No. 20-1180

In the Supreme Court of the United States

TERRITORY OF AMERICAN SAMOA, PETITIONER

v.

NATIONAL MARINE FISHERIES SERVICE, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
JEAN E. WILLIAMS
Acting Assistant Attorney General
ANDREW C. MERGEN
ELLEN J. DURKEE
ROBERT J. LUNDMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the National Marine Fisheries Service reasonably determined that a 2016 rule promulgated under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, to manage federal fisheries off the coast of American Samoa would not significantly affect any local fishing rights that might be protected by the 1900 and 1904 cessions from Samoan leaders to the United States.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the Federal Reporter but is reprinted at 822 Fed. Appx. 650. The order of the district court granting in part and denying in part petitioner's motion for summary judgment (Pet. App. 5-53) is not published in the Federal Supplement but is available at 2017 WL 1073348. The order of the district court denying the government's motion for reconsideration (Pet. App. 54-72) is not published in the Federal Supplement but is available at 2017 WL 8316931.

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2020. The petition for a writ of certiorari was filed on February 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the federal regulation of fisheries located between 3 and 50 nautical miles offshore of the islands of American Samoa, an unincorporated U.S. territory in the South Pacific. See Pet. App. 2, 7, 12.

1. The United States' "external sovereign powers" under the Constitution give it "paramount rights in the marginal sea." *United States* v. *Maine*, 420 U.S. 515, 522-523 (1975) (citation omitted); see *United States* v. *Texas*, 339 U.S. 707, 719 (1950); *Chicago, Rock Island & Pac. Ry. Co.* v. *McGlinn*, 114 U.S. 542, 546 (1885). For much of this nation's history, the United States has claimed the exclusive control of fisheries within the territorial sea, "a marginal belt of the sea extending from the coast line outward * * * three geographic miles." *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 122 (1923); *Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea*, 12 Op. O.L.C. 238, 244-245 (1988) (noting Secretary of State Jefferson's original claim of a three-mile sea in 1793); *Culebra Islands—Assignment as Naval Base*, 23 Op. Att'y Gen. 564, 566 (1901) (explaining that "the ordinary national control of the marine belt" applied to territories as well as States). Beyond the territorial sea, the high seas were open to all nations, and no coastal nation could assert sovereignty or claim exclusive rights over fisheries found there. See 3 Francis Wharton, *A Digest of the International Law of the United States* § 299 (1886); Restatement (Third) of Foreign Relations Law of the United States § 521(1) and (2)(c) (1987) (explaining that "freedom of fishing" exists on the high seas, and that freedom is "open and free to all states").

In 1976, however, Congress enacted the Fishery Conservation and Management Act of 1976, Pub. L. No.

94-265, 90 Stat. 331, later renamed the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act or the Act), 16 U.S.C. 1801 *et seq.*, to "conserve and manage the fishery resources found off the coasts of the United States." 16 U.S.C. 1801(b)(1). The Act declared a zone of "exclusive [federal] fishery management authority" extending from the seaward boundary of each State—with a few exceptions, three miles from a State's coastline—to 200 miles from the coast. 16 U.S.C. 1802(11), 1811(a). That zone is known as the "exclusive economic zone" (EEZ). See Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983) (creating EEZ "contiguous to the territorial sea of," among other places, "overseas territories").

In 1989, the President largely modified the inner boundary of the United States' territorial sea from three to 12 nautical miles—*i.e.*, expanded from three to 12 miles the area generally left to state regulation. See Proclamation No. 5928, 54 Fed. Reg. 777 (Jan. 9, 1989). But for purposes of the Magnuson Act, the inner boundary of the U.S. EEZ around American Samoa remains three nautical miles from shore. 48 U.S.C. 1705(a); see 16 U.S.C. 1802(11). The outer boundary of the U.S. EEZ around American Samoa is less than 200 nautical miles because the U.S. EEZ overlaps with the EEZs of other nations and because some maritime boundaries had already been established between the United States and its maritime neighbors. See, *e.g.*, C.A. E.R. 130, 186.

