ARTICLES

FISHERIES MANAGEMENT IN AMERICAN SAMOA AND THE EXPANDING APPLICATION OF *PARENS PATRIAE* STANDING TO CHALLENGE FEDERAL ADMINISTRATIVE ACTION

KAMAILE A.N. TURČAN*

INTRODUCTION

In *Territory of American Samoa v. National Marine Fisheries Service*,[1] the Territory of American Samoa ("Territory") sued the United States federal agency charged with managing the nation's fisheries resources. The Territory alleged that the agency failed in its obligation to consider the traditional cultural fishing practices of *alia* fishermen in the course of implementing a new fisheries management regulation in the pelagic waters beyond American Samoa's shores.[2] To establish that the federal court had jurisdiction to hear its claim, American Samoa relied on a novel application of the *parens patriae* standing doctrine: The Territory asserted it had *parens patriae* standing to protect the cultural fishing practices of its *alia* fishermen and the societal traditions that arose around these practices over millennia.

The Territory's quasi-sovereign interest in cultural fishing practices reflects the continuing expansion of *parens patriae* standing theory. States, Territories, and Native American Tribes have aggressively asserted *parens patriae* standing in recent years to litigate issues concerning, for example, discrimination, cultural rights, and federal executive policies.[3] The high-profile lawsuits filed by various states in support of and against federal immigration policies under both the Obama and Trump Administrations, and in particular the litigation over the Trump Administration's so-called Travel Ban, are stark examples. [4] The contentious litigation underscores a core aspect to a sovereign's *parens patriae* status—its authority to represent a segment of its population in accordance with its prerogative to decide which interests it will litigate to support.

Parens patriae standing permits a state to sue to protect an asserted "quasi-sovereign interest" [5] in the health and wellbeing of its population. A state invokes this doctrine to demonstrate the requisite standing under Article III of

* Kamaile A.N. Turčan is a former Attorney-Advisor for the Office of General Counsel, National Oceanic & Atmospheric Administration, Pacific Islands Section. She has served as a law clerk to Associate Justice Sonia Sotomayor of the Supreme Court of the United States, Judge Richard R. Clifton of the United States Court of Appeals for the Ninth Circuit, and Judge David E. Ezra of the United States District Court for the District of Hawai'i. She is currently an Associate at Jones Day. The views expressed herein are those of the author and do not reflect the views of NOAA or Jones Day.

1. *See* No. 16-00095, 2017 WL 1073348 (D. Haw. Mar. 20, 2017).
2. *See id.* at *1–2.
3. *See infra* Section I.B.
4. *See id.*
5. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

the U.S. Constitution to bring suit in federal court, even though the state suffers no direct injury to its own sovereign or proprietary interest.[6]

States or territories historically used *parens patriae* suits most often to protect their residents against injury caused by another state or by a private entity. The quintessential example of this type of suit, and the case that set forth the modern application of the *parens patriae* doctrine, is the 1982 case *Alfred L. Snapp & Son, Inc. v. Puerto Rico*,[7] in which the Commonwealth of Puerto Rico successfully asserted *parens patriae* standing to sue the Virginia apple-growing industry over discriminatory employment practices that resulted in harm to Puerto Rican citizens and the Puerto Rican economy.[8]

But since the U.S. Supreme Court ruled in its 2007 opinion *Massachusetts v. EPA*[9] that Massachusetts had standing to sue the federal environmental agency charged with regulating air pollutants, states have increasingly asserted *parens patriae* standing to sue the United States and its agencies in order to challenge perceived harm by federal administrative action.

This Article evaluates one such dispute. The impetus for American Samoa's lawsuit against the National Marine Fisheries Service ("NMFS") was the American Samoa Large Vessel Prohibited Area ("LVPA").[10] In 2002, NMFS issued a final rule implementing the LVPA to prohibit large vessels from fishing certain waters surrounding American Samoa.[11] The purpose of the LVPA was, in part, to address concerns that large commercial fishing vessels operating in the waters off American Samoa would reduce opportunities for American Samoa residents who operate smaller, traditional *alia* fishing vessels to participate in the fishery for cultural and subsistence purposes.[12] However, in 2016, NMFS issued another final rule amending federal regulations to allow certain large vessels back in to fish certain areas that had been closed.[13]

American Samoa sued NMFS in the U.S. District Court for the District of Hawai'i, seeking to set aside the 2016 final rule and keep large vessels out of the LVPA.[14] In defense of its rule, NMFS argued that not only did its rulemaking comply with all applicable fisheries management laws, but the Territory lacked standing to bring its claim.[15]

The district court resolved the threshold standing question in favor of the Territory—the court ruled that the Territory successfully demonstrated *parens patriae* standing to challenge NMFS' final agency action.[16] It held that the Territory "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."[17]

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6. *See id.* at 601–03.

7. *See id.* at 609–10.

8. *See id.* at 597–98.

9. *See* 549 U.S. 497 (2007).

10. *See* 67 Fed. Reg. 4369, 4371 (Jan. 30, 2002).

11. *See id.*

12. *See id.* at 4369; *see also* Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *4–5 (D. Haw. Mar. 20, 2017); 66 Fed. Reg. 39,475, 39,476 (July 31, 2001) (proposed rule).

13. *See* 81 Fed. Reg. 5619 (Feb. 3, 2016) (to be codified at 50 C.F.R. pt. 665).

14. *See generally* Complaint, Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

15. *See* Defendants' Combined Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

16. *See Territory of Am. Samoa*, 2017 WL 1073348, at *12.

17. *Id.*

The district court also ruled largely in favor of the Territory on the merits, and the case is currently on appeal before the United States Court of Appeals for the Ninth Circuit.[18]

American Samoa's assertion of a quasi-sovereign interest in the cultural fishing practices of its residents is a novel take on the *parens patriae* doctrine, and the District of Hawai'i's opinion recognizing that interest is one of the few cases to have ever even addressed the general question of cultural practices as quasi-sovereign interest. There is very little by way of jurisprudence from the federal bench concerning how courts may situate cultural practices within the *parens patriae* framework.

Part I of this Article provides an overview of the *parens patriae* doctrine as it has evolved over time and presents the analytical framework through which American Samoa's assertion of standing will be evaluated. Part II describes the traditional cultural fishing practices in American Samoa that the Territory seeks to protect through this litigation. Part III places these cultural fishing practices within the context of today's fishing industry. It outlines the domestic and international regulatory regimes that simultaneously manage the fishing industry across the Western and Central Pacific Ocean and limit American Samoa's role in that management. Part IV details NMFS' decision to allow large vessels back into portions of the LVPA and the Territory's resulting lawsuit. Part V evaluates American Samoa's assertion of *parens patriae* standing to preserve traditional cultural fishing practices.

This Article concludes that American Samoa's assertion of *parens patriae* standing fits within the analytical framework established by the Supreme Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*[19] and *Massachusetts v. EPA*[20] because the Territory seeks to secure, through this litigation, its role as a participant in the federal fisheries management scheme and thereby protect the wellbeing of its population that relies upon these cultural fishing practices.

I. *PARENS PATRIAE* STANDING

The Territory's standing theory presents a new application of the *parens patriae* doctrine. But it is nevertheless derived from established *parens patriae* principles, set forth below.

A. *The Modern* Parens Patriae *Standing Doctrine*

What is *parens patriae* standing? Translated literally, "*parens patriae*" means "parent of the country,"[21] and a state may invoke its status as *parens patriae* to assert standing to sue in federal court. This is significant because a plaintiff wishing to sue in federal court must first meet the case-or-controversy requirements of Article III of the U.S. Constitution.[22] Critical to this case-or-controversy requirement is that the plaintiff have "standing" to invoke the authority of a federal court—that the plaintiff has suffered an injury in fact that is traceable to the defendant's conduct and that is likely to be redressed by a favorable court decision.[23]

18. As of the writing of this article, opening and answering briefs are due to be filed in early 2019. *See id., appeal filed*, No. 17-17081 (9th Cir. Oct. 16, 2017).

19. *See* 458 U.S. 592 (1982).

20. *See* 549 U.S. 497 (2007).

21. *Snapp*, 458 U.S. at 600.

22. *See, e.g.*, DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006).

23. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).

Under the theory of *parens patriae* standing, a state (or, here, a territory)[24] may in some circumstances bring a lawsuit to protect the interests of its inhabitants, even though it alleges no direct injury to its own sovereign interests.[25] The *parens patriae* action has its roots in the English royal prerogative to care for persons unable to care for themselves, such as minors and the legally incompetent.[26] It has since developed in the American legal system to encompass injuries to a State's "quasi-sovereign" interests.[27]

The Supreme Court set forth the modern iteration of *parens patriae* standing in its 1982 opinion *Alfred L. Snapp & Son, Inc. v. Puerto Rico.*[28] In *Snapp*, the Court evaluated whether the Commonwealth of Puerto Rico had *parens patriae* standing to sue individuals and corporations in the Virginia apple-growing industry who violated federal employment laws by discriminating against Puerto Rican citizens seeking work as farm laborers.[29] The Court determined that Puerto Rico had an interest both in protecting its citizenry from the harmful effects of discrimination[30] and in achieving for its citizens the full benefits of federal employment law.[31] The Court ruled that Puerto Rico did have *parens patriae* standing[32] under an analytical framework still applied by courts today.

First, in order to maintain a *parens patriae* action, a state must express a quasi-sovereign interest at stake in the litigation.[33] These quasi-sovereign interests are amorphous, lacking in precise definition. They generally include a state's interest in protecting the public interest, such as "the health and well-being—both physical and economic—of its residents in general," as well as the state's interest in "not being discriminatorily denied its rightful status within the federal system."[34]

Second, the articulated interest must also affect "a sufficiently substantial segment of its population." [35] Thus, in *parens patriae* actions the government must assert an interest on behalf of its residents that is distinct from any particular individual's allegation of direct injury. [36]

Then, in 2007, the Court seemingly settled in *Massachusetts v. EPA*[37] whether states have standing to sue the federal government in order to assert their rights under federal law—they do.[38] In *Massachusetts*, the Court ruled that the State of Massachusetts had standing to petition for review of an order of the United States Environmental Protection Agency ("EPA") declining to regulate

24. This article uses the term "state" to include a territory, for ease of reference. Much of the court doctrine on the topic of *parens patriae* standing is phrased in terms of a state's quasi-sovereign interest, even those cases that pertain to a territory, such as *Snapp*.

25. *See Snapp*, 458 U.S. at 600–01; Missouri v. Illinois, 180 U.S. 208, 241 (1901).

26. *See, e.g., Snapp*, 458 US. at 600–01; Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 257-60 (1972). *See generally* Gary Igal Strausberg, *The Standing of a State as* Parens Patriae *to Sue the Federal Government*, 35 FED. BAR J. 1 (1976) (presenting the pre-*Snapp* jurisprudential history of *parens patriae* standing); Margaret S. Thomas, Parens Patriae *and the States' Historic Police Power*, 69 SMU L. REV. 759, 769–800 (2016) (discussing the history of *parens patriae* actions).

27. *Snapp*, 458 US. at 600–01.

28. *See id.* at 608–10.

29. *See id.* at 597–98.

30. *See id.* at 607.

31. *See id.* at 609–10.

32. *See id.* at 608–10.

33. *See id.* at 607.

34. *Id.*

35. *Id.*; *see also* Miccosukee Tribe of Indians of Fla. v. United States, 680 F. Supp. 2d 1308 (S.D. Fla. 2010) (describing criteria for *parens patriae* standing).

36. *See* Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *11 (D. Haw. Mar. 20, 2017).

37. *See* 549 U.S. 497 (2007).

38. *See id.* at 520, 520 n.17 (concluding Massachusetts had standing to sue the federal EPA over its refusal to regulate greenhouse gas emissions).

greenhouse gas emissions from motor vehicles under the Clean Air Act.[39] Thus, the lawsuit brought by twelve states, several local governments, a group of private organizations, and the Territory of America Samoa[40] was allowed to go forward, and the Court ruled on the merits that the EPA had offered no reasoned explanation for its failure to act.[41]

In so ruling, the Court "recognized that States are not normal litigants for the purposes of invoking federal jurisdiction,"[42] because "[w]hen a State enters the Union, it surrenders certain sovereign prerogatives"[43] that become lodged in the federal government. The critical distinction, as the Court explained, is whether a state seeks to protect its citizens from federal law—which it cannot do—or whether a state seeks to assert its own rights under federal law or to enforce existing federal law, which it can.[44]

Thus, under *Snapp* and *Massachusetts*, a state may assert *parens patriae* standing in order to sue a federal agency, but the contours of both the quasi-sovereign interests a state may assert and the substantial segment of the population affected by that interest remain undefined.

B. *The Quasi-Sovereign Interest*

What is a quasi-sovereign interest? It is perhaps simpler to describe what a quasi-sovereign interest is not: a quasi-sovereign interest is neither a sovereign interest (such as a state's power to enforce state law), nor a proprietary interest (such as a state's right to protect state-owned land or other property), nor a private interest pursued by the state as a nominal party (such as when a state acts as a virtual trustee for the benefit of individual creditors).[45] Broadly speak-

39. *See id.* at 521.

40. *See id.* at 505 nn.2–4.

41. *See id.* at 534.

42. *Id.* at 518.

43. *Id.* at 519.

