Nos. 11-16811, 16823, 16833

IN THE

United States Court of Appeals for the Ninth Circuit

TOHONO O'ODHAM NATION,

Plaintiff-Appellee,

v.

STATE OF ARIZONA and CITY OF GLENDALE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona, No. 2:11-cv-00279-DGC
District Judge David G. Campbell

OPENING BRIEF FOR DEFENDANTS-APPELLANTS STATE OF ARIZONA AND CITY OF GLENDALE

Thomas C. Horne, Attorney General*
Michael Tryon
Evan Hiller
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, AZ 85007-2926
(602) 542-8355

Counsel for the State of Arizona
**Counsel of record*

Audrey E. Moog*
Dominic F. Perella
Michael D. Kass
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
audrey.moog@hoganlovells.com

José de Jesus Rivera
Peter T. Limperis
HARALSON, MILLER, PITT, FELDMAN,
& MCANALLY, P.L.C.
2800 N. Central Avenue, Suite 840
Phoenix, AZ 85012

Counsel for City of Glendale
**Counsel of record*

November 4, 2011

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL PROVISION:

STATUTES:

TABLE OF AUTHORITIES—Continued

Page

RULES:

REGULATIONS:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

Page

IN THE
United States Court of Appeals for the Ninth Circuit

Nos. 11-16811, 16823, 16833

TOHONO O'ODHAM NATION,

Plaintiff-Appellee,

v.

STATE OF ARIZONA and CITY OF GLENDALE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona, No. 2:11-cv-00279-DGC
District Judge David G. Campbell

OPENING BRIEF FOR DEFENDANTS-APPELLANTS STATE OF ARIZONA AND CITY OF GLENDALE

INTRODUCTION

This is a case of preemption analysis gone wrong. As the Supreme Court has emphasized, federal courts apply a stringent presumption against preemption "because respect for the States as independent sovereigns" leads courts "to assume that Congress does not cavalierly pre-empt" state law. Wyeth v. Levine, 555 U.S. 555, 565 n.3 (2009) (citation omitted). The District Court in this case lost sight of that approach: It deemed a state law preempted due to a purportedly conflicting feature of federal law that in fact appears nowhere in the federal statute.

The case involves a federal law known as the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986) ("Gila Bend

Act"). The Gila Bend Act authorizes the Tohono O'odham Nation Indian tribe (the "Nation") to replace former reservation lands by buying property and asking the federal government to hold that property in trust as an Indian reservation. The key provision of the statute, Section 6(d), has two relevant clauses that place limits on the land the Nation can have held in trust. First, it provides that the Secretary of the Interior, "at the request of the Tribe, shall hold in trust" any land "which meets the requirements of this subsection." Second, it provides that "[l]and does not meet the requirements of this subsection if it is * * * within the corporate limits of any city or town." (emphasis added). The provision is designed to protect cities by blocking the Nation from creating a reservation in a city's midst—a situation that would create massive difficulties for municipal governance.

On its face, Section 6(d) defers to state law on the question whether land is "within the corporate limits" and thus ineligible for trust acquisition. It does not attempt to control that quintessentially local classification or to cabin state-law power to bring land within a city's limits. And yet the District Court held that Section 6(d) preempts an Arizona annexation statute, called H.B. 2534, which gives some Arizona cities the authority to annex—and thus bring within corporate limits[1]—land that is the subject of a federal land-into-trust application. The court

[1] As we explain below, Arizona and Glendale maintain that the particular parcel of land that triggered this dispute is already within Glendale's "corporate limits" for other reasons, and thus that it already is ineligible for Gila Bend Act acquisition.

reached that conclusion by divining in Section 6(d) a time-stopping mechanism that appears nowhere on the statute's face: Seizing on the phrase "at the request of the Tribe," the court opined that Congress must have intended to freeze land's eligibility the moment the tribe asks for it to be held in trust, such that land that was outside corporate limits (and thus potentially eligible for trust acquisition) on that date remains eligible throughout the land-into-trust application process. On that basis, the District Court held that cities cannot use H.B. 2534 to annex land that is the subject of a land-into-trust application. According to the District Court, that is preempted because (i) Congress "intended" for that land to remain eligible while (ii) an annexation under H.B. 2534 could make the land ineligible.

The District Court's statutory construction—which no party advanced in the briefing—creates a congressional mandate from thin air. Section 6(d) says nothing about freezing a parcel's eligibility on the application date. In fact, as we explain below, it is naturally read as requiring that land remain eligible until the moment it is accepted into trust. Because the eligibility-freezing mechanism the court somehow teased out of Section 6(d) is far from the "clear and manifest" expression of congressional purpose that is required to preempt state law, Wyeth, 555 U.S. at 565, the District Court's preemption holding should be reversed.

That question is before this Court in a related case, Gila River Indian Cmty. v. United States, Nos. 11-15631 et seq. See infra at 11 and 27 n.7.

STATEMENT OF JURISDICTION

The Nation timely filed suit in the U.S. District Court for the District of Arizona, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered final judgment in favor of the Nation on June 30, 2011. ER1. Arizona and Glendale timely noticed their appeals on July 27, 2011. ER30-35. This Court has jurisdiction over appeals from final judgments of the District Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES FOR REVIEW

1. Whether H.B. 2534 is preempted by the Gila Bend Act, where the District Court could identify a conflict between state and federal law only by teasing from the Gila Bend Act a purported eligibility-freezing provision that in fact appears nowhere in the statute.

2. Whether H.B. 2534 is preempted on the ground that it purportedly "discriminates against a federal right," where (i) the District Court relied upon "discrimination" case law that does not apply in this context and (ii) plaintiffs made no showing that H.B. 2534 stands as an obstacle to the significant objectives of Congress.

ADDENDUM

Pursuant to Ninth Circuit Rule 28-2.7, an addendum containing pertinent statutes is attached at the end of this brief.

STATEMENT OF FACTS AND OF THE CASE

This case has its genesis in the Nation's ongoing effort to convert land within Glendale into an Indian reservation and open a massive casino there, thus turning a parcel located in the midst of a growing residential community, and directly across from a high school, into the state's largest gaming operation.

A. The Nation and the Gila Bend Act

The Nation, formerly known as the Papago Tribe, is a federally recognized Indian tribe with "the second largest Tribal land base in the U.S., 2.8 million acres," and over 28,000 Tribal members. Tohono O'odham Nation v. Arizona, No. 2:11-cv-00279-DGC (D. Ariz.) ("Dist. Ct. Proceeding"), Dkt. No. 29 ¶ 14. During the 1970s and 1980s, a portion of the Nation's reservation lands flooded repeatedly, leaving it unsuitable for farming. ER196-197. The Nation blamed a federally-constructed dam for the flooding and petitioned Congress for recompense. ER197. Congress responded by enacting the Gila Bend Act. ER3; ER198-99.

The Gila Bend Act was designed to replace the flooded portions of the Nation's reservation "with land suitable for sustained economic use which is not principally farming[.]" ER194. Under the Gila Bend Act's terms, the Nation was required to assign to the United States all rights and title to 9,880 acres of the Gila Bend reservation for $30 million. Gila Bend Act § 4(a). The Nation was then authorized to purchase not more than 9,880 acres of replacement land. Id. § 6(c).

The Secretary, in turn, was authorized to take those lands into trust, creating an Indian reservation, if certain conditions were met. Id. § 6(d). The principal conditions involved the location of trust parcels:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town.

Id. § 6(d) (included in the Addendum at A4).

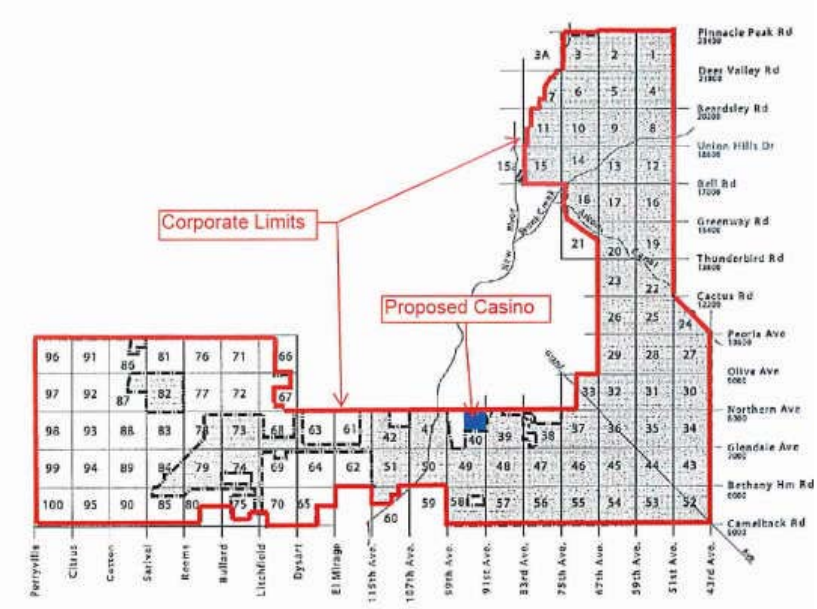
B. The Nation's Glendale Land Purchase

On August 21, 2003, the Nation bought a 135-acre block of land within Glendale, in a mixed-use area adjacent to growing communities with thousands of young residents. Dist. Ct. Proceeding, Dkt. No. 29 ¶¶ 15-16; ER41-42; ER97-99. The Nation kept its purchase quiet by having a shell company, "Rainier Resources, Inc.," acquire the land. Id. The Nation then sat on the property for nearly six years. During that time, the Nation never told the citizens, businesses, or officials of Glendale that it owned the property. Dist. Ct. Proceeding, Dkt. No. 29 ¶17. Nor did it reveal what it planned to do with the land—namely, ask the federal government to turn it into an Indian reservation so it could build a massive gaming complex on the site. Id.

