Nos. 11-16811, 11-16823, and 11-16833

IN THE

United States Court of Appeals for the Ninth Circuit

TOHONO O'ODHAM NATION,
Plaintiff-Appellee / Cross-Appellant,
v.

STATE OF ARIZONA AND CITY OF GLENDALE,
Defendants-Appellants / Cross-Appellees.

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

RESPONSE AND REPLY BRIEF FOR DEFENDANTS-APPELLANTS / CROSS APPELLEES

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

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

Craig D. Tindall
OFFICE OF THE CITY ATTORNEY
5850 West Glendale Ave., Suite 450
Glendale, AZ 85301

Counsel for City of Glendale

February 1, 2012

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*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS:

STATUTES:

TABLE OF AUTHORITIES—Continued

Page(s)

LEGISLATIVE MATERIALS:

REGULATIONS:

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

IN THE

United States Court of Appeals for the Ninth Circuit

Nos. 11-16811, 11-16823, and 11-16833

THE TOHONO O'ODHAM NATION,

Plaintiff-Appellee / Cross-Appellant,

v.

STATE OF ARIZONA and CITY OF GLENDALE

Defendants-Appellees.

RESPONSE AND REPLY BRIEF FOR DEFENDANTS-APPELLANTS / CROSS APPELLEES

SUMMARY OF ARGUMENT

Throughout its brief, the Tohono O'odham Nation ("Nation") works to hammer home a theme: H.B. 2534, it suggests over and over, is a sneaky piece of legislation, enacted by a legislature intent on "nullifying" federal law and taking rights away from an innocent landowner. That theme bears no resemblance to reality. In fact, the Nation has worked for years to ram a huge casino into metropolitan Glendale, deeply harming the interests of Arizona, Glendale, and other Indian tribes. The Nation's tactics alerted the state legislature to a serious and potentially recurring problem for Arizona cities. The legislature—acting openly and with all the usual legislative process—chose to do something about it, giving cities a voice in certain land transfer applications by allowing them to annex

land that is the subject of such applications. And as the District Court recognized, the legislature's choice was entirely rational: H.B. 2534 in fact will protect cities in important new ways, and it will have application in cases beyond this one. ER10, 21-23, 25-26. That is why the District Court soundly rejected the Nation's claims that H.B. 2534 violates equal protection, due process, and the Arizona's constitution's ban on special legislation. ER20-26.

H.B. 2534 is, in short, a valid law, enacted by a sovereign state to address a real problem. This Court should weigh the Nation's arguments with due regard to Arizona's sovereign interests and to the Supreme Court's admonition that federal courts should be "extremely cautious in upsetting State regulation[.]" Hill v. State of Fla. ex rel. Watson, 325 U.S. 538, 556 (1945). Properly viewed, H.B. should be sustained:

1. H.B. 2534 is not preempted by the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503 (1986) ("Gila Bend Act"). The Nation barely defends the District Court's primary preemption rationale, and rightly so; nothing in the Gila Bend Act's language suggests that the trust eligibility of a particular parcel is frozen the moment the Nation submits a trust application. And while the Nation seeks to defend the preemption ruling on other grounds—arguing, for example, that it will "impair" and "burden" the Gila Bend Act's operation—those arguments lose sight of a key fact: In the Gila Bend Act,

Congress chose to have the eligibility of particular parcels turn on mutable state-law classifications regarding corporate limits. For that reason, H.B. 2534, a law that gives cities power to alter corporate limits, is perfectly consistent with Congress's objectives. H.B. 2534 does nothing to impair Congress's overarching goal—to ensure that the Nation can acquire up to 9,880 acres of reservation land outside of cities. It accordingly does not "stand[] as an obstacle to the accomplishment * * * of the full purposes and objectives' of a federal law[.]" Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1136 (2011) (citation omitted).

2. As the District Court properly held, H.B. 2534 does not violate equal protection. The Nation concedes, as it must, that " 'protecting the interests of already existing municipalities' " from the "complications that can arise when Indian reservations or federal enclaves are created on the fringes of existing cities and towns" is a legitimate government objective. ER21 (quoting Green v. City of Tucson, 340 F.3d 891, 903 (9th Cir. 2003)); Resp. Br. 50. H.B. 2534's criteria—which provide that protection to the municipalities that need it—are rationally related to that objective.

3. Nor, as the District Court properly held, is H.B. 2534 an unconstitutional special law. Again, the statute's classifications are rationally related to a legitimate governmental objective. Those criteria are appropriately

targeted to address the particular needs of municipalities located in "urbanized or * * * urbanizing count[ies][.]" NER68. And the classifications are sufficiently elastic, enabling cities and towns to enter the class of benefitted municipalities as they satisfy statutory criteria and exit the class when they do not.

4. Finally, as the District Court properly concluded, H.B. 2534 does not violate due process. Indeed, the Nation's due process arguments fail at the outset because the statute does not deprive the Nation of any property interest. The Department of Interior ("Department") has not accepted the Nation's property into trust; it may never do so. Accordingly, the Nation cannot claim that H.B. 2534 threatens any legitimate claim of entitlement to a government benefit. Likewise, H.B. 2534 cannot qualify as retroactive legislation; it is entirely prospective in application. "A statute does not operate 'retrospectively' merely because it * * * upsets expectations based in prior law." Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994). Even if the Court were to find that H.B. 2534 deprived the Nation of a property interest and operated retroactively, the statute still would be be constitutional because its purportedly retroactive provisions trigger H.B. 2534's streamlined annexation process only when necessary—i.e., only after a landowner has applied to transfer land to the federal government. They accordingly are rationally related to the statute's legitimate objective.

ARGUMENT

I. H.B. 2534 IS NOT PREEMPTED BY FEDERAL LAW

The Nation cites forty-three separate cases in its effort to demonstrate that the Gila Bend Act preempts H.B. 2534, see Resp. Br. 22-45, but this Court need look to just one. In Mazda, federal law gave auto manufacturers the choice to use either of two type of restraints in their vehicles, while a state's tort law effectively restricted the manufacturers to one. The Supreme Court rejected the argument that that amounted to conflict preemption: "[E]ven though" the state law "may restrict the manufacturer's choice," the Court explained, "it does not 'stan[d] as an obstacle to the accomplishment * * * of the full purposes and objectives' of federal law." 131 S. Ct. at 1139-40 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). That is this case exactly. Congress's objective in the Gila Bend Act was to "facilitat[e] replacement" of up to 9,880 acres of reservation lands, but it "left entirely to Arizona law" the question whether particular parcels would meet the Act's requirements. ER13. H.B.2534 amends the very area of state law to which Congress deferred. And no matter how aggressively municipalities utilize H.B. 2534, they could never prevent the Nation from having 9,880 acres taken into trust; there are millions of acres from which the Nation could choose.[1] Thus even

[1] As explained in the Committee Report accompanying the Gila Bend Act, the legislation's "principal purpose" was "to provide suitable alternative lands and economic opportunity for the tribe," H.R. Rep. No. 99-851, at 9 (1986), within the

though H.B. 2534 "may restrict the [Nation's] choice" about which parcels to have taken into trust, it does not "stan[d] as an obstacle" to Congress' objectives. Mazda, 131 S. Ct. at 1139-40.

The Nation ducks this analysis and instead seeks to manufacture its own flavors of preemption, often relying on authorities that have nothing to do with preemption. We address its arguments point by point.

A. The Presumption Against Preemption Applies.

The Nation twists the law to argue that the presumption against preemption does not apply. Pointing to the Supreme Court's decision in Wyeth v. Levine, 555 U.S. 555 (2009), the Nation asserts that "even the cases on which Appellants rely make clear that such a presumption is appropriate only when the federal government regulates in an area with a 'historic presence of state law.' " Resp. Br. 23 (quoting Wyeth, 555 U.S. at 566 n.3). But Wyeth squarely held that "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated * * * in a field which the States have traditionally occupied,' * * * we 'start with the

---

geographical parameters Congress selected. It was not to give the Nation any land it happened to want. And though the Nation would like to place its casino in the middle of Glendale, Congress certainly never intended for that to happen. The Nation has no aboriginal lands near Glendale, and its closest reservation land is over 40 miles away. See ER92; 2:10-cv-01993-DGC, Dkt. No. 78 ¶ 39. And as Congress made clear, the Nation was only to choose lands located "outside the corporate limits of any city or town." H.R. Rep. No. 99-851, at 11 (emphasis added). This restriction plainly was designed to prevent the sorts of conflicts and complications spawned by the Nation's trust application, not to encourage them.

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.' " 555 U.S. at 565 (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) (emphases added). The holding could hardly be clearer: The presumption applies in all cases, even if it happens to have special resonance when Congress legislates in historically state-dominated fields. Id. To assert, as the Nation does, that Wyeth "ma[d]e clear" that the presumption is "only" appropriate in that latter category of cases is to rewrite the opinion.

