NO. 20-1180

In the
Supreme Court of the United States

TERRITORY OF AMERICAN SAMOA,

Petitioner,

v.

NATIONAL MARINE FISHERIES SERVICE; THE UNITED STATES DEPARTMENT OF COMMERCE; THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; KITTY SIMONDS, EXECUTIVE DIRECTOR OF THE WESTERN PACIFIC REGIONAL FISHERY MANAGEMENT COUNCIL; MICHAEL D. TOSATTO, REGIONAL ADMINISTRATOR FOR NOAA'S NATIONAL MARINE FISHERIES SERVICE PACIFIC ISLANDS REGIONAL OFFICE; WILBUR ROSS, SECRETARY OF COMMERCE, AND CHRIS OLIVER, ASSISTANT ADMINISTRATOR FOR FISHERIES

Respondents.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

MICHAEL F. WILLIAMS
COUNSEL OF RECORD
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 389-5000
mwilliams@kirkland.com

ELEASALO VA'ALELE ALE
Lt. Governor of American Samoa
FAINU'ULELEI FALEFATU ALA'ILIMA-UTU
Atty. General of American Samoa
OFFICE OF THE GOVERNOR
Pago Pago, American Samoa 96799
(684) 633-4116 / *info@go.as.gov*

Counsel for Pet'rs (Add'l Counsel Listed on Inside Cover)

May 26, 2021

ALEMA LEOTA
OFFICE OF THE GOVERNOR
Pago Pago, American Samoa 96799
(684) 633-4116
info@go.as.gov

WILLIAM LEDOUX
AITOFELE SUNIA
DEPARTMENT OF LEGAL AFFAIRS
Executive Office Bldg.
Third Floor, P.O. Box 7
Utulei, American Samoa 96799
(684) 633-4163
ag@la.as.gov

DON HONG
BRANDON D. STONE
CAROLINE DARMODY
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 389-5000
don.hong@kirkland.com
brandon.stone@kirkland.com
caroline.darmody@kirkland.com

STEVEN K.S. CHUNG
MICHAEL L. IOSUA
IMANAKA ASATO, LLLC
745 Fort Street Mall
17th Floor
Honolulu, Hawaii 96813
(808) 521-9500
miosua@imanaka-asato.com

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REPLY BRIEF OF PETITIONER

Respondents' brief confirms that this Court should grant the petition for a writ of certiorari and review the Ninth Circuit's two-page *per curiam* decision summarily reversing the district court's well-reasoned opinion and, in doing so, holding that the United States may disregard its statutory obligation to account for its indigenous citizens' cultural traditions when enacting rules that directly affect those traditions.

Tellingly, Respondents focus their brief entirely on the merits—claiming that Petitioner lacks standing, that the "contents" of the Deeds of Cession do not apply to Samoan cultural fishing practices, and that the federal government need not consider the cessions when regulating the exclusive economic zone surrounding American Samoa because the United States considered it to be the "high seas" when the cessions were signed. None of these arguments speak to the reason this Court should grant cert.: "a United States court of appeals has decided an important question of law that has not been, but should be settled by this Court." Sup. Ct. R. 10(c).

Of course, as the district court and Ninth Circuit both recognized, American Samoa has *parens patriae* standing to challenge the 2016 LVPA Rule. But because the Ninth Circuit's unpublished opinion failed entirely to engage on the language of the cessions, the citizens of American Samoa, and the United States, are left with no guidance as to how, whether, and in what context they apply. Respondents' merits arguments—which largely consist of post-hoc rationaliza-

tions for the NMFS's decision to ignore the cessions despite official comments by American Samoan officials invoking them—do nothing to alleviate this uncertainty.

The question of the applicability of the Deeds of Cession to Magnuson-Stevens Act rulemaking is of vital importance to American Samoans. With a tiny population and no voting member of Congress, American Samoans are vulnerable to administrative overreach. This is especially true when it comes to its fisheries, given American Samoa's unique geography as a remote island territory surrounded by the vast Pacific Ocean. If the United States and its agencies need not account for the Deeds of Cession as "other applicable law" in the context of fisheries rulemaking, it is difficult to imagine a scenario of any import in which they need ever consider the cessions. This Court should summarily reverse the Ninth Circuit or grant plenary review to address this important question of law.

ARGUMENT

I. Petitioner Has *Parens Patriae* Standing To Challenge the NMFS's Failure To Consider The Deeds of Cession.

Respondents first contend that this case presents a poor vehicle because "petitioner lacks standing to bring this *parens patriae* suit." Opp. 16. Respondents' standing arguments are misplaced and were explicitly rejected by the district court and implicitly by the Ninth Circuit.

