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Appendix A

**United States Court of Appeals
For the First Circuit**

No. 15-1336

GREGORIO IGARTÚA, et al.,
Plaintiffs, Appellants,

v.

DONALD J. TRUMP, President of the United
States of America; WILBUR L. ROSS, JR.,
Secretary of Commerce; KAREN L. HAAS, Clerk of
the U.S. House of Representatives,
Defendants, Appellees. *

Before

Howard, Chief Judge,
Torruella, Lynch, Lipez, Thompson, Kayatta, and
Barron, Circuit Judges.

ORDER OF COURT
Entered: August 9, 2017

Pursuant to First Circuit Internal Operating Procedure X(C), Appellant Gregorio Igartua's petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en

banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

KAYATTA, Circuit Judge, with whom HOWARD, Chief Judge, LYNCH, Circuit Judge, and BARRON, Circuit Judge join, statement on denial of rehearing en banc. The prolonged inability of our fellow citizens to vote for certain federal officials is certainly a matter of legitimate concern. The only issue now before us, though, is whether our court should convene an en banc hearing to consider whether the plaintiffs' claims in this action must be heard in the first instance by a three-judge court under 28 U.S.C. § 2284(a). Those urging that we do so premise their argument upon a suggestion that our controlling precedent errs in failing to require the appointment of a three-judge court. For the following reasons, we disagree.

To warrant the assignment of this lawsuit to a three-judge court, we would need to find that the complaint satisfies two criteria: (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) (quoting Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 100 (1974)).

* Pursuant to Fed. R. App. P. 43(c)(2), President Donald J. Trump, is substituted for former President Barack Obama, and Secretary Wilbur L. Ross, Jr., is substituted for former Secretary Penny Pritzker, as appellees.

Plaintiffs' only claim that meets the first criterion is that the United States Constitution makes it unconstitutional to apportion congressional districts as the Constitution itself says to apportion them. Notably, none of our colleagues even tries to explain how the Constitution itself might conceivably prohibit that which it directs "shall be" done. To the contrary, as Judge Torruella observed, "the text of Section 2, Article I does not grant to citizens of Puerto Rico the right to vote for members of the House of Representatives." Igartúa v. United States (Igartúa IV), 626 F.3d 592, 616 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (emphasis in original). Any argument to the contrary, certainly post-Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C.), affd. 531 U.S. 941 (2000), is therefore "wholly insubstantial." Vazza v. Campbell, 520 F.2d 848, 850 (1st Cir. 1975).

Our colleagues do posit an alternative theory that: (1) the Constitution might permit Congress to make such an apportionment; and (2) the International Covenant on Civil and Political Rights ("ICCPR"), a treaty approved by the Senate, requires the apportionment of congressional representation to Puerto Rico. Such a claim, however, cannot trigger the need to assign the case to a three-judge court under § 2284(a) because it is not a challenge to the constitutionality of the current apportionment. Rather, it is a claim that the current apportionment, implemented through an act of Congress, see 2 U.S.C. §§ 2a-2c, is not in compliance with what is, in effect, another law approved by Congress. See Medellín v. Texas, 552 U.S. 491, 505 (2008) (a treaty is "equivalent to an act of the legislature" (citation omitted)). To say that "plaintiffs' treaty-based claim is a constitutional claim that defendants have

violated the Supremacy Clause of the Constitution," Igartúa v. Obama (Igartúa V), 842 F.3d 149, 156 (1st Cir. 2016), 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.' And without 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.

TORRUELLA, Circuit Judge, dissenting from the denial of rehearing en banc. Although I fully join my dissenting colleagues' elegant and on point statements, I write separately because their expressions regarding the majority's denial of en banc review of the panel decision fall substantially short of what I consider to be an unwarranted and unjustifiable action that clearly runs contrary to the law.

At the heart of this controversy lies the total national disenfranchisement² and lack of national political clout of the community of 3.5 million United States citizens who reside in Puerto Rico, a condition which has lasted for the 119 years of U.S. sovereignty over the people who inhabit this territory, and even more significantly, throughout the 100 years since they were granted citizenship in 1917.³ This situation has, if anything deteriorated in recent times.⁴ This regrettable condition calls upon this court to heed the

¹ See U.S. Const. art VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

apparently forgotten advice of the Supreme Court in United States v. Carolene Products Co., 304 U.S 144, 152 n.4 (1938), to the effect that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Beyond the expressions of my dissenting colleagues, I am saddened, not only by this court's negation of the advice of Carolene Products, but, in opposition to that tenet, as is clearly demonstrated in the denial of the present en banc proceeding, by its consistently shallow grounds in doing so.

In substance, Appellants claim that they are deprived of their constitutional right to vote for representatives in the United States House of Representatives by reason of Congress having failed to apportion congressional districts for Puerto Rico, and demand the convening of a three judge district court pursuant to 28 U.S.C. § 2284. The Federal Rules of Appellate Procedure provide procedural relief designed to correct serious constitutional injuries of the type claimed by the insular minorities in question in this case.

Rule 35(a)(2) of the Federal Rules of Appellate Procedure establishes that an en banc court may be convened when "the proceeding involves a question of exceptional importance." Given our record of past en banc votes, it is difficult to discern in this circuit a principled rule as to what is considered a "question of exceptional importance." Judging from the votes in the present case, as well as in past cases, one cannot even accurately describe the existence of a double, triple, or even quadruple standard of what this court

considers a "question of exceptional importance." The closest we can come to in predicting the granting or denial of such a procedure in this Circuit is that it appears to depend on the "eye of the beholder," see Igartúa v. United States, 654 F.3d 99, 105 (1st Cir. 2011) (Torruella, J., dissenting), or stated with equal accuracy, that "we know it when we see it." Just a few examples will suffice to illustrate the nomadic nature of our non-"exceptional importance" rule. In Igartúa-de la Rosa v. United States, 417 F.3d 145, 158 (1st Cir. 2005) (Torruella, J., dissenting), this court motu proprio convened an en banc court and proceeded to suppress the original panel after the panel had held a rehearing and even before it could issue its opinion.⁵ In S.E.C. v. Tambone, we granted en banc to decide what it means "[t]o make any untrue statement of a material fact . in connection with the purchase or sale of any security." 597 F.3d 436, 438 (1st Cir. 2010) (en banc) (alterations in original). In United States v. Textron, we granted en banc to figure out "whether the attorney work product doctrine shields from an IRS summons 'tax accrual work papers' prepared by lawyers and others in a

² In 2012, 61% of the People of Puerto Rico voted in favor of joining the Union as a state, a result which was ignored by Congress. See OPCIONES NO TERRITORIALES, Elecciones Generales 2012 y Consulta sobre el Estatus Político de Puerto Rico (Nov. 16, 2012, 9:59 PM), <http://64.185.222.182/REYDI>NocheDelEvento12/index.html#es/default/OPCIONES NO TERRITORIALES ISLA.xml>. On June 11, 2017, a referendum reaffirmed this outcome with a 97% vote in favor of statehood. See CONSULTA DE ESTATUS, Plebiscito para la Descolonización Inmediata de Puerto Rico (June 14, 2017, 3:43 PM), [http://resultados2017.ceepur.org/Noche del Evento 78/index.html#es/default/CONSULTA DE SCOLONIZACION Resumen.xml](http://resultados2017.ceepur.org/Noche%20del%20Evento%2078/index.html#es/default/CONSULTA%20DE%20SCOLONIZACION%20Resumen.xml). Unfortunately, given the *Realpolitik* of the present situation in the National center of power, these results are most likely to be "dead on arrival."

[corporation]'s [t]ax [d]epartment to support [the corporation]'s calculation of tax reserves for its audited corporate financial statements." 577 F.3d 21, 22 (1st Cir. 2009) (en banc); see also Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 474 (1st Cir. 2013) (Torruella, 1. dissenting) (compiling cases demonstrating the First Circuit's ambivalence when granting and denying en banc review).

In contrast, the present request for en banc review raises a question of "exceptional importance" because:

(1) The panel that decided this case affirmed the denial by the district court of the convening of a three-judge district court because it found itself bound by "the brief, yet controlling, footnote in Igartúa v. United States, 626 F.3d 592, 598 n.6 (1st Cir. 2010) ("Igartúa IV")] rejecting the call for a three-judge court."⁶ Igartúa v. Obama, 842 F.3d 149, 151 (1st Cir. 2016). It nevertheless unequivocally stated "we emphasize that we now doubt the correctness of [that] brief, yet controlling, footnote" and, "[a]lthough we as a panel must follow Igartúa IV, the three-judge court issue is one of substantial importance that should be reconsidered by the full court in an en banc rehearing of this case."⁷ Thus, an issue which was "not... in [that] case" was decided in a summary, passing manner.

³ Jones-Shafroth Act, Pub. L. No. 64-368, 39 Stat. 951 (1917).

⁴ See Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016); Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101-2241.

(2) With respect, both the district court and the members of this court who have voted against en banc review have committed a fundamental error of law in considering the possible ultimate outcome of the underlying question raised by Appellants' petition as a deciding factor in whether a three-judge district court should be convened. The focus in deciding this question should have been whether Appellants' constitutional claims are "wholly insubstantial." *Vazza v. Campbell*, 520 F.2d 848, 849 (1st Cir. 1975). *Id.* ("Since no three-judge court was convened, we can affirm the dismissal of the action only if appellant's constitutional claims are 'wholly insubstantial.'" (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973))).

In *Igartúa IV*, the court decided in a conclusory footnote that the case did not have to be heard by a three-judge court, but failed to consider the issues that actually determine whether a three-judge court must be convened: (1) whether 28 U.S.C. § 2284(a) in fact covered the type of claim raised by *Igartúa*, and (2) whether there was a "substantial federal question." *Shapiro v. McManus*, 136 S. Ct. 450, 455 (2015). In its opposition to en banc, the government fails to address

⁵ See also *Igartúa de la Rosa v. U.S.*, 407 F.3d 30 (1st Cir. 2005).

⁶ That footnote states in its entirety: "We also reject the argument made by *Igartúa*, but not made by the government, that this case must be heard by a three-judge district court under 28 U.S.C. § 2284(a). That statute 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. That is not the issue in this case." (alteration in original) (emphasis added) (citation and quotations omitted). *Igartúa IV*, 626 F.3d at 598 n.6.

precedents discussed at length in the majority opinion regarding these two issues and dismisses *Adams v. Clinton*, 90 F. Supp. 2d 35, 72 (D.D.C.), *affd*, 531 U.S. 941 (2000), in a footnote, arguing in essence that the District of Columbia and the Commonwealth of Puerto Rico are distinct.

In *Adams*, residents of the District of Columbia challenged their exclusion by Congress from apportionment to a congressional district. *Adams v. Clinton*, 26 F. Supp. 2d 156, 157-58 (D.D.C. 1998). The district judge concluded that plaintiffs' nonapportionment claims were covered by § 2284(a), and convened a three-judge panel, *id.* at 161, which ultimately dismissed the case on the merits. *Adams*, 90 F. Supp. at 72 (three-judge panel). On direct appeal, the parties squarely raised the jurisdictional issue before the Supreme Court. The Court affirmed the judgment of the three-judge district court without explanation, 531 U.S. at 941, thus implying that the three-judge court had been properly convened for the nonapportionment claim. The government's attempt to dismiss the significance of *Adams* by merely arguing in a footnote that the District of Columbia and the Commonwealth of Puerto Rico are meaningfully distinct in both history and character is a red herring. Any difference to this effect has no relevance to the Supreme Court's implied reasoning that a claim of nonapportionment is, in essence, a challenge to the apportionment of a congressional district, which requires that a three-judge court be convened. And that is the legal

⁷ *Igartúa v. Obama*, 842 F.3d 149, 151 (1st Cir. 2016).

question at issue here: whether a three-judge court must have been convened for Appellants' nonapportionment claims.

