

No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Deeds of Cession, by which the Territory of American Samoa became part of the United States, establish binding and enforceable obligations on the United States and its agencies?

PARTIES TO THE PROCEEDING

The Territory of American Samoa is Petitioner here and was Plaintiff-Appellee below.

The following federal agencies and officials are Respondents here and were Defendants-Appellants below: the 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.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Territory of American Samoa v. National Marine Fisheries Service, No. 17-17081, 822 F. App'x 650 (9th Cir. Sept. 25, 2020) (reversing the district court's judgment).

Territory of American Samoa v. National Marine Fisheries Service, Civil 16-00095 LEK (Mar. 20, 2017) (order granting and denying in part plaintiff's motion for summary judgment).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

The Territory of American Samoa respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished decision of the Ninth Circuit is reported at 822 F. App'x 650 (9th Cir. Sept. 25, 2020) and reproduced in the Appendix ("App.") at App. 1. The decision of the United States District Court for the District of Hawaii vacating the agency's final rule is unreported but available at 2017 WL 1073348 and reproduced at App. 5. The district court's order denying Respondents' motion for reconsideration is unpublished but available at 2017 WL 8316931 and reproduced at App. 54.

JURISDICTION

The Ninth Circuit issued its decision reversing the District Court on September 25, 2020. App. 1. Pursuant to this Court's Order of March 19, 2020, Petitioner timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Magnuson-Stevens Fishery Conservation and Management Act ("MSA"), 16 U.S.C. §§ 1801 *et seq.*, are reproduced in the Appendix at App. 73.

INTRODUCTION

This case raises a basic question about the United States' responsibility to keep its promises to its territories. The United States acquired the Territory of American Samoa pursuant to Deeds of Cession offered by Samoan chiefs. The Deeds of Cession transferred sovereignty to the United States while protecting the customary rights and property of the people of American Samoa. For more than 120 years, the people of American Samoa and the United States have recognized the Deeds of Cession to require special consideration for the preservation of *fa'a Samoa*, the traditional Samoan way of life.

The National Marine Fisheries Service ("NMFS") recognized this obligation in 2002 when it issued a regulation prohibiting large vessels from fishing in the waters within 50 nautical miles of American Samoa. The purpose of the 2002 regulation was to protect local Samoan fishermen and their small fishing crafts, known as *'alia*, from interference and competition at the hands of larger commercial vessels. At the time, the NMFS acknowledged the central role of traditional fishing practices in Samoan society writ large.

The NMFS retracted the 2002 restrictions in 2016. It decided to allow large vessels to fish in waters within a mere 12 nautical miles of American Samoa. Government officials and prominent leaders of American Samoa objected during the rulemaking that this change threatened traditional Samoan fishing practices and violated the Deeds of Cession. Although the objections were properly asserted during the rulemaking process, the NMFS did not address them. Instead, the agency ignored what had, to that point, been well-

established obligations of the United States respecting the preservation of *fa'a Samoa*.

The district court vacated the 2016 regulation because it failed to address the Deeds of Cession. The Ninth Circuit, however, reversed in an unpublished *per curiam* opinion that put forward a single paragraph of substantive analysis. The Ninth Circuit's decision threatens to disrupt the relationship between the United States and one of its longstanding territories—a relationship predicated upon voluntary agreements that had served both sides well for more than a century. The court's decision leaves standing an administrative action that, much worse than determining the Deeds of Cession should not apply, treated them as if they do not exist.

American Samoa seeks this Court's intervention to affirm its rights under the Deeds of Cession.

STATEMENT OF THE CASE

*O le upega e fili i le po, 'ae talatala i le ao.*¹

A. The Territory Of American Samoa

American Samoa is a territory of the United States located on the eastern islands of an archipelago in the South Pacific Ocean. *See Tuaua v. United States*, 951

¹ “‘The net that became entangled in the night will be disentangled in the morning.’ For a certain kind of night fishing the Samoans use a particular net called a *tapo*. After the catch, the net is carried ashore and hung up. The following morning it is properly put in order. [Meaning:] In order to settle a dispute, it is necessary to be clear about its causes.” E. Schultz, *Proverbial Expressions of the Samoans*, 58 JOURNAL OF THE POLYNESIAN SOCIETY 139, 147 (1949).

