No. 11-837

In the Supreme Court of the United States

COMMONWEALTH OF PUERTO RICO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, the Commonwealth of Puerto Rico, has standing as parens patriae to litigate against the federal government on its citizens' behalf.

2. Whether, under the Constitution and international law, United States citizens residing in Puerto Rico are entitled to elect voting members of the U.S. House of Representatives.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-95a) is reported at 626 F.3d 592. The order of the court of appeals granting petitioner's motion to intervene (Pet. App. 113a-117a) is reported at 636 F.3d 18. The order of the court of appeals denying rehearing en banc (Pet. App. 119a-151a) is reported at 654 F.3d 99. The opinion of the district court (Pet. App. 99a-111a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2010. Petitions for rehearing were denied on August 4, 2011 (Pet. App. 119a-151a). On October 24, 2011, Justice Breyer extended the time within which to file a petition for writ of certiorari to and including December 2, 2011. On November 18, 2011, Justice Breyer

further extended the time to January 1, 2012, and the petition was filed on December 30, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A group of United States citizens residing in Puerto Rico filed this lawsuit contending that, under the Constitution and international law, citizens of Puerto Rico are entitled to elect voting members of the U.S. House of Representatives. The district court dismissed the complaint, Pet. App. 99a-108a, and the court of appeals affirmed, *id.* at 1a-95a. The court of appeals then permitted petitioner, the Commonwealth of Puerto Rico, to intervene over the objection of all parties and file a petition for rehearing en banc. *Id.* at 113a-117a. The court denied the petition. *Id.* at 119a-151a.

1. In the 1898 Treaty of Paris, Spain ceded to the United States "the island of Porto Rico," as well as Guam and the Philippines. See Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1755. The treaty specified that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." *Id.* at 1759; see U.S. Const. Art. IV, § 3, Cl. 2 (authorizing Congress to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States") (Territory Clause).

Exercising its power under the Territory Clause, Congress has, over time, accorded to Puerto Rico "the degree of autonomy and independence normally associated with States of the Union." *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 594 (1976) (*Examining Board*); see also

Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (observing that, although not "a State in the federal Union like the 48 States," Puerto Rico "would seem to have become a State within a common and accepted meaning of the word" (quoting *Mora* v. *Mejias*, 206 F.2d 377, 387-388 (1st Cir. 1953)). In 1917, Congress extended United States citizenship to all persons born in Puerto Rico. See Puerto Rican Federal Relations Act, ch. 145, § 5, 39 Stat. 953; see also 8 U.S.C. 1402. In 1950, Congress authorized the territory to organize its government as a commonwealth under a constitution ratified by the people of Puerto Rico, subject to Congress's review and approval. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319; see 48 U.S.C. 731d ("Upon approval by the Congress the constitution [of Puerto Rico] shall become effective in accordance with its terms."). Puerto Rico drafted a constitution providing for a government akin to that of many States, including an elected governor, an elected bicameral legislature, and an independent judiciary. Congress approved the constitution, with minor amendments, in 1952. Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327; see *Calero-Toledo*, 416 U.S. at 671. Puerto Rico thus "occupies a relationship to the United States that has no parallel in our history." *Examining Board*, 426 U.S. at 596.

That "unique status," however, is not equivalent to "statehood within the meaning of the Constitution." *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc) (*Igartua III*), cert. denied, 547 U.S. 1035 (2006). "Puerto Rico was not one of the original 13 states who ratified the Constitution; nor has it been made a state, like the other 37 states added thereafter, pursuant to the process laid down in the Constitution." *Ibid.* Nor have the people of Puerto Rico been

afforded any of the electoral privileges of statehood by constitutional amendment, as the residents of the District of Columbia have been. See U.S. Const. Amend. XXIII, § 1. Although Congress has for many purposes elected to treat Puerto Rico as though it were a State, see, *e.g.*, 48 U.S.C. 734 (extending most federal laws to Puerto Rico), this Court has held that Congress is entitled under the Territory Clause to "treat Puerto Rico differently from States so long as there is a rational basis for its actions." *Harris* v. *Rosario*, 446 U.S. 651, 651-652 (1980) (per curiam). And Congress has, in fact, adopted a variety of special rules for the Commonwealth. See, *e.g.*, *ibid.* (rejecting an equal protection challenge to a federal statute providing less federal financial assistance to families in Puerto Rico than those in the States); 26 U.S.C. 933 (exempting income earned in Puerto Rico from the federal income tax).