The government further argues that Appellants' constitutional claims are not "justiciable" because court can require a constitutional amendment, order that Puerto Rico be admitted into the Union as a state, or enjoin Congress to enact new legislation." Although the government uses the term "justiciable," its argument is actually that the complaint fails to state a claim for which relief can be granted. Failure to state a claim upon which relief may be granted, however, is not the proper standard. Rather, as previously indicated, we need to focus on whether Appellants' constitutional claims are "wholly insubstantial." *Vazza* 520 F.2d at 849. Thus, it is not enough that the government and some members of this court might consider the claim to be without merit. *Shapiro*, 136 S. Ct. at 456 ("Perhaps petitioners will ultimately fail on the merits of their suit, but § 2284 entitles them to make their case before a three-judge district court."). Because the substantiality threshold is not a test of whether the allegations in the complaint state a claim for relief on the merits and, as discussed in the majority opinion, Appellants' claims are not "wholly insubstantial," the government's response is unpersuasive.

The members of this court who have voted against en banc review reject on the merits the panel's suggestion that a constitutional claim may arise from the government's failure to abide by the obligations imposed by the International Covenant on Civil and Political Rights ("ICCPR"). A majority of the en banc court, if convened, might ultimately agree with that assessment. But the court should not be

deciding the issue without thorough briefing and full deliberation.

Indeed, dismissing the treaty argument on the ground that it merely identifies a conflict between two legislative enactments ignores the unique status of treaties as a source of federal law. Treaties are not garden-variety statutory enactments, see U.S. Const., Art. II, § 2 (giving the President power "to make Treaties, provided two thirds of the Senators present concur"), and their status under the Supremacy Clause means they can override inconsistent legislation, see, Julian G. Ku, Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes, 80 Ind. L.J. 319, 322 (2005) (noting that some scholars "believe that treaties have domestic effect superseding inconsistent domestic law"); id. at 334-35 (noting that "when conflict occurs between a treaty and a federal statute, the courts apply the last-in-time rule, which holds that 'a treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty'" (quoting Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871))); but see Vasan Kesavan, The Three Tiers of Federal Law, 100 Nw. U.L. Rev. 1479, 1633 (2006) (rejecting the first-in-time rule as unconstitutional and concluding that "[t]he Constitution establishes three tiers of federal law," with statutes superior to treaties). Hence, if Congress is obliged by the ICCPR to provide all citizens an equal right to vote -- and assuming no other constitutional provision bars that action -Congress arguably would have to re-do the current apportionment of representatives to include citizens residing in Puerto Rico within an apportionment plan. That scenario does not present a conflict between two laws of equal stature. A binding treaty that broadens the objectives of congressional

apportionment would necessarily trigger revision of an inconsistent mathematical formula for apportionment.

While this view of the United States' treaty commitments may be debatable, the majority of the active judges are unwilling even to engage on the complex questions raised here. Their rationale for rejecting deliberation -- that, at most, we have a run-of-the-mill statutory conflict -is to choose one framing of the argument over another. There is no doubt that the three-judge court issue was decided in a cursory manner without any reasoning or explanation in lgartúa IV. A bereft footnote should not be our "binding precedent" for such an important issue of law. An en banc court should be convened so that we can give the issue due consideration after additional briefing by the parties.⁸

In sum, this case presents important issues at the very heart of what it means to be a democracy. They deserve consideration by our full court and certainly greater deliberation than they were given in a footnote about an issue that was not before us. A report by the Senate Judiciary Committee regarding the amendment of the Three-Judge Court Act stresses that challenges to apportionment issues "are of such importance that they ought to be heard by a three-judge court." S. Rep. No. 94-204, at 9 (1975). This further reinforces that this case presents a question of exceptional importance that warrants en banc review. Because the majority of this court thinks otherwise, I respectfully dissent.

LIPEZ, Circuit Judge. I write to record my disappointment that a majority of the active judges of this court have refused to allow en banc review of

appellant's contention that a threejudge court should have been convened to decide in the first instance whether United States citizens who reside in Puerto Rico have a constitutional right to vote in certain federal elections. Bound by prior precedent, the panel had no choice but to reject that contention, and we thus upheld the dismissal of the complaint. See Igartúa v. Obama, 842 F.3d 149, 151 (1st Cir. 2016) ("Igartúa V"). We emphasized, however, that our decision "should not properly, or fairly, be the end of the case." Id. at 152. We urged our colleagues to grant any forthcoming request for en banc review "without delay." Id. at 160.

I will not repeat here the reasoning that led the panel to question our court's prior cursory holding that the three-judge-court statute does not cover the right-to-vote claim that appellant asserts. See id. at 153-59. It suffices to say that the issue is complex, our precedent does not seriously address it, and the right ultimately at stake -- "the fundamental privilege of voting," Igartúa v. United States ("Igartúa IV"), 626 F.3d 592, 610 (Lipez, J., concurring in the judgment) is undeniably of "exceptional importance." Fed. R. App. P. 35(a)(2). There could be no more compelling circumstances for en banc review. The certainty of our colleagues that the petition for en banc review does not raise a constitutional issue within the meaning of the three-

⁸ There are no logistical reasons for why an en banc court should not be convoked. This court last had an en banc in January 2015 and before that it had only two since 2012. Our statistics show fewer and fewer cases are being heard, a trend that has been going on for some time. We are hardly overworked.

judge-court statute is premature. Assisted by the comprehensive briefing that would accompany such review, we would be better positioned to consider the applicable law and achieve the correct outcome. I am deeply disappointed by my colleagues' failure to acknowledge that the issues presented here are worthy of this court's thorough deliberation and fully articulated analysis.

THOMPSON, Circuit Judge, dissenting from the denial of rehearing en banc. Bravo to Judges Torruella and Lipez for showing us just how wrong the decision not to hear this case en banc really is. Allow me to add my words of protest too.

Plaintiffs' en-banc request turns on whether a district judge should've convened a three judge court to decide a question of transcendent importance — do U.S. citizens/residents in Puerto Rico have a constitutional right to vote in certain federal elections? The problem here is that an earlier decision of this court — one that only an en-banc court can reverse — held that a three judge court isn't required to hear a claim like plaintiffs'. See Igartúa v. United States, 626 F.3d 592, 598 n.6 (1 st Cir. 2010), en banc review denied, 654 F.3d 99 (1 st Cir. 2011), cert. denied, 132 S. Ct. 2376 (2012). Given how significant the three-judge-court issue is -- for reasons well discussed by Judges Torruella and Lipez — one might expect the prior panel to have offered a good deal of analysis and reasoning to support its conclusion. Alas, one would be mistaken. The prior panel said just this — in a footnote, no less:

We also reject the argument made by Igartúa, but not made by the government, that this case must be heard by a three-judge district court under 28 U.S.C. §

2284(a). That statute 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." *Id.* That is not the issue in this case.

Id. (ellipses in original). Yes, that's all the footnote said — hardly a serious treatment of a complex issue, and a conclusion that's very likely wrong to boot, as lgartúa v. Obama, 842 F.3d 149, 15359 (1st Cir. 2016), persuasively explained.

For me, the matter comes down to these indisputable points: The applicability of the three judge-court statute is legally intricate. See *id.* (showing in detail why that is so). The right to vote is perhaps the most precious enjoyed by America's citizens. See generally Bonas v. Town of N. Smithfield, 265 F.3d 69, 74 (1st Cir. 2001) (noting "that the right to vote" is "the wellspring of all rights in a democracy"). And before depriving *millions and millions* of Americans of that right, **we should at least take the** time to explain our thinking in a binding en-banc opinion — something the above-quoted footnote unquestionably does *not do*.⁹

Ultimately, then, if this case does not "involve[] a question of exceptional importance," see Fed. R. App. P. 35(a), I don't know what does.

⁹ Taking plaintiffs' case en banc will give us the benefit of on-point briefing by the parties and interested amici on this oh-so-important issue, as Judge Lipez notes.

By the Court:

/s/ Margaret Carter. Clerk

cc:

Hon. Jay A. Garcia-Gregory

Frances Rios de Moran, Clerk, United States District
Court for the District of Puerto Rico

Gregorio Igartua

Mariana E. Bauza Almonte

Mark R. Freeman

Appendix B
**United States Court of Appeals
For the First Circuit**

No. 15-1336

GREGORIO IGARTÚA, et al.,
Plaintiffs, Appellants,

v.

BARACK OBAMA, President of the United
States of America; PENNY PRITZKER, Secretary
of Commerce; KAREN L. HAAS, Clerk of the U.S.

House of

Representatives,

Defendants, Appellees.

APPEAL

 FROM
THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF PUERTO RICO
[Hon. Jay A. García-Gregory, U.S. District Judge]

Before

Torruella, Lipez, and Thompson,
Circuit Judges.

Gregorio Igartúa for appellants.

Mark R. Freeman, Attorney, Appellate Staff,
Civil Division, U.S. Department of Justice, with whom
Benjamin C. Mizer, Principal Deputy Assistant
Attorney General, Carmen M. Ortiz, United States
Attorney, and Matthew M. Collette, Attorney,
Appellate Staff, Civil Division, U.S. Department of
Justice, were on brief for appellees.

November 23, 2016

LIPEZ, Circuit Judge. Plaintiff Gregorio Igartúa, a U.S. citizen-resident of Puerto Rico, returns to this court for the fifth time in search of a legal remedy for his claim that he has a constitutional right to vote in certain federal elections. Here, for the second time, Igartúa and his fellow plaintiffs specifically challenge the denial of the right of Puerto Rico citizens to vote for representatives to the U.S. House of Representatives and their right to have five Puerto Rico representatives apportioned to that body. Plaintiffs also assert that the district court again erred in refusing to convene a three-judge court to adjudicate their claims.

When Igartúa first raised the issue of congressional representation in 2010, a panel majority disposed of the three judge-court issue in a footnote. On the merits, it concluded that we were bound by past circuit decisions to find that "the Constitution does not permit granting such a right to the plaintiffs by means other than those specified for achieving statehood or by amendment." Igartúa v. United States ("Igartúa IV"), 626 F.3d 592, 594, 598 n.6 (1st Cir. 2010), en banc review denied, 654 F.3d 99 (1st Cir. 2011), cert. denied, 132 S. Ct. 2376 (2012). As we explain in Section I below, we again find ourselves bound by circuit precedent, and we thus must affirm the judgment of the district court refusing to convene a three-judge court and dismissing the case on the merits.

In so doing, however, we emphasize that we now doubt the correctness of the brief, yet controlling, footnote in Igartúa IV rejecting the call for a three-judge court. See 626 F.3d at 598 n.6.¹ Moreover, if our court were now to conclude, in an en banc proceeding,

that a three-judge panel should have been convened to hear the constitutional claims addressed in Igartúa IV, the merits ruling in Igartúa IV would be void. See infra. Hence, though we as a panel must follow Igartúa IV, the three-judge-court issue is one of substantial importance that should be reconsidered by the full court in an en banc rehearing of this case.

I. The Instant Appeal

In all material respects, this action is a reprise of Igartúa IV. As the district court noted, "Plaintiffs' arguments in the Complaint at bar are nearly identical to the ones raised in Igartúa IV." Igartúa v. United States, No. 3:14-cv-01558-JAG, slip op. at 2 (D.P.R. Jan. 28, 2015). In addition, the parties in the two cases largely overlap. Four of the six plaintiffs here were plaintiffs in Igartúa IV. The defendants in Igartúa IV were the President of the United States, the U.S. Secretary of Commerce, and the Clerk of the U.S. House of Representatives -- the same defendants as here.