Under the Magnuson Act, the United States has primary conservation and management authority over fisheries in the EEZ. 16 U.S.C. 1811(a). States' and territories' actions in that zone must therefore be consistent with applicable federal fishery-management

plans and regulations. 16 U.S.C. 1856(a). To assist the National Marine Fisheries Service (NMFS) in carrying out duties imposed by the Act, Congress established eight Regional Fishery Management Councils that are responsible for developing and recommending fishery-management plans and regulations within their assigned geographic areas. 16 U.S.C. 1852(a). Typically, Regional Fishery Management Councils develop and prepare plans, and NMFS reviews, approves, implements, and enforces those plans. See 16 U.S.C. 1852-1854. Before NMFS promulgates final regulations implementing an approved plan, NMFS must determine that the regulations are consistent with the fishery-management plan, any plan amendment, the Magnuson Act, and any "other applicable law." 16 U.S.C. 1854(b)(1).

The Western Pacific Fishery Management Council (Council) has authority over fisheries adjacent to American Samoa, as well as fisheries in and around Hawaii, the Commonwealth of the Northern Mariana Islands, and Guam. 16 U.S.C. 1852(a)(1)(H). The Council has 13 voting members, at least one of whom must be appointed from American Samoa. *Ibid.*

2. The unincorporated territory of American Samoa has had a complex history with the United States.

In 1889, the United States, Germany, and Great Britain entered a treaty "recogniz[ing] the independence of the Samoan Government." General Act—Samoan Islands, art. I, *signed* June 14, 1889, 26 Stat. 1497, T.S. No. 313 (annulled Feb. 16, 1900). Despite that assertion of independence, those three countries also selected the first Samoan king, Malietoa Laupepa, *ibid.*, and considered his acquiescence in the arrangement to be the "assent of Samoa," art. VIII, 26 Stat. 1507. After Malietoa

Laupepa died in 1898, the United States, Germany, and Great Britain signed another treaty to resolve their "rights and claims of possession or jurisdiction" of the islands. Convention—Samoa, pmbl., *signed* Dec. 2, 1899, 31 Stat. 1878, T.S. No. 314 (entered into force Feb. 16, 1900) (Convention). The Convention divided the islands between the United States and Germany, with the United States receiving Tutuila, Aunuu, the three islands of the Manu'a group, and the uninhabited Rose Atoll. Art. II, 31 Stat. 1879. Germany received the other islands (which later became the independent nation of Samoa), and Great Britain renounced all claims to the Samoan islands in exchange for cessions from Germany elsewhere. *Ibid.*

The Senate gave its advice and consent to the Convention in January 1900, and President McKinley ratified and proclaimed it in February 1900. Pmbl., 31 Stat. 1878. On February 19, 1900, President McKinley placed Tutuila and the other islands "under the control of the Department of the Navy, for a naval station." Am. Samoa Bar Ass'n, *Executive Order Placing Samoa Under the U.S. Navy: Exec. Order 125-A* (Feb. 19, 1900), https://www.asbar.org/index.php?option=com_content&view=article&id=13683:executive-order-placing-samoa-under-the-u-s-navy&catid=112&Itemid=178; see *Guam & Tutuila—Military Governors—Commissions*, 25 Op. Att'y Gen. 292, 293 (1904).

At that time, Samoan society was organized into aiga (clans) headed by matai (chiefs). See *Tuaua* v. *United States*, 788 F.3d 300, 309 (D.C. Cir. 2015), cert. denied, 136 S. Ct. 2461 (2016); Pet. 6. The first governor of American Samoa, Benjamin Franklin Tilley, invited the matai to a "ceremony of raising the flag and taking possession." H.R. Doc. No. 3, 56th Cong., 2d Sess. 69 (1900)

(report of Assistant Secretary of the Navy); see *id.* at 67-72. On the day of the flag-raising ceremony, the matai of Tutuila and Aunuu presented Tilley with a signed cession "to ratify and to confirm the grant of the rule of said islands heretofore granted on the 2nd day of April, 1900." C.A. E.R. 73. The cession states that it establishes as a United States territory the "District of 'Tutuila,'" defined to include "the islands of Tutuila and Aunuu and all other islands * * * and waters" between defined latitudes and longitudes. *Ibid.* It also provides that the United States "shall respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District." *Ibid.* The cession further provides that the United States must pay "fair consideration" for "any land or any other thing" that it acquires. *Ibid.* The cession does not specifically mention fishery resources or fishing rights. See *id.* at 73-74.