The relationship of Puerto Rico to the United States remains a subject of ongoing political controversy, both within the federal government and among the people of the Commonwealth. "Puerto Ricans themselves have been substantially divided as to whether to seek statehood status." *Igartua III*, 417 F.3d at 147. After extensive public debate over the benefits and drawbacks of statehood, including the implications of that question for Puerto Ricans' ability to participate in federal elections, the citizens of Puerto Rico have repeatedly voted in referenda—in 1967, 1993, and 1998—against statehood. See Keith Bea & R. Sam Garrett, Congressional Research Serv., *Political Status of Puerto Rico: Options for Congress* 13-15 (2010). In 2011, the President's Task Force on Puerto Rico's Status, an advisory group created by President Clinton and maintained by both President Bush and President Obama, published a report

recommending that Congress enact legislation providing for a new series of binding plebiscites to determine the will of the people of Puerto Rico, the results of which the United States would commit to honor—including, if the people of the Commonwealth so choose, the admission Puerto Rico as a State. See *Report by the President's Task Force on Puerto Rico's Status* 23-33 (2011) (*Puerto Rico Status Report*).[1]

2. In this putative class action, eight Puerto Rico residents led by pro se plaintiff and counsel Gregorio Igartua contend that United States citizens residing in Puerto Rico are entitled, under the Constitution and various international instruments, to elect voting members of the U.S. House of Representatives.[2] See Pet. App. 1a-2a. This is the fourth lawsuit filed by Igartua contending that the inability of Puerto Ricans to participate in federal elections violates the Constitution and international law.

a. In 1994, Igartua and others filed a lawsuit contending that American citizens residing in Puerto Rico have a constitutional right to vote in presidential elections. The First Circuit affirmed the district court's dismissal of the complaint, explaining that Puerto Rico is not a State and consequently is not entitled to appoint electors for President. *Igartua De La Rosa* v. *United States*, 32 F.3d 8, 9-10 (1st Cir. 1994) (per curiam) (*Igartua I*), cert. denied, 514 U.S. 1049 (1995). Only a "constitutional amendment or a grant of statehood to Puerto Rico," the court observed, "can provide appel-

[1] http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf.

[2] Puerto Rico currently elects a territorial delegate, known as the "Resident Commissioner," who sits in the House of Representatives but does not vote. See 48 U.S.C. 891; U.S. House of Rep., Rule III.

lants the right to vote in the presidential election which they seek." *Id.* at 10. The court of appeals also rejected Igartua's contention that Article 25 of the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, guarantees to Puerto Rico citizens the right to vote for President. See 32 F.3d at 10 n.1.

b. In 2000, in anticipation of the presidential election of that year, Igartua and a different group of plaintiffs filed a substantially identical lawsuit. This time, the district court accepted Igartua's constitutional claim, declaring invalid the Constitution's limitations on the appointment of presidential electors. See *Igartua* v. *United States*, 107 F. Supp. 2d 140 (D.P.R. 2000). The First Circuit reversed, explaining that it had previously rejected "precisely the [same] argument" with "undeniable clarity." *Igartua De La Rosa* v. *United States*, 229 F.3d 80, 83 (2000) (per curiam). "Since our decision in *Igartua I* in 1994," the court observed, "Puerto Rico has not become a State, nor has the United States amended the Constitution to allow United States citizens residing in Puerto Rico to vote for President." *Ibid.*

c. In 2003, Igartua and others filed a third lawsuit contending that Puerto Ricans are entitled to vote for President. The First Circuit, after voting to hear the case en banc, rejected the constitutional claim in unequivocal terms: "In this en banc decision, we now put the constitutional claim fully at rest: it not only is unsupported by the Constitution but is contrary to its provisions." *Igartua III*, 417 F.3d at 148. In addition, the en banc court rejected "an adjacent claim: that the failure of the Constitution to grant" citizens of Puerto Rico the right to vote "should be declared a violation of U.S. treaty obligations." *Id.* at 147; see *id.* at 148-152. Not-