The legal rulings made in Igartúa IV are thus binding on most of the parties in this action under principles of res judicata, see Haag v. United States, 589 F.3d 43, 45 (1st Cir. 2009), and, in any event, the doctrine of stare decisis bars us, as a panel, from

¹ Although we share our colleague's concern about the brevity of footnote 6, see infra, the fact remains -- as discussed below -- that the Igartúa IV panel could not have addressed the merits of that appeal if the case should have been heard originally by a three-judge court. Hence, the rejection of Igartúa's demand for a three-judge court was essential to the disposition in Igartúa IV, and it is therefore binding on us.

reaching a different conclusion on the same questions of law, see United States v. González-Mercado, 402 F.3d 294, 299 (1st Cir. 2005) ("We have heard and rejected this argument before. Under the doctrine of stare decisis, then, the issue is foreclosed." (citations omitted)); see also United States v. Mouscardy, 722 F.3d 68, 77 (1st Cir. 2013) (noting that an earlier panel decision binds a later panel under "[t]he law of the circuit doctrine").

Hence, because we are not at liberty to depart from the dispositive holdings in Igartúa IV, we must affirm the judgment of the district court granting defendants' motion to dismiss.²

On the merits, the district court concluded that it did not have subject matter jurisdiction over plaintiffs' claims because However, having closely examined the pertinent law, we are persuaded that a summary affirmance should not properly, or fairly, be the end of the case.

² The district court seemingly offered two reasons for denying plaintiffs' request for a three-judge court. First, it relied on footnote 6 in Igartúa IV, which summarily rejected the same request in that case. Second, the court appeared to treat the merits decision in Igartúa IV as a separate basis for its ruling, observing that plaintiffs' request for a three-judge panel was "unfounded" because "the controlling authority relevant to this case" rendered their claims "wholly insubstantial." Slip op. at 5 (quoting Vazza v. Campbell, 520 F.2d 848, 850 (1st Cir. 1975)). We explain below why the latter rationale is incorrect.

II. The Three-Judge-Court Requirement

Under 28 U.S.C. § 2284(a), "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." Accordingly, when the district court judge originally assigned to a case determines that one or more of the plaintiff's claims warrants a three-judge court, the judge must take the steps necessary to convene a three-judge panel. See 28 U.S.C. § 2284(b); see also Shapiro v. McManus, 136 S. Ct. 450, 454 (2015). The three-judge court's ruling on the merits of such claims is appealable only to the U.S. Supreme Court. See 28 U.S.C. §§ 1253, 1291; Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715–16 (1962). Hence, when a three-judge court is properly convened to hear claims within the scope of § 2284(a), the court of appeals does not play a role in resolving the merits. See Idlewild Bon Voyage Liquor Corp., 370 U.S. at 715-16 (noting that a court of appeals is "precluded from reviewing on the merits a case which should have originally been determined by a court of three judges").

(Cont. ²) On the merits, the district court concluded that it did not have subject matter jurisdiction over plaintiff's claim because they lacked standing. Again relying on Igartúa IV, the court held that "Plaintiffs have not demonstrated that a legally protected interest was harmed in this case." Slip op. at 8; see also id. at 12. We do not address the validity of the court's standing rationale and instead affirm based on the reasoning described above (i.e., res judicata and stare decisis). See Otero v. P.R. Indus. Comm'n, 441 F.3d 18, 20 (1st Cir. 2006) ("We review the district court's order of dismissal de novo and may affirm on any ground supported by the record.").

If a case is brought improperly to the court of appeals -- because the district court erroneously refused to convene a three-judge court -- any subsequent merits ruling by the appellate panel is void. See Stratton v. St. Louis Sw. Ry. Co., 282 U.S. 10, 16 (1930) ("Nor does an appeal [on the merits] lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to th[e] [Supreme Court].").³

Thus, if a three-judge district court should have been convened to address the constitutional claims asserted in Igartúa IV, our rejection of Igartúa's claims on the merits in that case would have no precedential force here. The three-judge-court question in Igartúa IV was therefore of great consequence affecting our very authority to hear the case.⁴ Yet, the issue was decided with the following footnote:

We also reject the argument made by Igartúa, but not made by the government, that this case must be heard by a three-judge district court

³ Of course, the single-judge district court's merits ruling in such a case is likewise without force. See 28 U.S.C. § 2284(b), (b)(3) (stating that "[i]n any action required to be heard and determined by a district court of three judges," a "single judge shall not . . . enter judgment on the merits").

under 28 U.S.C. § 2284(a). That statute 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." Id. That is not the issue in this case.

Igartúa IV, 626 F.3d at 598 n.6.⁵

This unelaborated assertion belies the complexity of Igartúa's contention that he is entitled to have his claims heard by a three-judge district court. Moreover, there is reason to doubt the correctness of the footnote's rejection of the applicability of § 2284(a). To demonstrate the need to revisit our cursory holding, we review below the issues that determine whether a three-judge court must be convened. We first consider whether § 2284(a) in fact covers the type of claim raised by Igartúa and then examine the requirement of a "substantial federal question." See Shapiro, 136 S. Ct. at 455.

A. Scope of the Three-Judge-Court Statute

The three-judge-court statute applies to a claim "challenging the constitutionality of the apportionment

⁴ We find it unnecessary to opine on whether the three-judge court statute is "jurisdictional," an issue whose complexity was reflected in questions from the justices during oral argument in Shapiro. See Transcript of Oral Argument at 11-19, Shapiro, 136 S. Ct. 450 (No. 14-990). Regardless of how the statute is labeled, the fact remains that Congress has directed that constitutionally based apportionment actions be heard by a three-judge district court in the first instance (when requested as Igartúa did here) and

of congressional districts." 28 U.S.C. § 2284(a) (emphasis added). As recounted above, in footnote 6 in Igartúa IV, we stated simply: "That is not the issue in this case." We understand that cryptic comment to mean that the statute does not cover Igartúa's claims because Igartúa challenges Congress's failure to include Puerto Rico within its apportionment of districts instead of attacking a specific apportionment of districts. Supreme Court precedent, however, supports a broader view of the statute.

In 1998, Lois Adams and other residents of the District of Columbia filed a complaint in federal district court alleging that "Congress has unconstitutionally excluded them from apportionment to a congressional district," in violation of Article IV's Guarantee Clause⁶ and the Fourteenth Amendment.

Adams v. Clinton, 26 F. Supp. 2d 156, 157–58 (D.D.C. 1998). Adams and her co-plaintiffs requested that the case be heard by a three judge district court under § 2284(a). Id. Over the objections of the defendants -- including the President of the United States and officers of the U.S. House of Representatives -- the district judge concluded that Adams' no apportionment claims were covered by

(Contn.⁴) then by the Supreme Court, see 28 U.S.C. §§ 2284(a), 1253, thereby foreclosing the courts of appeals from entertaining such claims. The Court in Shapiro also did not classify § 2284(a). Rather, its discussion focused on whether the plaintiffs' claims presented "a substantial federal question" such that the complaint was "justiciable in the federal courts." 136 S. Ct. at 455 (quoting Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 100 (1974)).

⁵ Two members of this panel also were panel members in Igartúa IV. The author of this opinion wrote a separate opinion concurring in the judgment in that case, and Judge Torruella filed an opinion concurring in part and dissenting in part.

§ 2284(a) and asked the chief judge of the district to convene a three-judge district court to hear the case. Id. at 161.

In deciding the case, a majority of the three-judge panel noted that "[t]he parties have not asked us to revisit the original judge's determination that this case falls within the confines of the three-judge court statute, and we will not do so insofar as the complaints allege the failure to apportion members of the House of Representatives to the District." Adams v. Clinton, 90 F. Supp. 2d 35, 38 (D.D.C. 2000) (three-judge court). The majority concluded that the plaintiffs had standing, but then went on to grant the defendants' motions to dismiss on the merits.⁷ Id. at 45, 72.

Adams appealed the decision of the three-judge court directly to the Supreme Court, see 28 U.S.C. § 1253, insisting, inter alia, that the case was properly before a three-judge court under § 2284(a). See Jurisdictional Statement at *21-30, Adams v. Clinton, 531 U.S. 941 (2000) (No. 00-97), 2000 WL 33999989. In response, the government filed a "Motion to Dismiss or Affirm." Motion to Dismiss or Affirm, Adams, 531 U.S. 941 (No. 00-97). In the opening paragraph of the Argument section of its motion, the government asked the Court to dismiss

⁶ The Guarantee Clause provides:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const., art. IV, § 4.

the appeal either because the "three-judge district court lacked jurisdiction over appellants' claim" or because "appellants lack standing to seek the relief that they have requested from any federal court." *Id.* at 9. In the alternative, the government asked the Court to "affirm" the judgment of the three-judge court because appellants' constitutional claim lacks merit." *Id.* (emphasis added).⁸

The Supreme Court affirmed the judgment of the three-judge district court without explanation. *Adams v. Clinton*, 531 U.S. 941 (2000) ("Judgment affirmed."). The Court also noted that "Justice STEVENS would dismiss the appeal." *Id.* Given the government's arguments distinguishing between dismissal and affirmance, and Justice Stevens' position that dismissal -- rather than affirmance -- was appropriate, the Court's decision to affirm appears to signify a determination that the three-judge court was properly convened for Adams' nonapportionment claim. Indeed, the Court has previously held that where a "three-judge court was . . . improperly convened, . . . this Court does not have jurisdiction to entertain a direct appeal from the judgment in such case." *Mobay Chem. Corp. v. Costle*, 439 U.S. 320, 321 (1979) (per curiam)

Notably, the government itself adopted the view that the Supreme Court had determined that Adams' claim was properly brought under § 2284(a). After the

⁷ The panel majority largely considered the claims raised by plaintiff Clifford Alexander, whose case had been consolidated with that of Adams. *Adams*, 90 F. Supp. 2d at 38, 45–72. The

Supreme Court decision, Adams returned to the three-judge court with a motion filed under Federal Rule of Civil Procedure 60(b) seeking reconsideration of her dismissed claims. The three-judge court denied the motion,⁹ and Adams appealed that denial to the D.C. (citation omitted). Circuit. The D.C. Circuit dismissed the appeal for lack of jurisdiction, stating that the "appeal from the three-judge district court's denial of relief . . . is not properly taken to this court." Adams v. Bush, No. 00-5239, 2001 WL 1488944, at *1 (D.C. Cir. 2001) (per curiam). Adams petitioned for a writ of certiorari. In its brief in opposition, the government wrote:

In its motion to dismiss or affirm petitioners' prior direct appeal, the government argued that petitioners' direct appeal should be dismissed because 28 U.S.C. 2284(a) did not give the district court jurisdiction over petitioners' equal protection claim. Instead of dismissing the appeal for lack of jurisdiction ,however, this Court affirmed the judgment of the three-

majority held, inter alia, that Article I of the Constitution reserved the right to vote in congressional elections to residents of states, id. at 45-46, 70-71, and that "constitutional text, history, and judicial precedent bar[red] [the court] from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I," id. at 55-56. The panel further held that the Guarantee Clause could not have been intended to override the provisions of Article I, id. at 71, and also rejected the plaintiffs' argument that they were entitled to vote "based on a theory of 'residual' citizenship" in Maryland, id. at 56-61.

judge court on the merits. That determination by this Court that the three-judge district court was properly convened under Section 2284(a) "settles the issue[] for the parties."

Br. for the President of the United States in Opposition at 6 n.2, Adams v. Bush, 537 U.S. 812 (2002) (No. 01-1519) (alteration in original) (citation omitted) (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam)).

In other words, the government interpreted the Supreme Court's affirmance in Adams to mean that the nonapportionment claim was properly before the three-judge court and that the plaintiffs' appeal of that panel's decision was properly before the Supreme Court. The proceedings in Adams thus provide strong support for Igartúa's argument that § 2284(a) covers a challenge to nonapportionment -- in addition to claims of improper apportionment.

