No. 04-2186

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

GREGORIO IGARTUA DE LA ROSA, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SUPPLEMENTAL BRIEF FOR APPELLEE

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INTRODUCTION AND SUMMARY

The panel in this case has requested supplemental briefing with respect to two issues. The first issue concerns the effect of "international legal obligations" of the United States on the eligibility of citizens residing in Puerto Rico to vote for President and Vice-President of the United States. The panel identified three specific international instruments in its order: the International Covenant on Civil and Political Rights (ICCPR), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948); and the Inter-American Democratic Charter of the Organization of American States, 28th Spec. Sess., OAS Doc. OEA/Ser. P/AG/RES.a (XXVIII-E01). The second issue concerns the availability of a declaratory judgment concerning the government's compliance with these international instruments.

As we discuss below, none of the international instruments at issue provides a basis for altering this Court's judgment – expressed three times within the last decade – that there is no legal right for citizens residing in Puerto Rico to participate in the election of the President and Vice President. Two of the instruments are non-binding resolutions that create no legal rights or obligations, and the third (the ICCPR) is not self-executing and therefore creates only international and not domestic legal obligations. This Court recognized as much in *Igartua de la Rosa* v.

United States, 32 F.3d 8 (1st Cir. 1994) (per curiam) (*Igartua I*), *cert. denied*, 514 U.S. 1049 (1995), and the panel is bound by that decision.

In addition, even if one could read these international instruments as creating enforceable legal obligations, no international instrument can override the express constitutional provision governing the selection of the President and Vice President – a provision that vests that selection in the states. This principle, too, was followed by this Court in *Igartua I*, and the panel may not overrule that decision.

Moreover, the exclusion of Puerto Rico from the electoral college does not violate any of the three international instruments at issue here. Nothing in any of these instruments purports to require that all citizens participate equally in the choice of every official to every office, let alone to require the United States to alter its longstanding constitutional system for selecting the President and the Vice President. Consistent with all of these instruments, citizens residing in Puerto Rico participate in their governance. On multiple occasions, those citizens, exercising their rights of self-governance protected by federal law, have voted on the question of Puerto Rico's status with respect to the United States and – with knowledge of all that statehood would entail (including the right to participate in the selection of the President and Vice President) – have not opted for statehood. For the courts to step in at this

juncture to alter that choice would itself override the democratically expressed wishes of the citizens of Puerto Rico.

Finally, this Court cannot enter a declaratory judgment declaring the United States in violation of those instruments. Where, as here, those instruments create no rights or obligations and are not judicially enforceable, the Declaratory Judgment Act cannot be used as an end run to provide relief.

ARGUMENT

I. THE DECISIONS IN *IGARTUA I* AND *IGARTUA II* ANSWER BOTH QUESTIONS, AND A PANEL OF THIS COURT MAY NOT OVERRULE THOSE DECISIONS.

This Court's previous decisions in *Igartua I* and *Igartua II* already laid to rest both questions raised in the order granting panel rehearing. In *Igartua I*, this Court explicitly rejected the contention that the ICCPR gives citizens of Puerto Rico the right to vote in presidential elections, concluding that the substantive provisions of the ICCPR "were not self-executing * * * and could not therefore give rise to privately enforceable rights under United States law * * *." 32 F.3d at 10 n.1. More important, in a holding that applies by its reasoning to all treaties and international instruments, the Court held that the ICCPR could not "override the constitutional limits" governing the election of President and Vice President, set forth in Article II. *Ibid*. The decision in *Igartua I* thus provides a conclusive answer to any question

concerning the effect of international instruments on the right of citizens residing in Puerto Rico to vote for President and Vice President of the United States. No international agreement or instrument can do so.

In addition, both previous *Igartua* decisions dispense with any contention that the Court can enter a declaratory judgment concerning international instruments that do not provide substantive rights and cannot override the Constitution. In *Igartua I*, the district court rejected the plaintiffs' request for a declaratory judgment, *see* 842 F. Supp. 607, 608 (D.P.R. 1994), and this Court affirmed. 32 F.3d at 11. And in *Igartua II*, the district court actually entered a declaratory judgment in favor of the plaintiffs, 113 F. Supp. 2d 228, 241, leading to this Court's reversal. *See Igartua de la Rosa* v. *United States*, 229 F.3d 80, 83-84 (1st Cir. 2000) (per curiam).

