No. 05-650

In the Supreme Court of the United States

GREGORIO IGARTUA DE LA ROSA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Constitution or international instruments entitle United States citizens residing in Puerto Rico to vote in presidential elections.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-81a) is reported at 417 F.3d 145. The panel opinion of the court of appeals (Pet. App. 88a-101a) is reported at 386 F.3d 313. The opinion of the district court (Pet. App. 102a-110a) is reported at 331 F. Supp. 2d 76.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2005. The petition for a writ of certiorari was filed on October 29, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are United States citizens residing in the Commonwealth of Puerto Rico, who desire to vote in

elections for the President and Vice President of the United States. This is the third action brought within the last 12 years in which citizens of Puerto Rico, led by pro se plaintiff and counsel Gregorio Igartua de la Rosa, contend that the United States Constitution and international agreements entitle citizens of Puerto Rico to vote in presidential elections.

a. In *Igartua de la Rosa* v. *United States*, 32 F.3d 8 (1st Cir. 1994) (per curiam) (*Igartua I*), cert. denied, 514 U.S. 1049 (1995), a group of citizens residing in Puerto Rico—including two of the petitioners in the instant case—brought an action asserting that the Constitution and various international instruments afforded them the right to participate in presidential elections. The court of appeals "summarily" rejected the contention that the "inability to vote in the United States presidential election violates their constitutional rights." 32 F.3d at 9. As the court explained, the Constitution itself expressly "provides that the President is to be chosen by electors who, in turn, are chosen by '*each state* . . . in such manner as the Legislature thereof may direct.'" *Ibid.* (quoting U.S. Const. Art. II, § 1, Cl. 2 (emphasis and ellipses added in *Igartua I*)). Accordingly, "the Constitution does not grant citizens the right to vote directly for the President," and "only citizens residing in *states* can vote for electors and thereby indirectly for the President." *Ibid.* Because Puerto Rico is not a State, the court held, "it is not entitled under Article II to choose electors for President, and residents of Puerto Rico have no constitutional right to participate in that election." *Id.* at 9-10.

The *Igartua I* court further explained that no constitutional amendment provides for citizens of Puerto Rico to vote in a presidential election. Instead, "[t]he only jurisdiction, not a state, which participates in the presi-

dential election is the District of Columbia, which obtained the right through the twenty-third amendment to the Constitution." 32 F.3d at 10. Accordingly, "[o]nly a similar constitutional amendment or a grant of statehood to Puerto Rico" could provide its citizens "the right to vote in the presidential election." *Ibid.*

Finally, the court of appeals held that the International Covenant on Civil and Political Rights (ICCPR) does not entitle citizens of Puerto Rico to vote in presidential elections. As the Court explained, the substantive provisions of the ICCPR "were not self-executing * * * and could not therefore give rise to privately enforceable rights under United States law" and, in any event, the ICCPR could not "override the constitutional limits" set forth in Article II. *Iguarta I*, 32 F.3d at 10 n.1.

b. In 2000, another group of citizens residing in Puerto Rico—including four of the petitioners in the instant case—filed a second action alleging that the Constitution and the ICCPR entitle citizens of Puerto Rico to vote in presidential elections. In *Igartua de la Rosa* v. *United States*, 229 F.3d 80 (1st Cir. 2000) (per curiam) (*Igartua II*), the court of appeals once again rejected those contentions. The court explained that *Igartua I* had "held with undeniable clarity that the Constitution of the United States does not confer upon United States citizens residing in Puerto Rico a right to participate in the national election for President and Vice-President." *Id.* at 83. The court further explained that, under settled principles of stare decisis, "our decision in *Igartua I* controls this case, unless there has been intervening controlling or compelling authority." *Id.* at 84. The court concluded that no post-1994 decisions had undercut *Igartua I*, and it therefore applied that "binding au-

thority" to order the dismissal of *Igartua II*. See *id.* at 84-85.

Judge Torruella joined the per curiam opinion in *Igartua II*, but also filed a separate concurrence. The concurrence urged at some length that disparate treatment of citizens of Puerto Rico was unfair and could warrant "judicial intervention at some point." 229 F.3d at 89 (concurring opinion); see *id.* at 85-90. Nonetheless, the concurring opinion concluded that *Igartua II* was not an "appropriate case for such intervention, largely because the particular issue of the presidential vote is governed by explicit language in the Constitution providing for the election of the President and Vice-President *by the States*, rather than by individual citizens." *Id.* at 90.