A ruling by the Supreme Court that Adams' nonapportionment claim was properly addressed by a three-judge court cannot be disregarded as a

⁸ At the conclusion of its argument for dismissal, the government offered yet another possible disposition, asserting that the Court could affirm the dismissal of appellants' claims based on standing. Motion to Dismiss or Affirm, supra, at 16-17. That option necessarily presumed that the Court had jurisdiction (and, hence, could affirm the judgment of the three-judge court, rather than dismiss, the appeal). Yet, even after asserting that affirmance would be warranted based on lack of standing, the government again pressed for dismissal on that basis:

nonprecedential "drive-by jurisdictional ruling." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998). Such limited judgments occur when the jurisdictional issue "was neither challenged nor discussed in that case." Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996) (cited in Steel Co., 523 U.S. at 91). As discussed above, the parties' briefs fully addressed whether Adams' nonapportionment claim was covered by the three-judge-court statute, and the government explicitly challenged the jurisdiction of the three-judge court and, in turn, that of the Supreme Court to hear the case. See Motion to Dismiss or Affirm at 9-12, Adams, 531 U.S. 941 (No. 00- 97).

Moreover, simply as a matter of language, we see no reason to treat a claim that challenges the failure to apportion any congressional districts -- entirely excluding a group of United States citizens from representation in Congress -- differently from a claim that challenges the allocation of too few congressional districts. As the single-judge district court in Adams reasoned, a challenge to nonapportionment is simply one type of apportionment challenge. See Adams, 26 F. Supp. 2d

(Cont.8) However, dismissal of the appeal rather than affirmance of the judgment is warranted because there is at least a substantial question as to the jurisdiction of the district court under Section 2284(a), but appellants' lack of standing clearly forecloses their ability to obtain relief from the federal courts.

at 161 ("These plaintiffs . . . challenge their existing allocation of zero representatives." (emphasis omitted)).

An inclusive construction of § 2284(a)'s language is also supported by the singular importance legislators attributed to apportionment claims when the Three-Judge Court Act was amended in 1976. A report by the Senate Judiciary Committee on the judge proposed amendment listed multiple reasons for eliminating the three-judge-court requirement for various types of claims. S. Rep. No. 94-204, at 3-4.¹⁰ Yet despite the goal to limit use of three-judge courts, the Report expressly endorsed retaining the procedure "for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because . . . these issues are of such importance that they ought to be heard by a three-judge court." *Id.* at 9. A narrow reading of "apportionment" undermines the objective to retain the three-judge court procedure for these "important [t] claims.

Nor do we find an impediment to applying the three-judge-court statute to Igartúa's claims in the language that requires a challenge to "the constitutionality of the apportionment of congressional districts," 28 U.S.C. § 2284(a)(emphasis added). Igartúa's claim involves such a challenge.

⁹ In a two-page per curiam decision, the three-judge court rejected plaintiffs' argument that it had misunderstood and failed to address their claims, and further observed that the Supreme Court's affirmance of the court's earlier decision leaves "no ground for granting relief under Rule 60(b)(4) or for exercising our discretion under Rule 60(b)(6)." Adams v. Bush, No. 1:98-cv01665, slip op. at 2 (D.D.C. Apr. 4, 2001) (three-judge court).

Members of this court have seen arguable merit, in particular, in Igartúa's claim that the International Covenant on Civil and Political Rights ("ICCPR") -- which recognizes the right of "[e]very citizen" to elect representatives -- is a self-executing treaty that must be enforced, absent a constitutional prohibition, as "the supreme Law of the Land," U.S. Const. art. VI, cl. 2. See Igartúa IV, 626 F.3d at 608-11 (Lipez, J., concurring in the judgment); id. at 620-628 (Torruella, J., concurring in part and dissenting in part); see also Dist. Ct. Op. at 12-13 (advising the First Circuit to "reconsider its decision that Article 25 of the ICCPR is a non-self-executing provision"). In other words, plaintiffs' treaty-based claim is a constitutional claim that defendants have violated the Supremacy Clause of the Constitution by failing to comply with the United States' obligation, under the ICCPR, to apportion congressional districts so as to provide all citizens with representation. In sum, there is substantial merit in plaintiffs' assertion that their claim to representation in the House of Representatives is within the scope of § 2284(a).

B. Substantiality

The Supreme Court has observed that, when deciding whether a three-judge court must be convened, "all the district judge must 'determin[e]' is whether the 'request for three judges' is made in a case

¹⁰ The reasons included: "to relieve the burden of three judge court cases, which have increased in number from 129 in 1963 to 320 in 1973, causing a considerable strain on the workload of Federal judges," and "because statutory and rules changes have eliminated the original reasons for the establishment of three - judge courts." S. Rep. No. 94-204, at 3-4.

covered by § 2284(a) -- no more, no less." Shapiro, 136 S. Ct. at 455 (quoting 28 U.S.C. § 2284(b)(1)) (alteration in original). The Court went on to explain, however, that this simple statement presumes subject-matter jurisdiction: "A three-judge court is not required where the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." Id. (alteration omitted)(quoting Gonzalez v. Automatic Emps. Credit Union, 419 U.S. 90, 100 (1974)).

In other words, ordinary subject matter jurisdiction requirements apply to the request for a three-judge court. An apportionment challenge falling within the terms of § 2284(a) will not require a three-judge court if the claim is "wholly insubstantial and frivolous" such that a federal court would lack subject matter jurisdiction to hear it. Id. (quoting Bell v. Hood, 327 U.S. 678, 682–83 (1946)); see also Vazza v. Campbell, 520 F.2d 848, 849 (1st Cir. 1975) (noting that we could affirm the dismissal of an action by a single-judge district court who had refused to request a three-judge court for a claim otherwise calling for one "only if appellant's constitutional claims are 'wholly insubstantial'" (quoting Goosby v. Osser, 409 U.S. 512, 512 (1973))). Thus, before convening a three-judge court, the district court must conclude that a plaintiff's claim presents "a substantial federal question." Shapiro, 136 U.S. at 455.

The Supreme Court has made clear that this substantiality threshold is not a test of whether the allegations in the complaint state a claim for relief on the merits. Indeed, the Court expressly rejected the notion that, "where the 'pleadings do not state a claim, then by definition they are insubstantial and so

properly are subject to dismissal by the district court without convening a three-judge court." Shapiro, 136 S. Ct. at 455 (emphasis omitted) (quoting Duckworth v. State Admin. Bd. of Elec. Laws, 332 F.3d 769, 772-73 (4th Cir. 2003)). The Court described the failure-to-state-a-claim standard as "both too demanding and inconsistent with our precedents," and it reiterated that "constitutional claims will not lightly be found insubstantial for purposes of the three-judge-court statute." Id. (quoting Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 147-48 (1980)). Hence, it is not enough for a claim to be without merit; rather, to fall short of the "substantial federal question" threshold, a claim must be "legally speaking non-existent" or "essentially fictitious." Id. at 455 56 (quoting Bailey v. Patterson, 369 U.S. 31, 33 (1962) (per curiam)).

Although we did not say so expressly, we had to have concluded in Igartúa IV that Igartúa's claims meet the substantiality requirement for subject matter jurisdiction. There, we decided his claims on the merits, see 626 F.3d at 594– 606, a step that we would not, and could not, have taken if those claims did not involve a substantial federal question. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause." (quoting Ex parte McCardle, 7 Wall. 506, 514 (1868))).

Nor does our decision in Igartúa IV itself render the claims in this case insubstantial for the purpose of subjectmatter jurisdiction. As explained above, if the district court and First Circuit panel were wrong about the applicability of § 2284(a) -- and the case should have been heard in the first instance by a three-judge court -- the prior panel's merits

decision would not stand and, hence, it could not create binding law.¹¹

The exclusion of the courts of appeals from the § 2284(a) scheme also helps to explain why the Supreme Court has indicated that only its own precedent can undermine a claim that otherwise would scale the statute's subject-matter threshold. In Goosby, the Court held that one of its prior decisions did not render insubstantial an otherwise viable claim brought under the three judge court statute, and thus a three-judge court was required. See 409 U.S. at 518. In so finding, the Court stated that such a claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Id.(quoting Ex parte Poresky, 290 U.S. 30, 32 (1933)) (emphasis added); cf. Shapiro, 136 S. Ct. at 456 (concluding that a claim was substantial even though a plurality of the Court had found it nonjusticiable in a prior case, but a concurring justice supported the plaintiffs' legal theory (discussing Vieth v. Jubelirer, 541 U.S. 267 (2004))).

Within the context of the three-judge court scheme, the Court's reference in Goosby to the preclusive effect of its own prior decisions must be understood as a limiting statement on the relevance of court of appeals precedent. In ordinary cases first

¹¹ Just such a scenario was contemplated in the Senate Judiciary Committee Report at the time the three-judge court statute was amended in 1976. The Report, in part, outlined the "[c]omplexities of [a]ppellate [r]eview" of "whether a three-judge court is needed." S. Rep. No. 94-204, at *6. Quoting Professor Charles Allen Wright, the Committee stated:

involving appeals to the intermediate courts of appeals, the Supreme Court has the last word on issues of federal law when it chooses to hear a case.

Under the three-judge-court framework, the Supreme Court provides the only level of appellate review. A fortiori, Goosby instructs, a claim cannot be rejected for lack of "a substantial federal question" unless "its unsoundness so clearly results from the previous decisions of [the Supreme Court]." Goosby, 409 U.S. at 518.¹²

Also, the Supreme Court's summary affirmance in Adams does not render Igartúa's claims insubstantial. While the challenges in both Adams and here concern the nonapportionment of congressional districts for citizens residing outside the states, the District of Columbia and the Commonwealth of Puerto Rico are meaningfully distinct in both history and character.

Moreover, Adams did not address the implications of the ICCPR or "the view that the Constitution does not necessarily forbid extensions of the rights it delineates." Igartúa IV, 626 F.3d at 608 (Lipez, J., concurring in the judgment). The possibility that the Constitution does not prohibit equal voting rights for Puerto Rico residents through congressional action was considered by two panel members in

(Cont. 11) If the single judge incorrectly believes that three judges are not required and proceeds to the merits, the remedy . . . [is] an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three judges, and reviews on the merits, its decision is void.

Id.; see Idlewild Bon Voyage Liquor Corp., 370 U.S. at 715-16.

Igartúa IV and has had academic recognition. See Igartúa IV, 626 F.3d at 616 (Torruella, J., concurring in part and dissenting in part) ("[W]hile the text of Section 2, Article I does not grant to citizens of Puerto Rico the right to vote for members of the House of Representatives, neither does it prohibit them that right, nor act as a limitation on the federal government's authority to extend the franchise to territorial residents under other constitutional powers."); id. at 608 (Lipez, J., concurring in the judgment) ("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."); José R. Coleman Tió, Six Puerto Rican Congressmen Go to Washington, 116 Yale L.J. 1389, 1394 (2007) ("Absent a clear constitutional intent to deny Congress the power to treat Puerto Rico as a state for purposes of representation in the House, the broad language of the Territorial Clause seems at least to provide a clearer source of power to enfranchise non state citizens than does the Seat of Government Clause [for D.C. residents].").

¹² Indeed, some justices have questioned whether even conclusive, adverse Supreme Court precedent can foreclose review by a three-judge court of an issue within the scope of § 2284(a). During oral argument in Shapiro, Chief Justice Roberts hypothesized a claim "clearly foreclosed by the Court's precedents, but maybe there's a very good argument that . . . those precedents . . . haven't withstood the test of time." Transcript of Oral Argument at 6, Shapiro, 136 S. Ct. 450 (No. 14-990). When counsel responded that the single-judge district court would properly dismiss that case under Goosby, Justice Kennedy noted that he had "some problems with that." Justice Kennedy then elaborated on the hypothetical: "Suppose . . . the case has been

Hence, we think it plain that the Court's view on the merits of a claim to congressional representation (with voting power) for citizens residing in Washington, D.C. does not dictate the outcome of the claim brought here by citizens residing in the Commonwealth.

As noted above, the Supreme Court recently reaffirmed that we may not lightly reject constitutional claims brought under § 2284(a) as insubstantial based on a lack of subject-matter jurisdiction. See Shapiro, 136 S. Ct. at 455. Having necessarily concluded in Igartúa IV that at least some of plaintiffs' claims "clear[] Goosby's low bar" for substantiality, we see no basis for changing course now. Id. at 456. Accordingly, if § 2284(a) governs, plaintiffs are entitled to a hearing before a three-judge court irrespective of our view as to the merits of those claims. See id. ("Perhaps petitioners will ultimately fail on the merits of their suit, but § 2284 entitles them to make their case before a three-judge district court.").