The previous decisions in *Igartua I* and *Igartua II* therefore control the outcome here. Even if this panel disagrees with or is dissatisfied with the decisions in those cases, it is not free to overrule them. *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 854 (1992).

II. THE INTERNATIONAL INSTRUMENTS AT ISSUE HERE DO NOT PROVIDE A BASIS FOR MANDATING THE PARTICIPATION OF PUERTO RICO IN PRESIDENTIAL ELECTIONS.

As in *Igartua I* and *Igartua II*, the plaintiffs in this case have sought to invoke various international instruments to support their request for judicial intervention to

permit citizens residing in Puerto Rico to participate in presidential elections. That effort faces three insurmountable obstacles, each of which independently mandates rejection of plaintiffs' claim.

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

With respect to the Universal Declaration, Eleanor Roosevelt, Chairman of the United Nations Human Rights Commission when the Declaration was drafted, spoke for the United States and stated that the Declaration "was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of principles * * *." *See* Humphrey, *The UN Charter and the Universal Declaration of Human Rights*, in *The International Protection of Human Rights* 39, 50 (E. Luard ed. 1967). Accordingly, the Universal Declaration "does not of its own force impose obligations as a matter of international law." *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2767 (2004); *see also Flores* v. *Southern Peru Copper Corp.*, 343 F.3d 140, 167 n.38 (2d Cir. 2003) (Universal Declaration is "merely a non-binding resolution").

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

The ICCPR, while a binding international agreement, is not self-executing and, as the President stated when submitting it to the Senate for ratification, its substantive provisions "would not of themselves become effective as domestic law." *Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights*, S. Exec. Docs. Nos. 95-C, D, E, F, at vi (1978); *see also Whitney* v.

Robertson, 124 U.S. 190 (1888); *Buell* v. *Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001); *Restatement (Third) of Foreign Relations of the United States*, § 111, cmt. h (1987). As "a compact between independent nations," the ICCPR "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it," and any infraction becomes "the subject of international negotiations and reclamations * * *." *Edye* v. *Robertson (The Head Money Cases)*, 112 U.S. 580, 598 (1884). Thus, "[i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Ibid*.

Moreover, the Senate expressly stated in its resolution of ratification that "the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing." 138 Cong. Rec. S4784 (daily ed. Apr. 2, 1992). Thus, controlling authority from this Court, *Igartua I*, 32 F.3d at 10 n.1, and the Supreme Court, *Sosa*, 124 S. Ct. at 2767, establishes that the ICCPR is not self-executing and does not create obligations enforceable in the federal courts. A panel of this Court is not free to overrule that precedent.

2. Even if the international instruments at issue created self-executing obligations, they would provide no basis for relief in this case. That is because no international instrument can alter the system set forth in the Constitution for selecting the President and Vice President. The Supreme Court "has regularly and uniformly

recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 17 (1957) (plurality); *see Matter of Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984) (collecting cases). Indeed, it is "obvious" that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid*, 354 U.S. at 16.

Concluding that a treaty can alter the constitutional framework would permit the Executive to amend the Constitution independent of the amendment provision in Article V. Such a result "would be manifestly contrary to the objectives of those who created the Constitution * * *." *Id*. at 17. Thus, "[i]t would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States * * *." *Id*. at 17-18.

This principle applies even though the Supremacy Clause provides that treaties shall be the "law of the land." As the *Reid* Court held, there is "nothing in this language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." *Id*. at 16. Statutes also are the "law of the land," but like treaties, must yield to the Constitution. And because a statute can override or abrogate a treaty, "[i]t would be completely anomalous to say

that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument." *Id*. at 18.

