No. 11-876

In the Supreme Court of the United States

GREGORIO IGARTUA, ET AL., PETITIONERS

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 the district court was required to convene a three-judge court under 28 U.S.C. 2284(a).

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, treaties, statutes and rules:

Treaties, statutes and rules: Page

Miscellaneous:

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 43-143) is reported at 626 F.3d 592.[1] The order of the court of appeals denying rehearing en banc (Pet. App. 1-42) is reported at 654 F.3d 99. The opinion of the district court (Pet. App. 148-159) 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. 1-2). The petition for a writ

[1] The petition appendix appears to omit the footnotes in the court of appeals' opinion, including the footnote (626 F.3d at 598 n.6) in which the court of appeals addressed the first question raised in the petition. Accordingly, this brief cites to the panel's opinion as reprinted in the *Federal Reporter*.

of certiorari was filed on November 2, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that United States citizens residing in Puerto Rico are entitled, under the Constitution and international law, to elect voting members of the U.S. House of Representatives. The district court dismissed the complaint, Pet. App. 148-159, and the court of appeals affirmed, 626 F.3d 592.

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 authority 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 has Puerto Rico been afforded any of the electoral privileges of statehood by constitutional amendment, as the District of Columbia has 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 seeking 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 of 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*).[2]

2. Petitioners in this putative class action are United States citizens who reside in Puerto Rico. Led by pro se plaintiff and counsel Gregorio Igartua, petitioners contend that citizens in Puerto Rico are entitled, under the Constitution and various international instruments, to elect voting members of the U.S. House of Representatives.[3] See 626 F.3d at 594. This is the fourth lawsuit filed by petitioner 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 (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 appellants 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

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

[3] 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.

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. Noting 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 limi-

tation 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. Petitioners filed the present lawsuit in February 2008, this time challenging Puerto Rico's lack of voting representation in the U.S. House of Representatives. Pet. App. 148-149. As a remedy, petitioners sought, *inter alia*, an order directing the President, the Secretary of Commerce, and the Clerk of the House to "take all the necessary 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. 148-159. "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 155. Thus, the court reasoned, petitioners could not demonstrate an invasion of a "legally cognizable right" sufficient to support standing. *Id.* at 155-156. 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 156-158. "[F]ederal courts cannot admit a territory as a state, make a constitutional amendment, nor force Congress to do so either." *Ibid.* Consequently, a "declaratory judgment [] would not remedy [petitioners'] 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 158. 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 159.

4. The court of appeals affirmed. 626 F.3d 592. 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 594. 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 petitioners relied in asserting the contrary, including the ICCPR, were not privately enforceable in court. See *id.* at 595-598, 602-604; see also *id.* at 607, 609 (Lipez, J., concurring). The members of

the panel disagreed, however, regarding whether *Igartua III* was correctly decided.

a. 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*." 626 F.3d at 595 (quoting U.S. Const. Art. I, § 2); see *id.* at 595-598. 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 596. 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." *Id.* at 597. 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.'" *Ibid.* (quoting 417 F.3d at 148).

Chief Judge Lynch also rejected the argument, advanced in a brief filed by the Commonwealth of Puerto Rico as amicus curiae, 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. 626 F.3d at 598-599. Puerto Rico's notion of *de facto* statehood, Judge Lynch concluded, is "refuted by a plain reading of the text of the Constitution." *Id.* at 599. "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 petitioners' 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 House of Representatives. 626 F.3d at 602-606. This claim, she explained, was foreclosed by *Igartua III*. See *id.* at 602-603. Moreover, neither petitioners nor the Commonwealth 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 603. 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, 735 (2004), and every court of appeals to consider the question has so held. 626 F.3d at 604-606.

b. Judge Lipez, in a concurring opinion (626 F.3d at 606-612), agreed that the Constitution does not itself extend to Puerto Rico citizens the right to participate in elections for the House of Representatives. *Id.* at 607. He also agreed that dismissal of petitioners' international law claims was dictated by the court's earlier decision in *Igartua III*. *Id.* at 609. 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 608 ("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 611-612.

c. Judge Torruella concurred in part and dissented in part. 626 F.3d at 612-639. 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 615 (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 619. 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 620-633, and the court could therefore properly issue a declaratory judgment that "the United States is in flagrant violation of its international commitments," *id.* at 635.

5. After the court of appeals entered its judgment, petitioners filed a petition for rehearing. The Commonwealth of Puerto Rico, 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 Commonwealth's motion.

The court of appeals denied both petitions for rehearing by an equally divided vote.[4] See Pet. App. 1-42.

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 U.S. House of Representatives. The court further held that petitioners cannot overcome the plain meaning of the constitutional text by invoking international law, including the ICCPR—a treaty that, as this Court has explained, "d[oes] not itself create obligations

[4] The Commonwealth has separately filed a petition for a writ of certiorari. See *Commonwealth of Puerto Rico* v. *United States*, No. 11-837 (filed Dec. 30, 2011).

