No. 98-536

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Tommy Olmstead, Commissioner, Georgia Department of Human Resources, et al.,
Petitioners,

v.

L.C., by Jonathan Zimring, Guardian Ad Litem and Next Friend, et al.,
Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality which are embodied in the Constitution and civil rights laws. ACLU affiliates around the country have been deeply engaged for nearly three decades in the effort to end the unnecessary segregation of the mentally disabled, beginning with the work of our New York affiliate on behalf of Willowbrook residents in the early 1970's, and continuing to this day. On a federal level, the ACLU was deeply involved in the advocacy effort that ultimately led to the enactment of the Americans with Disabilities Act (ADA). Both in disability cases and otherwise, the ACLU has appeared before this Court on numerous occasions as direct counsel and as amicus curiae.[1]

STATEMENT OF THE CASE

L.C. and E.W. are mildly retarded adults who have been diagnosed with additional mental disorders. At the commencement of this litigation, they were confined in a locked ward of a psychiatric hospital run by the State of Georgia.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored the brief in whole or in part and no person or entity, other than the amicus curiae and its counsel, made a monetary contribution to the preparation or submission of the brief.

L.C. initiated this action, challenging the State's failure to provide her with care in the most integrated setting appropriate to her needs. The complaint sought a declaratory judgment holding that her institutionalization violated the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134, the Attorney General's Title II regulations, 28 C.F.R. § 35.130 (1997), and the Due Process Clause of the Fourteenth Amendment. She also sought an injunction requiring the State to place her in a community-based treatment program. E.W. later intervened, asserting identical claims.

Noting that the State had conceded that L.C. and E.W. qualified for community-based programs, the district court granted the requested relief. *L.C. v. Olmstead*, 1997 WL 148673, *3-4 (N.D. Ga. 1997). The United States Court of Appeals for the Eleventh Circuit affirmed the ruling that the ADA imposed on the State a general duty to administer services to the plaintiffs in the most integrated setting appropriate for their needs. *L.C. v. Olmstead*, 138 F.3d 893 (11th Cir. 1998). The court remanded, however, instructing the district court to assess whether its ruling would impose such a great burdern on the State's mental health budget as to fundamentally alter the services provided. *Id.* at 905.

The State has argued throughout these proceedings that it is not required by the ADA to provide individuals with psychiatric disabilities "the least restrictive treatment." It argues further that, in light of the financial burdens associated with integration, a state's decision to provide or deny a community-based program should escape federal restrictions. In rejecting that argument, the Court of Appeals found that "[b]y definition, where, as here, the State confines an individual with a disability in an institutionalized setting when

community placement is appropriate, the State has violated the core principles underlying the ADA's integration mandate." *Id.* at 897. The court based this conclusion on the ADA's legislative history, the plain language of the act, its implementing regulations, and the analysis of the ADA in *Helen L. v. DiDario*, 46 F.3d 325, 331-32 (3d Cir. 1995).

SUMMARY OF ARGUMENT

The Court should affirm the judgment below because the unnecessary segregation of mentally disabled individuals who are appropriate for community placement violates some of the most fundamental civil rights guaranteed to American citizens, as well as the express judgment by Congress to extend those rights to the disabled through he ADA.

I. Forty-five years ago, this Court held that racial segregation violates the equal protection clause of the Fourteenth Amendment. Such segregation is inherently discriminatory because of its damaging effects on the excluded individuals. It sends a message of inferiority and perpetuates stereotypes with their resulting stigmata. *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). The Court also has condemned exclusionary practices directed at women. "[Gender]classifications may not be used, as they once were,...to create or perpetuate the legal, social, and economic inferiority of women." *United States v. Virginia*, 518 U.S. 515, 534 (1996). The fundamental civil rights prohibition against unnecessary segregation applies in the disability context for the same reasons.

II. Congress enacted the Americans with Disabilities Act against the backdrop of our nation's other civil rights laws and with the express purpose of providing disabled individuals

with equivalent protection against discrimination. Comparing disability discrimination to race and gender discrimination, Senators and Representatives denounced the segregation of disabled Americans in the ADA hearings and committee reports and explained that the ADA promises a future of integration for these individuals.

