HARALSON, MILLER, PITT, FELDMAN & McANALLY, P.L.C.
José de Jesus Rivera, SBN 4606
jrivera@hmpmlaw.com
Peter T. Limperis, SBN 19175
plimperis@hmpmlaw.com
2800 N. Central Avenue, Ste. 840
Phoenix, AZ 85012
Phone: (602) 266-5557 Fax: (602) 266-2223

HOGAN LOVELLS US LLP
Audrey E. Moog*
audrey.moog@hoganlovells.com
Dominic F. Perella*
dominic.perella@hoganlovells.com
555 Thirteenth Street, NW
Washington, DC 20004
Phone: (202) 637-5600 Fax: (202) 637-5910

Attorneys for Defendant City of Glendale

Thomas C. Horne, Attorney General, SBN 14000
Michael Tryon, SBN 3109
Michael.Tryon@azag.gov
Evan Hiller, SBN 28214
Evan.Hiller@azag.gov
1275 West Washington Street
Phoenix, AZ 85007-2926
Phone: (602) 542-8355 Fax: (602) 364-2214

Attorneys for Defendant State of Arizona

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE TOHONO O'ODHAM NATION,

Plaintiff,

v.

THE CITY OF GLENDALE and THE STATE OF ARIZONA,

Defendants.

Case No. 2:11-cv-279-NVW

DEFENDANTS' CONSOLIDATED OPPOSITION TO THE TOHONO O'ODHAM NATION'S MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CASES CONTINUED

CASES CONTINUED

CONSTITUTIONAL PROVISIONS

STATUTES

LEGISLATIVE MATERIALS

REGULATIONS

RULES

OTHER AUTHORITIES

Defendants oppose the Tohono O'odham Nation's ("Nation") motion for summary judgment and cross-move for summary judgment pursuant to Fed. R. Civ. P. 56.

INTRODUCTION

The Nation's summary judgment motion reveals a plaintiff more interested in telling a provocative story than in advancing cognizable legal arguments. According to the Nation, Glendale and Arizona panicked when they recognized that the Department of the Interior ("Interior") planned to accept the trust acquisition of Parcel 2, so Arizona "manipulat[ed] state law" by enacting H.B. 2534, a statute that "openly seeks to thwart congressional aims[.]" Nation Mot. for Summ. J. ("Mot.") 1-2. The Nation claims to be the sole target of H.B. 2534 and insists that the legislation "has no realistic probability of broader future application" and that it is merely an "attempt to disenfranchise a single Indian tribe." Id. at 3. Worst of all, says the Nation, H.B. 2534 is a blatant attempt by a state to "nullify" federal law by "add[ing] an additional requirement to the criteria" for trust acquisition specified in the Gila Bend Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986). Mot. 16.

This story—provocative as it is—bears no resemblance to reality. In fact, the process that led to H.B. 2534 was prompted by the Nation's bad faith: The Nation used a shell corporation to buy Parcel 2 and neighboring acreage and held the land in secret for years while the City carried out substantial development in the area and a new high school went up literally across the street. Only then did it announce that it was going to turn this urban land into the state's largest casino—to the shock of Glendale and Arizona. The Nation's exercise in deception alerted the state legislature to a serious and continuing risk for the state's municipalities. Indian tribes and others could surreptitiously buy land

in cities, transfer the land to the federal government, and create pockets of land over which neither state nor local government would have much, if any, control. That is a deeply troubling prospect for municipalities in populous counties, which plan their future growth in exacting detail and count on having sufficient control—through planning authority, zoning controls, and the like—over how the community develops.

And so the legislature gave cities and towns a new protection: Under H.B. 2534, when a landowner asks the federal government to take ownership or trust control of land surrounded (or bordered on three sides) by a municipality, the municipality may annex that land by majority vote of its governing body. H.B. 2534(1). This new protection applies to the municipalities that need it most—those in populous counties where annexation and land use concerns are particularly acute. See infra at 23-25. Importantly, H.B. 2534 does not take the property away from the landowner or stop him from developing his land. But, in Governor Brewer's words, it does "assure[ ] that local officials will continue to have a say in local development matters that affect their community." Mot., Ex. 10. As discussed below, annexation would in some circumstances make land ineligible for federal acquisition; in others, it would ensure that the city has the right to participate in the federal government's deliberations regarding the acquisition or use of the land. See infra at 22-23. Those are completely legitimate legislative aims.

The Nation, however, opposes H.B. 2534, because if Glendale were to use the new law to annex Parcel 2, it would imperil the Nation's plan to foist its casino on an unwelcoming City. The Nation thus paints H.B. 2534 as an "unapologetic[ ]" attempt to manipulate state law, negate federal law, and target the Nation to the exclusion of all

others. Mot. 3. But H.B. 2534 is none of these things:

- H.B. 2534 does not "manipulate" state law, Mot.1, 7, 9, any more than any other duly enacted change to the state code "manipulates" state law. H.B. 2534 was considered and voted upon by House and Senate committees; the Nation's representatives testified; the legislation was debated on the floor; and it was approved by a legislative majority and signed by the Governor. The process was perfectly appropriate, and the Nation never alleges the contrary.
- H.B. 2534 does not "nullify" the Gila Bend Act or "thwart congressional aims." On the contrary, it works quite properly within the bounds of federal law: Interior looks to state legal classifications to determine whether property is outside "corporate limits" and thus eligible for trust acquisition.[1] Gila Bend Act § 6(d). H.B. 2534 merely gives municipalities an additional procedure to define the relevant classifications in certain circumstances. If that constitutes an attempt to "nullify" the Gila Bend Act, then so does the entire corpus of Arizona annexation law.
- H.B. 2534 is not "target[ed]" at the Nation, Mot. 25, and it is false to say that the law has no reasonable possibility of future application. The legislature correctly recognized that other Indian tribes, and other property owners, could wreak havoc on municipal land use and planning in the manner attempted by the Nation. H.B.

[1] The Nation and the federal government interpret "within the corporate limits" to refer to the incorporated land of a municipality. See Case No. 2:10-cv-1993, Docket No. 133 ("March 3 Order") at 11-17. Glendale and Arizona respectfully disagree and are appealing the March 3 Order to establish, inter alia, that "corporate limits" refers to the outer boundaries of a municipality. The Nation does not argue that H.B. 2534 raises preemption concerns under Defendants' interpretation. Defendants therefore limit their analysis here to the interpretation of the Act adopted by the Nation and the federal government, employing that construction solely for the sake for the sake of rebutting the

2534 will provide all citizens equal say in the character of their community by, inter alia, preventing a quasi-sovereign, governmental entity from parasitically planting itself amidst the community and eliminating all modes of objection or recourse. The Nation's "targeting" argument is a fiction. The fact that the Nation's actions toward Glendale inspired the bill does not in any way change that conclusion. Many laws are inspired by the actions of a particular bad actor. That does not make that actor the sole "target" of the law.