The Nation relies heavily on the statement in United States v. Locke, 529 U.S. 89 (2000), that the presumption may not apply when a state " 'regulates in an area where there has been a history of significant federal presence.' " Resp. Br. 23 (quoting Locke, 529 U.S. at 108). But Locke predates Wyeth by almost a decade. And where there is tension between two Supreme Court decisions, this Court must be "guide[d]" by the Supreme Court's "most recent pronouncement[.]" Garcia-Ramirez v. Gonzales, 423 F.3d 935, 947 (9th Cir. 2005). As the District Court correctly observed, "the Supreme Court's most recent non-plurality pronouncement"— Wyeth—"states that the presumption applies in 'all' cases," and the lower courts are bound by that teaching. ER9.

Even if Locke and Wyeth must be reconciled, this Court has already done so. In Pacific Merchant Shipping Ass'n v. Goldstene, 639 F.3d 1154 (9th Cir.

2011), it examined Wyeth and Locke and held that even if a state law " 'regulates in an area where there has been a history of significant federal presence,' " id. at 1166 (quoting 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. Id. at 1167. Thus, even if H.B. 2534 "injects state and local governments into the process by which the federal government takes land into trust for Indian tribes," as the Nation asserts, Resp. Br. 24, it still "ultimately implicate[s]" an area of historic state regulation—namely, city authority to annex land. The District Court so held, ER9, and its holding is unimpeachable. After all, few subjects are more firmly within the heartland of historic state control than city boundaries and land annexation. See Green, 340 F.3d at 900-01 ("[S]tates have broad authority over the establishment and development of municipalities within their borders."); Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, 324 (6th Cir. 1967) (municipal annexation is "entirely within the power of the legislature of the State to regulate[.]")

Not to be dissuaded, the Nation asserts that "[t]he relevant question is not whether the state law can be characterized as an exercise of state police powers if considered in isolation, but whether in practical operation it intrudes on an inherently federal area." Resp. Br. 25. That simply is not an accurate portrayal of this Circuit's law. In Pacific Merchant, the state laws at issue intruded into federal

areas, including "maritime commerce," and yet this Court applied the presumption because the state laws "ultimately implicate[d] the prevention and control of air pollution," an area of historic state regulation. 639 F.3d at 1167. And in United States v. Arizona, 641 F.3d 339 (9th Cir. 2011), cert. granted, No. 11-182, 2011 WL 3556224 (U.S. Dec. 12, 2011), the state law intruded into a federal area—regulation of aliens—and yet this Court applied the presumption because the state law ultimately implicated "the power to regulate * * * employment," which is "within the states' historic police powers[.]" Id. at 357. The same is true here, as the District Court recognized. ER9. The presumption applies.

B. H.B. 2534 Is Not Preempted.

As for the merits: The Nation makes no serious attempt to defend the District Court's erroneous interpretation of the Gila Bend Act. Instead, the Nation primarily argues that H.B. 2534 is preempted because it " 'impair[s] significantly[ ] the exercise of power that Congress explicitly granted' " and alters the "specific balance among competing interests" that Congress chose. Resp. Br. 29, 30 (quoting Barnett Bank of Marion Cnty., N.A. v. Nelson, 517 U.S. 25, 33 (1996)). Neither is true.

1. The District Court's Statutory Interpretation Was Erroneous.

The District Court found H.B. 2534 preempted because "[t]he use of the present tense 'is' " in Gila Bend Act Section 6(c) "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. As the opening brief explained, that amounts to a holding that the Gila Bend Act freezes the trust eligibility of a particular parcel at the moment the Nation applies for trust acquisition. See Opening Br. 28-33. That holding is plainly wrong because (i) nothing in the statutory text so much as suggests such a freezing mechanism, (ii) a statute that uses present-tense verbs such as "is" typically does not include the past tense, and (iii) when Congress wants to tie eligibility to an application date, it knows how to do so. Id.

The Nation offers no rebuttal to these points. Indeed, it makes little attempt to support the District Court's novel interpretation of the statute, which no party advanced below, and it never even mentions the District Court's reliance on the word "is" as the keystone of its holding. Instead, the Nation makes several assertions about the arguments appellants advanced in the opening brief. Those assertions do nothing to rescue the District Court from error.

First, the Nation says our characterization of the District Court's holding—that the court viewed the land-into-trust application as freezing eligibility for the parcel—is "incorrect" and "beside the point." Resp. Br. 30-31. It is neither. The District Court plainly held as much, and that interpretation plainly was the basis for its holding. See ER15. We frankly cannot make heads or tails of the Nation's

assertion to the contrary; its description of why we are purportedly incorrect—"[t]he court merely reasoned that the Lands Replacement Act requires the Secretary to hold eligible land in trust when the Nation so requests [and] that a federal statutory obligation arises at the time of the request," Resp. Br. 30—appears to restate our exact point.

Second, the Nation asserts that appellants "offer no plausible alternative reading" of the statute. Resp. Br. 31. As an initial matter, the Nation has things backward; the question is whether the District Court's attempt to extract a temporal element from Section 6(d) is sufficiently compelling to overcome the presumption against preemption. The onus does not lie with appellants to prove a negative.

In any event, the Nation is wrong. The opening brief explained that Section 6(c), with its persistent use of the present tense, is most naturally read to require that land "is * * * within the corporate limits" when the Secretary attempts to take it into trust, not at some earlier time. Gila Bend Act § 6(d) (emphasis added); see Opening Br. 29-30. Here is the Nation's argument as to why that interpretation is incorrect: "Although the United States will not accept trust title the instant an application is filed, the Act imposes a mandatory duty on the Secretary to hold land in trust at the Nation's request if it satisfies the Act's requirements. That duty exists whether or not the Secretary has completed the steps necessary to fulfill it." Resp. Br. 31 (emphasis added). But that does not disprove our point at all. Many

federal statutes make an applicant eligible for a program, or give him the right to a legal status, if his application meets certain criteria. One can describe those statutes as imposing a "duty" to award the applicant the desired status if his application meets the criteria. And yet that "duty" does not suffice to freeze the applicant's eligibility in place the moment he applies; instead, when Congess desires that result, it says so. See, e.g., 11 U.S.C. § 109(e) (2000) (defining a "debtor" eligible for Chapter 13 bankruptcy as someone who "owe[s], on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $307,675") (emphasis added); see Opening Br. 30-31. Congress did not say so here. 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).

In short, Congress did not "ma[ke] clear its desire for pre-emption" of a law, such as H.B. 2534, that would change a parcel's eligibility after the application date. Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 151 (2001). The District Court's holding cannot stand.[2]

[2] Indeed, the Nation's own brief badly undercuts the District Court's holding. The Nation asserts that Section 6(d) could be read to freeze a parcel's eligibility on "the date of the Act itself," on "the date the Nation acquires particular land," or on "the date the Nation asks the Secretary to hold the land in trust." Resp. Br. 32 n.8. But

2. The Nation's "Impairment" Argument Is Mistaken.

a. Pivoting away from the District Court's erroneous interpretation, the Nation argues that H.B. 2534 is preempted because it takes from the Nation something Congress chose to bestow. Resp. Br. 26-30. H.B. 2534, it argues, "upset[s] the balance" Congress struck between the Nation and municipalities and would "frustrate the operation" of the Gila Bend Act. Id. 19, 29. It is thus preempted, says the Nation, because " 'Congress would not want States to forbid, or to impair significantly, the exercise of power that Congress explicitly granted.' " Id. at 29 (quoting Barnett Bank, 517 U.S. at 33).

All these contentions are incorrect for one simple reason: In the Gila Bend Act, Congress quite intentionally made trust eligibility turn on a classification determined under state law—namely, whether land is "within the corporate limits of any city or town." Gila Bend Act § 6(d). The Act "does not purport to regulate how cities or towns may incorporate land; that process is left entirely to Arizona law." ER13. Because Congress affirmatively chose to have the eligibility of particular parcels turn on mutable state-law classifications, H.B. 2534 is by definition fully consistent with the Gila Bend Act. And that means there can be no preemption here. As courts have recognized, when "[t]he substantive elements" of

---

if the Act is open to so many interpretations, it is hardly "clear" that the interpretation the District Court adopted is correct. Egelhoff, 532 U.S. at 151.

a federal statute are "defined by reference to state law," Congress necessarily embraces the idea that that state law may change—and that any such change is not preempted. Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1533 (D.C. Cir. 1984); see Reconstruction Fin. Corp. v. Beaver Cnty., Pa., 328 U.S. 204, 206-10 (1946); Opening Br. 27-28.

