

the disabled in areas such as marriage or voting, and on limitations of access to public services beyond the use of courts.²¹⁷⁰

Congress's authority under § 5 of the Fourteenth Amendment to abrogate states' Eleventh Amendment immunity is strongest when a state's conduct at issue in a case is alleged to have actually violated a constitutional right. In *United States v. Georgia*,²¹⁷¹ a disabled state prison inmate who used a wheelchair for mobility alleged that his treatment by the State of Georgia and the conditions of his confinement violated, among other things, Title II of the ADA and the Eighth Amendment (as incorporated by the Fourteenth Amendment). A unanimous Court found that, to the extent that the prisoner's claims under Title II for money damages were based on conduct that independently violated the provisions of the Fourteenth Amendment, they could be applied against the state. In doing so, the Court declined to apply the congruent and proportional response test, distinguishing the cases applying that standard (discussed above) as not generally involving allegations of direct constitutional violations.²¹⁷²

²¹⁷⁰ 541 U.S. at 524–25. Justice Rehnquist, in dissent, disputed the reliance of the Congress on evidence of disability discrimination in the provision of services administered by local, not state, governments, as local entities do not enjoy the protections of sovereign immunity. *Id.* at 542–43. The majority, in response, noted that local courts are generally treated as arms of the state for sovereign immunity purposes, *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), and that the action of non-state actors had previously been considered in such pre-*Boerne* cases as *South Carolina v. Katzenbach*, 383 U.S. 301, 312–15 (1966).

²¹⁷¹ 546 U.S. 151 (2006).

²¹⁷² “While the Members of this Court have disagreed regarding the scope of Congress’s ‘prophylactic’ enforcement powers under § 5 of the Fourteenth Amendment, no one doubts that § 5 grants Congress the power to ‘enforce . . . the provisions’ of the Amendment by creating private remedies against the States for *actual* violations of those provisions.” 546 U.S. at 158 (citations omitted).