The ADA itself makes it clear that Congress did not pass this law merely to express an hortatory preference for integration. Rather, the act sets forth a comprehensive mandate, specifically aimed at redressing discrimination against individuals with disabilities resulting from unnecessary institutionalization and segregation. 42 U.S.C. § 12101. Further, in passing the ADA, Congress instructed the Attorney General to promulgate regulations consistent with the coordination regulations issued pursuant to § 504 of the Rehabilitation Act--which in turn mandate that recipients of federal financial assistance administer programs "in the most integrated setting appropriate to the needs of qualified handicapped persons." 42 U.S.C. § 12134(b); 28 C.F.R. § 41.51(d). The Attorney General complied with the Congressional directive by including an express integration mandate in the ADA's implementing regulations. 28 C.F.R. Part 35, App. A. § 35.130.

III. Individuals with mental disabilities have been subjected to segregation comparable to the worst form of racial discrimination. Petitioners now ask this Court to endorse the "separate but equal" concept with respect to mentally disabled individuals qualified for community placement. The Court, however, should reject Petitioners' request because: (1) the ADA's integration mandate covers Americans with mental disabilities; (2) the unnecessary segregation of mentally disabled individuals is inherently discriminatory; (3)

Petitioners' concern regarding the dangers and practicalities of a mass deinstitutionalization does not justify the unnecessary segregation of those individuals deemed appropriate for community placement; (4) the Petitioners' segregationalist practices cannot be excused by paternalistic or other "benign" motives that perpetuate the stigmata resulting from unnecessary institutionalization; and (5) the provision of analogous social services to nondisabled individuals in the community underscores the discriminatory nature of Petitioners' actions.

ARGUMENT

I. UNDER OUR CIVIL RIGHTS LAWS AND EQUAL PROTECTION JURISPRUDENCE, THE UNJUSTIFIED SEGREGATION OF MINORITY GROUPS THROUGH OFFICIAL ACT OR DECREE IS AN IMPERMISSIBLE FORM OF DISCRIMINATION.

The unnecessary segregation of mentally disabled individuals violates some of the most fundamental civil rights principles guaranteed to American citizens.

The inextricable link between segregation and discrimination was permanently etched into our social and constitutional consciousness by this Court's landmark decision, forty-five years ago, in *Brown v. Board of Education*, 347 U.S. 483, 492, 494 (1954). Although the Court was writing then in the context of racial discrimination, its views on the meaning of equality have had a broader resonance both in this Court's own cases and in the civil rights laws that Congress has enacted in the intervening years.

As the *Brown* Court explained in rejecting the doctrine of "separate but equal," government-imposed segregation is inherently discriminatory because it sends a message of inequality that carries lifelong consequences for both the majority and the minority that cannot be erased merely by equal programs and facilities.

> Our decision, therefore, cannot turn on merely a comparison of these tangible factors...We must look instead to the effect of segregation itself...
>
> [To segregate children] generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone....
>
> Separate educational facilities are inherently unequal.

Id..

After this Court's ruling in *Brown v. Board of Education*, the lower court embraced an argument that resembles the position of the petitioners here--that the law "does not require integration. It merely forbids discrimination." *Briggs v. Elliott*, 132 F.Supp. 776, 777 (E.D.S.C. 1955). Eventually, however, the appellate courts extinguished this notion as logically inconsistent with *Brown*. *E.g. Kelley v. The Altheimer, Arkansas Public School District No. 22*, 378 F.2d 483, 488 (8th Cir. 1967). As noted by the Fifth Circuit, this attempt to avoid integration perpetuated racial segregation with all of its deleterious effects for more than a decade after *Brown*. *United States v. Jefferson County*

Board of Education, 372 F.2d 836, 862-863, 866 (5th Cir. 1966).