Seen in this light, the flaw in the Nation's contentions is apparent. H.B. 2534 does not "impair significantly[ ] the exercise of power that Congress explicitly granted," Resp. Br. 29 (citation omitted), because the power Congress "explicitly granted" was to hold in trust land lying outside of corporate limits. Congress left to state law the question of where those limits lie. Likewise, H.B. 2534 does not "upset the balance" Congress struck, Resp. Br. 29, because the balance Congress struck was to make a parcel eligible for acquisition only if, under state law, it falls outside a municipality. By defining eligibility with reference to state-law classifications, Congress accepted that the balance could and would shift; if state control over municipal boundaries impacts the Nation's -plans, that impact is by Congressional design.[3]

[3] The Nation cites Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) to support its "balance" argument. Resp. Br. 30. In Bonito Boats, Florida provided what was essentially patent protection to craftsmen whose inventions fell outside the federal patent laws. The Supreme Court recognized that the Florida law rendered eligible for protection inventions that Congress had deemed ineligible. 489 U.S. at 150-51. It thus conflicted with federal law. Id. Here, by

b. The Nation denies that cases like Ferebee apply here, but its arguments are ill-founded. Its principal response is that in "some" of the cases we cite the federal statute "actually incorporate[s] substantive state law," whereas here "[t]he question whether land is 'within the corporate limits of any city or town' is a question of federal law whose resolution turns on a fact—whether or not the parcel is incorporated by a city or town—determined by state law." Resp. Br. 32-33. The Nation makes no attempt to explain why this distinction makes a difference. In fact, it does not. Congress sometimes may choose to directly incorporate a state law; other times it may choose to have a statutorily significant fact turn on an underlying state law—but either way, Congress knows that the state law may change, and that if that happens, the outcome produced by the federal statute may change too. That is the very point of Ferebee and similar cases.

The Nation next says our argument "proves too much" because "[o]n Appellants' theory, Arizona could enact a law that would automatically annex the Nation's land to the nearest municipality upon the Nation's filing of a trust application." Resp. Br. 33. Not so. When Congress chose to look to mutable state-law classifications to determine which parcels are eligible, that necessarily means it took no view on which particular parcels would be eligible at particular

---

contrast, Congress looked to state law to determine what land is eligible. That glaring difference explains why the conflict in Bonito Boats is absent here.

times. It does not mean Congress would have expected no parcels to be eligible. In the Nation's hypothetical, the stated goal of the Gila Bend Act—that the Nation would acquire up to 9,880 acres of trust replacement land, Gila Bend Act § 6(c)—could not be fulfilled. "[C]ompliance with both federal and state regulations" thus would be "a physical impossibility," Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985) (citation omitted), and the state law would be preempted. That is not this case. Millions of acres meet the Gila Bend Act's eligibility criteria.

Finally, the Nation contends that "even when federal law does incorporate state law, state law is preempted where, as here, it obstructs federal objectives or discriminates against the federal government." Resp. Br. 33-34. This argument fails for several reasons. First of all, the cases the Nation cites—primarily Burks v. Lasker, 441 U.S. 471 (1979), Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454 (9th Cir. 1986), and De Sylva v. Ballentine, 351 U.S. 570 (1956)—do not support any part of its assertion: None involves a federal statute that "incorporate[s] state law." None is a preemption case. And none speaks of "obstruction" or "discrimination." On the contrary, in each case, the issue was whether the interpretation of a federal statute should be governed by a rule developed by the federal judiciary or by state-law rules governing, respectively, corporations law, contract law, and family law. See Burks, 441 U.S. at 479;

Mardan, 804 F.2d at 1458; De Sylva, 351 U.S. at 580. None of the three addresses the Supremacy Clause or any kind of preemption. The Nation's cases are irrelevant.

Even if the cases were apposite, however, they would not help the Nation here. The Nation quotes Burks for the proposition that "federal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest.' " 441 U.S. at 479 (citation omitted). The way a court makes that determination, according to Burks, is by examining whether application of the state law "would be inconsistent with the federal policy underlying the cause of action." Id. (citation omitted). That test does no damage to H.B. 2534 for the reasons already discussed: H.B. 2534 merely provides an additional mechanism for municipalities to change the classification of land. It cannot be "inconsistent" with a federal trust-eligibility statute that looks to those very local-government classifications to determine eligibility. In fact, the contrary is true: H.B. 2534 is consistent with the Gila Bend Act because the latter displays a Congressional intent to protect municipalities, and is silent on the question of how municipalities are formed or enlarged.

To be sure, H.B. 2534 is inconsistent with the Nation's scheme to foist a huge casino on Glendale. The Nation's frustration, however, is not the measure of inconsistency under Burks. As the Court there explained, inconsistency is not

determined by whether the state law "causes the plaintiff to lose"; it is determined by ensuring that the state law does not "destroy the federal right." Burks, 441 U.S. at 479 (citation omitted). H.B. 2534 does no such thing.

The Nation's reliance on AT&T Mobility LLC v. Concepcion,131 S. Ct. 1740 (2011), also is misguided. In that case, the issue was whether the Federal Arbitration Act preempted a California rule that effectively made it impossible for a consumer contract to include a collective-arbitration waiver. Id. at 1746. The Court concluded that the rule was preempted because it eviscerated the fundamental purpose of the FAA: "The overarching purpose of the FAA * * * is to ensure the enforcement of arbitration agreements according to their terms," id. at 1748, and the California rule "interfere[d] with [the] fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. Concepcion has no bearing here because H.B. 2534 does not interfere with any "fundamental attribute[ ]" of the Gila Bend Act. The Gila Bend Act is not "fundamental[ly]" about accepting into trust land located in cities; nor is it directed at providing the Nation complete freedom of choice in selecting trust lands. Moreover, because H.B. 2534 may only be employed in discrete circumstances when municipal interests are most at stake, the vast majority of the land available for potential trust acquisition under the Gila Bend Act cannot be affected. In these circumstances, as the Supreme Court held in Mazda, a state-law-imposed restriction on choice does

not "stand as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law. 131 S. Ct. at 1142 (citation omitted).

C. The "Discriminatory Burdens" Argument Fails

The Nation separately contends that H.B. 2534 is preempted because it "impos[es] discriminatory burdens on the exercise of a federal right, depriving the Nation of generally applicable procedural protections against annexation only because it has invoked its federal right to apply to have its land taken into trust." Resp. Br. 36. The Nation relies on the same cases it relied upon below; we already have explained why those cases are inapposite. Opening Br. 33-39. The Nation's responses to our arguments do nothing to change that fact.

1. The Nation insists that Felder v. Casey, 487 U.S. 131 (1988), demonstrates that discrimination against a federal right always triggers preemption. If that were so, it would be odd that the concept has never appeared in another Supreme Court case, despite the fact that the Court has decided dozens of preemption cases in the last few decades alone.[4] In fact, it is not so.

---

[4] The Nation points to one other case, Toll v. Moreno, 458 U.S. 1 (1982), that it says fits the description, but Toll has nothing to do with discrimination against a federal right. Toll was about resident aliens. The Court held that "[t]he Federal Government has broad constitutional powers" to regulate aliens' conduct, that states "can neither add to nor take from the conditions lawfully imposed by Congress upon admission," and that accordingly "[s]tate laws which impose discriminatory burdens upon the * * * residence of aliens lawfully within the United States conflict with this constitutionally derived federal power[.]" Id. at 11 (citation omitted). The Nation seizes on this reference to "discrimination." But

Felder does discuss preemption of federal law, see 487 U.S. at 138, but it does so in the context of applying state judicial rules to federal causes of action. And in that context, as we explained in the opening brief (at 34-35), a unique jurisprudence called the "nondiscrimination doctrine" has developed: "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.' " Christopher S. Elmendorf, State Courts, Citizen Suits, & The Enforcement of Federal Environmental Law by Non-Article III Plaintiffs, 110 Yale L.J. 1003, 1040 & n.204 (Apr. 2001) (citation omitted). While that jurisprudence is related to standard preemption—both arise out of the Supremacy Clause—they differ in important ways. Most significantly, in normal preemption analysis it would be no defense to say that a state law was "neutral" and applied to everyone equally. The only relevant question would be whether that state law "stand[s] as an obstacle to the accomplishment of the full purposes and objectives" of federal law. Mazda, 131 S. Ct. at 1140 (citation omitted). Neutrality, or lack thereof, would be irrelevant.

---

discrimination against an individual who happens to be regulated by federal law is not discrimination against a federal right. Toll does not prove that "discrimination against a federal right" amounts to preemption; the case is inapposite.

The state-judicial-rule context explains Felder's reference to discrimination. The state defended its rule in classic nondiscrimination-doctrine terms, arguing that it fell within the exception for "neutral, uniformly applicable state rule[s]" that nonetheless foreclose a federal claim. 487 U.S. at 144. The Court rejected that assertion, finding that the rule was not neutral because it "discriminates against the precise type of claim Congress has created." Id. at 145. This colloquy was straight out of the nondiscrimination-doctrine playbook—but it makes no sense in the context of normal preemption analysis. This Court should not confuse the doctrine by importing it across doctrinal lines.

