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

In the United States Court of Appeals for the Ninth Circuit

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

v.

THE CITY OF GLENDALE, ET AL.,
Defendants-Appellants / Cross-Appellees.

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

PRINCIPAL AND RESPONSE BRIEF FOR PLAINTIFF-APPELLEE / CROSS-APPELLANT

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PRELIMINARY STATEMENT

This case concerns an extraordinary Arizona statute—one expressly and openly designed to thwart the operation of federal law. The United States has determined that it has a statutory obligation to take certain land into trust for the Tohono O'odham Nation, and the district court has rejected Appellants' challenges to that determination. Unhappy with what federal law provides, Appellants concocted a strategy to circumvent it: a state law, House Bill 2534, that they assert would retroactively render the land in question ineligible for trust acquisition and thus block the United States from fulfilling its duty to take the land into trust. Members of the Arizona legislature freely admitted—indeed, boasted—that the bill's aim was to frustrate the pending trust acquisition and prevent the United States from taking title to the land. Unsurprisingly, the district court held that the Arizona law was an obstacle to the implementation of federal law and thus preempted. Nothing in Appellants' submission casts any doubt on that holding.

The Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1798 (1986), was enacted to remedy the grave harm caused by the United States' destruction of reservation lands belonging to the Nation. The Act enables the Nation to replace those lands with new reservation lands that can be used for much-needed economic development. It provides that the Secretary of the Interior, "at the request of the [Nation], shall hold in trust" any land that meets

certain requirements, including that it must be located within Maricopa, Pima, or Pinal Counties and outside "the corporate limits of any city or town." Pub. L. No. 99-503, §6(d). In January 2009, the Nation requested that the Secretary hold in trust a parcel of land located in an unincorporated Maricopa County "island" surrounded by a narrow strip of land that had been annexed by the City of Glendale. Glendale, the State of Arizona, and others opposed the Nation's trust application; Glendale contended, among other things, that even though the land was unincorporated county territory, it was within Glendale's corporate limits and thus ineligible for trust acquisition. In July 2010, the Secretary rejected that argument and determined that the Lands Replacement Act required him to take the land in trust. The Secretary voluntarily stayed trust acquisition of the land so that Appellants could challenge his determination in district court. Appellants' challenge failed, and the court upheld the Secretary's determination.

While the district court proceedings were pending, the Arizona legislature took advantage of the Secretary's voluntary forbearance by enacting H.B. 2534. The new state law permits cities in the three counties specified in the Lands Replacement Act to annex land bordered on three or four sides by a city without any of the procedures—such as a right to notice, a hearing, a vote, and judicial review—that all other Arizona landowners receive, "if the landowner has submitted a request to the federal government to take ownership of the territory or hold the

territory in trust" as required by a specific federal statute or regulation. Ariz. Rev. Stat. §9-471.04. As its sponsors openly avowed, the law is specifically designed to prevent the Secretary from taking the Nation's land into trust by purporting to bring the Nation's land within Glendale's corporate limits.

The district court correctly found H.B. 2534 preempted under basic principles of conflict preemption. As the court observed, H.B. 2534 specifically seeks to prevent the United States from fulfilling its obligation under the Lands Replacement Act to take the Nation's land into trust—an obligation that arose well before H.B. 2534 was enacted. ER16. Moreover, it impermissibly burdens a federal right, depriving the Nation of significant rights afforded all other Arizona property owners solely because it has invoked its rights under the Lands Replacement Act. ER17-18. There can be no serious question that, as applied to the land at issue here, H.B. 2534 is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Even if H.B. 2534 were not preempted, it would be unconstitutional. It violates the federal and Arizona Equal Protection Clauses by using arbitrary classifications to single out a narrow class of landowners for special political disabilities. It violates the Arizona Constitution's prohibition on special legislation because it was manifestly designed to apply to this particular case, excludes

similarly situated land in other Arizona counties, and has no realistic probability of broader future application. And it violates the federal and Arizona Due Process Clauses because it retroactively attaches harsh consequences—the Nation's loss of any say in the annexation of its land, and, if the annexation works as Appellants intend, the loss of the right to have its land taken into trust—to the Nation's lawful filing of a trust application more than two years before H.B. 2534's enactment. Neither the federal nor the Arizona Constitution permits Arizona's attempt to disenfranchise a single Indian tribe in retaliation for its invocation of its federal rights.

STATEMENT OF JURISDICTION

The Nation agrees with Appellants' statement of jurisdiction.

STATEMENT OF ISSUES

1. Whether Arizona House Bill 2534, Ariz. Rev. Stat. Ann. §9-471.04, is preempted by the Lands Replacement Act because its manifest purpose and intended effect is to obstruct the Act's operation by giving Glendale the power to veto a federally mandated trust acquisition, and because it imposes a discriminatory burden on the Nation's exercise of its federal rights under the Act.

2. Whether H.B. 2534 violates the Equal Protection Clauses of the United States and Arizona Constitutions because it arbitrarily singles out a narrow class of landowners for disparate treatment without a rational basis.

3. Whether H.B. 2534 violates the Arizona Constitution's prohibition on special legislation because it was crafted to govern this specific case and no other, excludes similarly situated land in other Arizona counties, and has no realistic probability of broader future application.

4. Whether H.B. 2534 violates the Due Process Clauses of the United States and Arizona Constitutions by retroactively and severely penalizing the Nation for invoking its federal right to have its land taken into trust.

STATEMENT OF FACTS AND OF THE CASE

A. The Lands Replacement Act

The Tohono O'odham Nation is a federally recognized Indian tribe with more than 28,000 members and eleven political subdivisions. One of those subdivisions, the San Lucy District, was originally located on the 10,297-acre Gila Bend Reservation on the Gila River, where the Nation's forebears had lived for centuries. *See* H.R. Rep. No. 99-851, at 4 (1986) (ER195).[1]

In the 1950s, the Army Corps of Engineers built a dam ten miles downriver from the Gila Bend Reservation to prevent flooding of non-Indian farmland and the City of Yuma. *Id.* The operation of the dam caused unanticipated levels of flooding on the reservation, which in turn forced the Nation's members to relocate to a nearby 40-acre tract known as San Lucy Village. However, government

[1] Glendale's and Arizona's Excerpts of Record are cited as "ER__." The Nation's Supplemental Excerpts of Record are cited as "NER__."

officials continued to assure the Nation "that flooding would occur so infrequently as not to impair [its] ability to farm the land." *Id.* Those assurances proved badly mistaken. Throughout the late 1970s and early 1980s, large areas of the reservation were regularly flooded for extended periods. The floods destroyed a 750-acre farm developed at tribal expense and "precluded any economic use of [the] reservation lands." *Id.* at 5-6 (ER196-197).

The Nation petitioned Congress for a new reservation on land suitable for agriculture, but the Department of the Interior ("DOI") found no available land that could be farmed without substantial federal outlays for irrigation and other necessities. *Id.* at 6-7 (ER197-198). Congress responded by enacting the Lands Replacement Act to "facilitate replacement of reservation lands with lands suitable for sustained economic use *which is not principally farming*." Pub. L. No. 99-503 §2(4), 100 Stat. 1798 (1986) (emphasis added). Specifically, Congress recognized that "[t]he lack of an appropriate land base severely retards the economic self-sufficiency of the O'odham people of the Gila Bend Indian Reservation" and "contributes to their high unemployment and acute health problems." *Id.* §2(3); *see also* H.R. Rep. No. 99-581 at 7 (ER198). The Act was thus intended both to replace the Nation's reservation and to "promote the economic self-sufficiency of the O'odham Indian people." Pub. L. No. 99-503 §2(4).

In return for the Nation relinquishing its legal claims arising from the destruction of the reservation and assigning the United States its rights in 9,880 acres of the reservation, the Act provided that (1) the United States would pay the Nation $30 million for acquiring land and water rights and for economic development, *id.* §4(a), and (2) the Secretary of the Interior would be required to hold in trust for the Nation up to 9,880 acres of land to replace its lost reservation land, *id.* §6(c). In 1987, the Nation relinquished its claims and assigned its rights in the reservation land, triggering the United States' obligations under the Act.

In contrast to other, discretionary trust-acquisition statutes, *see, e.g.*, 25 U.S.C. §465, the Act's key provision *mandates* that the Secretary of the Interior acquire trust title to eligible land at the Nation's request. Specifically, §6(d) of the Act provides, in relevant part:

> 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.

Pub. L. No. 99-503, §6(d). The Secretary is thus obligated to hold in trust, at the Nation's request, "any" land acquired under the Act that meets these criteria (and other criteria not relevant here). Congress did not require the Nation or the

Secretary to consult with or obtain consent from Arizona or neighboring municipalities before taking land into trust under the Act.

B. The Nation's Trust Application And The Secretary's Decision

This case arises from the Nation's January 28, 2009, application to have a 135-acre tract of land located near 91st and Northern Avenues in Maricopa County, Arizona (the "Settlement Property") taken into trust under the Lands Replacement Act. *See* ER211-218. The Settlement Property is surrounded by territory that has been annexed by Glendale, including a narrow "strip annexation" running along Northern Avenue. *See* ER215. But the property is located in unincorporated Maricopa County, thus satisfying the Act's requirement that land to be taken into trust be outside the "corporate limits of any city or town." *See* ER215-216 & n.2; *Gila River Indian Cmty. v. United States*, 776 F. Supp. 2d 977, 981, 989-991 (D. Ariz.) (*GRIC*), *appeals docketed*, Nos. 11-15631, *et al*. (9th Cir. Mar. 16, 2011).

The Nation's trust application indicated that, once the land is taken into trust, the Nation plans to use a portion of the Settlement Property for gaming in accordance with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701 *et seq.* Specifically, the Nation intends to develop the Settlement Property into a destination resort and gaming facility. The Nation's planned development and the jobs it will bring have been welcomed by many neighboring residents, landowners, and government officials, including the mayor of the City of Peoria, which is

located across the street from the Settlement Property. *GRIC*, Nos. 11-15631, *et al.*, Appellees' Supp. Excerpts of Record at 4-5, 65-66, 93-98, 166 (9th Cir. Aug. 30, 2011) (Dkt. 63) ("*GRIC* NER"). Others, including Glendale and tribes with competing gaming interests, oppose the Nation's plans and have maintained a vigorous and well-funded opposition campaign. *See, e.g.*, ER6 ("[T]he Court has no doubt that Glendale will use every available legal means to block the Nation's planned casino.").[2]

Glendale and other opponents raised numerous objections to the Nation's application. When DOI appeared likely to reject these arguments, Glendale also sought to thwart the Nation's application by manipulating local law. It purported to annex a portion of the Settlement Property retroactively by reviving a 2001 annexation that it had abandoned in 2002, before the Nation bought the property. *GRIC* NER109-111. This action, Glendale asserted, meant that the affected portion of the property no longer satisfied the Act's requirement that trust lands be outside "the corporate limits of any city or town." The Nation challenged the purported retroactive annexation, and the Arizona courts have now invalidated it. *See*

[2] The Settlement Property's eligibility for gaming under IGRA is the subject of pending litigation. *See Arizona v. Tohono O'odham Nation*, No. 11-cv-296 (D. Ariz. Feb. 14, 2011). Although Appellants devote considerable hyperbole to the Nation's planned gaming activities, they are not relevant to this appeal.

Tohono O'odham Nation v. City of Glendale, 253 P.3d 632 (Ariz. Ct. App.), *review denied*, No. CV-11-0167-PR (Ariz. Oct. 25, 2011).

While that litigation was pending, however, Glendale argued that the purported annexation prevented the Secretary from accepting trust title to the affected portions of the Settlement Property. To expedite action on its application, the Nation requested that the Secretary first acquire trust title to "Parcel 2" of the Settlement Property—the parcel not affected by the purported retroactive annexation—and defer action on the rest of the property until resolution of the state-court litigation. ER211-212. On July 23, 2010, the Secretary issued a decision concluding that "Parcel 2 … is eligible to be taken into trust" under the Lands Replacement Act, ER212, and holding "in abeyance" the Nation's application for the rest of the Settlement Property, ER218. The Secretary published notice of his decision on August 26, 2010. *See* 75 Fed. Reg. 52,550.