The cession was brought to the attention of President Theodore Roosevelt by his friend David Starr Jordan, an ichthyologist whom Roosevelt had sent to Samoa to conduct research. See 19 David Starr Jordan, *Personal Glimpses of Theodore Roosevelt*, Natural History, Pt. 1, at 15, 16 (Jan. 1919), https://books.google.com/books?id=rAVAAAAYAAJ&pg=PA15#v=onepage&q&f=false. Believing that it "always pays for a nation to be a gentleman," President Roosevelt sent a letter and a gold watch to each signatory to the cession. *Ibid.* The letter expressed gratitude for the cession—which the President called a "Declaration"—and pledged to respect the "local rights and privileges mentioned" therein. 1 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States, 1929: Reply of President Roosevelt to the Chiefs and People of Tutuila and Other Islands,*

July 21, 1902, Doc. 854 (1943), https://history.state.gov/historicaldocuments/frus1929v01/ch27.

The matai of the Manua island group signed a similar cession on July 14, 1904. C.A. E.R. 75-76. Although acknowledging that their lands had already been "controlled and governed" by the United States since the Convention was ratified on February 16, 1900, the cession states that the matai cede their islands and "the waters and property * * * adjacent thereto" to the United States. *Id.* at 75. The cession also states, in a handwritten revision, that "the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized." *Id.* at 75, 282. President Roosevelt sent another letter to the signatories of the 1904 cession, once again pledging to respect the "local rights and privileges" referred to in the cession. 1 U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States, 1929: Reply of President Roosevelt to the Chiefs and People of the Islands of Manua, August 19, 1904*, Doc. 856 (1943), https://history.state.gov/historicaldocuments/frus1929v01/d856.

For two decades, Congress took no action with respect to the cessions. But in 1929, Congress enacted a joint resolution that "accepted, ratified, and confirmed" both cessions. Act of Feb. 20, 1929, ch. 281, 45 Stat. 1253 (48 U.S.C. 1661(a)). The joint resolution noted that, through the cessions, the matai had "agreed to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over these islands." Pmbl., 45 Stat. 1253.

In the same resolution, Congress vested the President or his delegate (at that time, the Navy) with "all civil, judicial, and military powers" in the islands pending further legislation. 48 U.S.C. 1661(c). But Congress

never enacted an organic act for American Samoa. Cf. *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016) (noting enactment of organic act and subsequent legislation granting additional autonomy to Puerto Rico). Instead, in 1951, the President transferred control of the territory to the Department of the Interior and directed the Secretary of the Interior to "take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government in American Samoa." Exec. Order 10,264, 16 Fed. Reg. 6417, 6419 (July 3, 1951). The Secretary promptly established a local government with executive authority "vested in the Governor and other officials appointed pursuant to law," and "exercised under the supervision and direction of the Secretary of the Interior." U.S. Dep't of the Interior, Secretary's Order 2657, §§ 1, 3(a) (as amended Sept. 26, 1972). The Secretary later approved a territorial constitution, which may now be amended only by Act of Congress. See 48 U.S.C. 1662a.

3. For many years, NMFS did not impose vessel restrictions in the U.S. EEZ around American Samoa. See 66 Fed. Reg. 39,475, 39,476 (July 31, 2001). But in 2000, the Council recommended that NMFS bar vessels 50-feet and longer from catching pelagic fish in the EEZ within 50 nautical miles of American Samoa—an area known as the Large Vessel Prohibited Area (LVPA). *Ibid.* The Council was concerned about the potential for gear conflict and catch competition among the growing number of larger vessels and the small coastal fleet, including small local vessels known as "alias." See 67 Fed. Reg. 4369, 4370 (Jan. 30, 2002). Following notice and comment, NMFS issued a regulation adopting the Council's recommendation, which NMFS characterized

as "a balanced approach that allows large domestic vessels, primarily longliners, to continue fishing within two-thirds of the [EEZ] around American Samoa, while maintaining one-third for use by local small-scale fishing vessels." *Ibid.*