Respondents attempt to make the same standing arguments roundly rejected by the district court. *See* Opp. 16-19; *see also* App. 5. First, Respondents argue

that American Samoa "as a territory of the United States, lacks standing to assert the rights of its population in litigation against the federal government." Opp. 17. But, as the district court observed, the action in *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982), was distinguishable. App. 64 ("The instant case, however, is not like *Snapp*" because American Samoa "seeks judicial review, pursuant to the APA and MSA, of an agency rule"). In so holding, the district court agreed that "this type of *parens patriae* action is possible, as recognized in *Massachusetts v. EPA*, 549 U.S. 497 (2007)." *Id*. After conducting a detailed analysis of this Court's decision in *Massachusetts v. EPA*, the district court found that because "Plaintiff is not seeking to apply the MSA to its people; it seeks to assert its rights under the MSA by using the APA's established procedure to challenge arbitrary and capricious agency action," American Samoa "may assert *parens patriae* standing to challenge the 2016 LVPA Rule." *Id* at 67.

Respondents contend that the district court misapplied *Massachusetts* because although that case implied "quasi-sovereign interests" and "*parens patriae* standing," this Court "ultimately held that the State had established standing based on evidence demonstrating 'a particularized injury [it suffered] in its capacity as a landowner." Opp. 18. Such a narrow reading misconstrues this Court's holding that, *in addition to protecting its proprietary interests as a landowner*, Massachusetts could also have sued the federal government on account of its "stake in protecting its quasi-sovereign interests" and the long established right "to litigate as *parens patriae* to

protect quasi-sovereign interests." *Massachusetts v. EPA*, 549 U.S. at 520 & n.17. Indeed, "there is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' . . . and allowing a State to assert its rights under federal law (which it has standing to do)." *Id* at 520 n.17. Here, American Samoa seeks to protect its citizens and its quasi-sovereign interests by ensuring the appropriate application of federal law—not to preclude or undermine that law. The district court sanctioned this approach and concluded that American Samoa was not barred from asserting *parens patriae* standing. *See* App. 68-69.

Respondents cite two cases from the D.C. Circuit for the proposition that this Court's holding in *Massachusetts* is "best understood as relying on the State's injury to its proprietary interests." Opp. 18 (citing *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)). Both of these cases are inapposite and easily distinguishable from this case. In *Center for Biological Diversity*, the circuit court's discussion on *parens patriae* and the *Mellon bar* was unnecessary to the holding so "[d]etermining the precise scope of the holding on standing in *Massachusetts v. EPA* . . . remain[s] for another day." 563 F.3d at 489 (Rogers, J., concurring). Similarly, in *Bernhardt*, the D.C. Circuit's analysis on whether the state of Missouri had *parens patriae* standing under the APA is distinguishable from this case simply because the court did not analyze whether the same is true for the MSA, which is the key statute that provides American Samoa a procedural right to

challenge the 2016 LVPA Rule. *See* 923 F.3d at 180-182. In *Massachusetts*, this Court found that Congress recognized a "procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious." 549 U.S. at 520. While that case dealt with EPA regulations, an identical right was granted in the present case under the MSA for American Samoa to "assert its rights under federal law (which it has standing to do)."[1] *Id* at 520 n.17. The district court correctly recognized this as the procedural right provided by the MSA and asserted by American Samoa to challenge an "arbitrary and capricious agency action." App. 67.

Respondents also argue that "a territorial government such as petitioner may not bring a *parens patriae* suit against the United States." Opp. 17. This reasoning relies on the misreading of this Court's decision in *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1873 (2016). As an initial matter, *Sanchez Valle* says nothing about *parens patriae* standing, but rather dealt narrowly with the dual sovereignty carve-out from the Double Jeopardy Clause, which, as this Court explained, was a unique sovereignty issue. *See*

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[1] The procedural right under 16 U.S.C. § 1855(f) states: "Regulations promulgated by the Secretary under this chapter and actions described in paragraph (2) shall be subject to judicial review to the extent authorized by, and in accordance with, chapter 7 of title 5, if a petition for such review is filed within 30 days after the date on which the regulations are promulgated or the action is published in the Federal Register, as applicable; except that— (A) section 705 of such title is not applicable, and (B) the appropriate court shall only set aside any such regulation or action on a ground specified in section 706(2)(A), (B), (C), or (D) of such title."