The Nation chose this particular parcel because it was a "county island"—in other words, a swath of land within Glendale's city limits that had not been annexed by Glendale. Id. ¶¶ 3-4; ER38-39; ER46. That is relevant because, according to the Nation, "county islands" are not "within the corporate limits of any city or town," Gila Bend Act § 6(d), and thus are eligible for federal trust acquisition under the Gila Bend Act. See infra at 11. That question is being litigated in the related case pending before this Court.

County islands arise from a peculiarity of Arizona law. The borders of the City of Glendale—like those of many municipalities in the State of Arizona—encircle a mix of incorporated and unincorporated territory. ER38. This resulted from a practice, once common in Arizona, called "strip annexation." Strip annexation occurs when a city or a town "extend[s] [its] boundaries by annexing long strips of property" that encircle other, unincorporated areas they may want to annex in the future. Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1254-55 (Ariz. 1990) (en banc). After a strip annexation, unincorporated areas sit within, and are completely surrounded by, a municipality's borders. The process serves a practical purpose: Once land is encircled, no other municipality can annex it. See Carefree Improvement Ass'n v. City of Scottsdale, 649 P.2d 985, 986 (Ariz. App. Ct. 1982). And within the encircled area, a municipality can "exercise a strong degree of control over zoning and development." Id. at 987.

The land purchase by the Nation in this case is one such "county island" completely encircled by Glendale's borders. The property is depicted in blue below, with Glendale's borders shown in red:



Gila River Indian Cmty. v. United States, No. 2:10-cv-01993-DGC (D. Ariz.), Dkt. No. 86 at 5 ("Parcel 2 Proceeding"). The property came to be within Glendale's borders in 1977, when the City annexed an area west of city center. ER38; ER48-60. While the Nation's Glendale parcel has not been annexed, Glendale has long controlled its development. ER38-39; ER103. The parcel is part of Glendale's Municipal Planning Area and is included in its General Plan. Id. The General Plan guides zoning and subdivision of the parcel. Ariz. Rev. Stat. § 11-814(G); ER39.

In reliance on this land-use control, Glendale invested significant resources to develop the area around the property. ER 41; ER91. Since 2003, city, state, and private interests have invested in a $450 million NFL stadium, a $240 million NHL

arena, and a $120 million Major League Baseball spring training facility in western Glendale. Id. This development was designed to attract visitors to Glendale for dining, sports, and other entertainment. Id. In 2005, the Peoria Unified School District, which serves Glendale, finished building a public high school across the street from the land that the Nation now proposes to use as a reservation and gaming center. ER42; ER91. More than 30,000 people—approximately one-third of whom are under 20 years old—live within two miles of the property. ER41-42.

C. The Nation's Plan For A Glendale Casino

Glendale officials knew nothing of the Nation's casino venture during the years they were developing the area around the Nation's property. ER91. Finally, in January 2009, the Nation revealed its plans. It transferred ownership of the parcel from Rainier Resources to itself in fee simple. Dist. Ct. Proceeding, Dkt. No. 29 ¶ 17. Days later, the Nation filed its application with the United States Department of the Interior ("Department") requesting that the Secretary of the Interior ("Secretary") take the property into trust pursuant to the Gila Bend Act and grant the Nation permission to establish a Class III (Las Vegas-style) gaming complex[2] on the property. ER113; Parcel 2 Proceeding, Dkt. No. 78 ¶¶ 52-53.

The Nation has since released advertising materials proclaiming that its "new casino will be the largest in the state." ER113. It will include "150,000

[2] "Class III" includes high-stakes card games such as poker and electronic games of chance such as slots. See 25 U.S.C. § 2703.

square feet designated for a gaming floor" with "over 1,000 slot machines * * * as well as 50 table games, 25 poker tables, and a bingo hall large enough to seat a thousand guests." Id. The complex also will include—among many other things—two bars, a nightclub, and "parking for over 4,000 vehicles." Id.

The Nation's plan to create a reservation and build a mega-casino in Glendale came as a complete shock to City officials. Glendale has no reservations or gaming facilities of any kind. ER92. While the Nation already operates three casinos, all are located on its traditional lands, far from Glendale. Id.; ER72; ER90. And the reservation and mega-casino would cause the City serious harms, over and above the problematic prospect of having a giant gaming center within a quarter-mile of churches, schools, and neighborhoods. Because the property would be converted into an Indian reservation, Arizona and Glendale would be stripped of substantially all sovereign control over it—and Glendale accordingly would lose its long-standing authority to control land use on the parcel and its exclusive authority to annex the property. See California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987) (Indian tribes retain sovereignty "dependent on, and subordinate to, only the Federal Government, not the States"); Quinault Indian Nation v. Grays Harbor Cnty., 310 F.3d 645, 648 (9th Cir. 2002) ("state and local governments lack the power to tax reservation Indians or their land" absent congressional authorization); Crow Tribe of Indians v. Montana, 650 F.2d 1104,

1110 (9th Cir. 1981) (tribal sovereignty blocks state functions "such as zoning * * * or the exercise of general civil jurisdiction over the members of the tribe"). Glendale also would incur steep infrastructure costs: City officials estimated the casino complex would require Glendale to build a new fire station at a cost of more than $14.6 million and would require some $3.75 million in annual public safety outlays. ER43, ER117-18. On top of these direct costs, the casino would siphon business from Glendale's tax-paying establishments, decreasing City revenues. ER42-43, ER117-18. And the City could recoup none of those costs through the usual methods—taxes and development and permitting fees—because the property would be a reservation, immune from such treatment. ER96, ER118-19.

D. The Secretary's Parcel 2 Decision And The Ensuing Challenge

Glendale and other opponents of the Nation's plan expressed these concerns to the Department during the 18 months when it was considering the Nation's land-into-trust application. They also argued that the Nation's property was ineligible for trust acquisition for various reasons, including that the property already was "within the corporate limits" of Glendale. ER94-95. As Glendale explained, that phrase refers to land inside the outer boundary of a municipality. Id. That describes the Nation's Glendale property, which is a county island surrounded on all sides by the City of Glendale. Because Glendale's corporate limits surround the parcel, it is "within" those limits, under the plain meaning of that word.

On July 23, 2010, however, the Secretary rejected that argument and issued a decision concluding that a portion of the Nation's Glendale property, known as Parcel 2, was eligible to be taken into trust under the provisions of the Gila Bend Act. ER211-18 ("Parcel 2 Decision").[3] The Secretary reasoned that the phrase "within the corporate limits" reveals "a clear intent to make a given piece of property eligible under the Act if it is on the unincorporated side of a city's boundary line." ER216. On August 26, 2010, the Department announced its final determination "to acquire Parcel 2 consisting of 53.54 acres of land into trust for the Tohono O'odham Nation." 75 Fed. Reg. 52550, 52550-51 (Aug. 26, 2010).

Shortly afterward, Glendale, the Gila River Indian Community, and various individuals filed lawsuits in the U.S. District Court for the District of Arizona, challenging the Parcel 2 Decision as a violation of the Administrative Procedure Act and the United States Constitution. See Parcel 2 Proceeding, Dkt. No. 1. The Nation subsequently intervened as a defendant, and the State of Arizona and state legislators intervened as plaintiffs.

---

[3] The Nation initially sought to have its full 135-acre parcel accepted into trust. It later amended the application to include only the western portion, "Parcel 2," due to a dispute over whether Glendale had annexed other portions. ER3; ER211-212. At the Nation's request, the Secretary held in abeyance the land-into-trust application for the rest of the property pending resolution of that dispute. ER17; ER218. The distinctions among these sub-parcels should not be relevant on appeal because—as we explain below—the District Court held that the Gila Bend Act preempts H.B. 2534 as applied to all sub-parcels, whereas under the interpretation advanced by Arizona and Glendale, H.B. 2534 would not be preempted at all.

On March 3, 2010, the Court denied the plaintiffs' motions for summary judgment and upheld the Parcel 2 Decision. See Parcel 2 Proceeding, Dkt. No. 133 ("March 3 Order"). Plaintiffs appealed. In the meantime, at the plaintiffs' request, the District Court issued a temporary injunction blocking the Secretary from taking Parcel 2 into trust during the appeal. See id., Dkt No. 153. To preserve the status quo, the court also enjoined Glendale from annexing Parcel 2—an action that would render the parcel ineligible for trust acquisition under the interpretation of the Gila Bend Act embraced by the Secretary. Id.

The Parcel 2 appeal—which presents (among others) the question whether the Nation's parcel is already within Glendale's "corporate limits"—is fully briefed and pending before this Court.