More broadly, the Fifth Circuit recognized that a failure to pursue integration following a state sanctioned policy of segregation is "per se discriminatory." *Id.* at 872. "Denial of access to the dominant culture, lack of opportunity in any meaningful way to participate in political and other public activities, the stigma of apartheid ... are concomitants of the dual educational system." *Id.* at 866. This Court later confirmed that "a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation." *United States v. Fordice*, 505 U.S. 717, 727 (1992). In other words, a neutral policy is not sufficient where there are continuing effects of state imposed segregation. *Id.* at 731-732. In such a case, there is an affirmative duty to desegregate, and the maintenance of separate institutions violates the Fourteenth Amendment. *Id.* at 727-733.

Recently, this Court applied these principles to compel the integration of the Virginia Military Institute (VMI) in *United States v. Virginia*, 518 U.S. 515 (1996). That the VMI case involved gender integration rather than racial integration did not fundamentally change the equal protection analysis. In holding that VMI could not exclude a female applicant on the basis of her gender if her admission were otherwise appropriate, the Court rejected VMI's defense that it offered women a separate but equal program at Mary Baldwin College.

The integration of VMI was based in part on the "core instruction" of *J.E.B. v. Alabama ex rel. T.B.*,511 U.S. 127,

136-137 (1994), *cited in United States v. Virginia*, 518 at 531. The *J.E.B.* Court explained that the discriminatory effects inherent in segregation are not confined to the context of racial discrimination.

> While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, "overpower those differences."... Certainly, with respect to jury service, African-Americans and women share a history of total exclusion....
>
> The message it sends ... is that certain individuals, for no reason other than gender, are presumed unqualified....

J.E.B., 511 U.S. at 135, 142. VMI's admission policy, therefore, was illegal because it perpetuated "the legal, social, and economic inferiority of women" based on stereotypes and myths. 518 U.S. at 533-534.

Further, the state's benign explanations for the segregation did not excuse the discrimination. *Id.* at 535-538. The state advanced the argument, among others, that "'[m]ales tend to need an atmosphere of adversativeness,' while '[f]emales tend to thrive in a cooperative atmosphere.'" *Id.* at 541. In striking down VMI's discriminatory admissions policy, the court acknowledged that the physical rigors of VMI's program might pose problems for many women. Nonetheless, VMI's segregationist policy was illegal because

it unnecessarily excluded even those individuals who were appropriate for placement in its program.[2]

These same fundamental civil rights principles apply in the context of disabled individuals.

II. CONGRESS ENACTED THE AMERICANS WITH DISABILITIES ACT TO EXTEND THE PROTECTIONS OF EXISTING CIVIL RIGHTS LAW TO DISABLED INDIVIDUALS.

The Americans with Disabilities Act was not created out of whole cloth. Rather, Congress enacted it against the backdrop of our nation's other civil rights laws and the equal protection clause of the Fourteenth Amendment. Congress designed the ADA to extend to disabled individuals the same protection against discrimination provided by existing law to racial minorities and women.

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[2] The Court also rejected other "benign" explanations proffered by the state. For example, Virginia argued that the exclusion of women from VMI promoted diversity through single-sex educational options. 518 U.S. at 536. Noting, however, that the mere recitation of a benign purpose does not block inquiry into the historical purposes of the segregation, *id.* at 535, the Court analyzed the history of higher education in Virginia and concluded that the VMI policy was deeply rooted in a history of discrimination against women. The history of society's segregation of mentally disabled individuals leads to the conclusion that the State's benign explanations here similarly seek to mask historic discrimination. *See, infra,* Part III.

With Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, Congress outlawed discrimination on the basis of race, color or national origin by recipients of federal funds. With Title VII, 42 U.S.C. § 2000e, Congress extended civil rights protection to women as well as racial and ethnic minorities in the employment context. Over the years, Congress added to these laws to create a comprehensive federal statutory scheme prohibiting various forms of discrimination.[3] The ADA is an integral part of this national civil rights movement. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995) (recognizing that the ADA is part of a wider statutory scheme aimed at the elimination of invidious bias); *Helen L. v. DiDario*, 46 F.3d 325, 331 (3rd Cir. 1995) (finding that the ADA was Congress' response to the need for "civil rights" legislation for the disabled).

The ADA's legislative history establishes that Congress intended the ADA to place disability discrimination on a par with race and gender discrimination and, specifically, to end the discriminatory effects of the historic segregation of disabled Americans.