44. *See id.* at 520 n.17 (referencing Massachusetts v. Mellon, 262 U.S. 447 (1923) (Massachusetts lacked standing to enjoin a Congressional act authorizing appropriations on a voluntary basis)); *see also* Ryke Longest, *Massachusetts versus EPA:* Parens Patriae *Vindicated*, 18 DUKE ENVTL. L. & POL'Y FORUM 277, 277–88 (2008) (describing administrative action leading up to litigation and the Court's treatment of Massachusetts' standing argument); Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?:* Massachusetts v. EPA*'s New Standing Test for States*, 49 WM. & MARY L. REV. 1701 (2008) (considering whether a relaxed standing test is applicable to states); Robert A. Weinstock, *The Lorax State:* Parens Patriae *and the Provision of Public Goods*, 109 COLUM. L. REV. 798, 799 (2009) (discussing praise and criticism for the majority's standing analysis).

Lower courts have grappled with the Supreme Court's ruling, and much has been written on this topic already. The majority of courts appear to accept that *Massachusetts v. EPA* means, at a minimum, that a state may sue the federal government when that state is attempting to enforce, not block or change, existing federal law. *See, e.g.*, Michigan v. EPA, 581 F.3d 524, 529 (7th Cir. 2009) (distinguishing *Massachusetts v. EPA*); Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009) (ruling states had *parens patriae* standing under *Massachusetts v. EPA* to sue electric power corporations), *rev'd on other grounds*, 564 U.S. 410 (2011) (affirming, by an equally divided Court, the Second Circuit's exercise of jurisdiction); Challenge v. Moniz, 218 F. Supp. 3d 1171, 1182 (E.D. Wash. 2016) (ruling State of Washington had standing to sue the U.S. Department of Energy with respect to treatment of hazardous waste because "the State ha[d] adequately asserted at least one quasi-sovereign interest—protection of the health and well-being of Washington residents."); Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (state seeking to enforce, rather than prevent the enforcement of, federal immigration law). The Territory is no stranger to this standard—American Samoa was one of the parties to the *Massachusetts v. EPA* litigation. *See* 549 U.S. at 505 n.3. Now the Territory argues that it falls within the permissible scope of actions against the federal government because it "seek[s] to stop certain federal agencies from violating [federal] statutes" and to litigate its "quasi-sovereign interest in protecting the cultural [fishing] practices . . . ." Plaintiff's Memorandum in Opposition to Defendants' Motion for Reconsideration at 7–9, Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

45. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600–01 (1982); Oklahoma *ex rel.* Johnson v. Cook, 304 U.S. 387 (1938).

ing, quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace . . . . sufficiently concrete to create an actual controversy between the State and the defendant."[46]

The Supreme Court has consciously avoided articulating an exhaustive list of quasi-sovereign interests for which a state may have standing to sue, opting instead for case-by-case development. [47] One result of this *ad hoc* process is that states have gradually over time expanded the list of interests they claim in their *parens patriae* capacity.

1. Expansion of the Quasi-Sovereign Interest

Some of the first examples of *parens patriae* litigation in the United States developed in the context of natural resource disputes.[48] Indeed, the Supreme Court's original jurisdiction cases adjudicating environmental transboundary nuisance disputes have been described as "the paradigm for the modern *parens patriae* action."[49] In one early application of the theory to natural resources litigation, the Supreme Court described the state sovereign as having "an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[50] On this principle the Court entertained actions brought by states as *parens patriae* beginning in the early 1900s concerning, for example, air pollution,[51] discharge of sewage into waterways,[52] flooding,[53] diversion of water,[54] and then, later, greenhouse gas emissions.[55] In these cases, the Court treated natural resources as a trust corpus in which the state has a quasi-sovereign interest.[56]

States next sought to litigate economic harms as *parens patriae.* Even before the Supreme Court ruled Puerto Rico had standing to sue defendant apple farmers,[57] for example, the Court held in 1923 that Pennsylvania had standing to enjoin West Virginia from curtailing the supply of natural gas to Pennsylvania residents[58] and in 1945 that Georgia had standing to sue on behalf of its residents against railroads involved in a freight-rate fixing conspiracy.[59] Throughout the 1990s, states relied on *parens patriae* standing in their suits

46. *Snapp,* 458 U.S. at 602 (alteration in original); *see Massachusetts,* 549 U.S. at 520 n.17.

47. *See Snapp,* 458 U.S. at 607.

48. *See* Thomas W. Merrill, *Global Warming as a Public Nuisance,* 30 COLUM. J. ENVTL. L. 293, 305 (2005).

49. *Id.*

50. Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

51. *See id.*

52. *See* Missouri v. Illinois, 180 U.S. 208, 210–11 (1901).

53. *See* North Dakota v. Minnesota, 263 U.S. 365, 372 (1923).

54. *See* Connecticut v. Massachusetts, 282 U.S. 660, 663 (1931); Kansas v. Colorado, 185 U.S. 125, 133–34 (1902); *see also* South Carolina v. North Carolina, 558 U.S. 256, 274 (2010) (apportionment).

55. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

56. At least one lower court has expressly acknowledged a State's standing to sue over loss of fish life or fish habitat, as it constitutes part of the natural resource trust corpus. When granting Maine standing to sue vessel owners for damage to water and marine life, including a fish kill, caused by a large oil spill, the District of Maine explained: "[A] State has sovereign interests in its coastal waters and marine life, as well as in its other natural resources, which interests are separate and distinct from the interests of its individual citizens." Maine v. M/V Tamano, 357 F. Supp. 1097, 1100 (D. Me. 1973). The resources were not litigated as the basis for cultural practices.

57. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607–10 (1982).

58. *See* Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

59. *See* Georgia v. Pa. R.R. Co., 324 U.S. 439 (1945). When the State of Georgia complained that certain railroads conspired to fix rates in such a way as to harm and disadvantage the State's economy, the Supreme Court held that Georgia, "as a representative of the public," had raised an interest independent from those of any particular individual sufficient to invoke the Court's original jurisdiction. *Id.* at 451.

against tobacco corporations to recover costs for tobacco-related injuries.[60] More recently, states along the Gulf of Mexico asserted *parens patriae* standing to sue British Petroleum for environmental and economic damages after the 2010 Deepwater Horizon oil rig explosion.[61] And in 2018, the District of Columbia and the State of Maryland asserted *parens patriae* standing to sue President Trump in his personal and official capacity over the Trump Organization's ownership of Trump International Hotel, alleging economic injury resulting to local businesses in violation of the Emoluments Clause.[62]

At times there is a palpable socio-political overtone to these cases. States asserted *parens patriae* standing to challenge, for example, a charitable college's racially discriminatory admission policies,[63] a night club's refusal to admit African American patrons,[64] and systemic police misconduct.[65] Even in *Snapp*, Puerto Rico's challenge to apple farmers' employment practices was as much about discriminatory hiring practices and immigration law as it was about economics.[66]

The recent surge in politically-charged cases challenging the federal government's immigration policies serves as a stark example of the broadening scope of *parens patriae* litigation.

When over two dozen states filed suit against the United States and various federal agencies to enjoin the Obama Administration from implementing the Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA") designed to provide legal presence to certain aliens,[67] the States asserted a quasi-sovereign interest to protect their residents' economic well-being.[68] To wit, the Administration's DAPA directive would "create a discriminatory employment environment that [would] encourage employers to hire DAPA beneficiaries instead of those with lawful permanent status in the United States."[69]

On the flip side of that coin, nearly two dozen states sought to enjoin the Trump Administration's rescission of the Deferred Action for Childhood Arrivals program ("DACA") that would allow some individuals brought to the United States as children to become eligible for a work permit and receive deferred

60. *See, e.g.*, Texas v. Am. Tobacco Co., 14 F. Supp. 2d 956, 971 (E.D. Tex. 1997), *subsequent mandamus proceeding sub nom. In re* Fraser, 75 F. Supp. 2d 572 (E.D. Tex. 1999) (allowing Texas' claim based on quasi-sovereign interests to proceed); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859 (2000) (describing the legal actions resulting in a master settlement agreement between states and tobacco corporations).

61. *See* Thomas H. Koenig & Michael L. Rustad, Parens Patriae *Litigation to Redress Societal Damages from the BP Oil Spill: The Latest Stage in the Evolution of Crimtorts*, 29 UCLA J. ENVTL. L. & POL'Y 45 (2011) (arguing that when federal agencies allow industry to essentially self-regulate, state-plaintiff suits are an important mechanism for safeguarding societal interests); Thomas H. Koenig & Michael L. Rustad, *Reconceptualizing the BP Oil Spill as* Parens Patriae *Products Liability*, 49 HOUS. L. REV. 291 (2012).

62. *See, e.g.*, District of Columbia v. Trump, 291 F. Supp. 3d 725 (D. Md. 2018).

63. *See* Pennsylvania v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966), *aff'd*, 392 F.2d 120 (3d Cir. 1968) (asserting *parens patriae* standing to sue trustees of a private charitable college for their refusal to admit African American students).

64. *See* People v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 810 (N.D.N.Y. 1996).

65. *See* New York v. Town of Wallkill, No. 01-civ-0364, 2001 U.S. Dist. LEXIS 13364 (S.D.N.Y. Mar. 16, 2001).

66. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 608–09 (1982).

67. Texas v. United States, 86 F. Supp. 3d 591, 604 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

68. *See id.* at 627.

69. *Id.*

action from deportation, also citing a quasi-sovereign interest in the health and well-being of all their residents.[70]

In June 2018, seventeen states and the District of Columbia sued the United States, President Trump, and federal immigration agencies over the Trump Administration's purported policy to refuse entry to asylum applicants and to separate families found entering along the county's southern border.[71] The States assert that their "quasi-sovereign interest in protecting the health, safety, and wellbeing of their residents . . . extends to all of their residents who will be harmed by the Policy" by virtue of detention, separation from children and other family members, and they have an "interest in ensuring that their residents are not excluded from the rights and privileges provided by the U.S. Constitution . . . includ[ing] due process and equal protection." [72]

And *parens patriae* standing was one of the many issues at play, albeit peripherally, in national litigation over the 2017 "Travel Ban"—President Trump's executive orders and presidential proclamation suspending or barring from entry into the United States nationals of certain Muslim-majority countries.[73] In one of these cases, the State of Hawai'i brought an action against President Trump and the U.S. Department of Homeland Security, among others, alleging violations of the First and Fifth Amendments to the U.S. Constitution, the Immigration and Nationality Act, the Religious Freedom Restoration Act, and the Administrative Procedure Act. The State alleged standing on the basis of injuries to both its proprietary interests as operator of public universities and in the interest of its citizens as *parens patriae*.[74]

The quasi-sovereign interests Hawai'i asserted in the Travel Ban litigation were two-fold: one, to protect its "residents from the harmful effects of discrimination" in pursuit of "the benefits of a pluralistic and inclusive society"; and two, the State's "culture and tradition of ethnic diversity and inclusion."[75] Because the District of Hawai'i ruled that the State had successfully asserted standing on the basis of its proprietary interests as a sovereign, however, the court opted to follow the lead of the Ninth Circuit just one month earlier and declined to reach *parens patriae* standing.[76] The Supreme Court ultimately upheld the Travel Ban as a lawful exercise of the discretion granted to the executive to suspend the entry of aliens into the United States without reaching the question of state standing.[77] The validity of the State's asserted quasi-sovereign interest in protecting its "culture and traditions" therefore remains unresolved.

2. Cultural Practices as Quasi-Sovereign Interest

The concept of cultural rights or cultural practices as an interest upon which to assert *parens patriae* standing is not entirely new to the courts. But, apart from the American Samoa litigation, less than a handful of cases have dealt with the issue in any meaningful way. To date, these issues have been litigated by tribal governments.

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70. *E.g.*, Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011, 1035 n.11 (N.D. Cal. 2018); *see* Complaint at 11, Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., 279 F. Supp. 3d 1011 (N.D. Cal. 2018) (No. 3:17-cv-05235); *see also* Batalla Vidal v. Duke, 295 F. Supp. 3d 127, 162 (E.D.N.Y. 2017) (denying *parens patriae* standing with respect to several counts).

71. *See* Complaint at 1, Washington v. United States, (W.D. Wash.) (No. 18-00939).

72. *Id.* at 97.

73. *E.g.*, Hawai'i v. Trump, 241 F. Supp. 3d 1119 (D. Haw. 2017); *see* Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam), *cert. granted sub nom.* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, (2017), *and vacated and remanded*, 138 S. Ct. 377 (2017).

74. *Id.* at 1129.

75. *Id.* at 1129 n.7.

76. *See id.*; Washington v. Trump, 847 F.3d 1151, 1161, 1161 n.5 (9th Cir. 2017).

77. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2416 (2018).