C. Challenges To The Secretary's Decision

Arizona, Glendale, and a tribe with competing gaming facilities, the Gila River Indian Community, challenged the Secretary's decision in district court. *See Gila River Indian Cmty. v. United States*, Nos. 10-cv-1993, *et al.* (D. Ariz. Sept. 19, 2010). On March 3, 2011, the district court upheld the Secretary's decision. The court rejected plaintiffs' constitutional challenges to the Lands Replacement Act, *GRIC*, 776 F. Supp. 2d at 994-995, and held that the Secretary reasonably

interpreted the Act's requirement that eligible land be outside the corporate limits of any city or town to permit trust acquisition of land within a county island, *id.* at 989-991.

Under DOI's regulations, the Secretary could have taken Parcel 2 into trust any time after September 25, 2010—30 days after publication of notice of his decision. *See* 25 C.F.R. §151.12(b). But DOI voluntarily stayed the acquisition of Parcel 2 during the district court litigation, *see GRIC*, Nos. 11-15631, *et al.*, Appellants' Excerpts of Record at 133 (9th Cir. July 18, 2011) (Dkt. 43), and the district court later enjoined the Secretary from taking Parcel 2 into trust pending appeal to this Court, *see Gila River Indian Cmty. v. United States*, 2011 WL 1656486, at *5 (D. Ariz. May 3, 2011).[3] Recognizing that enjoining the trust acquisition pending appeal would further delay the Nation's pursuit of a much-needed economic-development project and offer the Nation's opponents an opportunity to attempt to "materially alter the status quo in their favor," the court required plaintiffs to post a $500,000 bond and barred Glendale from proceeding during the appeal with its continuing efforts—described in detail below—to annex Parcel 2, through which Glendale hoped to undermine the statutory basis for the Secretary's decision. *Id.* at *4-5.

[3] Although the court concluded that the Nation is "likely to prevail on appeal," *Gila River Indian Cmty.*, 2011 WL 1656486, at *1, it issued an injunction to prevent the appeal from being mooted, noting that the Quiet Title Act would arguably bar review of the trust acquisition once it had occurred, *id.* at *2-3.

D. H.B. 2534

While the Nation's trust application was pending—fearing that its efforts to defeat the application in the agency and courts would fail—Glendale urged the Arizona Legislature to enact a special bill to block the trust acquisition of the Nation's land. The bill would have allowed Glendale to annex the Settlement Property without the Nation's consent and without any of the procedural protections Arizona law affords other landowners. *See* H.B. 2297, 49th Leg., 2d Regular Sess. (Ariz. 2010) (NER2). That bill failed, but opponents of the Nation's plans renewed their efforts at the start of the 2011 legislative session, introducing a new bill based on H.B. 2297. *See* H.B. 2534, 50th Leg., 1st Regular Sess. (Ariz. 2011) (introduced Jan. 19, 2011). The bill was rushed through the legislative process and signed into law on February 1, 2011.[4]

Arizona law ordinarily does not permit involuntary annexation. Rather, it requires a city seeking to annex territory to follow carefully defined procedures designed to protect the rights of affected landowners. The city must file a petition with the county recorder identifying the territory to be annexed and wait thirty days, during which it must notify affected landowners and hold a public hearing on the proposed annexation. Ariz. Rev. Stat. Ann. §9-471(A)(1)-(3). The city then has one year to obtain the consent of "more than one-half of the persons owning

[4] The bill's procedural history is available at http://www.azleg.gov/ bills.asp.

real and personal property that would be subject to taxation by the city or town in the event of annexation." *Id.* §9-471(A)(4). The annexation cannot occur unless a majority of the landowners consent. Arizona law also provides interested parties thirty days to file suit "to question the validity of the annexation for failure to comply with this section." *Id.* §9-471(C). An annexation is not effective until after the expiration of this thirty-day period. *Id.* §9-471(D).

H.B. 2534 strips away all these procedural protections for an exceedingly narrow class of landowners—a class that effectively consists of the Nation alone. The statute enacts a new §9-471.04 providing that, "[n]otwithstanding any other provision of this article," a municipality may annex land meeting the statute's criteria without the affected landowners' consent or the notice and public hearing otherwise required by law. All that is required is a "majority vote of the governing body of the city or town." Moreover, if the annexation is approved by a two-thirds majority of the city council, it becomes immediately effective, without the thirty-day period generally provided for seeking judicial review.

A city may invoke H.B. 2534's special annexation procedure only if three conditions are met. First, the city must be "located in a county with … more than three hundred fifty thousand persons." That requirement eliminates all but three of Arizona's fifteen counties: Maricopa County, where the Settlement Property is located, and Pima and Pinal Counties, the other two counties in which land may be

acquired under the Lands Replacement Act.[5] Second, the land must be "surrounded by the city or town or … bordered by the city or town on at least three sides." Third, "the landowner [must have] submitted a request to the federal government to take ownership of the territory or hold the territory in trust." H.B. 2534 further specifies that "submitted a request to the federal government" means that the landowner "has made an application to the federal government as required by a specific federal statute or regulation."

These criteria make clear that H.B. 2534 was surgically crafted to prevent the Settlement Property from being taken into trust under the Lands Replacement Act. Indeed, the law's sponsors touted that as the law's purpose. The lead sponsor in the Senate forthrightly stated that "the goal is to prevent [the Nation] from taking [the land] into trust, turning it into their sovereign land." NER199. The same senator introduced the bill in committee by condemning the Secretary's decision and declaring:

> [T]he Federal Government is working to undermine the will of Arizona voters and the tenth amendment to the Constitution …. This power grab by the Federal Government led to the drafting of [the bill] to attempt to address some of these issues. So what we're doing is fighting an overreaching, intrusive Federal Government.

NER143-144. The legislative debate on H.B. 2534 focused almost exclusively on the Nation's property and the Secretary's decision to take Parcel 2 into trust. As an

[5] *See* U.S. Census Bureau, 2010 Census Data, http://2010.census.gov/2010census/data/.

opponent of the bill noted, "there's plenty of legislative history … that show[s] that this Bill is being targeted specifically for a parcel of land that's held by the Tohono O'odham tribe near Glendale and in fact, there's quite a lot of discussion on the record … that shows that … the sponsors … absolutely intend this legislation to be solely for that issue." NER190.

As originally introduced, H.B. 2534 contained an "emergency" clause providing that it would become "operative immediately" upon being signed by the Governor, rather than ninety days after the end of the legislative session, which is the usual rule, *see* Ariz. Const. art. IV, pt. 1, §1(3). This clause—together with the provision allowing a city to make an annexation immediately effective with a two-thirds vote—would have permitted Glendale to annex the Nation's land with as little as twenty-four hours' notice following enactment of the bill. *See* Ariz. Rev. Stat. Ann. §38-431.02(C) (requiring twenty-four hours' notice for public meetings). These provisions, and the Legislature's extraordinary haste in passing the bill, were intended to allow Glendale to annex the Nation's land before the district court could rule on the pending challenge to the Secretary's decision. The bill's lead sponsor in the Senate openly acknowledged that the district court was "expected to take some action … in February and, that's why the timing of the introduction of these Bills … and moving these Bills through the process, at this point … is important." NER147; *see also* NER164 (testimony by the Glendale City Attorney

that the bill "[o]bviously" will have an effect on the ongoing litigation "and one that we believe is positive").

The attempt to interfere with judicial review of the Secretary's decision failed when H.B. 2534 did not attain the two-thirds majorities required to enact the emergency clause. Accordingly, the bill did not become effective until July 20, 2011. By that time, the district court had upheld the Secretary's decision and held that H.B. 2534 was preempted by the Lands Replacement Act.

E. The District Court's Decision

Shortly after H.B. 2534 was passed, the Nation filed suit in the District Court for the District of Arizona. The Nation contended that H.B. 2534 was preempted by the Lands Replacement Act, violated the Nation's due process and equal protection rights under the United States and Arizona Constitutions, and violated the Arizona Constitution's prohibition against special legislation. The parties filed cross-motions for summary judgment.

On June 30, 2011, the district court struck down H.B. 2534 as preempted by the Lands Replacement Act, granting summary judgment to the Nation on that claim. The court explained that "[t]he 'principal purpose' of the [Act] was 'to provide suitable alternative lands and economic opportunity for the [Nation]'" and that "Congress specifically intended that the Nation have 'great flexibility' in determining the use of … funds" provided under the Act for that purpose. ER13

(quoting H.R. Rep. 99-851, at 9-10). It recognized that the Act took municipalities' interests into account by providing that land taken into trust must be outside the corporate limits of any city or town. ER12. It concluded, however, that the Act's plain text "mandate[s] that land be taken into trust once a request [is] made by the Nation with respect to qualifying land." ER15. The Nation had already made such a request with regard to the Settlement Property, triggering the Secretary's obligation to take the land into trust. *Id.*

The court accordingly held that, even applying a presumption against preemption, H.B. 2534 "stand[s] as an obstacle to th[e] mandate" of the Lands Replacement Act" and "clearly conflicts with … Congressional intent" because it seeks to "block DOI from taking the land into trust, contrary to the express command of Congress." ER16. Moreover, H.B. 2534 impermissibly burdens the exercise of federal rights by "den[ying] statutory hearing and voting rights only to those who have asked the federal government to take … land in trust." ER18 (quoting *Felder v. Casey*, 487 U.S. 131, 145 (1988)). The court thus held that H.B. 2534 is preempted by the Act. ER20.

The district court declined to hold H.B. 2534 unconstitutional on the alternative grounds raised by the Nation, granting summary judgment to Appellants on those counts. With respect to the Nation's equal protection and special legislation arguments, the district court focused exclusively on H.B. 2534's

population classification. Without explaining how H.B. 2534's classifications rationally further municipalities' interest in controlling development of adjoining land, it determined that H.B. 2534 could be limited to populous counties because "complete inclusiveness is [not] a requirement of the rational basis test." ER23. The court also determined that H.B. 2534's narrowly drawn classification—which, for all practical purposes, includes only the Nation—did not violate the Arizona Constitution's prohibition on the enactment of special laws, even though that provision requires that legislation encompass "all members of the relevant class," *State Comp. Fund v. Symington*, 848 P.2d 273, 278 (Ariz. 1993), and requires an actual probability that the law will be applied to others.

The court also rejected the Nation's due process claim, reasoning that H.B. 2534 is rationally related to preventing "'intergovernmental conflict over resources and economic development'" by "increasing the ability of cities and towns to annex neighboring areas which may be transferred to the federal government." ER21. The court did not address the Nation's argument that H.B. 2534's retroactive application to the Settlement Property contravened due process by attaching disproportionately severe and unanticipated consequences to the Nation's past invocation of its rights under the Lands Replacement Act. ER22 n.10.

SUMMARY OF ARGUMENT

I. The district court correctly held that H.B. 2534 is preempted by the Lands Replacement Act. H.B. 2534 was designed specifically to block the Secretary of the Interior from fulfilling his obligation under the Lands Replacement Act to hold the Settlement Property in trust. It would permit Glendale to annex the Settlement Property with no process—and, Glendale contends, render the land ineligible for trust acquisition under the Act—*because* the Nation has requested that the land be taken into trust. The district court did not err in concluding that, as applied to the Settlement Property, H.B. 2534 would frustrate the operation of the Lands Replacement Act. Indeed, as the statute's language and legislative history make clear, that is H.B. 2534's entire *raison d'être*.

