No. 02-

IN THE

# Supreme Court of the United States

RICHARD ARIA, *et al.*,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether congressional enactment of the Swamp and Overflowed Lands Act of September 28, 1850 established an *in praesenti* grant to the individually affected states such that title vested in the states as of that date?

2. Whether title to swamp lands is retained by the federal government until such time as the federal government elects to issue a patent to the state?

3. Whether the Ninth Circuit Court of Appeals correctly held that this Court's line of precedent establishing and reconfirming the doctrine of "relation back" as to swamp lands has been implicitly overruled by a "trend" in the case law requiring that a patent be issued before a state's title to swamp lands becomes perfected?

## LIST OF PARTIES

The Petitioners not listed in the caption are: Thomas E. and Barbara J. Fryer, Daniel and Joyce McIntyre, James L. and Terry S. Henderson, Alora and Alvin Grudem, Donald and Margaret M. Lewis, Gail Frances Jewell, Rose Marie Burdick, Kenneth Lucas, Helmut and Kathryn Teffke, Terry Anderson (successor in interest to Sharon O'Connor), Richard and Ruth Aria, Lewis M. Cooper, Shirley J. and Brewer Johnson, Leroy Munsun, George and Charlotte Harrison, Crystal L. Giannotti and Lucinda Giannotti.

The Respondents are United States of America and Fort Mohave Indian Tribe. In addition, Robert Hall and Camille Englemann are also being served as Respondents.

## STATEMENT PURSUANT TO RULE 29.6

Petitioner Fidelity National Title Insurance Company ("Fidelity) states its corporate parent is Fidelity National Financial, Inc.; and there are no other publicly held companies that own 10% or more of Fidelity's stock.

Petitioner Mohave Valley River Enterprises, Inc. ("MVRE") states that it has no parent companies and there are no publicly held companies which own 10 percent or more of MVRE's stock.



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## OPINIONS BELOW

The Order and Amended Opinion (the "Amended Opinion") on which review is sought was entered on May 29, 2002. Prior to that, on January 28, 2002, the same panel of judges for the Ninth Circuit Court of Appeals issued its Initial Opinion ("Initial Opinion") in this matter. Both the Initial Opinion and the Amended Opinion were published and are set forth herein as Appendix A and B, respectively. The district court issued its unpublished findings of fact and conclusions of law and order on March 30, 2000. (Appendix C).

## STATEMENT OF JURISDICTION

On August 20, 2002, this Court granted Petitioners an extension of time through October 11, 2002, within which to file this Petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## APPLICABLE STATUTORY PROVISIONS

Swamp and Overflow Lands Act of 1850: 9 Stat. 519 (Appendix D).

## STATEMENT OF THE CASE

The case involves a dispute regarding ownership of approximately 130 acres of land (the "Disputed Land") located adjacent to, and on the east side of, the current alignment of the Colorado River. Amended Opinion, at 7a. More specifically, the Disputed Land is located approximately 20 miles south of Bullhead City, Arizona, within what is often referred to as the Mohave Valley.

Historically, title to the Disputed Land has been held by private persons, many of whom are parties to this lawsuit.

Indeed, the Disputed Land had been bought, sold, improved and enjoyed in a manner comparable to any other privately held real property. For more than 100 years prior to date on which the United States filed this lawsuit, the Disputed Land has been in private ownership and neither the United States nor the Fort Mohave Indian Tribe ever intimated that they might have an ownership interest in it.

Then, in 1994, for some yet unexplained reason, the United States sought to divest the private landowners of their title. The United States filed this lawsuit and sought to quiet title the Disputed Land in favor of itself as trustee for the Fort Mohave Indian Tribe ("the Tribe"). In addition, the United States sought an order of ejectment against the private individuals and entities that held record title to the Disputed Land.