In *Center for Biological Diversity v. U.S. Department of Interior*,[78] an opinion issued two years after *Massachusetts v. EPA* signaled the go-ahead for states to sue the federal government to protect their rights under federal law, several non-profit organizations and the Native Village of Point Hope, Alaska (a federally-recognized tribal government) sued the U.S. Department of Interior over its approval of a program to expand leasing areas off the coast of Alaska for oil and gas development. The D.C. Circuit's opinion flagged, but did not resolve, the question of *parens patriae* standing to litigate cultural interests. The plaintiffs alleged violations of several federal statutes and a failure by the agency to adequately consider the impact of the activity on climate change.[79] As part of its argument for *parens patriae* standing, the Native Village of Point Hope explained that its members used the sea and coast "for subsistence hunting, fishing, whaling, and gathering, as well as cultural and religious activities."[80] Ultimately, the court ruled that the plaintiffs had sufficiently established injury due to the agency's failure to abide by procedural requirements, and therefore the court did not reach *parens patriae* standing. In an opinion concurring in the judgement, Judge Rogers observed that: "Determining the precise scope of the holding on standing in *Massachusetts v. EPA* and whether the Native Village of Point Hope has identified by affidavit particularized harms to its culture and way of life from climate change sufficient to establish Article III standing, for example, remain for another day."[81]

One year later, a district court did reach the question of whether a Tribe had identified harms to its culture and way of life sufficient to establish standing—and ruled that it had.[82] In *Miccosukee Tribe of Indians of Florida v. United States*, the Miccosukee Tribe sued the United States and federal agencies, alleging that the federal government's water management actions infringed on the Tribe's constitutional and statutory rights by causing flooding over lands on which the Tribe leased and engaged in traditional activities.[83] The Southern District of Florida ruled that the Tribe had adequately alleged a quasi-sovereign interest sufficient to support *parens patriae* standing to litigate its claims.[84] The court first explained that the Tribe utilized the land threatened by flooding for "cultural, religious, recreation, commercial, and subsistence activities, including hunting, fishing, frogging, commercial air-boating, and agriculture . . . includ[ing] traditional subsistence agriculture and cultivating corn on tree islands for religious purposes."[85] Relying on *Snapp*, the court ruled that there could be "little doubt that the Miccosukee Tribe's interests in preserving basic elements of its culture and way of life affects the general physical and economic

78. *See* 563 F.3d 466 (D.C. Cir. 2009).

79. *See id.* at 471–72.

80. *Id.* at 472.

81. *Id.* at 489 (Rogers, J., concurring) (citation omitted); *see also* Hae-June Ahn, Note, *Tribal Governments Should Be Entitled to Special Solicitude: The Overarching Sentiment of the* Parens Patriae *Doctrine*, 37 ECOLOGY L.Q. 625, 651 (2010) (arguing that Native American and Native Alaskan tribal governments should be afforded special solicitude in climate change litigation, because traditional economies based on subsistence activities are particularly vulnerable to environmental hazards); Elizabeth Ann Kronk, *Effective Access to Justice: Applying the* Parens Patriae *Standing Doctrine to Climate Change-Related Claims Brought by Native Nations*, 32 PUB. LAND & RESOURCES L. REV. 1 (2011) (describing the historical development of *parens patriae* standing as applied to Native Nations).

82. Miccosukee Tribe of Indians of Fla. v. United States, 680 F. Supp. 2d 1308, 1315 (S.D. Fla. 2010).

83. *See id.* at 1312.

84. The Tribe's Complaint was ultimately dismissed on the merits, and the Eleventh Circuit did not review the question of standing. *See* Miccosukee Tribe of Indians of Fla. v. United States, 716 F.3d 535 (11th Cir. 2013).

85. *Miccosukee Tribe*, 680 F. Supp. 2d at 1315 (alteration in original).

health and well-being of Tribe members."[86] "The Miccosukee Tribe's interest in its ability to preserve its culture and way of life is a paradigmatic example of an interest that goes beyond a propriety or private interest, and affects the general well-being of a sufficiently substantial segment of Tribe members." [87]

Another district court addressed a Tribe's *parens patriae* standing argument in a case concerning hair length regulations in public schools. In *Alabama & Coushatta Tribes of Texas v. Trustees of Big Sandy Independent School District*,[88] Native American students and their Tribe, the Alabama and Coushatta Tribes of Texas, filed suit against Texas school district officials over a regulation that restricted the hair length of male students. As the Eastern District of Texas explained it, although the Tribe did not require young men to wear their hair long and some adult male members kept their hair short, long hair had both religious and cultural significance to tribal members.[89] Further, the student members had established a sincerely held belief in the practice of wearing their hair long.[90] The Tribe asserted *parens patriae* standing on behalf of its members affected by the hair length restrictions.

The court ruled against the Tribe on standing, despite conceding that it was "evident that the Tribe ha[d] an interest in the preservation of its Native American heritage, culture, and religion and in encouraging its members, especially its young people, to observe and participate in its sacred ceremonies."[91] The problem, according to the court, was that the Tribe was not acting on behalf of *all* of its members: "While the application of the hair restriction may in some way affect members of the Tribe other than the Native American students at Big Sandy and their families, the Tribe is not representing the interests of all its members in this case, as the doctrine of *parens patriae* requires."[92]

In other words, cultural and religious practices associated with hair length might have been a recognizable quasi-sovereign interest, but the interests of too few tribe members were at stake.[93] In so ruling the court touched upon the two key questions also raised by American Samoa's assertion of *parens patriae* standing—whether cultural practices may constitute a quasi-sovereign interest, and how a court should quantify the "substantial segment" of the population sufficient to establish standing.

C. *The Substantial Segment of the Population*

Exactly who does the sovereign represent as *parens patriae*? Not every individual will endorse a particular position taken by the sovereign.[94] Strong public

86. *Id.*
87. *Id.*
88. *See* 817 F. Supp. 1319 (E.D. Tex. 1993).
89. *See id.* at 1326.
90. *See id.*
91. *Id.* at 1327.
92. *Id.* The court continued on to address the merits question in the context of the students' constitutional rights, and issued a preliminary injunction enjoining the defendants from enforcing the hair regulation against Native American students. *See id.* at 1338.
93. *See also* Kickapoo Tribe of Okla. v. Lujan, 728 F. Supp. 791, 795 (D.D.C. 1990) (ruling Tribe lacked standing to sue Secretary of Interior over reorganization of Indian Tribe on the basis that it would not be representing the interests of all members).
94. Indeed, the State's position might not be favored by the very group the State claims to be protecting. For example, the State of Wisconsin in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), sought to compel Amish parents to send their children to school until the age of 16—against the religious and cultural beliefs of the Amish community. *See id.* at 207–08 (Although the State asserted a *parens patriae* interest in the children's education and upbringing, this was not a *parens patriae* standing case). The State's position there was that it was "empowered, as *parens patriae*, to 'save' a child from himself or his Amish parents," *id.* at 232, and impose the "benefit" of secondary education on Amish children, *id.*at 229. Expert testimony, however, revealed that "compulsory high school attendance could not only

support for and opposition to the policies of the Obama and Trump Administrations with respect to DACA and DAPA, with the resulting cross-litigation by various states, are obvious examples. So too is the Travel Ban litigation. Safe to say, universal agreement is not the standard.

The Supreme Court formulated the inquiry in this way: A state may prove *parens patriae* standing by asserting injury to a "substantial segment" of its population. As the Court explained it in *Snapp*:

> The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.[95]

But what constitutes a "substantial segment" remains a gray area. Perhaps rightfully so. The concept of the "public health and welfare" is inherently indistinct, although it certainly includes, as described above in Section I.B., economic wellbeing, freedom from discrimination, and access to natural resources. Often it is only by evaluating the "indirect effects of the injury," such as the broad societal impact of discriminatory practices as alleged by the State of Hawai'i in the Travel Ban case, does the complaint assert an "injury to more than an identifiable group of individual residents."[96]

Even in *Snapp*, only 787 persons out of 3 million were directly impacted by the discriminatory hiring practices of Virginia apple growers.[97] Nevertheless the Supreme Court rejected as "too narrow a view" the district court's conclusion that a loss of this small number of jobs was insufficient to demonstrate an impact to Puerto Rico's economy for purposes of *parens patriae* standing.[98] The Court explained:

> Just as we have long recognized that a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination. This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.[99]

With the LVPA litigation, American Samoa asserted *parens patriae* standing to protect not only the fishing practices of its *alia* fishermen, but also the societal traditions that developed around them. These cultural fishing practices, and the context in which they arose, are described in the next section.

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result in great psychological harm to Amish children, because of the conflicts it would produce, but would also . . . ultimately result in the destruction of the Old Order Amish church community as it exists in the United States." *Id.* at 212. Ultimately, the Supreme Court held that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children to attend formal schooling, and the State's *parens patriae* interest thus could not be sustained against the Amish community's constitutional rights. *See id.* at 234–35.

95. Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607 (1982).

96. *Id.*

97. *Id.* at 597. The Supreme Court granted certiorari to determine "whether Puerto Rico could maintain a *parens patriae* action . . . despite the small number of individuals directly involved." *Id.* at 599.

98. *Id.* at 609.

99. *Id.*

II. CULTURAL FISHING PRACTICES IN AMERICAN SAMOA

American Samoa asserted standing to sue the federal government on the basis of its quasi-sovereign interest in preserving the cultural fishing practices of its *alia* fishermen and, more broadly, of Samoan society as a whole.[100] This interest arises within a unique geographic and historical setting that the Territory, as *parens patriae,* has sought to represent in its lawsuit.

Politically, American Samoa has been a territory of the United States since the early 1900s, following a period of international rivalries between Germany, the United States, and the United Kingdom over supremacy in the region throughout the middle to late 1800s.[101] The Treaty of Berlin divided the Samoan archipelago, with the eastern Samoan islands eventually becoming a territory of the United States known today as American Samoa, and the western Samoan islands falling under the jurisdiction of various countries until achieving independence in the 1960s.[102] The islands of American Samoa became a part of the United States by the 1900 and 1904 Deeds of Cession, which ceded certain lands and surrounding bodies of water to the federal government.[103] The U.S. Congress confirmed this exchange through the Ratification Act of 1929.[104]

Geographically, the territory of American Samoa is made up of several islands in the South Pacific Ocean, for a total land area of 76.1 square miles.[105] With relatively limited land area and no significant bodies of fresh water, the ocean and its natural resources has historically played a significant role in Samoan life and community well-being.

One traditional fishing vessel in American Samoa, and the subject of the litigation discussed in this Article, is the *alia.* These vessels have catamaran hulls and are typically less than forty feet in length.[106] Today, *alia* vessels are utilized for commercial, recreational, and subsistence fishing.[107] Although *alia*

100. Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *1–2 (D. Haw. Mar. 20, 2017).

101. *See* Tripartite Convention of 1899, Dec. 2, 1899, 31 Stat. 1878; 1889 Treaty of Berlin (Multilateral Neutrality and Autonomous Government in Samoa), June 14, 1889, 1889 U.S.T. LEXIS 10.

102. *See* Western Samoa Act 1961, s 2 (N.Z.).

103. *See* Deed of Cession of Tutuila and Aunu'u, U.S.-Am. Samoa, Apr. 17, 1900; Deed of Cession of Manu'a, U.S.-Am. Samoa, July 16, 1904. *See generally* Complaint at Ex. A & B, Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095); *see also* Tuaua v. United States, 788 F.3d 300, 302 (D.C. Cir. 2015) (discussing cession).

104. *See* 48 U.S.C. §§ 1661–1662. For the legislative history see S.J. Res. 110, 70th Cong., 45 Stat. 1253. President Truman subsequently directed that the U.S. Secretary of the Interior oversee administration of the civil government of American Samoa. *See* 16 Fed. Reg. 6417 (July 3, 1951) (transferring administrative authority from the Secretary of the Navy to the Secretary of the Interior with Executive Order 10264).

105. *See American Samoa,* U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/oia/islands/american-samoa (last visited July 3, 2018). The main island groups include Tutuila, Aunu'u, the Manu'a Islands, Swains Island, and Rose Atoll. American Samoa is, by comparison, slightly larger than Washington, D.C., which has a total land area of 61.4 square miles. *See* OFF. OF THE CHIEF FIN. OFFICER, 2016 CITIZEN'S FINANCIAL REPORT 2 (2017), https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/FY2016_DCOCFO_PAFR.pdf. It is significantly smaller than New York City, which has a total land area of over 300 square miles. *See Table 2: Population, Land Area, and Population Density by County, New York State—2006,* DEP'T OF HEALTH, https://www.health.ny.gov/statistics/vital_statistics/2006/table02.htm (last visited Aug. 13, 2018).

106. W. PAC. REG'L FISHERY MGMT. COUNCIL, AMENDMENT 3 TO THE FISHERY ECOSYSTEM PLAN FOR PELAGIC FISHERIES OF THE WESTERN PACIFIC REGION 25 (2011) [hereinafter AMENDMENT 3], https://www.regulations.gov/document?DN°AA-NMFS-2010-0013-0002.