The Nation's characterizations, in short, are deeply misleading. Yet all of their legal arguments depend on those characterizations. The Nation can assert preemption only by identifying a state-federal "conflict" that does not exist; it can assert a due process violation only by asserting an irrational legislative "manipulation" that ignores valid reasons for the law; it can claim equal protection and special law violations only by pointing to an irrational "targeting" that has not occurred. Stripped of its rhetoric, the Nation has failed to establish any viable legal claims. Its motion for summary judgment should be denied, and Defendants' cross-motion should be granted.

ARGUMENT

I. THE NATION CANNOT ADVANCE AS-APPLIED CHALLENGES TO H.B. 2534.

At the outset, Defendants are entitled to judgment on all counts because the Nation's "as-applied" challenges to H.B. 2534 are not cognizable. The Nation makes clear, in its complaint and motion, that it "brings only an as-applied challenge." Mot. 13 n.9. But it cannot do so because H.B. 2534 has not been applied to the Nation's

---

Nation's claims. But even if the Nation were to address Defendants' interpretation, a similar argument would apply—municipal boundaries are "state legal classifications."

property—indeed, the law has not yet even taken effect. And where a statute "has not been applied to the plaintiffs' conduct, it may not be challenged as applied." Lawline v. ABA, 956 F.2d 1378, 1386 (7th Cir. 1992); accord Nordyke v. King, 319 F.3d 1185, 1189 (9th Cir. 2003) ("Nordyke challenged the law before it went into effect. Accordingly, he mounts a facial challenge[.]"); Covad Commc'ns Co. v. FCC, 450 F.3d 528, 550 (D.C. Cir. 2006) (rejecting claim that an Act "is unconstitutional as applied" where "the Act has not been applied") (emphasis in original).

To be sure, the Nation could have advanced a facial challenge to H.B. 2534, but it apparently made the strategic decision to avoid trying to prove "that no set of circumstances exists under which [H.B. 2534] would be valid." United States v. Stevens, 130 S. Ct. 1577, 1587 (2010) (citation omitted). Because it cannot advance an as-applied challenge, it has failed to state a claim.

II. THE GILA BEND ACT DOES NOT PREEMPT H.B. 2534.

The Nation argues that H.B. 2534 is preempted because it conflicts with the Gila Bend Act by placing limits on trust-eligible land above and beyond those enshrined by Congress. Mot. 13-19. This argument is a fallacy. Congress affirmatively chose to look to state-law legal classifications—namely, corporate and county limits—to define the land available for trust acquisition. See Gila Bend Act § 6(d). As a logical matter, those state-law classifications cannot conflict with the very federal law that incorporates them. Court after court has recognized as much, and the Nation fails to identify any contrary federal authority. The preemption argument should be rejected.

A. Preemption Law

1. The Nation suggests (among other things) that H.B. 2534 "seeks to nullify"

federal law and "discourage[s] conduct" federal law seeks to encourage, Mot. 14, 18, but these theories fail to confront the core legal inquiry: " '[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.' " Wyeth v. Levine, 129 S. Ct. 1187, 1194 (2009) (citation omitted). If Congress "intend[ed] the [federal law] to preempt [state law]," state law is preempted; if Congress did not so intend, state law retains its full effect. Kroske v. U.S. Bank Corp., 432 F.3d 976, 981 (9th Cir. 2005).

Preemption comes in three well-recognized classes—express, field, and conflict—but the Nation relies only on conflict preemption. Conflict preemption arises when "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 712-13 (1985) (quotations & citations omitted).

2. Federal courts start with the presumption that state law is not preempted. As the Supreme Court recently explained: "[I]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." Wyeth, 129 S. Ct. at 1194-95 (quotations omitted; alteration & omissions in original). To defeat that presumption is a "considerable burden," De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997): The plaintiff must show that Congress has "made clear its desire for pre-emption." Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 151 (2001).

The Nation seeks to skirt this substantial burden by offering two reasons why "the

usual presumption against preemption" purportedly "has no application here." Mot. 14 n.10. The Nation first quotes White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980), for the proposition that it is "generally unhelpful" to apply the usual "standards of pre-emption" to cases involving Indian law. Mot. 14 n.10. The Nation's argument here is disingenuous at best because throughout the rest of its paper it asks this Court to apply the usual "standards of pre-emption," rather than the balancing test developed in White Mountain. In any event, White Mountain addresses whether and when state law applies on Indian reservations and has no bearing on the issues in this proceeding. See 448 U.S. at 142 ("[T]here is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."); see generally id. at 141-45. Cases following White Mountain make clear that the White Mountain balancing test applies in lieu of preemption analysis only in that limited context—when a state tries to "exercise its authority over tribal members or reservation activities." Ramah Navajo Sch. Bd. Inc. v. Bureau of Revenue, 458 U.S. 832, 837 (1982); accord Barona Band of Mission Indians v. Yee, 528 F.3d 1184, 1188-89 (9th Cir. 2008). White Mountain is inapposite.

Second, the Nation quotes United States v. Locke, 529 U.S. 89, 108 (2000), for the proposition that the presumption does not apply "when the State regulates in an area where there has been a significant history of federal presence." Mot. 14 n.10. But Locke was limited by Wyeth, which states that "[i]n all pre-emption cases" involving a state's exercise of police powers, the presumption applies. 129 S. Ct. at 1194. Every court to consider the import of Wyeth—including the Ninth Circuit—has interpreted it to mean that the presumption applies where the state is exercising its police powers, even if those

powers touch a federally-regulated sphere. In Pacific Merchant Shipping Ass'n v. Goldstene, ___ F.3d ___, No. 09-17765, 2011 WL 1108201 (9th Cir. Mar. 28, 2011), for example, the Ninth Circuit rejected a Locke argument and found the presumption applicable, even though the challenged state law touched federally regulated maritime commerce, because the law "ultimately implicate[s] the . . . control of air pollution"—an area of historic state regulation. Id. at *10. Just so here. H.B. 2534 bears on local land annexation, an area of historic state regulation if ever there was one. See Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988). The presumption against preemption applies.