Within a decade, however, the American Samoa longline fishery nearly collapsed from a combination of declining prices for albacore tuna (the primary target stock), increasing operating costs, and a tsunami that severely damaged infrastructure in Pago Pago Harbor. See C.A. E.R. 104-107, 129-130, 153. From 2001 to 2009, American Samoan longline incomes decreased by 96%, with per-vessel annual profits dropping from an average of $177,201 to $6379. *Id.* at 93, 107, 129-130, 170-171. In order to address the struggling longline fishery, the Council revisited the LVPA. *Id.* at 106-108; 80 Fed. Reg. 51,527, 51,528 (Aug. 25, 2015). The Council held public meetings on the topic, along with a public hearing in American Samoa. 81 Fed. Reg. 5619, 5619 (Feb. 3, 2016); 79 Fed. Reg. 22,100 (Apr. 21, 2014); C.A. E.R. 109-110, 169. Ultimately, the Council recommended narrowing the LVPA from 50 to 12 nautical miles from the American Samoa shoreline. 80 Fed. Reg. at 51,528; 81 Fed. Reg. at 5619.

In 2016, after further opportunity for public comment, NMFS published a final rule implementing the Council's latest recommendation. 81 Fed. Reg. at 5619; 50 C.F.R. 665.818 (2016). NMFS anticipated that reducing the size of the LVPA would "improve the efficiency and economic viability of the American Samoa longline fleet, while ensuring that fishing by the longline and small vessel fleets remains sustainable on an ongoing basis." 81 Fed. Reg. at 5619. It also explained that the broader 50-mile LVPA "no longer serves the

conservation and management purpose for which it was developed." *Id.* at 5623.

In adopting the final rule, NMFS thoroughly considered its potential effects on alias. See 81 Fed. Reg. at 5619-5623. The agency observed that the 50-mile LVPA had been created in 2002 when 40 alias were in regular operation; by contrast, "since 2006, fewer than three alia ha[d] been operating on a regular basis," only one of which had been "active in 2013 and 2014." *Id.* at 5620. NMFS also observed that factors other than competition from longliners had driven most alias from the fishery. *Id.* at 5622. Specifically, NMFS found that alias had left the fishery because of the low catch rates for albacore that were common across the South Pacific and because of high economic and operating costs. *Id.* at 5621; see C.A. E.R. 104 (noting that the number of alia boats started to decline in the early 2000s, including after the LVPA was established in 2002). And the agency noted that, according to its review of the data, "gear competition between large longline and alia vessels has not been a contributing factor to the decline of alia vessels." 81 Fed. Reg. at 5622. Given the absence of a relationship between the LVPA and the success of small alia vessels, NMFS concluded that once again permitting large boats to fish in the area between 12 and 50 miles from shore would not "adversely affect reentry of fishery participants into the alia fishery." *Ibid.* NMFS nevertheless committed to "annually review the effects of this final rule on catch rates, small vessel participation, and sustainable fisheries development initiatives." *Id.* at 5619.

In the final rule, NMFS also responded to commenters on both sides, including some who asked the agency to eliminate the LVPA entirely. 81 Fed. Reg. at 5620-

5621. For example, some commenters argued that the larger longline vessels should have the same right to fish near American Samoa as the smaller alia vessels and that the alia fleet had under-utilized the LVPA for more than ten years. *Id.* at 5620. Other commenters asserted that a narrower LVPA would be inconsistent with provisions in the 1900 and 1904 cessions "to protect the lands, preserve the traditions, customs, language and culture, Samoan way of life, and the waters surrounding the islands." *Id.* at 5623. NMFS responded that the narrower LVPA "preserves full access [throughout the EEZ] by smaller vessels," and that the agency "took particular care to ensure that the views of American Samoa stakeholders, including fishermen, fishing communities, and the American Samoa government, were solicited and taken into account throughout the development of this action." *Ibid.* Indeed, NMFS noted that the Council had "been working with the American Samoa government on several fishery development initiatives" not involving competition with large longline vessels. *Id.* at 5621-5622; see *id.* at 5623 (discussing willingness to work with the Samoan government if an aspirational "super alia fleet is fully developed").

4. Petitioner sued NMFS, contending that the 2016 rule violated the Magnuson Act because it was not "consistent with * * * other applicable law," 16 U.S.C. 1854(b)(1)—namely, the cessions. C.A. E.R. 262-263. On cross-motions for summary judgment, the district court granted petitioner's motion in part and vacated the rule. Pet. App. 5-53; see *id.* at 54-72 (denying reconsideration).