III.

Appellant Igartúa has persisted in his pursuit of federal voting rights for the four million Puerto Rico residents who are United States citizens in the face of

(Cont. 12) on the books from this Court for 15, 20 years, has all sorts of academic commentary; certain circuits have questioned whether the reasoning is still valid." Id. at 7. Counsel gave the same response. In Shapiro, however, the Court did not need to reach the role of such dispositive precedent as it concluded that its cases did not foreclose the petitioners' claim. See 136 S. Ct. at 456.

repeated rejection of his claims by this court. His objective is laudable. As one member of this panel emphasized in Igartúa IV, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." 626 F.3d at 638 (Torruella, J., concurring in part and dissenting in part) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)); see also *id.* at 606 ("The unequal distribution of the fundamental privilege of voting among different categories of citizens is deeply troubling." (Lipez, J., concurring in the judgment)).

In Igartúa IV, our court failed to appreciate the strength of plaintiffs' argument that their constitutionally based apportionment claims should be heard by a three-judge court. As the Supreme Court has made clear, the ultimate merit of those claims is not the question. Rather, the need to convene a three-judge court turns on two issues: whether plaintiffs' claims are within the scope of § 2284(a) and whether they satisfy the minimum requirements of substantiality for subject-matter jurisdiction.

Our analysis above demonstrates that these issues deserve considerably more deliberation than we have previously given them. Thus, with the benefit of hindsight and the Supreme Court's renewed attention to the three-judge-court framework in Shapiro, we have come to believe that Igartúa's request for a three-judge court should be addressed by our court en banc, "with the best advocacy available in support of all parties." Igartúa IV, 626 F.3d at 612 (Lipez, J., concurring in the judgment). This is, inescapably, "a question of exceptional importance," Fed. R. App. P. 35(a)(2), that "fits squarely within the guidelines for

en banc review," Igartúa IV, 626 F.3d at 612. Any request for such reconsideration should be granted without delay.

As a panel, however, bound by precedent, we must affirm the judgment of the district court.

So ordered.

-Opinion Concurring in Part/Dissenting in Part Follows-

TORRUELLA, Circuit Judge (Concurring in part, Dissenting in part). I wholeheartedly agree with the majority that Igartúa's claim challenging Congress's failure to include Puerto Rico within its apportionment of districts is an apportionment challenge covered by § 2284(a). I also agree that it satisfies the minimum requirements of substantiality for subject matter jurisdiction and, thus, a three-judge court should have been convened. Despite the excellent analysis provided by the majority in reaching these conclusions, I am unable to join their opinion because, unlike my colleagues, I do not believe this Court is bound by stare decisis on the three-judge issue.

The panel's treatment of the three-judge issue in Igartúa IV did not provide any reasoning or explain its conclusion, and was not among the case's enumerated holdings. Moreover, the footnote, consisting of just three sentences -- the first acknowledging only that the Government did not argue for a three judge court; the second merely restating a portion of § 2284(a); and the third offering a vague eight-word rejection -- is the opinion's sole and complete discussion of that topic.

Far from "considered," the footnote is cursory, a comment made merely in passing.

The utter lack of discussion and complete absence of analysis of the three-judge issue renders footnote 6 dicta. This Court has defined "obiter dictum" as "observations relevant, but not essential, to the determination of the legal questions then before the court." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992). In Arcam Pharm. Corp. v. Faría, this Court quoted Second Circuit Judge Pierre Leval's characterization of dictum as "an assertion in a court's opinion of a proposition of law which does not explain why the court's judgment goes in favor of the winner." 513 F.3d 1, 3 (1st Cir. 2007) (emphasis added) (quoting Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1256 (2006)). "[I]n evaluating dicta, '[m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . . , though technically dictum, must carry great weight, and may even . . . be regarded as conclusive.'" McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 19 (1st Cir. 1991) (quoting Charles A. Wright, The Law of Federal Courts § 58, at 374 (4th ed. 1983)).

Considering the cursory treatment given to this issue by the Igartúa IV panel, our hands are not tied by stare decisis. See Montejo v. Louisiana, 556 U.S. 778, 793 (2009) (arguing that a relevant factor in stare decisis is "whether the decision was well reasoned"); Edelman v. Jordan, 415 U.S. 651, 670-71 (1974) (stating that the lack of substantive discussion of issues in an opinion carries the consequence that the opinion not be given "the same precedential value as would be [given to] an opinion of this Court treating

the question on the merits"); see also CBOCS W., Inc. v. Humphries, 553 U.S. 442, 468 (2008) (Thomas, J., dissenting) ("[T]he Court's one-paragraph discussion of the issue was, at best, both cursory and ambiguous. This is hardly the stuff of which stare decisis is made."); Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Stare decisis is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.'" (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))); Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co., 215 F.3d 136, 142 (1st Cir. 2000) ("[S]tare decisis is neither a straightjacket nor an immutable rule; it leaves room for courts to balance their respect for precedent against insights gleaned from new developments, and to make informed judgments as to whether earlier decisions retain preclusive force."); Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1549 (Fed. Cir. 1994) (overruled on other grounds) ("[W]e are unwilling to give stare decisis effect to a matter that we did not fully consider and that was not before us in the prior case.").

As the footnote is dicta and does not constitute stare decisis, neither this Court nor the district court can be bound by it, regardless of the similarities between Igartúa IV and Igartúa V. "Dicta -- as opposed to a court's holdings -- have no binding effect in subsequent proceedings in the same (or any other) case." Municipality of San Juan v. Rullán, 318 F.3d 26, 28 n.3 (1st Cir. 2003) (emphasis added). "[D]ictum contained in an appellate court's opinion has no preclusive effect in subsequent proceedings in the same, or any other, case." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 459 (1st Cir. 1992); see also Kosereis v. Rhode Island, 331 F.3d 207, 213 (1st Cir. 2003) ("Dicta, of course, is not

binding on future panels."). Rather, "[w]e are at liberty to correct the misunderstanding" and "[t]hose statements are not good law." United States v. Pérez-Ruiz, 353 F.3d 1, 10 (1st Cir. 2003). This Court has explicitly cautioned district courts against following dicta from the appellate court, even within the same case. See Dedham Water Co., 972 F.2d at 459 ("When, as here, the district court . . . proposed to act upon dicta contained in the appeals court's earlier opinion . . . it is especially important that we . . . hold the parties to the usual consequence of invited error."). "To do otherwise," Dedham warns, "would place a premium on agreeable acquiescence to perceivable error as a weapon of appellate advocacy." Id. (quoting Merchant v. Ruhle, 740 F.2d 86, 92 (1st Cir. 1984)).

Indeed, Igartúa IV's footnote is the kind of "drive-by jurisdictional ruling' that the Supreme Court has instructed has 'no precedential effect.'" CE Design Ltd. v. Amer. Econ. Ins. Co., 755 F.3d 39, 46 (1st Cir. 2014) ("[T]he brief discussion in the Massachusetts [v. United States Veterans Admin.], 541 F.2d 119 (1st Cir. 1976)] footnote is arguably the sort of 'drive-by jurisdictional ruling' that the Supreme Court has instructed has 'no precedential effect.'" (quoting Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 91 (1998))).

Although the Supreme Court has not yet formally resolved whether convening a three-judge court under § 2284(a) is a jurisdictional requirement, it was jurisdictional before the statute was amended in 1976. As relevant here, those amendments changed the statute to require parties to request a three-judge panel rather than requiring judges to identify claims as falling under § 2284(a) upon their

filing, but the amendments left intact the mandate that "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a) (emphasis added). Thus, the three-judge requirement of § 2284 uses jurisdictional language, and nothing in the legislative history suggests any intention to change that determination to be otherwise. The Second, Fifth, and Sixth Circuits have held as much. Lulac of Texas v. Texas, 318 F. App'x 261, 264 (5th Cir. 2009) ("We agree with our sister circuits that the term 'shall' in § 2284 is mandatory and jurisdictional. Although the 1976 amendment to § 2284 reduced the categories of cases subject to the three-judge requirement, nothing in the legislative history suggests an intent to alter its jurisdictional nature." (internal citations omitted)); Kalson v. Paterson, 542 F.3d 281, 287 (2d Cir. 2008) ("The text of 28 U.S.C. § 2284 uses typically jurisdictional language. . . . There is, moreover, no reason to think that when in 1976 Congress amended the three-judge statute, it intended to make this

¹³ By contrast, the Supreme Court's implicit jurisdictional decision in Adams v. Clinton, 531 U.S. 941 (2000), carries precedential value with respect to the validity of the three-judge panel because the threshold jurisdictional requirement for direct review by the Supreme Court was explicitly established by 28 U.S.C. § 1253 and spelled out by the Court in Norton v. Mathews, 427 U.S. 524 (1976) and Mobay Chem. Corp. v. Costle, 439 U.S. 320 (1979) (per curiam). Far from being a potential "drive-by jurisdictional ruling," the determination of jurisdiction in such cases, where the nature and importance of the jurisdictional question is clearly established by both stand-alone statute and precedent, is an "ignition" ruling -- the first, prerequisite step without which the Court could not proceed.

imperative nonjurisdictional. . . .[N]othing in the legislative history that describes the reasons for retaining the three-judge requirement in apportionment challenges suggests any change with respect to jurisdiction."); see also Armour v. Ohio, 925 F.2d 987, 989 (6th Cir. 1991) (en banc). Accordingly, the Igartúa IV footnote is a "drive-by jurisdictional ruling" with no precedential effect.¹³

For these reasons I do not believe Igartúa IV decided the three-judge issue. Judge Lipez's concurrence, as written, accepts only the judgment. 626 F.3d 592, 606 (1st Cir. 2010). I dissented in everything except the conclusion 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 620-28. Accordingly, it seems that only one member of the panel (Judge Lynch) subscribed to footnote 6, which would be insufficient to constitute a holding of the Court and, instead, makes it nothing other than dicta. Because the footnote lacked the necessary support to become a determination of this Court, it does not bind this Court or any other court.

A mere footnote, bereft of reasoning or analysis, should not foreclose the voting rights of close to four million United States citizens. I would reverse the judgment of the district court refusing to convene a three-judge court and remand the case to that court for further proceedings consistent with all other aspects of the majority opinion.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

GREGORIO IGARTUA, ET AL,

Plaintiffs,

v.

UNITED STATES OF
AMERICA, et al,

Defendants.

CIVIL NO. 14-1558
(JAG)

OPINION AND ORDER

GARCIA GREGORY, D.J.