As this Court recognized in *Igartua I*, the Constitution establishes a framework in which the states choose electors who in turn choose the President, and only a constitutional amendment or a grant of statehood would permit Puerto Rico to participate in this process. *See* 32 F.3d at 9-10 & n.1; *see also Igartua II*, 229 F.3d at 83-84. If there were any doubt about the constitutional structure vesting the election of the President and Vice President in the states rather than the citizenry, the Supreme Court recently resolved it. *Bush* v. *Gore*, 531 U.S. 98, 104 (2000). Even if one accepts the notion that United States diplomats negotiated binding international agreements that would change the structure of the Constitution – and they most certainly did not do so here – any such agreements would lack any force.[1]

[1] The Supreme Court's decision in *Roper* v. *Simmons*, 125 S. Ct. 1183 (2005) does nothing to undermine this longstanding principle. In that case, the Court looked to international understanding to confirm its holding that imposition of the death penalty for offenders under the age of 18 is inconsistent with evolving standards of decency and therefore violates the Eighth Amendment. *See id*. at 1198-99; *see id*. at 1199 (acknowledging that the opinion of the world community is "not controlling our outcome"). Unlike questions of cruel and unusual punishment under the Eighth Amendment, the validity of the constitutional framework establishing the electoral college is not subject to a standard that focuses on "evolving standards of decency." Thus, nothing in *Roper* permits resort to international instruments to override the clear commands of Article II.

3. Finally, even apart from questions of constitutional supremacy and judicial enforceability, adherence to the electoral college system is not inconsistent with any of the three instruments at issue. Each of these instruments speaks generally concerning the right to vote in periodic elections and to take part in the governance of one's country. Those rights are exercised by the citizens of Puerto Rico within the context of a vibrant democratic political system. Federal law establishes Puerto Rico as a Commonwealth with rights of self-government and with numerous statutory and constitutional rights. *See, e.g.,* 48 U.S.C. § 731d; *id*. §§ 734, 737; 8 U.S.C. § 1402; *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 7-8 (1982); *Trailer Marine Transp. Corp.* v. *Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992); *Lopez* v. *Aran*, 844 F.2d 898, 902 (1st Cir. 1988).[2]

And, on the important question of Puerto Rico's status in relation to the United States, the citizens of Puerto Rico have not been denied their right to participate. Commonwealth status, as opposed to statehood, has advantages as well as disadvantages. *See, e.g.*, 26 U.S.C. § 933 (income of Puerto Rico residents is not

[2] The United Nations has recognized that "the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination," and "the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., 459th plen. mtg. at 25-26 (1953).

subject to federal income tax). With full knowledge of both the benefits and drawbacks of statehood, including the implications of status on participation in presidential elections, the citizens of Puerto Rico have voted repeatedly – in 1967, 1993, and 1998 – against statehood. *See* Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 Rev. Jur. U.P.R. 1, 12-13, 17, 19 (1999).

The fact that citizens of Puerto Rico do not participate in the selection of the President and Vice President does not violate the terms of any of the three international instruments at issue here. None of those instruments mandates that every office be subject to that right. No one would suggest, for instance, that these international instruments require the United States to permit the popular election of Supreme Court justices notwithstanding the method of appointment set forth in Article III of the Constitution. Nor could one reasonably argue that these instruments render the structure of the United States Senate invalid because each state receives two senators without regard to population. The notion that the United States negotiated and signed instruments that require it to change the system enshrined in the Constitution for choosing the President and Vice President is fanciful at best.

The ICCPR, for instance, does not require all citizens to vote for all offices. In pertinent part, Article 25 of the Covenant provides that "[e]very citizen shall have

the right and the opportunity, without * * * unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and] (b) To vote * * * at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the majority." App. 55.

Plaintiffs nowhere explain how the inability of U.S. citizens in Puerto Rico to vote for President and Vice President unreasonably abridges their rights to "take part in the conduct of public affairs," which they do through many channels, including the direct election of Puerto Rico officers. In fact, the Covenant's negotiating history makes clear that Article 25 was not intended to guarantee the right to vote for all public officials; a proposal that would have affirmed the right of every citizen to vote for "all organs of authority" was specifically rejected, on the ground that "not all organs of authority were elective." M. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* 474 (1987).

Moreover, the Senate expressly conditioned its ratification of the ICCPR on the proviso that "[n]othing in the Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States of America as interpreted by the United States." 138 Cong. Rec. S4784 (daily

ed. Apr. 2, 1992). An interpretation of the ICCPR to require a change in the constitutional framework procedure for the selection of the President and Vice President would be directly contrary to this understanding.

Nor is there anything in the Universal Declaration of Human Rights suggesting that every office – including the President and Vice President of the United States – must be subject to popular election by every United States citizen. Article 21 of the Declaration states that "[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives," and that the will of the people "shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage * * *." Universal Declaration, Art. 21.