All of the United States' claims were based on its assertion that the Disputed Land was formed by the gradual process of "accretion" and thus was owned by the Tribe, the entity that owned the riparian section of land located adjacent to and east of the Disputed Land.[1] Pursuant to the legal principles associated with the process of accretion, the United States contended that all record titles were invalid and that it (on behalf of the Tribe) should become the "rightful" owner of the Disputed Land.

In response to the legal assault by their own government, the landowners/Petitioners sought to defend their titles to

1. "'Accretion' is the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain." Amended Opinion at 4a.



the Disputed Lands. The district court conducted a 5-day trial on the government's claims. Based upon the evidence presented at trial, the district court found that the government failed to carry its burden of proof that the Disputed Land was formed by accretion to the Tribe's upland section. In fact, the district court found that the landowners/Petitioners demonstrated that there had been an *avulsive* movement[2] of the Colorado River in 1857, which, as a matter of law, *fixed* the state boundary line in a location east of the Disputed Land. Therefore, notwithstanding any subsequent river movements or statutory enactment, title to the Disputed Land remained within the jurisdiction of the State of California. Thus, although the district court did not enter an order quieting title in them, because all of the private landowners/ Petitioners derived their titles from a California patent, the effect of its judgment is that they defeated the government/ Tribe's ownership claims.

The United States filed a timely appeal from the district court's decision. For purposes of this Petition, the United States' principal argument on appeal[3] was that the district court erred in considering the effect of Colorado River movements which occurred before the date patents with respect to the Disputed Land were issued by the federal government. After briefing and oral argument, on January 28,

2. An "avulsive movement" of a river "occurs when a river abandons its old course and adopts a new one 'suddenly or in such a manner as to destroy the identity of the land between the old and new channels.'" Amended Opinion at 5a, *citing State v. Jacobs*, 380 P.2d 998, 1001 (Ariz. 1963).

3. In addition to the issue addressed in this Petition, the United States raised another issue relative to jurisdiction. That issue has been resolved and is not an element of this Petition.

2002, the assigned Ninth Circuit panel issued its Initial Opinion, reversing and remanding the judgment entered by the district court. The basis for that holding was the Ninth Circuit's conclusion that the "relation-back" principle adopted by this Court in cases dating back to 1876 had been implicitly overruled by more recent Supreme Court precedents. Initial Opinion, at 20a-21a. Petitioners filed a Petition for Rehearing, bringing to the Ninth Circuit Court's attention serious flaws in its reasoning. Without further briefing or argument, the same Ninth Circuit panel, on May 29, 2002, issued its Amended Opinion. Although the Amended Opinion reflects a revised "discussion" of the principal issue, it did *not* alter the Court's conclusion.

If the Amended Opinion is allowed to stand, the Petitioners face another expensive multi-day trial in district court. In light of the fact that they have already conclusively established their ownership rights in a manner consistent with *this* Court's applicable precedent, such a result is manifestly unfair. Consequently, the landowners/Petitioners hereby seek review by this Court.

## INTRODUCTION

In order to understand the framework for the Ninth Circuit's legal analysis, it is helpful to note the context in which it is presented. While the issue is easily stated, the factual and legal underpinnings illuminate the discussion.

In September of 1850, California became a state. As a result, a boundary line was created along the centerline of the Colorado River, dividing the new State of California from the then-existing New Mexico-Arizona territory to the east. Simultaneously, pursuant to the so-called Equal Footing



Doctrine, California became the owner of all the land underlying the west half of the "navigable" Colorado River. *United States v. Utah*, 283 U.S. 64 (1931).

Later in the same month of September 1850, the United States Congress passed the Swamp and Overflowed Lands Act (the "Swamp Act"), 9 Stat. 519 (1850), codified at 43 U.S.C. § 982. By its terms, the Swamp Act granted to the State of California title to *all* swamp and overflowed lands within the State. As of that date, the Disputed Land was located within California and was later (pursuant to federal government survey) designated as swamp and overflowed lands. Thus, by act of Congress (i.e., the Swamp Act) as of September 28, 1850, title to the Disputed Land was conveyed to the State of California. Although the record does not contain specific dates, the evidence is undisputed that the State of California later conveyed title to the Disputed Land to various private persons and/or entities.

