Overview of Legislation and Programs*, Disability World, Apr. – May, 2002. Many companies avoid complying with the quota by bribing persons with disabilities to falsely register as their employee. Martz, *supra*, at 119. Alternately, a quota-levy system allows employers to opt out of employing persons with disabilities by contributing financially to a fund, which in turn disperses aid to workers with disabilities, employers, or service providers. Daniel Mont, *Social Protection Discussion Paper: Disability Employment Policy* 21 (World Bank, July 2004). Moreover, these quota laws contain no enforcement mechanisms. Tarasenko Elena, *Awkward Citizens: Problems and Perspectives of Disability Policy in a Changing Russia* 5 (2008); Martz, *supra*, at 119.

e. Political powerlessness and ineffective redress for violation of human rights

Although the Russian Federation has ratified certain human rights covenants sponsored by the UN, it has not ratified the International Convention on the Rights

of Persons with Disabilities. Similarly, although Russia has certain legal provisions that appear to grant certain protections to persons with disabilities,³⁵ it has not implemented or enforced its obligations under international human right treaties to which it is party, or its federal laws. In spite of supposed protections, governmental and societal discrimination towards people with disabilities persists. *Country Reports, supra*. Russian laws primarily are “a declaration of intent and [are] not supported by implementation mechanisms.” Elena, *supra*, at 5; Open Soc’y Inst., COMBATING DISCRIMINATION IN RUSSIA: STRATEGIES FOR LAWYERS AND NGOS (2008). For instance, the Russian Federation has no government enforcement or civil rights commission designated to protect the rights of individuals with disabilities, and there is no private right of action or legal mechanism, judicial or otherwise, for redress of harm caused by discriminatory treatment or in violation of human rights. Open Soc’y Inst., *supra*. Disability-focused NGO’s similarly are ineffective to protect these rights, lack essential funds, and are subject to harassment by government soldiers. *Country Reports, supra*; Annika Johnson, *Disability Rights*, in HUMAN RIGHTS IN RUSSIA AND THE FORMER SOVIET REPUBLICS 10 (Arianna Nowakowsk, ed., 2007).

³⁵ See Constitution of the Russian Federation, art. 19 (providing for equal status among Russian citizens, regardless of race, sex, language, disability or other circumstances); Federal Law 181, Law on the Social Protection of the Disabled in the Russian Federation, Preamble (1995).

CONCLUSION

As demonstrated above—and whether viewed from a legal, biological, or sociological perspective—Petitioners are members of at least one “particular social group,” namely Russians with intellectual disabilities. Moreover, they have experienced extreme maltreatment (including assaults, unjust institutionalization, and exclusion from public education and the workforce) that parallels the historical experience of the social group, and that equates with persecution as defined in the asylum laws. *Compare Tchoukhrova, supra*, 404 F.3d at 1192–1195 (holding remarkably similar conduct rose to the level of persecution).³⁶ Should this Court find sufficient evidence of persecution, it should also clarify that Petitioners are members of a particular social group for purposes of asylum consideration, or it should remand to the B.I.A. for its determination of that issue.³⁷

³⁶ See also *Pitcherskaia v. I.N.S.*, 118 F.3d 641, 646 (9th Cir. 1997) (unjust institutionalization may constitute persecution); *Right to Asylum, supra*, 73 Temp. L. Rev. at 1136–1137 and nn. 153 and 155 (restrictions on livelihood or education may constitute persecution); H.R. REP. 95-1452, at 5, 1978 U.S.C.C.A.N. 4700, 4704, 1978 WL 8575 (Leg.Hist.) (describing persecution as the infliction of suffering or harm, not just physical but also taking other forms, “such as the deliberate imposition of severe economic disadvantage or the deprivation of . . . employment or other essentials of life.”).

³⁷ Cf. *Gonzales v. Thomas*, 547 U.S. 183 (2006), referring to the ordinary remand rule.

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CERTIFICATE OF SERVICE

I certify that on this 19th day of February, 2008, a true and correct copy of the foregoing document, in both paper and electronic versions, was served via Federal Express, for next day delivery to:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 6,851 words, including 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word software in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

BRIAN EAST

APPENDIX

The Arc of the United States is the largest national voluntary organization in the United States dedicated solely to protecting the interests of the millions of adults and children with intellectual disabilities. (The Arc now uses the term “intellectual disability” rather than “mental retardation”.) It provides an array of services and supports for families and individuals and includes over 140,000 members affiliated through more than 850 state and local chapters across the nation. The Arc is devoted to promoting and improving supports and services for all people with intellectual and developmental disabilities. The Arc has a particular interest in preserving families and family relationships and in avoiding institutionalization for people with intellectual disabilities.

The National Disability Rights Network (“NDRN”) is the membership association of protection and advocacy (“P&A”) agencies that are located in all 50 states, the District of Columbia, Native American community, Puerto Rico, and the territories (the Virgin Islands, Guam, American Samoa and the Northern Marianas Islands). P&As are authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings. The P&A network is the largest provider of legally based advocacy services to people with disabilities in the United States. Through training and technical assistance and legal support, NDRN works to

create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

Advocacy, Inc. is the Texas P&A, that is, the agency designated by the Governor of Texas to protect and advocate for the rights of individuals with disabilities in the State of Texas, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15041 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 *et seq.*, and the Protection and Advocacy of Individual Rights program, 29 U.S.C. § 794e. Advocacy, Inc. is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities.

The Advocacy Center is the Louisiana P&A, that is, the agency designated by the Governor of Louisiana to protect and advocate for the rights of individuals with disabilities in the State of Louisiana, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15041 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 *et seq.*, and the Protection and Advocacy of Individual Rights program, 29 U.S.C. § 794e. The Advocacy Center is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities.

The Mississippi Protection & Advocacy System, Inc., is a private, nonprofit organization incorporated under the laws of the State of Mississippi, and in 1982 designated, by the Governor of Mississippi, to be the Protection And Advocacy System for this State. This organization's mission is to protect the legal and human rights of Mississippians with disabilities through negotiation, mediation, and/or to provide legal representation in administrative hearings or court. It is the goal of MPAS to make it possible for persons with disabilities to live, work and play in their community or in their least restrictive environment.

The Burton Blatt Institute at Syracuse University seeks to advance the civic, economic, and social participation of persons with disabilities in a global society, and to transform policy, systems, and people through inclusive education, the workforce, and communities. To accomplish this goal it maintains a global network for research, education, training, technical assistance, and outreach.

The Disability Law Clinic at the Indiana University School of Law (Bloomington) assists clients with disabilities to receive federal disability benefits. Many of its clients have mental disabilities that cover the full range of cognitive, developmental, and psychological impairments. Consequently, its representation includes helping clients obtain appropriate diagnosis and treatment, and addressing the stigma and discrimination persons with mental disabilities face from agencies, employers, family, friends, and other members of their communities.