ing that it had already addressed this claim in *Igartua I*, the court of appeals explained that "the Constitution is the supreme law of the land, and neither a statute nor a treaty can override the Constitution." *Id.* at 148. Nor, the court continued, may a plaintiff circumvent that limitation by seeking a "declaration" that the United States is in "violation" of principles of international law by failing to modify the constitutional structure of our government. *Id.* at 148-149. Such a claim, the court observed, is "probably not justiciable in the sense that [no] effective relief could be provided; it is enough to let common sense play upon the conjecture that the Constitution would be amended if only a federal court declared that a treaty's generalities so required." *Id.* at 149. And in any event, the court concluded, it would be "patent imprudence to 'declare' purported rights under the treaties at issue in this case," including the ICCPR, because none was privately enforceable in federal court. *Id.* at 149-151.

Judge Lipez concurred in the result, concluding that the plaintiffs lacked standing to litigate a grievance against the Constitution itself because such a complaint is not amenable to judicial redress. *Igartua III*, 417 F.3d at 158 (Lipez, J., concurring in the judgment). Two judges dissented. *Id.* at 158-184 (Torruella, J., dissenting); *id.* at 184-192 (Howard, J., dissenting).

3. In the present case, Igartua and seven others filed suit in February 2008 challenging Puerto Rico's lack of voting representation in the U.S. House of Representatives, again relying on the United States Constitution and various international instruments. Pet. App. 99a-100a. As a remedy, plaintiffs sought, *inter alia*, an order directing the President, the Secretary of Commerce, and the Clerk of the House to "take all the neces-

sary steps" to "implement[] the apportionment of Representatives [in the] electoral process to Puerto Rico." 08-cv-1174 Docket entry No. 1, at 61 (D.P.R. Feb. 7, 2008).

Relying on Judge Lipez's concurring opinion in *Igartua III*, the district court dismissed the complaint as non-justiciable. Pet. App. 99a-108a. "The fact that Puerto Ricans cannot vote for congressional representatives is not unconstitutional," the court explained, because "the Constitution does not provide them such [a] right." *Id.* at 104a. Thus, the court reasoned, plaintiffs could not demonstrate an invasion of a "legally cognizable right" sufficient to support standing. *Id.* at 105a. The court further explained that, even if the Constitution's exclusion of territorial residents from House elections were an injury-in-fact adequate to support standing, that injury would not be subject to redress by judicial order. *Id.* at 106a-107a. "[F]ederal courts cannot admit a territory as a state, make a constitutional amendment, nor force Congress to do so either. Consequently, even if this Court were to grant Plaintiffs' [request] for [a] declaratory judgment it would not remedy Plaintiffs' grievances, as Congress is not forced to do what the judiciary branch tells it to do, and ultimately we would simply be writing an advisory opinion." *Id.* at 107a. The court explained that "it is up to Congress, and not the federal courts, to exercise the authority to deal with this issue." *Id.* at 108a.

4. The court of appeals affirmed. Pet. App. 1a-95a. The panel unanimously held "that the U.S. Constitution does not give Puerto Rico residents the right to vote for members of the House of Representatives because Puerto Rico is not a state." *Id.* at 2a. A majority of the panel further concluded that the court was bound by its

en banc decision in *Igartua III* that (i) the Constitution prohibits the extension of federal voting rights to Puerto Rico absent a constitutional amendment or the admission of Puerto Rico as a State; and (ii) the international instruments on which plaintiffs relied in asserting the contrary, including the ICCPR, were not privately enforceable in court. See *id.* at 3a, 20a; see also *id.* at 28a (Lipez, J., concurring). The members of the panel disagreed, however, regarding whether *Igartua III* was correctly decided.

a. In the lead opinion, Chief Judge Lynch explained that the plain language of the Constitution limits the right to choose members of the House of Representatives to "*the People of the several States*." Pet. App. 4a (quoting U.S. Const. Art. I, § 2); see *id.* at 4a-10a. Judge Lynch explained that "[s]tatehood is central to the very existence of the Constitution, which expressly distinguishes between states and territories" and grants electoral representation in Congress only to the former. *Id.* at 8a. The Great Compromise, by which the Framers achieved agreement on the structure of the national legislature, "was explicitly predicated on the definition of statehood contained in the Constitution." *Ibid.* Judge Lynch therefore would have reaffirmed the court's holding in *Igartua III* that participation in federal elections is permissibly "'confined' to citizens of the states because that 'is what the Constitution itself provides.'" *Id.* at 10a (quoting 417 F.3d at 148).