F. Supp. 2d 88, 90 (D.D.C. 2013). American Samoa is unique among United States territories in that it was not acquired by conquest. In the words of former Congressman Eni F.H. Faleomavaega: “American Samoa has never been taken as a prize of war, and never been annexed against the will of [its] people.” *See* Statement of the Hon. Eni F.H. Faleomavaega, United Nations Special Comm. on Decolonization (May 23, 2001), *available at* https://www.oocities.org/west_papua/Faleomavaega.htm. Rather, American Samoa became a territory when its traditional leaders “voluntarily ceded their sovereign authority to the United States Government.” *Tuaua v. United States*, 788 F.3d 300, 302 (D.C. Cir. 2015). It remains a point of pride among American Samoans today that their history is “free from conquest or involuntary annexation by foreign powers.” *Tuaua*, 951 F. Supp. 2d at 91.

At the turn of the 20th Century, the United States entered into two separate agreements with the traditional leaders of the eastern Samoan Islands. App. 12. One is the Tutuila and Aunu’u Deed of Cession, dated April 17, 1900; the other is the Manu’a Deed of Cession, dated July 14, 1904 (collectively “the Deeds of Cession”). *See id.* Through these Deeds of Cession, the leaders of the islands ceded their lands and the surrounding bodies of water to the United States, subject to the terms of the Deeds themselves. *See id.*

The Cession of Tutuila and Aunu’u is signed by chiefs representing the people of those islands. *See* App. 13–16. It cedes to the United States “[a]ll these the islands of Tutuila and Aunu’u and all other islands, rocks, reefs, foreshores and waters,” designated by relatively precise geographic coordinates. App. 14. The Cession calls for the United States to “respect and

protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District,” *id.*, and it requires the United States to make “payment of a fair consideration for the land, or other thing, to those who may be deprived of their property on account of the desire of the Government,” *id.*

The Cession of Manu’a is likewise signed by chiefs representing the people of those islands. *See* App. 15. It cedes to the United States all of the islands of the Manu’a group, including “Tau, Olosega, Ofu, and Rose Islands, and all other, the waters and property and adjacent thereto, together with all sovereign rights thereunto belonging and possessed by us.” *Id.* The Manu’a Cession further states “that the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.” App. 15–16.

The United States Congress ratified the Deeds of Cession in 1929, and the ratification is codified at 48 U.S.C. § 1661. The ratification was enacted *nunc pro tunc* as of April 10, 1900 and July 16, 1904. *See* 48 U.S.C. § 1661(a). American Samoa was administered by the Secretary of the Navy until 1951, when President Truman transferred administrative responsibility to the Secretary of the Interior. *See Corp. of Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Hodel*, 830 F.2d 374, 376 (D.C. Cir. 1987) (citing Exec. Order No. 10264, 16 Fed. Reg. 6419 (July 3, 1951)). Today, American Samoa is partially self-governed, possessing a popularly elected bicameral legislature and similarly elected governor. *See Tuaua*, 788 F.3d at 302. The territory nonetheless remains under the ultimate supervision of the Secretary of the Interior, who is authorized to “take such action

as may be necessary and appropriate, and in harmony with applicable law.” See 16 Fed. Reg. 6419.

American Samoa is distinctive among the territories for its preservation of the traditional Samoan way of life, known as *fa’a Samoa*. Communal ownership of land is “the cornerstone” of this traditional way of life. *Corp. of Presiding Bishop*, 830 F.2d at 377. Under *fa’a Samoa*, the “*aiga* (extended families) ‘communally own virtually all Samoan land, [and] the *matais* [chiefs] have authority over which family members work what family land and where the nuclear families within the extended family will live.” *Tuaua*, 788 F.3d at 309 (quoting *King v. Morton*, 520 F.2d 1140, 1159 (D.C. Cir. 1975)). The laws of American Samoa reinforce this adherence to *fa’a Samoa*. The Constitution of American Samoa expressly protects “persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests.” Rev. Const. of Am. Samoa, Art. I, § 3. The Constitution authorizes legislation as may be necessary “to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons.” *Id.*

Even today, “[e]xtended families under the authority of *matais* remain a fundamentally important social unit in modern Samoan society.” *Tuaua*, 788 F.3d at 309-10. American Samoans are fiercely protective of their traditional way of life: “since their earliest contacts with the West, Samoans have insisted on protecting the communal land system from encroachment.” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 637 F. Supp. 1398, 1401 (D.D.C. 1986) (citation omitted). The commitment of

American Samoa and its people to preserving *fa'a Samoa* has, if anything, only grown stronger over time.