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. Further review is not warranted.

1. As an initial matter, petitioners argue (Pet. 9-10) that the district court erred under the circumstances of this case in failing to convene a three-judge court under 28 U.S.C. 2284(a). That fact-bound contention does not warrant this Court's review. Section 2284 provides that a "district court of three judges shall be convened" when, *inter alia*, "an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. 2284(a). As the court of appeals explained in rejecting petitioners' reliance on Section 2284, "[t]hat is not the issue in this case." 626 F.3d at 598 n.6. Petitioners' complaint does not challenge the apportionment of congressional districts *per se*, but rather the predicate constitutional rule that excludes Puerto Rico and other territories from the apportionment process entirely. That contention does not require resolution by a three-judge court under Section 2284(a).[5]

2. The court of appeals correctly held that the people of Puerto Rico are not entitled under the Constitution to elect voting members of the House of Representatives. As the district court concluded, moreover, a federal court is powerless to adjudicate a claim that the Constitution *should* provide something other than what it does—even if a grievance against the Constitution were a cognizable injury under Article III, it would not

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[5] Nor, contrary to petitioners' contention (Pet. 10-11), did the court of appeals' refusal to rehear this case en banc violate petitioners' rights to due process or equal protection of the laws.

be subject to redress by judicial order. See Pet. App. 155-159. 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).[6] 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.[7]

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[6] Contrary to petitioners' contention (Pet. 20-21), the court of appeals did not apply principles of res judicata based on *Igartua III*, nor did the court fail to appreciate the distinction under the Constitution between presidential and congressional elections. The court simply recognized that its holding in *Igartua III* that the Commonwealth is not a "State" for purposes of appointing presidential electors, see 417 F.3d at 148, logically required the conclusion that the people of Puerto Rico are not among "the People of the several States" under Article I. See 626 F.3d at 597; see also *id.* at 607 (Lipez, J., concurring).

[7] 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.* § 2, 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.* § 2, 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

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. Puerto Rico has not.

Nor has Puerto Rico 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 not congressional—elections. See 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

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(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).

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. Petitioners' arguments to the contrary do not warrant review. Petitioners contend (Pet. 11-15) that the inability of Puerto Rico residents to participate in federal elections violates constitutional principles of due process and equal protection. But Article I's restriction of voting representation in the House to the "People of the several States" cannot be unconstitutional "because it is what the Constitution itself provides." *Igartua III*, 417 F.3d at 148. This Court's decision in *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982), is not to the contrary. Pet. 19. The Court in *Rodriguez* recognized that a citizen of Puerto Rico, like a citizen of a State, "has a constitutionally protected right to participate in elections on an equal basis with other citizens *in the jurisdiction*." 457 U.S. at 10 (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972)) (emphasis added). The Court did not hold or suggest in *Rodriguez* that the Constitution entitles citizens residing in Puerto Rico participate in federal elections on the same terms as those who reside in States.

Petitioners correctly observe (Pet. 13-14) 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 concluded that Puerto Rico *is* a State under the Constitution. Nor has any court of appeals suggested that the Commonwealth is entitled 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 any rubric of *de facto* or functional 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.[8] U.S. Const. Art. IV, § 3; see *Baker* v. *Carr*, 369 U.S. 186, 217 (1962).

Petitioners emphasize (Pet. 3-5, 15-19) that all persons born in Puerto Rico are natural-born United States citizens, see 8 U.S.C. 1402, and that their lack of voting representation in Congress denies them a voice in crafting the laws that apply to all Americans. The United States does not underestimate the importance of voting or electoral representation, and, like the court of appeals, "recognize[s] the loyalty, contributions, and sacri-

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[8] For essentially this reason, the district court dismissed the complaint as non-justiciable, reasoning, *inter alia*, that it was beyond the power of the federal courts to provide any effective redress for petitioners' alleged injury. See Pet. App. 156-158. That decision was correct. Although the court of appeals discussed the merits of petitioners' arguments without separately addressing justiciability, the court ultimately affirmed the judgment of the district court. See 626 F.3d at 606.

fices of those who are in common citizens of Puerto Rico and the United States." *Igartua III*, 417 F.3d at 148. As a legal proposition, however, petitioners' contention that "the source of the right to vote in Federal elections is citizenship" (Pet. 15-16) is mistaken. In cases brought by United States citizens residing in the District of Columbia, this Court has repeatedly rejected the claim that a right to electoral representation inheres in national citizenship. In *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317 (1820), for example, Chief Justice Marshall upheld the power of Congress to tax residents of the District, rejecting arguments premised on "that great principle which was asserted in our revolution, that representation is inseparable from taxation." *Id.* at 324-325; see also *Heald* v. *District of Columbia*, 259 U.S. 114, 124 (1922) (Brandeis, J.) ("There is no constitutional provision which so limits the power of Congress that taxes can be imposed only upon those who have political representation.").

c. Petitioners also contend that "the Constitution does not *prohibit* United States citizens residing in Puerto Rico from voting for representatives in the U.S. House of Representatives," implying that Congress could alter the status quo if it wished. Pet. 15 (emphasis added). That question, however, is not presented by this case. Even if Congress could use its powers under the Territory Clause to grant voting representation in Congress to citizens in Puerto Rico, it has not sought to do so: 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). The statutory process for electing members of the House remains unchanged. The question whether Congress could constitutionally alter that process thus remains purely hypothetical.