B. Federal Statutes That Define Their Parameters By Looking To State Law Have No Preemptive Effect

1. The question, then, is whether the Nation can carry the "considerable" burden, DeBuono, 520 U.S. at 814, to show that Congress "clear[ly]" intended that H.B. 2534 should be preempted. Wyeth, 129 S. Ct. at 1194. The Nation cannot do so, and could not even absent the presumption, for the simple reason that Congress made trust eligibility turn on a classification determined under state law—whether land is "within the corporate limits of a city or town." Gila Bend Act § 6(d). Congress indicated no intent to dictate how corporate limits are fixed or how they can be changed. It left those determinations where they have always been: in the hands of state government.

This feature of the Gila Bend Act is dispositive of the Nation's claim. That is so because despite all the labels the Nation attaches to its various preemption arguments, Mot. 14-19, the "touchstone" of preemption analysis is congressional purpose. Wyeth, 129 S. Ct. at 1194. And here Congress's purpose was "to provide suitable alternative

lands and economic opportunity for the tribe," H.R. Rep. 99-851 at 9, within the geographical parameters Congress chose. Congress did not seek to give the Nation complete discretion in choosing land; nor did it intend to freeze the legal status of land once the Nation set its sights on a parcel. There is no sign in the text or history of the Gila Bend Act, much less a "clear" sign, Wyeth, 129 S. Ct. at 1194, that Congress intended either of these outcomes. Because Congress affirmatively chose to have the eligibility of particular parcels turn on mutable state-law classifications, H.B. 2534 is by definition fully consistent with the Gila Bend Act.[2]

Rather than acknowledge as much, the Nation contends that H.B. 2534 somehow changes the Gila Bend Act. The Nation argues, for instance, that H.B. 2534 "would effectively add an additional requirement" to the Act, modifying it so that "[l]and outside a city's corporate limits but 'surrounded by a city or bordered by a city on at least three sides' could not be taken into trust . . . over the city's objection." Mot. 16 (alterations & ellipses deleted). That is wrong. H.B. 2534 provides a procedure for land annexation. And once annexed, land plainly is not "surrounded by a city or bordered by a city on three sides," Mot. 16; it is indisputably "within the corporate limits" of the city. Gila Bend Act § 6(d). That is exactly the test Congress chose to determine whether land is eligible for trust acquisition. The Nation also argues that H.B. 2534 "block[s] the Nation from exercising its federal right . . . to have its land taken into trust." Mot. 3. But the Nation has no abstract right to have all of its land taken into trust; it instead has a right to have eligible land taken into trust—and whether land is eligible turns on whether it is

[2] Obviously, Congress knew that whether a parcel is within "corporate limits" could change as boundaries expand. Indeed, that could happen in this case without H.B. 2534: Under existing law, Glendale could annex Parcel 2 so long as it was part of a larger annexation and the majority of landowners approved. Ariz. Rev. Stat. § 9-471(A).

within the corporate limits. H.B. 2534 does not deprive the Nation of a right it would otherwise have under federal law; there is no conflict.

2. The case law only underscores the failure of the Nation's preemption argument. The courts have long recognized that "[t]here are. . . instances in which the application of certain federal statutes may depend on state law," NLRB v. Natural Gas Util. Dist. of Hawkins County, 402 U.S. 600, 603 (1971), and that when federal statutes are structured in this way, their intent is to let the state law operate. See United States v. Craft, 535 U.S. 274, 278 (2002). In the preemption context specifically, the courts regularly hold that that when a federal statute refers to or incorporates state law, variation in that state law cannot create a preemption problem. In Reconstruction Finance Corp. v. Beaver County, 328 U.S. 204 (1946), for example, the Supreme Court confronted a federal statute that exempted a governmental corporation from most taxes but subjected it to state real property taxes "to the same extent . . . as other real property is taxed." Id. at 206. The question was whether a Pennsylvania law that defined machinery and other personalty as "real property" for tax purposes conflicted with the federal statute. Id. The Supreme Court answered in the negative. It held that "[t]he fact that Congress subjected [the corporation] to local taxes 'to the same extent according to its value as other real property is taxed' indicated an intent to integrate Congressional permission to tax with established local tax assessment and collection machinery." Id. at 210 (emphasis added). By "subject[ing]" the corporation to local taxation rules, Congress signaled its intent to expose the corporation to "variable tax consequences." Id. at 209. Other cases are to the same effect. See, e.g., Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1171-72 (11th Cir. 2008) (finding that the federal law "dynamically incorporates state law

requirements" and that state law is therefore no obstacle to federal objectives); Power v. Arlington Hospital Ass'n, 42 F.3d 851, 864 (4th Cir. 1994) ("[P]reemption analysis is inappropriate when . . . a federal statute expressly incorporates state law.").

Just so here. The Gila Bend Act "expressly incorporate[d]," Power,42 F.3d at 864, a state-law concept—the location of corporate limits—and made the trust eligibility of property turn on that state classification. It is illogical to suggest that the federal law can somehow preempt the state law it has chosen to adopt as a referent.

C. The Nation's Contrary Arguments Are Without Merit

Ignoring Congress's choice to incorporate criteria determined by state law, the Nation advances three separate conflict-preemption arguments. None has merit.

1. The "Nullification" Argument. First, the Nation argues that H.B. 2534 is preempted because it "seeks to nullify the implementation" of the Gila Bend Act. Mot. 14. This does not amount to a cognizable preemption claim. Conflict preemption occurs when compliance with both federal and state law is impossible or when state law stands as an obstacle to Congress's objectives. Hillsborough Cnty., 471 U.S. at 713. What the state legislature "seeks" to do is irrelevant, as the Nation's own authority makes clear. See Perez v. Campbell, 402 U.S. 637, 651-52 (1971) (rejecting notion that state legislature's intentions were relevant to the question whether state law "frustrate[d] the operation of federal law").[3] In any event, H.B. 2534 does not nullify the Gila Bend Act

[3] The Nation appears to advance its "bad intent" theory primarily as a justification for trotting out what it views as harmful quotes from Arizona legislators. See Mot. 15. But those quotes are less telling than the Nation seems to think. Many of the "states' rights" statements are references to constitutional claims that have been advanced in litigation, not to a desire to "nullify" federal law. And the statement claiming the right to "clarify" how the Gila Bend Act operates with respect to particular land is actually quite proper. After all, whether property is eligible for Gila Bend Act acquisition does turn on matters of state law. This, then, is the unusual case where a federal law's scope in a particular application "depends upon state law." Craft, 535 U.S. at 278.