Even if "discrimination" analysis were appropriate here, H.B. 2534 does not discriminate against a federal right because the only right the Nation enjoys is to have eligible land held in trust. See Opening Br. 36. The Nation responds that the Gila Bend Act "grants not only a right to have eligible land placed into trust, but also a right to apply to have that land taken into trust," and that H.B. 2534 discriminates against that antecedent right. Resp. Br. 40. That is wrong for three reasons. First, it makes no sense to think of the ministerial act of filing an application as a "right." See Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta, 256 U.S. 350, 358 (1921) (Holmes, J.) ("[T]he word 'right' is one of the most deceptive of pitfalls[.]"). Second, H.B. 2534 does not "discriminate" against the application in any coherent sense; the Nation's ability to apply remains

unfettered. Finally, the Nation's argument underscores how far astray we are from proper preemption analysis. The Nation's claim—that its purported right to apply for trust acquisition is somehow adversely affected by H.B. 2534—has nothing to do with the showing the Supreme Court actually requires: that H.B. 2534 "stand[s] as an obstacle to the accomplishment of the full purposes and objectives" of federal law. Mazda, 131 S. Ct. at 1140 (citation omitted).

2. The Nation next defends its reliance on Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), and Livadas v. Bradshaw, 512 U.S. 107 (1994), arguing that they "establish that a state law imposing a burden—especially a discriminatory burden—on the exercise of a right granted by federal statute is, by definition, an obstacle to achieving that statute's purposes and thus conflicts with federal law." Resp. Br. 39-40. They establish no such thing. As we explained in the opening brief, the Nash Court found that a burden caused actual frustration of Congress' goals: The state's policy of withholding unemployment benefits whenever an employee filed a federal unfair labor practice charge had a "direct tendency to frustrate the purpose of Congress" by discouraging conduct that federal law encouraged. 389 U.S. at 239. And in Livadas, the Court likewise found that a burden caused actual frustration of Congress' goals: "A state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." 512 U.S. at

116. Those holdings make perfect sense because the proper preemption inquiry is—once again—whether state law "stand[s] as an obstacle to the accomplishment of the full purposes and objectives" of Congress. Mazda, 131 S. Ct. at 1140 (citation omitted).

The difference here is that the Nation has not explained how H.B. 2534 frustrates Congress' goals. Congress' goals in the Gila Bend Act were to ensure that the Nation acquires up to 9,880 acres of trust land without impinging on cities or towns. See Gila Bend Act § 6(d); ER13. H.B. 2534 certainly will not stop the Nation from acquiring its 9,880 acres of land. And if anything, it advances the second goal, making proper use of the very state-law municipal-boundary powers that Congress chose to leave untrammeled. This accordingly is not a situation, like Nash and Livadas, where the purported burden would discourage the accomplishment of Congress' objectives. Much less would it discourage the accomplishment of Congress' "significant objective[s]," as the Court required in Mazda, 131 S. Ct. at 1134 (emphasis added), or "erect[ ] a substantial barrier to the accomplishment of congressional objectives," as the Court required in the seminal preemption case Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 166 (1963) (emphasis added). Acquisition of this particular urban parcel to build a massive casino may be a "significant objective" of the tribe; it certainly is not a significant objective of the United States Congress. See Crosby v. Nat'l Foreign

Trade Council, 530 U.S. 363, 373 (2000) ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]").

D. The Nation's "Legislative Purpose" Argument Is Baseless

Finally, the Nation argues that the proponents of H.B. 2534 openly sought "to nullify" the Gila Bend Act, and that that suffices for preemption because "[t]he Supreme Court has made clear that the proper inquiry takes account of whether the state law 'conflicts in both its purpose and effects' with federal law." Resp. Br. 43 (quoting Felder, 487 U.S. at 138) (emphasis in Nation's brief). The argument fails for two reasons.

First, the Supreme Court certainly has not "made clear" that conflicting legislative purpose can create conflict preemption; instead, as we demonstrated in the opening brief (at 40-41), the Court has "made clear" that the opposite is true. In the Paul case, it rejected the suggestion that preemption "should depend upon whether the purposes of the two laws are parallel or divergent," explaining that "[t]he test * * * is whether both [the state and federal laws] can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." 373 U.S. at 142 (emphasis added). It has repeated that guidance time and again. See Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 106 (1992) (any "focus on 'whether the purposes of the two

laws are parallel or divergent' tends to 'obscure more than aid' in determining whether state law is pre-empted by federal law") (quoting Paul, 373 U.S. at 141-42); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) ("[W]hen considering the purpose of a challenged statute, this Court is not bound by [t]he name, description or characterization given it by the legislature or the courts of the State, but will determine for itself the practical impact of the law") (quotation marks & citation omitted); Napier v. Atl. Coast Line R.R. Co., 272 U.S. 605, 612 (1926) (pre-emption analysis turns not on whether federal and state laws "are aimed at distinct and different evils" but whether they "operate upon the same object"). That is unsurprising, because no other approach makes any sense. When the key conflict-preemption question is whether the state law stands as "a substantial barrier to the accomplishment of congressional objectives," Paul, 373 U.S. at 166, the only relevant data point is the state law's effect. Its purpose cannot create a barrier to federal objectives if its effect does not.

The Nation pushes the contrary position, but—as is true for so much of its case—its primary authority is a passing statement in Felder, this time to the effect that the state law there in question "conflicts in both its purpose and effects" with federal law. 487 U.S. at 138; see Resp. Br. 43. Felder's language was deeply influenced by its nondiscrimination-doctrine context, as we have demonstrated. See supra at 19-22. Perhaps that explains its reference to legislative purpose. But

whatever the reason for it, Felder's approach (i) has never appeared in another Supreme Court case, even though preemption cases liberally dot the court's docket, and (ii) has been squarely repudiated by the Supreme Court on numerous occasions, before and since. This Court should reject the Nation's invitation to distort preemption law by focusing on state legislative purpose.

Second, the supposed "purpose" of H.B. 2534—to the extent that purpose can be known from the snippets the Nation cites[5]—does not conflict with the Gila Bend Act. According to the Nation, that purpose was to " 'clarif[y] that the Gila Bend Act does not apply to county islands in the Phoenix metropolitan area." Resp. Br. 42 (quoting NER217). But that is just another way of saying that the purpose was to amend state law to change the municipal classification of some county islands. And as we have explained, Congress understood, and implicitly accepted, that such changes could occur when it decided to make trust eligibility turn on mutable state-law classifications. There is no conflict.[6]

[5] See Coal. for Clean Air v. S. Cal. Edison Co., 971 F.2d 219, 227 (9th Cir. 1992) ("statements of individual legislators are entitled to little, if any, weight" in interpreting statutes).

[6] We advanced this argument in the opening brief (at 40-42), and the Nation offered no response.

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

The Nation concedes that the merits of its equal protection claims are evaluated under rational-basis review. Resp. Br. 45-46. As the District Court properly concluded, H.B. 2534 survives this " 'very lenient' " inquiry. ER23 (quoting RUI One Corp. v. City of Berkeley, 371 F.3d 1137, 1155 (9th Cir. 2004)).

Under rational-basis review, courts will uphold a legislative classification if it is "rationally related to a legitimate governmental purpose." Green, 340 F.3d at 895 (citation omitted). Rational-basis review does not require the legislature to "actually articulate at any time the purpose or rationale supporting its classification. Instead, a classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification." Heller v. Doe, 509 U.S. 312, 320 (1993) (citations & quotations omitted).

"[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) (citation omitted). "A statute is presumed constitutional, * * * and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it * * *, whether or not the basis has a foundation in the record." Heller, 509 U.S. at 320-21 (citation & quotation omitted). Thus, the Nation's efforts to cherry-pick

remarks from individual Arizona legislators are both misleading, see supra 1-2, and irrelevant to the Court's analysis.

Moreover, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." Beach Commc'ns, 508 U.S. at 315. "A State * * * has no obligation to produce evidence to sustain the rationality of a statutory classification." Heller, 509 U.S. at 320. Finally, "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." Id. at 321 (citations & quotation omitted).

A. H.B. 2534 Serves Legitimate Governmental Objectives

The Nation fails to satisfy its heavy burden under this standard. Far from "negat[ing] every conceivable basis" that might support the statute, id. at 320, the Nation focuses primarily on its straw-man theory that the statute was designed to, and serves to, "obstruct[] federal law" by blocking the Nation's attempts to establish new reservation land under the Gila Bend Act. Resp. Br. 49. But as we have explained, see supra at 9-19, H.B. 2534 is entirely consistent with the objectives of the Gila Bend Act.

In any event, the Court need not look far to find legitimate rationales for the statute. "[S]tates have broad authority over the establishment and development of municipalities within their borders." Green, 340 F.3d at 900-01. In Green, the

Ninth Circuit rejected an equal protection challenge to an Arizona statute that gave municipalities the ability to veto the incorporation attempts of nearby communities. The Ninth Circuit found the statute rationally related to Arizona's legitimate state interest in "protecting the interests of already existing municipalities":

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

Id. at 903 (citations & internal quotes omitted; emphasis added). As the District Court concluded, H.B. 2534 serves the same type of legitimate state interest by "protecting the ability of cities in populous counties to exercise control over properties within their boundaries, and protecting the cities' interests in not having such lands transferred to other sovereigns[.]" ER22-23 (citing Green, 340 F.3d at 903).