As the district court held, H.B. 2534 is also preempted because it attaches discriminatory burdens to the exercise of a federal right. A state may not "discourage conduct that federal legislation specifically seeks to encourage," *City of Morgan City v. South La. Elec. Coop. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994), nor may it "burden … a federal right" when that burden "is not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule," *Felder v. Casey*, 487 U.S. 131, 144 (1988). H.B. 2534 does both. By stripping the Nation of rights all other landowners enjoy under state law if and only if the Nation exercises its federal rights under the Lands Replacement Act, the statute would

discourage the Nation—and, in this case, seek to prevent it altogether—from acquiring trust lands for the economic development Congress wished to encourage. And it burdens the Nation's exercise of its rights through a rule that is anything but "neutral" and "uniformly applicable."

II. H.B. 2534 also offends equal protection principles because it singles out the Nation for a severe political disability without a rational basis. The Equal Protection Clauses of the Federal and Arizona Constitutions require that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). H.B. 2534 fails even that minimal standard. Its classifications are drawn in a manner that targets the Nation, and for all practical purposes, the Nation alone. That narrow classification is rationally related to H.B. 2534's admitted goal, blocking the Secretary's trust acquisition of the Settlement Property. But frustrating federal law is not a legitimate governmental objective. And, although Appellants have now manufactured a post-hoc justification for the statute, arguing that it gives municipalities greater control over development of adjoining land, H.B. 2534's classifications are not rationally tailored to further that putative aim.

III. H.B. 2534 is impermissible "special legislation" under the Arizona Constitution. The "special legislation" provision goes beyond the protections of the Federal and Arizona Equal Protection Clauses, prohibiting the legislature from

enacting laws that are "plainly intended for a particular case" and that "look[] to no broader application in the future." *Arizona Downs v. Arizona Horsemen's Found.*, 637 P.2d 1053, 1061 (Ariz. 1981). H.B. 2534 is a textbook example of such a law: It is targeted at the Nation alone; if it had a legitimate purpose, the classifications it employs would be wildly underinclusive; and there is no reasonable prospect that it will be applied more broadly in the future.

IV. Finally, H.B. 2534 violates due process. Retroactive statutes such as H.B. 2534 are constitutionally "disfavored," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268 (1994), and are permissible only when their retrospective, as well as their prospective, are supported by a rational basis, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Even if H.B. 2534 were deemed to have some legitimate purpose as applied prospectively, its retroactive application could not be sustained: It would impose a harsh penalty on the Nation because of the Nation's wholly legitimate past conduct and upset reasonable expectations upon which the Nation relied when it invested substantial resources in purchasing and developing the Settlement Property. Moreover, H.B. 2534's retroactive effect goes far beyond the ordinary readjustment of economic benefits and burdens to deprive a single Indian tribe of political rights that every other Arizona landowner possesses.

STANDARD OF REVIEW

This Court reviews "the district court's summary judgment de novo." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The relevant facts in this case are undisputed.

ARGUMENT

I. H.B. 2534 IS PREEMPTED BY THE LANDS REPLACEMENT ACT

The Supremacy Clause mandates that "the Laws of the United States … shall be the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, "state laws that conflict with federal law are 'without effect.'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). Even in the absence of an "express provision for preemption," state laws are preempted "to the extent of any conflict with a federal statute." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). A state law conflicts with federal law and is preempted if compliance with both is impossible or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The district court correctly held that H.B. 2534 is preempted as applied to the Settlement Property because it "conflicts in both its

purpose and effects" with the Lands Replacement Act, *Felder v. Casey*, 487 U.S. 131, 138 (1988), by frustrating the operation of the Act and imposing discriminatory burdens on the exercise of a federal right.

A. No Presumption Against Preemption Applies Here

Appellants rely very heavily on the "presumption against preemption" to bolster their arguments. But the presumption is merely a tool for discerning congressional intent, to be applied where the statutory context warrants it. Accordingly, no such presumption exists "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Indeed, 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." *Wyeth v. Levine*, 555 U.S. 555, 566 n.3 (2009); *Pacific Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1167 (9th Cir. 2011).[6]

[6] Appellants point (Br. 22-23) to a single sentence from *Wyeth* for the proposition that a presumption against preemption applies in "all" cases. That significantly overreads *Wyeth*, which concerned the preemptive effect of federal law on state-law tort suits, a traditional area of state concern that the federal government historically has "regarded … as a complementary form of drug regulation." 555 U.S. at 578. *Wyeth* did not purport to overrule or limit *Locke*, and this Court has continued to rely on *Locke* even after *Wyeth*. *See, e.g.*, *In re Korean Air Lines Co. Antitrust Litig.*, 642 F.3d 685, 693 n.6 (9th Cir. 2011); *United States v. Arizona*, 641 F.3d 339, 356 n.16 (9th Cir. 2011).

Here, Congress has not regulated in an area traditionally subject to state control—quite the opposite. H.B. 2534 injects state and local governments into the process by which the federal government takes land into trust for Indian tribes—a process over which the Constitution gives the federal government exclusive authority. *See* U.S. Const. art. I, §8, cl. 3; *id.* art. II, §2, cl. 2; *United States v. Lara*, 541 U.S. 193, 200 (2004) (Congress has "'plenary and exclusive'" power to legislate with respect to Indian tribes); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("Indian relations [are] the exclusive province of federal law."). Indeed, H.B. 2534 applies *only* to landowners who make a request to the federal government "as required by a specific federal statute or regulation" to take ownership of their land or take it in trust. This is precisely the type of "inherently federal" situation in which the Supreme Court has made clear that "no presumption against pre-emption obtains." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347, 348 (2001); *see also Chapman v. Westinghouse Elec. Corp.*, 911 F.2d 267, 269 (9th Cir. 1990) ("Preemption is particularly likely in so-called areas of uniquely federal interest. In such circumstances, the conflict with federal policy need not be as sharp as that which must exist for ordinary preemption." (citation, alteration, and internal quotation marks omitted)).

Appellants contend (Br. 23) that H.B. 2534 merely governs the adjustment of municipal boundaries, an area of local and state regulation. But the same argument

could have been made in *Buckman*, 531 U.S. at 347-348, which involved a state products-liability suit that encroached on the federal government's exclusive authority to police fraud against federal agencies. The 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. *See National Foreign Trade Council v. Natsios*, 181 F.3d 38, 74 (1st Cir. 1999) (rejecting argument that "state procurement is a traditional area of state power" where the state law at issue was in fact "aimed primarily at effecting [foreign] change"), *aff'd*, *Crosby*, 530 U.S. 363; *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 425-426 (2003) (rejecting purported state interest in regulating insurance where the law interfered with the President's ability to settle claims of American nationals against foreign governments). Because H.B. 2534's avowed purpose and intended effect is to interfere with the workings of a federal law dealing with Indian land, a presumption against preemption is inappropriate.

B. H.B. 2534 Is Preempted Even If A Presumption Against Preemption Applies

In any event, even applying a presumption against preemption, the district court correctly held that H.B. 2534 clearly "conflicts in both its purpose and effects" with the Lands Replacement Act. *Felder*, 487 U.S. at 138. Three features of the law mandate that conclusion.

1. H.B. 2534 Is Designed To Prevent The Secretary From Fulfilling His Obligations Under Federal Law

a. First, H.B. 2534 is preempted as applied to the Settlement Property because, to the extent that annexation under H.B. 2534 would prevent the Nation's land from being taken into trust, it would frustrate the purpose of the Lands Replacement Act by permitting Glendale to block the Secretary from fulfilling his obligations under the Act. ER16.

The district court carefully examined the language and purpose of the Lands Replacement Act in coming to this conclusion. *See, e.g.*, *Crosby*, 530 U.S. at 372 ("[W]hen the question is whether a Federal act overrides state law, the entire scheme of the statute must … be considered and that which … must be implied is of no less force than that which is expressed."). As the court recognized, the Act settled the Nation's legal claims against the United States arising out of the destruction of the Gila Bend Indian Reservation, which had left the Nation's people "'desperate for a land base that [could] provide them realistic and reasonable opportunities for economic and social development.'" ER12 (quoting H.R. Rep. 99-851, at 7). The Act recognized and implemented the "'responsibility of the United States, as trustee, to take action to resolve'" the "'pressing problems'" afflicting those displaced from the reservation. ER13 (quoting H.R. Rep. 99-581, at 9). It did so by "'facilitat[ing] replacement of [the Nation's] reservation lands'" with lands suitable for non-agricultural development that would "'promote the

economic self-sufficiency of the O'odham Indian people.'" *Id.* (quoting Pub. L. No. 99-503 §2(4)); *see* H.R. Rep. 99-851, at 9 (ER200). The Nation is authorized to choose those lands, subject to certain criteria specified in the statute, and Congress intended that the Nation have "'great flexibility'" in doing so. *Id.* (quoting H.R. Rep. 99-581, at 10).

At the same time, the district court recognized that the Lands Replacement Act took account of the interests of Arizona municipalities by providing that replacement land could not be "within the corporate limits of any city or town." ER13. Accordingly, to determine whether H.B. 2534 posed an obstacle to the full achievement of Congress's purposes, the court did not rely solely on the Act's general aim of facilitating the acquisition of replacement reservation land, but examined the Act's operation in detail. As the court noted, the Act provides that "[t]he Secretary, at the request of the [Nation], *shall* hold in trust for the benefit of the [Nation] any land … which meets the requirements of this subsection." Pub. L. No. 99-503, §6(d) (emphasis added); ER14. That is, "when the Nation asks DOI to take land into trust that is not at that time within the corporate limits of any city or town, DOI has a mandatory obligation to take the land into trust provided the other requirements of §6(d) … are satisfied." ER14.

Thus, when the Nation requested that the Secretary take the Settlement Property—which was eligible for trust acquisition under the Act—into trust, the

law obligated the Secretary to do so. The Secretary formally recognized that obligation and agreed to take Parcel 2 in trust well before the enactment of H.B. 2534.[7] H.B. 2534 is designed to thwart the Secretary's fulfillment of that obligation. Indeed, it attempts to render the Nation's trust application self-defeating, by providing that the very filing of the application gives Glendale a right to employ unique procedures to annex the land and purportedly destroy its previous eligibility for trust acquisition. Whatever might be true in other circumstances, there should be no question that federal law preempts a state law that (1) was enacted after the Nation's federal application and (2) uses that application itself to trigger unique state provisions specially designed to prevent a federal officer from complying with an already-recognized federal statutory duty.

More broadly, H.B. 2534 attempts to rewrite the Secretary's obligations, and the Nation's rights, under the Lands Replacement Act by adding a new criterion for trust eligibility never contemplated by Congress. The Act excludes from trust eligibility only land that is actually incorporated by a city or town. As the Secretary explained, "Congress chose to use the term 'corporate limits' … rather than phrases that would have expressed the intent to further insulate cities from

[7] Because the remainder of the Settlement Property is identical to Parcel 2 for purposes of the Act's eligibility criteria—it is adjoining land in the same unincorporated county island—the Secretary's determination makes clear that his obligation extends to the entire Settlement Property.

trust acquisition." ER216; *see also* ER12-13. Under H.B. 2534, by contrast, Appellants contend that land outside a city's corporate limits but "surrounded by [a] city … or … bordered by [a] city … on at least three sides" could not be taken into trust over the city's objection. But Congress did not provide for city nullification in the Lands Replacement Act, and "Congress would not want States to forbid, or to impair significantly, the exercise of power that Congress explicitly granted." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996); *see also, e.g.*, *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 385 (3d Cir. 1999) (application of "well-established legal principles" leads "to the ineluctable conclusion that [the challenged state law] cannot stand because it prohibits the copyright holder from exercising rights protected by the Copyright Act"); *Spain v. Mountanos*, 690 F.2d 742, 746 (9th Cir. 1982) ("a state cannot frustrate the intent of [42 U.S.C. §1988] by setting up state law barriers to block enforcement of an attorney's fees award" made under that statute).