(or "seek" to do so). As explained above, after H.B. 2534 takes effect, the Act will operate as it always has, and as Congress intended: Land outside corporate limits will be eligible for trust acquisition; land within corporate limits will not.

2. The "Prevent Actions Authorized By The Act" Argument. The Nation next argues that H.B. 2534 conflicts with federal law because it "would allow Glendale to prevent the Nation and the Secretary from taking actions specifically authorized" by the Gila Bend Act. Mot. 16. That is simply not so. Under the Nation's interpretation of the Gila Bend Act, if Glendale were to annex Parcel 2, the land would be within the corporate limits of the city. Thus the Secretary would not be "specifically authorized" to take the land into trust—quite the contrary.

As with all of the Nation's preemption arguments, this one assumes that the Nation somehow acquired a vested right, once it bought a piece of land, in that land's existing jurisdictional classification. But the Nation points to not a shred of evidence that Congress intended as much—nor can it. The Gila Bend Act looks to state-law classifications of land to determine trust eligibility; it does not displace or freeze them. H.B. 2534 thus does not "impair . . . the exercise of a power that Congress explicitly granted." Id. (quoting Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 33 (1996)). The power Congress "explicitly granted" was to hold in trust land lying outside of corporate limits. Congress left to state law the question of where those limits lie.[4]

The Nation relatedly argues that to the extent H.B. 2534 would allow Glendale to stop trust acquisition, it "upsets the balance that Congress struck[.]" Id. This argument fares no better. Here is how the Nation described "the balance" Congress struck:

"[T]h[e] [statutory] language excludes only land that has actually been incorporated by a city or town." Mot. 17 (emphasis added). But once land is annexed by a city, it has been "incorporated by a city or town." H.B. 2534 respects the balance struck by Congress, even under the Nation's own formulation.

The Nation cites Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989), to support its "balance" argument. In Bonito Boats, Florida provided what was essentially state patent protection to craftsmen whose inventions fell outside the federal patent laws. The Supreme Court recognized that the Florida law rendered eligible for protection inventions that Congress had decided should be ineligible. 489 U.S. at 150-51. The state law therefore conflicted with the federal statute. Id. Here, by contrast, Congress looked to state law to determine what land should be eligible. That glaring difference explains exactly why the conflict found in Bonito Boats is absent here.

3. The "Discriminatory Burdens" Argument. Finally, the Nation argues that H.B. 2534 is preempted because it "imposes discriminatory burdens on the exercise of a federal right." Mot. 18. As an initial matter, this, too, is not a cognizable stand-alone preemption theory; it is just another species of the Nation's obstacle-preemption argument. See City of Morgan City v. S. La. Elec. Coop. Ass'n, 31 F.3d 319, 322 (5th Cir. 1994). It thus fails for the reasons already discussed. To advance this argument the Nation must—once again—mischaracterize the "federal right" at issue. The Gila Bend Act does not give the Nation the unfettered right to have land taken into trust. Instead, it gives the Nation the right to have eligible land taken into trust. Any increase (or

[4] Barnett and the Nation's other authorities are classic conflict-preemption cases. In Barnett, federal law authorized banks to sell insurance, and state law forbade them to do so. 517 U.S. at 31-32. That is a square conflict. Nothing similar is present here.

decrease) in the land within a municipality's "corporate limits" accordingly does not discriminate against the federal right.

III. H.B. 2534 DOES NOT VIOLATE DUE PROCESS.

The Nation argues that H.B. 2534 offends due process because it constitutes "retroactive" legislation. Mot. 19. This argument is fatally flawed several times over. First, H.B. 2534 does not "deprive" the Nation of any "property." U.S. Const. amend. XIV, § 1. Second, to the extent the Nation intends to raise a procedural due process claim (it never specifies whether its claim is procedural or substantive), it fails because the legislature afforded the bill its usual process. Finally, to the extent the argument is based on substantive due process, it fails because (a) H.B. 2534 is not retroactive and (b) in any event the legislation easily clears the low hurdle of rational-basis review.[5]

A. H.B. 2534 Does Not Deprive The Nation Of A Property Interest

"The first step in both due process and taking analyses is to determine whether there is a property right that is protected by the Constitution." Peterson v. U.S. Dep't of Interior, 899 F.2d 799, 807 (9th Cir. 1990). The Nation's claim thus fails at the outset, for it never establishes, in either its complaint or summary judgment brief, the "property interest" of which it supposedly has been deprived.

Nor could it. The enactment of H.B. 2534 does not take Parcel 2 away from the Nation. It does not impair the Nation's ownership rights. It does not block the Nation from developing the land. Indeed, even the annexation of Parcel 2 would have none of these effects; all it would do is move the land from Maricopa County's general

[5] The Nation raises its claim under the U.S. and state constitutions. It says the analysis is the same for each, Mot. 25 n.15, but that is inaccurate. Under state law, it must prove its due process and equal protection claims beyond a reasonable doubt. See infra at 25. Because it cannot prevail under the U.S. Constitution, its state-law claims fail a fortiori.

jurisdiction to Glendale's. That would not implicate the Nation's property interests. The Nation does not have a protected interest in a Maricopa County address. See Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47 (1994) (" '[P]olitical subdivisions exist solely at the whim and behest of their State[.]' ") (citation omitted); Baldwin v. City of Winston-Salem, N.C., 710 F.2d 132, 135 (4th Cir. 1983) ("[T]he exercise by a state of the discretion accorded to it in structuring its internal political subdivisions is subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications.").

The Nation hints at a few possible property interests in its brief. It first suggests H.B. 2534 could rob it of its "reasonable, investment-backed expectations regarding the use of its property"—in other words, its casino plan. Mot. 20. That is not a protected property interest for due process purposes. See Peterson, 899 F.2d at 813 ("The Water Districts offer no authority for the proposition that a constitutionally protected property interest can be spun out of the yarn of investment-backed expectations."). The Nation next suggests that annexation pursuant to H.B. 2534 will deprive it of its "settled entitlements under federal law." Mot. 20. That is pure speculation—H.B. 2534 is not yet on the books, and there is no way to know whether the Glendale City Council will annex the parcel—but in any event annexation would not deprive the Nation of a "settled entitlement" because the Nation has no such entitlement until the land is in trust. Interior's own jurisprudence establishes as much. See Big Lagoon Park Co. v. Acting Sacramento Area Dir., 32 I.B.I.A. 309, 318 (1998) ("The signature of an authorized Departmental official on the formal document of acceptance under section 151.14 effects the transfer of legal title to the United States . . . . It is also at that point that the vested

rights . . . are created in the Indian beneficiary.") (emphasis added).