That conclusion makes good sense. When unincorporated lands practically or entirely encircled by a municipality are transferred to the federal government, cities and towns lose significant ability to govern, control, or even guide their use.[7]

[7] For example, Arizona cities and towns exert a "strong degree of control over zoning and development" over unincorporated areas within their borders. See,

And, as the District Court acknowledged, ER21, those municipalities will be faced with "problems that may flow from the existence of many separate governmental entities in a limited geographical area"—including "intergovernmental conflict over resources and economic development." Green, 340 F.3d at 903 (citation omitted). H.B. 2534 helps to prevent, or at least mitigate, these problems in several ways.

First, by exercising their rights under H.B. 2534 municipalities may, in some situations, prevent the landowner from transferring land to the federal government—eliminating outright the problems noted above. This outcome would occur under the Gila Bend Act because of the way Congress designed the Act's trust eligibility provision. For example, while Defendants maintain that the Nation's Glendale property is not eligible for trust acquisition under the Act,[8] annexation pursuant to H.B. 2534 would eliminate any doubt on this score. See Opening Br. 27 & n.7.

---

e.g., Carefree Improvement Ass'n v. City of Scottsdale, 649 P.2d 985, 986-87 (Ariz. Ct. App. 1982). But courts regularly reject attempts to apply state and local laws—including taxes, gaming laws, traffic laws, and zoning and building codes—on land that has been converted into a reservation. See, e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987); Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146, 149 (9th Cir. 1991); Segundo v. City of Rancho Mirage, 813 F.2d 1387, 1390-94 (9th Cir. 1987); United States v. Humboldt Cnty., 615 F.2d 1260, 1260-62 (9th Cir. 1980); Santa Rosa Band of Indians v. Kings Cnty., 532 F.2d 655, 659 (9th Cir. 1976).

[8] See Gila River Indian Cmty. v. United States, Nos. 11-15631, 11-15633, 11-15639, 11-15641, and 11-15642.

Second, annexation ensures that cities and towns will have a voice in discretionary trust-acquisition decisions under 25 U.S.C. § 465 and other federal statutes. See Opening Br. 26-27. In these situations, before deciding whether to take the land into trust, the Department must notify "local governments having regulatory jurisdiction over the land to be acquired" and provide them 30 days in which to comment on "impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d). This requirement is not a mere formality: A former Bureau of Indian Affairs official described "the impact on the state and political subdivisions and the jurisdictional problems" as "the factors that really matter in these [trust acquisition] applications[.]" Larry E. Scivner, Acquiring Land Into Trust For Indian Tribes, 37 New Eng. L. Rev. 603, 606 (Spring 2003).[9]

Third, as the District Court observed, H.B. 2534 "would appear" to apply if a landowner attempted to exchange private land for federal land. ER10. It would

[9] The Nation acknowledges 25 C.F.R. § 151.11(d) in a footnote, but claims that the municipalities already would have an opportunity to comment on discretionary trust acquisitions—even in the absence of annexation under H.B. 2534—due to the "measure" of control they exercise over county islands and other unincorporated land in or near their borders. Resp. Br. 49 n.18. Tellingly, the Nation cites no authority to support that contention. But even if the Department were to adopt the Nation's interpretation, H.B. 2534 still would serve an important purpose: Through annexation, the municipalities would obtain control over, inter alia, zoning and land use on the parcels at issue, see Ariz. Rev. Stat. § 9-462.01, and thus would be better-positioned to address the topics described in 25 C.F.R. § 151.11(d) and influence the Department's decision on a trust application.

indeed. Although, as the Nation observes, either the federal government or the landowner would be free to propose a land transfer, Resp. Br. 47 n.17, the landowner ultimately would have to apply for the transfer by executing "a nonbinding agreement to initiate an exchange." See 36 C.F.R. § 254.4(c); 43 C.F.R. § 2201.1(c). The federal government must then provide notice and an opportunity to comment to "jurisdictional * * * local governments[.]" See 36 C.F.R. § 254.8; 43 C.F.R. § 2201.2. Those municipalities that exercised their rights under H.B. 2534 and thus acquired jurisidiction over the lands then would have an opportunity to raise concerns regarding the transfer.

Fourth, even in situations where the land ultimately is transferred to the federal government, H.B. 2534 serves important and legitimate purposes by mitigating risks arising from the transfer. For example, in the reservation context, municipalities that annex the territory in question improve their standing in negotiations with the tribe to proactively address the problems outlined above. See, e.g., Acquiring Land Into Trust For Indian Tribes, 37 New Eng. L. Rev. at 606 (observing that cooperative "agreements between tribes, states, and local governments" are a way to address the "impact on the state and political subdivisions and the jurisdictional problems"). Similarly, in situations where the land is donated or sold to the Department and managed by the Bureau of Land Management ("BLM"), annexation ensures that the municipalities will have input

into the BLM's land use decisions.[10] In such cases, the BLM must "coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of * * * local governments within which the lands are located[.]" 43 U.S.C. § 1712(c)(9). The BLM must also involve "local government officials * * * in the development of land use programs, land use regulations, and land use decisions for public lands[.]" Id.

B. H.B. 2534's Classifications Satisfy Rational-Basis Scrutiny

For all of these reasons, the Nation cannot even remotely show that H.B. 2534 lacks a "legitimate governmental purpose." Green, 340 F.3d at 895. Indeed, the District Court summarized H.B. 2534's purpose as " 'protecting the interests of already existing municipalities' " from 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), and the Nation concedes that this is a "legitimate governmental objective." Resp. Br. 50. But the Nation nevertheless insists that H.B. 2534 fails rational-basis review because its

---

[10] Landowners seeking to donate or sell their property to BLM would trigger H.B. 2534 when they followed the application procedures prescribed by 42 U.S.C. §§ 4601 et seq., and the statute's implementing regulations, see, e.g., 42 U.S.C. § 4651 (directing appraisal and negotiation procedures for real property acquisition); 49 C.F.R. §§ 24.102, 24.108 (describing notice, appraisal, and negotiation procedures). BLM's Acquisition Handbook explains that these laws apply to "[a]ll acquisitions of real property" by BLM. See http://www.blm.gov/nils/AQ_handbook/h-2100-1/chapter-VI/chap-VI-sect-ii.htm#II-B (last visited Feb. 1, 2012).

"classifications do not rationally further that interest." Id. The Nation is mistaken. We address the pertinent criteria in turn.

1. H.B. 2534 applies only in Arizona's most populous counties—specifically, those with "a population of more than three hundred fifty thousand persons[.]" Ariz. Rev. Stat. § 9-471.04(A)(1). As the District Court explained, "it is rational to conclude that the most crowded counties have the greatest need to control land use and annexation." ER23. In fact, courts repeatedly have recognized that municipalities in densely-inhabited regions, such as these, have special needs regarding annexation, zoning, land use, and government administration. Accordingly, courts have found the rational-basis standard satisfied where states limited the application of laws affecting these issues to populous counties. See, e.g., City of Mountain Brook v. Green Valley Partners I, 690 So. 2d 359, 362 (Ala. 1997) (rejecting equal-protection challenge to a statute that provided "cities located in heavily populated counties with a greater ability to regulate land use"); Dade Cnty. v. City of N. Miami Beach, 109 So. 2d 362, 363-64 (Fla. 1959) (upholding as rational legislation to facilitate annexation of unincorporated areas "in counties of large populations" where there presumably "will be concentrations of people in the outlying unincorporated areas in need of municipal services"); Masters v. Pruce, 274 So. 2d 33, 45 (Ala. 1973) (upholding legislation giving special zoning rights to large counties: "The problems of highly

populous counties are unique with regard to the regulation of land use" in part because "such counties generally contain a number of municipalities").[11] The Arizona Court of Appeals itself has engaged in similar analysis: It found a classification limiting creation of a Tourism and Sports Authority to counties with more than two million residents to be rational, in large part because the legislature reasonably could have determined that those counties had the population and resources necessary to take full advantage of the legislation. See Long v. Napolitano, 53 P.3d 172, 179-83 (Ariz. Ct. App. 2002).[12] The same holds true here. The Arizona legislature reasonably could have concluded that the legitimate governmental objective described above is most relevant in populous counties, where communities sit elbow-to-elbow, limiting opportunities for expansion and heightening the potential for conflicts over limited resources when land practically or entirely encircled by municipal borders is transferred to the federal government. In short, populous counties are the ones that need, and stand to benefit from, H.B. 2534.

---

[11] The Nation observes that a " 'classification must reflect pre-existing differences[.]' " Resp. Br. 51 (quoting Williams v. Vermont, 472 U.S. 14, 27 (1985)). Just so. The differences between heavily populated counties and less populated counties are well established and were recognized by courts decades before the Arizona legislature first began considering H.B. 2534.