B. 2002 Large Vessel Prohibited Area Rule

The Magnuson-Stevens Fishery Conservation and Management Act (“MSA”), 16 U.S.C. §§ 1801 *et seq.*, was “enacted to establish a federal-regional partnership to manage fishery resources.” *Nat. Res. Def. Council, Inc. v. Daley*, 209 F.3d 747, 749 (D.C. Cir. 2000). Under the MSA, states retain authority over fishery management within their borders. *See* 16 U.S.C. § 1856(a)(1). American Samoa is considered a “state” for these purposes. *See id.* § 1802(40).

Beyond the seaward boundary of each coastal state lies the 200-mile “exclusive economic zone” of the United States. *See id.* § 1802(11). The federal government exercises “sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.” *Id.* § 1811(a). In order to manage fishing in the exclusive economic zone, the MSA calls for the creation of twelve regional Fishery Management Councils, composed of federal officials, state officials, and experts appointed by the NMFS. *See id.* § 1852(b)(1)-(2). The regional councils develop Fishery Management Plans to “achieve and maintain, on a continuing basis, the optimum yield from each fishery.” *See id.* § 1801(b)(4). The MSA defines the “optimum yield” as that amount of fish that “will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems.” *Id.* § 1802(33).

The NMFS has authority to review and approve the Fishery Management Plans proposed by the regional Fishery Management Councils, along with any proposed changes to these plans. *See id.* § 1854(a)(1)-(3). The plans and proposed amendments are subject to a 60-day notice-and-comment period following publication in the Federal Register. *See id.* § 1854(c)(6). After 60 days, the NMFS has 30 days to promulgate final regulations in the Federal Register, along with an explanation of any substantive differences between the proposed and final rules. *See id.* § 1854(c)(7).

The final regulations promulgated by the NMFS must be consistent with the fishery management plan, with national standards for fishery conservation, “and with any other applicable law.” *Id.* § 1854(c)(7). The regulations promulgated under the MSA are subject to judicial review under certain provisions of the Administrative Procedure Act. *Id.* § 1855(f). Specifically, a reviewing court should set aside any such regulation on a ground specified in sections 706(2)(A), (B), (C), or (D) of the APA. *See id.*

On January 30, 2002, the NMFS issued a final rule restricting large vessels from fishing within 50 nautical miles around American Samoa. *See Final Rule Regarding Fisheries Off West Coast States and in the Western Pacific; Pelagic Fisheries; Prohibition on Fishing for Pelagic Management Unit Species; Near-shore Area Closures Around American Samoa by Vessels More than 50 Feet in Length*, 67 Fed. Reg. 4369 (“2002 LVPA Rule”). The restriction applied, with limited exceptions, to vessels larger than 50 feet in length. *See* 67 Fed. Reg. at 4369. The effect of the rule was to establish an area between three nautical miles and 50 nautical miles from the coast of American Samoa

where fishing was limited exclusively to smaller vessels, including local Samoan craft known as *'alia*. This area was known as the American Samoa Large Vessel Prohibited Area, or LVPA.

The purpose of the 2002 LVPA Rule was to prevent the displacement of local Samoan fishermen. The restrictions were intended “to prevent the potential for gear conflicts and catch competition between large fishing vessels and locally based small fishing vessels.” *Id.* The NMFS noted that “[s]uch conflicts and competition could lead to reduced opportunities for sustained participation by residents of American Samoa in the small-scale pelagic fishery.” *Id.* The NMFS specifically recognized the traditional importance of fishing to Samoan communities: “Local fishermen and associated fishing communities depend on this fishery not only for food, income, and employment, but also for the preservation of their Samoan culture.” *Id.*

During the development of the 2002 LVPA Rule, the regional Fishery Management Council also recognized the importance of small-craft fishing to traditional Samoan culture. As recounted by the district court in this case, the Council stated:

American Samoan are among the last full-blooded Polynesians. Their dependence on fishing undoubtedly goes back as far as the peopled history of the Samoa islands, about 3,500 years ago. Many aspects of the culture have changed in contemporary times but Samoans have retained a traditional social system that continues to strongly influence and depend upon the culture of fishing. . . .

Traditional Samoan values still exert a strong influence on when and why people fish, how they distribute their catch and the meaning of fish within the society. When distributed, fish and other resources move through a complex and culturally embedded exchange system

. . . .

