No. 17-1007

In the Supreme Court of the United States

GREGORIO IGARTUA, ET AL., PETITIONERS

v.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, 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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QUESTION PRESENTED

Whether petitioners' claim that United States citizens residing in Puerto Rico are entitled to voting representation in the House of Representatives must be decided by a three-judge court under 28 U.S.C. 2284(a).

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OPINIONS BELOW

The order of the court of appeals denying the petition for rehearing en banc (Pet. App. 2-17) is reported at 868 F.3d 24. The opinion of the court of appeals (Pet. App. 18-46) is reported at 842 F.3d 149. The opinion of the district court (Pet. App. 47-73) is reported at 86 F. Supp. 3d 50.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 2016. A petition for rehearing en banc was denied on August 9, 2017. On October 18, 2017, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including January 8, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Constitution governs the apportionment of each State's congressional representatives. Seats in the House of Representatives "shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. Amend. XIV, § 2; see U.S. Const. Art. I, § 2, Cl. 3. The number of Representatives must "not exceed one for every thirty Thousand, but each State shall have at Least one Representative." U.S. Const. Art. I, § 2, Cl. 3.

To accomplish the constitutionally required apportionment, Congress provides for the "actual Enumeration" of persons in the States through a census conducted every ten years. U.S. Const. Art. I, § 2, Cl. 3. Following the census, Congress "allocat[es] Congressmen * * * to each State * * * by the number of the State's inhabitants." *Wesberry* v. *Sanders*, 376 U.S. 1, 13 (1964). Congress initially exercised its apportionment authority through a legislative act adopted after each decennial census. See Act of Apr. 14, 1792, ch. 23, 1 Stat. 253; see generally *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 448-452 (1992). In 1941, however, Congress established a permanent formula for automatic reapportionment of the 435 Representatives that Congress had specified in prior legislation, see Act of Aug. 8, 1911, ch. 5, §§ 1-2, 37 Stat. 13-14; see also *Department of Commerce*, 503 U.S. at 451 & n.24, based on future censuses conducted decennially by the Census Bureau of the Department of Commerce. See Act of Nov. 15, 1941, ch. 470, § 1, 55 Stat. 761 (2 U.S.C. 2a(a)); see also 2 U.S.C. 2a(b) (specifying number of representatives to which "[e]ach State shall be entitled").

2. In 1898, Puerto Rico became a territory of the United States upon cession by Spain at the conclusion of

the Spanish-American War. See Treaty of Peace, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1755. Exercising its authority under the Territory Clause, U.S. Const. Art. IV, § 3, Cl. 2, Congress has, over time, granted Puerto Rico "a measure of autonomy comparable to that possessed by the States." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1874 (2016) (quoting *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 597 (1976)); see *Examining Bd.*, 426 U.S. at 594 ("Puerto Rico [has been granted] the degree of autonomy and independence normally associated with States of the Union."). 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. But Puerto Rico has "not become a State in the federal Union" under the Constitution. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974).

3. Petitioners are United States citizens who reside in Puerto Rico. Pet. App. 47. Petitioner Gregorio Igartua has brought four prior lawsuits claiming a right to participate in federal elections. *Id.* at 20, 48.

a. In 1994, Igartua and others brought suit contending that United States citizens residing in Puerto Rico had a constitutional right to vote in presidential elections. The First Circuit rejected their challenge, explaining that only States are entitled to choose presidential electors and that the plaintiffs would need a "constitutional amendment or a grant of statehood to Puerto Rico" in order to gain "the right to vote in the presidential election which they seek." *Igartua de la Rosa* v. *United States*, 32 F.3d 8, 10 (1994) (*Igartua I*) (per curiam), cert. denied, 514 U.S. 1049 (1995). The court also rejected the plaintiffs' argument that their right to vote in presidential elections was secured by provisions of the International Covenant on Civil

and Political Rights (ICCPR), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368. Those provisions, the court explained, "were not self-executing * * * and could not therefore give rise to privately enforceable rights under United States law," nor in any event could the ICCPR "override the constitutional limits" on electoral representation. *Igartua I*, 32 F.3d at 10 n.1.