107. *See* AMENDMENT 3, *supra* note 106, at 25–30; *see also* W. PAC. REG'L FISHERY MGMT. COUNCIL, AMENDMENT 7 TO THE FISHERY ECOSYSTEM PLAN FOR PELAGIC FISHERIES OF THE WESTERN PACIFIC REGION 74–77 (2014) [hereinafter AMENDMENT 7, http://www.fpir.noaa.gov/SFD/pdfs/feps/Pelagics_Amendment_7.pdf (describing the pelagic fisheries of American Samoa).

fishermen primarily engage in bottomfish and troll fishing, they also conduct small-scale longline tuna fishing.[108]

Cultural fishing practices are integral to American Samoan society.[109] For the residents of this small-island community, fishing provides more than a critical protein source—it is intricately tied to a cultural heritage that developed over a period of three thousand years since Samoans first settled the islands.[110]

Island customs both "strongly influence[d] and depend[ed] upon the culture of fishing."[111] Traditional values and social norms involving the customary exchange of fish developed around this resource as both food and as recognition of a shared cultural and social heritage—why and when people fish, how that fish is distributed, the use of fish in ceremony, and the meaning of fish within the society.[112]

Customary exchange of fish in Samoan culture differs from a commercial market system, the latter having a profit motive.[113] The motives behind customary exchange "relate to the fishermen's role and reputation in their community and their social networks."[114] Providing fish to family members, neighbors, or community leaders enlarges social networks and may enhance the fisherman's stature in the community. There may be nothing tangible received in return, or, sometimes, the fisherman may receive a gift in return in the form of other products, labor, or social support.[115] These generalized reciprocities are embedded in the social relations that keep the island society functioning.[116] Historically, landing fish to contribute to customary exchange and cultural practices was considered so important that the concept of catch-and-release or recreational fishing was "virtually unknown," as releasing fish was "considered a failure to meet [cultural] obligations."[117]

These practices reaffirm and perpetuate *fa'a Samoa*, meaning "the Samoan way of life," [118] a term reflecting the Samoan cultural heritage and social cohesion developed over millennia of relatively isolated development on a small island surrounded by a wealth of ocean-based natural resources.[119] The fundamental unit of the society is the *'aiga* (family or extended family), headed by the *matai*, or chief.[120] Because families and, more broadly, villages are recognized as the key element of society, rather than individuals, land and natural

108. *See generally* AMENDMENT 3, *supra* note 106, at 30–34, tbl.4; J. JOHN KANEKO & PAUL K. BARTRAM, PACMAR, INC., OPERATIONAL PROFILE OF A HIGHLINER IN THE AMERICAN SAMOA SMALL-SCALE (*alia*) Longline Albacore Fishery 1, 7 (2005) [hereinafter KANEKO & BARTRAM], http://www.soest.hawaii.edu/PFRP/soest_jimar_rpts/kaneko_bartram_alia_fishery.pdf.

Most participants in the small-scale longline tuna fishery are indigenous American Samoans. *See* AMENDMENT 3, *supra* note 106, at 25.

109. *See* Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *12 (D. Haw. Mar. 20, 2017).

110. *See id.*; AMENDMENT 3, *supra* note 106, at 16, 23.

111. *Territory of Am. Samoa*, 2017 WL 1073348, at *12.

112. *See id.*

113. *See* Craig Severance, *Customary Exchange Maintains Cultural Continuity*, PAC. ISLANDS FISHERY NEWS, Summer 2010, at 1, https://www.wpcouncil.org/outreach/newsletters/PIFN_summer2010.pdf.

114. *Id.*

115. *See id.*

116. *See id.*

117. AMENDMENT 3, *supra* note 106, at 29. Since approximately 2003, recreational fishing has become more prevalent in the islands, through the Pago Pago Game Fishing Association. *See id.*

118. Plaintiff's Combined Opposition and Reply to Defendants' Combined Cross-Motion for Summary Judgment at 1, Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

119. Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *12 (D. Haw. Mar. 20, 2017).

120. ADAM STEIN, U.S. DEP'T OF THE INTERIOR, AMERICAN SAMOA BUSINESS OPPORTUNITIES REPORT 5 (Rick Turner ed., 2007), http://www.americansamoarenewal.org/sites/default/files/resource_documents/AmericanSamoa.pdf. Chiefs deliberate and select chiefs to serve in the Senate,

resources are shared communally within each village even today.[121] Community fishing events are common, and traditionally the village *fono* (legislative body) decides, according to season, the type of fishing and when the fishing will take place.[122] The society traditionally valued reciprocity and generous distribution of resources over individual accumulation—organized fishing efforts, with subsequent distribution of the catch, was and remains key.[123]

Pelagic fish species, especially tuna, have a particular significance in customary exchange between family and community members. Not only is customary exchange important for meeting the nutritional needs of each family, but it is critical to supporting community leaders, with fishermen expected to contribute fish for ceremonial purposes.[124] Some of these traditions take place on a near-daily basis, such as the practice of providing the largest fish caught on a boat trip to the chief,[125] or providing fish for free or at a reduced price to village ministers.[126] Other traditions occur less frequently and mark important occasions—skipjack tuna, for example, are caught and distributed in ceremonies marking the one-year anniversary of a death and funeral.[127] Despite the introduction of modern fishing techniques and increasing commercialization, the traditional subsistence lifestyle and cultural practices continue to be intricately connected to island life.[128]

The government of American Samoa has vigorously litigated against efforts that, in its view, threaten *fa'a Samoa.* So, for instance, in *Tuaua v. United States,*[129] when the D.C. Circuit took up the question whether the Fourteenth Amendment's Citizenship Clause applied in the Territory such that United States birthright citizenship would be automatically granted to persons born in American Samoa, the Territory joined the United States in arguing that it did *not* apply.[130] The D.C. Circuit agreed, and declined to "impose citizenship by judicial fiat" against the "democratic prerogatives of the American Samoan people."[131] In opposing *certiorari* to the U.S. Supreme Court, the Territory argued that judicial imposition of citizenship outside of the political process would "threaten[ ] a fundamental change," and defeat the "rights of self-determination" held by the people of American Samoa.[132] Among other considerations, the Territory noted that a blanket imposition of U.S. laws would threaten American Samoa's unique political structure, system of land ownership and alienation, and religious customs.[133]

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which, together with the popularly elected House of Representatives, makes up the *Fono,* or legislative body. *See id.*

121. *See* ARIELLE LEVINE & STEWART ALLEN, NAT'L OCEANIC & ATMOSPHERIC ADMIN., NOAA TECHNICAL MEMORANDUM NMFS-PIFSC-19, AMERICAN SAMOA AS A FISHING COMMUNITY 7–8 (2009), https://www.pifsc.noaa.gov/library/pubs/tech/NOAA_Tech_Memo_PIFSC_19.pdf.

122. *See id.* at iii.

123. *See id.* at 8.

124. *See Territory of Am. Samoa,* 2017 WL 1073348, at *12.

125. *See* Severance, *supra* note 113, at 2.

126. W. PAC. REG'L FISHERY MGMT. COUNCIL, FINAL CORAL REEF ECOSYSTEM FISHERY MANAGEMENT PLAN 93 (2000), http://www.wpcouncil.org/wp-content/uploads/2013/03/COMPLETE-CRE-FMP-CD.pdf.

127. *See* Severance, *supra* note 113, at 2.

128. *Territory of Am. Samoa,* 2017 WL 1073348, at *12. Pelagic fishing as a source of income and employment is increasing, as is recreational fishing and associated tourism-linked economic benefits, but subsistence fishing continues. *See* AMENDMENT 3, *supra* note 106, at 23, 30.

129. 788 F.3d 300 (D.C. Cir. 2015).

130. *See id.* at 301.

131. *Id.* at 302.

132. Brief for Respondent American Samoa in Opposition to Petition for Writ of Certiorari, at 1–2, Tuaua v. United States, 136 S. Ct. 2461 (2016) (No. 15-981), http://www.scotusblog.com/wp-content/uploads/2016/06/15-981-American-Samoa.pdf.

133. *See id.* at 10–17. The petition was denied. *See* 136 S. Ct. 2461 (2016).

American Samoa now once again seeks to litigate on behalf of *fa'a Samoa.* Here, the question arises in the context of fishing, and in particular, *alia* fishermen's access to fishery resources.

III. CULTURAL FISHING PRACTICES IN A GLOBAL CONTEXT

American Samoa is of the view that *alia* cultural fishing practices are threatened by federal agency action allowing larger, modern vessels to fish in the pelagic waters off its shores. However, as explained further below, American Samoa's status as a territory of the United States means that its role in both international and domestic fisheries management is limited and that it has little recourse outside of filing a lawsuit if the Territory is at odds with the United States' position with respect to fisheries management.

A. *Tuna Fisheries of the Western and Central Pacific*

Tuna fishing is big business. The majority of the tuna catch[134] in the Western and Central Pacific Ocean is caught by purse seine and longline vessels.[135] Combined, vessels operating in the Western and Central Pacific Ocean Convention Area (described below) caught an estimated total of 2,717,850 metric tons of tuna in 2016.[136] This is a significant percentage of the world's total supply of tuna: the catch represents seventy-nine percent of the total Pacific Ocean catch and fifty-six percent of the global tuna catch.[137] The total economic value of tuna catch in 2016 was estimated at $5.3 billion.[138]

As the worldwide tuna industry expanded, so too did the size of the boats used to haul in the catch. United States longline vessels are typically between fifty and one hundred feet in length.[139] A longliner typically fishes by deploying horizontal fishing lines greater than one mile in length, with branch lines dropping vertically down into the water that then hook the fish. The lines may soak for several hours, and then are reeled back in.[140]

United States purse seine vessels are commonly 200 feet in length.[141] So-called "superseiners" used by other fishing nations are even bigger, and they are

134. The main species targeted by fisheries in this region include skipjack tuna, yellowfin tuna, bigeye tuna, and albacore tuna. *See* PETER WILLIAMS ET AL., W. & CENT. PAC. FISHERIES COMM'N, OVERVIEW OF TUNA FISHERIES IN THE WESTERN AND CENTRAL PACIFIC OCEAN, INCLUDING ECONOMIC CONDITIONS—2016 1 (2017), https://www.wcpfc.int/node/29628 [hereinafter WILLIAMS ET AL.].

135. *See id.* at iii (summarizing total catch of various fisheries). Fisheries include small-scale artisanal and large-scale purse seine, pole-and-line, and longline operations. *See id.* at 1.

136. *See id.* at ii. As of the time of writing this Article, this is the most recent available information. This catch number is lower than the highest record catch in 2014 of 2,860,648 metric tons. *See id.* Purse seine vessels catch by far the majority of tuna in the Convention Area, catching approximately 2,020,627 metric tons in 2014 and 1,858,198 in 2016, with longline vessels coming in a far second, with approximately 268,795 metric tons caught in 2014 and 231,860 metric tons in 2016. *See id.*

137. *See id.* These percentages reflect the lower catch when compared to the year 2014, when the catch represented eighty-three percent of the total Pacific Ocean catch and sixty percent of the global tuna catch. *See* PETER WILLIAMS & PETER TERAWASI, W. & CENT. PAC. FISHERIES COMM'N, OVERVIEW OF TUNA FISHERIES IN THE WESTERN AND CENTRAL PACIFIC OCEAN, ECONOMIC CONDITIONS—2014 iii (2015), http://www.wcpfc.int/system/files/GN-WP-01%20Overview%20of%20WCPFC%20Fisheries%20Rev%201.pdf.

138. WILLIAMS ET AL., *supra* note 134, at iii.

139. *See* Nat'l Marine Fisheries Serv., "Biological Opinion on the Continued Operation of the American Samoa Longline Fishery" 6 (2015), http://www.fpir.noaa.gov/Library/PUBDOCs/biological_opinions/bio_op_asll_fishery_esa_listed_species.pdf [hereinafter AS BiOp]; AMENDMENT 7, *supra* note 107, at 79–82, 82 n.26.

140. *See* 50 C.F.R. § 665.800 (2014) (defining longline gear); AS BiOp, *supra* note 139, at 6.

141. *See WCPFC Record of Fishing Vessels,* W. & CENT. PAC. FISHERIES COMM'N, https://www.wcpfc.int/record-fishing-vessel-database?flag=United+States+of+America&field_vessel_submitted_

large enough to carry a helipad and helicopter to aid in locating schools of fish.[142] The method of fishing is to lay out one large net around a school of fish that encircles the school and then lift the net up out of the water, pulling in the fish along the way, like a draw-string purse.[143]

In the waters off of American Samoa, the combined efforts of the purse seine and longline fisheries dwarf what the *alia* catch. Comparatively, the *alia* vessels are much smaller than longline and purse seine vessels (as mentioned above, less than forty feet). This is significant because larger vessels have greater fishing power, larger longline vessels have longer soak times, and both large longline and purse seine vessels have a much greater hold capacity.[144] A typical American Samoa *alia* catches an average less than 18 metric tons of fish, per year.[145] A typical Hawai'i-based longline vessel, which will often fish in the same waters, catches an average of 141 metric tons of fish per year.[146] A typical U.S. purse seine vessel catches an average of 6,518 metric tons of fish per year, with superseiners catching even more.[147]

Put another way, the average U.S. purse seine vessel can catch nearly fifty times the amount of fish a longline vessel can catch in one year, and a longline vessel in turn can catch nearly ten times the amount of fish an *alia* vessel can catch in one year.

The Territory believes that this fishing power disparity is driving out its *alia* fleet. Why the territorial government believes litigation to be its sole recourse requires further explanation of the domestic and international regulatory regimes in place today.

B. *Fisheries Management Regimes*

Fisheries management is part domestic regulation, part international agreement.

1. Fisheries Management Initiated Under Federal Statute

Fisheries management poses unique regulatory challenges for federal entities. Managers strive to achieve conservation goals and sustainable fishery participation while taking into account the economic realities faced by large commercial vessels and small subsistence fishers alike.

