

Opinion of STEVENS, J.

**SUPREME COURT OF THE UNITED STATES**

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No. 98–536

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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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE ELEVENTH CIRCUIT

[June 22, 1999]

JUSTICE STEVENS, concurring in part and concurring in  
the judgment.

Unjustified disparate treatment, in this case, “unjustified institutional isolation,” constitutes discrimination under the Americans with Disabilities Act of 1990. See *ante*, at 15. If a plaintiff requests relief that requires modification of a State’s services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State’s services and programs. In this case, the Court of Appeals appropriately remanded for consideration of the State’s affirmative defense. On remand, the District Court rejected the State’s “fundamental-alteration defense.” See *ante*, at 10, n. 7. If the District Court was wrong in concluding that costs unrelated to the treatment of L. C. and E. W. do not support such a defense in this case, that arguable error should be corrected either by the Court of Appeals or by this Court in review of that decision. In my opinion, therefore, we should simply affirm the judgment of the Court of Appeals. But because there are not five votes for that disposition, I join JUSTICE GINSBURG’s judgment and Parts I, II, and III–A of her opinion. Cf. *Bragdon v. Abbott*, 524 U. S. 624, 655–656 (1998)

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(STEVENS, J. concurring); *Screws v. United States*, 325 U. S. 91, 134 (1945) (Rutledge, J. concurring in result).