Finally, the Nation suggests that the relevant property interest is its "right . . . to vote . . . regarding the potential annexation of its land[.]" Mot. 20. But the Nation offers no authority for the proposition that the right to rely on an annexation procedure is a protectable property interest, and Defendants are not aware of any. The few relevant cases we have found suggest the opposite. See Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) ("The [S]tate . . . at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality . . . with or without the consent of the citizens, or even against their protest."), limited in other contexts as recognized in City of Herriman v. Bell, 590 F.3d 1176, 1185 (10th Cir. 2010); Kuhn v. Thompson, 304 F. Supp. 2d 1313, 1329 (M.D. Ala. 2004) ("Plaintiffs cannot establish that their rights to vote [in a state election] constitute a sufficient property interest to give rise to a Due Process claim."); Zahra v. Town of Southold, 48 F.3d 674, 681 (2d Cir. 1995) (refusing to recognize "the existence of . . . a 'property interest' in the procedures" used to consider zoning variances and other land-use benefits) (emphasis in original). The Nation has failed to allege a due process violation.

B. If The Nation Is Advancing A Procedural Due Process Claim, It Fails

To the extent the Nation intends to advance a procedural due process claim, that claim fails because H.B. 2534 was enacted pursuant to standard legislative process, including committee hearings, floor debates, and testimony from the Nation's representatives. See generally Mot., Ex. 7. That alone renders any procedural due process claim a non-starter for the Nation. See Gallo v. U.S. Dist. Ct., 349 F.3d 1169, 1181 (9th Cir. 2003) ("When the action is purely legislative, the statute satisfies due

process if the enacting body provides public notice and open hearings.").

C. Any Substantive Due Process Claim Likewise Fails

If the Nation intends a substantive due process claim, it fails for several reasons.

1. First, the Nation's argument is premised entirely on H.B. 2534's purported retroactivity, Mot. 19-24, but the legislation is not retroactive. It has purely prospective effect: It adds a new annexation procedure, beginning the day the law takes effect, and it applies to future annexation proceedings. It could hardly be less like the statutes the Supreme Court has deemed retroactive—statutes that, for example, require an employer to pay retirement benefits to former employees who worked there "some 30 to 50 years before the statute's enactment[.]" Eastern Enters. v. Apfel, 524 U.S. 498, 531 (1998).

The Nation asserts that H.B. 2534 is retroactive because it "is intended to destroy the Nation's reasonable, investment-backed expectations regarding the uses of the property [.]" Mot. 20. But even if Glendale were to annex the property—an event that has not yet occurred—that would not make the legislation retroactive. The leading case, Landgraf v. USI Film Prods., 511 U.S. 244 (1994), makes that quite clear in language that reads as if it were written for this case:

> A statute does not operate "retrospectively" merely because it . . . upsets expectations based in prior law. Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or spent his life learning to count cards.

Id. at 269 & n.24 (emphases added). As the Court observed: "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal

rules, the whole body of our law would be ossified forever." Id. at 269 n.24 (citation omitted). But that is exactly the result the Nation argues for here.

Relying on Landgraf, the courts of appeals regularly reject arguments like the one the Nation makes here. In Spoklie v. Montana, 411 F.3d 1051 (9th Cir. 2005), for example, the Ninth Circuit rejected a landowner's argument that a new state law effectively outlawing the business he conducted on his land—alternative livestock ranching—was impermissibly retroactive and caused him to lose his "vested rights" in his business. Id. at 1058. Looking to Landgraf, the Ninth Circuit rejected the claim: "[T]hese business losses . . . provide no basis for arguing that the state's abolition of formerly legal [ ] practices is impermissibly retroactive." Id.; see also Sierra Club v. EPA, 129 F.3d 137, 142-43 (D.C. Cir. 1997) (dismissing as "ridiculous" an argument—akin to the one the Nation makes here—that immediate application of a new regulation would cause retroactivity concerns because it would "seriously prejudice" localities that relied on a previous legal status).

2. The Nation chose to confine its due process argument to retroactivity; that argument's failure means the Court need go no further. But even if the Nation had advanced a cognizable argument, its claim still would fail because H.B. 2534 meets the "lenient" hurdle of rational-basis scrutiny. Costantino v. TRW, Inc., 13 F.3d 969, 976 (6th Cir. 1994).[6] "Under rational basis review, a statute will pass constitutional muster if it is 'rationally related to a legitimate state interest.' " Merrifield v. Lockyer, 547 F.3d 978, 984 n.9 (9th Cir. 2008) (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303

[6] Indeed, rational-basis scrutiny applies, and H.B. 2534 meets it, regardless of whether H.B. 2534 is retroactive. See Gadda v. State Bar of Cal., 511 F.3d 933, 938 (9th Cir. 2007) ("Retrospective economic legislation need only survive rational basis review in order to pass constitutional muster.") (citation & quotation marks omitted).

(1976)). In applying this test, the courts "merely look to see whether the government could have had a legitimate reason for acting as it did." Halverson v. Skagit Cnty., 42 F.3d 1257, 1262 (9th Cir. 1994) (citation omitted; emphasis in original). This test is extraordinarily deferential in the land-use context: "There is, of course, no federal Constitutional right to be free from changes in the land use laws. To establish a violation of . . . substantive due process, [plaintiffs] must prove that the County's actions were clearly arbitrary and unreasonable, having no substantial relation to the . . . general welfare." Dodd v. Hood River Cnty., 59 F.3d 852, 864 (9th Cir. 1995) (internal quotes & citations omitted). A due process issue arises "only where the government body could have no legitimate reason for its decision." Id. (citation omitted).

H.B. 2534 easily passes that test. The Arizona legislators had fresh in their minds a fact that Plaintiffs would like to sweep under the rug: The Nation blindsided Glendale, holding Parcel 2 in secret as it watched the City, State, and private interests invest hundreds of millions of dollars carrying out their plans for the area. Def. SOF ¶¶ 7-9. Having seen how vulnerable municipalities are to this tactic, the legislature sought to ensure that municipalities can influence local development to the maximum extent allowed within the bounds of federal law. That is a legitimate purpose. See Green v. City of Tucson, 340 F.3d 891, 903 (9th Cir. 2003) ("Arizona has a legitimate state interest . . . in protecting the interests of already existing municipalities."). Indeed, courts have recognized as much when faced with the exact question presented here—whether landowners must be given a vote before the city annexes a county island. See Kane v. City of Beaverton, 122 P.3d 137, 142 (Or. Ct. App. 2005). And the means the legislature selected were rational too. As discussed below, the disruption caused by a landowner's

desire to transfer property to another sovereign can be particularly severe in populous areas. Recognizing this fact, the legislature extended the protections of H.B. 2534 to Arizona's most populous counties. The Nation has failed to "prove that the [legislature's] actions were clearly arbitrary and unreasonable, having no substantial relation to the . . . general welfare." Dodd, 59 F.3d at 864 (internal quotes & citation omitted).