E. H.B. 2534

In the meantime, the Arizona state legislature took action that has led to this iteration of the case. The Nation's maneuvers in Glendale alerted the legislature to a serious, continuing risk for the state's municipalities: Landowners could transfer urban land to the federal government, creating pockets of land over which neither state nor local government would have much, if any, control. See supra at 10. That is a deeply troubling prospect for municipalities in populous counties, which plan their future growth in exacting detail and count on having control, through planning authority, zoning, and the like, over how the community develops.

In January 2010, the legislature enacted H.B. 2534 to equip cities and towns with a measure of protection against this risk. Governor Brewer signed the legislation on February 1, 2011. ER190. H.B. 2534 provides in pertinent part:

> 1. A city or town located in a county with a population of more than three hundred fifty thousand persons may annex any territory within an area that is surrounded by the city or town or that is bordered by the city or town on at least three sides if the landowner has submitted a request to the federal government to take ownership of the territory or hold the territory in trust.
>
> 2. The annexation of territory pursuant to this section is valid if approved by a majority vote of the governing body of the city or town. The annexation becomes immediately operative if it is approved by at least two-thirds of the governing body of the city or town.

Ariz. Rev. Stat. § 9-471.04 (included in Addendum at A1).

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 through a more streamlined process than that applicable to other annexations. Id. § 9-471.04(A); compare id. § 9-471 (providing for a process that includes a public hearing and a requirement that a majority of affected landowners agree to the annexation). This new protection applies to the municipalities that need it most—those in populous counties where annexation and land use concerns are particularly acute. This

Court and others—including the District Court in this case—have recognized that states have a legitimate interest in providing such protection.[4]

Importantly, H.B. 2534 does not take the property away from the landowner or prevent the landowner from developing the land. Instead, it simply changes the land's governing body from a county to a city or town. As Governor Brewer explained when signing the legislation, that "assures that local officials will continue to have a say in local development matters that affect their community." ER141. In some circumstances—turning on choices Congress has made—annexation would 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 26-27.

F. District Court Proceedings and Decision

On February 10, 2011, the Nation filed a Complaint against Arizona and Glendale to challenge the constitutionality of H.B. 2534. See Dist. Ct. Proceeding, Dkt. No. 1. In particular, the Nation claimed that to the extent H.B. 2534 would authorize Glendale to annex Parcel 2 or any other portion of the Nation's Glendale Property, it was preempted by the Gila Bend Act, violated the Equal Protection and

[4] See, e.g., Green v. City of Tucson, 340 F.3d 891, 900 (9th Cir. 2003) ("Arizona has a legitimate state interest * * * in protecting the interests of already existing municipalities" by letting them veto certain annexation attempts); ER23 ("[I]t is rational to conclude that the most crowded counties have the greatest need to control land use and annexation."); City of Mountain Brook v. Green Valley Partners I, 690 So. 2d 359, 362 (Ala. 1997) (upholding as rational a statute that provided cities in populous counties with a greater ability to regulate land use).

Due Process Clauses of the U.S. and Arizona Constitutions, and constituted special legislation in violation of the Arizona Constitution. Id.[5] The parties filed cross-motions for summary judgment. Id., Dkt. Nos. 23, 28. On June 30, 2011, the District Court issued the order now on review, ruling in favor of the Nation on its preemption claim while rejecting its other theories.

The District Court began its preemption analysis by acknowledging that the "general purpose of the Gila Bend Act does not resolve the preemption question in this case." ER13. That was so because while the Gila Bend Act was designed "to provide the Nation with power to acquire reservation lands that would promote economic self-sufficiency," it "does not purport to regulate how cities or towns may incorporate land; that process is left entirely to Arizona law." Id. "Thus," concluded the District Court, "the mere fact that Congress intended to provide the Nation with power to acquire new reservation lands that would promote economic self-sufficiency, and even intended the Nation to have great flexibility in making these acquisitions, does not show that Congress intended to override the annexation decisions of Arizona cities and towns." Id.

The District Court nevertheless concluded that the "operation" of the Gila Bend Act preempted H.B. 2534. The Court reviewed what it considered to be the key language of the Gila Bend Act: "The Secretary, at the request of the Tribe,

[5] Notably, the United States—a party in the related case pending in this Court—did not intervene or otherwise voice support for the Nation's preemption claim.

shall hold in trust for the benefit of the Tribe any land * * * which meets the requirements of this subsection. * * * Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town." ER14 (quoting Gila Bend Act § 6(d)). From that language the District Court extracted an eligibility-freezing mechanism that appears nowhere in the statutory text:

> Several Congressional purposes are evident from this language. First, * * * statute is mandatory * * * . Second, the point at which the Secretary acquires this mandatory obligation is "at the request of the Tribe," provided the requirements of the section are satisfied. No other point in time is specified in § 6(d). Third, land acquired by the Nation does not satisfy the requirements of § 6(d) if the land "is" within the corporate limits of any city or town. The use of the present tense "is" suggests that the land must not be within corporate limits when the triggering event occurs—when the request is made by the Nation to the Secretary.

ER14 (emphases added). The District Court held, in other words, that Congress's intent in Section 6(d) was to freeze a parcel's eligibility vel non in place on the day the tribe's land-into-trust application is filed; if the land is eligible for trust acquisition on that day, then it must be accepted into trust, regardless of whether it subsequently ceases to meet the requirements of Section 6(d).

Having extracted this meaning from Section 6(d), the District Court found that H.B. 2534 was preempted as applied to all of the Nation's Glendale sub-parcels. It reasoned that on January 28, 2009, the date the Nation filed its land-

into-trust application, "the property was not within the corporate limits of Glendale[.] * * * Thus, as of January 28, 2009, Congress' intent under the Gila Bend Act was that the land be taken into trust." ER16. "H.B. 2534 clearly conflicts with this Congressional intent," the court concluded, because its "clear purpose and effect would be to block DOI from taking the land into trust, contrary to the express command of Congress." Id. The District Court held in the alternative that H.B. 2534 was preempted because it burdens a right Congress created. ER17.

The District Court rejected the Nation's due-process and equal-protection claims, finding that Arizona has a " 'legitimate state interest * * * in protecting the interests of already existing municipalities' " by "avoiding the complications that can arise when Indian reservations or federal enclaves are created on the fringes of existing cities and towns." ER21 (quoting Green, 340 F.3d at 903). The District Court also rejected the Nation's special-legislation claim, finding that H.B. 2534 is sufficiently flexible and rational and "applies equally to all in a similar situation who come within its scope." ER23-26.

Arizona and Glendale timely appealed, and the Nation cross-appealed.

SUMMARY OF ARGUMENT

1. The District Court's preemption holding turns on a fundamental error of statutory construction. The court concluded that under Gila Bend Act Section

6(d), Congress intended to freeze a parcel's eligibility for trust acquisition on the date of the tribe's application. Operating from that premise, the court identified a conflict between federal and state law: Congress "wanted" the Glendale parcel taken into trust because it was eligible on the application date, while H.B. 2534 sought to strip away that eligibility. But the court's premise was wrong, and the state-federal conflict it identified accordingly does not exist. The eligibility-freezing mechanism the District Court conjured simply appears nowhere in Section 6(d). And that is fatal to the District Court's preemption analysis. The court, after all, was required to—and purported to—apply a "strong" presumption against preemption, National Meat Ass'n v. Brown, 599 F.3d 1093, 1097 (9th Cir. 2010), such that H.B. 2534 was not preempted unless Congress "made clear its desire" for that outcome. Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 151 (2001). The eligibility-freezing mechanism the court read into Section 6(d) is far from "clear." There would be no preemption here even absent the presumption, but there certainly is none when the presumption is properly applied.

2. Nor can the District Court's alternative holding withstand scrutiny. The court held that the H.B. 2534 is preempted because it "discriminates" against and "burdens" the federal right provided to the Nation in the Gila Bend Act. But the "discrimination" principle the District Court applied is inappropriate in conflict preemption analysis. And the "burden" cases on which the District Court relied

require a showing of conflict between state and federal law. Here there is no such conflict. The District Court's decision should be reversed.

STANDARD OF REVIEW

This Court "review[s] a district court's decision regarding federal preemption de novo." American Trucking Assocs., Inc. v. City of Los Angeles, ___ F.3d ___, 2011 WL 4436256, at *5 (9th Cir. Sept. 26, 2011). The District Court's factual determinations are reviewed for clear error. United States v. Hinkson, 585 F.3d 1247, 1261 (9th Cir. 2009) (en banc). However, if a "question requires [the Court] to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, * * * the question should be classified as one of law and reviewed de novo." Id. at 1260 (quotation marks & citation omitted).

ARGUMENT

THE DISTRICT COURT'S DETERMINATION THAT THE GILA BEND ACT PREEMPTS H.B. 2534 WAS ERRONEOUS AND SHOULD BE REVERSED.

A. The Gila Bend Act Preempts H.B. 2534 Only If That Is The "Clear" And "Manifest" Purpose Of Congress.

1. "The preemption doctrine is rooted in the Supremacy Clause of the U.S. Constitution." Barrientos v. 1801-1825 Morton LLC, 583 F.3d 1197, 1208 (9th Cir. 2009) (citing U.S. Const. art. VI, cl. 2). Under the Supremacy Clause, state law can be preempted in three ways. First, Congress may preempt state law

"expressly—through clear statutory language." Whistler Inv., Inc. v. Depository Trust & Clearing Corp., 539 F.3d 1159, 1164 (9th Cir. 2008). Second, state law is preempted where Congress occupies the field in which the state law purports to operate. See id. Finally, state law is "nullified to the extent that it actually conflicts with federal law." Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982).