Despite increasing commercialization, the small-scale pelagic fishery continues to contribute[] strongly to the cultural identity and social cohesion of American Samoa. The role of pelagic fish in meeting cultural obligations is at least as important as the contributions made to nutritional or economic well-being of island residents.

App. 38–39. The limits on large-vessel fishing in the waters around American Samoa remained in effect until the NMFS amended the rule in 2016.

C. 2016 Large Vessel Prohibited Area Rule

On August 25, 2015, the NMFS published notice of proposed rulemaking that would reopen much of the exclusive economic zone around American Samoa to large-vessel fishing. *See Proposed Rule, Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area; Court Order, 80 Fed. Reg. 51527.* The proposed rule would allow vessels larger than 50 feet in length to fish in the waters between 12 and 50 nautical miles from the shores of

American Samoa. *See id.* The effect of the rule would be to open an additional 16,817 square nautical miles for large-vessel fishing that previously had been reserved to small crafts. *See id.* at 51529.

As justification for the change, the NMFS stated “[s]ince 2002,” “the American Samoa pelagic fisheries have changed” such that “the conditions that led the Council and NMFS to establish the LVP are no longer present.” *Id.* at 51528. The NMFS believed the larger 2002 LVPA “may be unnecessarily reducing the efficiency of the larger American Samoa longline vessels by displacing the fleet from a part of their historical fishing grounds.” *Id.*

The reaction from government officials and other prominent leaders in American Samoa was swift and negative. The Governor of American Samoa objected that the proposed rule “threatens to rob the people of these islands of the opportunity to nurture and practice their culture, let alone access the natural resources surrounding their islands.” App. 40. The Governor warned that the presence of larger vessels “will likely discourage local fisherman from practicing traditional fishing methods for fear of being run over by the larger long liners.” App. 41. A convocation of chiefs, including the descendants of the signatories of the Deeds of Cession, objected that the influx of larger vessels “will surely undermine the treated peoples’ property interests in the marine waters and resources . . . and create unbalanced competition that will further threaten the collapse of the traditional ‘*alia*’ fishing community.” *Id.*

The Samoan officials and leaders also objected that the proposed rule violates the Deeds of Cession. *See*

App. 26. The NMFS acknowledged these objections but did not answer them. In addressing comments that arose during the rulemaking, the NMFS stated:

Comment 27: Several commenters noted that in the Deed of Cession with the chiefs of the islands of Tutuila, Aunuu, and Manua Islands, the United States promised to protect the lands, preserve the traditions, customs, language and culture, Samoan way of life, and the waters surrounding the islands, and that all the science and environmental analysis should not supersede the rights of the people of these islands.

Final Rule, Pacific Island Pelagic Fisheries; Exemption for Large U.S. Longline Vessels to Fish in Portions of the American Samoa Large Vessel Prohibited Area, 81 Fed. Reg. 5619, 5623 (Feb. 3, 2016) (“2016 LVPA Rule”). Instead of contending with the argument that the 2016 LVPA Rule would violate the Deeds of Cession, the NMFS proclaimed that the change “is consistent with its authority under the Magnuson-Stevens Act to manage fishery resources in the U.S. EEZ.” *Id.* The NMFS’s response to the comments made clear that it was relying upon a “determination that the restriction no longer serves the conservation and management purposes for which it was developed,” rather than any analysis of the legal effect of the Deeds of Cession. *See id.* In connection with the 2016 LVPA Rule, the NMFS took the position that “all fishing sectors should be treated equally, unless there is a legitimate conservation and management need to treat them differently.” 81 Fed.

Reg. 5620. This position is the opposite of the special consideration for Samoan cultural practices that was established in the 2002 LVPA Rule and sought by the commenters who cited the Deeds of Cession in support of their objections.

D. The Proceedings Below

American Samoa brought an action in the district court challenging the 2016 LVPA Rule. American Samoa argued that the rule violates the Deeds of Cession, which constitutes a violation of the MSA. App. 7. It argued that the NMFS “abused its discretion by failing to review, address, or consider the Deeds of Cession as required under the MSA and the Administrative Procedure Act.” *Id.* American Samoa emphasized that “during the comment period and at Council meetings prior to the adoption of the 2016 LVPA Rule, dozens of American Samoans objected to the new rule as a violation of the Deeds, including many highly respected American Samoa officials.” App. 26 (internal quotation marks omitted). Despite this, the NMFS “failed to consider how the rule would affect American Samoa’s cultural practices.” *Id.*

The NMFS responded that American Samoa lacked *parens patriae* standing to bring its claim. On the merits, “Defendants argue[d] that the Deeds of Cession do not constitute ‘any other applicable law’ that NMFS was required to ensure the proposed rule was consistent with.” App. 29. In the alternative, the NMFS argued that it had “adequately considered and responded to the concerns raised about the rule’s impact on American Samoan fishing communities.” *Id.*

The district court awarded summary judgment in favor of American Samoa and vacated the 2016 LVPA

Rule. With regard to standing, 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 Samoa people as a whole.” App. 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. App. 41–42.