The district court first concluded that petitioner had Article III standing. Pet. App. 36-42. The court stated

that, "in light of the long-standing significance of fishing" in Samoan culture, petitioner "has a quasi-sovereign interest in protecting the American Samoan[s'] cultural fishing rights to preserve their culture" and thus was entitled to bring this *parens patriae* suit. *Id.* at 40; see *id.* at 4. After the government moved for reconsideration, the district court further explained its view that, under *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), a territory may permissibly file a *parens patriae* suit against the United States. See Pet. App. 63-69.

On the merits, the district court concluded that the cessions "are federal law," Pet. App. 44, and protect "cultural practices * * * by inference" and "by implication," *id.* at 50. The court further concluded that it was "not enough" for NMFS to consider "American Samoan cultural fishing practices in general" and that NMFS had therefore erred by issuing the 2016 rule "without a determination that [it] was consistent with, *inter alia*, the Deeds of Cession." *Id.* at 51.

5. The court of appeals reversed in an unpublished per curiam opinion. Pet. App. 1-4.

Because the court of appeals viewed petitioner's *parens patriae* standing as a prudential rather than a jurisdictional matter, it declined to reach the question. See Pet. App. 3. Nor did the court address the meaning of the cessions or whether those cessions guaranteed the Samoan fishing communities any particular fishing rights. See *id.* at 3-4. Instead, the court held that the 2016 rule was not arbitrary and capricious because NMFS had considered the available information about the rule's impact on such fishing communities and had "rationally determined the effects were not significant." *Ibid.* The court repeated the agency's observation that fewer than three alia had been operating regularly for

several years, and noted that the Council and petitioner are developing other strategies to support alia fishing. *Id.* at 4. And the court found it "of little import that NMFS did not specifically cite the cessions when detailing the 'other applicable laws' it consulted, as NMFS considered the consequences of the rule on alia fishing boats." *Id.* at 3.

ARGUMENT

Petitioner contends (Pet. 16-23) that the 1900 and 1904 cessions establish binding and enforceable obligations on the United States. But the court of appeals did not address "the validity and enforceability" of the cessions. Pet. 16 (capitalization and emphasis omitted). Rather, the court concluded that NMFS had reasonably determined that its 2016 rule altering the boundaries of the LVPA would not have any significant effect on the fishing rights that petitioner asserts the cessions protect. See Pet. App. 3-4. That fact-specific question, decided in an unpublished opinion, does not warrant this Court's review. In any event, this case would be a poor vehicle in which to evaluate the reasonableness of the 2016 rule because petitioner lacks standing to challenge that rule. The petition for a writ of certiorari should therefore be denied.

1. Petitioner asks this Court to determine whether the 1900 and 1904 cessions "establish binding and enforceable obligations on the United States and its agencies." Pet. i; see Pet. 16 ("This case presents an issue of fundamental importance to the Territory of American Samoa: whether the Deeds of Cession are binding and enforceable under federal law."). The court of appeals, however, did not address that question. The court merely concluded that—even assuming the cessions reserved some fishing rights to offshore fishing stocks—

NMFS had adequately "considered the consequences of the rule on alia fishing boats" and had "rationally determined the effects were not significant." Pet. App. 3-4. Given that conclusion, the court found it "of little import" that "NMFS did not specifically cite the cessions." *Id.* at 3. And because the rule would not affect any fishing rights protected by the cessions, the court determined that the rule was consistent with "other applicable law," 16 U.S.C. 1854(b)(1), and was not arbitrary and capricious. Pet. App. 3-4.

Petitioner repeatedly contends that the United States has "disavowed [its] obligations under the Deeds of Cession," Pet. 16, or is otherwise "disput[ing]" their "validity," Pet. 18. That contention misapprehends the government's arguments in the lower courts. At least since Congress approved the cessions in 1929, it has been clear that the cessions are federal law. 48 U.S.C. 1661(a); see p. 7, *supra*. The issue that the parties disputed in the court of appeals—and that the court did not resolve—was whether the cessions protected fishing rights in the waters affected by the 2016 rule (*i.e.*, waters between 12 to 50 nautical miles offshore). The government contended that the cessions did not mention fishing or fishing rights, Gov't C.A. Br. 30-34; Gov't C.A. Reply Br. 14-17, and that, at a minimum, the cessions did not reserve fishing rights in the LVPA because waters more than three miles offshore were considered the high seas at the time the cessions were both signed and approved by Congress, Gov't C.A. Br. 34-36; Gov't C.A. Reply Br. 18-19. Those arguments relate to the *contents* of the cessions, not their validity.