This final type of preemption, known as "conflict preemption," arises in two situations: where "compliance with both federal and state regulations is a physical impossibility," Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (quotation marks & citation omitted), and where state law stands "as an 'obstacle to the accomplishment' of a significant federal regulatory objective." Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1136 (2011). This case involves only the last of these concepts; the Nation argues that H.B. 2534 is invalid because it creates an obstacle to the Gila Bend Act.

No matter what type of preemption is involved, there are "two cornerstones of * * * pre-emption jurisprudence." Wyeth, 555 U.S. at 565 (citation omitted). "First, 'the purpose of Congress is the ultimate touchstone in every pre-emption case.' " Id. (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Thus, 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). Second, in " 'all pre-emption cases, and particularly in those in which Congress has legislated * * * in a field which the States have traditionally occupied,' " federal courts employ a presumption against preemption: They " 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " Wyeth, 555 U.S. at 565 (quoting Lohr, 518 U.S. at 485) (omission in original; emphases added). To defeat that presumption is a "considerable burden." De Buono v. NYSA-ILA Med. & Clinical Servs. Fund, 520 U.S. 806, 814 (1997). The presumption is "strong," National Meat Ass'n, 599 F.3d at 1097, and the plaintiff accordingly must show that Congress has "made clear its desire for pre-emption" before the doctrine will apply. Egelhoff, 532 U.S. at 151.

2. The Nation argued below that the presumption against preemption does not apply here, but the District Court correctly rejected the argument. ER8-11. The Nation relied on United States v. Locke, 529 U.S. 89 (2000), for the proposition that the presumption is inapplicable "when the State regulates in an area where there has been a significant history of federal presence." Id. at 108. As the District Court recognized, however, that argument fails for two reasons. First, the Supreme Court's most recent majority pronouncement on the presumption came in Wyeth, and there the Court "state[d] that the presumption applies in 'all'

cases." ER9 (quoting Wyeth, 555 U.S. at 565). Second, Wyeth explained that the presumption is particularly strong in cases "in which Congress has legislated * * * in a field which the States have traditionally occupied" and that the presumption's applicability "does not rely on the absence of federal regulation." 555 U.S. at 565 & n.3 (citation omitted). Seizing on those statements, this Court has reconciled Wyeth and Locke by holding that even if the challenged state law "regulates in an area where there has been a significant history of federal presence," Locke, 529 U.S. at 108, the presumption nonetheless applies so long as the state law "ultimately implicate[s]" an area of historic state regulation. Pacific Merchant Shipping Ass'n v. Goldstene, 639 F.3d 1154, 1166-67 (9th Cir. 2011). That is the situation here. As the District Court observed: "H.B. 2534 ultimately implicates a city's authority to extend its corporate limits through annexation, an area of law historically subject to state regulation." ER9. "[T]he presumption against preemption" accordingly "applies in this case." Id.

B. The Gila Bend Act Cannot Be Read To Freeze Land Classifications In Place The Moment The Tribe Files A Land-Into-Trust Application, Much Less To "Clearly" Do So.

The question, then, is whether the Gila Bend Act reveals a "clear" and "manifest" congressional intent to hold in trust any land that happened to be eligible for trust acquisition on the day the Nation submitted an application, regardless of whether it is rendered ineligible later in the application process.

Wyeth, 555 U.S. at 565. The answer is no. The District Court could find such an intent only by stretching the Act's words far beyond their meaning. That was error, especially in light of the presumption against preemption.

1. The Gila Bend Act & H.B. 2534

a. We begin, as the District Court did, by "examining the federal statute as a whole," "identifying its purpose and intended effects," and holding it up against the state law it supposedly preempts. Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000). The Gila Bend Act creates a mechanism for the Nation to buy parcels of land and ask the Secretary of the Interior to hold those parcels in trust. See Gila Bend Act §§ 6(c)-(d). The statute, however, does not allow the Nation to choose, or the Secretary to accept into trust, just any parcel. Instead, a parcel must meet limiting criteria designed to protect Arizona municipalities: "The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land * * * which meets the requirements of this subsection. * * * Land does not meet the requirements of this subsection if it is * * * within the corporate limits of any city or town." Id. § 6(d).

These limiting criteria have two critical features. First, as the District Court correctly recognized, they make a parcel's trust eligibility turn on a state-law classification: whether the parcel is "within the corporate limits of a city or town."

Id. Congress deferred to state law on that question. Section 6(d) "does not purport to regulate how cities or towns may incorporate land[.]" ER13.

Second, under Section 6(d), the Secretary is authorized to "hold" land "in trust for the benefit of the Tribe" only if that land is outside "the corporate limits of any city or town." Gila Bend Act § 6(d). That language is naturally read to require that land must be eligible at the time the Secretary attempts to take it into trust. On that day, if land is eligible, then the Secretary "shall hold" it in trust. Id. If it is not eligible, then nothing in Section 6(d) authorizes the Secretary to complete the acquisition and "hold" the land in trust.

That is important because parcels that are the subject of a land-into-trust application do not go into trust immediately. Instead, as an agency appeals board observed in connection with a previous Gila Bend Act acquisition—and as the events of this case illustrate—"Subsection 6 (d) clearly contemplates a request by the Nation and action by the Secretary before trust status is attained." Tohono O'odham Nation v. BIA, 22 I.B.I.A. 220, 229 (1992) (emphasis added). First, the Secretary must examine whether the land is eligible for trust acquisition. See ER211. The Secretary then must issue a decision finding the land eligible (or not). See Big Lagoon Park Co. v. Acting Sacramento Area Dir., 32 I.B.I.A. 309, 317 (1998). That decision is appealable and "subject to reconsideration * * * prior to completion of the second step." Id. The second step involves the examination of

title evidence and correction of title defects. Id. at 318. If the Secretary finds the land eligible, and finds that the Nation has clear title and can convey it, the Secretary will move ahead and complete the acquisition. Id.[6] The Secretary only holds in trust land for which he has executed "an instrument of conveyance." 25 C.F.R. §151.14. No such "instrument of conveyance" has been executed in this case. There is no dispute that the Glendale parcel is not yet held in trust.

b. H.B. 2534, for its part, gives eligible Arizona municipalities a new mechanism to annex land and bring it within the municipality's jurisdiction. The statute provides that when a landowner seeks to transfer unincorporated land surrounded by a municipality to federal ownership, the municipality can annex that land. Ariz. Rev. Stat. § 9-471.04(A). Annexation under H.B. 2534 does not take the land from the landowner. Quite the contrary, the owner still holds the land in fee and can develop it as he sees fit, within the bounds of the law applicable to all other owners. But H.B. 2534 does give the municipality some basic protections. For example, with respect to land transfers for the benefit of Indian tribes, annexation assures that cities and towns will have a voice in discretionary trust-acquisition decisions under 25 U.S.C. § 465 and other federal statutes. See 25 C.F.R. § 151.11(d) (requiring the Department to notify "local governments having

[6] These steps remain the same regardless of whether the statute authorizing the acquisition is a "mandatory" trust acquisition statute, as the Secretary deemed the Gila Bend Act, or discretionary. See 25 C.F.R. §§ 151.12, 151.13, 151.14.

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") (emphasis added). Annexation likewise assures that cities and towns will have a role in land-use planning decisions involving lands managed by the Bureau of Land Management ("BLM"). See 43 U.S.C. § 1712(c)(9). And, of course, in some cases, consistent with the language of federal law, municipal annexation may prevent a trust acquisition by rendering land ineligible. That is what would happen here—and appropriately so, given Congress's choice to make Gila Bend Act eligibility turn on the boundaries of "corporate limits."[7]

c. The bottom line is that H.B. 2534 operates on a subject matter—the boundaries of a municipality's corporate limits—that the Gila Bend Act expressly leaves to state law. There accordingly is no conflict between the Gila Bend Act and H.B. 2534. After all, federal courts have recognized that when "the substantive elements" of a federal statute are "defined by reference to state law," Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1533 (D.C. Cir. 1984), Congress

[7] Arizona and Glendale have maintained at all times, and continue to maintain, that "county islands" like the parcel at issue—surrounded on all sides by Glendale's jurisdiction—are already "within the corporate limits" of Glendale, and thus ineligible for trust acquisition. See supra at 11. That issue is being litigated in this Court in Gila River Indian Cmty. v. United States, Nos. 11-15631 et seq., and if the Court accepts Arizona and Glendale's argument, the Nation's parcel would be ineligible for trust acquisition regardless of any annexation pursuant to H.B. 2534. This case would be moot. That said, the District Court analyzed this case as if the parcel is not currently within Glendale's corporate limits, such that an H.B. 2534 annexation would change the parcel's eligibility for trust acquisition. We proceed on that basis for the sake of argument in this case only.

necessarily embraces the idea that that state law may change—and that any such change is not preempted. See, e.g., Reconstruction Fin. Corp. v. Beaver Cnty., 328 U.S. 204, 206-210 (1946) (federal statute that tied government corporation's tax liability to state law did not preempt uniquely burdensome state tax provision); Florida State Conference of NAACP v. Browning, 522 F.3d 1153, 1171-72 (11th Cir. 2008) (federal law "dynamically incorporates state law requirements" and thus the state law is 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.").