On the merits, the district court enforced the requirement that final regulations under the MSA must comply with “any other applicable law.” App. 44 (quoting 16 U.S.C. § 1854(c)(7)). The court held that the Deeds of Cession constitute “other applicable law” for purposes of the MSA. The court pointed to guarantees protecting “lands and other property” in the Cession of Tutuila and Aunu’u, *see* App. 45, and the guarantees concerning “property according to their customs” in the Cession of Manu’a Islands, *see* App. 46.

The district court rejected the NMFS’s argument that the Deeds of Cession did not extend to fishing rights. The court compared American Samoa with Native American tribes. App. 50. The Supreme Court had long since established “that hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes.” App. 48–49 (quoting *Paravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (citing *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968))). The court thus concluded that “the American Samoans’ right to use their ‘property’ to continue their customary fishing practices is reserved by implication in the Deeds of Cession.” App. 50.

The district court also rejected the NMFS’s argument that it had considered American Samoans’ interests in cultural fishing practices during the rulemaking. The court observed that “the consideration of American Samoan cultural fishing practices in general is not enough.” App. 51. Because the court had concluded that the Deeds of Cession require the United States to preserve American Samoan cultural fishing practices, and that the Deeds of Cession constitute “any other applicable law” for purposes of the MSA, “the 2016 LVPA Rule should not have been adopted without a determination that the proposed rule was consistent with, *inter alia*, the Deeds of Cession. *Id.* The NMFS’s positions in the district-court litigation—including those arguments denying the Deeds of Cession had any legal effect—had confirmed that the NMFS did not consider the legal impact of the Deeds of Cession when it promulgated the 2016 LVPA Rule. *See id.*

Because the NMFS failed to consider whether the 2016 LVPA Rule was consistent with the Deeds of Cession, the district court found it had “entirely failed to consider an important aspect of the problem.” *Id.* (internal quotation marks omitted). Accordingly, the district court invalidated the 2016 LVPA Rule as arbitrary and capricious under the MSA and the APA.

The Ninth Circuit reversed on appeal. App. 4. In an unpublished *per curiam* decision that devoted one paragraph of analysis to the merits, the court found that the NMFS had “considered the input offered by [the American Samoa Government] regarding the rule’s impact on fishing communities, the probable effects of increased large vessel longline fishing, and the availability of fish.” App. 3. The court deemed it “of

little import” that the NMFS did not specifically address the Deeds of Cession because the NMFS “considered the consequences of the rule on [']*alia* fishing boats, and rationally determined the effects were not significant.” App. 3–4.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Address The Validity And Enforceability Of The Deeds Of Cession Under Federal Law.

*Ia gatasi le futia ma le umele.*²

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. Since it first became a part of the United States in 1900, American Samoa has understood the Deeds of Cession to provide the basic legal foundation for the relationship between the territory and the federal government. Now, approximately 120 years later, the United States (in its briefs to the Ninth Circuit) and its federal agencies (in their rulemaking) have disavowed their obligations under the Deeds of Cession. This reversal, which was completely unexpected and remains entirely unexplained, strikes at

² “‘The sinnet ring and the stand for the fishing rod must be equally strong.’ The bonito fishing rod is fastened to the thwart by means of a sinnet ring (*futia*). The lower end rests in a stand, to which it is tied by means of a rope (*umele*). Both ropes must be of equal strength lest one of them tear when a bonito bites. [Meaning:] When two men are in a partnership, they must be of one mind.” E. Schultz, *Proverbial Expressions of the Samoans* at 150-51.

the heart of the relationship between American Samoa and the United States.