Nor does the court of appeals' "decision threaten[] to disrupt the relationship between the United States and

one of its longstanding territories," as petitioner asserts. Pet. 3; see Pet. 22 ("[T]his petition asks the Court to correct an error with the potential to upend the longstanding relationship between the United States and one of its insular territories."). The court's narrow, unpublished decision rests on NMFS's factual conclusion that narrowing the LVPA would not have a significant impact on alia fishing and therefore would not affect any rights even arguably protected by the cessions. See Pet. App. 3-4; see also *id.* at 3 (noting that NMFS "considered the input offered by [petitioner] regarding the rule's impact on fishing communities"); 81 Fed. Reg. at 5623 (explaining that NMFS "took particular care to ensure the views of American Samoa stakeholders, including fishermen, fishing communities, and the American Samoa government, were solicited and taken into account throughout the development of this action").

2. The fact-specific question actually decided by the court of appeals—whether NMFS reasonably determined that the 2016 rule would not significantly affect alia fishing—does not independently warrant this Court's review. Petitioner does not identify any specific error in the court of appeals' analysis of the factual record, let alone an error justifying further review. And this Court does not ordinarily "grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10.

Petitioner suggests in passing (Pet. 20, 22) that the court of appeals' decision was too short to be fairly reasoned. But the court communicated the key elements of its analysis: NMFS had considered the "input offered by [petitioner]"; that input and other information suggested that the fortunes of the alia were not linked to

the size of the LVPA; and the Council and NMFS continued to seek "to develop and increase alia fishing" in other ways. Pet. App. 3-4. The brevity of the court's opinion may have reflected its conclusion that petitioner had failed to identify any evidence suggesting that the 2016 rule would in fact have a significant impact on the alia fishing community.

3. In any event, this case would be a poor vehicle to consider the question presented—either as framed by petitioner or as actually decided by the court of appeals—because petitioner lacks standing to bring this *parens patriae* suit.

To establish Article III standing, a plaintiff bears the burden of showing that: (1) he has suffered an injury-in-fact, which is "concrete and particularized" and "'actual or imminent'"; (2) the injury is "'fairly traceable to the challenged action of the defendant'"; and (3) "it [is] 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (brackets, citations, and ellipsis omitted). A sovereign governmental entity seeking to demonstrate *parens patriae* standing must establish two additional elements. First, the sovereign "must articulate an interest apart from the interests of particular private parties, *i.e.*, the [sovereign] must be more than a nominal party." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). Second, the sovereign must identify an injury to a "sufficiently concrete" "quasi-sovereign interest." *Id.* at 602.*

* The court of appeals did not address the government's standing arguments because it labeled them as prudential rather than jurisdictional. See Pet. App. 3. But the government's arguments relate to whether petitioner has suffered a concrete injury fairly traceable

a. Petitioner, as a territory of the United States, lacks standing to assert the rights of its population in litigation against the federal government. See *Massachusetts* v. *EPA*, 549 U.S. 497, 520 n.17 (2007); *Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923). As this Court has explained, "it is no part of [a State's or territory's] duty or power to enforce [its citizens'] rights in respect of their relations with the Federal Government." *Mellon*, 262 U.S. at 485-486. Indeed, in holding that Puerto Rico had standing as *parens patriae* to enforce certain labor laws in *Snapp*, this Court emphasized that Puerto Rico had brought suit against private parties, not against the federal government. See 458 U.S. at 610 n.16 ("A State does not have standing as *parens patriae* to bring an action against the Federal Government."). If anything, it is particularly clear that a territorial government such as petitioner may not bring a *parens patriae* suit against the United States. A territorial government "owes its existence" to the United States, *Grafton* v. *United States*, 206 U.S. 333, 354 (1907), and "U.S. territories * * * are not sovereigns distinct from