> The Americans With Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964. This year, 1990, is an historic one in the evolution of this nation's public policy towards persons with disabilities. The ADA is a comprehensive piece of civil

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[3] **[cite other acts such as ADEA, IDEA, etc.**

> rights legislation which promises a new future: a future of inclusion and integration, and the end of exclusion and segregation.

H.R. Rep. No. 101-485, pt. 3 at 26 (1990). "[D]rawing an analogy to the segregation of African-Americans, the House Report noted that 'segregation for persons with disabilities 'may affect their hearts and minds in a way unlikely ever to be undone.'...(quoting Brown v. Board of Educ., 347 U.S. 483...)." *L.C. v. Olmstead*, 138 F.3d 893, 898 (11th Cir. 1998).

Former Senator Lowell Weicker, the original Republican sponsor of the ADA, strenuously denounced in particular the application of the "separate but equal" notion to disabled individuals.

> For years, this country has maintained a public policy of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for blacks; it is not for the disabled.

Hearings on S.933 at 215.

Other comparisons of disability discrimination to historic exclusionary practices directed at racial minorities and women abound in the ADA's legislative history, along with corresponding expressions of Congressional intent to integrate Americans with disabilities into the mainstream of society to

the fullest extent possible. *See, e.g.,* 134 Cong Rec. S5106, 5107-5108 (statement of Sen. Weicker, purpose of the bill is to extend to the disabled protection parallel in scope to that afforded against discrimination based on race, sex, religion and national origin); 135 Cong. Rec. E2812, E2813 (statement of Rep. Owens, comparing disability movement to the African-American civil rights struggles of the Sixties); 136 Cong. Rec. H2421, H2427 (statement of Rep. Owens, ADA will provide parallel protections guaranteed to other minority groups); H2428 (statement of Rep. Bartlett, ADA provides same protection available to others on the basis of race, sex, national origin and age); H2438 (statement of Rep. Edwards, "'Separate but equal' is not civil rights"); H2441 (statement of Rep. Brooks, individuals with disabilities will have same protection provided to others against discrimination); H2445 (statement of Rep. Coleman, disabled individuals will receive saame protections available to other minorities); H2447-H2448 (statement of Rep. Miller, ADA guarantees same rights provided to other minorities); 136 Cong. Rec. H2599, H2616 (statement of Rep. Glickman, comparing disability discrimination to discrimination on the basis of race and sex); H2639 (statement of Rep. Dellums, denouncing the separate but equal concept as applied to the disabled).

The plain language of the ADA itself makes it clear that Congress did not pass this law simply to express an hortatory preference, but rather mandated the integration of disabled individuals pursuant to its power to enforce the Fourteenth Amendment. In this respect, the ADA differs significantly from the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (DDA), 42 U.S.C. § 6000, which was the subject of the principal case cited by Petitioners, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981). In *Pennhurst*, the Court held that with the DDA, Congress meant

only to encourage rather than mandate integration because the act contained no express invocation of Congress' power to enforce the Fourteenth Amendment, and the legislative history established that Congress did not intend to create enforceable duties. 451 U.S. at 15, 20-23.

Unlike the DDA, after listing the predicate findings that discrimination against individuals with disabilities often takes the form of "institutionalization" and "segregation," the ADA invokes Congress' "power to enforce the fourteenth amendment" for the stated purposes of providing "a clear and comprehensive *mandate*" and "*enforceable* standards" for the elimination of discrimination against individuals with disabilities. 42 U.S.C. § 12101 (a)(3),(5), (b)(1),(2),(4) (emphasis added). Moreover, the ADA explicitly incorporates by reference the coordination regulations issued pursuant to § 504 of the Rehabilitation Act--which in turn mandate that recipients of federal financial assistance administer programs "in the most integrated setting appropriate to the needs of qualified handicapped persons." 42 U.S.C. § 12134(b); 28 C.F.R. § 41.51(d). Because "[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act," the Department of Justice complied with the Congressional directive by including an express integration mandate in the ADA's implementing regulations. 28 C.F.R. Part 35, App. A. § 35.130. *L.C.*, 138 F.3d at 897-898; *Helen L.*, 46 F.3d at 332.