Chief Judge Lynch also rejected petitioner's argument, advanced in a brief filed as amicus curiae at the panel stage, that the Commonwealth had become the "functional equivalent" of a State and accordingly was "entitled to representation in the House of Representatives" even without admission to the Union. Pet. App.

10a. Petitioner's notion of *de facto* statehood, Judge Lynch concluded, is "refuted by a plain reading of the text of the Constitution." *Id.* at 13a. "No constitutional text vests the power to amend [the Constitution] or the power to create a new state in the federal courts." *Ibid.*

Finally, Chief Judge Lynch rejected plaintiffs' contention that international agreements such as the ICCPR obligate the United States to grant residents of Puerto Rico the right to vote for members of the U.S. House of Representatives. Pet. App. 18a-27a. This claim, she explained, was foreclosed by *Igartua III*. See *id.* at 20a. Moreover, neither Igartua nor petitioner had argued that the ICCPR or other international agreements were self-executing and privately enforceable, so the issue was not properly before the court. *Id.* at 20a-21a; see *id.* at 21a ("The government of Puerto Rico made an express choice not to join these arguments, thereby both waiving and forfeiting them."). And in any event, Judge Lynch observed, this Court has expressly stated that the ICCPR is not self-executing, see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004), and every court of appeals to consider the question has so held. Pet. App. 24a, 26a-27a.

b. Judge Lipez, in a concurring opinion (Pet. App. 27a-38a), agreed that the Constitution does not itself extend to Puerto Rico citizens the right to participate in elections for the U.S. House of Representatives. *Id.* at 29a. He also agreed that dismissal of Igartua's complaint was dictated by the court's earlier decision in *Igartua III*. *Id.* at 29a-30a. In Judge Lipez's view, however, the Constitution might permit the political branches, by entering into a binding international agreement such as the ICCPR, to extend the right to vote to Puerto Rico citizens. See *id.* at 31a ("If the Constitution does

not prohibit extending the right to vote to citizens who reside outside 'the several States,' an enforceable treaty could provide the governing domestic law on that issue."). Judge Lipez thus concurred in the court's affirmance of the district court's judgment but urged the full court to reconsider *Igartua III*'s holding that the ICCPR is not self-executing. *Id.* at 33a-38a.

c. Judge Torruella concurred in part and dissented in part. Pet. App. 39a-95a. He acknowledged that "under the present circumstances the denial of the right to vote for representatives in Congress to United States citizens who reside in Puerto Rico does not violate the provisions of Article I." *Id.* at 45a-46a (emphasis omitted). But he concluded that the Constitution "in no way limits the power of the federal government to provide the right to vote by other means." *Id.* at 52a. In Judge Torruella's view, the ICCPR provides a self-executing, privately enforceable right for all citizens to participate equally in federal elections, *id.* at 52a-82a, and the court could therefore properly issue a declaratory judgment that "the United States is in flagrant violation of its international commitments," *id.* at 86a.

5. After the court of appeals entered its judgment, petitioner, which had previously participated in the case only as amicus curiae, sought leave to intervene and to file a petition for rehearing en banc in its own name. Over the objection of all parties, the court of appeals granted the motion. Pet. App. 113a. Chief Judge Lynch dissented, concluding that petitioner lacked standing as parens patriae to litigate against the United States on its citizens' behalf, that the intervention motion was untimely, and that the arguments petitioner sought to raise had not been preserved. *Id.* at 113a-117a. Plaintiffs separately filed their own petition for rehearing.

The court of appeals denied the petitions for rehearing by an equally divided vote.[3] See Pet. App. 119a-151a.