The primary federal statute applicable to fisheries management is the Magnuson-Stevens Fishery Conservation and Management Act ("MSA").[148] This statute directs the conservation and management of United States fisheries through measures that are developed by various Fishery Management Councils—consisting of state, federal, and private representatives—and are then

by_ccm_value=All&type=Tuna¶urse§einer&name=&ircs=&win=&vid=&imo=&auth_tranship_hs=All&fishing_methods=All (last visited July 3, 2018) (allowing database query for vessel information).

142. *See Tuna Purse Seining*, FOOD & AGRIC. ORG. OF THE U.N., http://www.fao.org/fishery/fishtech/40/en (last visited July 24, 2018).

143. *See* NOAA Fisheries, Programmatic Environmental Assessment for the Implementation of Decisions of the Western and Central Pacific Fisheries Commission on Management of Tropical Tunas in the Western and Central Pacific Ocean from 2015–2010 32 (2015), https://www.regulations.gov/document?DN²AA-NMFS-2015-0072-0008 [hereinafter Tropical Tunas Programmatic EA].

144. *See* 66 Fed. Reg. 39,475, 39,476 (July 31, 2001).

145. *See* KANEKO & BARTRAM, *supra* note 108, at 9 & tbl. 7 (documenting only 40,824 pounds of tuna catch in one year, approximately 18 metric tons).

146. *See* Tropical Tunas Programmatic EA, *supra* note 143, at 46–47, tbls.8–9 (providing aggregate numbers).

147. *See id.* at 38–39, tbl. 4; *see also* AMENDMENT 3, *supra* note 106, at 44–45 & tbl.4 (documenting that in 2004, 21 U.S. purse seine vessels caught a total of 67,419 metric tons of tuna).

148. *See* 16 U.S.C. §§ 1801–1891(d) (2012).

implemented by NMFS, a federal sub-agency of the National Oceanic and Atmospheric Administration ("NOAA"). NMFS Regional Offices, as the designees of the Secretary of Commerce,[149] are responsible under the MSA for managing living marine resources pursuant to the requirements of that statute and in compliance with "other applicable laws."[150] "Other applicable laws" may include, for example, the Endangered Species Act,[151] the Marine Mammal Protection Act,[152] and the National Environmental Policy Act.[153] Whether the American Samoa Deeds of Cession are "other applicable laws" with which NMFS's management actions must comply is one of the substantive issues before the court, discussed below in Part IV.

Under the MSA, the United States exercises sovereign rights and exclusive fishery management authority over all fish and continental shelf resources within the U.S. Exclusive Economic Zone ("EEZ").[154] For these purposes, the EEZ is defined to extend from the seaward boundary of each coastal state out to 200 nautical miles.[155] The MSA's definition of "state" includes each of the several states, the District of Columbia, the Territory of American Samoa, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States.[156] Because the Submerged Lands Act conveyed to American Samoa submerged lands outward to three geographic miles from the coastline,[157] the Territory has authority to manage fisheries resources in waters up to three miles from its shore; beyond that, the United States exercises exclusive authority over the fisheries resources.[158]

One of the stated purposes of the MSA is to promote domestic commercial and recreational fisheries under sound conservation and management principles.[159] To this end, measures taken under the MSA must be consistent with ten National Standards.[160] Of particular relevance here, National Standard 1 requires that NMFS implement conservation and management measures that prevent overfishing, while achieving the "optimum yield" from each fishery.[161] Other standards require consideration of the modernity and accuracy of the scientific and commercial information relied upon ("best available scientific information"),[162] impacts to non-target stocks and protected species,[163] and the

149. *See id.* § 1802(39); NAT'L OCEANIC & ATMOSPHERIC ADMIN., TRANSMITTAL NO. 61, NOAA ORGANIZATIONAL HANDBOOK: DELEGATIONS OF AUTHORITY TO THE ASSISTANT ADMINISTRATOR FOR FISHERIES (2015), http://www.corporateservices.noaa.gov/ames/delegations_of_authority/.

150. *See* 16 U.S.C. §§ 1853–1855 (2012); *see also About Us*, NOAA FISHERIES, https://www.fisheries.noaa.gov/about-us (last visited July 3, 2018).

151. *See* 16 U.S.C. §§ 1531–1544 (2012).

152. *See id.* §§ 1361–1362, 1371–1389, 1401–1407, 1411–1418, 1421–1421(h), 1423–1423(h).

153. *See* 42 U.S.C. §§ 4321–4370(m) (2012).

154. *See* 16 U.S.C. § 1811(a) (2012). The United States also claims exclusive fishery management authority beyond the EEZ for Continental Shelf resources, anadromous species throughout their migratory range except within the waters of a foreign nation, and in other identified areas. *See id.* § 1811(b).

155. *Id.* § 1802(11); Exclusive Economic Zone of the United States, 48 Fed. Reg. 10,605 (Mar. 14, 1983) (Presidential Proclamation No. 5030 establishing the EEZ).

156. *See* 16 U.S.C. § 1802(41) (2012) (defining a "state" to include American Samoa for purposes of the MSA).

157. *See* 48 U.S.C.A. § 1705(a) (Westlaw through Pub. L. No. 115-231).

158. *See id.* Under certain circumstances not relevant here, the American Samoa government may regulate a fishing vessel outside of its boundaries if its regulations are consistent with the applicable FEP and federal regulations. *See* 16 U.S.C. § 1856(a)(3) (2012).

159. *See* 16 U.S.C. § 1801(b) (2012).

160. *See id.* §§ 1851, 1853.

161. *Id.* § 1851(a)(1).

162. *Id.* § 1851(a)(2).

163. *See id.* § 1851(a)(9).

impact of the proposed measure on fishery resource users.[164] National Standard 8 requires that management measures take into account the importance of fishery resources to fishing communities in order to provide for the sustained participation of those communities.[165]

A unique aspect of the MSA's statutory regime is the establishment of Fishery Management Councils.[166] The Councils play an integral part in NMFS's development of fishery regulations. The Councils are tasked to, among many other things, develop "fishery management plans" and amendments that serve as precursors to federal regulations.[167] The Western Pacific Fishery Management Council is the relevant Council for Hawai'i and the U.S. Pacific Territories and possessions.[168] The Council is made up of thirteen voting members.[169] Voting members include NMFS, the State of Hawai'i, and the applicable Territories—American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.[170] There are also three nonvoting members, including representatives from the U.S. Fish and Wildlife Service, the U.S. Department of State, and the U.S. Coast Guard.[171]

Regulations implemented domestically under the MSA are typically developed through the Council process.[172] The Council develops Fishery Ecosystem Plans ("FEPs"),[173] which are written documents that will contain the conservation and management measures applicable to a particular fishery, and may establish, for example, limits on catch and fishing effort, allocation of fishing privileges, and measures for reducing bycatch of protected or non-target species. [174]

Any particular FEP or FEP amendment is approved by the Council through majority vote, and is then transmitted to NMFS for approval, disapproval, or partial approval.[175] The Council may also, at the same time or later, transmit proposed regulations for NMFS to implement the plan or plan amendment.[176] NMFS will evaluate the plan or plan amendment and proposed regulations for consistency with all other applicable law.[177]

As a "State" for purposes of federal fisheries law, American Samoa's role in the management of federal fisheries beyond its state waters in the U.S. EEZ is the same as that of any state in the United States. In accordance with the authority granted under the MSA, representatives of American Samoa may sit

164. *See id.* § 1851(a)(8).

165. *See id.*

166. *See id.* § 1852.

167. *Id.* § 1852(h).

168. *See id.* § 1852(a)(1)(H); W. Pac. Reg'l Fishery Mgmt. Council, http://www.wpcouncil.org/ (last visited July 3, 2018).

169. *See* 16 U.S.C. § 1852(a)(1)(H) (2012); *About us, Council Members*, W. Pac. Reg'l Fishery Mgmt. Council, http://www.wpcouncil.org/about-us/council-members/ (last visited July 3, 2018). Representatives from American Samoa have three out of the thirteen votes.

170. *See* 16 U.S.C. § 1852(a)(1)(H) (2012).

171. *See id.* § 1852(c).

172. *See id.* § 1854. Under certain circumstances, NMFS may take action outside the normal process by preparing a fishery management plan, *id.* § 1854(c), or taking emergency action, *id.* § 1855(c).

173. *See Fishery Plans and Publications*, W. Pac. Reg'l Fishery Mgmt. Council, http://www.wpcouncil.org/fishery-plans-policies-reports/ (last visited July 3, 2018). Councils throughout the country, other than the Western Pacific Council, refer to the plans by the statutory designation—"Fishery Management Plans." 16 U.S.C. § 1852(h) (2012).

174. *See generally* 16 U.S.C. § 1853 (2012).

175. *See id.* § 1852(e), (h); *id.* § 1854(a).

176. *See id.* § 1855(b).

177. *See id.* §§ 1853–1854.

and vote as members of the Council, and in this capacity, may draft and vote to approve FEPs, FEP amendments, and proposed federal regulations.[178]

Once NMFS issues proposed regulations pursuant to the Administrative Procedure Act's notice and comment requirements,[179] the Territory's role in the rulemaking process is limited. Outside its role on the Council, the Territory may submit public comments and participate in the rulemaking process as would any member of the public.[180] And, as discussed in Part IV, it may sue if it disagrees with NMFS's federal action.

2. Fisheries Management Initiated Under International Agreement

Fisheries management initiated domestically under the MSA is only part of the federal regulatory schema. The countries whose fleets traverse the Pacific Ocean enter into a number of international agreements, which are then implemented under their respective domestic laws.

Various international entities are charged, pursuant to their governing international agreements, with adopting conservation and management measures for highly migratory species like tuna in the Western and Central Pacific Ocean. This Part highlights the two primary regional agreements: the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean [181] ("WCPF Convention"); and the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States[182] (more commonly referred to as the "South Pacific Tuna Treaty," or "SPTT"). Under these multilateral agreements, members agree upon appropriate conservation and management measures that are then implemented and enforced domestically through statutes and regulations.

As explained below, the United States is a party to these agreements, but American Samoa, by virtue of its status as a territory within the United States, has little to no role in the decision-making process.

a. WCPF Convention

The Convention is an international fisheries agreement applicable in the area spanning the northern and southern hemispheres identified as the Western and Central Pacific Ocean.[183] The Convention has several stated goals, including the conservation and management of highly migratory species (including tunas) and the cooperative management of the fisheries for these

178. *See* 16 U.S.C. § 1852(a)(1)(H), (e), (h) (2012); *id.* § 1854(b).

179. *See generally* 5 U.S.C. §§ 500–596 (2012).

180. It may, for instance, offer comment pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370(m) (2012), and the Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466 (2012).

181. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, 40 I.L.M 278 [hereinafter Convention].

182. Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States, Apr. 2, 1987, 26 I.L.M 1048, 1053 [hereinafter SPTT].

183. *See generally* Convention, *supra* note 181. The precise area of application of the Convention is defined in Article 3 to the Convention, and can be roughly described as spanning a geographic range west of the 150 degrees longitude. *See id.* at pt. I, art. 3, para. 1; *see also Convention Area Map*, W. & Cent. Pac. Fisheries Comm'n, www.wcpfc.int/doc/convention-area-map (last visited July 3, 2018).

species.[184] There are currently twenty-six members to the Convention,[185] seven participating territories,[186] and seven cooperating nonmembers.[187]

Article 9 of the Convention establishes the Western and Central Pacific Fisheries Commission.[188] The Commission adopts measures to ensure, among other things, that highly migratory fish stocks are harvested at sustainable levels.[189] Commission decisions on matters of substance are generally made through consensus, with some exceptions.[190] Measures agreed upon by consensus would include, for example, tuna catch and effort limits.[191]

The United States is a Party to the Convention and a Member of the Commission.[192] As a Contracting Party to the Convention, the United States exercises all rights attendant to that status, including voting on conservation and management measures.

As a territory of the United States, American Samoa has a limited role in managing fish stocks under this agreement. United States Territories, including American Samoa, the Commonwealth of the Northern Mariana Islands, and Guam, are afforded the status of "Participating Territories" under the Convention.[193] Participating Territories have the right to be present and speak at Commission meetings, to participate in deliberations, and may make proposals and offer amendments.[194] Participating Territories may not, however, exercise rights that are inconsistent with their territorial status (which is defined by the United States).[195] They may not be elected Chair, be counted toward a quo-

184. *See* Convention, *supra* note 181, at pt. II, art. 5.

185. Australia, China, Canada, Cook Islands, European Union, Federated States of Micronesia, Fiji, France, Indonesia, Japan, Kiribati, Republic of Korea, Republic of Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, United States of America, and Vanuatu. *About WCPFC*, W. & Cent. Pac. Fisheries Comm'n, https://www.wcpfc.int/about-wcpfc (last visited July 3, 2018).

186. American Samoa, Commonwealth of the Northern Mariana Islands, French Polynesia, Guam, New Caledonia, Tokelau, and Wallis and Futuna. *See id.*

187. Ecuador, El Salvador, Mexico, Panama, Liberia, Thailand, and Vietnam. *See id.*

188. *See* Convention, *supra* note 181, at pt. III, art. 9.

189. *See id.* at pt. III, art. 10.

190. *See id.* at pt. III, art. 9, para. 8 & art. 10, para. 4; *About WCPFC, Frequently Asked Questions and Brochures*, Western & Central Pacific Fisheries Commission, https://www.wcpfc.int/frequently-asked-questions-and-brochures (last visited July 3, 2018).