On July 14, 2014, Gregorio Igartua, Carlos Mendez- Martinez, Jorge Perez- Diaz, Pedro Mendez- Soto, Iris Gonzalez- Camacho, and Maria Negrón- Cedenó (Collectively “Plaintiffs”) filed a complaint against the United States of America, the President of the United States, the Secretary of Commerce, and the Clerk of the U.S. House of Representatives, all in their official capacities (Collectively “Defendants”) seeking declaratory judgment and other relief. Docket No. 1. Plaintiffs claim that the U. S. Citizens- residents of Puerto Rico are entitled to vote for representatives from Puerto Rico to the U.S. House of Representatives. *Id.* Specifically Plaintiffs argue that the U.S. Constitution, international treaties and customary international law compel Defendants to take the necessary steps for the apportionment of

congressional districts in Puerto Rico. *Id.* Furthermore, Plaintiffs ask this Court to convene a three judge panel to evaluate and decide the merits of the instant case pursuant to 28 U.S.C § 2284. Docket Nos. 2-3 Defendants. On the other hand, have filed a Motion to Dismiss under both Fed. R. Civ. P. 12 (b) (6). Docket No. II

This is Plaintiff Igartúa's fifth case concerning the enfranchisement of the U.S. citizen residents of Puerto Rico and their participation in the federal electoral processes. In the first three cases, including an en banc decision, the First Circuit held that Puerto Ricans do not have a legal right to vote for the President and Vice President of the United States. See Igartua-De La Rosa v. United States (Igartua III), 417 F.3d 145 (1st Cir. 2005) (en banc); Igartua De La Rosa v. United States (Igartúa II), 229 F.3d 80 (1st Cir. 2000) (per curiam); Igartua De La Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (per curiam). In his fourth case, Plaintiff Igartúa brought suit claiming that the U.S. citizen-residents of Puerto Rico have a right to vote for Representatives from Puerto Rico in the U S. House of Representatives. See Igartua v. United States (Igartúa IV) No. 08-1174 (D.P.R. June 3, 2409), *affd*, 626 F.3d 592 (1st Cir. 2010), *cert. denied*, 132 S. Ct 2376 (2012).¹ This Court dismissed the complaint in that case and the First Circuit, upon *de novo* review, affirmed the dismissal. *Id.*

Plaintiffs' arguments in the Complaint at bar are nearly identical to the ones raised in Igartúa IV. Since the text of the Constitution has not been amended, Puerto Rico's political status has not changed, and the relevant jurisprudence continues to be the same, it follows that a contrary result in this case is foreclosed by this Circuit's precedent. For the

reasons outlined below, Plaintiffs' Motion Requesting a Three-Judge District Court is DENIED and Defendant's Motion to Dismiss is hereby GRANTED.

STANDARD OF REVIEW

A defendant may move to dismiss an action for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). As courts of limited jurisdiction, federal courts have the duty of narrowly construing jurisdictional grants. See, e.g., Alicea-Rivera v. SIMED, 12 F. Supp. 2d 243, 245 (D.P.R. 1998). Since the justiciability requirement of standing is generally viewed as a component of subject matter jurisdiction, see, Dubois v. U.S. Dep't of Agric., 102 F.3d 1273, 1280-81 (1st Cir. 1996), standing challenges are more appropriately brought under Fed. R. Civ. P. Rule 12(b)(1). See Valentin v. Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001) (stating that justiciability issues should be analyzed under Rule 12(b)(1)). Accordingly, this Court evaluates Defendants' Motion to Dismiss under the standard for motions brought pursuant to Rule 12(b)(1).

Motions brought under Rule 12(b)(1) are subject to the same standard of review as Rule 1.2(b)(6) motions. Negron-Gaztambide v. Hernandez-Torres, 35 F.3d 23, 27 (1st Cir. 1994). To survive dismissal for failure to state a claim, a complaint must allege "a plausible entitlement to relief." Bell Atl. Corp. v.

¹ In addition to Plaintiff Igartua, some of the parties in the instant case, specifically Plaintiffs Carlos Mendez-Martinez, Jorge Perez-Diaz and Pedro Mendez-Soto, were also parties in Igartua IV.

Twombly, 127 S. Ct 1955, 1967 (2007). According to Twombly, the complaint must state enough facts to "nudge [plaintiffs] claims across the line from conceivable to plausible." *Id.* at 1974. Therefore, to preclude dismissal pursuant to Fed. R. Civ. P. 12(b)(6), the complaint must rest on factual allegations sufficient "to raise a right to relief above the speculative level." Id. at 1965.

At the motion to dismiss stage, the court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in the plaintiff's favor. See Correa-Martínez v. Arrillaga-Belendez, 903 F.2d 49, 51 (1st Cir. 1990). Thus, the plaintiff bears the burden of stating factual allegations regarding each element necessary to sustain recovery under some actionable theory. Goolev v. Mobil Oil Corp., 851 F.2d 313, 514 (1st Cir. 1988). The court need not address complaints supported only by "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like." Aulson v. Blanclard, 33 F.3d 11, 3 (1st Cir. 1996).

ANALYSIS

I. Plaintiffs' Request for a Three-judge District Court

Plaintiffs ask this Court to appoint a Three-Judge Court to resolve the merits of this case pursuant to 28 U.S.C. § 2234. Docket Nos. 2-3. Section 2284 provides, in relevant part that [a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts, or the apportionment of any statewide legislative body." Plaintiffs argue that the

judicial disposition of this case requires that a three-judge court be convened as in *Adams*, 90 F. Supp. 2d 35, 72 (D.D.C. 2000) (per curiam), aff'd without opinion, 531 U.S. 941 (2000), where a three-judge district court held that the District of Columbia is not a "State" for purposes of Article I of the Constitution and, as a result, its residents may not vote in congressional elections. Docket No. 2 at 2. Defendants, on the other hand, argue that Plaintiffs' claims are meritless and that a three-judge court is not necessary when the constitutional claim raised is insubstantial. Docket No.12 at 2 (citing Butler v. Dexter, 425 U.S. 262, 266 (1976)).

The First Circuit already rejected this request in Igartúa IV when it held that Plaintiffs' action cannot be construed as a challenge to the constitutionality of the apportionment of congressional districts. Igartúa IV, 626 F.3d at 598 n.6. In other words, the First Circuit already found that Plaintiffs' claims for political inclusion do not meet the requirements of 28 U.S.C.2284. While it is true that a three-judge court was convened to adjudicate similar claims in *Adams*, this Court Ends that such a court is not necessary in this case since Plaintiffs' constitutional and international law claims were already rejected in previous decisions, particularly in Igartúa IV. The First Circuit stated in Igartúa IV that "[s]ince Puerto Rico is not a state, and cannot be treated as a state under the Constitution for these purposes, its citizens do not have a constitutional right to vote for members of the House of Representatives." *Id.* at 594. The First Circuit also stated that "Igartúa's claim that international law requires a contrary result is foreclosed by our decision in Igartúa III." *Id.* (citing Igartúa III, 417 F.3d 145). Moreover, in light of the

controlling authority relevant to this case, Plaintiffs' request for a three judge court is unfounded. See Vazza v. Campbell, 520 F.2d 843 (1st Cir. 1975) (finding that a previous decision and its subsequent affirmance had rendered the parties' claims "wholly insubstantial" for purposes of convening a three-judge panel). Therefore, this Court rejects Plaintiffs' request.

II Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6)

Defendants argue, *inter alia*, that this case must be dismissed because Plaintiffs lack standing to assert the constitutional and international law claims in the Complaint. Docket No. 11 at 5-7. Specifically, Defendants contend that Plaintiffs lack standing to assert their constitutional claims because they neither show that the alleged harm is fairly traceable to the Defendants' actions nor that a favorable decision is likely to redress the alleged harm *Id.* As to the international law claims, Defendants argue that Plaintiffs do not have standing to raise these claims because the alleged harm is not likely to be redressed by a favorable judicial decision. *Id.* As a result, Defendants assert that this Court lacks subject matter jurisdiction to entertain Plaintiffs' claims. *Id.*

Moreover, Defendants contend that Plaintiffs have failed to show that their international law claims fall within the scope of a waiver of federal sovereign immunity. *Id.* at 7-9. Also, Defendants assert that the claim that Puerto Rico has evolved into a *de facto* "state" under Article I constitutes a non-justiciable political question. *Id.* at 9-11 Finally, in the alternative that this Court decides to exercise its subject matter

jurisdiction, Defendants argue that Plaintiffs fail to state any valid claim upon which relief can be granted. Id. at 11-23.² This Court holds that it has no subject matter jurisdiction to entertain Plaintiffs' claims for lack of standing. This holding is consistent with the First Circuit's affirmance in Igartúa IV, which considered and rejected virtually identical claims to the ones raised in the instant case.

A. Plaintiffs' Standing: Absence of a Legally Cognizable Injury

It is well-established that "Article III of the Constitution limits the judicial power' of the United States to the resolution of 'cases' and 'controversies'" Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 471 (1982). This is because federal courts are courts of limited jurisdiction and do not have "an unconditioned authority to determine the constitutionality of legislative or executive acts." Id. It is also clear that a

² Plaintiffs' constitutional claims consist of violations of their equal protection and due process rights, as well as the right to travel and the right to vote under the Privileges and Immunities Clause. Docket No.1 at 2-3. The international law claims, on the other hand, consist of violations of the right to vote and participate in free and fair elections under (1) the International Covenant on Civil and Political Rights, opened for signature Dec.16,1966, 999 U.N.T.S. 171; (2) the Universal Declaration of Human Rights, GA Res. 217 A(I11), U.N. Doc. A/810 (1948); (3) the Inter-American Democratic Charter of the Organization of American States, 28th Spec. Sess., OAS Doc. OEA/Ser. P./AG/RES.1 (XXVIII-E/01) (OAS General Assembly) (Sept. 11, 2001); (4) the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/1.4 Rev. (1965); and (5) customary international law. Docket No. 1 at 46-58.

case or controversy requires litigants bringing forth a claim to demonstrate their "standing to challenge the action sought to be adjudicated in the lawsuit." *Id.* (quotation marks omitted). The standing doctrine embedded in Article III of the Constitution on is an example of a judicially self-imposed on the exercise of federal jurisdiction." Allen v. Wright, 468 U.S. 737, 750 (1984). To ignore or bypass this important constitutional requirement would be to overstep those carefully considered boundaries imposed upon the judiciary by our Constitution.

In order to establish standing under Article III, Plaintiffs Must meet the following three requirements:

(1) an injury in fact (i.e., a "concrete and particularized" invasion of a legally protected interest); (2) causation (Le., a "fairly . . . trace [able]" connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is "likely" and not "merely speculative" that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Sprint Commc'ns Co., LP. v. APCC Servs., Inc., 554 U.S. 269, 274 (2008) (quoting Lujan. v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992)). As to the first prong of the standing doctrine requirements, it is well-established that the injury or harm alleged in a complaint must be an "invasion of a *legally protected* interest." Lujan, 504 tl.S. at 560 (emphasis added). Additionally, the injury alleged must be "distinct and palpable," as opposed to "abstract" or "hypothetical." Warth v. Seldin, 422 U.S. 490, 501 (1975).

Furthermore, the plaintiff bears the burden (DE proving that he "has sustained or is immediately in danger of sustaining same direct injury," that is, whether the Civil No.14-1558 (JAG) injury in fact is both 'real and immediate." O'Shea v. Littleton, 414 U.S. 488, 494 (1974).

The First Circuit already rejected claims virtually identical to those raised in the Complaint at bar; in light thereof, this Court finds that Plaintiffs have failed to satisfy the injury-in-fact requirement. This is because Plaintiffs have not demonstrated that a legally protected interest was harmed in this case. First, Article I of the U.S. Constitution extends the right to participate in congressional elections to "the People of the several States." U.S. Const. art. I, 4 2.³ The First Circuit has explicitly held that Puerto Rico is not a "State" for purposes of Article I and, thus, is not entitled to representatives in the U.S. House Representatives. Igartúa IV, 626 F.3d at 596. While sitting en banc, the First Circuit held: "The text of the Constitution defines the term "State" and affords no flexibility as to its meaning Because Puerto Rico is not a state, it may not have a member of the House of Representatives." *Id* (emphasis in original). Furthermore, other courts of appeals have also held that U.S. territories cannot be defined as "States" for purpose of Article I and II of the U.S. Constitution. See, e.g., Ballentine v. United States, 486 F.3d 806, 811 (3d Cir. 2007) (holding that the Virgin Islands is not a state for purposes of federal elections); Attorney Gen. of the Territory of Guam v. United States, 738 F.2d 1017,1019 (9th Cir. 1984) (holding that Guam is not a state for purposes of federal elections).