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

The Nation nevertheless insists that the population classification is irrational, declaring that all municipalities have an interest "in not being stripped of * * * sovereign control," regardless of the county's population. Resp. Br. 51 (citation & quotation omitted). But that amounts to nothing more than disagreement with the Arizona legislature; it does not show that the legislature was irrational in concluding otherwise. The Nation certainly has not provided evidence that municipalities in less populated counties face the same problems as those located in populous counties. And even if it had, "a legislative choice is not subject to courtroom fact-finding[.]" Beach Commc'ns, 508 U.S. at 314.[13]

2. H.B. 2534 applies only to lands surrounded or bordered on at least three sides by a city or town. That classification is rationally related to the statute's purposes because it addresses a scenario common in Arizona.[14] Because the lands affected by H.B. 2534 are practically or entirely encircled by municipal

[13] The Nation cites Kahawaiolaa v. Norton for the proposition that "even under rational basis review, a geographic exception to an otherwise uniform [law] appears problematic." 386 F.3d 1271, 1280 (9th Cir. 2004). But H.B. 2534 imposes a population classification, not a geographic classification. As the District Court explained, ER26, other counties can and will qualify under H.B. 2534 as their populations increase and their cities and towns experience concerns involving annexation, zoning, land use, and government administration. In any event, notwithstanding the Nation's implicit suggestion to the contrary, the court in Kahawaiolaa upheld the law at issue, despite its "geographic exception." Id.

[14] Indeed, the Arizona legislature previously has recognized the need for special annexation rights over such land. See Ariz. Rev. Stat. § 9-471(K) (providing such rights over land "bordered by the * * * city or town on at least three sides").

borders, they share many of the same resources as the adjoining municipality. And municipal constituents may be confused as to which government entity has jurisdiction over, and thus should be held accountable for issues related to, such lands.[15] Municipalities thus have a strong interest in governing, controlling, or at least guiding use of those lands. But cities and towns lose that authority once land is transferred into trust and have diminished authority following other federal transfers. As explained above, H.B. 2534's streamlined annexation procedure helps municipalities avoid, or at least mitigate, these problems.

3. H.B. 2534 applies only when a landowner seeks to transfer land to the federal government. This classification, too, makes sense. Transfers of privately held property to the federal government are the only transfers that displace (in the case of trust lands) or significantly preempt (in the case of other federal title) state law. Were the federal government to take ownership of the land or hold it in trust, the municipality would risk losing the ability to control or guide its use. The municipality also suddenly would face "intergovernmental conflict over resources and economic development." Green, 340 F.3d at 903. These harms do not arise in other land-transfer contexts.

[15] Cf. Kane v. City of Beaverton, 122 P.3d 137, 142 (Or. Ct. App. 2005) (explaining that annexing county islands may reduce "jurisdictional confusion").

4. Finally, H.B. 2534 is triggered when a landowner makes "an application to the federal government as required by a specific federal statute or regulation." Ariz. Rev. Stat. § 9-471.04(B). The Arizona legislature had no wish to make H.B. 2534 the default annexation process for lands partially or entirely encircled by municipal boundaries; accordingly, the new statute is triggered only when necessary to protect against the problems described above—i.e., when a landowner applies to transfer these lands to the federal government. Id. By allowing municipalities to pursue annexation as soon as the landowner makes an application, H.B. 2534 ensures that cities and towns will have time to annex before the transfer is completed—enabling the full range of protections described above.

For these reasons, the District Court properly concluded that "each of H.B. 2534's classifications is rationally related to legitimate state interests," ER23, and the Nation fails to prove otherwise.

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

As the District Court held, the Nation also fails carry its heavy burden in establishing that H.B. 2534 is an unconstitutional "special law." ER23-25. Under the Arizona Constitution, "[n]o local or special laws shall be enacted * * * [w]hen a general law can be made applicable." Ariz. Const. art. 4, pt. 2, § 19(20). "Legislation does not violate the special law prohibition if (1) the classification is rationally related to a legitimate governmental objective, (2) the classification is

legitimate, encompassing all members of the relevant class, and (3) the class is elastic, allowing members to move in and out of it." Long, 53 P.3d at 178 (citing Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1257 (Ariz. 1990)). The threshold for finding a "special law" is very high. The Nation must prove "beyond a reasonable doubt that the Act conflicts with [the] state constitution." Id. at 179 (emphasis added). And the Court "must construe the * * * legislation, if possible, to give it a reasonable and constitutional meaning." Id. (citation omitted). "In doubtful cases, [courts] will generally defer to legislative determinations of policy." Id. (citation omitted). The Nation is unable to prove beyond a reasonable doubt that H.B. 2534 fails this test.

A. The Classifications in H.B. 2534 Are Rational

As the Nation concedes, the first prong of the special law test—whether a classification is rationally related to a legitimate governmental objective—is identical to the rational-basis standard discussed above. Resp. Br. 54; see Tucson Elec. Power Co. v. Apache Cnty., 912 P.2d 9,16 n.6, 19 (Ariz. Ct. App. 1995) (citations omitted). The District Court properly rejected the Nation's arguments on this prong for all the reasons previously explained. See supra at 27-38; ER24.

B. The Classifications Encompass The Relevant Class

The Nation likewise cannot carry its burden to show that the lines drawn in H.B. 2534 do not "encompass[ ] all members of the relevant class[.]" Long, 53

P.3d at 178 (citation omitted). Under this prong, courts focus on the treatment of the members of the affected class to ensure that the law applies equally to each of them. See, e.g., Governale v. Lieberman, 250 P.3d 220, 266 (Ariz. Ct. App. 2011); City of Tucson v. Grezaffi, 23 P.3d 675, 683 (Ariz. Ct. App. 2001). Here, it is clear that H.B. 2534 applies equally to all members of the class—extending to all cities and towns in populous counties the same process for annexing lands that meet the statutory criteria.

The Nation does not contend otherwise. Instead, it focuses its entire argument on the class definition itself, contending that H.B. 2534 is "patently underinclusive." Resp. Br. 56. While courts occasionally use the second prong of the special law test to evaluate the propriety of the class definition, the inquiry is narrow and deferential—mirroring, in many respects, rational-basis review analysis. See, e.g., City of Tucson v. Woods, 959 P.2d 394, 401 (Ariz. Ct. App. 1997) (the second prong "appears to overlap the first test"). A classification will be upheld under the second prong so long as there is "a rational reason why the scope of its application is limited." Town of Gilbert v. Maricopa Cnty., 141 P.3d 416, 421 (Ariz. Ct. App. 2006). As with rational-basis review, such "legislative classification can be based on rational speculation unsupported by evidence," Tucson Elec. Power Co., 912 P.2d at 18 (citation omitted), and courts will uphold a

classification based on hypothetical justifications, regardless of whether those justifications actually motivated the legislative. See, e.g., Long, 53 P.3d at 183.

The Nation deems H.B. 2534 underinclusive in two respects: (1) The law purportedly fails to include "all persons or entities who would transfer 'urban' land to the federal government, irrationally benefiting non-tribal landowners," and (2) it purportedly fails to include "all localities that may be subject to the transfer requests contemplated by the statute." Resp. Br. 56. The Nation is mistaken on both counts.

1. The Nation's first theory misses the point. "Prohibited special legislation * * * unreasonably and arbitrarily discriminates in favor of a person or class by granting them a special or exclusive immunity, privilege, or franchise." Republic Inv. Fund I, 800 P.2d at 1256 (quotation omitted; emphasis in original). The Court therefore should focus on the municipalities that are encompassed within H.B. 2534's class, rather than the landowners who may or may not trigger benefits for those municipalities. In any event, the Nation's theory is simply at odds with the facts. As explained above, contrary to the Nation's suggestion, H.B. 2534 in fact applies to transfers by both tribal and non-tribal landowners. See supra 30-33. But even assuming arguendo that non-tribal landowners somehow were incapable of triggering H.B. 2534, the law still would survive the second prong of the special law inquiry. As noted above, when land is coverted into a

reservation, the municipality loses its regulatory authority over the land. See supra 29 n.7. And while the BLM is required to at least "coordinate" land use planning and management "with the land use planning and management programs of * * * local governments,]" 43 U.S.C. § 1712(c)(9), tribal governments have no such obligation. In short, when land is converted into a reservation, adjoining municipalities face the prospect of extraordinary intergovernmental conflict over resources, land use, and economic development. Accordingly, the Arizona state legislature would have a rational reason to give municipalities special protections concerning the creation of reservations "on the fringes of existing cities and towns." ER21. This is all that is required under the second prong of the special law test. See Town of Gilbert, 141 P.3d at 421.

2. The Nation's second theory also fails. In the proceeding below, the Nation conceded that "[i]n some cases, of course, it may be reasonable for a state to differentiate between more and less densely populated counties." Dist. Ct. Dkt. 23 at 28. In fact, the Arizona legislature does so frequently. See, e.g., Ariz. Rev. Stat. § 11-821 (requiring populous counties to develop more rigorous county plans, anticipating long-term land use and resource needs); Ariz. Rev. Stat. § 11-419 (providing higher salaries for officers in populous counties); Ariz. Rev. Stat. § 11-259(A) (authorizing additional expenditures for purposes of encouraging settlement, tourism, and investment in populous counties).