2. Undaunted by *Igartua I* and *Igartua II*, Mr. Igartua de la Rosa and others filed a third, essentially identical lawsuit in August 2003. As in the previous cases, petitioners alleged that citizens of Puerto Rico have a right to vote in presidential elections under the Constitution (C.A. App. 1, 15-17, 50-51) and under international instruments such as the ICCPR (*id.* at 34-40).

The district court dismissed the complaint for failure to state a claim. With respect to the constitutional claims, the court found "no new jurisprudence warranting departure from prior clear, applicable precedent. Nor is there new legislation * * * which would require the court to disregard *Igartua I* and *Igartua II*." Pet. App. 106a. The court similarly found dispositive the previous holding in *Igartua I* that treaties or other international agreements, even if privately enforceable, "could not 'override the constitutional limits' imposed by Art. II" of the Constitution. *Ibid.* (quoting 32 F.3d at 10 n.1).

3. a. On appeal, a panel of the court of appeals affirmed. Pet. App. 88a-90a. The majority held that the prior decisions in *Igartua I* and *Igartua II* controlled, and that petitioners had not raised any arguments that warranted departure from the rule that earlier decisions are binding.

Judge Torruella dissented. Pet. App. 91a-101a. Complaining of the "colonial nature of the U.S.-Puerto Rico relationship" and of the "doctrine of inequality" created by past Supreme Court decisions (*id.* at 93a-94a), the dissent asserted that "[t]he indefinite disenfranchisement of the United States citizens residing in Puerto Rico constitutes a gross violation of their civil rights as guaranteed by the Fifth Amendment and by international treaties to which our Nation is a signatory." *Id.* at 96a.

b. The court of appeals' panel thereafter granted rehearing, ordering the parties to submit supplemental briefs addressing two questions: (1) the effect of "treaty obligations" of the United States on the eligibility of citizens residing in Puerto Rico to vote for President and Vice-President of the United States; and (2) the availability of relief under the Declaratory Judgment Act, 28 U.S.C. 2201. See Pet. App. 82a-83a. Prior to re-argument before the panel, however, the full court of appeals voted to hear the case en banc. *Ibid.*

4. a. The en banc court of appeals affirmed the dismissal of petitioners' complaint. Pet. App. 1a-11a. The court noted that the constitutional claim is "readily answered" by the text of the Constitution itself, which vests the election of the President and Vice President in the States rather than the citizens. *Id.* at 3a. The court concluded: "Like each state's entitlement to two Senators regardless of population, the make-up of the elec-

toral college is a direct consequence of how the framers of the Constitution chose to structure our government—a choice itself based on political compromise rather than conceptual perfection." *Id.* at 4a. Thus, vesting the franchise in States rather than citizens "cannot be 'unconstitutional' because it is what the Constitution itself provides." *Ibid.* Noting that petitioners' constitutional claim had been rejected three times by the court of appeals, the court stated: "In this en banc decision, we now put this constitutional claim fully at rest: it not only is unsupported by the Constitution but is contrary to its provisions." *Id.* at 5a.

The en banc court of appeals also held that petitioners' reliance upon three international instruments - the ICCPR, the Universal Declaration of Human Rights, and the Inter-American Democratic Charter—did not warrant relief. The court observed that "[n]o treaty claim, even if entertained, would permit a court to order the electoral college to be enlarged or reapportioned," since "neither a statute nor a treaty can override the Constitution." Pet. App. 5a-6a.

The court of appeals also rejected petitioners' efforts to recast the claim as one seeking declaratory (rather than injunctive) relief, identifying "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." Pet. App. 6a. The court found it "unnecessary to plumb these questions, * * * because none of these treaties comprises domestic law of the United States and so their *status* furnishes the clearest ground for denying declaratory relief." *Id.* at 7a. The court held that the international instruments cited by petitioners "do not adopt any legal obligations binding as a matter of domestic law,"

noting that the Universal Declaration and the Inter-American Democratic Charter are merely "precatory," and the ICCPR is not self-executing. *Id.* at 8a-9a. To declare that the United States was in violation of these provisions "would attempt to do what the President and Congress have declined to do, namely, to deploy the treaty provision in an attempt to order domestic arrangements within the United States." *Id.* at 9a.