Put another way, the Lands Replacement Act struck a deliberate balance between its overarching goal of restoring the Nation's lost reservation land and the concerns of municipalities. ER12. H.B. 2534 seeks to upset that balance. Indeed, one of its cosponsors explained that H.B. 2534 "balanc[es] the rights between a … citizen that lives next door … and the federal government that's coming in to acquire the land and turn it into reservation land." NER93. But where, as here,

Congress has chosen a specific balance among competing interests, "that is not a judgment the States may second-guess." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989). The district court correctly concluded that, having declined to condition the Nation's right to have land taken into trust on consent by neighboring municipalities, Congress could not have intended to allow Arizona to grant the same veto power Congress had withheld.

b. Appellants' contrary arguments are unavailing. Their primary contention is that the district court held H.B. 2534 preempted only because it wrongly understood the Lands Replacement Act to "freeze" land's eligibility for trust acquisition on the application date. That is incorrect. The court merely reasoned that the Lands Replacement Act requires the Secretary to hold eligible land in trust when the Nation so requests; that a federal statutory obligation arises at the time of the request; and that Arizona may not enforce special legislation enacted after such an obligation arose and designed to thwart it by stripping the Nation of otherwise generally applicable state-law protections. ER15.

It is not necessary to decide that eligibility for acquisition can never be altered after an application has been made to conclude that H.B. 2534 is preempted as applied to the Settlement Property. As the Nation argued below, *if* annexation under H.B. 2534 would make the Settlement Property ineligible for trust acquisition, then H.B. 2534 is preempted. The district court decided the case on the

same assumption. *See* ER13 ("If the [Settlement Property] were to be annexed by Glendale, it may be ineligible for trust acquisition under the Act as it would be within Glendale's corporate limits."); ER17 ("DOI has a mandatory obligation to take the [Settlement Property] into trust if the requirements of §6(d) are satisfied. Glendale's annexation of the land under H.B. 2534 would obstruct the Act's objectives."). Appellants' attack on the district court for "freezing" eligibility under the Act is thus beside the point.

To the extent Appellants take issue with the district court's reasoning that an obligation to take eligible land into trust arises when the Nation requests it, they offer no plausible alternative reading. They appear to contend (*e.g.*, Br. 25-26) that no obligation arises under the Act until the moment the United States actually accepts trust title to the land, and that H.B. 2534 accordingly does not conflict with the Act's purposes. But that contention makes no sense. 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. The district court thus did not err in concluding that H.B. 2534's attempt to render land ineligible for trust acquisition

after an application has been made (and, indeed, acted upon) impermissibly frustrates the operation of the Act.[8]

Relatedly, Appellants contend (Br. 27-28) that H.B. 2534 cannot be preempted because the Lands Replacement Act "incorporates" state law regarding municipal boundaries. As an initial matter, the Act does not "incorporate" state law in any substantive manner. The 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

[8] Although the Court need not reach this issue, there is a strong argument that the Lands Replacement Act would not permit H.B. 2534 to alter the Settlement Property's eligibility at this late date. Appellants argue (Br. 25) that the Act "is naturally read to require that land must be eligible at the time the Secretary attempts to take it into trust." But that is perhaps the least plausible reading of the Act. The Act provides that "[t]he Secretary, at the request of the Tribe, shall hold in trust … any land … which meets the requirements of this subsection." Pub. L. 99-503, §6(d). The word "meets" could well be construed to refer to the date of the Act itself. *Cf. Carcieri v. Salazar*, 555 U.S. 379 (2009) (phrase "now under Federal jurisdiction" in Indian Reorganization Act refers to tribes under federal jurisdiction in 1934, when IRA was enacted). It could refer to the date the Nation acquires particular land. Or it could refer to the date the Nation asks the Secretary to hold the land in trust. The Act cannot, however, reasonably bear Appellants' construction, under which land that was eligible when the Nation requested it be held in trust and when the Secretary determined to take it into trust could later be rendered ineligible through the unilateral actions of opponents of the acquisition—particularly when the trust acquisition would already have occurred were it not for opponents' efforts to delay it. Nonetheless, this Court need not resolve that question, because even on Appellants' interpretation of the Act, H.B. 2534 is preempted for all the reasons discussed in text.

state law. The Act thus differs from the statutes in some of the cases on which Appellants rely, which actually incorporate substantive state law.[9]

At any rate, Appellants' contention proves too much. The Lands Replacement Act contains eligibility criteria for replacement land that refer to the land's status under state law. It does not follow that no law altering the state-law status of otherwise eligible land can conflict with the Act. On 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, even though, on their view, that law would prevent the Nation from ever having any land taken into trust. Yet such a law would plainly frustrate the purpose of the Lands Replacement Act. H.B. 2534 is no different. Although it applies to a subset of eligible trust lands rather than to all of them, it too presents an obstacle to the full achievement of Congress's purpose by seeking to permit municipalities, in their sole discretion, to render ineligible a category of land that Congress determined was eligible, should the Nation invoke its federal right to have that land taken into trust.

Indeed, even when federal law does incorporate state law, state law is preempted where, as here, it obstructs federal objectives or discriminates against

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[9] *See, e.g.*, *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 860 (4th Cir. 1994) (federal statute creating right to "'those damages available for personal injury under the law of the State in which the hospital is located.'"); *Florida State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1172 (11th Cir. 2008) (federal statute "dynamically incorporates state law" voter-eligibility requirements).

the federal government. The Supreme Court has instructed 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'" and that, therefore, "'unreasonable' or 'specific aberrant or hostile state rules' will not be applied," even if federal law otherwise incorporates state law. *Burks v. Lasker*, 441 U.S. 471, 479-480 (1979) (citation omitted); *see also id.* at 479 (federal statutes regulating investment companies generally incorporate state laws governing corporate directors' power "unless '[state laws'] application would be inconsistent with the federal policy'"); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1458 (9th Cir. 1986) (even if "state law should be incorporated as a general matter, … federal courts should still reject specific state rules that are aberrant or hostile to federal interests"). This principle "guarantees that '[n]othing that the state can do will be allowed to destroy the federal right.'" *Burks*, 441 U.S. at 480.

This rule is readily apparent from the very case on which Appellants principally rely, *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946). The federal statute in that case subjected "real property"—as defined by "application of settled state rules," *id.* at 210—held by certain federal agencies to state and local taxation "'to the same extent … as other real property is taxed,'" *id.* at 206. But the Court was clear that state law would govern only "so long as it is

plain … that the state rules do not effect a discrimination against the government, or patently run counter to the terms of the Act." *Id.* at 210.

The Supreme Court reaffirmed that principle just last Term in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). In *Concepcion*, the Court considered the preemptive scope of the Federal Arbitration Act, which expressly incorporates state contract law, providing that arbitration clauses are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The Court held that a particular California unconscionability rule relating to class arbitration provisions was preempted by the FAA even though unconscionability generally is a ground "for the revocation of any contract," explaining that "[a]lthough §2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." 131 S. Ct. at 1748.

These well-established precedents make clear that H.B. 2534 would be preempted even if the Lands Replacement Act generally "incorporated" state law. H.B. 2534 necessarily "discriminate[s] against the [federal] government," *Beaver County*, 328 U.S. at 210, because it singles out for disfavored treatment those who seek to transfer land to the government. It is also "'hostile'" to the interests of the United States and to the Lands Replacement Act, *Burks*, 441 U.S. at 479, because

its acknowledged purpose is to prevent or limit the creation of trust lands. And it is "'aberrant,'" *id.* at 479, in that it is unlike any annexation law Congress could have contemplated when it passed the Act in 1986. *Cf. De Sylva v. Ballentine*, 351 U.S. 570, 580-581 (1956). In short, it is preempted even though the Lands Replacement Act conditions eligibility for trust acquisition on whether land is within a municipality's corporate limits.

2. H.B. 2534 Imposes Discriminatory Burdens On The Exercise Of A Federal Right

a. As the district court held (ER17-18), H.B. 2534 is also preempted because it conflicts with federal law by imposing 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.

The imposition of such penalties for the exercise of a federal right runs afoul of the settled principle that "state action is preempted if its effect is to discourage conduct that federal legislation specifically seeks to encourage." *City of Morgan City v. South La. Elec. Coop. Ass'n*, 31 F.3d 319, 322 (5th Cir. 1994); *see also* 1 Tribe, *American Constitutional Law* §6-29, at 1181 (3d ed. 2000). The Supreme Court has thus held that a "state rule predicating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose." *Livadas v. Bradshaw*, 512 U.S. 107, 116 (1994).

Likewise, in *Nash v. Florida Industrial Commission*, the Court held that a state may not "refuse to pay its unemployment insurance to persons solely because they have [filed federal] unfair labor practice charges against their former employer." 389 U.S. 235, 236 (1967); *see also id.* at 239 (a state may not "defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the [federal] Government's constitutional plan"); *Coe v. County of Cook*, 162 F.3d 491, 497 (7th Cir. 1998) ("Any attempt by a state to punish the exercise of a federal right is forbidden by the supremacy clause of the U.S. Constitution.").

Nor may state laws "discriminate in a manner detrimental to [a] federal right." *Felder*, 487 U.S. at 146. *Felder* thus struck down a state law that would have prescribed a much shorter limitations period for federal civil rights plaintiffs than for state-law tort plaintiffs, noting that it burdened federal rights in a way that was "not the natural or permissible consequence of an otherwise neutral, uniformly applicable state rule." *Id.* at 144, 150-153; *see also, e.g.*, *Toll v. Moreno*, 458 U.S. 1, 17 (1982) (state law "impos[ing] discriminatory tuition charges and fees solely on account of the federal immigration classification" of a student's parents preempted); *Biotechnology Indus. Org. v. District of Columbia*, 496 F.3d 1362, 1373, 1374 (Fed. Cir. 2007) (drug price-control law preempted by federal patent

law because it "is in no way general, affecting only patented products," and because it "is targeted at the patent right").[10]

As the district court held, "H.B. 2534 'discriminates against the precise type of [right] Congress has created' in the Gila Bend Act—that is, it denies statutory hearing and voting rights only to those who have asked the federal government to take ownership of private land or to hold the land in trust." ER18 (quoting *Felder*, 487 U.S. at 145). H.B. 2534 thus necessarily "frustrate[s] Congress' purpose" by seeking to impede the Nation's ability to exercise its rights under the Lands Replacement Act, and "must yield" in light of its conflict with the Act. *Id.*

b. Appellants accuse the district court (Br. 33, 34) of "creat[ing] a new category of preemption—the 'discrimination against a federal right' category" and "los[ing] sight of the real question: whether H.B. 2534 conflicts with the Gila Bend Act." These contentions are meritless.

[10] This principle is consistent with the Supreme Court's longstanding recognition in the related intergovernmental immunity context that, under the Supremacy Clause, a "state regulation is invalid … if it … discriminates against the Federal Government or those with whom it deals." *North Dakota v. United States*, 495 U.S. 423, 435 (1990). The Court has consistently struck down state laws imposing discriminatory burdens on parties who lease land from the federal government, explaining that "[i]f anything is settled in the law, it is that a State may not discriminate against the Federal Government or its lessees." *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 751 (1961); *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 387 (1960).

Appellants first claim (Br. 34) that *Felder* "has nothing to do with this case" because it articulates a special "nondiscrimination doctrine" that applies only in "the context of state judicial enforcement of federal law." To the contrary, *Felder* makes clear that the question presented in that case was "one of pre-emption," specifically, whether enforcement of the state law would "'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" 487 U.S. at 138. Appellants are thus simply wrong to contend (Br. 34) that the district court's reliance on *Felder* "for the proposition that 'discrimination' analysis is appropriate in the preemption context … was badly misplaced." And, contrary to Appellants' contention, and as discussed above, courts have held that states may not discriminatorily burden a federal right both in and "outside the context of state courts." *See, e.g.*, *Toll*, 458 U.S. at 17 (holding discriminatory state law regarding public education preempted); *Biotechnology Indus. Org.*, 496 F.3d at 1373-1374 (holding discriminatory drug price-control law preempted).