Yet the Declaration does not provide any guidance at to what transgresses either of these general provisions – neither of which even hints that every citizen must participate in the election of every office. If "everyone" must so participate, then restricting the vote to those above the age of 18 violates the Universal Declaration. And, as noted above, the failure to provide for the election of judicial officers and a host of other appointive posts might be deemed to deprive citizens of "the right to take part in the government" of their country. As we have noted (pp. 10-11, *supra*), citizens of Puerto Rico can and do "take part in the government" of their country, and they have vigorously expressed their will through "periodic and genuine elections."

Finally, the general aspirational provisions of Inter-American Charter (App. 103-10) do not purport to alter the specific constitutional scheme for United States presidential elections. The Charter merely states that the people "have a right to democracy" (Art. 1), and that among the "essential elements" of democracy are "the holding of periodic, free, and fair elections based on secret balloting and universal suffrage * * *" (Art. 3). App. 105. Again, nothing in this general language suggests that every citizen must participate in the election of every national office. In fact, the OAS General Assembly expressed its will that these democratic principles operate within existing systems of constitutional democracy, providing for an international enforcement mechanism for instances in which "an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime" occurs. Art. 19, App. 108 (emphasis supplied); *see also* Art. 20-21, App. 108-09. The notion that the OAS General Assembly, with full knowledge of the United States' constitutional system, intended to require the United States to alter its constitutional framework for selecting its President, is flatly inconsistent with this language.

Thus, neither the Universal Declaration nor the Inter-American Democratic Charter can possibly be read as providing clear, enforceable statements of legal obligation requiring the United States to change the electoral college. Rather, these instruments contain principles that "are boundless and indeterminate. They express

virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree with many of the particulars regarding how actually to achieve them." *Flores*, 343 F.3d at 161. Accordingly, there is no basis upon which to conclude that the current electoral college system mandated by the Constitution violates international instruments that merely contain "'abstract rights and liberties devoid of articulable or discernable standards and regulations.'" *Ibid*. (quoting *Beanal* v. *Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999)).

III. THE DECLARATORY JUDGMENT ACT CANNOT BE USED TO ENTER A JUDGMENT CONCERNING INTERNATIONAL INSTRUMENTS THAT ARE NOT OTHERWISE JUDICIALLY ENFORCEABLE.

As discussed in section II, *supra*, no international instrument can override the express constitutional provision governing presidential elections. Moreover, none of the international instruments plaintiffs have sought to invoke in this case creates legal rights or obligations enforceable by the courts. That is why this Court on two prior occasions has rebuffed attempts to seek declaratory judgments that citizens of Puerto Rico have a right to participate in presidential elections. *Igartua I*, 32 F.3d at 10; *Igartua II*, 229 F.3d at 83-84.

Because the international instruments at issue here provide no individual legal rights, a court cannot enter a declaratory judgment on the question whether United

States action is inconsistent with those instruments. Entering such a judgment would be an unwarranted intrusion by the courts into delicate areas of foreign relations in which they are ill-equipped to operate, and would reflect an incorrect use of the Declaratory Judgment Act to circumvent the lack of both private rights and judicial enforceability.

The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that "[i]n a case of actual controversy within its jurisdiction * * * any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." Despite this seemingly broad language, the reach of the Act is limited. It most certainly does not authorize a court to enter a declaratory judgment where no private right of action exists. The Act "is procedural only." *Aetna Life. Inc. Co.* v. *Haworth*, 300 U.S. 227, 240 (1937). It "does not confer jurisdiction but merely grants an additional remedy in cases where jurisdiction already exists." *Nickerson* v. *United States*, 513 F.2d 31, 33 (1st Cir. 1975); *see Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) ("Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction."). As the Supreme Court explained in *Skelly Oil*, "[w]hen concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the

Constitution and Acts of Congress confine them, 'jurisdiction' means the kinds of issues which give right of entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act." 339 U.S. at 671. Thus, the Declaratory Judgment Act "merely expands the relief available through litigation; it does not affect parties' substantive rights." *Colonial Penn Group, Inc.* v. *Colonial Deposit Co.*, 834 F.2d 229, 232 (1st Cir. 1987) (emphasis supplied).