ARGUMENT

The court of appeals unanimously held that United States citizens residing in Puerto Rico do not have a constitutional right under Article I to elect voting members of the House of Representatives. The court further held that plaintiffs cannot overcome the plain meaning of the constitutional text by invoking the ICCPR—a treaty that, as this Court has explained, "d[oes] not itself create obligations enforceable in the federal courts." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004). Those rulings are correct and do not conflict with any decision of this Court or any other court of appeals. Petitioner, moreover, lacks standing as parens patriae to litigate such issues against the federal government on its citizens' behalf. This Court's review is not warranted.

1. As a threshold matter, the petition should be denied because petitioner, as a territory of the United States, lacks standing to assert the rights of its citizens in litigation against the federal government. See *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923); *see also Florida* v. *Mellon*, 273 U.S. 12, 18 (1927). As this Court has explained, "it is no part of [a state's or territory's] duty or power to enforce [its citizens'] rights in respect of their relations with the federal government." *Mellon*, 262 U.S. at 485-486. Indeed, in holding that Puerto Rico had standing as parens patriae to enforce certain labor

[3] Plaintiffs have separately filed a petition for a writ of certiorari. See *Igartua* v. *United States*, No. 11-876 (filed Nov. 2, 2011).

laws in *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592 (1982), this Court emphasized that Puerto Rico had brought suit against private parties, not against the federal government. See *id.* at 610 n.16.

Petitioner has no independent sovereign interest cognizable under the Constitution in the ability of its citizens to elect members of the House of Representatives. That is the plain meaning and effect of the constitutional text, which provides that members of the House of Representatives shall be chosen by "the *People* of the several States" directly. U.S. Const. Art. I, § 2, Cl. 1 (emphasis added). Puerto Rico is not a State. And even if Puerto Rico *were* a State, only "the People" of Puerto Rico, and not the government of Puerto Rico itself, would have a cognizable right to participate in House elections. Likewise, Article 25 of the ICCPR, on which petitioner relies (Pet. 23-32), speaks only of the rights and opportunities that the signatory countries shall provide to "citizen[s]." Pet. App. 157a. Even if the ICCPR were privately enforceable in federal court, it would be no part of petitioner's "duty or power" to enforce the rights of its citizens under that treaty "in respect of their relations with the federal government." *Mellon*, 262 U.S. at 485-486.[4]

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[4] In its motion to intervene in the court of appeals, petitioner sought to establish standing under *Utah* v. *Evans*, 536 U.S. 452 (2002). See Pet. App. 115a. But *Evans* stands at most for the proposition that a State may have standing to challenge the Commerce Department's conduct of the decennial census—that is, the Constitution's requirement of an "actual Enumeration" of the "People of the several States," U.S. Const. Art. I, § 2—to determine the apportionment of Representatives "among the several *States*." *Ibid.* (emphasis added); see also *id.* Amend. XIV, § 2. Puerto Rico, which is not a State, lacks any constitutionally cognizable interest in the apportionment process.

Petitioner thus lacks standing to challenge the court of appeals' decision here. As this Court held in *Diamond* v. *Charles*, 476 U.S. 54 (1986), "an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that [it] fulfills the requirements of Art. III." *Id.* at 68. Although the Court left open the question whether an intervenor that satisfies the requirements of Rule 24(a) of the Federal Rules of Civil Procedure must independently satisfy the requirements of Article III if another party in the case has standing, *id.* at 69, that question is not implicated here. Because petitioner lacks any cognizable interest as parens patriae in the claims of its citizens against the federal government, it does not satisfy the requirements of Rule 24. See Fed. R. Civ. P. 24(a)(2). And because the individual plaintiffs in this case lack standing themselves, see Pet. App. 104a-108a, there is no other party on whose standing petitioner may rely. This defect alone supplies sufficient grounds to deny the petition.