191. Convention, *supra* note 181, at pt. III, art. 10, para. 4; *see, e.g.*, W. AND CENT. PAC. FISHERIES COMM'N, CONSERVATION & MANAGEMENT MEASURE 2014-01, CONSERVATION AND MANAGEMENT MEASURE FOR BIGEYE, YELLOWFIN AND SKIPJACK TUNA IN THE WESTERN AND CENTRAL PACIFIC OCEAN (2015), https://www.wcpfc.int/system/files/CMM%202014-01%20Conservation%20and%20Management%20Measure%20for%20Bigeye,%20Yellowfin%20and%20Skipjack%20Tuna.pdf.

192. *See About WCPFC*, W. & Cent. Pac. Fisheries Comm'n, https://www.wcpfc.int/about-wcpfc (last visited July 3, 2018) (noting the United States is a Member); *see also* Western and Central Pacific Fisheries Convention Implementation Act, 16 U.S.C. §§ 6901–10 (2012) (implementing Convention agreements). The United States became a Contracting Party to the Convention in 2007. *See* 80 Fed. Reg. 1894, 1894–95 (Jan. 14, 2015).

193. *See* Convention, *supra* note 181, at pt. XII, art. 43; *About WCPFC*, W. & Cent. Pac. Fisheries Comm'n, https://www.wcpfc.int/about-wcpfc (last visited July 3, 2018).

194. *See* Convention, *supra* note 181, at pt. XII, art. 43; *see* W. & CENT. PAC. FISHERIES COMM'N, COMMISSION FOR THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN RULES OF PROCEDURE ANNEX II (2004), https://www.wcpfc.int/system/files/Rules_of_Procedure.pdf [hereinafter Commission Rules Annex II].

195. *See* Convention, *supra* note 181, at pt. XII, art. 43; Commission Rules Annex II, *supra* note 194. This is not to say the international community does not recognize American Samoa's dependency on fishing; on the contrary, under Article 30 to the Convention, a separate status is afforded Participating Territories, predicated on a recognition that these entities are historically dependent on their coastal marine resources and have "special requirements." Convention, *supra* note 181, at pt. VIII, art. 30. Accordingly, prior to adopting a proposed conservation and management measure, the Commission is required to determine whether the measure will have a disproportionate burden on the Participating Territories. *See id.*

rum, or vote as would a Contracting Party.[196] In other words, Participating Territories do not exercise rights not authorized by their host country, and they do not gain any authority under the Convention that they do not already have.[197]

NMFS implements the Commission's decisions through regulations under the authority of the Western and Central Pacific Fisheries Convention Implementation Act.[198] The Implementation Act authorizes NMFS,[199] in consultation with the Secretary of State and the Department of Homeland Security, to promulgate such regulations as may be necessary to carry out the obligations of the United States under the Convention, including implementation of the decisions of the Commission.[200] American Samoa has no role in NMFS's domestic implementation of the Commission decisions through the Implementation Act.[201]

b. SPTT

The SPTT is an agreement between the United States and certain Pacific Island States pertaining to fisheries resources within the Treaty Area.[202] The Treaty Area substantially overlaps with the southern portion of the Convention Area discussed above.[203]

The catalyst for the SPTT began during the 1980s, when some U.S. commercial fishing vessels gained access to the Exclusive Economic Zones of South Pacific Island States through multilateral industry-to-government agreements.[204] However, tension persisted between some vessel operators and Pacific Island States because of continuing disagreement over the extent of the coastal states' interest in managing highly migratory species, including tuna species.[205]

196. *See* Commission Rules Annex II, *supra* note 194.

197. *See id.* To the extent that Commission decisions recognize a Participating Territory's interests in marine resources that may be found beyond its borders, those interests would not be enforceable unless and until they are implemented by NMFS regulations under its domestic authority. *See, e.g.*, Nat. Res. Def. Council v. EPA, 464 F.3d 1, 10 (D.C. Cir. 2006) (noting that post-ratification agreements are political commitments rather than judicially enforceable domestic law).

198. 16 U.S.C. §§ 6901–6910 (2012).

199. The statute authorizes the Secretary of Commerce to promulgate regulations, *see id.* § 6904, and the Secretary has delegated this authority to NMFS, *see* NAT'L OCEANIC & ATMOSPHERIC ADMIN., TRANSMITTAL NO. 70, NOAA ORGANIZATIONAL HANDBOOK: DELEGATIONS OF AUTHORITY TO THE ASSISTANT ADMINISTRATOR FOR FISHERIES (2007), http://www.corporateservices.noaa.gov/ames/delegations_of_authority/.

200. 16 U.S.C. § 6904.

201. As with other federal rules implemented pursuant to the Administrative Procedure Act, American Samoa may offer public comments on the rule, as would any member of the public.

202. *See* SPTT, *supra* note 182. Signatories include Australia, Cook Islands, Federated States of Micronesia, Fiji, Republic of Kiribati, Republic of the Marshall Islands, Republic of Nauru, New Zealand, United States of America, Niue, Republic of Palau, Papua New Guinea, Solomon Islands, Kingdom of Tonga, Tuvalu, Republic of Vanuatu, and Western Samoa (now Independent Samoa). *See id.* at 1051.

203. *See* 50 C.F.R. § 300.31 (2014) (defining Treaty Area). *Compare* SW. FISHERIES SCI. CTR., https://swfsc.noaa.gov/textblock.aspx?Division=FRD&id=21601 (last visited July 3, 2018) (providing map of SPTT boundary), *with Convention Area Map*, W. & CENT. PAC. FISHERIES COMM'N, www.wcpfc.int/doc/convention-area-map (last visited July 3, 2018) (providing map of Convention Area).

204. NAT'L OCEANIC & ATMOSPHERIC ADMIN., ENVIRONMENTAL ASSESSMENT FOR THE THIRD EXTENSION OF THE SOUTH PACIFIC TUNA TREATY 1-1 (2004), http://www.fpir.noaa.gov/Library/PUBDOCs/env_assess_fonsi/SPTT_EXT3_EA_July_%202004.pdf [hereinafter SPTT EA 2004].

205. South Pacific Tuna Act of 1987 and Reauthorize the Fishermen's Protection Act: Hearing on S. 1989 Before the Nat'l Ocean Policy Study of the S. Comm. on Commerce, Science, and Transp., 100th Cong. 4-5 (Feb. 23, 1988) (opening statement of Sen. Inouye), http://njlaw.rutgers.edu/collections/gdoc/hearings/8/88601689/88601689_1.pdf.

As a result, in 1988, the United States concluded and implemented the SPTT, to which it is a named Party.[206] The SPTT provides individual licenses for U.S. purse seiners[207] to access most of the waters of the seventeen member states of the Forum Fisheries Agency ("FFA")[208]—an advisory body made up of participating island nations with a stated goal to foster regional cooperation for the sustainable use of fishery resources—for the primary purpose of accessing the plentiful tuna stocks in those waters. In return, the FFA members receive a negotiated industry access and fee payment.[209]

Under the authority of the South Pacific Tuna Act,[210] the domestic statute implementing provisions of the SPTT, NOAA promulgates regulations to carry out the provisions of the Treaty.[211] Through this system, U.S. purse seiners need only purchase one license to gain access to multiple fishing zones on consistent terms.[212] This allows fishing vessels to move with relative ease through different jurisdictions to gain access to the region's vast tuna resources.

American Samoa and other U.S. Territories have no negotiating authority under the SPTT. The SPTT nevertheless plays a significant role in the American Samoa economy: a portion of the purse seine landings each year (a delivered value of $2.8 billion in the year 2016)[213] are offloaded at the canneries in American Samoa, providing an important source of revenue to the Territory.

IV. THE AMERICAN SAMOA LVPA AND RESULTING LITIGATION

It was within this context when, in 2002, NMFS instituted the Large Vessel Prohibited Area, or "LVPA."[214] The LVPA regulates the confluence of the various fishing sectors in the waters off American Samoa—purse seine, longline, and *alia* fleets. Fishing competition between large and small commercial and non-commercial ocean-users creates the potential for gear conflict and localized fish stock depletion.

Prompted by a rapid influx of large longline vessels into the American Samoa fishery around the year 2000,[215] the LVPA generally prohibits large vessels from fishing for pelagic species like tuna from the three mile mark out to approximately fifty nautical miles around the islands of American Samoa.[216] "Large vessels" are defined to be those vessels larger than fifty feet in length.[217] The rule essentially created a fifty-mile-wide ring around the islands in which large commercial fishing vessels could not fish.

One purpose of the LVPA was to address concerns that large vessels and the resulting fishing competition would reduce opportunities for participation

206. SPTT EA 2004, *supra* note 204, at 1-1.

207. *See* SPTT, *supra* note 182, at sched. 2, paras. 1–2.

208. The Forum Fisheries Agency consists of Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu. PAC. ISLAND FORUM FISHERIES AGENCY, http://www.ffa.int/about (last visited July 3, 2018).

209. *See* SPTT, *supra* note 182, at sched. 2, paras. 1–2.

210. 16 U.S.C. § 973 (1988).

211. *See* 50 C.F.R. § 300.30 (2018).

212. *See generally* 16 U.S.C. §§ 973–973i (describing licensing terms).

213. *See* WILLIAMS ET AL., *supra* note 134, at iii.

214. 67 Fed. Reg. 4369 (Jan. 30, 2002) (final rule establishing LVPA); *see also* 66 Fed. Reg. 39,475 (July 31, 2001) (proposed rule). This rule was created through the Council FEP process and then implemented through NMFS regulations.

215. *See* AMENDMENT 3, *supra* note 106, at 25.

216. *See* 50 C.F.R. §§ 665.806(b), 665.802(xx). The specific boundaries of the closed areas are defined by latitude and longitude around the islands of Tutuila, Aunu'u, the Manu'a Islands, Rose Atoll, and Swains Island. *See id.* § 665.806(b).

217. *See id.* § 665.12.

in the tuna fishery by residents of American Samoa who operate the smaller *alia* vessels.[218] The LVPA would reduce the chance for gear conflicts and catch competition between the larger, more mobile vessels and the smaller ones. It would safeguard opportunities for "sustained fishery participation by the locally based small boat operators,"[219] who, as NMFS acknowledged, "depend on this fishery not only for food, income, and employment, but also for the preservation of their Samoan culture." [220]

When first implemented, the LVPA was expected to enhance local participation in the fishery, while at the same time afford the large longline and purse seine vessels the opportunity to continue fishing in other parts of the U.S. EEZ around American Samoa.[221] In doing so, the LPVA would further the purpose in the MSA to encourage development of sustained participation of local fishing communities, consistent with the conservation needs of effected stocks.[222] As discussed above, under the MSA's National Standard 8, NMFS is required to take into account the importance of fishery resources to fishing communities and their sustained participation in the fishery, and fishery management plans are also required to analyze the effects of proposed conservation and management measures on fishing communities.[223]

Over ten years later, however, the *alia* fleet had not developed, and there were fewer *alia* vessels operating than before.[224] On August 25, 2015, NMFS published a proposed "LVPA exemption"—a rule to allow larger U.S. longline vessels *back in* to fish in certain areas of the LVPA.[225] The asserted basis for this amendment was that the LVPA, as originally implemented, was not fulfilling the purpose for which it was intended. It had not fostered the sustained participation of the local fishing community in the fishery as envisioned by National Standard 8 and might have adversely affected optimum yield in the fishery in contravention of National Standard 1.[226] In sum, the agency's position was that the protected area had been needlessly displacing larger commercial vessels from the entire area.[227]

On February 3, 2016, after considering public comment on the proposed rule, NMFS published a final rule implementing the large vessel exemption.[228] Under the final rule, large U.S. longline vessels are allowed to fish seaward of 12 nautical miles around Swains Island, Tutuila, and the Manu'a Islands.[229] Purse seining continues to be prohibited in all areas of the LVPA.[230] The stated

218. *See* 66 Fed Reg. 39,475, 39,475–77 (July 31, 2001) (LVPA proposed rule).
219. 66 Fed. Reg. 39,475, 39,475–76 (July 31, 2001).
220. 67 Fed. Reg. 4369 (Jan. 30, 2002).
221. *See* 66 Fed Reg. at 39,475–77.
222. *See id.*
223. *See* 16 U.S.C. § 1853(a)(9) (2007).
224. *See* 80 Fed. Reg. 51,527, 51,527–30 (Aug. 25, 2015) (to be codified at 50 C.F.R. pt. 665).
225. *See id.*
226. *See* 80 Fed. Reg. at 51,528–29. The agency determined that because the *alia* vessels had not reentered the fishery, the original LVPA was not reducing any potential for gear conflict or catch competition and was, in fact, reducing the viability of the longline fleet. Allowing large longline vessels back in certain areas "would improve the efficiency and economic viability of the American Samoa longline fleet." *Id.* at 51,529. It would also increase the fishing efficiency of vessels, increase catch per unit of effort, increase sale price of fish, and lower operations costs. *See* 81 Fed. Reg. 5620 (Feb. 3, 2016) (response to comment 3). NMFS took the position that "the reduced participation of the small alia vessels in the fishery was driven primarily by low catch rates of albacore experienced across the South Pacific region combined with high economic and other operating costs," and not competition with large longline vessels that would be allowed back in portions of the LVPA. *Id.* at 5621 (response to comment 17).
227. *See* 16 U.S.C. § 1853(a) (necessary and appropriate measures); 80 Fed. Reg. at 51,528.
228. *See* 81 Fed. Reg. at 5619 (LVPA exemption final rule, effective Jan. 29, 2016).
229. *See id.*
230. *See id.*

intent of the rule was to improve the viability of the longline fishery and achieve optimum yield while preventing overfishing in accordance with National Standard 1.[231]