IV. H.B. 2534 DOES NOT VIOLATE EQUAL PROTECTION.

The Nation's equal protection arguments are equally unavailing on the merits.

A. The Nation Faces A Heavy Burden

As the Nation properly concedes, the merits of its equal protection claim are evaluated under rational-basis review. Mot. 24. Under this deferential standard, courts will uphold a legislative classification if it is "rationally related to a legitimate governmental purpose." Green, 340 F.3d at 896 (citation omitted). As in the due process context, equal protection rational-basis review does not require the legislature to "actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld if there is any reasonably conceivable set of facts that could provide a rational-basis for the classification." Taylor v. Rancho Santa Barbara, 206 F.3d 932, 935 (9th Cir. 2000) (quotation omitted). "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1155 (9th Cir. 2004) (quotation omitted).

"[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Id. (quotation omitted). In defending against an equal protection challenge, "the state actor has no

obligation to produce evidence to sustain the rationality of a statutory classification; rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Johnson v. Rancho Santiago Cmty. Coll. Dist., 623 F.3d 1011, 1031 (9th Cir. 2010) (quotation omitted).

B. H.B. 2534 Serves Legitimate Governmental Purposes

The Nation makes little effort to satisfy its heavy burden. Far from "negat[ing] every conceivable basis" which might support the statute, id., the Nation rests its entire argument on a single hypothetical basis for the statute—the straw-man notion that H.B. 2534 was designed to "obstruct[] federal law." Mot. at 27. But as explained above, H.B. 2534 is entirely consistent with the objectives of the Gila Bend Act.

In any event, the Court need not look far to find other legitimate bases for the statute. "[S]tates have broad authority over the establishment and development of municipalities within their borders." Green, 340 F.3d at 900-01. In Green, the Ninth Circuit rejected an equal protection challenge to an Arizona statute that gave municipalities the ability to veto the incorporation attempts of nearby communities. The Ninth Circuit found the statute rationally related to Arizona's legitimate state interest in "protecting the interests of already existing municipalities":

> [T]he very purpose of [§] 9-101.01 is to protect cities and towns from problems that may flow from the existence of many separate governmental entities in a limited geographical area. Municipal incorporation of areas on the fringes of existing cities and towns, if left unchecked, can lead to intergovernmental conflict over resources and economic development. . . . Arizona has rationally chosen to prevent such . . . conflict by giving existing municipalities a veto over the incorporation of neighboring areas.

Id. at 903 (citations & internal quotes omitted; emphasis added). An Oregon court likewise rejected an equal-protection challenge to a statute that, like H.B. 2534,

streamlined annexation for county islands. Kane, 122 P.3d at 142. It found that the law legitimately served the purpose of "reduc[ing] jurisdictional confusion" and "improv[ing] administrative efficiency." Id.

C. H.B. 2534's Population-Based Classification Is Rationally Related To Its Legitimate Purposes

The classification at issue in H.B. 2534, making the simplified annexation process available in counties with over 350,000 people, is rationally related to the types of purposes described above. Mot. 25-26.

Arizona cities and towns exert a "strong degree of control over zoning and development" over unincorporated areas within their borders. See, e.g., Carefree Imp. Ass'n v. City of Scottsdale, 649 P.2d 985, 986-87 (Ariz. Ct. App. 1982). By annexing these and other adjoining lands, municipalities can exert even greater control over zoning and land use,[7] expand their tax base,[8] reduce confusion as to governmental jurisdiction,[9] and increase the efficiency of municipal services.[10] If these lands are taken in trust, those rights disappear.[11] What is worse, municipalities suddenly are faced with the "problems that may flow from the existence of many separate governmental entities in a limited geographical area"—including "intergovernmental conflict over resources and economic development." Green, 340 F.3d at 903 (citation omitted).

H.B. 2534 addresses these issues in several ways. First, by annexing land pursuant to H.B. 2534, municipalities may, in some instances, prevent the transfer of land

---

[7] See, e.g., Ariz. Rev. Stat. § 9-462.01.
[8] See, e.g., City of Tucson v. Woods, 959 P.2d 394, 397 (Ariz. Ct. App. 1997).
[9] See, e.g., Kane, 122 P.3d at 142.
[10] See, e.g., id.; Woods, 959 P.2d at 397.
[11] Most state and local laws, including taxes and zoning ordinances, do not apply on reservation lands. See Case No. 2:10-cv-1993, Dkt No. 133 at 127 n.13.

to the federal government—eliminating outright the risks outlined above. Second, annexation assures cities and towns of having a voice in discretionary trust-acquisition decisions under 25 U.S.C. § 465 and other federal statutes. That is so because in discretionary cases Interior must notify "local governments having regulatory jurisdiction over the land to be acquired" and provide them 30 days to comment on "impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d). This requirement is not a mere formality: A former high-level official in the Bureau of Indian Affairs described "the impact on the state and political subdivisions and the jurisdictional problems" as "the factors that really matter in these [trust acquisition] applications[.]" Larry E. Scivner, Acquiring Land Into Trust For Indian Tribes, 37 New Eng. L. Rev. 603, 606 (Spring 2003).[12] Third, annexation may also be valuable in other contexts in which land is to be transferred to the federal government. For example, annexation assures that cities and towns will have a role in land use planning decisions involving lands donated or sold to the Department of Interior and managed by the Bureau of Land Management ("BLM"). In such cases, BLM must "coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of . . . local governments within which the lands are located[.]" 43 U.S.C.A. § 1712(c)(9). And BLM "shall provide for meaningful public involvement of . . . local government officials . . . in the development of land use programs, land use regulations, and land use decisions for public lands[.]" Id.