This is precisely such a case. The Gila Bend Act (i) provides that parcels must lie outside "corporate limits" if the Secretary is to "hold" them in trust and (ii) leaves the boundaries of corporate limits to state law. A state law like H.B. 2534 that is applied to adjust municipal jurisdiction, and render a parcel ineligible, does not conflict with those "intended effects." Crosby, 530 U.S. at 373.

3. The District Court's Preemption Analysis.

a. The District Court saw things differently. The court acknowledged that the Gila Bend Act leaves the matter of "how cities or towns may incorporate land * * * entirely to Arizona law" and that Congress did not "intend[ ] to override the annexation decisions of Arizona cities and towns." ER13. And yet the court still deemed H.B. 2534 preempted on the strength of its conclusion that Section

6(d) freezes the eligibility of parcels on the application date—an interpretation which no party had urged in the briefing and which has no basis in law.

Once again, the text on which the District Court relied provides:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land * * * which meets the requirements of this subsection. * * * Land does not meet the requirements of this subsection if it is * * * within the corporate limits of any city or town.

Gila Bend Act § 6(d). Without citing any case law, the District Court asserted that two crucial propositions are "evident" from this language: first, that "the only date § 6(d) identifies for assessing" whether Section 6(d)'s requirements are met "is 'at the request of the Tribe' "; and second, that "[t]he use of the present tense 'is' " in the final sentence above "suggests that the land must not be within corporate limits when the triggering event occurs—when the request is made by the Nation to the Secretary." ER14-15. Based on those "evident" propositions, the District Court concluded (i) that Congress desires for the federal government to hold in trust any land that was eligible on the day the Nation submitted a land-into-trust application, and (ii) that a statute such as H.B. 2534, which would strip away the eligibility of the Nation's parcel after the application date, conflicts with that desire. ER16-17.

That is, to put it mildly, inventive statutory interpretation. The phrase "at the request of the tribe" naturally signifies that the tribe must initiate the land-into-trust process by filing an application—nothing more. See Pickard v. Department

of Justice, 653 F.3d 782, 787 (9th Cir. 2011) (statutory language must be given its "ordinary," "common" meaning). It is not a "date" at all, ER15, and it cannot be fairly read to freeze a parcel's eligibility for acquisition on the day the application is filed, or on any particular day. And when that phrase is given its ordinary meaning—not the extraordinary meaning advanced by the District Court—the word "is" creates an entirely different effect: It blocks the Secretary from accepting into trust land that "is" within corporate limits. Gila Bend Act § 6(d) (emphasis added). After all, if land was outside corporate limits, but now "is" within those limits, the Secretary is not authorized to "hold [it] in trust for the benefit of the Tribe." Id. See Carr v. United States, 130 S. Ct. 2229, 2236 (2010) ("[T]he present tense generally does not include the past."). The fact that land was once eligible does not somehow give the Secretary the power to execute the necessary instruments to take that land into trust.

b. The conclusion that Section 6(d) does not freeze land's eligibility on the application date is especially compelling given that in countless other statutes Congress has demonstrated that it knows how to tie program eligibility to the application date when it wants to do so. Federal immigration laws, for example, require that "a determination of whether an alien satisfies" certain age requirements "be made using the age of the alien on the date on which the petition is filed with the Attorney General." 8 U.S.C. § 1151(f)(1) (emphasis added). A

federal Native American grant program likewise requires that "at the time of application," the institution applying for a grant have "an enrollment of undergraduate students that is not less than 10 percent Native American students." 20 U.S.C. § 1059f(b)(2). And the bankruptcy statutes define a "debtor" for purposes of Chapter 13 as "an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $250,000." 11 U.S.C. § 109(e) (2000) (emphasis added). Indeed, this Court relied on that language to hold that eligibility for Chapter 13 bankruptcy "should normally be determined by the debtor's originally filed schedules," not by later changes to his debt load. In re Scovis, 249 F.3d 975, 982 (9th Cir. 2001).

Congress easily could have included similar language in Section 6(d), making clear that land must meet the statutory criteria "at the time of application." Congress did not do so. Because "Congress knows how to" tie eligibility to the application date "when it wants to," the fact "[t]hat Congress failed to do so here argues forcefully that [that] was not its intention." Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987).[8]

[8] Similarly, Congress knows how to avoid the impact of changing municipal boundaries when it wants to do so. In one tribal settlement act, it authorized municipalities to object to trust acquisitions involving lands within "incorporated boundaries (as such boundaries exist on the date of the Settlement Agreement)[.]" 25 U.S.C. § 1778d(a)(2)(B) (emphasis added). Congress could have used that language here, authorizing trust acquisition of land that was outside corporate limits "as such limits exist on the date of" a land-into-trust application. It did not.

c. The District Court's analysis also suffers from another fatal error: It fails on its own logic because even if Section 6(d) actually mandated trust acquisition of any property that was eligible on the application date, H.B. 2534 still would not be preempted. That is so because under the District Court's approach, only the parcel's jurisdictional status on the application date—not its status at any later date—would matter for Gila Bend Act purposes. The Secretary accordingly would be required to take the Nation's parcel into trust even if Glendale used H.B. 2534 to annex the parcel after the application date. H.B. 2534 would not stop the trust acquisition. Thus the law could not possibly create an "obstacle to the accomplishment of a significant federal regulatory objective," Mazda, 131 S. Ct. at 1136 (quotation marks & citation omitted), even under the District Court's understanding of that phrase.

Of course, the District Court is not correct about Section 6(d)'s supposed eligibility-freezing component, as we have demonstrated. But the fact that the court's analysis fails on its own terms underscores its deep flaws.

* * *

The District Court, in sum, strayed far off base in its sua sponte preemption analysis. Section 6(d) contains no eligibility-freezing mechanism. And that means the District Court's preemption holding must fall. H.B. 2534, after all, is not preempted unless it is "clear" and "manifest," Wyeth, 555 U.S. at 565 (citation

omitted), that the law creates an obstacle to a "significant objective" of the Gila Bend Act. Mazda, 131 S. Ct. at 1136. The non-existent eligibility-freezing mechanism that the District Court identified as Congress's objective in Section 6(d) is neither "clear" nor "manifest." The court's decision flies in the face of the "strong" presumption against preemption, National Meat Ass'n, 599 F.3d at 1098, and indeed would be incorrect even absent the presumption. It is erroneous and should be reversed on de novo review.

C. The District Court's Alternative "Discriminatory Burden" Rationale Is Without Basis.

The District Court held in the alternative that H.B. 2534 conflicts with the Gila Bend Act because it "would cause the Nation to lose important voting and hearing opportunities that otherwise would be available under Arizona's general annexation law," thus " 'discriminat[ing] against the precise type of [right] Congress has created' " in the Gila Bend Act. ER17-18 (quoting Felder v. Casey, 487 U.S. 131, 145 (1988)). This holding fares no better. It erroneously accepts the Nation's invitation to create a new category of preemption—the "discrimination against a federal right" category—and loses sight of the real question: whether H.B. 2534 conflicts with the Gila Bend Act by creating an obstacle to the Act's significant objectives. The answer to that question is no.

1. The District Court described its discrimination holding as resting on a "line of cases," ER17, but that "line" is in fact a collection of disparate precedent, much of which has no application here.

To begin with Felder: The District Court relied on the case for the proposition that "discrimination" analysis is appropriate in the preemption context. That reliance was badly misplaced. Felder is about a state's attempt to place limitations on a federal right of action; it held that a Wisconsin notice-of-claim statute could not be applied to Section 1983 claims because it sharply truncated the effectiveness of the Section 1983 remedy. 487 U.S. at 141. In that context, the Supreme Court observed that the state notice-of-claim rule "discriminates against the precise type of claim Congress has created." Id. at 145. But it did so because it was applying a doctrine, called the "nondiscrimination doctrine," that has nothing to do with this case. The doctrine applies in the context of state judicial enforcement of federal law and provides that while state courts generally must enforce federal law, they can decline to do so if "a neutral rule of judicial administration" forecloses a particular federal claim. Haywood v. Drown, 129 S.Ct. 2108, 2114 (2009). Since a "neutral" state rule of judicial administration is required, a state rule that "discriminate[s] against the federal claim" does not pass muster. Id. at 2116. Accord Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 371-372 (1990) (describing "neutrality" rule and cases where state judicial-

administration rule was discriminatory). Courts and commentators have acknowledged this doctrine for well over a century. See, e.g., McKnett v. St. Louis & S.F. Ry., 292 U.S. 230, 232-233 (1934) (applying rule); Campbell v. City of Haverhill, 155 U.S. 610, 615 (1895) (applying rule); C. Elmendorf, State Courts, Citizen Suits, & The Enforcement of Federal Environmental Law by Non-Article III Plaintiffs, 110 Yale L.J. 1003, 1040 & n.204 (2001) ("Rooted in the Supremacy Clause, the Supreme Court's 'nondiscrimination doctrine' bars state courts from discriminating against 'federal rights' except in limited circumstances that to date have included only 'neutral rules of judicial administration.' ") (citation omitted). But to our knowledge, they have never applied it outside the context of state courts—not once in the course of many decades. The District Court's opinion in this case appears to be the first time the "nondiscrimination doctrine" has ever made the leap to other areas of the law. The court's decision to employ it was error. To talk about discrimination in the conflict-preemption context distracts from the proper focus on whether state law actually conflicts with federal law. It is a classic attempt to jam a square peg in a round hole.