b. In 2000, Igartua and a different group of plaintiffs filed a substantially identical lawsuit. After a district court accepted the plaintiffs' constitutional claim, *Igartua de la Rosa* v. *United States*, 107 F. Supp. 2d 140 (D.P.R. 2000), the First Circuit reversed, explaining that it had already rejected "precisely th[at] argument" with "undeniable clarity." *Igartua de la Rosa* v. *United States*, 229 F.3d 80, 83 (2000) (per curiam). The court noted that, in the time since its prior decision, "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 brought a third suit contending that residents of Puerto Rico are entitled to vote for President. The First Circuit, sitting en banc, rejected their argument, concluding that "it not only is unsupported by the Constitution but is contrary to its provisions." *Igartúa-de la Rosa* v. *United States*, 417 F.3d 145, 148 (2005) (*Igartua III*), cert. denied, 547 U.S. 1035 (2006). "That the franchise for choosing electors is confined to 'states,'" the court explained, "cannot be 'unconstitutional' because it is what the Constitution itself provides." *Ibid.*

The en banc court of appeals also rejected the plaintiffs' request for a declaration that the United States had violated international law by denying Puerto Rico federal electoral privileges. *Igartua III*, 417 F.3d at 148 ("[T]he

Constitution is the supreme law of the land, and neither a statute nor a treaty can override the Constitution."). The court further identified "a host of problems with the treaty claim, including personal standing, redressability, the existence of a cause of action, and the merits of the treaty interpretations offered." *Id.* at 149; see *ibid.* ("The present claim is * * * probably not justiciable in the sense that any effective relief could be provided."). The court concluded that "[t]he case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means." *Id.* at 151.

d. In 2008, Igartua and others filed suit challenging Puerto Rico's lack of voting representation in the House of Representatives. The plaintiffs requested that their claims be heard by a three-judge court under 28 U.S.C. 2284(a). Section 2284(a) provides that "[a] district court of three judges shall be convened * * * when an action is filed challenging the constitutionality of the apportionment of congressional districts." Decisions of a three-judge court may be appealed directly to the Supreme Court. 28 U.S.C. 1253; see *Shapiro* v. *McManus*, 136 S. Ct. 450, 453 (2015). A single district judge declined to convene a three-judge court and dismissed the plaintiffs' suit for lack of jurisdiction, concluding that the plaintiffs lacked standing. *Igartua* v. *United States*, No. 08-1174, 2009 WL 10668720 (D.P.R. June 3, 2009).

A panel of the First Circuit agreed that the case was "properly dismissed" on the ground 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," finding the en banc decision in *Igartua III* to be controlling on that issue.

Igartúa v. *United States*, 626 F.3d 592, 594 (2010) (*Igartua IV*). The court also "reject[ed] the argument made by Igartúa * * * that this case must be heard by a three-judge district court under 28 U.S.C. § 2284(a)." *Id.* at 598 n.6. Section 2284(a) requires a three-judge district court to hear a challenge to "'the constitutionality of the apportionment of congressional districts,'" the court explained, but such a challenge "is not the issue in this case." *Ibid.* (quoting 28 U.S.C. 2284(a)).

The members of the *Igartua IV* panel disagreed, however, on whether the en banc decision in *Igartua III* had been correct in rejecting the plaintiffs' treaty claims. Then-Chief Judge Lynch "independently conclude[d]" that the ruling had been "correct." *Igartua IV*, 626 F.3d at 594. Judge Lipez concurred in the judgment, expressing the view that the First Circuit should convene en banc to determine whether the plaintiffs' claims based on the ICCPR had merit. *Id.* at 606-612. Judge Torruella concurred in part and dissented in part, arguing that the ICCPR provides a self-executing, privately enforceable right for all United States citizens to demand congressional representation and that a federal court could properly declare that "the United States has not complied with its obligations under the ICCPR" to provide residents of Puerto Rico with voting representation in the House of Representatives. *Id.* at 639.

The court of appeals denied rehearing en banc by an equally divided vote. *Igartúa* v. *United States*, 654 F.3d 99 (1st Cir. 2011). This Court denied a petition for a writ of certiorari filed by the plaintiffs, *Igartua* v. *United States*, 566 U.S. 986 (2012) (No. 11-876), and also a separate petition filed by the Commonwealth of Puerto Rico, which had been an amicus in the court of appeals, *Puerto Rico* v. *United States*, 566 U.S. 986 (2012) (No. 11-837).