It is no exaggeration to state that more than a century's worth of history rests on the validity of the Deeds of Cession. Since 1900, other territories of the United States have secured independence, *see, e.g.*, Philippine Independence Act, Pub. L. 73-127, 48 Stat. 456 (Mar. 24, 1934), established frameworks for self-governance, *see, e.g.*, Puerto Rico Federal Relations Act of 1950, Pub. L. 81-600, 64 Stat. 319 (July 3, 1950), or entered into free association with the United States, *see, e.g.*, Palau Compact of Free Association Act, Pub. L. 99-658, 100 Stat. 3672 (Nov. 14, 1986). American Samoa, on the other hand, has remained an unincorporated, unorganized territory of the United States. App. 12. The decision to maintain this status is based, in large part, on the success of the framework established by the Deeds of Cession.

American Samoa has consistently relied upon the Deeds of Cession as the predicate for its longstanding relationship with the United States. The United Nations has identified American Samoa as a "Non-Self-Governing Territory" since its first session in 1946. *See* General Assembly resolution 66(I), *Transmission of Information under Article 73e of the Charter* (Dec. 14, 1946). While the UN General Assembly promulgates a resolution every year concerning the "Question of American Samoa," *see, e.g.*, General Assembly resolution 74/98, *Question of American Samoa*, A/RES/74/98 (Dec. 13, 2019), American Samoa has replied that "[b]eing a part of the United States was really a matter of self-determination," United Nations, General Assembly, Special Comm. on the Situation with regard to Implementation of the Decl. on the

Granting of Independence to Colonial Countries and Peoples: American Samoa, A/AC.109/2020/1 ¶ 12 (Mar. 13, 2020) (“U.N. Working Paper”). In response to questions about decolonization, then-Governor Lolo Matasila Moliga informed the UN that “American Samoa had freely, through its deeds of cession, bequeathed its sovereignty to the United States; it had not been acquired through any military conquest.” *Id.* Simply put, American Samoa has proudly been a part of the United States, and the United States had largely kept its promises to American Samoa.

Indeed, the validity of the Deeds of Cession had never previously been disputed. Respondents suggested to the Ninth Circuit that the Deeds of Cession might not bind the United States because “[t]he cession is signed only by the matai and not by any representative of the United States.” Br. of Fed. Appellants at 5-6 (Feb. 21, 2019). But President Roosevelt ratified the Deeds upon receiving them, sending a letter and a timepiece to each signatory of the Deeds. *See* U.S. Dep’t of State, *Papers Related to the Foreign Relations of the United States*, 1929, Vol. I, Doc. 854 (1943) (“1929 Papers”), available at <https://history.state.gov/historicaldocuments/frus1929v01/ch27>; *see also id.* Doc. 856 (1943), available at <https://history.state.gov/historicaldocuments/frus1929v01/d856>. By letters dated July 21, 1902 and July 14, 1904, Roosevelt affirmed that “[t]he people of said islands ceded unto the Government of the United States of America . . . all the islands . . . the waters and property adjacent thereto.” *See* 1929 Papers, Doc. 856 (1943). Indeed, Roosevelt expressly promised that “[t]he local rights and privileges mentioned in said declaration will be respected.” *See id.*

The United States Congress, for its part, ratified the Deeds of Cession on February 29, 1929. *See* Pub. Res. 89, Ch. 281, 45 Stat. 1253 (codified at 48 U.S.C. § 1661(a)). It took more than 20 years for Congress to address the Deeds of Cession, but it retroactively “accepted, ratified, and confirmed, as of April 10, 1900, and July 16, 1904” both Deeds of Cession by joint resolution. *Id.* Accordingly, the Deeds of Cession have held the force of federal law, no less than any treaty or statute, for nearly 100 years. *Cf.* Statement of Robert B. Shanks, Deputy Asst. Atty. Gen., Office of Legal Counsel, before the Comm. on Energy and Nat. Resources Subcomm. on Energy Conservation and Supply, United States Senate, Concerning the Revised Const. of American Samoa (May 8, 1984) at 3 (“It has been the constant policy of the United States, partly as a matter of honor, partly as a result of treaty obligations, not to impose our way of life on Samoa.”). As such, it seemed beyond reasonable dispute that the Deeds of Cession constitute “applicable law” for federal regulatory purposes. *See* 16 U.S.C. § 1854(c)(7).