Moreover, even if "discrimination against a federal right" were a cognizable preemption theory, there would be no such discrimination here precisely because—as discussed below—H.B. 2534 does not discriminate against a federal right. The Gila Bend Act balances multiple parties' rights, seeking to ensure that the tribe can

acquire land but also that cities and towns are protected. Thus the "right" inhering in the tribe under the Gila Bend Act is not a right to have land taken into trust, but a right to have eligible land taken into trust. A state statute rendering land ineligible does not discriminate against that right. See infra at 37.[9]

2. Striving to augment its misplaced "discrimination" theory, the Nation's briefs below cited cases striking down state laws that place a "burden" on federal rights and treated them as if they are of a piece with Felder. See Dist. Ct. Proceeding, Dkt. No. 23 at 18 (discussing Nash v. Florida Indus. Comm'n, 389 U.S. 235 (1967) and Livadas v. Bradshaw, 512 U.S. 107 (1994)). Those cases do use "burden" terminology, or similar phrases. But they turn—as they should—not on discrimination but on the existence of actual conflict between state and federal enactments. In Nash, for instance, the Supreme Court held that a state policy of withholding unemployment benefits whenever an employee filed a federal unfair labor practice charge was preempted because it had a "direct tendency to frustrate the purpose of Congress" by discouraging conduct that the National Labor Relations Act protected and encouraged. 389 U.S. at 239. And in Livadas, the

[9] Other cases relied upon by the District Court for its "discrimination" holding, see ER19, are simply inapposite. In Crosby, 530 U.S. at 378, the state law was preempted because it sanctioned Burmese citizens "that Congress has explicitly exempted or excluded from sanctions." That has nothing to do with discrimination against a federal right. And in Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 33 (1996), the state law was preempted because it forbade banks from selling insurance, even though federal law authorized them to do so. That is classic conflict preemption. It does not support a "discrimination" theory.

Supreme Court held that a state could not make employees choose between (i) their rights under a state law that required employers to pay all back wages immediately upon termination and (ii) a federal statutory right to enter into a collective bargaining agreement with an arbitration clause. 512 U.S. at 117-118. As the Livadas Court recognized, "[a] state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." Id. at 116.

Nash, Livadas, and similar cases make clear that the mere fact that a state law has some effect on a federal applicant is not enough for preemption. Instead, such a state law will trigger preemption only if it impedes the federal law by blocking (or discouraging) people from obtaining relief Congress wanted them to obtain. H.B. 2534 does not meet that description. It does not block the Nation from applying to have land held in trust, and it does not block the Nation from obtaining the benefit the Gila Bend Act provides—namely, the ability to have eligible land held in trust. All it does is define what land is eligible. And that is an arena the Gila Bend Act explicitly left to state law.

This understanding of Nash and Livadas is consistent with the Supreme Court's explanations that, to create obstacle preemption, a state law must stand as an obstacle to a "significant objective" of the federal enactment. Mazda, 131 S. Ct. at 1136. In Mazda, federal automobile-safety regulations gave vehicle

manufacturers two choices for restraints on middle back seats: simple lap seat belts or lap-and-shoulder belts. Both met federal safety standards. Id. at 1134. A state tort action, however, sought to impose tort liability upon manufacturers who chose to install a simple lap belt. Id. The question the Court faced was whether such a state rule of law was preempted because it took away a choice provided by federal law. The Court determined that "providing manufacturers with this seatbelt choice is not a significant objective of the federal regulation." Id. It accordingly held that "even though the state tort suit may restrict the manufacturer's choice, it does not 'stan[d] as an obstacle to the accomplishment * * * of the full purposes and objectives' of federal law." Id. at 1139-40 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) (alteration in original; emphasis added).

Just so here. As the District Court recognized, Congress's objective in the Gila Bend Act was to "facilitat[e] replacement" of 9,800 acres of economically productive reservation lands for the Nation. ER13. Congress "left entirely to Arizona law" the question whether particular parcels of land would meet the requirements of Section 6(d), ER13; it did not express any preference about which of the millions of acres of land in the three designated counties were to be held in trust. Thus even if H.B. 2534 could be characterized as "restrict[ing] the [Nation]'s choice" of land to have held in trust—an exaggeration, considering all it really does is create the possibility that the Nation's choice might be restricted—it

nonetheless does not " 'stan[d] as an obstacle to the accomplishment * * * of the full purposes and objectives' of federal law." Mazda, 131 S. Ct. at 1139-40 (quoting Hines, 312 U.S. at 67).

Indeed, the only way to conclude that Congress did express a preference regarding what precise land should be held in trust—and therefore the only way to hold that H.B. 2534 "poses special dangers of interference with congressional purpose," Livadas, 512 U.S. at 116—would be to accept the District Court's tortured notion that under Section 6(d), the eligibility of land is frozen on the day the Nation submits a land-into-trust application. But that analysis is wrong, as demonstrated above. If the District Court's primary holding falls—as it must—its "discrimination" holding falls too.

D. The District Court's "State Legislative Purpose" Analysis Is Both Erroneous And Irrelevant.

Finally, the District Court observed that Arizona legislators debating H.B. 2534 openly stated that they wanted to block the Nation from turning the Glendale property into a reservation. ER18-19. The court concluded that in enacting H.B. 2534 "[t]he Arizona Legislature clearly sought to block application of the Gila Bend Act to the Nation's property near Glendale," and opined that that state legislative intent sufficed to "confirm[ ]" obstacle preemption. ER18.

Though the District Court took some of the legislative statements out of context,[10] the court was quite correct that the Nation's shenanigans in Glendale provided a spark for H.B. 2534. The court likewise was correct that Glendale could use H.B. 2534 to annex the Nation's Glendale parcel and bring it within the City's corporate limits. The District Court erred, however, in concluding that those facts are relevant to obstacle preemption. In fact they are not, for two reasons: First, state legislative purpose is irrelevant to obstacle preemption. Second, and in any event, the Arizona legislature's intent in enacting H.B. 2534 poses no conflict with the goals or purposes of the Gila Bend Act.

1. The purpose of a state legislative enactment is irrelevant to the obstacle-preemption inquiry. The question, always, for purposes of obstacle preemption is whether the state law creates "an 'obstacle to the accomplishment' of a significant federal regulatory objective." Mazda, 131 S. Ct. at 1136 (citation omitted). That is a question of effect; the purpose motivating the state law cannot create an obstacle if it does not otherwise exist. The Supreme Court said as much in the seminal preemption case of Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963):

[10] Many of the statements quoted by the District Court—for example, the statement that the Gila Bend Act was "not the supreme law" of the land if it allowed the Nation "to take sovereign land out of the state with an act of Congress," ER19—were references to constitutional claims that have been advanced in litigation. They did not signal legislative desire to pass statutes that conflict with federal law.

> [I]t is suggested that the coexistence of federal and state regulatory legislation should depend upon whether the purposes of the two laws are parallel or divergent. * * * [But] [t]he test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.

Id. at 142 (emphasis added). Put another way, "[i]n determining whether it conflicts with the federal law, the Court must look to the effect, rather than the purpose of the state law." New York State Comm'n on Cable Television v. FCC, 669 F.2d 58, 62 (2d Cir. 1982); accord New Hampshire Motor Transport Ass'n v. Rowe, 448 F.3d 66, 77 (1st Cir. 2006) (explaining in the context of airline regulation that the Supreme Court's preemption analysis "has focused on the effect that a state law has on carrier operations, not on the state's purpose for enacting the law"); cf. Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 59 (2d Cir. 1988) (state-created obstacle to federal objective "justifies preemption regardless of the state's legitimate purpose"). That makes good sense. As one scholar observed: "The intent behind a state law does not create a conflict between federal and state laws; the laws either conflict or they do not." A. Levitin, Hydraulic Regulation: Regulating Credit Markets Upstream, 26 Yale J. on Reg. 143, 210 (2009).[11] Here they do not, for the reasons already discussed.