Finally, the court of appeals rejected the contention that "customary international law" requires a declaration concerning the right of Puerto Rico residents to vote in presidential elections. Noting the different methods by which democratic nations choose their leaders, the court concluded: "If there exists an international norm of democratic government, it is at a level of generality so high as to be unsuitable for importation into domestic law." Pet. App. 11a.

b. Judge Lipez concurred in the judgment. Pet. App. 13a-22a. The concurring opinion would not have reached the merits of petitioners' claim for declaratory relief, concluding that the court lacked jurisdiction over the claim because it is not redressable by the court. *Id.* at 13a-14a. The concurring opinion explained that "there is only hope and speculation that Congress, in response to a declaratory judgment about a violation of international law, would invoke cumbersome and contentious processes relating to Constitutional amendment or the admission of a new state to eventually give citizen residents of Puerto Rico the right to vote for President and Vice President. Such hope and speculation does not satisfy the 'case or controversy' requirement of Article III." *Id.* at 22a.

c. Judge Campbell issued a short concurring opinion (Pet. App. 12a) agreeing with the concurrence of Judge

Lipez that the court lacked jurisdiction to grant declaratory relief. He also agreed with the majority's "alternative analysis which leads to the same outcome." *Ibid.*

d. Judge Torruella dissented. Pet. App. 23a-66a. In a lengthy opinion recounting the political and legal history of Puerto Rico, Judge Torruella asserted that the right to vote is fundamental and that, even if international legal instruments are not self-executing and do not create private rights, the court should enter a declaratory judgment stating that the United States has not taken any steps to comply with those international instruments. See *id.* at 25a-66a.

e. Judge Howard also dissented. Pet. App. 66a-81a. He asserted that the case should be remanded to permit the parties to develop a record concerning whether the ICCPR is self-executing. *Id.* at 80a-81a.

ARGUMENT

The court of appeals held that the Constitution does not confer upon U.S. citizens residing in Puerto Rico the right to participate in presidential elections and that the courts lack the authority to enter a declaratory judgment stating that the United States has violated various international instruments in failing to provide for such a right. That decision is amply supported by constitutional text, unbroken tradition, and uniform precedent. Moreover, the court of appeals' decision does not create a conflict in the circuits. Accordingly, review by this Court is unwarranted.

1. a. The Constitution expressly provides for the President to be elected through a vote of presidential electors chosen by the States. In pertinent part, Article II states: "Each *State* shall appoint, in such Manner as the Legislature thereof may direct, a Number of Elec-

tors, equal to the whole Number of Senators and Representatives to which the *State* may be entitled in the Congress." Art. II, § 1, Cl. 2 (emphases added). Moreover, the Twelfth Amendment provides for the electors to vote for President "in their respective *states*" and further provides that, if no candidate receives a majority of votes of the presidential electors, the House of Representatives is to elect the President in a vote "taken by *states*, the representation from each *state* having one vote" (emphases added). These provisions make unambiguously clear that only the States (and, derivatively, the citizens of States) may participate in presidential elections.

The Twenty-third Amendment reinforces this understanding. That Amendment permits the District of Columbia to appoint presidential electors, and it specifies that the number of such electors shall be "equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*, but in no event more than the least populous State" (emphasis added). The Amendment obviously presupposes that, because the District of Columbia is not a State, it could not have participated in the presidential election absent a constitutional amendment.

The Constitution also expressly distinguishes between States and territories, the latter of which are nowhere mentioned in the clauses addressing presidential elections, but which are addressed in a separate clause providing that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." Art. IV, § 3, Cl. 2. Moreover, when the Twelfth Amendment was ratified in 1804, United States "Territory" (outside of any State) included the

Indiana Territory, the Mississippi Territory, and the Louisiana Territory. Nonetheless, the Amendment confirmed that only States would appoint presidential electors, after Congress specifically rejected an alternative amendment that would have provided for the presidential electors to be chosen by a nationwide popular vote. See *McPherson* v. *Blacker*, 146 U.S. 1, 33-34 (1892).