The Nation makes much of the fact that the protections offered by H.B. 2534 are

[12] And even if the land ultimately is taken into trust, cities and towns that have annexed the application land will have improved their standing in negotiations with the tribe to address the concerns outlined above. See, e.g., id. (proposing cooperative "agreements

available only in counties with over 350,000 people. But courts have recognized that municipalities in densely-inhabited regions, such as these, have special needs regarding annexation, zoning, land use, and government administration. Accordingly, courts have found the rational-basis standard satisfied where states limited the application of laws affecting these issues to populous counties. See, e.g., City of Mountain Brook v. Green Valley Partners I, 690 So. 2d 359, 362 (Ala. 1997) (rejecting an equal protection challenge to a statute that provided "cities located in heavily populated counties with a greater ability to regulate land use"); Dade Cnty. v. City of N. Miami Beach, 109 So. 2d 362, 363-64 (Fla. 1959) (upholding as rational legislation to facilitate annexation of unincorporated areas "in counties of large populations" where there presumably "will be concentrations of people in the outlying unincorporated areas in need of municipal services"); Masters v. Pruce, 274 So. 2d 33, 45 (Ala. 1973) (upholding legislation giving special zoning rights to large counties: "The problems of highly populous counties are unique with regard to the regulation of land use" in part because "such counties generally contain a number of municipalities."). The Arizona Court of Appeals has engaged in similar analysis: It found a classification limiting creation of a Tourism and Sports Authority to counties with more than two million residents to be rational, in large part because the legislature reasonably could have determined that those counties had the population and resources necessary to take full advantage of the legislation. Long v. Napolitano, 53 P.3d 172, 179-83 (Ariz. Ct. App. 2002).[13]

The same is true here. The Arizona legislature reasonably could have concluded

---

between tribes, states, and local governments" as a way to address the "impact on the state and political subdivisions and the jurisdictional problems").

[13] Though Long, Masters, and Mountain Brook are special law cases, they apply the same rational-basis test.

that the legitimate governmental interests described above are most relevant in populous counties, where communities sit elbow-to-elbow, limiting opportunities for expansion and heightening the potential for conflicts over limited resources. In short, populous counties are the counties that need, and stand to benefit from, H.B. 2534.

Ignoring this case law, the Nation baldly asserts that "cities in counties with more than 350,000 persons have no greater interest" in using the annexation process available under H.B. 2534 "than those in other counties." Mot. at 28. But, as shown above, the Arizona legislature could reasonably disagree. The Nation certainly has not provided evidence to show that less populated counties face the same risks and incentives as populous counties. And in any event, " 'a legislative choice is not subject to courtroom fact-finding[.]' " RUI One, 371 F.3d at 1155 (citation omitted).

V. H.B. 2534 IS NOT A SPECIAL LAW.

The Nation also is unable to carry its heavy burden on its "special law" claim. A special law confers rights "on particular members of a class or to an arbitrarily drawn class that is not rationally related to a legitimate governmental purpose, while a 'general law' applies to all persons of a reasonably defined class." Long, 53 P.3d at 178. The Arizona constitution provides that "[n]o local or special laws shall be enacted . . . [w]hen a general law can be made applicable." Ariz. Const. art. 4, pt. 2, § 19(20).

But the threshold for finding a "special law" is very high. The Nation must prove "beyond a reasonable doubt that the Act conflicts with [the] state constitution." Long, 53 P.3d at 254 (emphasis added). And the Court "must construe the . . . legislation, if possible, to give it a reasonable and constitutional meaning." Id. (citation omitted). "In doubtful cases, [courts] will generally defer to legislative determinations of policy." Id.

(citation omitted).

"Legislation does not violate the special law prohibition if (1) the classification is rationally related to a legitimate governmental objective, (2) the classification is legitimate, encompassing all members of the relevant class, and (3) the class is elastic, allowing members to move in and out of it." Id. at 253 (Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1257 (Ariz. 1990)). As explained below, the Nation is unable to prove beyond a reasonable doubt that H.B. 2534 fails this test.

A. The Classification in H.B. 2534 Is Rational

As the Nation concedes, the first prong of the special law test—determining whether a classification is rationally related to a legitimate governmental objective, id.—is identical to the rational-basis standard discussed above. See Mot. at 28; see also Tucson Elec. Power Co. v. Apache Cnty., 912 P.2d 9,16 n.6, 19 (Ariz. Ct. App. 1995) (citations omitted). The Nation's arguments on this prong fail for all the reasons set forth above. See supra at 20-25.

B. The Classification Encompasses The Relevant Class

The Nation likewise cannot carry its burden to show that the lines drawn in H.B. 2534 do not "encompass[ ] all members of the relevant class." Long, 53 P.3d at 253 (citation omitted). Under this prong, courts focus on the treatment of the members of the affected class to ensure that the law applies equally to each of them. See, e.g., Governale v. Lieberman, ___ P.3d ___, No. 1 CA-CV 10-0195, 2011 WL 833231, at *5 (Ariz. Ct. App. Mar. 10, 2011); City of Tucson v. Grezaffi, 23 P.3d 675, 683 (Ariz. Ct. App. 2001); Arizona v. Bonnewell, 2 P.3d 682, 685-86 (Ariz. Ct. App. 1999). Here, it is clear that H.B. 2534 applies equally to all members of the class—extending to all cities and towns

in populous counties the same process for annexing lands that meet the statutory criteria.

The Nation does not argue to the contrary. Instead, it focuses its entire argument on the class definition itself, arguing that there is "no legitimate justification" for limiting application of H.B. 2534 to counties with populations of over 350,000. Mot. at 28. While courts occasionally use the second prong to evaluate the propriety of the class definition, the inquiry is narrow and deferential—mirroring, in many respects, rational-basis review analysis. See, e.g., Woods, 959 P.2d at 401 (the second prong "appears to overlap the first test"). As the Nation concedes, Mot. 28, "[t]he special law ban does not prohibit the legislature from enacting laws that confer privileges only on a population-based class, as long as the classification is a rational one." Long, 53 P.3d at 178 (citation omitted). And, as with rational-basis review, "legislative classification can be based on rational speculation unsupported by evidence," Tucson Elec. Power Co., 912 P.2d at 18 (citation omitted), and courts will uphold a classification based on hypothetical justifications, regardless of whether those justifications actually motivated the legislative. See, e.g., Long, 53 P.3d at 183.

The Nation concedes that "[i]n some cases . . . it may be reasonable for a state to differentiate between more and less densely populated counties." Mot. 28. In fact, the Arizona legislature does so frequently. See, e.g., Ariz. Rev. Stat. § 11-821 (populous counties must develop more rigorous county plans, anticipating long-term land use and resource needs).