Appellants next argue (Br. 36) that the Nation's reliance on decisions such as *Nash* and *Livadas* is mistaken because those decisions involved "actual conflict between state and federal rights." But those decisions, and others on which the Nation relies, 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. *See Nash*, 389 U.S. at 239; *Livadas*, 512 U.S. at 116; *Felder*, 487 U.S. at 138; *Morgan City*, 31 F.3d at 322. Indeed, Appellants recognize (Br. 36) that *Nash* and *Livadas* found state statutes preempted because, by imposing burdens on the exercise of federal rights, they impeded the exercise of those rights. The same is true here.

Appellants also assert (Br. 36) that H.B. 2534 does not discriminate against or burden a federal right because the Nation's right under the Lands Replacement Act "is not a right to have land taken into trust, but a right to have *eligible* land taken into trust," and H.B. 2534 merely determines which land is eligible. That is wrong for two reasons. First, the Lands Replacement 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. *See* Pub. L. 99-503, §6(d) (Secretary shall act "at the request of the Tribe"). H.B. 2534 unquestionably imposes a discriminatory burden on the exercise of that federal right: It attaches unique and discriminatory political consequences to the filing of a trust application by eliminating the Nation's right to notice and to vote and be heard regarding annexation of its land. That is all that is necessary to find H.B. 2534 preempted. *See, e.g.*, *Nash*, 389 U.S. at 236 (holding preempted state law that burdened right to file unfair labor practice charges). Second, H.B. 2534 does not merely determine which land is eligible. To the

contrary, on Appellants' own view, H.B. 2534 renders an application that falls within its scope self-defeating: The very act of applying to have eligible land taken into trust allows an objecting city to invoke special rules designed to render the land ineligible.[11] States may not impose this kind of burden on a party solely because that party seeks relief under a federal statute; nor may they seek to obstruct the exercise of a federal right in this manner. *See Nash*, 389 U.S. at 239.

3. H.B. 2534 Openly Seeks To Nullify Federal Law

a. H.B. 2534 does not merely frustrate Congress's objective in the Lands Replacement Act and discriminate against the exercise of a federal right; it is the rare state law whose open and avowed purpose is to thwart the operation of federal law. As the district court concluded (ER18-19), while an examination of the text of H.B. 2534 is all that is necessary to discern that it is preempted, the statute's legislative history is illuminating: The bill's supporters could not have been clearer that the bill was motivated by hostility to the Lands Replacement Act (and the federal government) in general and the desire to thwart the trust acquisition of the Settlement Property in particular.

[11] Appellants' reliance (Br. 37-39) on *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), is thus misplaced. H.B. 2534 does not merely "restrict the [Nation's] choice" of land to have taken into trust; it penalizes the Nation's very act of exercising its federal right to seek the acquisition of particular land.

Indeed, H.B. 2534's lead sponsor in the state Senate characterized the bill as a direct challenge to the United States' implementation of the Lands Replacement Act:

> [A]re we going to accept this subversive activity from our Federal Government? I hope not. So we must assert the right to control the future of our own state. Challenging the Federal Government and the Tohono O'odham's efforts to build a casino … is a[n] assertion of our rights and should be a rallying point for those of us who value our constitutional rights.

NER144-145; NER193 (Senate cosponsor's statement that the Secretary's determination "is Federal interference that Arizona will not stand by and allow to happen"); NER16 (House cosponsor's statement that "[i]t's a violation of state['s] rights for the Federal Government to come in and try to create a sovereign nation within a local community").[12] On the Senate floor, the lead sponsor asserted that the Arizona Legislature has the power to "clarif[y]" a federal statute: "[T]he Bill … clarifies that the Gila Bend Act does not apply to county islands in the Phoenix metropolitan area." NER217. And, perhaps most remarkably, one of the bill's House cosponsors attempted to justify H.B. 2534 by flatly denying the supremacy of federal law: "We're talking about a nation trying to take sovereign land out of the state with an act of Congress.… But … that is not the supreme law. In fact, the Constitution dictates that the states are sovereign and that the tenth amendment

[12] Similarly, one of H.B. 2534's Senate cosponsors explained, "I'm not a big fan of that arrangement [in the Lands Replacement Act]. ... I don't know why they were given the authority to just go buy land anywhere and then declare it tribal land[.]" NER154; *see also* NER97 ("The 1986 Act we always cite, if they wish to take land because of this Act then they ought to take federal land[.]").

abides here too just as well. Just because an act of Congress comes down, doesn't mean that it is the law of the land." NER22-23.[13]

Glendale and Arizona had every right to seek judicial review of the Secretary's interpretation of the Lands Replacement Act and to raise their constitutional challenges to the Act in federal court. They did so, and the district court held those challenges to be meritless. *GRIC*, 776 F. Supp. 2d at 985-995. They cannot now seek to use the state legislative process to change that result. Indeed, if the Supremacy Clause has any meaning, it must forbid a state from openly seeking to nullify a federal statute with which it disagrees.

b. Appellants argue (Br. 39-41) that this Court should ignore the legislative record because, they assert, legislative purpose is irrelevant to conflict-preemption analysis. They are wrong. The 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. *Felder*, 487 U.S. at 138 (emphasis added); *see id.* at 142-143 (examining purpose of state law). While Appellants claim that the only relevant factor in a conflict-preemption case is the *effect* of the state law—even if

[13] Appellants claim (Br. 40 n.10) that these statements "were references to constitutional claims that have been advanced in litigation" and "did not signal legislative desire to pass statutes that conflict with federal law." But the Arizona legislators invoked the purported constitutional invalidity of the Lands Replacement Act not merely as a basis for challenging it in court, but also as a justification for seeking to nullify it by passing H.B. 2534.

the legislature clearly intends to undermine or frustrate federal law—the cases on which they rely say no such thing. Br. 41 (citing *N.Y. State Comm'n on Cable Television v. FCC*, 669 F.2d 58, 62 (2d Cir. 1982); *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 77 (1st Cir. 2006); *Environmental Encapsulating Corp. v. City of N.Y*, 855 F.2d 48, 59 (2d Cir. 1988)). Rather, those cases stand for the unremarkable proposition that state law is preempted to the extent it "frustrates the full effectiveness of federal law," even if the state legislature seeks to disguise its intent "to nullify federal law" or if the state's purpose is otherwise legitimate. *Perez v. Campbell*, 402 U.S. 637, 652 (1971); *see N.Y. State Comm'n*, 669 F.2d at 63-64 (holding that state cable commission's denial of intent to interfere with and burden federally licensed activity did not mean state action was not preempted, and noting that, at any rate, the commission *did* intend to interfere with federally licensed activity); *N.H. Motor Transp. Ass'n*, 448 F.3d at 77-78 (state's use of police powers to regulate in area traditionally regulated by state still preempted if effect of state regulation conflicts with federal law); *Environmental Encapsulating Corp.*, 855 F.2d at 59 (state program that is an "'obstacle to the accomplishment and execution of the full purposes and objectives of Congress' … justifies preemption regardless of the state's legitimate purpose"). As these decisions make clear, a state law with obstructive effects can never escape preemption, no matter

what the legislature's purpose.[14] But where, as here, a state statute *openly* seeks "to nullify federal law," *Perez*, 402 U.S. at 652, it is even more obviously preempted.

II. H.B. 2534 VIOLATES EQUAL PROTECTION

H.B. 2534, which is targeted at the Nation and effectively at the Nation alone, and which strips the Nation of rights all other Arizona landowners enjoy, with the goal of frustrating the Nation's exercise of its federal rights, offends the federal and Arizona Constitutions' guarantee of equal protection of the laws. U.S. Const. amend. XIV, §1; Ariz. Const. art. II, §13.[15] "At [a] minimum," equal protection requires that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This "rational basis" standard might not be a "difficult standard for a State to meet when it is attempting to act sensibly and in good faith," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 439 (1982) (Blackmun, J.), but it is

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[14] Courts commonly apply this principle to prevent states from avoiding preemption by asserting a legitimate purpose for a state law whose actual effect frustrates federal law. *See, e.g.*, *English v. General Elec. Co.*, 496 U.S. 72, 84 (1990) (a state law regulates in the federally occupied field of nuclear health and safety if its purpose is to regulate nuclear health and safety, *or* if that is its effect regardless of its stated purpose); *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658 (1995) (examining "the purpose and the effects" of state law in express preemption context). Appellants' criticism of the district court's citation of these cases (Br. 41 n.11) is misplaced.

[15] The provisions are interchangeable for purposes of this analysis. *See, e.g.*, *Valley Nat'l Bank v. Glover*, 159 P.2d 292, 299 (Ariz. 1945); *Chavez v. Brewer*, 214 P.3d 397, 408 (Ariz. Ct. App. 2009).

not "'a toothless one,'" *Schweiker*, 450 U.S. at 234. Legislative classifications must rationally "advanc[e] a reasonable and identifiable governmental objective." *Id.* at 235. A State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). The classifications "must find some footing in the realities of the subject addressed by the legislation." *Heller v. Doe*, 509 U.S. 312, 321 (1993).

H.B. 2534 fails even this forgiving standard. The law applies (1) in only three of Arizona's fifteen counties, as defined by population, (2) to land that is surrounded or bordered on at least three sides by a city or town, (3) if the landowner has sought to transfer the land, (4) to the federal government, (5) by making "an application to the federal government as required by a specific federal statute or regulation." These classifications serve no rational end, other than to constrict the statute's application as narrowly as possible—effectively, to the Nation alone.[16]

[16] H.B. 2534's provision for a two-thirds vote rather than the three-fourths vote usually required by state law for ordinances to become immediately effective, *see* Ariz. Rev. Stat. Ann. §19-142(B), also reflects the law's narrow targeting of the Nation. That provision—not present in the previous version of the bill—was apparently included in H.B. 2534 because a supporter of the Nation's plans had been elected to the Glendale City Council in the interim—meaning that an annexation attempt likely could not attain a three-fourths majority. *See* NER151, NER212-213.

First, to the extent H.B. 2534's classifications are rationally related to an objective, that objective is the impermissible one of preventing the federal government from taking land into trust for an Indian tribe. Indeed, the "relation between the classification adopted and [that] object" is utterly transparent. *Romer v. Evans*, 517 U.S. 620, 632 (1996). H.B. 2534 is limited to landowners who have "submitted a request to the federal government to take ownership of the territory or hold the territory in trust" "as required by a specific federal statute or regulation." The legislative debate on H.B. 2534 did not identify any "specific federal statute or regulation" that would meet this requirement other than statutes providing for the acquisition of land on behalf of Indian tribes. Nor, throughout this litigation, has Glendale or Arizona ever identified one. To the contrary, one of the bill's opponents observed without contradiction that "House Bill 2534 … explicitly targets Indian tribes and their right to have land taken into trust" and would "allow[] Arizona cities to treat tribal lands totally different[ly] than any other land in the state." NER232.[17]

[17] The district court suggested that a "proposal to exchange private land for federal land" under the Federal Land Policy Management Act would "necessarily" "include a request … to 'take ownership' of [that] land," ER10, but did not identify "a specific federal statue or regulation" that "require[s]" the landowner to "submit[]" such a request. In fact, land exchanges, unlike trust acquisitions, do not require the landowner to make a request to the federal government. Rather, either the federal government or the landowner may propose an exchange; the parties then prepare a preliminary, non-binding "agreement." *See* 36 C.F.R. §254.4(a), (c) (Forest Service); 43 C.F.R. §2201.1(a), (c) (Bureau of Land Management). Indeed,

Moreover, the law does not even apply to all tribal acquisitions; rather, it applies only in counties "with a population of more than three hundred fifty thousand persons." This population classification includes only three counties: Maricopa, Pima, and Pinal—the same three counties in which the Lands Replacement Act authorizes the Nation to acquire replacement reservation lands. *Cf. Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) ("even under rational basis review, a geographic exception to an otherwise uniform [law] appears problematic"). And, although a law targeting all Indian tribes in the three Lands Replacement Act counties would be no more legitimate than a law aimed at the Nation alone, there is no reason to think that annexation of lands for which a tribe has submitted a *discretionary* fee-to-trust application would have any effect on the trust acquisition—let alone prevent it. Only the Lands Replacement Act requires that land be "outside the corporate limits" of a city or town, and nothing in the relevant statute or regulations for discretionary trust acquisitions suggests that the opportunity for the local government to be heard or the strength of its interest is

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the "as required by" language appears to have been added to H.B. 2534 precisely to exclude from its scope ordinary exchanges, sales, or donations. *See* NER165 (statement by the Glendale City attorney that "We aren't talking about private property rights at all. What we're talking about with respect to this Bill, with respect to this entire issue, is government rights. Remember, this land right now is held by the Tohono O'odham Nation, not any individual.").

related to whether the land at issue has been annexed. Application of H.B. 2534 to discretionary trust acquisitions would thus likely be ineffectual.[18]

In short, H.B. 2534's classifications are a transparent attempt to block the Nation from establishing a reservation as authorized by the Lands Replacement Act. But obstructing federal law by frustrating the exercise of a federal right is not a legitimate state objective. *See Rollins Envt'l Servs.(FS), Inc. v. Parish of St. James*, 775 F.2d 627, 635 (5th Cir. 1985).[19] Nor is a "'bare … desire to harm a politically unpopular group.'" *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.