The understanding that States, but not territories, would participate in presidential elections has remained uniform throughout American history. To pick but a few examples: the Indiana Territory and the Louisiana Territory did not participate in presidential elections either before or after ratification of the Twelfth Amendment; Alaska and Hawaii did not participate in presidential elections before achieving statehood in 1959; the District of Columbia did not participate in presidential elections before ratification of the Twenty-third Amendment in 1961; and territories within the meaning of the Constitution, such as Puerto Rico (see *Harris* v. *Rosario*, 446 U.S. 651 (1980)), Guam, and the Virgin Islands, to this day do not participate in presidential elections. This Court has held that "'traditional ways of conducting government * * * give meaning' to the Constitution," *Mistretta* v. *United States*, 488 U.S. 361, 401 (1989) (citation omitted), particularly where the practice at issue has spanned the entirety of American history. See, *e.g.*, *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 328 (1936). That principle clearly applies here, where no territory has ever participated in any of the 54 presiden-

tial elections conducted over more than two centuries of American history.[1]

b. Petitioner's fundamental premise—that the right to vote in presidential elections accrues as a right of United States citizenship (Pet. 11)—is incorrect. In fact, this Court has recognized that the right to appoint presidential electors is constitutionally vested in the States. See, *e.g.*, *Bush* v. *Gore*, 531 U.S. 98, 104 (2000) (per curiam) ("The individual citizen has no federal constitutional right to vote for electors for President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."); *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 n.18 (1983) ("The Constitution expressly delegates authority to the States to regulate the selection of Presidential electors."); *McPherson*, 146 U.S. at 35 ("the appointment and mode of appointment of electors belong exclusively to the States under the Constitution"); *In re Green*, 134

[1] Petitioner argues (Pet. 10) that Ohio has participated in presidential elections since 1803 even though it was "not formally admitted as a state until 1953" due to a technical error. However, the courts have uniformly rejected the contention that Ohio was not properly admitted as a State in 1803. See, *e.g.*, *Knoblauch* v. *Commissioner*, 749 F.2d 200, 201-202 (5th Cir. 1984) (collecting cases), cert. denied, 474 U.S. 830 (1985); *State* v. *Bob Manashian Painting*, 782 N.E.2d 701, 704 (Ohio Mun. Ct. 2002) ("Litigants in other courts have argued that Ohio is not a state, or that it was never properly admitted to the Union. These assertions are entirely groundless.") (collecting cases); see also *Bowman* v. *Government of the U.S.*, 920 F. Supp. 623, 625 n.4 (E.D. Pa. 1995) (concluding that the 1953 presidential declaration of Ohio's statehood was "purely ceremonial"). This Court reocgnized long ago that Ohio was "admitted to the Union in 1802, under an act of Congress." *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 160 (1886); see also *Piqua Branch of the State Bank* v. *Knoop*, 57 U.S. (16 How.) 369, 384 (1854) (discussing Ohio Enabling Act).

U.S. 377, 379 (1890) (referring to "the vote of the State for President and Vice-President of the nation"); see also *Romeu* v. *Cohen*, 265 F.3d 118, 123 (2d Cir. 2001) ("the Constitution does not directly confer on any citizens the right to vote in a presidential election."); *In re Opinion of the Justices*, 107 A. 705, 706 (Me. 1919) ("The language of section 1, subd. 2, is clear and unambiguous. It admits of no doubt as to where the constitutional power of appointment is vested, namely, in the several states.").

Petitioners nevertheless contend (Pet. 10) that the specific constitutional provisions governing presidential elections must be considered in conjunction with other constitutional provisions governing voting rights, such as the First, Fourteenth, and Fifteenth Amendments. But whatever the source and scope of the right to vote in other contexts, there is simply no individual constitutional right to vote for President of the United States. For instance, this Court made clear in *Bush* v. *Gore* that equal protection constraints attach only *after* a "state legislature vests the right to vote for President in its people," and the Court stressed that "[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors." 531 U.S. at 104. In *McPherson*, the Court noted that "[t]he constitution does not provide that the appointment of electors shall be by popular vote" (146 U.S. at 27), and it specifically rejected a contention that a popular vote for the President is required by the Fourteenth and Fifteenth Amendments, including the Equal Protection Clause (see *id.* at 38-40).

Nor do due process or equal protection principles, including the principle of "one person, one vote" recognized in *Reynolds* v. *Sims*, 377 U.S. 533 (1964), under-

mine the electoral college that provisions of the Constitution itself specifically mandate for presidential elections. In *Gray* v. *Sanders*, 372 U.S. 368 (1963), for example, the Court explained that the electoral college, "despite its inherent numerical inequality," was "validated" by its specific inclusion in the Constitution. *Id.* at 378; see *id.* at 380 ("The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President."). Similarly, in *Reynolds*, this Court invalidated state apportionment plans inconsistent with the "one person, one vote" principle, but nonetheless stressed that the Senate apportionment scheme (which, like the electoral college, does not follow the "one person, one vote" principle) is "one ingrained in our Constitution, as part of the law of the land." 377 U.S. at 574.