The Declaratory Judgment Act was not designed as a method for obtaining a judgment where no private rights or right of action otherwise would exist. Rather, the Act was designed to provide "a new, noncoercive remedy (a declaratory judgment) in cases involving an actual controversy that has not reached the stage where either party may seek a coercive remedy (such as an injunction or damages award) and in cases in which a party who could sue for coercive relief has not yet done so." *B. Braun Medical, Inc.* v. *Abbot Labs.*, 124 F.3d 1419, 1428 (Fed. Cir. 1997); *see* 10A *Wright & Miller, Federal Practice & Procedure*, § 2751, at 568. Under the Act, "in any actual controversy wherein a court otherwise has jurisdiction of the subject-matter and the parties the court has power to determine the rights of the petitioner, although the case may not have developed to a point wherein affirmative relief could be given. That is as far as the Act goes." *Putnam* v. *Ickes*, 78 F.2d 223, 226 (D.C. 1935).

With respect to the United States' observance of the international instruments discussed above, this is not a case in which a party could invoke "a coercive remedy," nor is it a case that has not yet ripened to the point where a coercive remedy will be available. Rather, in this case there are no underlying private rights, or private rights of action, and therefore no prospect of coercive relief. The Declaratory Judgment Act does not permit relief in these circumstances.

Under the Act, "a court may only enter a declaratory judgment in favor of a party who has a substantive claim of right to such relief." *In re Keene Corp. (Joint Eastern & Southern Dist. Asbestos Litigation)*, 14 F.3d 726, 731 (2d Cir. 1993). As this Court has held, the Declaratory Judgment Act does not, "in itself, create[] a cause of substantive action." *Akins* v. *Penobscot Nation*, 130 F.3d 482, 490 n.9 (1st Cir. 1997). Rather, parties "must rely on an independent source for their claims * * *." *Ibid*.

A party – or a court – may not use the Declaratory Judgment Act to circumvent a lack of jurisdiction, rights, or a substantive right of action. In *Williams* v. *Nat'l Sch. of Health Tech., Inc.*, 836 F. Supp. 273 (E.D. Pa., 1993), *aff'd*, 37 F.3d 1491 (3d Cir. 1994), for instance, the court found that the Higher Education Act (HEA) did not provide a private right of action, and also held that the plaintiff could not escape the import of that holding by seeking a declaratory judgment that the Act has been

violated. The court reasoned that "[a]llowing plaintiffs to proceed in a declaratory judgment action with the HEA as the source of the underlying substantive law is tantamount to allowing a private cause of action. The Declaratory Judgment Act cannot be used to circumvent the enforcement mechanism which Congress established." *Id*. at 281. Both this Court and the Supreme Court have rejected similar attempts to avoid the lack of a right to relief by resorting to the Declaratory Judgment Act. *See Green* v. *Mansour*, 474 U.S. 64, 73 (1985) (holding that "a declaratory judgment is not available when the result would be a partial 'end run' around" Eleventh Amendment immunity); *Marshall* v. *Crotty*, 185 F.2d 622, 627-28 (1st Cir. 1950) (holding that, where a former government employee did not have a right to reinstatement by way of mandamus, the court "is likewise without jurisdiction to give a declaratory judgment determining reinstatement rights").

Where a party seeking declaratory relief has no underlying substantive right of action, a declaratory judgment not only serves as an inappropriate "end run," but also results in a judgment that is "futile and ineffective." *Marshall*, 185 F.2d at 627. As a judgment that under no circumstances could be backed by a coercive order, it "would serve no purpose whatever in resolving the remaining dispute between the parties, and is unavailable for that reason" as well. *Green*, 474 U.S. at 428 n.2; *see Riva* v. *Commonwealth of Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995).

Indeed, a naked declaration concerning the United States' observance of otherwise judicially unenforceable international instruments would not "clarify[] and settle[] the legal relations at issue," nor would it "terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Borchard, *Declaratory Judgments* 229 (2d ed. 1941). Such a declaration would serve only to embroil the panel in an ongoing political debate by offering the panel's opinion in areas of foreign policy within the responsibility of the Executive Branch.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2005 I served the foregoing Supplemental Brief for Appellee upon the following counsel of record by facsimile and by first class mail:

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