4. Petitioners subsequently brought this action, again requesting that a three-judge district court resolve their claims that United States citizens residing in Puerto Rico are entitled, under "the U.S. Constitution, international treaties and customary international law," to voting representation in the House of Representatives. Pet. App. 47. Petitioners seek, among other things, a judicial order assigning five congressional districts to Puerto Rico. *Id.* at 20.

a. The district court denied petitioners' request to convene a three-judge court. Pet. App. 47-73. Adhering to *Igartua IV*, the court concluded that petitioners' "action cannot be construed as a challenge to the constitutionality of the apportionment of congressional districts." *Id.* at 51. The court also determined that a three-judge district court was unnecessary because petitioners' constitutional and international law claims had been squarely rejected by the court of appeals' prior decisions. *Ibid.* (citing *Igartua III* and *IV*). Those claims were thus "wholly insubstantial" and hence insufficient under Section 2284(a) to raise a question meriting resolution by a three-judge court. *Id.* at 51-52 (quoting *Vazza* v. *Campbell*, 520 F.2d 848, 849 (1st Cir. 1975)). Finally, the district court concluded that petitioners lacked standing to seek a judicial order granting them voting representation. *Id.* at 53-60.

b. A panel of the court of appeals affirmed. Pet. App. 18-46. The court agreed that it was bound, under *Igartua IV*, to "affirm the judgment of the district court refusing to convene a three-judge court and dismissing the case on the merits." *Id.* at 20. The court of appeals expressed doubt, however, about the correctness of *Igartua IV*'s holding that petitioners' treaty-based claim fell outside the scope of the three-judge statute. *Id.* at 33. The

court recommended that the First Circuit rehear the case en banc to resolve that question. *Id.* at 23-41.

Judge Torruella concurred in part and dissented in part, arguing that the ruling in *Igartua IV* was not entitled to *stare decisis* effect and did not require dismissal of petitioners' claims. Pet. App. 41-46.

c. The court of appeals denied rehearing en banc. Pet. App. 2-3. In a statement concerning the denial, Judge Kayatta, joined by Chief Judge Howard and Judges Lynch and Barron, explained that a complaint merits review by a three-judge district court only where "two criteria" are met: "(1) it commences 'an action challenging the constitutionality of the apportionment of congressional districts,' 28 U.S.C. § 2284(a); and (2) it presents 'a substantial federal question,' so that the complaint is 'justiciable in the federal courts.' *Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015)." *Id.* at 3. Petitioners' "only claim that meets the first criterion," Judge Kayatta explained, "is that the United States Constitution makes it unconstitutional to apportion congressional districts as the Constitution itself says to apportion them." *Id.* at 4. That argument, Judge Kayatta continued, is "wholly insubstantial," and thus insufficient to invoke the need for resolution by a three-judge court. *Ibid.* (citation omitted).

Judge Kayatta further explained that a three-judge court was not required to evaluate petitioners' "alternative theory" that the ICCPR "requires the apportionment of congressional representation to Puerto Rico." Pet. App. 4. That argument "is not a challenge to the constitutionality of the current apportionment," but rather "a claim that the current apportionment, implemented through an act of Congress, * * * is not in compliance with what is, in effect, another law approved by

Congress." *Ibid.* Judge Kayatta rejected the suggestion that petitioners' ICCPR-based claim was "a constitutional claim that defendants have violated the Supremacy Clause of the Constitution." *Id.* at 4-5 (citation omitted). That suggestion "cannot be correct because the Supremacy Clause on its face has nothing whatsoever to do with adjudicating an asserted clash between two actions of the United States." *Id.* at 5; see *ibid.* ("[W]ithout the misnomer created by calling a treaty based claim a 'constitutional claim,' the predicate for convening a three-judge court to hear such a claim disappears.").

Judge Torruella dissented from the denial of rehearing en banc, arguing that petitioners' en banc request "raises a question of exceptional importance." Pet. App. 8 (internal quotation marks omitted); see *id.* at 5-13. Judges Lipez and Thompson also separately dissented, arguing that plenary review of petitioners' claims was appropriate. *Id.* at 13-16.