The Nation nevertheless takes the position that a population-based classification is inappropriate in this case—insisting, without any evidence, that municipalities in less populous counties would and should benefit from the protections of H.B. 2534. Resp. Br. 56-57. This contention already has been refuted. See supra at 34-36. The Arizona legislature reasonably could have concluded that municipalities in populous counties have special needs regarding annexation, zoning, land use, and government administration. This rationale is sufficient for purposes of the second prong of the special law test. See Long, 53 P.3d at 178 ("The special law ban does not prohibit the legislature from enacting laws that confer privileges only on a population-based class, as long as the classification is a rational one.") (citations omitted).

Even if the Nation had adduced evidence proving that municipalities in less populous counties would benefit from H.B. 2534—it offered none in the trial court—the point would be irrelevant. As noted above, "legislative classification can be based on rational speculation unsupported by evidence[.]" Tucson Elec. Power Co., 912 P.2d at 18 (citation omitted).

At bottom, the Nation's arguments parallel those rejected in Long, where the Arizona Court of Appeals upheld a statute authorizing creation of a Tourism and Sports Authority in counties populated by over two million people. Long, 53 P.3d at 176-78, review denied (Dec. 3, 2002). Although the statute applied only to one

county and although other counties might have benefited from its provisions, the court explained: "The legislature is not constrained from enacting class-based legislation merely because non-members of the class would also derive some benefit from the legislation." Id. at 178-81 (citation omitted). So too here.[16]

3. The Nation's authorities do nothing to change this. In State Compensation Fund v. Symington, the court rejected a statute's classification, finding that there was no "substantial difference between those within and those without the class." 848 P.2d 273, 279 (Ariz. 1993) (citation omitted). In Gilbert, (i) the court concluded that entities outside the scope of the statute were "similarly situated" to those covered by the statute, and (ii) the parties defending the statute failed to "articulate why it is rational" that the statute did not include those "similarly situated" entities. 141 P.3d at 421. And in Arizona v. Levy's, the court concluded that the geographic classification at issue was arbitrary. 580 P.2d 329, 331 (Ariz. 1978). Here, by contrast, appellants have explained at length why the classifications in H.B. 2534 are perfectly rational; municipalities in less populous counties simply do not face the same risks and prospective harms. See supra 34-

[16] Similarly, in Bonnewell, the Arizona Court of Appeals upheld against a special-law challenge a statute that prohibited leghold traps on public land. 2 P.3d at 684-86. The court rejected arguments that the legislature was required to make the law applicable on private land too: "Legislation can be enacted one step at a time, addressing first what is perceived as the most acute aspect of a problem. Consequently, [appellants] are mistaken in assuming that only a statute prohibiting all leghold trapping could further the interest involved." Id. at 685.

36. Those municipalities thus are not "similarly situated," and the Nation's ipse dixit pronouncements to the contrary do nothing to meet its burden of proof beyond a reasonable doubt.[17]

In In re Cesar R. and In re Marxus B.—other cases cited by the Nation—the courts held that a firearm statute was an unconstitutional special law because it applied only in Maricopa County and Pima County despite express legislative findings that (i) the law's subject was " 'a matter of statewide concern' " and (ii) " 'laws on this subject must continue to be uniform so that * * * all citizens in this state can have full confidence that they are fully protected by the same law.' " 4 P.3d 980, 981 (Ariz. Ct. App. 1999) (citation omitted; emphasis added); 13 P.3d 290, 292-93 (Ariz. Ct. App. 2000). And in Republic Investment Fund I, the court addressed a deannexation provision enacted to remedy statewide abuses in "strip" annexation. 800 P.2d at 1254-55. The statewide nature of the problem was made clear in the statute's legislative findings and had been conceded by the parties

[17] The Nation identifies a handful of purportedly "populous 'urban cities' " in Arizona's less populous counties and suggests, without citing any evidence, that they also might have a strong interest in preventing the transfer of land within or adjacent to their borders. Resp. Br. 56-57. But as explained above, the Arizona legislature acted rationally in focusing on the population of counties rather than that of cities. In a heavily populated county, municipalities are likely to be hemmed in by neighboring cities and towns and confronted with all of the special needs regarding annexation, zoning, and government administration that courts long have recognized. See supra at 34-36. In a less populous county, these circumstances are far less likely to occur.

defending the law.[18] Here, by contrast, the classifications in H.B. 2534 do not conflict with any express legislative findings, particularly any finding proclaiming an intent to address a statewide problem. On the contrary, the legislative history indicates that it was designed to address the needs arising in "urbanized or * * * urbanizing count[ies]." NER68. As the District Court properly concluded, the statute's classifications were designed appropriately to accomplish this discrete goal. ER25 ("H.B. 2534 provides these more crowded counties with a means for confronting urban development issues.").

C. The Classification Is Elastic

Turning to the third and final prong—whether the class is elastic, allowing members to move in and out of it—the Nation once more fails to carry its burden. The Nation argues that the class of landowners whose land transfer requests might trigger H.B. 2534 "is limited to Indian tribes and, as a practical matter, to the Nation alone." Resp. Br. 59. This is false for all the reasons explained above. See supra 30-33. The relevant class is comprised of the entities that benefit from H.B. 2534—namely, certain cities and towns in the qualifying counties—rather than the landowners whose transfer requests might trigger H.B. 2534. As the court in Long

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

explained, legislation satisfies the third prong "if the classification is sufficiently elastic to both admit entry of additional [members] attaining the requisite characteristics of the classification and enable[ ] class members to exit when they no longer have those characteristics." 53 P.3d at 183 (citing Republic Inv. Fund I, 800 P.2d at 1258). Put another way, the class must be "flexible," not "static." Bonnewell, 2 P.3d at 686. For classisfication imposing a population floor, the elasticity requirement is satisfied if there is "an actual probability" that new members will join the benefitted class. ER 26; see also Town of Gilbert, 141 P.3d at 422.

Under H.B. 2534, any time a landowner in a populous county seeks to transfer to the federal government lands practically or entirely surrounded by municipal borders, the affected municipality will enter the class. This may occur when a landowner attempts to transfer land to the Department for management by the BLM, or when a tribe seeks federal trust acquisition under 25 U.S.C. § 465 or a similar statute. Either circumstance may easily arise. The BLM is very active in Arizona, "manag[ing] approximately 12.2 million surface acres" of land. See http://www.blm.gov/az/st/en/prog/planning.html (last visited Feb. 1, 2012). And the Section 465 discretionary trust application is a tool available to Arizona tribes

to expand their reservation holdings.[19] Conversely, absent a request to transfer the land to the federal government, municipalities will exit—i.e., fail to qualify for the benefits of—the class.

Instead of focusing on the manner in which municipalities in populous counties might enter and exit the class, the Nation focuses primarily on H.B. 2534's county population threshold—offering its own attempt to predict when other counties (besides Maricopa, Pima, and Pinal Counties) might exceed that threshhold. The district court rejected the same line of argument, expressly holding that "[g]iven the historical growth of Arizona and the Southwest, * * * there is an actual probability that other counties will reach the population threshold of the statute[.]" ER26. But in any event, the Nation misses the point. As explained above, the third prong focuses on the entities benefitted by H.B. 2534—i.e., cities and towns in "urbanized or * * * urbanizing count[ies]," NER68, not the counties themselves. See, e.g., Town of Gilbert, 141 P.3d at 418-19, 422 (for legislation benefitting county islands, "[t]he question becomes whether there is an actual probability that the legislation will eventually apply to other county islands"). In Town of Gilbert, the Arizona Court of Appeals held that the "remote possibility" that one other member would join the class did not satisfy the "actual

[19] See, e.g., Ak-Chin Indian Community Intends to Place Properties into Trust Status, available at http://www.ak-chin.nsn.us/run/2011/03.pdf (last visited Feb. 1, 2012) (referencing the Ak-Chin Indian Community's recent Section 465 application regarding land in Pinal County).

probability" standard. 141 P.3d at 422. Similarly, in In re Cesar R., the Arizona Court of Appeals found it "improbable" that other entities would enter (or exit) the relevant class. 4 P.3d at 983. Here, by contrast, any number of municipalities in Maricopa, Pima, and Pinal Counties might well enter the relevant class today or tomorrow or next year—whenever the Nation or any other owner of land practically or entirely encircled by municipal borders applies to transfer that property to the federal government.[20] And even more cities and towns may qualify for the protections of H.B. 2534 as other counties in the state grow in population.

Just as in the trial court below, the Nation "has not shown beyond a reasonable doubt that H.B. 2534 constitutes special legislation." ER 26.

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

The Nation argues that H.B. 2534 offends due process because it constitutes "retroactive" legislation. Resp. Br. 59, 61. This argument is fatally flawed several times over. First, H.B. 2534 does not "deprive" the Nation of any "property." U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4. Second, H.B. 2534 is not

[20] The Nation erroneously contends that the district court relied "on a lone decision from the Arizona Court of Appeals" when it rejected the special legislation claim. Resp. Br. 58 n.22. Not so; the court carefully synthesized the holdings of a number of Arizona decisions, of which Long v. Napolitano was just one. See ER25-26. The Nation also wrongly suggests that the Long decision is erroneous. The Arizona Supreme Court denied review in that case, and numerous Arizona courts and commentators have cited the opinion favorably since it was issued in 2002.

retroactive. And third, even putting the foregoing points aside, the legislation easily clears the low hurdle of rational-basis review.