2. In any event, the court of appeals correctly held that the people of Puerto Rico are not entitled under the Constitution or international law to elect members of the House of Representatives. Pet. App. 1a-10a; see also *id.* at 27a-31a (Lipez, J., concurring). Further review is not warranted.

a. The election of members of the House of Representatives, like the election of the President, is "governed neither by rhetoric nor intuitive values but by a provision of the Constitution." *Igartua-De La Rosa* v. *United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc), cert. denied, 547 U.S. 1035 (2006). The Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by

the People of the several *States*." U.S. Const. Art. I, § 2, Cl. 1 (emphasis added). The Framers expressly distinguished between "States" and "Territor[ies]," see *id.* Art. IV, § 3, and reserved to "the People of the several States" alone the right of representation in the House.[5] Nor is there any doubt about what, for these purposes, counts as a "State[]": after identifying the original 13 States by name, see *id.* Art. I, § 2, Cl. 3, the Constitution provides that Congress may vote to admit new States to the Union, *id.* Art. IV, § 3. Each of the remaining 37 States has been admitted by that process. Petitioner, as it concedes, has not. See Pet. 20 ("To be sure, Puerto Rico has not been formally admitted as a State of the Union.").

Nor has petitioner acquired electoral representation in the federal government by the only other means contemplated by the Framers: amendment of the Constitution. See U.S. Const. Art. V. It was by that process that United States citizens residing in the District of Columbia acquired the right to participate in presidential—but

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[5] See also, *e.g.*, U.S. Const. Art. I, § 2, Cl. 2 (providing that a Representative must "when elected, be an Inhabitant of that *State* in which he shall be chosen") (emphasis added); *id* Cl. 3 (providing that representatives "shall be apportioned among the several *States* which may be included within this Union, according to their respective Numbers") (emphasis added); *id*. Cl. 4 ("When vacancies happen in the Representation from any *State*, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.") (emphasis added); see also U.S. Const. Amend. XIV, § 2 ("Representatives shall be apportioned among the several *States* according to their respective numbers, counting the whole number of persons in each *State*, excluding Indians not taxed.") (emphasis added); cf. U.S. Const. Art. II, § 1, Cl. 2 (providing that States may appoint a number of electors for President and Vice President "equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress") (emphasis added).

not congressional—elections. See U.S. Const. Amend. XXIII, § 1 (authorizing the District of Columbia to appoint electors that "shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State"). Nothing in the text, structure, or history of the Constitution suggests that the Framers intended any other mechanism for a territory to gain representation in Congress. See *Adams* v. *Clinton*, 90 F. Supp. 2d 35, 56 (D.D.C. 2000) (three-judge court), aff'd, 531 U.S. 941 (2000) ("[T]he overlapping and interconnected use of the term 'state' in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood. * * * There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise.").

In light of the plain language of the Constitution, the courts of appeals have uniformly rejected claims that citizens of United States territories are entitled to vote in federal elections. See *Igartua III*, 417 F.3d at 148 (Puerto Rico) (presidential elections); *Ballentine* v. *United States*, 486 F.3d 806, 810-812 (3d Cir. 2007) (Virgin Islands) (presidential and congressional elections); *Attorney Gen. of Territory of Guam* v. *United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (Guam) (presidential elections), cert. denied, 469 U.S. 1209 (1985).

b. Petitioner does not appear to dispute that the Constitution, by its own terms, grants the right to choose members of the House of Representatives only to U.S. citizens who reside in States. See Pet. 13. But petitioner contends that the Commonwealth is "functionally

indistinguishable from a State" (Pet. 20) and that "[t]his evolution informs the constitutional question in this case" (Pet. 18). As the court of appeals explained, however, the Constitution recognizes no notion of *de facto* statehood, much less one that would entitle a territory to gain representation in Congress. Pet. App. 11a-18a.

This Court rejected such an approach to statehood as early as 1805. In *Hepburn & Dundas* v. *Ellzey*, 6 U.S. (2 Cranch) 445 (1805), residents of the District of Columbia urged the Court to treat the District as a "state" for purposes of federal jurisdiction, arguing that the District was a "distinct political society" and therefore "a 'state' according to the definitions of writers on general law." *Id.* at 452. Chief Justice Marshall rejected that argument in an opinion for a unanimous Court, explaining that "the members of the American confederacy only are the states contemplated in the constitution." *Ibid.* The Court recognized that it was "extraordinary" to exclude the nation's capital from the privileges of statehood, but concluded that "this is a subject for legislative not for judicial consideration." *Id.* at 453; see also *Corporation of New Orleans* v. *Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816) (Marshall, C.J.) ("It has been attempted to distinguish a *Territory* from the district of Columbia; but the court is of opinion, that this distinction cannot be maintained. They may differ in many respects, but neither of them is a state, in the sense in which that term is used in the constitution."); *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Peters) 511, 542 (1828) (Marshall, C.J.) (holding that the treaty ceding Florida to the United States "admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. * * * They do not, however, participate in political power; they do not

share in the government, till Florida shall become a state."). Although petitioner relies (Pet. 14) on *National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582 (1949), nothing in any of the opinions in that case recognizes a general notion of *de facto* statehood under the Constitution or suggests that a territory may obtain voting representatives in Congress by any method other than those contemplated by the Framers.