c. The court of appeals decision is consistent with every court that has addressed the issue of the right of constitutional territories (and derivatively their citizens) to participate in presidential elections. In *Attorney General* v. *United States*, 738 F.2d 1017, 1019 (1984), cert. denied, 469 U.S. 1209 (1985), the Ninth Circuit rejected a suit seeking presidential voting rights brought on behalf of U.S. citizens residing in Guam. That court explained that "[t]he right to vote in presidential elections under Article II inheres not in citizens but in states; citizens vote indirectly for the President by voting for state electors." The court concluded: "Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation."). Accord *Sanchez* v. *United States*, 376 F. Supp. 239, 242

(D.P.R. 1974) ("until the Commonwealth [of Puerto Rico] votes for Statehood, or until a constitutional amendment is approved which extends the presidential and vice presidential vote to Puerto Rico, there is no substantial constitutional question raised").

2. The court of appeals also correctly rejected petitioners' contention that various international instruments support their request for judicial intervention to permit citizens residing in Puerto Rico to participate in presidential elections.

a. First, none of the international instruments invoked by the petitioners creates legal rights or obligations enforceable through the courts. Two of the instruments—the Universal Declaration and the Inter-American Democratic Charter—are aspirational resolutions that are not binding by their terms and therefore cannot create legal rights or obligations.

With respect to the Universal Declaration, Eleanor Roosevelt, Chairman of the United Nations Commission on Human Rights when the Declaration was drafted, spoke for the United States and stated that the Declaration "was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of principles." See John P. Humphrey, *The UN Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights* 39, 50 (Evan Luard ed. 1967). Accordingly, the Universal Declaration "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 734 (2004); see also *Flores* v. *Southern Peru Copper Corp.*, 414 F.3d 233, 261 n.38 (2d Cir. 2003) (Universal Declaration is "merely a non-binding resolution") (citation omitted).

The Inter-American Democratic Charter, adopted in 2001 by the General Assembly of the Organization of American States (OAS), likewise is merely a non-binding aspirational instrument. Immediately prior to the Charter's adoption, the U.S. Ambassador to the OAS made that point clear, stating to the OAS that "the United States understands that this Charter does not establish any new rights or obligations under either domestic or international law." Remarks of Ambassador Roger Noriega, OAS Permanent Council Meeting (Sept. 6, 2001), excerpted in Representation: Inter-American Democratic Charter, *2001 Digest* chap. 6(I)(1), at 347. Moreover, the Charter speaks in "broad generalities" and in that way confirms that its provisions "are declarations of principles, not a code of legal rights." *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). And the Charter itself gives no indication that it is to be enforced by courts, but instead provides for an international diplomatic mechanism to address non-observance of its provisions. See Inter-American Democratic Charter, arts. 17-22.

The ICCPR, while a binding international agreement, is not self-executing and, as the Executive stated when submitting it to the Senate for ratification, its substantive provisions "would not of themselves become effective as domestic law." S. Exec. Docs. Nos. C, D, E, and F, 95th Cong., 2d Sess., at vi (1978); see also *Whitney* v. *Robertson*, 124 U.S. 190 (1888); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1987). As "a compact between independent nations," the ICCPR "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it," and any infraction be-

comes "the subject of international negotiations and reclamations." *Head Money Cases*, 112 U.S. 580, 598 (1884). Thus, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Ibid.*

Moreover, 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). Thus, controlling authority from this Court, *Sosa*, 542 U.S. at 734-735, establishes that the ICCPR is not self-executing and does not create obligations enforceable in the courts. The Senate expressly conditioned its ratification of the ICCPR on the proviso that "[n]othing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States of America as interpreted by the United States." 138 Cong. Rec. at 8071. An interpretation of the ICCPR to require a change in the constitutional framework for the selection of the President and Vice President would be directly contrary to that understanding.

b. In any event, the international instruments relied on by petitioners would provide no basis for relief in this case, because *no* international instrument can alter the system set forth in the Constitution for selecting the President and Vice President. This Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17 (1957) (plurality opinion); see *In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984) (collecting cases). Indeed, it is "obvious" that "no agreement with a foreign nation can confer power on the Congress, or on any other

branch of Government, which is free from the restraints of the Constitution." *Reid*, 354 U.S. at 16.