[11] The District Court cited two Supreme Court cases, English v. General Elec. Co.,

2. Second, even if purpose were relevant to the obstacle-preemption inquiry, it would not justify the District Court's observations here because the purpose of H.B. 2534 does not conflict with the Gila Bend Act. As already discussed, the Gila Bend Act is designed to (i) allow the Nation to acquire 9,880 acres of trust property while (ii) protecting cities and towns. See supra at 24-25, 35-36. The Gila Bend Act expressly defers to state law on the question whether particular parcels of land fall within or without "corporate limits," and thus whether a parcel will be eligible for acquisition. A state law such as H.B. 2534 that changes the corporate designation of a parcel coveted by the Nation accordingly does not infringe the federal law's objectives in any way. And that means the District Court's conclusion that the state legislature "sought to block application of the Gila Bend Act to the Nation's property near Glendale," ER18 (emphasis added), is off the mark. H.B. 2534 creates a mechanism that might let

---

496 U.S. 72 (1990), and New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), for the contrary proposition. But neither is a conflict-preemption case. English is about field preemption, see 496 U.S. at 82-83, and Travelers is about an express-preemption provision designed to effectively "preempt the field." 514 U.S. at 657 (citation omitted). Since the question for field-preemption purposes is whether state law "touch[es]" a field that Congress means to regulate exclusively, Anderson v. Edwards, 514 U.S. 143, 156 (1995), it may make sense to consider whether the state intended the law to operate in that field. But that consideration carries no resonance in the arena of conflict preemption. In any event, even in the field-preemption context the Supreme Court appears dubious about whether state purpose should carry any weight. See English, 496 U.S. at 84 ("even if enacted out of nonsafety concerns," a state law that touches the preempted field of nuclear safety "would nevertheless [infringe upon] the NRC's exclusive authority") (citation omitted).

Glendale block trust acquisition of this particular property, but that is a far cry from blocking the "application of the Gila Bend Act." Instead, H.B. 2534 operates in a space the Gila Bend Act left to state control.

Indeed, to accept the District Court's characterization that H.B. 2534 seeks to "block application of the Gila Bend Act," ER19, one must accept that Congress expressed a preference that particular parcels be accepted into trust—and that means one must accept the District Court's theory that Section 6(d) contains an eligibility-freezing mechanism. The District Court's "state purpose" analysis, like its "discrimination" analysis, flows from its erroneous statutory construction. Because that statutory construction fails, the court's subsidiary analyses must fail as well.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

/s/ Audrey E. Moog

Audrey E. Moog *
Dominic F. Perella
Michael D. Kass
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, DC 20004
(202) 637-5600
audrey.moog@hoganlovells.com

José de Jesus Rivera
Peter T. Limperis

Thomas C. Horne, Attorney General*
Michael Tryon
Evan Hiller
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington Street
Phoenix, AZ 85007-2926
(602) 542-8355

Counsel for the State of Arizona
**Counsel of record*

HARALSON, MILLER, PITT, FELDMAN,
& MCANALLY, P.L.C.
2800 N. Central Avenue, Suite 840
Phoenix, AZ 85012

Counsel for City of Glendale
**Counsel of record*

November 4, 2011

NINTH CIRCUIT RULE 28-2.6 STATEMENT

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the State of Arizona and the City of Glendale state that they are aware of one related case pending in this Court. In Gila River Indian Cmty. v. United States, Nos. 11-15631 et seq., the Gila River Indian Community, the State, Glendale, and several individual plaintiffs are challenging the Secretary of the Interior's decision to take Parcel 2 into trust. The case is fully briefed and awaiting argument.

One additional related case is pending in the District of Arizona. State of Arizona v. Tohono O'odham Nation, No. 2:11-cv-00296-DGC, involves allegations by the State and GRIC, among other plaintiffs, that by gaming on Parcel 2 the Nation will violate a tribal-state compact that limits casino-style gaming within Arizona to certain defined lands. The case is pending before Judge Campbell.

/s/ Audrey E. Moog
Audrey E. Moog

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached Brief is proportionally spaced, has a typeface of 14 point, and contains 10,845 words.

/s/ Audrey E. Moog
Audrey E. Moog

[blue page]

ADDENDUM TABLE OF CONTENTS

H.B. 2534 (codified as Ariz. Rev. Stat. § 9-471.04)

9-471.04. Annexation of territory partially or completely surrounded by city or town; definition

A. Notwithstanding any other provision of this article:

1. A city or town located in a county with a population of more than three hundred fifty thousand persons may annex any territory within an area that is surrounded by the city or town or that is bordered by the city or town on at least three sides if the landowner has submitted a request to the federal government to take ownership of the territory or hold the territory in trust.

2. The annexation of territory pursuant to this section is valid if approved by a majority vote of the governing body of the city or town. The annexation becomes immediately operative if it is approved by at least two-thirds of the governing body of the city or town.

B. For the purposes of this section, "submitted a request to the federal government" means the landowner has made an application to the federal government as required by a specific federal statute or regulation.

(EMERGENCY NOT ENACTED)

Sec. 2. Emergency

This act is an emergency measure that is necessary to preserve the public peace, health or safety and is operative immediately as provided by law.

Gila Bend Indian Reservation Lands Replacement Act,
Pub. L. No. 99-503, 100 Stat.1798 (1986)

An Act to provide for the replacement of certain lands within the Gila Bend Indian Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Gila Bend Indian Reservation Lands Replacement Act".

CONGRESSIONAL FINDINGS

SEC. 2. The Congress finds that:

(1) Section 308 of Public Law 97-293 "96 Stat. 1282" authorizes the Secretary of the Interior to exchange certain agricultural lands of the Gila Bend Indian Reservation, Arizona, for public lands suitable for farming.

(2) An examination of public lands within a one-hundred-mile radius of the reservation disclosed that those which might be suitable for agriculture would require substantial Federal outlays for construction of irrigation systems, roads, education and health facilities.

(3) The lack of an appropriate land base severely retards the economic self-sufficiency of the O'odham people of the Gila Bend Indian Reservation, contributes to their high unemployment and acute health problems, and results in chronic high costs for Federal services and transfer payments.

(4) This Act will facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and do not require Federal outlays for construction, and promote the economic self-sufficiency of the O'odham Indian people.

DEFINITIONS

SEC. 3. For the purpses of this Act, the term:

(1) "Central Arizona Project" means the project authorized under title III of the Colorado River Basin Project Act (82 Stat. 887; 43 U.S.C. 1521, et seq.).

(2) "Tribe" means the Tohono O'odham Nation, formerly known as the Papago Tribe of Arizona, organized under section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476).

(3) "Secretary" means the Secretary of the Interior.

(4) "San Lucy District" means the political subdivision of the Tohono O'odham Nation exercising governmental functions on the Gila Bend Indian Reservation.

ASSIGNMENT OF TRIBAL LANDS; RETAINED RIGHTS

SEC. 4. (a) If the tribe assigns to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of land within the Gila Bend Indian Reservation, the Secretary of the Interior shall pay to the authorized governing body of the Tribe the sum of $30,000,000 -- $10,000,000 in fiscal year 1988, $10,000,000 in fiscal year 1989 and $10,000,000 in fiscal year 1990 -- together with interest accruing from the date of enactment of this Act at a rate determined by the Secretary of the Treasury taking into consideration the average market yield on outstanding Federal obligations of comparable maturity, to be used for the benefit of the San Lucy District. The Secretary shall accept any assignment under this subsection.

(b) The Tribe shall be permitted to continue to hunt, fish, and gather on any lands assigned to the United States under subsection (a) of this section so long as such lands remain in Federal ownership.

(c) With respect to any lands of the Gila Bend Indian Reservation which the Tribe does not assign to the United States, the Tribe shall have the right to withdraw ground water therefrom from wells having a capacity of less than thirty-five gallons per minute and which are used only for domestic purposes.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. Effective October 1, 1987 there is authorized to be appropriated such sums

as may be necessary to carry out the purposes of section 4.

USE OF SETTLEMENT FUNDS; ACQUISITION OF LANDS

SEC. 6. (a) The Tribe shall invest sums received under section 4 in interest bearing deposits and securities until expended. The authorized governing body of the Tribe may spend the principal and the interest and dividends accruing on such sums on behalf of the San Lucy District for land and water rights acquisition, econolmic and community development, and relocation costs. Such income may be used by the Tribe for planning and administration related to land and water rights acquisition, economic and community development and relocation for the San Lucy District.

(b) The Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section, nor shall the Secretary be subject to liability for any claim or cause of action arising from the Tribe's use and expenditure of such moneys. No portion of such moneys shall be used for per capita payments to any members of the Tribe.

(c) The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres. The Tribe and the United States shall be forever barred from asserting any and all claims for reserved water rights with respect to any land acquired pursuant to this subsection.

(d) The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

(e) The Secretary shall establish a water management plan for any land which is held in trust under subsection (c) which, except as is necessary to be consistent

with the provisions of this Act, will have the same effect as any management plan developed under Arizona law.

REAL PROPERTY TAXES

SEC. 7. (a) With respect to any private land acquired by the Tribe under section 6 and held in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes.

(b) The Secretary is authorized to enter into agreements with the State of Arizona and its political subdivisions pursuant to which the Secretary may satisfy the obligation under subsection (a), in whole or in part, through the transfer of public land under his jurisdiction or interests therein, including land within the Gila Bend Indian Reservation or interests therein.

WATER DELIVERY

SEC. 8. If the tribe acquires rights to the use of any water by purchase, rental, or exchange within the State of Arizona, the Secretary, at the request of the Tribe, shall deliver such water, at no cost to the United States, through the main project works of the Central Arizona Project to any land acquired under section 5(c), if, in the judgment of the Secretary, sufficient canal capacity exists to convey such water: Provided, That deliveries of such water shall not displace deliveries of Central Arizona Project water. The rate charged to the tribe for water delivery shall be the same as that charged by the Central Arizona Water Conservation District pursuant to contracts entered into pursuant to the Colorado River Basin Project Act (43 U.S. C. 1521, et seq.). Nothing in this section shall be deemed to obligate the Secretary to construct any water delivery system.