Given the foregoing, the government had to concede that the chain of title to the Disputed Land derived from California's ownership, as a matter of law. Because the landowners/Petitioners obtained their titles pursuant to that chain, they should be the rightful owners of the Disputed Land, absent some intervening event that would invalidate their titles.

In filing the instant lawsuit, the United States claimed it had identified such an intervening event. Specifically, the United States claimed that the Disputed Land had been eroded away and thereafter reformed by the process of accretion on the Arizona side of the Colorado River. Accordingly, the United States contended, pursuant to the law applicable to the processes of accretion and avulsion, that title to this

reformed land was now vested in the owner of the adjacent Arizona riparian section – the Tribe.

This matter was tried in the district court in September 1997. After a 5-day trial and extensive briefing, the district court issued its Findings of Fact and Conclusions of Law on March 31, 2000. Based upon the evidence submitted at trial, the district court found that an 1857 avulsive event occurred in the Colorado River in the reach within which the Disputed Land is located. The district court properly recognized, as a matter of law, that avulsion would "forever fix" land titles to properties in the area according to the pre-avulsion boundaries. Because those landowners derived their titles to the Disputed Land from the State of California, title should remain with that State (and, later, its successors, the Landowners/Petitioners). That is precisely what the district court held. Amended Opinion at 5a.

On appeal, the United States contended that, because patents to the subject Disputed Land were not issued by the federal government until 1905, any and all pre-1905 movements of the Colorado River were irrelevant for purposes of determining the subsequent ownership of those properties. In other words, despite conceding that the Disputed Land was designated as swampland and that title to such lands was "hereby granted" by the United States Congress as of September 28, 1850, the United States contended that those first 55 years of ownership should be ignored. Notwithstanding the prior holdings of this Court, the government sought to avoid the legal affect of the 1857 avulsion (an event that would conclusively invalidate the United States' ownership claims) by arguing that California's title to the Disputed Land did not "relate back." As explained further below, the Ninth Circuit Court endorsed that argument.



## REASONS FOR GRANTING THE PETITION

### A. The Ninth Circuit's Erroneous Application and Selective Use of This Court's Precedent Requires This Court's Intervention.

As noted, the Ninth Circuit's Initial Opinion and Amended Opinion both set forth its conclusion that the river movement analysis necessary to determine title to the Disputed Land "should have commenced with the patent date (1905), not with pre-1905 avulsive river movements." Initial Opinion at 22a; Amended Opinion at 10a. As support for that conclusion, the Ninth Circuit relied upon five (5) carefully selected United States Supreme Court opinions issued between 1897 and 1938.[4] In essence, the Ninth Circuit interpreted that precedent to "make clear that in order to perfect legal title to swamp and overflowed lands, those lands had to be identified and patented." Amended Opinion at 8a. As explained below, the Ninth Circuit misapplied this Court's opinions.

In its Initial Opinion, the Ninth Circuit observed what it termed a "trend in the case law shift[ing] toward an understanding that in order to perfect the legal title to swamp and overflowed lands, those lands had to be identified and patented." Initial Opinion at 20a-21a. As support for that observation, the Court cited *United States v. O'Donnell*, 303 U.S. 501 (1938), *Joanna Little v. J. J. Williams*,

4. Interestingly, and perhaps revelatory, although it cited them in its Initial Opinion, in its Amended Opinion, the Ninth Circuit omitted any reference to three earlier Supreme Court opinions, each of which undercut its conclusion that the patent date is the starting point for the river movement analysis. Each of these opinions is addressed in the text of this Petition.