The Nation nevertheless says a population-based classification is inappropriate in this case—insisting, without any evidence, that "cities in counties with more than 350,000 persons have no greater interest in [pursuing annexation under H.B. 2534] than

those in other counties." Mot. 28. This contention already has been refuted at length. See supra at 23-25. The legislature could reasonably have concluded that municipalities in populous counties have a greater need for the procedure created by H.B. 2534 than do those in less populous counties. Indeed, there is evidence it did so conclude: It designed H.B. 2534 with the specific goal of facilitating annexation in "urbanized or . . . urbanizing count[ies]." Mot., Ex. 7 at TR63 (testimony of counsel for the legislature).

Even if Nation were able to adduce evidence proving beyond a reasonable doubt that less populous counties would benefit from H.B. 2534, the point would be irrelevant. As noted above, "legislative classification can be based on rational speculation unsupported by evidence[.]" Tucson Elec. Power Co., 912 P.2d at 18 (citation omitted). Ultimately, the Nation's arguments parallel those rejected in Long, where the Arizona Court of Appeals upheld a statute authorizing creation of a Tourism and Sports Authority in counties populated by over two million people. Long, 53 P.3d at 176-78. Although the statute applied to only one county and although other counties might have benefited from its provisions, the court explained, "The legislature is not constrained from enacting class-based legislation merely because non-members of the class would also derive some benefit from the legislation." Id. at 178-81 (citation omitted). Just so here.[14]

C. The Classification Is Elastic

Turning to the third and final prong—determining whether the class is elastic, allowing members to move in and out of it—the Nation once more fails to carry its burden. In fact, the Nation misconstrues this prong in focusing on the landowners who

[14] Similarly, in Bonnewell, the court addressed a statute that prohibited leghold traps on public land and rejected arguments that the legislature was required to make the law applicable on private land too: "Legislation can be enacted one step at a time, addressing first what is perceived as the most acute aspect of a problem." 2 P.3d at 685.

may be affected by H.B. 2534. Mot. 29. "Prohibited special legislation, . . . unreasonably and arbitrarily discriminates in favor of a person or class by granting them a special or exclusive immunity, privilege, or franchise." Republic Inv. Fund I, 800 P.2d at 1256 (quotation omitted). The relevant class is thus comprised of the entities that benefit from H.B. 2534—namely, municipalities in counties with over 350,000 people. As the court in Long explained when faced with a similar population-based classification, the statute "satisfies the third prong of the special law test if the classification is sufficiently elastic to both admit entry of additional counties attaining the requisite characteristics of the classification and enables class members to exit when they no longer have those characteristics." 53 P.3d at 183 (citation omitted).

H.B. 2534 meets that test. Three counties presently fall within the class of described in H.B. 2534. Ex. 5 (census results). As their populations rise and fall over time, counties will enter or exit this class.[15]

The Nation's special law claim relies on two inapposite cases. In Republic Inv. Fund I, the court addressed a deannexation provision that had been enacted to remedy statewide abuses in "strip" annexation. 800 P.2d at 1254-55. Because the deannexation law plainly had been "enacted in response" to a statewide problem,[16] the court noted that the law should apply statewide to "all cities where annexation abuses may have occurred." Id. at 1259. Instead, the law had been crafted to apply only to 12 small municipalities in Maricopa County—and even there, only for a period of 13 months. As

[15] Indeed, several rapidly-growing counties are well on their way to entering the class. See Ex. 5 (census results).

[16] The court in the proceeding below explained that "[the parties defending the law] do not dispute . . . that annexation abuses were not limited to small municipalities or Maricopa County. The legislative history. . . supports this contention." Petitioners for Deannexation v. City of Goodyear, 773 P.2d 1026, 1032 n.2 (Ariz. Ct. App. 1989).

the court explained, this narrow focus "immuniz[ed] larger cities in Maricopa County and all other similarly situated cities in other counties" and "prevent[ed] any municipality from either coming within or exiting from its operation in the future." Id. H.B. 2534 does not suffer from these (or any) infirmities; its purpose and classification are rational, and the affected class will grow as the population in other urbanizing counties increases.

Town of Gilbert v. Maricopa County is similarly distinguishable. 141 P.3d 416 (Ariz. Ct. App. 2006). In Gilbert, the court struck down a statute allowing for the creation of a fire district in county islands within the town of Gilbert. Id. at 420-21. The fact that the statute applied only to county islands within a single town did not by itself render the legislation unconstitutional. Id. at 421. But, as the court explained, "there must be a rational reason why the scope of its application is limited." Id. The parties defending the statute failed to "articulate why it is rational that the legislation does not include other similarly situated county islands," and the court ultimately concluded that the statute should have applied to "similarly situated" residents in other county islands. Id. at 421. Here, by contrast, Defendants have explained (i) why the legislature acted rationally in targeting populous counties and (ii) why the legislature could have found that less populous counties are not "similarly situated" to those affected by H.B. 2534. The Nation fails to refute these points beyond a reasonable doubt.

CONCLUSION

The Court should deny the Nation's motion for summary judgment, grant this cross-motion, and enter judgment in favor of the City of Glendale and the State of Arizona on all counts.

Respectfully submitted,

Dated: April 18, 2011

By: *s/Jose de Jesus Rivera*

HARALSON, MILLER, PITT, FELDMAN & McANALLY, P.L.C.
José de Jesus Rivera, SBN 4606
jrivera@hmpmlaw.com
Peter T. Limperis, SBN 19175
plimperis@hmpmlaw.com
2800 N. Central Avenue, Ste. 840
Phoenix, AZ 85012
Phone: (602) 266-5557 Fax: (602) 266-2223

HOGAN LOVELLS US LLP
Audrey E. Moog*
audrey.moog@hoganlovells.com
Dominic F. Perella*
dominic.perella@hoganlovells.com
555 Thirteenth Street, NW
Washington, DC 20004
Phone: (202) 637-5600 Fax: (202) 637-5910

CITY OF GLENDALE
Craig D. Tindall, SBN 14071
ctindall@glendaleaz.com
5850 West Glendale Avenue, Suite 450
Glendale, AZ 85301
Phone: (623) 930-2930 Fax: (623) 915-2391

Attorneys for Defendant City of Glendale

By: *s/ Michael Tryon*

Thomas C. Horne, Attorney General, SBN 14000
Michael Tryon, SBN 3109
Michael.Tryon@azag.gov
Evan Hiller, SBN 28214
Evan.Hiller@azag.gov
1275 West Washington Street
Phoenix, AZ 85007-2926
Phone: (602) 542-8355 Fax: (602) 364-2214

Attorneys for Defendant State of Arizona

* admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system for filing and service to counsel of record in these consolidated proceedings.

s/Jennie Larsen