Indeed, the integration mandate of the ADA resembles that of the Individuals with Disabilities Education Act (IDEA), which this Court recognized and enforced in its recent decision in *Cedar Rapids Community School Dist. v. Garret F.*, __ U.S. __ (March 3, 1999). *Garret F.* addressed a provision of the Individuals with Disabilities Education Act

(IDEA), 20 U.S.C. § 1400(c), designed to "assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." *Id.* In rejecting the school district's argument that the IDEA did not require it to provide a ventilator-dependent student with certain nursing services during school hours, the Court stressed that, with the IDEA, Congress "require[d] participating States to educate handicapped children with nonhandicapped children whenever possible." *Id.* Further, the Court held that the district's financial concerns could not override the integration mandate dictated by Congress. *Id.* Because the ADA shares with the IDEA the same the ADA's integration goal, the Court likewise should enforce Congress' integration mandate here.

III. THE ADA PROHIBITS THE UNNECESSARY SEGREGATION OF INDIVIDUALS WITH MENTAL DISABILITIES.

The civil rights principles enunciated in *Brown v. Board of Education* and codified in the ADA and other statutes such as the IDEA apply with equal force to individuals with mental disabilities. It is widely recognized that individuals with mental disabilities have suffered from exclusionary practices comparable to prohibited race and gender discrimination. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450 (1985) (holding that zoning restrictions imposed on a group home for the mentally retarded reflected "an irrational prejudice against the mentally retarded"). As observed by Justice Marshall, "the mentally retarded have been subject to a 'lengthy and tragic history...of

segregation and discrimination that can only be called grotesque." *Id.* at 461.

> Fueled by the rising tide of Social Darwinism, . . . [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...
>
> For the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; out-dated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people....

Id. at 461-462, 467 (Marshall,J., concurring in part and dissenting in part).

Like the mentally retarded, the mentally ill, epileptics and individuals with brain injuries historically have been segregated in large human "warehouses." Construction of custodial colonies for the mentally retarded actually followed the mid-nineteenth-century movement to build state institutions for the mentally ill. Edward J. Larson, *Sex, Race and Science* 24 (1995). Mental health officials promoted eugenics as a way to rid society of the mentally insane as well as other "mental defectives." *Id.* at 24, 44.

Segregation has the same effects on disabled individuals as it has had on racial minorities and women. It sends a message of inequality, perpetuates stereotypes and forces these individuals to accept services in an isolated and inherently unequal environment. E.g., Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 409-410 (1991) (citing additional sources). The conclusion reached in *Brown*, therefore, also is applicable to the unnecessary institutionalization of mentally disabled individuals. Such state-imposed segregation is per se discriminatory and the Department of Justice regulations correctly recognized as much by construing the ADA to require community integration, where appropriate..

Nonetheless, faced with findings that community placement was appropriate for L.C. and E.W., Petitioners ask this Court to reverse because "appropriate treatment can also be provided to them in a State hospital." Petitioners' Brief at _. To do so, however, this Court would have to return to the "separate but equal" concept of a bygone era. To do so, moreover, this Court would have to disregard the plain language of the ADA, its legislative history and the principles of civil rights law developed over the last four decades.

Congress heard but rejected generalized concerns regarding extending the ADA's protections to individuals with mental impairments. 135 Cong. Rec. S11173. As a result, the ADA's statutory language explicitly addresses Americans with "mental disabilities," and discrimination in the form of "institutionalization" and "segregation." 42 U.S.C. § 12101(a)(1),(3),(5). The implementing regulations also include mental disabilities among the conditions covered by the act. Chai Feldblum, *Antidiscrimination Requirements of the ADA* at 38 in *Implementing the American with Disabilities*

Act (Gostin & Beyer)(1992). In light of the plain language of the ADA covering the institutionalization of the mentally disabled and others, the Court must reject the doubts proffered by Petitioners regarding Congress' intent to mandate the integration of a mentally disabled individual qualified for community placement. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. __, 118 S.Ct. 1952 (1998).