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[18] As Appellants point out (Br. 7), Arizona cities already enjoy a measure of regulatory jurisdiction over county islands, Ariz. Rev. Stat. Ann. §§9-461.11(A), 9-462.07(A), and DOI's regulations already require it to notify and permit comment by "local governments having regulatory jurisdiction over the land to be acquired," 25 C.F.R. §151.11(d). A last-minute annexation of a property with no history of receiving or paying for city services is thus unlikely to be a significant factor. *See South Dakota v. DOI*, 423 F.3d 790, 801-802 (8th Cir. 2005) (removal of parcel from tax rolls would not have substantial impact where there were no businesses on the land at the time the trust application was filed); *City of Lincoln City v. DOI*, 229 F. Supp. 2d 1109, 1125-1126 (D. Or. 2002) (similar). And, even if annexation better positioned the city to oppose a trust application, that merely confirms that H.B. 2534's aim is to frustrate the creation of Indian reservations by allowing local governments to manufacture previously non-existent jurisdictional conflicts when the tribe exercises its federal rights.

[19] The district court's criticism of *Rollins*, *see* ER21-22, is misplaced. *Rollins* involved a local law that—like H.B. 2534—appeared to have been narrowly crafted to target a particular activity governed by federal law. Although the *Rollins* court acknowledged that the question before it was whether the law "trenche[d] impermissibly upon a field preempted by Congress," it determined that the conflict and equal protection analyses were "related" because the challenged law must also "attain[] … a legitimate governmental objective[]," and "regulating a field preempted by Congress" was "illegitimate." 775 F.2d at 635. So too here.

432, 446-447 (1985). As an opponent of the bill aptly noted, "this Bill is so narrowly defined [that] it will only apply to this property owner, at this time, and in this place, and in this way." NER224. Those narrow and arbitrary classifications permitted the legislature "to escape the political retribution that might [have been] visited upon them if larger numbers were affected." *Railway Express Agency, Inc. v. N.Y.*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Second, although the district court, relying on this Court's decision in *Green v. City of Tucson*, 340 F.3d 891, 903 (9th Cir. 2003), posited a legitimate governmental objective for H.B. 2534—"'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—H.B. 2534's classifications do not rationally further that interest. As this Court has emphasized, courts have the "duty to scrutinize the connection, if any, between the goal of a legislative act and the way in which individuals are classified in order to achieve that goal." *Silveira v. Lockyer*, 312 F.3d 1052, 1088 (9th Cir. 2002). H.B. 2534 fails that scrutiny.

Although the Nation's argument rested on all of the statute's classifications, the district court addressed only the restriction based on county population—and only by stating that "protecting the ability of cities in populous counties to exercise control over properties within their boundaries" is a legitimate goal. ER22. But a

state cannot deflect an equal protection challenge by observing that in light of the statutory classification ("populous" counties) all those within the burdened class are similarly situated. "The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps." *Williams v. Vermont*, 472 U.S. 14, 27 (1985). Nor is it sufficient to note simply that it is "rational" that "the most crowded counties have the greatest need to control land use and annexation." ER23. The question is not whether the abstract governmental interests are more relevant in populous counties, but whether it rationally furthers those interests to limit H.B. 2534 to such counties. *See* ER24. On that score, the district court's opinion is silent. But the question is not even a close one. A municipality's interest in not being "stripped of … sovereign control" over nearby unincorporated land (*see* Br. 10) is simply unrelated to whether the county as a whole is "populous." Accordingly, the "decision to act on the basis of th[at] difference[] … give[s] rise to a constitutional violation." *Board of Trs. v. Garrett*, 531 U.S. 356, 366-367 (2001). As the Arizona Court of Appeals concluded in an analogous case, a statute lacks "a legitimate and rational basis" where there is no reason why certain demographic characteristics "should give these communities a right … that no other urbanized areas elsewhere in the state

can have." *City of Tucson v. Woods*, 959 P.2d 394, 401 (Ariz. Ct. App. 1997) (right to municipal incorporation).[20]

Moreover, even if H.B. 2534's 350,000-person limit were rational standing alone, the statute cannot be justified in light of its other classifications. No general interest in municipal integrity can justify special annexation laws that apply only when the transferee is the federal government and then only when the landowner has made "an application … as required by a specific federal statute or regulation," thus excluding ordinary sales or donations to the United States. The mechanism that triggers a land transfer has no effect on the locality's resulting loss of jurisdiction. And restricting H.B. 2534 to a singular type of land transfer in only three of Arizona's counties amply demonstrates that this is a case where "[t]he breadth"—or narrowness—"of the [law] is so far removed from the[] particular justifications" offered that it is "impossible to credit them." *Romer*, 517 U.S. at 635; *see also Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (the law at issue was

[20] The statute in *Green* is an instructive contrast: That law simply allowed cities of a given size to veto the incorporation of new cities within six miles of their borders. 340 F.3d at 893. It applied statewide, restricting the creation of all new municipalities and granting a veto to all existing municipalities, subject only to straightforward size and distance requirements. Unsurprisingly, therefore, the plaintiffs in *Green* "d[id] not argue that [the law] fail[ed] rational basis scrutiny." *Id.* at 902.

"so riddled with exceptions" that the interest claimed by the government "cannot reasonably be regarded as its aim").[21]

The government of course "must have substantial latitude to establish classifications that … account for limitations on the practical ability … to remedy every ill," *Plyler v. Doe*, 457 U.S. 202, 216 (1982), but the population and "as required … by statute or regulation" classifications are not the result of a practical difficulty in realizing the goal of "blocking federal acquisition of nearby land," ER23. To the contrary, they serve merely to thwart that goal, restricting the beneficiaries of the legislature's largess to municipalities where the Lands Replacement Act's unique "corporate limits" provision could arguably block the Nation's trust acquisition. Accordingly, if, as Appellants claim (Br. 13-14), H.B. 2534's objective was to "equip cities and towns" with a way to avoid "creating pockets of land over which neither [the] state nor local government would have much, if any, control," H.B. 2534 is an utterly irrational—and not merely imperfect—means to achieve that result. *See Nordlinger*, 505 U.S. at 11.

[21] While the district court correctly observed that *Eisenstadt* does not hold that "complete inclusiveness is a requirement of the rational basis test," ER23, that has never been the Nation's argument. Rather, here, as in *Eisenstadt*, H.B. 2534's severe underinclusiveness and arbitrary classifications show that it does not rationally support its purported objective of granting municipalities greater control over adjacent land.

III. H.B. 2534 IS IMPERMISSIBLE SPECIAL LEGISLATION

H.B. 2534 is also special legislation forbidden by the Arizona Constitution, which provides that "[n]o local or special laws shall be enacted … [w]hen a general law can be made applicable." Ariz. Const. art. IV, pt. 2, §19. This provision, which is more protective than the federal or state Equal Protection Clause, prohibits the Legislature from enacting laws that are "plainly intended for a particular case" and that "look[] to no broader application in the future," even if the classification has a rational basis. *Arizona Downs v. Arizona Horsemen's Found.*, 637 P.2d 1053, 1061 (Ariz. 1981). A law, like H.B. 2534, that applies only in certain locations or to certain persons is invalid special legislation unless "(1) there is a rational basis for the classification; (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the class is flexible, allowing members to move into and out of the class." *State Comp. Fund v. Symington*, 848 P.2d 273, 278 (Ariz. 1993) (emphasis added). "[A] statute must meet every one of [the] three tests to survive." *Woods*, 959 P.2d at 400. H.B. 2534 satisfies none of them.

First, the "rational basis" requirement mirrors the Equal Protection Clause's requirement that the statute have a "rational relationship to a legitimate legislative purpose." *Republic Inv. Fund I v. Town of Surprise*, 800 P.2d 1251, 1257 (Ariz.

1990). H.B. 2534 fails this inquiry for the same reasons it cannot withstand scrutiny under the Equal Protection Clause. *See supra* Part II.

Second, H.B. 2534's classifications are not "legitimate" because they do not "encompass[] all members of the relevant class." *State Comp. Fund*, 848 P.2d at 278. This prong of the test "proscrib[es] … the legislature from providing benefits or favors to certain groups or localities" while ignoring others who are similarly situated. *Id*. at 277. It is the law's objective—not merely its terms—that determines what "members [are] within the [law's] circumstances." *Republic Inv. Fund I*, 800 P.2d at 1258; *see also* 2 *Sutherland Statutory Construction* §40:4 (7th ed. 2007). Because the "legitimacy" inquiry is a "different and heightened standard" than rational-basis review, a law that "withstand[s] equal protection review [may] still be found unconstitutional" as a special law. *Republic Inv. Fund I*, 800 P.2d at 1257. In finding H.B. 2534's population classification "rational" because "[l]and use and control issues clearly are more pressing in more populated areas," ER25, the district court fundamentally misconstrued Arizona law.

In *Republic Investment Fund I*, for example, the Arizona Supreme Court struck down a deannexation law that applied to some cities but not others. The court held that because the statute addressed the abuse of "strip annexation," it should have applied to all cities where strip annexation might have been abused, even though "'small cities … may have greater cause to deannex.'" 800 P.2d at

1259. It is thus irrelevant that the problem being addressed may be "more acute" in some areas than others. *State v. Levy's*, 580 P.2d 329, 331 (Ariz. 1978); *cf. Petitioners for Deannexation v. City of Goodyear*, 773 P.2d 1026, 1032 (Ariz. Ct. App. 1989) ("A [constitutional] law would provide a remedy to individuals in areas annexed by small or large cities in any county in the state."). Indeed, Arizona courts routinely strike down statutes that address broad legitimate concerns but fail to encompass all those affected. *See, e.g.*, *Town of Gilbert v. Maricopa County*, 141 P.3d 416, 421 (Ariz. Ct. App. 2006) (invalidating a statute creating a fire district in a county island because it failed to include other "similarly situated" county islands); *In re Cesar R.*, 4 P.3d 980, 982 (Ariz. Ct. App. 1999) (invalidating a juvenile firearms statute limited to counties with a population over 500,000 where the subject was "'of statewide concern'"); *accord In re Marxus B.*, 13 P.3d 290, 293 (Ariz. Ct. App. 2000).