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to the challenged rule—both because petitioner generally cannot rely on any *parens patriae* interest in a suit against the United States and because petitioner specifically failed to establish that it or its population will suffer any injuries to cultural fishing rights. See Gov't C.A. Br. 21-30; pp. 17-20, *infra*. Even if the former flaw involves a prudential doctrine, but see *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014) (reserving the question whether third-party standing is prudential or jurisdictional), the latter flaw involves standard Article III requirements of a concrete injury and traceability. See *Lujan*, 504 U.S. at 560-561. Thus, at a minimum, this Court would be required to address some aspects of petitioner's standing before reaching the merits here. See *Virginia House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019).

the United States." *Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016); see *National Bank* v. *County of Yankton*, 101 U.S. 129, 133 (1880).

The district court attempted to distinguish *Snapp*, concluding that *Massachusetts* later blessed *parens patriae* suits challenging agency rules under the Administrative Procedure Act. See Pet. App. 63-69. But in *Massachusetts*, this Court noted that a State was entitled to "special solicitude" in the standing analysis because it had a procedural right (to challenge the rejection of a rulemaking petition) afforded by Congress in 42 U.S.C. 7607(b)(1), and because it had a "stake in protecting its quasi-sovereign interests." 549 U.S. at 520. Although this Court referred to the State's quasi-sovereign interests and *parens patriae* standing, it ultimately held that the State had established standing based on evidence demonstrating "a particularized injury [it suffered] in its capacity as a landowner." *Id.* at 522; see *id.* at 520 n.17. The Court's holding is thus best understood as relying on the State's injury to its proprietary interests. See *Center for Biological Diversity* v. *United States Dep't of the Interior*, 563 F.3d 466, 475-479 (D.C. Cir. 2009); *Missouri, ex rel. Schmitt* v. *Bernhardt*, 923 F.3d 173, 180-182 (D.C. Cir. 2019).

Moreover, even assuming that *parens patriae* standing might be available to petitioner in a suit against the federal government, petitioner has not met its burden to satisfy the additional requirements of that doctrine here. There exists "a small group of citizens who are likely to challenge the [government action] directly," *Maryland* v. *Louisiana*, 451 U.S. 725, 739 (1981): local small-vessel fishermen whose livelihoods could be directly affected by the rule. Because petitioner has not "articulate[d] an interest apart from the interests of"

those "particular private parties," *parens patriae* standing would not be appropriate in this case in any event. *Snapp*, 458 U.S. at 607.

b. In addition, regardless of whether petitioner may assert a *parens patriae* theory of standing, petitioner has failed to make the requisite evidentiary showing of a concrete injury fairly traceable to the 2016 rule. The district court relied on petitioner's asserted injury to its "quasi-sovereign interest in protecting the American Samoan[s'] cultural fishing rights to preserve their culture for the benefit of" American Samoans "as a whole." Pet. App. 40. But although the court assessed the importance of fishing to the Samoan culture, see *id.* at 37-39, it demanded no real evidence that the 2016 rule would in fact cause concrete harm to those cultural fishing rights. Instead, the court relied on general speculation in the administrative record about the effects of a reduced LVPA on alia fishermen, *id.* at 40-41, and "other similar evidence" that it did not identify, *id.* at 41.

That is an insufficient basis for establishing Article III standing at the summary-judgment stage. Such "general factual allegations of injury resulting from the defendant's conduct may suffice" at the motion-to-dismiss stage. *Lujan*, 504 U.S. at 561. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Ibid.* (citation and internal quotation marks omitted). And because any likelihood of injury is not "self-evident" from the administrative record here, petitioner was required to submit declarations or other evidence of the harmful effects that it alleges. *American Chemistry Council* v. *Department of Transp.*, 468

F.3d 810, 819 (D.C. Cir. 2006); see 81 Fed. Reg. at 5622 (stating that "NMFS has no reason to believe that the action will adversely affect reentry of fishery participants into the alia fishery"). Yet petitioner failed to establish specific facts demonstrating a concrete harm either to its own proprietary interests or to Samoan cultural practices. For that reason, too, petitioner lacks standing to bring this suit, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General
ANDREW C. MERGEN
ELLEN J. DURKEE
ROBERT J. LUNDMAN
Attorneys

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