Plaintiffs correctly point out that the U.S. Supreme Court and the First Circuit have interpreted

the term "State" in other parts of the Constitution to include Puerto Rico. Igartua IV 626 F3d at 615616 (Torruella, J., concurring and dissenting in part) (citing numerous cases holding that Puerto Rico should be treated as a state for purposes of various constitutional provisions). For example, it is dux that Puerto Rico is a "State" for purposes of (1) the Eleventh Amendment, see Nieves-Marquez v. Puerto Rico, 353 F.3d 108 (1st Cir. 2003); (2) the Dormant Commerce Clause, see Trailer Marine Transp. v. Rivera-Vázquez, 977 F.2d 1, 7 (1st Cir. 1992); and (3) the Double Jeopardy Clause, see United States v. Lopez-Andino 831 F.2d 1164, 1168 (1st Cir. 1987). Nonetheless, Plaintiffs' claim that Puerto Rico is a "State" for purposes of Article I is directly contradicted by controlling First Circuit precedent See Igartua IV, 626 F.3d at 594.⁴

Plaintiffs also argue that Puerto Rico has evolved into a *de facto* State and, thus, is entitled to congressional representation. Docket No. 1 at 6-15. Plaintiffs rely on Judge Gelpi's decision in Consejo de Salud de Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 43 (D.P.R. 2008) for the proposition that the historical evolution of Puerto Rico's relationship with

³ Article I provides, in relevant part "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. 1, & 2 cl 1 (emphasis added). In addition, "Article I itself uses the term 'State' or 'States' eight times when defining and outlining the House of Representatives." Igartua IV, 626 F.3d at 595.

the United States constitutes a *de facto* incorporation of the island, thus, granting the U.S. citizen-residents of Puerto Rico the right to participate in congressional elections. Docket No. 17 at 7-9. The Court in Consejo de Salud de Playa stated "The court, rather, today holds that in the particular case of Puerto Rico, a monumental constitutional evolution based on continued and repeated congressional annexation has taken place. Given the same, the territory has evolved from an unincorporated territory to an incorporated one" 586 F. Supp. 2d at 43.

Assuming *arguendo* that the holding in Consejo de Salud de Playa is correct, this would only mean that Puerto Rico has become an incorporated territory and not a State. Since 'Article I clearly grants the right to vote in congressional elections to the people of the several States and the Constitution "affords no flexibility as to" the meaning of the term 'State," it necessarily follows that Puerto Rico's status as an incorporated territory does not entitle the island's residents to vote for representatives to the U S. House of Representatives. Igartúa IV, 626 F 3d at 596. The First Circuit has also stated that "no case . . . has ever held that Puerto Rico is to be

⁴ Plaintiffs' Opposition to Defendants' Motion to Dismiss asserts that because the first three Igartúa cases relate to the right to vote for President and Vice-President of the United States under Article II, they cannot be relied upon to dismiss Plaintiffs' Complaint. Docket No. 17 at 6-7. Plaintiffs conveniently ignore, however, the fact that the claims in the Complaint at bar are virtually indistinguishable from those already rejected in Igartúa IV, 626 F.3d 592.

treated as the functional equivalent of a state for purposes of the House of Representatives clauses of Article 1 of the Constitution." *Id.* at 599. Therefore, to the extent that Plaintiffs' argument that Puerto Rico has become a *de facto* State resembles the "functional equivalent" argument raised in Igartúa IV, Plaintiffs' argument fails and "is refuted by a plain reading of the text of the Constitution." *Id.* (rejecting the *á facto* test because it is based on a misreading of Boumediene v. Bush, 553 U.S. 723 (2008)); see also Adams, 90 F. Supp. 2d at 56 (concluding that "the overlapping and interconnected use of the term 'state' in ... 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").

Moreover, Plaintiffs once again argue that Puerto Rico's disenfranchisement violates other constitutional provisions, such as the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment, the Fifteenth Amendment, and the rights to vote and to travel that arise out of the Privileges and Immunities Clause.. Docket No.1 at 76-77. These claims have already been rejected on multiple occasions. This Court will not repeat itself. It suffices to say that since the Constitution does not affirmatively extend the federal franchise to the U.S. citizen-residents of Puerto Rico, "[i]t cannot, then, be unconstitutional to conclude the residents of Puerto Rico have no right to vote for Representatives." Igartúa IV, 626 F3d at 596. In other words, while the Cota recognizes that Puerto Rico's disenfranchisement constitutes a 'grave injustice' in terms of U.S. citizens being unable to choose among those competing ideologies, policies, and party

platforms that directly affect them, "the deprivation of which [Plaintiffs] complain s created by the Constitution." Romeu v. Cohen, 265 F.3d 118, 122 (2d Cir. 2001).

In addition to Plaintiffs' constitutional claims, the Complaint asserts that the I.J.S. treaty and international law obligations confer the right to vote in congressional elections upon the U.S. citizen-residents of Puerto Rico. Docket No. 46-58. Specifically, Plaintiffs' claim relies on both customary international law and international agreements signed and ratified by the United States. *Id.* Once again, the First Circuit already evaluated and rejected these arguments in its prior decisions. See, e.g., Igartúa IV, 626 F.3d at 602 (stating that "[n]either international agreements nor customary international law mandates that residents of Puerto Rico who are U.S. citizens be able to vote for members of the House of Representatives."); Igartúa III, 417 F.3d at 149-152 (finding that customary international law and the international agreements mentioned in the Complaint at bar do not create any legal obligations binding as a matter of law).

For example, as to Plaintiffs' customary international law claim, the First Circuit previously stated that international law does not require a particular form of representative government" and that "[i]f an international norm of democratic governance exists, ...it is at a level of generality so high as to be unsuitable for importation into domestic law." Igartúa IV, 626 F.3d at 602 (quoting Igartúa III, 417 F.3d at 151) (internal quotation marks omitted). As to Plaintiffs' treaty-based claims, the First Circuit already held that the International Covenant on Civil and Political Rights ("ICCPR"), the Universal

Declaration of Human Rights, the Inter-American Democratic Charter of the Organization of American States, and the American Declaration of the Rights and Dotes of Man "do not constitute domestic law because they are not self-executing and Congress has not enacted implementing legislation." *Id.* at 602-603.3 Consequently, this Court is bound by the First Circuit's clear statement in *Igartua IV* that the en banc holding in *Igartua III* forecloses us from considering these international law claims and reaching a contrary result. *Igartua IV*, 626 F.3d at 602-603.

In conclusion, depriving the U.S. citizen-resident of Puerto Rico from participating in congressional elections, while perhaps troubling in a political and socio-economic sense, does not constitute a violation of a legally protected interest Therefore, this Court holds that Plaintiffs have failed to show that they were deprived of a legally cognizable right In light of Plaintiffs' failure to satisfy the injury-in-fact requirement, there is no need to go further. It is clear that this Court has no subject matter jurisdiction over this case. See *Allen*, 463 U.S. at 750 (stressing that the standing doctrine is one of the most important doctrines arising out of Article III that delineates the boundaries for the exercise of federal jurisdiction).

B. The ICCPR's Impact to Plaintiffs' Standing: An Issue Worth Revisiting

While it is clear from the previous section that Plaintiffs' claim must be dismissed for lack of standing, it might be advisable for the First Circuit, if the opportunity arises, to reconsider its decision that Article 25 of the ICCPR is a non-self-executing provision. This Court agrees with Judge Lipez's

statement in Igartúa IV that "[g]iven the magnitude of the issues and Judge Torruella's forceful analysis [of the ICCPR's self-executing nature], this is one of those rare occasions when reconsideration of [Igartúa III's] en banc ruling is warranted." Igartúa IV, 626 F.3d at 607 (Lipez, J., concurring in the judgment).

Article 25 of the ICCPR provides in relevant part, that [e]very citizen *shall* have the right and the opportunity . . . (a) [t]o take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage." ICCPR art. 25 (emphasis added). The clear text of the treaty provision creates individual rights and entitles the U.S. citizen-resident of Puerto Rico to be able to vote and participate in the process of lawmaking and policymaking through freely chosen representatives. Nonetheless, three important questions remain for Plaintiffs' ICCPR claim to survive dismissal at this early stage: (1) whether this provision creates an obligation as a matter of domestic law, that is, whether the provision is self-executing and, thus, "law of the land" under the Constitution's Supremacy Clause; (2) whether this treaty provision is constitutional; (3) whether a right of action exists for the Plaintiffs to pursue their right. The First Circuit already answered the first question in the negative. See Igartúa III, 417

⁵ The First Circuit also indicated in Igartúa IV that *stare decisis* requires ongoing adherence to the en banc ruling that these agreements are non-self-executing and, thus, do not create any legal obligations as a matter of domestic law. Igartúa IV, 626 F.3d at 603-606.

F.3d at 150. Furthermore, it partially addressed the East two questions by stating, *inter olla*, that a treaty cannot override the Constitution, and that because [t]reaties are made between states . . . citizens do not automatically have a right to sue upon them" Id at 150. Given the complexity of the questions and Igartua III's cursory analysis of the ICCPR's legal status, it might be worthwhile to revisit this issue. Alter all, "at its core, this case is about whether a substantial group of United States citizens should be given a right that out. country and the international community agree is a fundamental element of a free society." Igartúa 1V, 626 F.3d at 612 (Lipez, J concurring in the judgment). Plaintiff's and the U.S. citizen-residents of Puerto Rico deserve better than a summary dismissal on the grounds of stare decisis.

As to the first question, the First Circuit's holding that the ICCPR is a non-selfexecuting treaty was predicated on the following conclusions: (1) the text of the treaty provision is ambiguous as to "who should be entitled to vote for whom, or that an entity with the negotiated relationship that the United States has with Puerto Rico is nevertheless required to adopt some different arrangement as to governance or suffrage;" (2) the U.S. Senate consented to the treaty's ratification "on the express condition that it would be not "self-executing;" (3) the Supreme Court's dictum in Sosa v. Alvarez-Machain, 542 U.S. 692,729 (2004) indicated that the ICCPR's substantive provisions are not self-executing; (4) courts must defer to the Political Branches' understanding and judgment in managing foreign affairs. See Igartua III, 417 F.3d at 149-151.

There are various problems, however, with these underlying conclusions. First, it is hard to believe that the text of Article 25 could be

characterized as ambiguous. This provision clearly mandates that all citizens of a ratifying State participate in the election of those who represent them. See *César A. López Morales, A Political Solution to Puerto Rico's Disenfranchisement: Reconsidering Congress's Role in Bringing Equality to America's Long-Forgotten Citizens*, 32 B.U. Int'l L.J. 185, 204-211 (analyzing the text of Article 25 to conclude that U.S. citizens are entitled to participate in federal electoral processes regardless of whether they reside in one of the fifty states or in the territories). The limited participation of the U.S. citizen-residents of Puerto Rico at the federal level and their exclusion

⁶ The Human Rights Committee (the "Committee"), the treaty body charged with interpreting the treaty and monitoring its implementation, has previously expressed its concern regarding the disenfranchisement of the residents of the District of Columbia. In the 2006 "Concluding Observations" to the United States Second and Third Periodic Reports concerning the ICCPR, the Committee stated that the "residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the Covenant." Concluding Observations of the Human Rights Committee on the United States of America, U.N. Doc. CCPR/C/USAJC0/3/Rev.I, at 11 para. 36 (2006) (emphasis added). Furthermore, the Committee recommended that the United States 'ensure the right of [D.C. residents] to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the House of Representatives.' *Id.* This observation applies with equal force to the current condition of the U.S. citizen-residents of Puerto Rico and the United States, as a ratifying State, must consider and embrace the Committee's interpretation of the treaty text.

from national electoral processes preclude them from choosing among those competing ideologies, policies, and party platforms that directly affect them.⁶ This exclusion is simply irreconcilable with the fact that "Article 25 lies at the core of the democratic government based on the consent of the people and in conformity with the principles of the [ICCPR.]" U.N. Office of the High Commissioner for Human Rights, General Comment No. 25, 13.N. Doc. CCPR/C/21/Rev.I/Add. 7 General Comment No. 25, 57-1 Sess. (July 12, 1996); see also *Igartua IV*, 626 F.3d at 620 (Torruella, J., concurring and dissenting in part) ("Plainly, the continued lack of political representation of [Plaintiffs] is a violation of the United States' treaty obligations under Article 25"). This holds true regardless of the political status that the Puerto Ricans acceded to in 1952. Since extending the right to vote to Puerto Ricans does not transform the island into one of the several states of the Union, the ongoing disenfranchisement in violation of Article 25 cannot be justified on the basis that Puerto Ricans have consented to it.