Petitioner correctly observes (Pet. 18-19) that this Court and the First Circuit have sometimes treated Puerto Rico as though it were a State for statutory purposes, and that the First Circuit has done so with respect to at least some constitutional principles that apply only to States, such as Eleventh Amendment immunity. See, *e.g.*, *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108 (2003). But neither this Court nor the court of appeals has held that Puerto Rico *is* a State under the Constitution. Nor has any court suggested that the Commonwealth is entitled, based on its similarity to a State, to claim the most fundamental prerogative of statehood: electoral representation in the government of the United States. The Framers did not anticipate that the federal courts would decide, under the rubric of *de facto* statehood, whether a particular territory should be entitled to claim the privileges of membership in the Union. The Constitution commits that quintessentially political question to Congress. U.S. Const. Art. IV, § 3; see *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

c. Petitioner argues (Pet. 13) that, even if Article I "does not require that citizens residing in Puerto Rico be allowed to vote for Representatives," the Constitution "need not be construed to foreclose such a result." Thus, petitioner frames the first question in its petition as "[w]hether the Constitution *prohibits* the extension

of the right to vote for members of the House of Representatives to United States citizens residing in Puerto Rico." Pet i (emphasis added).

That question, however, is not presented by this case. Congress has not attempted to extend to Puerto Rico the right to elect voting members of the House of Representatives. It has not, for example, altered the statutory process for apportioning Representatives among the States, see 2 U.S.C. 2a, or granted Puerto Rico's territorial delegate, see 48 U.S.C. 891, the right to vote on the floor of the House. Cf. *Michel* v. *Anderson*, 14 F.3d 623, 630-632 (D.C. Cir. 1994) (discussing constitutional limitations on the powers of non-voting territorial delegates in the House of Representatives). Petitioner asserts (Pet. 23) that the ICCPR itself "establishes the right of U.S. citizens in Puerto Rico to vote in elections for the House of Representatives." But nothing in that international agreement, even assuming it were domestically enforceable, could be construed to apportion Representatives to the Commonwealth without (at a minimum) further legislation. Cf. *Reid* v. *Covert*, 354 U.S. 1, 16-17 (1957) (plurality opinion) (treaties are subordinate to the Constitution). The question that petitioner invites the Court to address—whether Congress's authority under the Territory Clause includes the power to grant congressional representation to citizens in Puerto Rico, see Pet. 22—is thus purely hypothetical.

3. For the same reason, resolution of the second question presented in the petition—whether the ICCPR is self-executing (Pet. 23-32)—could not affect the judgment below: even if petitioner were correct, a federal court could not permissibly enjoin the operation of the Constitution or compel Congress to apportion Representatives to Puerto Rico. In any event, consistent with this

Court's decision in *Sosa* and in accord with the view of every court of appeals that has addressed the question, the court of appeals correctly concluded that the ICCPR is "not self-executing and so [does] not itself create obligations enforceable in the federal courts." *Sosa*, 542 U.S. at 735. Pet. App. 18a-27a; see also *id.* at 33a (Lipez, J., concurring); *Igartua III*, 417 F.3d at 149-151.

As an initial matter, petitioner failed to preserve this issue in the court of appeals. As Chief Judge Lynch observed (Pet. App. 20a-21a), neither petitioner nor plaintiffs argued on appeal that the ICCPR is self-executing. Indeed, petitioner, which filed a brief in support of plaintiffs and appeared at oral argument as amicus curiae, did not address questions of international law at all, focusing instead on its contention that the Commonwealth had evolved into a de facto State under the Constitution and was therefore entitled to representation in the House without any further action by Congress. See Pet. C.A. Amicus Br. 8-26. Thus, "[t]he government of Puerto Rico made an express choice not to join" any arguments predicated on international law, "thereby both waiving and forfeiting them." Pet. App. 21a. Only after petitioner obtained new counsel and moved to intervene for purposes of rehearing en banc did petitioner first seek to raise the question whether the ICCPR is self-executing.[6] That is insufficient to preserve a question for this Court's review.