WAIVER AND RELEASE OF CLAIMS; EFFECTIVE DATE

SEC. 9. (a) The Secretary shall be required to carry out the obligations of this Act only if within one year after the enactment of this Act the Tribe executes a waiver and release in a manner satisfactory to the Secretary of any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water) with respect to the lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Tribe of such a waiver.

(b) Nothing in this section shall be construed as a waiver or release by the Tribe of

any claim where such claim arises under this Act.

(c) The assignment referred to in section 4 and the waiver and release referred to in this section shall not take effect until such time as the full amount authorized to be appropriated in section 4 has been appropriated by the Congress and paid to the Tribe.

COMPLIANCE WITH BUDGET ACT

SEC. 10. No authority under this Act to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts. Any provision of this Act which, directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal years beginning after September 30, 1987.

Approved October 20, 1986.

25 C.F.R. §§ 151.11-151.14

25 C.F.R. § 151.11

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10(a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10(e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

25 C.F.R. § 151.12

(a) The Secretary shall review all requests and shall promptly notify the applicant in writing of his decision. The Secretary may request any additional information or justification he considers necessary to enable him to reach a decision. If the Secretary determines that the request should be denied, he shall advise the applicant of that fact and the reasons therefor in writing and notify him of the right to appeal pursuant to part 2 of this title.

(b) Following completion of the Title Examination provided in § 151.13 of this part and the exhaustion of any administrative remedies, the Secretary shall publish in the Federal Register, or in a newspaper of general circulation serving the affected area a notice of his/her decision to take land into trust under this part. The notice will state that a final agency determination to take land in trust has been made and that the Secretary shall acquire title in the name of the United States no sooner than 30 days after the notice is published.

25 C.F.R. § 151.13

If the Secretary determines that he will approve a request for the acquisition of land from unrestricted fee status to trust status, he shall acquire, or require the applicant to furnish, title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice. After having the title evidence examined, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities which may exist. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable.

25 C.F.R. § 151.14

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

Ariz. Rev. Stat. § 11-814

A. All rezonings adopted under this article shall be consistent with and conform to the adopted comprehensive plan. In the case of uncertainty in constructing or applying the conformity of any part of a proposed rezoning to the adopted comprehensive plan, the rezoning shall be construed in a manner that will further the implementation of, and not be contrary to, the goals, policies and applicable elements of the comprehensive plan. A rezoning conforms with the comprehensive plan if it proposes land uses, densities or intensities within the range of identified uses, densities and intensities of the comprehensive plan.

B. A property owner or authorized agent of a property owner desiring a rezoning shall file an application for the rezoning.

C. The commission, on its own motion, may propose a rezoning and, after holding a public hearing as required by this chapter, may transmit the proposal to the board, which shall proceed as prescribed in this chapter for any other rezoning.

D. On receipt of the application the board shall submit the application to the commission for a report. Before reporting to the board, the commission shall hold at least one public hearing after giving at least fifteen days' notice of the hearing by one publication in a newspaper of general circulation in the county seat and by posting of the area included in the proposed rezoning. If the matter to be considered applies to territory in a high noise or accident potential zone as defined in § 28-8461, the notice shall include a general statement that the matter applies to property located in the high noise or accident potential zone. The posting shall be in no less than two places with at least one notice for each quarter mile of frontage along perimeter public rights-of-way so that the notices are visible from the nearest public right-of-way. The commission shall also send notice by first class mail to each real property owner as shown on the last assessment of the property within three hundred feet of the proposed rezoning and each county and municipality that is contiguous to the area of the proposed rezoning. In proceedings involving rezoning of land that is located within territory in the vicinity of a military airport or ancillary military facility as defined in § 28-8461, the commission shall send copies of the notice of public hearing by first class mail to the military airport. The notice sent by mail shall include, at a minimum, the date, time and place of the hearing on the proposed rezoning including a general explanation of the matter to be considered and a general description of the area of the proposed rezoning. For those counties with five or more supervisors, the notice must include a general

description of how the real property owners within the zoning area may file approvals or protests of the proposed rezoning, and notification that if twenty per cent of the property owners by area and number within the zoning area file protests, an affirmative vote of three-fourths of all members of the board will be required to approve the rezoning. In proceedings that are initiated by the commission involving rezoning, notice by first class mail shall be sent to each real property owner, as shown on the last assessment of the property, of the area to be rezoned and all property owners, as shown on the last assessment of the property, within three hundred feet of the property to be rezoned.

E. If the commission or hearing officer has held a public hearing, the board may adopt the recommendations of the commission or hearing officer through use of a consent calendar without holding a second public hearing if there is no objection, request for public hearing or other protest. If there is an objection, a request for public hearing or a protest, the board shall hold a public hearing at least fifteen days' notice of which shall be given by one publication in a newspaper of general circulation in the county seat and by posting the area included in the proposed rezoning. In counties with territory in the vicinity of a military airport or ancillary military facility as defined in § 28-8461, the board shall hold a public hearing if, after notice is mailed to the military airport pursuant to subsection D of this section and before the public hearing, the military airport provides comments or analysis concerning the compatibility of the proposed rezoning with the high noise or accident potential generated by military airport or ancillary military facility operations that may have an adverse impact on public health and safety, and the board shall consider and analyze the comments or analysis before making a final determination. After holding the hearing the board may adopt the rezoning by a majority vote of the board for those counties with fewer than five supervisors, or for those counties with five or more supervisors if a protest has not been filed. If twenty per cent of the owners of property by area and number within the zoning area file a protest to the proposed rezoning, the change shall not be made except by a three-fourths vote of all members of the board for those counties with five or more supervisors. If any members of the board are unable to vote on the question because of a conflict of interest, the required number of votes for the passage of the question is three-fourths of the remaining membership of the board for those counties with five or more supervisors, except that the required number of votes in no event shall be less than a majority of the full membership of the board. In calculating the owners by area, only that portion of a lot or parcel of record situated within three hundred feet of the property to be rezoned shall be included. In calculating the owners by number or area, county property and public rights-of-

way shall not be included.

F. The board of supervisors shall adopt by ordinance a citizen review process that applies to all rezoning and specific zoning plan applications that require a public hearing. The citizen review process shall include at least the following requirements:

1. Adjacent landowners and other potentially affected citizens will be notified of the application.

2. The county will inform adjacent landowners and other potentially affected citizens of the substance of the proposed rezoning.

3. Adjacent landowners and other potentially affected citizens will be provided an opportunity to express any issues or concerns that they may have with the proposed rezoning before the public hearing.

G. The rezoning or subdivision plat of any unincorporated area completely surrounded by a city or town shall use as a guideline the adopted general plan and standards as prescribed in the subdivision and zoning ordinances of the city or town after April 10, 1986.

H. The board or commission, before taking any action on a rezoning or subdivision plat in an area as prescribed in subsection G of this section, may require the affected city or town to supply information to allow the county to meet the guideline. If an affected city or town objects to any such proposed action the board or commission shall prescribe in the minutes of the meeting specific reasons why in its opinion the guideline is actually being followed or why it is not practicable to follow the guideline of the general plan.

I. The board may approve a change of zone conditioned on a schedule for development of the specific use or uses for which rezoning is requested. If at the expiration of this period the property has not been improved for the use for which it was conditionally approved, the board after notification by certified mail to the owner and applicant who requested the rezoning shall schedule a public hearing to grant an extension, determine compliance with the schedule for development or cause the property to revert to its former zoning classification.

J. The legislature finds that a rezoning of land that changes the zoning

classification of the land or that restricts the use or reduces the value of the land is a matter of statewide concern. Such a change in zoning that is initiated by the governing body or zoning body shall not be made without the express written consent of the property owner. In applying an open space element or a growth element of a comprehensive plan, a parcel of land shall not be rezoned for open space, recreation, conservation or agriculture unless the owner of the land consents to the rezoning in writing. For the purposes of this subsection, rezoning does not include the creation or expansion of overlay zones solely for the purpose of implementing airport safety and protection. Rezoning also does not include the redesignation of areas of the county to which the residential provisions of the county building codes apply or do not apply. The county shall not adopt any change in a zoning classification to circumvent the purpose of this subsection.

K. Notwithstanding title 19, chapter 1, article 4, [FN1] a decision by the governing body involving rezoning of land that is not owned by the county and that changes the zoning classification of the land may not be enacted as an emergency measure and such a change shall not be effective for at least thirty days after final approval of the change in classification by the board. Unless a resident files a written objection with the board of supervisors, the rezoning may be enacted as an emergency measure that becomes effective immediately by a four-fifths majority vote of the board for those counties with five or more supervisors or a two-thirds majority vote of the board for those counties with fewer than five supervisors.

L. For the purposes of this section, "zoning area" means the area within three hundred feet of the proposed amendment or change.

CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk using the appellate CM/ECF system on November 4, 2011. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Four copies of appellants' Excerpts of Record were sent on November 4, 2011 via FedEx to the Clerk. Paper copies were served upon:

Seth P. Waxman
Danielle Spinelli
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006

Counsel for the Tohono O'odham Nation

/s/ Audrey E. Moog
Audrey E. Moog