ARGUMENT

Petitioners renew their contention (Pet. 9-14) that their challenge to the lack of representation for Puerto Rico in the House of Representatives is "an action * * * challenging the constitutionality of the apportionment of congressional districts," for which review by a three-judge court is required under 28 U.S.C. 2284(a). Pet. 9 (citation omitted). The court of appeals was correct to reject that argument, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, petitioners' underlying challenge to Puerto Rico's status under the Constitution is not susceptible to judicial redress. This Court previously denied certiorari on an identical question, see *Igartua* v. *United States*, 566 U.S. 986 (2012) (No. 11-876); *Puerto*

Rico v. *United States*, 566 U.S. 986 (2012) (No. 11-837), and the same result is warranted here.

1. Section 2284 provides that "[a] district court of three judges shall be convened * * * when an action is filed challenging the constitutionality of the apportionment of congressional districts," unless the initially assigned judge "determines that three judges are not required." 28 U.S.C. 2284(a) and (b)(1). This Court has explained that, when presented with a request for a three-judge court under Section 2284, the relevant question is "whether the 'request for three judges' is made in a case *covered by* § 2284(a)." *Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015) (quoting 28 U.S.C. 2284(b)(1)) (emphasis added). Answering that question requires "examining the allegations in the complaint," to determine whether the claims at issue "'challeng[e] the constitutionality of the apportionment of congressional districts.'" *Id.* at 454-455 (quoting 28 U.S.C. 2284(a)). Even where such a claim is presented, a three-judge court need not be convened if the complaint asserts only a "'constitutionally insubstantial' claim." *Id.* at 455 (quoting *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)). The court of appeals here correctly concluded that petitioners' complaint was not required to be heard by a three-judge district court.

a. An action "challenging the constitutionality of the apportionment of congressional districts," 28 U.S.C. 2284(a), means as relevant here a suit raising constitutional claims challenging the processes and procedures implementing Article I, Section 2 of the Constitution and Section 2 of the Fourteenth Amendment. See *Black's Law Dictionary* 129 (rev. 4th ed. 1968) (defining "Apportionment" as "[t]he determination upon each de-

cennial census of the number of representatives in congress which each state shall elect, the calculation being based upon the population") (citing U.S. Const. Art. 1, § 2; Amend. XIV, § 2).* Those provisions dictate that voting representation in the House of Representatives shall be "apportioned *among the several States*." U.S. Const. Art. I, § 2, Cl. 3 and Amend. XIV, § 2 (emphasis added). Yet petitioners acknowledge, as they must, that Puerto Rico is *not* a State. See Pet. 5 ("[T]oday it is a de facto incorporated territory of the United States."); see also *Corporation of New-Orleans* v. *Winter*, 14 U.S. (1 Wheat.) 91, 94 (1816) (Marshall, C.J.) (A territory is not "a state, in the sense in which that term is used in the Constitution.").

As Judge Kayatta explained, therefore, petitioners' argument "is that the United States Constitution makes it unconstitutional to apportion congressional districts as the Constitution itself says to apportion them." Pet. App. 4. That argument is "wholly insubstantial" and does not require evaluation by a three-judge court. *Ibid.* (citation omitted). Indeed, this Court rejected a nearly identical constitutional challenge in *Adams* v. *Clinton*, 531 U.S. 941 (2000), where residents of the District of Columbia argued that they had been improperly denied "their right to elect representatives to the Congress of the United States," 90 F. Supp. 2d 35, 37 (D.D.C. 2000) (per curiam). After a three-judge district court rejected that argument because "only the residents of actual states are entitled to representation," *id.* at 47, this Court summarily affirmed, 531 U.S. 941. As Judge

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* Section 2284(a) also requires a three-judge district court for challenges to the apportionment of congressional districts *within* a State. See *Shapiro*, 136 S. Ct. at 456.

Kayatta noted, petitioners' constitutional argument is "certainly" meritless in light of *Adams*. Pet. App. 4.

b. Aside from their contention that the apportionment required by the Constitution is itself unconstitutional, petitioners' only remaining theory (Pet. 11-14) is that the apportionment scheme violates a treaty: the ICCPR. According to petitioners, that argument implicates the "constitutionality of the apportionment of congressional districts," for purposes of Section 2284(a), because the Supremacy Clause of the Constitution gives treaties their legal effect. See Pet. App. 5-16 (similar suggestion by panel). The assertion that Puerto Rico is entitled under the ICCPR to Representatives in Congress, however, is not a constitutional challenge to apportionment under Section 2284(a).