This final rule was implemented by NMFS over the objection of the Territory and some members of the Samoan community, who believed that allowing large vessels back within 50 nm will cause the *alia* fleet to stagnate further.[232] In fact, the Governor of American Samoa as well as the Council of Chiefs publicly opposed the regulatory amendment.[233] Some submitted public comments, arguing that the exemption violated the Deeds of Cession by interfering with the American Samoan government's ability to regulate its marine resources.[234] Other residents and longline fishery participants submitted public comments in favor of NMFS's action, noting that the longline fishery offered employment opportunities.[235] Fish processing at two tuna canneries forms the basis of American Samoa's largest private commercial industry.[236]

In March 2016, the Territory of American Samoa sued NMFS and the Council in the U.S. District Court for the District of Hawai'i, seeking to set aside the 2016 rule.[237] The Territory's principle contention was that NMFS failed to consider the 1900 and 1904 Deeds of Cession as they relate to the protection of ceded lands and waters.[238] The Deeds, the Territory contends, are "other applicable law" [239] with which agency action taken under the MSA must be consistent.[240]

Both sides moved for summary judgment. NMFS argued that the Territory lacked standing to bring its claims, and, on the merits, that the Territory failed to establish either that the Deeds are "other applicable law" under the MSA or that NMFS had not satisfied any requirement imposed by the Deeds.[241] The Territory asserted that it did have standing, primarily arguing that its quasi-sovereign interest in protecting cultural fishing practices was sufficient to establish *parens patriae* standing.[242] And, in evaluating whether to allow large vessels

231. *See id.*

232. *See id.* at 5621–23 (public comments).

233. Letter from Lolo M. Moliga, Governor, Am. Samoa, to Penny Pritzker, Secretary of Commerce, U.S. Department of Commerce (Sept. 16, 2015), *filed in* Complaint for Declaratory and Injunctive Relief at Ex. D, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095). The American Samoa Department of Marine and Wildlife Resources also opposed the amendment, stating that the process did not involve adequate consultation with local stakeholders, and that the rule would lead to conflict with *alia* boats and other vessels. *See* Letter from Ruth Matagi-Tofiga, Director, Am. Samoa Dep't of Marine and Wildlife Res., to Penny Pritzker, Sec'y of Commerce, U.S. Dep't of Commerce (Sept. 21, 2015), *filed in* Complaint for Declaratory and Injunctive Relief at Ex. E, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

234. *See* 81 Fed. Reg. at 5623 (public comments).

235. *Id.*

236. *See* AMENDMENT 7, *supra* note 107, at 75–76, 223 (Starkist Samoa Co. and Tri Marine); *see also* Tom Seaman, *StarKist Inks 10-Year Lease Deal for Tri Marine American Samoa Plant*, UNDERCURRENT NEWS (May 26, 2016, 9:13 AM), https://www.undercurrentnews.com/2018/05/26/starkist-inks-10-year-lease-deal-for-tri-marine-american-samoa-plant/ (reporting on lease agreement to keep two processing plants running). Canned tuna exports account for well over half of the private sector. *See* STEIN, *supra* note 120, at 4.

237. Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348 (D. Haw. Mar. 20, 2017).

238. *Id.* at *7–8.

239. *See* 16 U.S.C. §§ 1854–1855 (2007); *see supra* Section III.B.1.

240. *See* Complaint for Declaratory and Injunctive Relief *passim*, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

241. *See* Defendants' Combined Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

242. *See* Memorandum in Support of Plaintiff's Combined Opposition and Reply to Defendants' Combined Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary

back into certain portions of the LVPA, the Territory argued, NMFS had failed in its obligation to consider its responsibility under the Deeds to protect the ceded areas—which include surrounding bodies of water.[243] Because NMFS failed to do so, according to the Territory, the final rule violates the MSA and the Administrative Procedure Act and must be vacated.

On March 20, 2017, the district court ruled substantially in favor of the Territory.[244] The court granted in part and denied in part the Territory's motion for summary judgment and denied NMFS's counter-motion.[245] The court agreed with the Territory that, because the administrative record indicated that NMFS did not specifically consider whether the 2016 rule was consistent with the Deeds of Cession, the final rule was invalid.[246] In accordance with the court ruling, NMFS removed the regulatory exemption for the longline vessels.[247] The matter is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit. [248]

Before reaching the merits, the district court resolved the threshold standing question in favor of the Territory—the court ruled that the Territory successfully demonstrated *parens patriae* standing to challenge NMFS's final agency action.[249] Relying on *Massachusetts v. EPA*,[250] it held 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."[251] This interest is, the court concluded, "a separate and distinct interest from the interests of individual American Samoans."[252] In so doing the court endorsed a formulation of quasi-sovereign interests not before litigated—a government's interest in protecting the cultural fishing rights of a distinct segment of the community for the benefit of its populace as a whole.[253]

Lawsuits expressly asserting a quasi-sovereign interest in preserving "culture" in one form or another have been relatively few and far between.[254] The question has scarcely been touched upon by the lower courts, and to this author's knowledge, no federal appellate court has directly ruled upon the issue.[255]

Judgment at 2–4, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

243. *See* Complaint for Declaratory and Injunctive Relief at ¶¶ 16–25, 40–48, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095). The Territory relied upon two provisions in the deeds. From the 1900 Cession of Tutuila and Aunu'u: "The Government of the United States of America shall respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District . . . ." *Id.* at Exhibit F, Exhibit 2, cl. 2. From the 1904 Cession of Manu'a: "It is intended and claimed . . . that the rights of the Chiefs of each village and of all people concerning their property according to their customs shall be recognized." *Id.* at Ex. F, Ex. 3, cl. 2.

244. *See* Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 1073348, at *11–17 (D. Haw. Mar. 20, 2017).

245. *See id.* at *17.

246. *See id.* at *13–17. The District Court subsequently denied NMFS' motion for reconsideration with respect to standing and remedy. *See* Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 16-00095, 2017 WL 8316931 (D. Haw. Aug. 10, 2017).

247. *See* 82 Fed. Reg. 43,908 (Sept. 20, 2017).

248. *See* Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 17-17081 (9th Cir. filed Oct. 16, 2017).

249. *Territory of Am. Samoa*, 2017 WL 1073348, at *12.

250. 549 U.S. 497 (2007).

251. *Territory of Am. Samoa*, 2017 WL 1073348, at *12.

252. *See id.*

253. *See id.*

254. *See supra* Section I.B.

255. In *Havasupai Tribe v. Provencio*, a Ninth Circuit panel ruled that the non-profit organizational plaintiffs had standing to sue over the U.S. Forest Service's approval of uranium mining. *See* 906

V. *PARENS PATRIAE* STANDING PRINCIPLES APPLIED TO AMERICAN SAMOA'S INTEREST IN CULTURAL FISHING PRACTICES

Does American Samoa have *parens patriae* standing to challenge NMFS's final LVPA rule? The district court ruled that it does, finding that the Territory 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."[256] The court relied heavily on the "long-standing cultural significance of fishing in American Samoa" and the government's interest in "perpetuation of *fa'a Samoa*."[257]

This Part delves more deeply into the Territory's interest as it fits within the *parens patriae* standing framework established by *Snapp* and *Massachusetts v. EPA*.

A. *American Samoa's Quasi-Sovereign Interest in Cultural Fishing Practices*

Are these cultural fishing practices a quasi-sovereign interest sufficient to establish *parens patriae* standing? Yes. The *Snapp* court outlined two (non-exclusive) criteria for evaluating whether a state has asserted a quasi-sovereign interest. A quasi-sovereign interest may include (1) the general health and well-being of a state's residents, as well as (2) the state's interest in securing its status under and participation in the federal system.[258] Both criteria are met here, and each separately supports a *parens patriae* action.

First, the Territory's assertion of its role as protectorate of cultural fishing practices speaks directly to the sovereign's prerogative to protect the well-being of its residents. This was the basis for the District of Hawai'i's ruling—not only do traditional fishing practices provide food for the community at large, but these fishing practices are intricately tied to the social customs and cultural heritage unique to the region, or *fa'a Samoa*.[259]

One indication that a particular injury to the welfare of its residents suffices to give a sovereign *parens patriae* standing is whether the injury is of a type that the sovereign might address through its lawmaking powers.[260] This analysis was endorsed by the Court in *Snapp*, where Puerto Rico had an interest in protecting its residents from the effects of discrimination.[261] Here, the preservation of cultural fishing practices is well within American Samoa's sovereign lawmaking powers. In fact, one need look no further than American Samoa's own constitution, which declares it:

> [T]he policy of the Government of American Samoa to protect 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. *Such legislation as may be necessary may be enacted to protect* the lands, *customs, culture,* and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons.[262]

F.3d 1155 (9th Cir. 2018). The panel also noted in a footnote that the plaintiff Tribe had standing because the agency action "cause[d] concrete injury to the Tribe's religious and cultural interests." *Id.* at 1162 n.3. The Forest Service did not press the question of standing on appeal, and neither the district court nor the Ninth Circuit parsed the matter.

256. *Territory of Am. Samoa*, 2017 WL 1073348, at *12.

257. *Id.*

258. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 607–08 (1982).

259. *See supra* Part II.

260. *See Snapp*, 458 U.S. at 607.

261. *See id.* at 609.

262. AM. SAM. CONST. art. I, § 3 (emphasis added). There is perhaps an argument to be made that this constitutional provision establishes the Territory's *sovereign* interest in enforcing its own legal code. *See Snapp*, 458 U.S. at 601. The Territory does not appear, however, to assert that this constitu-

And as described above in Part II, there is no question that fishing practices are intimately tied with "customs" and "culture" within the Samoan community.

American Samoa has declared its prerogative to protect these cultural practices—on what basis may the federal courts disagree? Justice Brennan, for one, would surely say none in this case: "A state," he declared in his *Snapp* concurrence,

> is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention. I know of nothing—except the Constitution or overriding federal law—that might lead a federal court to superimpose its judgment for that of a State with respect to the substantiality or legitimacy of a State's assertion of sovereign interest.[263]

Certainly, no part of the U.S. Constitution undermines American Samoa's asserted right to protect the cultural practices of its indigenous population. And the laws at issue in the case, particularly the MSA and the Deeds of Cession, pertain to the substantive dispute over NMFS's rulemaking.[264] They do not purport to restrict American Samoa's sovereign interest in protecting cultural practices for purposes of standing.

Second, American Samoa also seeks to secure, through this litigation, "observance of the terms under which it participates in the federal system."[265] In particular, it seeks to secure the terms through which it agreed to become a part of the United States under the Deeds of Cession and to secure its role under the MSA's statutory framework to manage fisheries.[266] This is an important but under-litigated aspect to the Territory's lawsuit.[267]

To borrow a line from Justice Steven's opinion in *Massachusetts v. EPA*, American Samoa "surrender[ed] certain sovereign prerogatives" upon entering the Union.[268] Just as Massachusetts may not invade another state over a greenhouse gas dispute, may not negotiate treaties with foreign nations, and may find its police powers preempted by federal law,[269] American Samoa may not invade another state over a fisheries dispute, may not negotiate treaties with foreign nations concerning their tuna fleets, and is subject to federal law concerning domestic fisheries. American Samoa is therefore "entitled to special solicitude" in the standing analysis.[270]

The domestic and international regulatory scheme described in Section III.B. reveals American Samoa's limited recourse for relief outside the court. It has, by virtue of its status as a territory of the United States, surrendered its prerogative to manage fisheries and other natural resources beyond the three-mile mark.

As a territory, American Samoa cannot directly negotiate conservation strategies with other nations of the Western and Central Pacific Fisheries Com-

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tional provision is self-executing, nor yet has it pointed to legislation enacted to protect cultural fishing practices. *See* Plaintiff's Combined Opposition and Reply to Defendants' Combined Cross-Motion for Summary Judgment at 7–8, Territory of Am. Samoa v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095). Moreover, as described in Part III.B., there are systemic and legal impediments to the Territory's authority to directly address this issue via lawmaking.

263. *Snapp*, 458 U.S. at 612 (Brennan, J., concurring); *see also* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57–58 (1890) ("This prerogative of *parens patriae* is inherent in the supreme power of every state. . . ."); Thomas, *supra* note 26, at 802–10 (discussing *parens patriae* as a manifestation of the state's police power).

264. *See supra* Part IV.

265. *Snapp*, 458 U.S. at 608.

266. *See supra* Section III.B., Part IV.

267. The District of Hawai'i's opinion did not rest on this second rationale.

268. 549 U.S. 497, 519 (2007).