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

"The first step in * * * due process * * * analys[i]s is to determine whether there is a property right that is protected by the Constitution." Peterson v. U.S. Dep't of Interior, 899 F.2d 799, 807 (9th Cir. 1990). The Nation contends that H.B. 2534 "deprives the Nation of its property right to have its land held in trust under the Act." Resp. Br. 60. But this is not a property interest cognizable under the Due Process Clause. "To have a property interest in a government benefit, a person * * * must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it.' " Gerhart v. Lake Cnty., Mont., 637 F.3d 1013, 1019 (9th Cir. 2011) (internal quotes & citations omitted). The Nation is not yet entitled to have its property transferred in trust to the United States. Accordingly the Nation does not have a protected property interest.

The Department has "recognized that two distinct steps are involved in a trust acquisition. The first step is the decision to take land into trust." Big Lagoon Park Co. v. Acting Sacramento Area Dir., 32 I.B.I.A. 309, 317 (1998) (citing Sycuan Band of Mission Indians v. Acting Sacramento Area Dir., 31 I.B.I.A. 238 (1997)). That decision is appealable and "subject to reconsideration * * * prior to completion of the second step." Id. "The second step * * * is taken following

examination of title evidence and correction of title defects." Id. at 318 (citing 25 C.F.R. §§ 151.13-14). "The signature of an authorized [Department] official on the formal document of acceptance * * * effects the transfer of legal title to the United States[]" and "[i]t is [ ] at that point that the vested rights * * * are created in the Indian beneficiary." Id. (emphasis added).

The Department's Board of Indian Appeals (the "IBIA") applied these principles in Sycuan Band. The Department originally decided to take land into trust but subsequently reconsidered and vacated that decision. Sycuan Band, 31 I.B.I.A. at 238, 241. The IBIA affirmed, explaining, in part:

> The * * * August 30, 1995, decision announced an intent to take the * * * two properties into trust but did not constitute an acceptance of the properties into trust. Indeed, as the regulations in 25 C.F.R. Part 151 make clear, further steps must be taken before a tract * * * can be formally accepted in trust status. * * * The Board * * * rejects as unsupported the Band's contention that it acquired vested property rights on August 30, 1995.

Id. at 245-46 (emphasis added). Here, as in Sycuan Band, the Department has completed only the first step in the two-step process—issuing a decision expressing an intent to take Parcel 2 into trust.[21] Resp. Br. 10. Recently, in a related proceeding, the U.S. District Court for the District of Arizona enjoined the Department from completing the second step of the trust acquisition process

[21] With respect to the rest of the Nation's Glendale property, the Department has not completed even the first step in the process: The trust application was stayed at the Nation's request, and no decision has yet been made. Resp. Br. 10.

pending appeal. Case No. CV10-1993-PHX DGC, Docket No. 162 at 9; Resp. Br. 11. The Department thus has not "issu[ed] or approv[ed] * * * an instrument of conveyance," accepting Parcel 2 into trust. 25 C.F.R. §151.14. Until and unless that happens, the Nation simply has no vested property interests.[22]

The Nation makes much of the "mandatory" duty purportedly imposed on the Secretary by the Gila Bend Act. Resp. Br. 60-61. But this has done nothing to eliminate or short-circuit the two-step process outlined above—a fact the Nation should know all too well from past experience. See Tohono O'odham Nation v. BIA, 22 I.B.I.A. 220, 229 (1992) ("Subsection 6(d) [of the Gila Bend Act] clearly contemplates a request by the Nation and action by the Secretary before trust status is attained. The Board finds that the lands are not presently in trust status.") (emphasis added).

B. H.B. 2534 Is Not Retroactive

Second, contrary to the Nation's contentions, H.B. 2534 is not retroactive. It has a purely prospective effect: It adds a new annexation procedure that can only apply to future annexation proceedings.

[22] The Nation's citation to Foss v. National Marine Fisheries Service is inapposite because there the applicant would have been entitled to an individual fishing quota permit but for his untimely application. 161 F.3d 584, 587-89 (9th Cir. 1998). Here, by contrast, the Nation does not acquire an entitlement until the Department's acceptance of title—an event that has not happened and may not happen. For example, if appellants prevail in their related appeal of the Secretary's Parcel 2 Decision, Gila River Indian Cmty. v. United States, Nos. 11-15631 et seq., the Department will not be accepting title to the land in question.

"A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment"; nor is it retroactive "merely because it draws upon antecedent facts for its operation." Landgraf v. USI Film Prods., 511 U.S. 244, 269-70 & n.24 (1994) (citations omitted). Instead, to be retroactive, it must attach "new legal consequences to events completed before its enactment." Id. at 270. Here, as explained above, no relevant events have been "completed." The Nation's Glendale property has not yet been taken into trust.

The Nation asserts that H.B. 2534 is retroactive because it might prevent the Secretary from taking the property into trust—thus interfering with the Nation's investment-backed expectations to use the land as a setting for casino gambling. Resp. Br. 64-65. But even if Glendale were to annex the property, leaving the Secretary unable to take the land into trust, that still would not make the legislation retroactive. Landgraf—one of the Nation's principal authorities—makes that quite clear in language that seems to anticipate this very case:

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

Id. at 269 & n.24 (emphases added). As the Court observed: "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." Id. at 269 n.24 (citation omitted). That is exactly the result the Nation argues for here.

Relying on Landgraf, the courts of appeals regularly reject arguments like the one the Nation proffers. In Spoklie v. Montana, 411 F.3d 1051 (9th Cir. 2005), for example, this Court rejected a landowner's argument that a new state law effectively outlawing the business he conducted on his land—alternative livestock ranching—was impermissibly retroactive and caused him to lose his "vested rights" in his business. Id. at 1058. Looking to Landgraf, this Court explained that "these business losses * * * provide no basis for arguing that the state's abolition of formerly legal [ ] practices is impermissibly retroactive." Id.

C. H.B. 2534 Satisfies Rational-Basis Review

As explained above, the Nation has no property rights at stake. And H.B. 2534 is not retroactive. For either or both of these reasons, the Court should reject the Nation's due process claims. But even if the Nation had advanced a cognizable due process argument, its claims still would fail because H.B. 2534 satisfies the requirements of rational-basis scrutiny. See, e.g., United States v. Carlton, 512 U.S. 26, 31 (1994) ("retroactive application of the legislation is itself justified by a rational legislative purpose") (citations omitted).

"Under rational basis review, a statute will pass constitutional muster if it is 'rationally related to a legitimate state interest.' " Merrifield v. Lockyer, 547 F.3d 978, 984 n.9 (9th Cir. 2008) (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). This test is extraordinarily deferential in the land-use context: "There is, of course, no federal Constitutional right to be free from changes in the land use laws. To establish a violation of * * * substantive due process, [plaintiffs] must prove that the County's actions were clearly arbitrary and unreasonable, having no substantial relation to the * * * general welfare." Dodd v. Hood River Cnty., 59 F.3d 852, 864 (9th Cir. 1995) (internal quotes & citations omitted). A due process issue arises "only where the government body could have no legitimate reason for its decision." Id. (citation omitted). H.B. 2534 easily passes rational-basis scrutiny. Here, Arizona sought to further a legitimate state interest—preventing or at least reducing "intergovernmental conflict over resources and economic development," Green, 340 F.3d at 903, "by increasing the ability of cities and towns to annex neighboring areas which may be transferred to the federal government." ER21. And as explained above, by allowing municipalities to invoke H.B. 2534 after landowners apply to transfer land to the federal government—the aspect of the law the Nation mistakenly deems "retroactive"—

the legislature sought to ensure that municipalities could invoke the statute only when necessary to accomplish those purposes. See supra 37.[23]

For all of these reasons, the Nation's due process claims must fail.

CONCLUSION

The judgment below should be reversed as to the Nation's preemption claims and affirmed as to the equal protection, special law, and due process claims.

[23] The Nation suggests that H.B. 2534, if applied to Parcel 2, could deprive the Nation of its ability to vote on annexation of its land. But "[t]here is no constitutional right to vote for municipal incorporation," and as noted above, states have tremendous discretion on matters involving incorporation and municipal boundaries. City of Tucson v. Pima Cnty., 19 P.3d 650, 656-60 (Ariz. Ct. App. 2001) (collecting citations).

Respectfully submitted,

/s/ Audrey E. Moog

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

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

Craig D. Tindall
OFFICE OF THE CITY ATTORNEY
5850 West Glendale Ave., Suite 450
Glendale, AZ 85301

Counsel for City of Glendale

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*

February 1, 2012

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 13,954 words.

/s/ Audrey E. Moog
Audrey E. Moog

CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk using the appellate CM/ECF system on February 1, 2012. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Audrey E. Moog
Audrey E. Moog