231 U.S. 335 (1913), *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), *Brown v. Hitchcock*, 173 U.S. 473 (1899) and *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897). In purporting to follow these Supreme Court holdings, the Ninth Circuit held that earlier rulings of this Court in *Wright v. Roseberry*, 121 U.S. 488 (1887), and other related swamp lands opinions were implicitly overruled. *See Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U.S. 559 (1896); *French v. Fyan*, 93 U.S. 169, 170 (1876). Because *Wright* plainly held that titles to properties designated under the Swamp Act "related back" to the date of the Act, the Ninth Circuit did not even attempt to reconcile that opinion with its "delayed conveyance" approach.

Upon close examination, however, it is clear that the cases cited by the Ninth Circuit do not establish or support the development of any "trend" toward abrogating the "relation back" doctrine. To the contrary, aside from carefully excerpted snippets and dicta, those opinions do not address the issue presented here, *i.e.*, whether sufficient title to swamp lands vests as of the date of the Swamp Act so as to require application of the accretion/avulsion analysis beginning on that date.

*United States v. O'Donnell*, 303 U.S. 501 (1938), is illustrative. *O'Donnell* addresses the narrow question of whether retained Mexican property rights are superior to title granted pursuant to the Swamp Act. It does not support the notion that Swamp Act rights are delayed or held in abeyance pending issuance of a patent. In fact, the analysis in *O'Donnell* assumes that Swamp Act titles are valid as of September 28, 1850, and then examines whether titles established by Mexican law *prior* to the Swamp Act take precedence. If it has any bearing on the issues before this



Court, a fair reading of *O'Donnell* supports perfection of title as of the date of the Swamp Act.

Similarly, in *Little v. Williams*, 231 U.S. 335 (1913), this Court addressed the question of whether a settlement between the State of Arkansas and the United States, which had been approved by the State legislature and Congress, could limit the amount of land to which the State was entitled pursuant to the Swamp Act. Without a great deal of apparent debate, the Court answered that question in the affirmative. *Id.* at 340. Nothing in that opinion, however, rejects, modifies or invalidates this Court's holding in *Wright v. Roseberry*, 121 U.S. 488 (1887), that the Swamp Act effected a *present grant* of title to those lands subsequently designated.

Turning next to *Niles v. Cedar Point Club*, 175 U.S. 300 (1899), we find an opinion addressing a question regarding the proper scope of a riparian meander line survey. Only at the very end of the opinion does the Court even mention the Swamp Act. Its reference there is clearly dicta as it acknowledges that "[w]hatever claims the State of Ohio may have (pursuant to the Swamp Act) cannot be litigated in this suit." *Id.* at 309. Because the State of Ohio was not a party to that lawsuit, the Court could not address any claims regarding the scope of its Swamp Act ownership. *Id.* Obviously, that opinion cannot be fairly construed to overrule *Wright*.

The last two United States Supreme Court cases cited in the Amended Opinion, *Brown v. Hitchcock*, 173 U.S. 473 (1899) and *Michigan Land & Lumber Co. v. Rust*, 168 U.S. 589 (1897), are equally unsupportive of a purported "trend" toward patent issuance as the definitive title vesting date. *Brown* dealt with whether judicial intervention may be obtained prior to a final administrative determination by the

Secretary of the Interior regarding selection of swamplands. As would be expected, the *Brown* Court concluded that the courts cannot intervene prior to a final administrative decision. 173 U.S. at 477-78. Nothing in that opinion addressed the issue of whether title related back to the enactment of the Swamp Act.

Although based on somewhat different factual circumstances, *Rust* is, in essence, another case dealing with the appropriate time for exercise of judicial power. Fundamentally, *Rust* confirms only that the Secretary of Interior retains Swamp Lands Act selection jurisdiction until he finishes the process. Then, but not before, the courts are available to contest the Secretary's decision. 168 U.S. at 598. Nothing in this opinion indicates that river movement events occurring between September 1850 and the date of the final decision by the Secretary are to be disregarded for purposes of determining ownership of the property under the Secretary's jurisdiction.