Like those laws, H.B. 2534 is patently underinclusive with regard to its purported objective—to prevent the "transfer [of] urban land to the federal government" (Br. 13). H.B. 2534 fails to include (1) all persons or entities who would transfer "urban" land to the federal government, irrationally benefiting non-tribal landowners, and (2) all localities that may be subject to the transfer requests contemplated by the statute. Even assuming that more populous municipalities have a stronger interest in preventing the transfer of adjacent land to the federal

government—which is hardly self-evident—H. B. 2534 excludes a number of populous "urban" cities, including Yuma, Flagstaff, and Lake Havasu City. All those cities are more populous than *any* city in Pinal County and many of the cities in Maricopa and Pima Counties. *See* ER133-134; U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/04000.html. Yet they are not covered by the statute, while every city within the three identified counties enjoys special protection irrespective of population.

Indeed, the Legislature declined to give H.B. 2534 statewide effect precisely because the attendant burden to landowners' rights "proved politically impossible." *See Woods*, 959 P.2d at 400. The legislature was unwilling to chance that any private landowner would be burdened with—or that cities other than those in the Lands Replacement Act counties would benefit from—the involuntary annexation procedure. *See, e.g.*, NER145-146, NER150-151, NER224. That deliberate choice not to apply H.B. 2534 "to all … who may benefit from its attempt to remedy a particular evil," *Republic Inv. Fund I*, 800 P.2d at 1257, demonstrates that H.B. 2534 is textbook special legislation.

Third, H.B. 2534's classifications are not "flexible" because there is no "actual probability that the legislation will eventually apply" to others. *Town of Gilbert*, 141 P.3d at 422. Under this test, all of H.B. 2534's classifications—including the 350,000-person population limit, the restriction to land surrounded by

a town or bordered by it on three sides and the requirement that the landowner has sought to transfer the land to the federal government as required by a specific federal statute—must be considered. *See id.* Although the district court concluded that H.B. 2534 met the flexibility requirement because "other counties will reach the population threshold of the statute," ER26, it is undisputed that no county will do so for more than twenty years, assuming constant growth at year-2000 levels. *See* ER133-134. Arizona courts have rejected the notion that such projections satisfy the "actual probability" standard. *See Town of Gilbert*, 141 P.3d at 422 (possibility that one other entity would "enter the class in the next nineteen years … insufficient"); *Cesar R.*, 4 P.3d at 983 (class not flexible where, assuming "growth remains constant," the next largest county will not enter the class "for more than ten years [and] [o]ther counties would … require much longer periods to qualify, if ever").[22] And H.B. 2534's future application to other land is even more unlikely because no municipality will benefit from the statute unless an owner of a

[22] The district court relied on a lone decision from the Arizona Court of Appeals upholding as flexible a statute applying to a single county of more than two million people. *See* ER24; *Long v. Napolitano*, 53 P.3d 172, 183 (Ariz. Ct. App. 2002). That determination, which found it sufficient that the statute was not "permanently confined" to a single county, *see* 53 P.3d at 183, cannot be reconciled with Arizona Supreme Court precedent, which requires not only a technically open class, but "the *actual probability* that others will come under the act's operation when the population changes." *Republic Inv. Fund I*, 800 P.2d at 1259 (emphasis added); *see also Town of Gilbert*, 141 P.3d at 422 ("remote possibility" of attaining population insufficient).

county island or peninsula submits the "required" request. As demonstrated above, *see supra* pp.46-49, the class of owners who might submit such a request is limited to Indian tribes and, as a practical matter, to the Nation alone. Accordingly, even if H.B. 2534 could theoretically apply to a few other counties several decades from now, the actual probability that the law will be invoked in such a county is vanishingly remote.

IV. H.B. 2534 VIOLATES DUE PROCESS

H.B. 2534 also offends the Due Process Clauses of the United States and Arizona Constitutions by imposing a severe and disproportionate penalty for the Nation's wholly lawful exercise of its federal rights under the Lands Replacement Act well before H.B. 2534 was enacted.[23] The district court declined to address this argument, concluding that H.B. 2534 satisfied due process as applied prospectively and stating that "[b]ecause H.B. 2534 clearly passes the rational basis test, the Court will not address" the retroactivity issue. ER22 n.10. But "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Retroactive statutes such as H.B 2534 are constitutionally "disfavored" and raise "particular concerns" because they can

[23] The Federal and Arizona Due Process Clauses "contain nearly identical language and protect the same interests." *State v. Casey*, 71 P.3d 351, 354 (Ariz. 2003).

"sweep away settled expectations suddenly and without individualized consideration." *Landgraf v. USI Film Prods*., 511 U.S. 244, 266, 268 (1994). Even if H.B. 2534's prospective application satisfied rational-basis review—and, as demonstrated above, *see* Part II, it does not—its retroactive deprivation of the Nation's property rights based on the Nation's past lawful invocation of its entitlements under the Lands Replacement Act cannot survive scrutiny.

H.B. 2534 deprives the Nation of its property right to have its land held in trust under the Act. It is well-established that a federal statute confers a property right if it creates a "legitimate claim of entitlement" to a benefit. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005); *Hardison v. Cohen*, 375 F.3d 1262, 1268 (11th Cir. 2004). Here, the Nation has a "legitimate claim of entitlement" under the Lands Replacement Act to convey the Settlement Property to the United States to be held in trust. Indeed, the Act *requires* the Secretary to hold the land in trust for the Nation if it meets certain criteria. And, as the Secretary has already determined, the Nation's property meets those criteria.

Appellants contended below that no property right accrues until the property is actually taken into trust. But this Court has "long held that applicants have a property interest protectable under the Due Process Clause where the regulations establishing entitlement to the benefit are … mandatory." *Foss v. National Marine*

Fisheries Serv., 161 F.3d 584, 588 (9th Cir. 1988). The Lands Replacement Act—as the Secretary and the district court concluded, ER14—establishes a "mandatory" duty for the Secretary to hold in trust for the Nation any land that satisfies its conditions. H.B. 2534 thus deprives the Nation of a very real and tangible property interest.

And it does so retroactively, by "attach[ing] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270; *see also id.* at 269 ("'[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.'") The retroactivity inquiry "demands a commonsense, functional judgment" and "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357, 358 (1999); *see also Landgraf*, 511 U.S. at 270.

H.B. 2534, as applied to the Settlement Property, is unquestionably retroactive. It attaches new, unforeseeable, and harsh legal consequences to the Nation's past, wholly legitimate conduct. Because the Nation exercised its federal right to file a trust application *two years before* H.B. 2534 was enacted, H.B. 2534 strips the Nation of the rights all other Arizona landowners possess to vote on, and

be heard regarding, the annexation of its land. It thereby seeks to thwart the Nation's valid exercise of its federal right to have that land taken into trust.

As H.B. 2534 vividly illustrates, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). Retroactive laws must thus "meet a burden not faced by legislation that has only future effects": "[T]he *retroactive application* of the legislation … itself [must be] justified by a rational legislative purpose." *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (emphasis added). When the severity of a statute's retroactive effect is sufficiently disproportionate to any legitimate purpose, its retroactive application offends due process. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute.").

In *Eastern Enterprises*, for example, the Supreme Court struck down a statute requiring a company that had mined coal more than thirty years ago to pay health benefits to its past employees. 524 U.S. at 537-538 (plurality); *id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part). Although the plurality analyzed the statute under the Takings Clause and Justice Kennedy under

the Due Process Clause, both concluded that the statute's imposition of substantial retroactive monetary liability rendered it unconstitutional. The plurality held that Eastern had no expectation that it would be required to provide lifetime health benefits to its retirees, and that Congress could not constitutionally impose "such a disproportionate and severely retroactive burden upon Eastern," however legitimate the objective. *Id.* at 536. Justice Kennedy similarly explained that "[i]f retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.* at 548 (Kennedy, J., concurring in the judgment and dissenting in part); *see also, e.g.*, *Jideonwo v. INS*, 224 F.3d 692, 700 (7th Cir. 2000) (construing statute to be retroactive would raise grave constitutional concerns); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 971-972 (2d Cir. 1985) (same).[24]

[24] It is appropriate to rely on *Eastern Enterprises* in considering a due process challenge to a retroactive law. The majority of the Justices found that due process was the appropriate rubric for consideration of retroactivity concerns. *See* 524 U.S. at 539 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554 (Breyer, J., dissenting). And the plurality, while expressing some concern about "using the Due Process Clause to invalidate economic legislation" and thus not reaching the due process question, acknowledged that "[o]ur analysis of legislation under the Takings and Due Process Clauses is correlated to some extent." *Id.* at 537; *see also Connolly v. PBGC*, 475 U.S. 211, 223 (1986) (noting that if a statute does not violate due process, it would be "surprising" if it worked an unconstitutional taking). In any event, the *Eastern Enterprises* plurality's concerns are not relevant here because H.B. 2534 is not economic legislation, but legislation that governs citizens' right to be heard regarding the exercise of jurisdiction over their land.

The Arizona Supreme Court has similarly held that state legislation retroactively modifying existing surface water rights violated due process, concluding that the statute "change[d] the consequences of past events" and was a "paradigm of unconstitutional retroactive application." *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179, 191 (Ariz. 1999).

To be sure, retroactivity is not necessarily unconstitutional, and "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Turner Elkhorn*, 428 U.S. at 16. But H.B. 2534 is the rare statute that is sufficiently egregious in both its ends and means to transgress constitutional limits. It not only "fails to serve any legitimate governmental objective," *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005); *see supra* Part II, but even if it had some legitimate purpose, that purpose could not justify its retroactive application to the Settlement Property.

When the Nation purchased the Settlement Property, it expected that the land could not be annexed without the procedural protections guaranteed under generally applicable state law. It also had a legitimate expectation—since confirmed by the Secretary and the district court—that the Secretary was required, on request, to take the land into trust under the Lands Replacement Act. Relying on those settled expectations, the Nation invested $13.8 million to purchase the Settlement Property, NER243, and invested additional substantial amounts in

anticipation of developing the property. H.B 2534 seizes on the Nation's past invocation of its rights under federal law to block the Secretary from taking the Nation's land into trust, robbing the Nation of the benefit of its bargain and further frustrating the Nation's attempts to address the entrenched poverty of its people. It thus "sweep[s] away [the Nation's] settled expectations suddenly," *Landgraf*, 511 U.S. at 266, in a "particularly harsh and oppressive" manner, *R.A. Gray*, 467 U.S. at 733 (internal quotation marks omitted).

Moreover, unlike the retroactive statutes upheld by the Supreme Court, H.B. 2534 does not merely "readjust[] [the] rights and burdens" of economic life. *Turner Elkhorn*, 428 U.S. at 16; *see, e.g.*, *United States v. Carlton*, 512 U.S. 26, 30-34 (1994); *General Motors*, 503 U.S. at 191-192; *R.A. Gray*, 467 U.S. at 728-734. Rather, H.B. 2534 singles out the Nation for a unique *political* disability by stripping it of the right to be heard and to vote regarding annexation of its land. And it is designed to deprive the Nation of its federal rights as a trust beneficiary. H.B. 2534 thus retroactively infringes not only on the Nation's economic expectations but also on its political rights as an Arizona landowner and, ultimately, on its ability to exercise sovereignty over the reservation lands to which it is entitled. Retroactively penalizing the Nation's exercise of federal rights in that manner is wholly disproportionate to any legitimate purpose H.B. 2534 could serve.

CONCLUSION

The district court's judgment as to Count One of the Nation's Complaint should be affirmed, and its judgment as to Counts Two through Six should be reversed.

Respectfully submitted,

/s/ Danielle Spinelli

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December 19, 2011

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the Nation state that the pending appeal in *Gila River Indian Community v. United States*, Nos. 11-15631, 11-15633, and 11-15639, 11-15641, and 11-15642, is related to this case within the meaning of Rule 28-2.6(d). That appeal arises out of a suit brought by the Gila River Indian Community, the City of Glendale, and the State of Arizona challenging the Secretary's decision to take Parcel 2 into trust.