This principle applies even though the Supremacy Clause provides that treaties shall be the "Law of the Land." As the *Reid* Court held, there is "nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." 354 U.S. at 16. Statutes also are the "Law of the Land," but like treaties, must yield to the Constitution. And because a statute can override or abrogate a treaty, "[i]t would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Id.* at 18.[2]

c. Finally, even apart from questions of constitutional supremacy and judicial enforceability, adherence to the electoral college system is not inconsistent with any of the three international instruments at issue. Each of those instruments speaks generally concerning the right to vote in periodic elections and to take part in the governance of one's country. Those rights are exer-

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[2] This Court's decision in *Roper* v. *Simmons*, 125 S. Ct. 1183 (2005), does nothing to undermine this longstanding principle. In that case, the Court looked to international understanding to *confirm* its holding that imposition of the death penalty for offenders under the age of 18 at the time of the offense is inconsistent with evolving standards of decency and therefore violates the Eighth Amendment. See *id.* at 1198-99; see also *id.* at 1200 (acknowledging that the opinion of the world community is "not controlling our outcome"). Unlike questions of cruel and unusual punishment under the Eighth Amendment, the validity of the constitutional framework establishing the electoral college is not subject to a standard that focuses on "evolving standards of decency." Thus, nothing in *Roper* permits resort to international instruments to override the clear commands of Article II.

cised by the citizens of Puerto Rico within the context of a vibrant democratic political system. Federal law establishes Puerto Rico as a Commonwealth with rights of self-government and guarantees its citizens numerous statutory and constitutional rights. See, *e.g.*, 48 U.S.C. 731d, 734, 737; 8 U.S.C. 1402; *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 7-8 (1982); *Trailer Marine Transport Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992); *Lopez* v. *Aran*, 844 F.2d 898, 902 (1st Cir. 1988).[3]

On the important question of Puerto Rico's status in relation to the United States, the citizens of Puerto Rico have not been denied their right to participate. Commonwealth status, as opposed to statehood, has advantages as well as disadvantages. See, *e.g.*, 26 U.S.C. 933 (income of Puerto Rico residents is not subject to federal income tax). With full knowledge of both the benefits and drawbacks of statehood, including the implications of that status on participation in presidential elections, the citizens of Puerto Rico have voted repeatedly—in 1967, 1993, and 1998—against statehood. See José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 Rev. Jur. U.P.R. 1, 12-13, 17, 19 (1999).

3. The court of appeals also correctly held that the Declaratory Judgment Act does not provide relief here.

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[3] The United Nations has recognized that "the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination," and "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 26, U.N. Doc. A/2630 (1953).

Because the international instruments at issue provide no individual legal rights, a court cannot enter a declaratory judgment on the question whether United States action is inconsistent with those instruments. Entering such a judgment would be an unwarranted intrusion by the courts into matters of domestic constitutional structure and delicate areas of foreign relations in which they are ill-equipped to operate, and would reflect an incorrect use of the Declaratory Judgment Act to circumvent the lack of both private rights and judicial enforceability.

The Declaratory Judgment Act, 28 U.S.C. 2201, provides that "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Despite this seemingly broad language, the reach of the Act is limited and was not designed to circumvent a lack of jurisdiction, rights, or a substantive right of action. See *Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (holding that "a declaratory judgment is not available when the result would be a partial 'end run' around" Eleventh Amendment immunity); *Marshall* v. *Crotty*, 185 F.2d 622, 628 (1st Cir. 1950) (holding that, where a former government employee did not have a right to reinstatement by way of mandamus, the court "is likewise without jurisdiction to give a declaratory judgment determining the reinstatement rights"). Where a party seeking declaratory relief has no underlying substantive right of action, a declaratory judgment not only serves as an inappropriate "end run," but also results in a judgment that is "futile and ineffective." *Id* at 627. As a judgment that under no circumstances

could be backed by a coercive order, it "would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason" as well. *Green*, 474 U.S. at 73 n.2; see *Riva* v. *Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995).

Indeed, a naked declaration concerning the United States' observance of otherwise judicially unenforceable international instruments would not "clarify[] and settle[] the legal relations in issue," nor would it "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Edwin Borchard, *Declaratory Judgments* 299 (2d ed. 1941). Such a declaration would serve only to embroil the Court in an ongoing political debate by offering the panel's opinion in areas of constitutional structure that are committed to the statehood or amendment process and matters of foreign policy within the responsibility of the political Branches. The court of appeals therefore correctly held that declaratory relief is inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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