3. For similar reasons, petitioners' contentions regarding the ICCPR and other international instruments (Pet. 22-30) do not warrant this Court's review. Even if petitioners were correct about the meaning and domestic effect of the instruments on which they rely, no international agreement may override the express terms of the Constitution.[9] *Reid* v. *Covert*, 354 U.S. 1, 16-18 (1957) (plurality opinion); see also *Igartua III*, 417 F.3d at 148. Further review is additionally unwarranted because, as Chief Judge Lynch observed (626 F.3d at 603), petitioners failed to preserve in the court of appeals their argument (Pet. 28) that the ICCPR is self-executing. In their briefs below, petitioners did not make an argument "as to how the [ICCPR] bind[s] federal courts," and instead "cite[d] the ICCPR merely 'as supportive,' noting that it has 'been used by many courts to interpret existing U.S. law or to determine legal rights when the plaintiff has an independent cause of action.'" 626 F.3d at 603. As Judge Lynch correctly noted, "[t]his amounts to forfeiture if not waiver." *Ibid.*

In any event, petitioners' arguments concerning international law fail on their own terms. As the court of appeals recognized, see 626 F.3d at 602-603 & n.11; *Igartua III*, 417 F.3d at 148-150, none of the interna-

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[9] For the same reason, petitioners err (Pet. 31-33) in suggesting that the Declaratory Judgment Act, 28 U.S.C. 2201, would permit a court to declare that the Constitution violates international law. "[T]he availability of [declaratory] relief presupposes the existence of a judicially remediable right." *Schilling* v. *Rogers*, 363 U.S. 666, 677 (1960).

tional agreements on which petitioners rely is self-executing. "[N]ot all international law obligations automatically 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).[10]

Petitioners principally rely on the ICCPR. Pet. 23-29. The ICCPR, however, 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. This Court in *Sosa* 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."[11] *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 alone could not "establish the relevant and applicable rule of international law" governing litigation in a United States court, *ibid*.

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[10] Indeed, some of the instruments cited by petitioners, such as the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948), see Pet. 29, do not themselves impose binding obligations as a matter of domestic *or* international law. See *Sosa*, 542 U.S. at 734.

[11] 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).

Although members of the court of appeals characterized this portion of *Sosa* as dicta, see, *e.g.*, 626 F.3d at 628 (Torruella, J., dissenting), the Court in *Sosa* discussed the ICCPR in the course of rejecting the plaintiff's argument 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 *Sosa*, 542 U.S. at 733-737. A considered rationale of that kind, integral to the outcome 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."). And every court of appeals to consider the question has likewise concluded that the ICCPR is not self-executing.[12] Further review is not warranted.

4. Petitioners' basic error subsists in their contention that "it is only through the judicial channel that [petitioners'] fundamental right to vote in elections for representatives to the U.S. House of Representatives as American citizens can be clarified and granted." Pet. 6. In fact, as the district court recognized (Pet. App. 159),

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[12] 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, *Ruotolo* v. *United States*, 537 U.S. 869 (2002); *Beazley* v. *Johnson*, 242 F.3d 248, 267-268 (5th Cir.), cert. denied, *Beazley* v. *Cockrell*, 534 U.S. 945 (2001).

the Constitution affords the federal courts no proper role in determining whether the right to participate in federal elections should be extended to the people of Puerto Rico. That question belongs, in the first instance, to the people of the Commonwealth themselves, who 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 electoral 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 to determine the will of the people of Puerto Rico, coupled with a political commitment from the United States to honor the results of that process—including, if the people of the Commonwealth so choose, the admission of Puerto Rico as a State. See *id.* at 23-33. Contrary to petitioners' 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.[13]

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[13] This case is not suitable for the Court's review for the additional reason that petitioners' notice of appeal in the district court appears to have been jurisdictionally defective. As the government noted in its brief below (Gov't C.A. Br. 2 & n.2), the notice of appeal failed to comply with the requirements of Fed. R. App. P. 3(c), which specifies that a valid notice of appeal must, *inter alia*, "name the court to which the appeal is taken." See 08-cv-1174 Docket entry No. 34 (D.P.R. Aug. 5, 2009) (Notice of Appeal). Although the government was not prejudiced by the omission, this Court has stated that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to judicial review." *Smith* v. *Barry*, 502 U.S. 244, 248 (1992); see also *Becker* v. *Montgomery*, 532 U.S. 757, 765-766 (2001). The court of appeals did not address the sufficiency of petitioners' notice of appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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