Indeed, the Court should reject the Petitioners' position for many of the same reasons that it has rejected similar excuses in other civil rights cases. Petitioners' argument that the ADA does not require integration, that it merely forbids discrimination, is reminiscent of the attitude of those who, even after *Brown v. Board of Education*, could not quite accept the task of eliminating the vestiges of racial segregation. Because this type of state-imposed segregation is per se discriminatory, however, the argument fails in the disability context just as it did in the context of racial discrimination.

The Petitioners' paternalistic excuses cannot justify segregation of the mentally disabled any more than they can justify the exclusion of women. *United States v. Virginia*, U.S. at ; *J.E.B.*, U.S. at . *See also International Union etc. v. Johnson Controls*, 499 U.S. 187 (1991). In fact, it is this type of protectionalism that has perpetuated the discriminatory isolation of women and disabled individuals in the past. The absence of an overtly malevolent motive simply cannot convert a segregationalist practice into a neutral policy. *International Union*, 499 U.S. at 199.

Experience has shown that segregation of the mentally disabled, like segregation of other minorities, is almost never neutral in its impact on the affected class. To the contrary, it

sends a message of unequality, often results in unequal services,[4] and reinforces the myths, fears and stereotypes that are inevitably produced by isolation and ignorance. Petitioners' effort to escape their obligations under the ADA ignores the fact that the statute was enacted to address these precise concerns.

Moreover, the Petitioners' concern over the dangers and problems posed by a broad-based "deinstitutionalization" is unwarranted. The court below emphasized that it was not mandating "the deinstitutionalization of individuals with disabilities," but only the integration of individuals whose treating professionals deem community placement to be appropriate. *L.C.* at 902. Just as the State of Virginia cannot justify its exclusion of qualified women from VMI with "overbroad generalizations about the different talents, capacities, or preferences of males and females," *United States v. Virginia* at 533, the State of Georgia cannot rely on generalized concerns regarding deinstitutionalization to segregate individuals who, like L.C. and E.W., have been found qualified for community placement.

Nor do the Petitioners' financial concerns exempt the State from the ADA's integration mandate. To the contrary, the ADA's legislative history indicates that Congress did not intend for cost concerns to provide a simple way to avoid the ADA requirements. "As the House Judiciary report explained, '[t]he fact it is more convenient, either administratively or fiscally, to provide services in a

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[4]The problem of institutional warehousing of disabled individuals has been especially acute for the mentally disabled. See O'Conner v. Donaldson.

segregated manner, does not constitute a valid justification for separate or different services..." *L.C.*, 138 F.3d at 902. Because Title II of the ADA does not provide a cost defense, acceptance of Petitioners' position would result in judicial lawmaking without guidance from Congress. *Garrett F.* at *6. As recognized by the court below, Petitioners' cost concerns are more appropriately addressed by the ADA's implementing regulations, which permit a cost defense only where the accommodation "would fundamentally alter the nature of the service, program or activity." *See L.C.* at 902 (citing 28 C.F.R. § 35.130(b)(7).

Finally, the Petitioners' argument that the segregation of L.C. and E.W. was not discriminatory because the services in question are not provided to nondisabled persons defies common sense--much as the historic justifications for discrimination against women and minorities. The services provided to mentally disabled persons capable of functioning in a community setting are analogous to many social services offered to nondisabled persons in the community. For example, Georgia's Temporary Assistance to Needy Families program offers job preparation training and psychological counseling. *See* 42 U.S.C. § 601 et seq.; O.C.G.A. § 49-4-180 et seq. The State also offers welfare recipients medical services and housing in a community environment. The State, therefore, engages in unlawful discrimination by requiring the unnecessary institutionalization of a mentally disabled individual as a prerequisite to the provision of similar social services.

In sum, the Petitioners' argument runs counter to the stated goals of the ADA to eliminate the stereotypes and stigmata flowing from the unnecessary institutionalization of disabled individuals. In light of the plain language of the

ADA and fundamental civil rights principles developed over the years, the conclusion reached by the court below is inescapable. The state's unnecessary segregation of an individual based on her mental disability violates the ADA, unless the state can prove on remand that the expense of community placement would fundamentally alter the services provided.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.