Sanchez Valle, 136 S. Ct. at 1870. In *Sanchez Valle*, this Court held that territories were not separate sovereigns for double jeopardy purposes because prosecutorial powers of territories emanate from the same source as the federal government. *Id.* To that end, this Court did not "probe" into the sovereignty of a territory to bring a *parens patriae* suit against the federal government. *See id.* Moreover, for purposes of the MSA, American Samoa is considered a "state," which means it possesses the same rights to a judicial remedy as any other state. *See* 16 U.S.C. § 1802(40) ("The term 'State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, ***American Samoa***, the Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States.") (emphasis added).

Finally, Respondents argue that, "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." Opp. 18. The district court rejected this argument as well. *See* App. 40-42. In its detailed opinion, the court determined that, "in light of the long-standing significance of fishing to the *fa'a Samoa*, Plaintiff has a quasi-sovereign interest in protecting the American Samoan's cultural fishing rights to preserve their culture for the benefit of the American Samoan people as a whole." *Id.* at 40. The separate and distinct interest of American Samoa in preserving traditional Samoan culture is sufficiently concrete and traceable to establish Article III standing and *parens patriae* standing. *Id.* at 41-42.

II. Respondents' Arguments Regarding The Application Of The Deeds Of Cession To The Rulemaking Are Post-Hoc Rationalizations.

Respondents claim that Petitioner "misapprehends the government's arguments in the lower courts," because those arguments only "relate[d] to the *contents* of the cessions, not their validity." Opp. 14. Of course, the Respondents cannot seriously contest the cessions' validity, given their codification by Congress. *See* 48 U.S.C. § 1661(a). However, Respondents' characterization of the cessions' contents and applicability to MSA rulemaking are merely post-hoc rationalizations for the NMFS's failure to consider the Deeds of Cession in the first place.

When the NMFS published the proposed 2016 LVPA Rule, it received scores of comments objecting to the proposed outside boundary reduction. Among those objections were official comments by American Samoa's government representatives explicitly reminding the NMFS of its obligation to consider the Deeds of Cession. *See, e.g.,* App. 40-41 (American Samoa Governor's official comments from March and September 2015 referencing the Deeds of Cession); *see also* American Samoa C.A. Opp. Brief at 13-14 (American Samoa Director of Marine and Wildlife Resources, and member of the Western Pacific Fishery Council's September 2015 official comment referencing the Deeds of Cession); App. 26. Given that "[a]n agency must consider and respond to significant comments received during the period for public comment," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015), it was incumbent on the NMFS to respond to those official comments and explicitly address the Deeds of Cession in the rulemaking process. Nevertheless, the NMFS

ignored those comments and likewise ignored the cessions.

Respondents do not contest this shoddy administrative record, but claim that such an oversight is of no moment "because the [2016 LVPA] rule would not affect any fishing rights protected by the cessions." Opp. 14. For this reason, argue the Respondents, "the [Ninth Circuit] determined that the rule was consistent with 'other applicable law' and was not arbitrary and capricious." *Id*. (citation omitted). Respectfully, that assertion is flat wrong; the Ninth Circuit's unpublished *per curiam* decision made no such finding as to whether offshore fishing rights are, or are not, protected by the Deeds of Cession. Like the NMFS, the Court of Appeals declined to engage the cessions' language.

Moreover, the Respondents' "high seas" argument—raised for the first time before the Ninth Circuit—hinges solely on the word "property." *See* Gov't C.A. Brief 35 (arguing that "the reference in the cessions to 'property' could not have included exclusive fishing rights on the high seas."). But, as the district court aptly observed, "[t]he use of the words 'lands' and the word 'property' [in the Cession of Tutuila and Aunu'u] indicates that 'property' is not limited to land/real property." App. 45. Thus, "'property' is not limited to tangible property," but may also include "for example, a right of access necessary to engage in certain cultural practices." App. 46. But because the NMFS failed to address the Deeds of Cession during the 2016 LVPA rulemaking, it is speculation to conclude that it considered such cultural practices.

III. The Denial of Certiorari In This Case Will Effectively Prevent Any Further Development Of This Important Issue.

The denial of certiorari in this case would not only serve a devastating blow to the people of American Samoa, but it would effectively endorse the NMFS's practice of ignoring territorial government officials and disregarding the Deeds of Cession. Indeed, denying certiorari here would foreclose further development of this issue, and let stand a precedent that administrators need only "consider the input offered" by territorial leaders before disregarding the United States' binding obligations to its territories.