The district court recognized that the Deeds of Cession established binding and enforceable obligations under federal law. In its detailed opinion, the district court found that “the Deeds of Cession require the United States to preserve American Samoan cultural fishing practices and that the deeds constitute ‘any other applicable law’ for purposes of the MSA.” App. 51. As a result, Respondents could not adopt the 2016 LVPA Rule “without a determination that the proposed rule was consistent with, inter alia, the Deeds of Cession.” *Id.* Based on the regulatory record and Respondents’ own positions in litigation, the district

court determined it “is clear that NMFS did not consider whether the proposed rule that eventually became the 2016 LVPA Rule was consistent with the Deeds of Cession.” *Id.* Having failed entirely to consider an important consideration under applicable federal law, the NMFS could not lawfully enact the 2016 LVPA Rule. *See* App. 51–52.

The Ninth Circuit, by contrast, did not contend with the Deeds of Cession at all. It reversed the district court in an unpublished decision with a single paragraph of analysis. App. 1. The Ninth Circuit did not address the objections raised by officials of American Samoa concerning the legal effect of the Deeds of Cession, the potential impact of the revised regulation on Samoan culture, or the NMFS’s abandonment of a standard that accounted for these legal and cultural considerations. Instead, the court opined that “NMFS considered the input offered by ASG regarding the rule’s impact on fishing communities, the probable effects of increased large vessel longline fishing, and the availability of fish.” App. 3. According to the Ninth Circuit, it was “of little import that NMFS did not specifically cite the cessions when detailing the ‘other applicable laws’ it consulted” because the agency had determined the impact on the number of local fishing boats was insignificant. App. 3–4. The court sanctioned the NMFS’s decision to ignore the Deeds of Cession, or any effect Samoan culture, as independent factors for consideration.

Beyond being merely incorrect, the Ninth Circuit’s decision was also out of line with this Court’s recognition that the United States is obligated to keep its promises to its indigenous inhabitants. While there might once have been ambiguity about whether

changed circumstances or the passage of time could relieve the United States of its obligations, that question has been definitively resolved in favor of keeping promises. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020). It may be argued in another case that Congress has the power to disavow its responsibilities under the Deeds of Cession, but that power, as “this Court has cautioned, belongs to Congress alone.” *Id.* at 2462. The NMFS, an agency of the federal government, was bound in this case to act in accordance with all applicable law, including the Deeds of Cession.

II. The Ninth Circuit Was Wrong To Reverse The Decision Invalidating The 2016 LVPA Rule.

The Ninth Circuit’s decision is wrong as a matter of statutory interpretation, wrong as a matter of administrative law, and wrong as a matter of process.

The Ninth Circuit erred in allowing the NMFS to ignore the Deeds of Cession. Respondents argued alternatively to the Ninth Circuit that “the cessions . . . are not ‘other applicable law’ that NMFS was required to consider under the Magnuson Act,” Reply Br. of Fed. Appellants at 19, and that the NMFS “satisf[ied] any obligation that the cessions might impose,” *id.* at 1. These arguments are not only inconsistent; they are both incorrect.

As explained above, the NMFS should have recognized that the Deeds of Cession are part of federal law. Respondents argued to the Ninth Circuit that the Deeds of Cession do not extend to fishing rights, or could not extend to fisheries on the high seas. But these arguments should have been addressed during the administrative process, not in defense of the 2016

LVPA Rule on appeal. Instead, when American Samoan officials and leaders raised objections based on the Deeds of Cession, the NMFS simply ignored them. The agency's failure during the rulemaking "to consider an important aspect of the problem" warranted invalidation of the 2016 LVPA Rule. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The district court applied this bedrock principle of administrative law in its decision vacating the 2016 LVPA Rule.

Against this backdrop, the Ninth Circuit took a different approach. The court misconstrued the objections of Samoan officials and leaders—objections that plainly referred to violations of the Deeds of Cession, *see* App. 26—and ruled it was enough for the NMFS to consider the impact of the proposed rule on fishing communities more generally, *see* App. 3–4. The result was a decision that did not fairly address the district court's detailed reasons for invalidating the 2016 LVPA Rule. Although the Ninth Circuit's unpublished *per curiam* decision tends to obscure the extent of the issues in this case, it is clear enough from the record that the NMFS overlooked an important problem in its rulemaking process. The brusque reasoning of the Ninth Circuit here should not counsel against review.

In the end, this 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 record in this case, including the well-reasoned opinion of the district court, demonstrates that the NMFS brushed aside its responsibility to consider the promises made by the United States in

accepting sovereignty over American Samoa. The Territory of American Samoa respectfully submits that the Court should grant review and address this error.

CONCLUSION

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

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