Counsel for the Nation are unaware of any other cases pending in this Court that are related to this case as defined in Ninth Circuit Rule 28-2.6. There is one related case pending in the U.S. District Court for the District of Arizona, *Arizona v. Tohono O'odham Nation*, No. 11-cv-296 (filed Feb. 14, 2011). In that case, the State of Arizona, the Gila River Indian Community, and the Salt River Pima-Maricopa Indian Community are seeking an injunction barring the Nation from conducting gaming activities on the land at issue here once it is taken into trust.

ADDENDUM

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Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99-503, 100 Stat. 1789 (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 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 purposes 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.

[1799]

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, economic 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 **[1800]** 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.

[1801]

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.

Ariz. Rev. Stat. Ann. §9-471—Annexation of territory; procedures; notice; petitions; access to information; restrictions

A. The following procedures are required to extend and increase the corporate limits of a city or town by annexation:

1. A city or town shall file in the office of the county recorder of the county in which the annexation is proposed a blank petition required by paragraph 4 of this subsection setting forth a description and an accurate map of all the exterior boundaries of the territory contiguous to the city or town proposed to be annexed, except that a city or town shall not file an annexation petition that includes any territory for which an unsuccessful annexation was attempted by the same city or town until at least forty-five days after completion of the unsuccessful attempt. A property owner may waive the forty-five day waiting period for the owner's property that was part of the original unsuccessful annexation. Notice and a copy of the filing shall be given to the clerk of the board of supervisors and to the county assessor. The accurate map shall include all county rights-of-way and roadways that are within or contiguous to the exterior boundaries of the area of the proposed annexation. If state land, other than state land utilized as state rights-of-way or land held by the state by tax deed, is included in the territory, written approval of the state land commissioner and the selection board established by § 37-202 shall also be filed. For the purposes of this paragraph, "unsuccessful annexation" means an annexation attempt that was withdrawn or that was not completed pursuant to this section.

2. Signatures on petitions filed for annexation shall not be obtained for a waiting period of thirty days after filing the blank petition.

3. After filing the blank petition pursuant to paragraph 1 of this subsection, the governing body of the city or town shall hold a public hearing

within the last ten days of the thirty day waiting period to discuss the annexation proposal. The public hearing shall be held in accordance with title 38, chapter 3, article 3.1,[1] except that, notwithstanding § 38-431.02, subsections C and D, the following notices of the public hearing to discuss the annexation proposal shall be given at least six days before the hearing:

(a) Publication at least once in a newspaper of general circulation, which is published or circulated in the city or town and the territory proposed to be annexed, at least fifteen days before the end of the waiting period.

(b) Posting in at least three conspicuous public places in the territory proposed to be annexed.

(c) Notice by first class mail sent to the chairman of the board of supervisors of the county in which the territory proposed to be annexed is located.

(d) Notice by first class mail with an accurate map of the territory proposed to be annexed sent to each owner of the real and personal property as shown on the list furnished pursuant to subsection G of this section that would be subject to taxation by the city or town in the event of annexation in the territory proposed to be annexed. For the purposes of this subdivision, "real and personal property" includes mobile, modular and manufactured homes and trailers only if the owner also owns the underlying real property.

4. Within one year after the last day of the thirty day waiting period a petition in writing signed by the owners of one-half or more in value of the real and personal property and more than one-half of the persons owning real and personal property that would be subject to taxation by the city or town in the event of annexation, as shown by the last assessment of the property, may be circulated and filed in the office of the county recorder. For the purposes of this paragraph, "real and personal property" includes mobile, modular and manufactured homes and trailers only if the owner also owns the underlying real property.

5. No alterations increasing or reducing the territory sought to be annexed shall be made after a petition has been signed by a property owner.

[1] Section 38-431 et seq.

6. The petitioner shall determine and submit a sworn affidavit verifying that no part of the territory for which the filing is made is already subject to an earlier filing for annexation. The county recorder shall not accept a filing for annexation without the sworn affidavit.

B. All information contained in the filings, the notices, the petition, tax and property rolls and other matters regarding a proposed or final annexation shall be made available by the appropriate official for public inspection during regular office hours.

C. Any city or town, the attorney general, the county attorney, or any other interested party may upon verified petition move to question the validity of the annexation for failure to comply with this section. The petition shall set forth the manner in which it is alleged the annexation procedure was not in compliance with this section and shall be filed within thirty days after adoption of the ordinance annexing the territory by the governing body of the city or town and not otherwise. The burden of proof shall be upon the petitioner to prove the material allegations of the verified petition. No action shall be brought to question the validity of an annexation ordinance unless brought within the time and for the reasons provided in this subsection. All hearings provided by this section and all appeals therefrom shall be preferred and heard and determined in preference to all other civil matters, except election actions. In the event more than one petition questioning the validity of an annexation ordinance is filed, all such petitions shall be consolidated for hearing. If two or more cities or towns show the court that they have demonstrated an active interest in annexing any or all of the area proposed for annexation, the court shall consider any oral or written agreements or understandings between or among the cities and towns in making its determination pursuant to this subsection.

D. The annexation shall become final after the expiration of thirty days from the adoption of the ordinance annexing the territory by the city or town governing body, provided the annexation ordinance has been finally adopted in accordance with procedures established by statute, charter provisions or local ordinances, whichever is applicable, subject to the review of the court to determine the validity thereof if petitions in objection have been filed. After adoption of the annexation ordinance, the clerk of the city or town shall provide a copy of the adopted annexation ordinance to the clerk of the board of supervisors of each county that has jurisdiction over the annexed area within sixty days of the annexation becoming final.

E. For the purpose of determining the sufficiency of the percentage of the value of property under this section, such values of property shall be determined as follows:

1. In the case of property assessed by the county assessor, values shall be the same as shown by the last assessment of the property.

2. In the case of property valued by the department of revenue, values shall be appraised by the department in the manner provided by law for municipal assessment purposes.

F. For the purpose of determining the sufficiency of the percentage of persons owning property under this section, the number of persons owning property shall be determined as follows:

1. In the case of property assessed by the county assessor, the number of persons owning property shall be as shown on the last assessment of the property.

2. In the case of property valued by the department of revenue, the number of persons owning property shall be as shown on the last valuation of the property.

3. If an undivided parcel of property is owned by multiple owners, such owners shall be deemed as one owner for the purposes of this section.

4. If a person owns multiple parcels of property, such owner shall be deemed as one owner for the purposes of this section.

G. The county assessor and the department of revenue, respectively, shall furnish to the city or town proposing an annexation within thirty days after a request therefor a statement in writing showing the owner, the address of each owner and the appraisal and assessment of all such property.

H. Territory is not contiguous for the purposes of subsection A, paragraph 1 of this section unless:

1. It adjoins the exterior boundary of the annexing city or town for at least three hundred feet.

2. It is, at all points, at least two hundred feet in width, excluding rights-of-way and roadways.

3. The distance from the existing boundary of the annexing city or town where it adjoins the annexed territory to the furthest point of the annexed territory from such boundary is no more than twice the maximum width of the annexed territory.

I. A city or town shall not annex territory if as a result of such annexation unincorporated territory is completely surrounded by the annexing city or town.

J. Notwithstanding any provisions of this article to the contrary, any town incorporated prior to 1950 which had a population of less than two thousand persons by the 1970 census and which is bordered on at least three sides by Indian lands may annex by ordinance territory owned by the state within the same county for a new townsite which is not contiguous to the existing boundaries of the town.

K. Subsections H and I of this section do not apply to territory which is surrounded by the same city or town or which is bordered by the same city or town on at least three sides.

L. A city or town annexing an area shall adopt zoning classifications that permit densities and uses no greater than those permitted by the county immediately before annexation. Subsequent changes in zoning of the annexed territory shall be made according to existing procedures established by the city or town for the rezoning of land.

M. The annexation of territory within six miles of territory included in a pending incorporation petition filed with the county recorder pursuant to § 9-101.01, subsection D shall not cause an urbanized area to exist pursuant to § 9-101.01 that did not exist prior to the annexation.

N. As an alternative to the procedures established in this section, a county right-of-way or roadway may be annexed to an adjacent city or town by mutual consent of the governing bodies of the county and city or town if the property annexed is adjacent to the annexing city or town for the entire length of the annexation and if the city or town and county each approve the proposed annexation as a published agenda item at a regular public meeting of their governing bodies.

O. On or before the date the governing body adopts the ordinance annexing territory, the governing body shall have approved a plan, policy or procedure to provide the annexed territory with appropriate levels of infrastructure and services to serve anticipated new development within ten years after the date when the annexation becomes final pursuant to subsection D of this section.

P. If a property owner prevails in any action to challenge the annexation of the property owner's property, the court shall allow the property owner reasonable attorney fees and costs relating to the action from the annexing municipality.

Q. A city or town may annex territory that is a county owned park or a park operated on public lands by a county as part of a management agreement if otherwise agreed to by the board of supervisors. If the board of supervisors does not agree to the annexation, the county owned park or park operated on public lands by a county as part of a management agreement shall be excluded from the annexation area, notwithstanding subsections H and I of this section. A county owned park or park operated on public lands by a county as part of a management agreement that is excluded from the annexation area pursuant to this subsection may subsequently be annexed with the permission of the board of supervisors notwithstanding any other provision of this section. For the purposes of this subsection, "public lands":

1. Has the same meaning prescribed in § 37-901.

2. Does not include lands owned by a flood control district.

Ariz. Rev. Stat. Ann. §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.

25 C.F.R. §151.10—On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the

Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

25 C.F.R. §151.11—Off-reservation acquisitions.

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.

Ariz. Const. art. IV, pt. 2, §19—Local or special laws

No local or special laws shall be enacted in any of the following cases, that is to say:

1. Granting divorces.

2. Locating or changing county seats.

3. Changing rules of evidence.

4. Changing the law of descent or succession.

5. Regulating the practice of courts of justice.

6. Limitation of civil actions or giving effect to informal or invalid deeds.

7. Punishment of crimes and misdemeanors.

8. Laying out, opening, altering, or vacating roads, plats, streets, alleys, and public squares.

9. Assessment and collection of taxes.

10. Regulating the rate of interest on money.

11. The conduct of elections.

12. Affecting the estates of deceased persons or of minors.

13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises.

14. Remitting fines, penalties, and forfeitures.

15. Changing names of persons or places.

16. Regulating the jurisdiction and duties of justices of the peace.

17. Incorporation of cities, towns, or villages, or amending their charters.

18. Relinquishing any indebtedness, liability, or obligation to this State.

19. Summoning and empanelling of juries.

20. When a general law can be made applicable.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2011. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Danielle Spinelli
DANIELLE SPINELLI

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned hereby certifies:

1. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), the brief contains 16,496 words.

2. The brief complies with the type size and typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman font.

As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Danielle Spinelli
DANIELLE SPINELLI

December 19, 2011

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November 17, 2011

Molly Dwyer, Clerk of Court
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San Francisco, CA 94119-3939

Re: *Tohono O'odham Nation v. City of Glendale*, Nos. 11-16811 et al.

Dear Ms. Dwyer:

Pursuant to 9th Cir. R. 31-2.2(a), Plaintiff/Appellee/Cross-Appellant the Tohono O'odham Nation has been granted a 14-day telephonic extension for its principal and response brief in these cross-appeals. The Nation's brief will be due December 19, 2011. The response and reply brief of Defendants/Appellants/Cross-Appellees ("Defendants") the State of Arizona and the City of Glendale will be due January 18, 2012. The Nation's reply brief will be due within 14 days after service of Defendants' response and reply brief.

This letter has been copied to counsel for Arizona and Glendale.

Regards,

/s/ *Danielle Spinelli*
Danielle Spinelli

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