First, even assuming that the ICCPR is self-executing and can create binding obligations that are enforceable in federal courts, but see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 735 (2004) ("[T]he United States ratified the [ICCPR] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."), that would mean at most that the treaty is "equivalent to an act of the legislature," *Medellin* v. *Texas*, 552 U.S. 491, 505 (2008) (citation omitted). Under the Constitution, "a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other." *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888). Petitioners' claim that the ICCPR conflicts with the federal statutes apportioning congressional districts is accordingly the assertion of a conflict between federal

acts of equivalent status—not a challenge to the "constitutionality" of the apportionment scheme.

Nor have petitioners raised a constitutional claim under the Supremacy Clause. As Judge Kayatta explained, petitioners' treaty argument "is a claim that the current apportionment, implemented through an act of Congress, * * * is not in compliance with what is, in effect, another law approved by Congress." Pet. App. 4. That is not a claim under the Supremacy Clause, because "the Supremacy Clause on its face has nothing whatsoever to do with adjudicating an asserted clash between two actions of the United States." *Id.* at 5.

Finally, even if petitioners' argument did properly invoke the Supremacy Clause, this Court has held that such an argument does not qualify as the type of constitutional challenge that requires resolution by a three-judge district court. In *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), addressing a prior statute that required review by a three-judge district court of suits challenging the constitutionality of state statutes, the Court held that a claim that a state statute conflicts with a federal statute, while "of course grounded in the Supremacy Clause of the Constitution," is not *itself* a question of constitutionality that merits resolution by a three-judge court. *Id.* at 120; see *ibid.* ("The basic question involved in" cases under the Supremacy Clause "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes."); see also *Ex parte Bransford*, 310 U.S. 354, 359 (1940) (a preemption claim "involves merely the construction of an act of Congress, not the constitutionality of the state enactment"). That conclusion applies with equal force to Section 2284(a), which affords three-judge review only to

actions challenging the "constitutionality" of the apportionment process. Petitioners' contention that the ICCPR conflicts with the congressional apportionment scheme therefore "cannot trigger the need to assign the case to a three-judge court under § 2284(a)." Pet. App. 4.

2. The court of appeals' judgment was also correct for the independent reason that "the district court itself lack[ed] jurisdiction of the complaint [and] the complaint is not justiciable in the federal courts." *Shapiro*, 136 S. Ct. at 455 (quoting *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U.S. 90, 100 (1974)). The panel below rejected petitioners' request for a three-judge district court based on *Igartua IV*, without addressing the question of Article III jurisdiction. See Pet. App. 22 n.2. But the district court found it "clear" that it "ha[d] no subject matter jurisdiction over this case," *id.* at 60, and the court of appeals had previously explained in *Igartua III* that claims seeking political representation for Puerto Rico suffer from "a host of problems" that make them nonjusticiable in federal courts. *Igartúa-de la Rosa* v. *United States*, 417 F.3d 145, 149 (1st Cir. 2005), cert. denied, 547 U.S. 1035 (2006); see *ibid.* (listing, as considerations precluding judicial review of such claims, "personal standing, redressability, [and] the existence of a cause of action").

Among other things, the Constitution vests Congress with exclusive authority to admit new States, U.S. Const. Art. IV, § 3, Cl. 1, and thus, whether a political entity should become a State and thereby secure the electoral benefits of statehood is a question entirely reserved to Congress. It would be fundamentally inconsistent with the constitutional structure for a court to declare that a territory must be afforded the quintessential prerogatives of statehood. While this Court has

reviewed challenges to the statutory formula for apportioning congressional districts among *existing* States, see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 446 (1992), any claim that Puerto Rico should be included in that process is "fundamentally a political one and must be made through political means." *Igartua III*, 417 F.3d at 151. Similarly, no court could validly order that the Constitution must be amended to afford electoral privileges to Puerto Rico. See *id.* at 149 ("[I]t 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."); cf. *Coleman* v. *Miller*, 307 U.S. 433, 454 (1939) (holding to be "essentially political and not justiciable" the question whether Kansas had waited too long to ratify a constitutional amendment).

3. Petitioners do not suggest that any other court of appeals has articulated a different standard for convening a three-judge court, nor have they identified any disagreement among the circuits concerning whether residents of the territories are entitled to voting representation in Congress. The court of appeals' application of the *Shapiro* standard to the circumstances of this case—which in any event was correct—does not warrant the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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