It is no secret that American Samoa, like other insular territories, does not have voting representation in Congress. As a result, the commenting power is one of its citizens' only recourse for ensuring the federal government respects their cultural traditions. For this reason, it is especially troubling that the Ninth Circuit's decision comes in a case involving MSA rulemaking—a statutory scheme vitally important to the United States' island territories given their outsized role in America's fisheries and proximity to vast swaths of the country's exclusive economic zone. As a commentator writing about the United States' EEZ observed:

> Most of this "wet territory" is not adjacent to the 48 contiguous states. In fact, the exclusive economic zone adjacent to the continental United States, including the Atlantic and Pacific coasts and the coast of the Gulf of Mexico, comprises only about 20 percent of the total area. The states

> of Alaska and Hawaii both have gigantic exclusive economic zones, each of them larger than the entire exclusive economic zone area adjacent to the contiguous 48 states. ***Even larger than either of these, however, is the area surrounding the insular areas of the United States, including the commonwealths of Puerto Rico and the Northern Mariana Islands; the territories of Guam, the Virgin Islands, and American Samoa; and the other island possessions of the United States. When combined, these insular areas have exclusive economic zone areas of more than 1 million square nautical miles, about 31 percent of the total.***

Donald C. Woodworth, *The Exclusive Economic Zone and the United States Insular Areas*: *A Case for Shared Sovereignty*, 25 OCEAN DEV. & INT'L L. 365, 366 (1994) (emphasis added); *see also* U.S. Congress, Office of Technology Assessment, *Marine Minerals: Exploring Our New Ocean Frontier*, OTA-O-342 (Washington, DC: U.S. Government Printing Office, July 1987), App. B at 292 (observing that the United States island territories "include only 1.5 percent of the population and 0.13 percent of the land area of the United States, but ***30 percent of the EEZ***.") (emphasis added). This gross disparity only underscores the need for the NMFS to account for those few statutory protections enjoyed by American Samoans.

To allow the Ninth Circuit to sanction the NMFS's rulemaking process here is to ensure there will be nothing to protect Samoan cultural fishing rights from the actions of NMFS administrators. And though Respondents assert that the NMFS graciously considered

the views of some commenters who asserted that a narrower LVPA would be inconsistent with the cessions, *see* Opp. 10-11, even they would concede there was "no actual discussion" of the cessions during the 2016 LVPA rulemaking process. *See* 2/5/20 C.A. Hr'g Tr. at 2 ("JUDGE: And is it true that in making this determination to shrink the area that the record does not reflect consultation or consideration of the [c]essions? . . . MR. LUNDMAN: Of what the se – there's no discussion of what the [c]essions mean and, and the response."). In any event, Respondents' insistence of the NMFS's benevolence belies the federal government's paternalism toward its territories. But what becomes of cultural fishing practices when that graciousness is exhausted or when whims and administrations change?

By failing to consider the Deeds of Cession, NMFS effectively denies American Samoa any recourse to protect cultural fishing rights from federal rulemaking. Without the protection of the Deeds, American Samoans would be at the whim of any agency that seeks to disregard the *fa'a Samoa*.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL F. WILLIAMS
Counsel of Record
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 389-5000
mwilliams@kirkland.com

ELEASALO VA'ALELE ALE
Lieutenant Governor of American Samoa
FAINU'ULELEI FALEFATU ALA'ILIMA-UTU
Attorney General of American Samoa
OFFICE OF THE GOVERNOR
Pago Pago, American Samoa 96799
(684) 633-4116
info@go.as.gov

ALEMA LEOTA
OFFICE OF THE GOVERNOR
Pago Pago, American Samoa 96799
(684) 633-4116
info@go.as.gov

WILLIAM LEDOUX
AITOFELE SUNIA
DEPARTMENT OF LEGAL AFFAIRS
Executive Office Building
Third Floor, P.O. Box 7
Utulei, Am. Samoa 96799
(684) 633-4163
ag@la.as.gov

DON HONG
BRANDON D. STONE
CAROLINE DARMODY
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
(202) 389-5000
don.hong@kirkland.com
brandon.stone@kirkland.com
caroline.darmody@kirkland.com

STEVEN K.S. CHUNG
MICHAEL L. IOSUA
IMANAKA ASATO, LLLC
745 Fort Street Mall, 17th Floor
Honolulu, Hawaii 96813
(808) 521-9500
miosua@imanaka-asato.com

Counsel for Petitioner Territory of American Samoa

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