In any event, petitioner's argument is without merit. "[N]ot all international law obligations automatically

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[6] One consequence of petitioner's failure to raise the issue in its amicus brief was that, because the court of appeals did not order a response to the petitions for rehearing, see Fed. R. App. P. 35(e), the United States had no opportunity to address in the court of appeals the arguments that petitioner now advances concerning the ICCPR.

constitute binding federal law enforceable in United States courts." *Medellin* v. *Texas*, 552 U.S. 491, 504 (2008). As a matter of domestic law, a treaty provision that is not self-executing "can only be enforced pursuant to legislation to carry [it] into effect." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888); Restatement (Third) of Foreign Relations Law of the United States § 111 cmt. h (1987).

The ICCPR is not a self-executing treaty and therefore does not create any rights directly enforceable in the courts of the United States. See *Sosa*, 542 U.S. at 728, 735. The Court in *Sosa* specifically cited the ICCPR as an example of a circumstance in which "the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law."[7] *Id.* at 728. Because "the United States ratified the Covenant 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, the Court explained, the ICCPR could not itself "establish the relevant and applicable rule of international law" governing litigation in a United States court, *ibid*.

Petitioner would disregard (Pet. 30) the Court's discussion of the ICCPR in *Sosa* as "dicta." But the Court discussed the ICCPR in the course of rejecting the plaintiff's argument in *Sosa* that the Covenant established an international norm against arbitrary arrest sufficient to support a cause of action for damages under the Alien Tort Statute, 28 U.S.C. 1350. See 542 U.S. at 733-737. A considered rationale of that kind, integral to the out-

[7] The Senate expressly stated in its resolution of ratification that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. 8071 (1992).

come of the case, is not mere *obiter dicta*. See *County of Allegheny* v. *ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.").

Nor, in any event, does petitioner identify any persuasive reason to reconsider the Court's conclusion in *Sosa* that the ICCPR is not self-executing. Petitioner's arguments notwithstanding, every court of appeals to consider the question has reached the same conclusion as the court below. See *Serra* v. *Lappin*, 600 F.3d 1191, 1196-1197 (9th Cir. 2010); *Clancy* v. *Office of Foreign Assets Control*, 559 F.3d 595, 603-604 (7th Cir. 2009); *Ballentine*, 486 F.3d at 814-815; *Guaylupo-Moya* v. *Gonzales*, 423 F.3d 121, 133, 137 (2d Cir. 2005); *Bannerman* v. *Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *United States* v. *Duarte-Acero*, 296 F.3d 1277, 1283 (11th Cir.), cert. denied, 537 U.S. 1038 (2002); *Hain* v. *Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cert. denied, 537 U.S. 1173 (2003); *United States ex rel. Perez* v. *Warden, FMC Rochester*, 286 F.3d 1059, 1063 (8th Cir.), cert. denied, 537 U.S. 869 (2002); *Beazley* v. *Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, 534 U.S. 945 (2001). Further review is not warranted.

4. The political relationship between the United States and the Commonwealth of Puerto Rico remains a subject of ongoing controversy, including among the people of Puerto Rico. With full knowledge of the consequences for political representation in Congress, however, the people of Puerto Rico have repeatedly voted in referenda *against* seeking admission to the Union. See *Puerto Rico Status Report* 21. Although commentators continue to disagree on the interpretation of those elec-

toral results, voter turnout in each plebiscite has "hovered around 70 percent." *Ibid.* In 2011, the President's Task Force on Puerto Rico's Status formally recommended that Congress authorize a new series of binding plebiscites, coupled with a political commitment from the United States to honor the expressed will of the people of Puerto Rico—including, if the people of the Commonwealth so choose, the admission of Puerto Rico as a State. See *id.* at 23-33. Contrary to petitioner's view, it is by a process of that kind, not by a decree of a federal court, that the political status of Puerto Rico should be resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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