269. *See id.*

270. *See id.* at 520.

mission. The United States, not American Samoa, is a party to the Convention and a member of the Commission. The United States, not American Samoa, may vote on the fisheries measures proposed by the Commission. And the United States through its agency NMFS, not American Samoa, implements the Commission decisions through the Implementation Act.[271]

American Samoa has even less of a role in SPTT negotiations. The Territory has no role in either the SPTT negotiations in the international arena or in implementation of those agreements domestically through the South Pacific Tuna Act. This, despite the prevalent use of its harbor by purse seiners, whose landing are offloaded at the American Samoa canneries and have an annual dollar value in the billions.[272]

In the domestic sphere, American Samoa does play an important role on the Council established under the MSA. In their capacities as Councilmembers, representatives of American Samoa vote on management plans and proposed regulations for implementation by NMFS.[273] And in this management scheme, National Standard 8 requires that management measures proposed by the Council take into account the sustained participation of fishing communities, like those in American Samoa.[274] But the Territory's councilmembers can be outvoted, and once NMFS issues a proposed fisheries rule, the Territory has no greater role than a member of the public in its capacity to offer public comment and, perhaps, to sue.[275]

The Territory participates in—and is dependent upon—the federal fisheries management scheme that impacts its own domestic fisheries. As in *Snapp*, where Puerto Rico's participation in the operation of federal employment laws meant it had an interest in ensuring the proper implementation of those laws, American Samoa has an interest in ensuring that the federal government's fisheries management regime comports with its obligations under federal law.[276] These obligations include taking due consideration of the cultural fishing practices of the Samoan community. It is thus consistent with the doctrine of *parens patriae* standing that the Territory seek to enforce its rights under federal law and to ensure the intended operation of that fisheries scheme.[277]

B. *Cultural Fishing Practices and the Substantial Segment of the Population*

Who does American Samoa represent as *parens patriae*? Its articulated quasi-sovereign interest must affect "a sufficiently substantial segment of its population"[278] in order to demonstrate *parens patriae* standing. This criterion, too, is met.

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271. *See supra* Section III.B.2.

272. *See id.*

273. *See supra* Section III.B.1.

274. *See id.*

275. *See id.* Some have noted that *parens patriae* standing is all the more relevant in light of the expanding so-called "administrative state"—a state or territory is hard-pressed to protect its own sovereign or quasi-sovereign interests without participating in federal regulatory regimes. *See, e.g.*, Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 83 (2014) ("State suits against the federal government are a form of 'uncooperative federalism' that may substitute for the structural check of state autonomy that passed away with the death of dual sovereignty."); Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 677 (2016); *see also* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008) (opining that a distinct standing rule for states is indicative of a new approach to federalism).

276. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 593, 610 (1982).

277. *See id.* at 609–10 (observing that Puerto Rico's *parens patriae* interest in ensuring residents' equal participation under federal employment laws was "compelling").

278. *Id.* at 607.

American Samoa argues that harm to particular members of the populace—here, *alia* fishermen—has broader implications to the society as a whole. The Territory explained its interest on behalf of the public in this way:

> [T]he protection of culture is an interest apart from the economic interests of the alia fishermen. The loss and degradation of the Samoan culture is a harm not limited to alia fishermen but one that is felt and suffered by the entire diaspora. . . .
>
> . . . Plaintiff's role as protectorate of the Samoan culture is of interest to the entire populace.[279]

This broader impact to Samoan society is akin to the impact to the Puerto Rican economy when just a fraction of its citizenry (787 persons out of 3 million) were directly impacted by the discriminatory practices of the Virginia apple farmers.[280] In fact, in *Snapp*, the Supreme Court granted certiorari to determine "whether Puerto Rico could maintain a *parens patriae* action . . . despite the small number of individuals directly involved," and answered yes.[281] Characterizing the problem as limited to only 787 job opportunities was, in the Court's view, "too narrow a view of the interests at stake" because a state has a broader interest in protecting all its residents from the effects of discrimination.[282] Similarly here, despite *alia* fishermen making up only a small portion of the population, the Territory's interest in protecting cultural fishing practices suffices to maintain a *parens patriae* action because the fishermen's inability to continue fishing would result in a ripple effect across the entire community.[283] To limit the impact analysis to just the *alia* fishermen would indeed be "too narrow a view of the interests at stake." [284] The Territory's interest is, in this author's view, on par with the "political, social, and moral damage of discrimination"[285] sufficient to establish standing in *Snapp*,[286] and the "ability to preserve its culture and way of life" [287] sufficient in *Miccosukee Tribe.*

Nevertheless, there are opponents to the Territory's position. Over 270 individuals and entities submitted public comments for and against NMFS's exemption to the LVPA.[288] Commenters in favor of large longline vessel access noted a desire for equal treatment under the law and their reliance on longline vessels for work and earnings, while commenters opposed to large longline vessel access noted a risk of environmental harm and the inability of smaller *alia* to compete economically with the larger vessels.[289] In fact, during the summary judgment stage of litigation, dueling testimony from *alia* and longline fishermen was submitted to the court, each arguing their case. The Alia Fisherman Association attested that large longline vessels outcompete the *alia* vessels and discourage participation in the fishery.[290] Longline Services, Inc. and Tautai-O-Samoa Fishing & Longline Association disputed that the presence of longline

279. Plaintiff's Combined Opposition and Reply to Defendants' Combined Cross-Motion for Summary Judgment at 3–4, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

280. *See Snapp*, 458 U.S. at 597.

281. *Id.* at 599.

282. *Id.* at 609.

283. *See supra* Part II.

284. *Snapp*, 458 U.S. at 609.

285. *Id.*

286. *See supra* Sections I.A., I.B.

287. Miccosukee Tribe of Indians of Fla. v. United States, 680 F. Supp. 2d 1308, 1315 (S.D. Fla 2010).

288. Exemption for Large U.S. Longline Vessels to Fish in Portions of American Samoa Large Vessel Prohibited Area, 81 Fed. Reg. 5619, 5619 (Feb. 3, 2016) (to be codified at 50 C.F.R. 665).

289. *Id.* at 5619–22.

290. Affidavit of Taloloa Howard Dunham, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

vessels interfere with *alia* fishing and noted the economic benefits derived from the longline industry in the form of jobs and other contributions to the Samoan economy.[291]

This opposition to the sovereign's position, however, can nevertheless be reconciled with *parens patriae* standing, for at least three reasons. First, just because a sovereign has standing to pursue litigation does not mean that the sovereign's substantive argument will prevail. Those in favor of NMFS's large vessel exemption, in opposition to the Territory's position, may yet achieve success on appeal.[292] Second, and more to the point, those who support the federal administrative action *are* represented—by the federal government, in *its* own role as *parens patriae* over matters within its purview.[293] Third, to the extent a party feels unrepresented by *either* government, it may seek to intervene in the litigation.[294] Fishing industry groups, for example, have been known to intervene as defendants alongside NMFS in environmental litigation when the industry does not believe the federal government adequately represents its interests.[295]

Ultimately, it is within a sovereign's authority to determine which interests warrant its protection and legal intervention.[296] American Samoa has elected to intervene as *parens patriae* on behalf of cultural fishing practices and to secure its role in the federal fisheries management regime. That is enough to open the courthouse door. Whether the Territory will ultimately prevail on the merits of its claim remains to be seen.

CONCLUSION

American Samoa's assertion of *parens patriae* standing, along with the other similar examples briefly mentioned here, demonstrates that participation of the state in its capacity of quasi-sovereign is highly valuable. This participation ensures that certain interests, often intangible but nevertheless vital, are given due consideration alongside sovereign or personal rights when they otherwise may be absent from the discussion entirely. Indeed, the judiciary is witnessing a growing interest among states to litigate issues—be they immigration policies, racial equality, economic interests, natural resource impacts, or cultural rights, to name just a few—in their role as *parens patriae*. Given that the 50 States and tribal and territorial governments represent many diverse populations and viewpoints, the regular representation of these interests via assertion of the states' *parens patriae* status is an opportunity for the legal system to take account of legal trends and policy preferences across the nation.

The cultural fishing practices championed by the Territory of American Samoa reflect this developing *parens patriae* standing rubric. One individual *alia* fisherman may sue for the right to fish, but a lone individual's ability to fish is not sufficient; others must be able to do the same if robust societal traditions

291. Letter from Carlos M. Sanchez, Longline Services, Inc., to Judge Leslie Kobayashi, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095); Letter from Lautai O Samoa Longline & Fishing Association to Judge Leslie Kobayashi, Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., 2017 WL 1073348 (D. Haw. Mar. 20, 2017) (No. 16-00095).

292. *See* Territory of Am. Sam. v. Nat'l Marine Fisheries Serv., No. 17-17081 (9th Cir.) (appeal pending).

293. *See, e.g.*, Mass. v. Mellon, 262 U.S. 447, 485–86 (1923) (dismissing Massachusetts's action against federal law that would appropriate funds to states voluntarily participating in maternal and infant health program, because it was the United States, and not the State, that represents mothers and infants as *parens patriae* in the federal program).

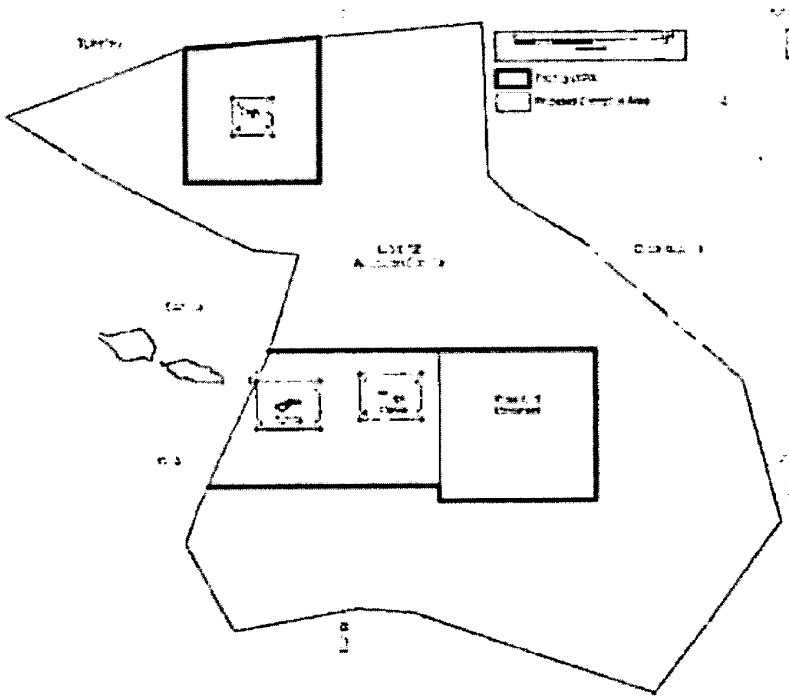
294. *See generally* FED. R. CIV. P. 24 (motions to intervene).

295. *See, e.g.*, Turtle Island Restoration Network v. U.S. Dep't of Com., 672 F.3d 1160 (9th Cir. 2012) (Hawaii Longline Association as intervening party).

296. *See* Alfred L. Snapp, Inc. v. Puerto Rico, 458 U.S. 593, 612 (1982) (Brennan, J., concurring).

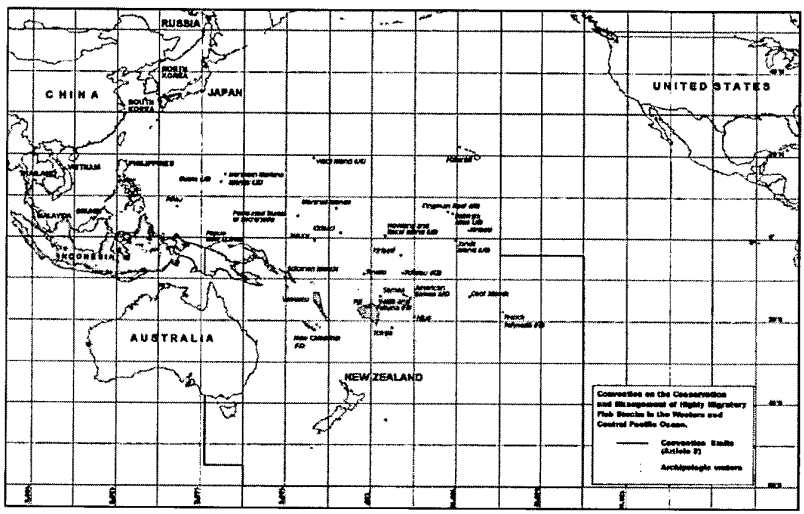
are to flourish. Theirs is not a private harm best left to an aggrieved party seeking private relief. It is a collective harm that the sovereign is well-suited to litigate.

EXHIBIT I: CURRENT AMERICAN SAMOA LARGE VESSEL PROHIBITED AREAS AND PROPOSED EXEMPTION AREAS[297]



297. The bold line indicates the boundary of the LVPA. The shaded areas indicate the areas where NMFS proposes to allow large U.S. vessels to fish. The smaller white boxes indicate the area where NMFS would continue to prohibit longline fishing by large vessels. *See* 80 Fed. Reg. at 51,529 (Aug. 25, 2015).

EXHIBIT II: CONVENTION ON THE CONSERVATION AND MANAGEMENT OF HIGHLY MIGRATORY FISH STOCKS IN THE WESTERN AND CENTRAL PACIFIC OCEAN[298]



298. The solid line represents the geographical limits of the Convention. *See Convention Area Map*, W. & CENT. PAC. FISHERIES COMM'N, https://www.wcpfc.int/doc/convention-area-map (last visited July 3, 2018).