Furthermore, since the United States did not issue a reservation excluding the U.S. citizen-residents of Puerto Rico on the basis of the island's Commonwealth status, it cannot be said that the United States effectively modified its legal obligation under the provision to guarantee all of its citizens the right to vote and to equal political participation at the federal level.⁷ To the extent that this provision is self-executing and part of the law of the land, it cannot be seriously argued that someone may consent to the violation of federal law. Consequently, it is clear from the text that Puerto Ricans are entitled to participate in congressional elections and that Puerto Rico's political status does not prevent the

United States from complying with its legal obligation.

Second, the fact that the ICCPR was ratified under the understanding that it would not be self-executing does not mean that such statement requires the courts to adopt this understanding. In fact, "separation of powers considerations prevent a court from relying exclusively on the Senate's declaration to determine that a treaty is non-self-executing. The Supremacy Clause and Article III require a court to examine independently the intentions of the treaty makers to decide if a treaty, by its own force, creates individually enforceable rights." Igartua III, 417 F.3d at 185-86 (Howard, J., dissenting). The Supreme Court has also stated that the self-executing nature of a treaty is, of course, a master for [the courts] to decide," and not for the Senate to decide unilaterally. See Medellín v. Texas, 552 U.S. 491, 518 (2008). It follows that the excessive reliance on the Senate's understanding of the ICCPR's self-executing nature is misplaced. The Supreme Court's dictum in Sosa relied exclusively on this understanding to conclude that the ICCPR's substantive provisions are not self-executing. Since the Supreme Court has not had the opportunity to carefully consider and analyze the text of the ICCPR, let alone Article 25 of the treaty, this dictum does not foreclose a contrary interpretation. Therefore, courts should be reluctant to accept the dictum in Sosa without analysis. See Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 336, 353 ("[W]e are not bound to follow out dicta in a prior case in which the point now at issue was not fully debated").

Instead, the proper analysis of the provision's self-executing status requires courts to redirect their

attention to the text of Article 23. See Medellin 552 U.S. at 518-519 ("It is well settled that the [i]nterpretation of [a treaty] ... must, of course, begin with the language of the Treaty itself".) It is worth mentioning that, due to a general reliance on the Senate's unilateral declaration and the dictum in *Sosa*, the First Circuit held that the ICCPR as a whole is a nonself-executing treaty. See Igartua III, 417 F.3d at 149-151.⁸ It is clearly established, however, that a treaty may contain both self-executing and non-self-executing provisions. See Medellin, 552 U.S. at 505-506 (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)) (finding that treaties may contain certain stipulations which are self-executing and others that require legislation to make them operative). This is why reviewing and analyzing the text of Article 25 is essential to a proper determination of its self-executing nature. In this regard, Judge Torruella's compelling analysis in Igartúa IV of this specific provision should be carefully considered in the event that the Circuit chooses to review its previous en banc ruling. Finally, the Supreme Court stated in Medellin that a treaty's use of mandatory, as opposed to discretionary, language is evidence of self-execution. 532 U.S. at 308, 509 n.5 (distinguishing mandatory language such as «shall" from discretionary language such as "undertakes to comply").

⁷ "[N]o reservations or other limitations to the specific obligations contained in Article 25 were made, aside from the declaration of non-self-execution applicable to all substantive articles of the ICCPR.." Igartua III, 417 F.3d at 174 n. 42 (Torruella, J., dissenting) (citing 138 Cong. Rec. 54781, 54783).

In this case, Article 25 of the ICCPR explicitly states that "[e]very citizen shall have the right and opportunity participate in policy-making processes "directly or through freely chosen representatives" and to vote in periodic elections. ICCPR art. 2.5 (emphasis added). It follows that the mandatory nature of Article 25's language weighs in favor of its self-executing nature.

In the event that the First Circuit reconsiders its analysis and finds that Article 2.5 is a self-executing provision, it must also determine whether this provision violates Article I of the U.S. Constitution. It is clear that the "Constitution is the supreme law of the land, and neither a statute nor a treaty can override the Constitution." Igartua III, 417 F.3d at 148 (citations omitted). It is also clear, as stated above, that Article I of the Constitution only provides the right to vote in congressional elections to the people of the several States. This does not mean, however, that only these residents may participate in such elections. It is not entirely obvious that Article I's affirmative grant necessarily prohibits extending the right to vote to citizens residing in Puerto Rico via federal statute or a treaty. See López Morales, *supra* at 219-222 (stating, in the context of Article II and the right to participate in presidential elections, that "the fact that only state residents may participate in presidential elections because of Article II is a non sequitur").

⁸ The First Circuit in Igartúa IV cited a series of circuit opinions for the proposition that the circuit courts unanimously reinforce the First Circuit's holding in Igartúa III. See Igartúa IV, 626 F.3d at 606. These opinions, however, mostly relied on the Senate's declaration and understanding of the treaty's nature as a whole. In fact, none of these cases involved a careful and direct examination of the text of Article 25.

The "view that the Constitution does not necessarily forbid extensions of the rights it delineates" finds support in both case law and history. Igartua IV, 626 F.3d at 608 (Lipez, J., concurring in the judgment). As both Judge Lipez and Judge Torruella pointed out in Igartúa IV, the Supreme Court held in Nacional Mutual Insurance Co. v. Tidewater Transfer Co. that a federal statute extending Article III diversity jurisdiction to the District of Columbia was constitutional, even though the text of Article III refers only to "States." 337 U.S. 582 (1949). This holding shows that the fact that the District of Columbia is not a "State" within the meaning of Article III "does not ... determine that Congress lacks power under the provisions of the Constitution to enact ... legislation" extending diversity jurisdiction over citizens of the District of Columbia. *Id.* at 588. Similarly, the fact that Puerto Rico is not a "State" within the meaning of Article I does not mean that Congress may enact a statute pursuant to its constitutional powers granting the right to vote to the U.S. citizen-residents of Puerto Rico.

Furthermore, to hold that the Constitution forbids Congress from acting in this manner would be to conclude that the political exclusion of some U.S. citizens from participation in congressional elections was a conscious product of our constitutional design. This conclusion is problematic in itself because every U.S. territory acquired up until the Spanish-American War was eventually admitted into the Union, thus suggesting "that territorial disenfranchisement was meant to be temporary" and that "territories would be held as states-in waiting." José R. Coleman Tió, Comment, Six Puerto Rican Congressman Go to Washington, 116 Yale L.J. 1389, 1394 (2007). It was, rather, the Insular Cases and the patent

discrimination at the time against the inhabitants of the newly acquired Spanish territories that "permitted a sharp deviation from prior practice." Id.; see also Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of the Separate and Unequal (1985) (providing a compelling critique of the Insular Cases and the role that racism and discrimination against the newly conquered territories played in the decisions).⁹ Consequently, while it is true that the Constitution does not require the enfranchisement of U.S. citizens in Puerto Rico, it is also true that it does not prohibit Congress from acting to address this scenario of political inequality. See Igartua II, 229 F.3d at S9 (per curiam) (Indefinite colonial rule by the United States is not something that: was contemplated by the Founding Fathers nor authorized per secula seculorum by the Constitution.").

Only after the First Circuit finds that Article 25 is self-executing and that it is constitutional would the Plaintiffs be able to allege a violation of a legally protected right. Other questions remain, however. As to the issue of the claim's redressability, a declaration that the United States is in default of its obligation

⁹ For further historical evidence of the discrimination and racism of the time, see Consejo de Salud Playa, 586 F. Supp. 2d 2 at 28 n_ 9 (D.P.R. 2008) (citing 33 Cong. Rec. 2015, 3616 (1900)) (including statements in both the House and Senate Floors describing both Filipinos and Puerto Ricans as 'mongrels ...with breath of pestilence and touch of leprosy ... [and] with their idolatry, polygamous creeds and harem habits").

under Article 25 "would have the practical effect of nuking it 'substantially likely that the President and other executive and congressional officials would abide' by the [Court's] interpretation of the law and proceed to act favorably on [Plaintiffs'] claims thereafter." Igartúa IV, 626 F.3d at 636 (Torruella, J., concurring and dissenting in part) (quoting Utah v. Evans, 536 U.S. 452, 460 (2002); Franklin v. Massachusetts, 505 U.S. 788,1303 (1992)) (alteration in original). This is because it would not be speculative to assume that a favorable judicial decision under these circumstances would result in some kind of action by congressional or executive officials. *Id.* at 637-638 (relying on Juda v. United States, 13 CL Ct. 667 (1987) to explain that the "prescription that executive officials will abide by an authoritative declaration of the United States law is a sound one").

A declaration as to these effects does not mean that Congress would be forced to either admit Puerto Rico as a state or amend the Constitution to permit Puerto Ricans to participate in congressional elections. Instead, other measures could be available that guarantee substantive compliance with the legal obligations under ICCPR without involving the judiciary telling Congress to act in a specific manner.¹⁰ In fact, congressional action is not even required. In the words of judge Lipez, "If Puerto Rico residents' right to vote originates from a source of United States law other Constitution,... it is possible that declaratory relief could properly involve individual government officials rather than Congress." Igartua IV, 626 F.3d at 636 (Lipez, , concurring in the judgment). If the First Circuit adopts this analysis, it necessarily follows that Plaintiffs have a justiciable "case and controversy."

Finally, it is important to address the question of whether a right of action exists for Plaintiffs to be able to bring forth their ICCPR claim. This Court notes that the First Circuit has never reached this issue. If the Circuit decides to tape upon this question, it must do so while keeping these two things in mind: (1) Article 25 creates individual rights for the citizens of every ratifying State; and (2) Article 2 of the ICCPR requires every contracting State to ensure that any person whose rights under the ICCPR have been violated to provide "an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity." ICCPR art. 2. Article 2 also requires, in relevant part,

¹⁰ For example, Professors Robert Sloane and Gary Lawson suggest that:

Congress could authorize ... the local election of a number of persons in the various territories equal to the number of representatives in Congress to which they would be entitled if they were states. It could then allow those elected officials to participate, in a substantive but formally nonbinding fashion, in congressional deliberations and votes. And Congress could then cast and count its formal votes in a fashion that conforms to the outcomes that would have resulted if the votes of the territorial representatives had officio' weight. Congress could even inscribe these procedures in House and Senate rules, though such rules could be repealed by a majority at any time and therefore would not add value to the mix.

Gary Lawson & Robert Sloane, The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered, 50 B.C. L. Rev. 1123 (2009).

that "such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, and that the compete authorities shall enforce such remedies when granted." Id. It is hard to conceive that a treaty with such mandatory language and clear directives to the judiciary does not create a right of action for Plaintiffs. In any event, this is a complicated question that the First Circuit should consider if it has the opportunity.

Notwithstanding these observations as to the ICCPR claim, it is clear that Plaintiffs' Complaint must be dismissed with prejudice pursuant to the Circuits previous decisions, specifically Igartua IV. These observations only mean to emphasize the need to reconsider several conclusions in light of the exceptional importance of the issues raised. The right to vote and to equal political participation is pivotal to our constitutional system, if not democracy itself. The notions of political legitimacy and the consent of the governed are basic pillars of our system of government and are deeply rooted in our Nation's history. Federal courts must be eager to protect these pillars and guarantee the proper functioning of an open and effective democratic process that is properly grounded on the principle of popular sovereignty. In order to be able to fulfill this constitutional duty, it is advisable to reconsider the analysis of those questions raised in this last sec don of the opinion.

CONCLUSION

For the reasons outlined above, specifically, section I and II.A of this Opinion and Order, Plaintiffs' Motion for a Three-judge District Court is DENIED and Defendants' Motion to Dismiss is GRANTED. Judgment shall be entered accordingly.

In San Juan, Puerto Rico, this 28th day of
January, 2015.

S/Jay A García-Gregory
JAY A. GARCIA-GREGORY
United States District Judge