Finally, the Ninth Circuit Court cited its earlier opinion in *United States v. 62.57 Acres of Land in Yuma County, Arizona*, 449 F.2d 5 (9th Cir. 1971), in support of its holding that the patent date is controlling "for determining a river's position and that the doctrine of relation back did not apply." Initial Opinion at 22a. First, it is essential to recognize that the *62.57 Acres of Land in Yuma County* case did not deal with swamp and overflowed lands. Although the lands involved were riparian, none of the competing ownership claims were based upon the lands having been designated as subject to the Swamp Act. Thus, the *62.57 Acres* opinion has no precedential effect with regard to the lands at issue here.



As to the former principle concerning the patent date as controlling for river movement analysis purposes, the Ninth Circuit Court appears to have erred by seeking to apply the rule beyond its appropriate context. While that rule may apply under the facts of the *62.57 Acre* case, it does not – and cannot – apply when the case involves swamp lands. In the latter case, the relation back doctrine is far more than "a fiction of law adopted by the courts solely for the purpose of justice." 449 F.2d at 6. Indeed, as to swamplands, the relation back doctrine was expressly established by statute and recognized by this Court in a consistent line of decisions. As such, the courts not only may employ the doctrine to achieve justice, they *must* follow the doctrine to enforce the law. Anything else is judicial error.[5]

Finally, even if the *62.57 Acres* holding did apply to swamp lands (which it does not) and even if the *62.57 Acres* court was correct in concluding that the doctrine of relation back did not apply, the Ninth Circuit's opinion in that case cannot supersede this Court's long-established rule to the contrary. When contrary to the pronouncements of *this* Court, the Ninth Circuit precedent is of no material import.

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5. In its Amended Opinion, the Ninth Circuit Court deleted the phrase "and the doctrine of relation back did not apply." Amended Opinion at 12a. It appears that this deletion was motivated by the Court's recognition that the *62.57 Acres* case, because it did not involve swamp lands, did not involve an *in praesenti* conveyance and thus *could not* have given rise to the doctrine of relation back. If so, the Court's deletion of the phrase did not correct its erroneous application of the "patent dates" principle to this case – a case that *does* involve swamp lands.

### B. Review Should Be Granted Because the Ninth Circuit Court of Appeals Has Issued an Amended Opinion Setting Forth Its Decision on an Important Question of Federal Law that Conflicts with Relevant Decisions of this Court.

This Petition seeks reaffirmation of a principle first articulated by this Court more than 125 years ago. Beginning at least as early as 1876, this Court has uniformly held that:

> the swamp-lands act was a grant *in praesenti*, by which the *title to those lands passed at once to the State in which they lay*, except as to States admitted to the Union after its passage. *The patent, therefore*, which is the evidence that the lands contained in it had been identified as swamp-lands under the act, *relates back and gives certainty to the title [as of] of the date of the grant.*

*French v. Fyan*, 93 U.S. 169, 170 (1876) (sic). That language is neither equivocal nor ambiguous. It plainly confirms that: (1) *title* to swamp-lands *passed to the individual affected states "at once"*; and (2) the patent to those lands, when issued, "relates back" to the date of the grant and "gives certainty to the title." In other words, with regard to swamp lands, the patent does *not* serve the typical function as the functional equivalent of a deed. Rather, the patent is merely "evidence" of the identification of the lands conveyed and "declaratory" of the title previously conveyed. *Wright v. Roseberry*, 121 U.S. 488, 500 (1887).

Contrary to the conclusion reached by the Ninth Circuit, these principles of law have never been altered by this Court. In fact, although *Wright v. Roseberry* is often cited as the



seminal Supreme Court case with regard to passage of title to swamp lands, its progeny uniformly endorse its principles.

For example, proceeding from a historic chronological framework, in *Rogers Locomotive Machine Works v. American Emigrant Company*, 164 U.S. 559 (1896), this Court (citing *Wright v. Roseberry* and others) reaffirmed the "relation back" doctrine which provides that, even though the lands may be identified years after the 1850 Act, title to swamp lands becomes "perfect as of the date of the granting act." *Id.* at 570. This doctrine remains the fundamental legal principle upon which swamp land title disputes are to be analyzed. *See Little v. Williams*, 231 U.S. 335 (1913) (the act of 1850 was *in praesenti* such that, when identified, title to the (swamp lands) becomes perfect as of the date of the act).

If this doctrine of relation back is to have any legal significance, it must be applied to this case. As this Court has uniformly recognized, Congress clearly intended that the states were to be given *immediate* title to swamp and overflowed lands. When it enacted the Swamp Act, Congress openly acknowledged that specific identification of those lands to be designated as swamplands would take some time. Nonetheless, Congress plainly expressed its intention to effectuate passage of title as of September 28, 1850, regardless of the date of identification. Congressional intent will be thwarted in this case unless the date of enactment of the Swamp Act is deemed the starting point for analysis. If the Ninth Circuit's Amended Opinion is permitted to stand, there is a 55-year period during which the State of California's title is of no force or affect. Manifestly, that is contrary to the expressed will of Congress and contravenes the principles this Court has uniformly and repeatedly endorsed and confirmed.

### C. Review is Warranted Because the Rules Applicable to the Disposition of this Case Affect Property Titles Along Many Major Watercourses and Within Many Different States.

Undoubtedly, this Court annually receives thousands of Petitions for Writs of Certiorari, each of which argues that its particular case is of monumental import and national significance. Certainly, the landowners/Petitioners here hold similar beliefs with regard to the importance of their Petition. Although this case directly impacts title to a relatively small (130 acre) parcel of land located on the banks of the Colorado River, the ownership of thousands of parcels of riparian land located within the jurisdiction of the Ninth Circuit Court of Appeals will be subject to a novel and incorrect application of the Swamp Act. There is no cogent rationale or legal basis for allowing that to occur.

For more than 150 years, this Court has interpreted the Swamp Act to be an *in praesenti* grant of title to the affected lands. Now, after indicating in its Initial Opinion that it observed a "trend" in the Supreme Court opinions toward a different interpretation, and then retracting that observation in its Amended Opinion, the Ninth Circuit Court has effectively overridden this Court's line of precedent. With all due respect, the Ninth Circuit misperceived the existence of a "trend" to abandon the relation-back application of the Swamp Act.

As for the scope of the significance of this case, a review of this Court's prior Swamp Act opinions reveals the geographical expanse of the Act's application. This Court has decided cases involving disputes regarding ownership of swamp and overflowed lands located in states as far north



as Minnesota and Michigan, to states as far south as Arkansas; from states as far east as Ohio, to states on the west coast (including, without limitation, California and Oregon). Congress expressly granted ownership to swamp and overflowed lands to states throughout the country. Although the Ninth Circuit's opinion here is arguably not applicable outside the circuit, if allowed to stand it has the potential for starting a "trend" among the circuits in direct conflict with this Court's long-standing interpretation of the Swamp Act.

## CONCLUSION

This case presents this Court with an opportunity to correct a clear error by the Ninth Circuit before it adversely impacts other similarly situated landowners. Although, admittedly, such an opportunity may not be rare, it nevertheless is significant. In this case, the federal government is utilizing its resources in an effort to take property from private citizens who have purchased and utilized it as their own for almost 100 years. Until the Ninth Circuit "re-wrote" the Swamp Act and this Court's precedents with respect thereto, there was no legal or factual support for the government's claims. Without this Court's intervention, the Petitioners are faced with yet another lengthy and expensive trial in order to seek reaffirmation of their titles by the district court. Such a result is unwarranted and unfair. All that need be done to end this lawsuit is this Court's issuance of a Writ of Certiorari and reaffirmation of its long-standing principles regarding the *in praesenti* nature of the conveyance of swamp and overflowed lands. Petitioners, therefore, respectfully request that the Court exercise its discretion to grant the instant Petition.

Respectively submitted,

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## APPENDIX