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

REPLY BRIEF FOR PLAINTIFF-APPELLEE / CROSS-APPELLANT

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March 6, 2012

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PRELIMINARY STATEMENT

Glendale and Arizona accuse the Nation (Br. 1) of distorting "reality" by suggesting that H.B. 2534 "nullif[ies] federal law and take[s] rights away from an innocent landowner." But the reality is that, by its terms, H.B. 2534 *does* take important rights away from landowners who ask the government to take their land into trust pursuant to federal law. H.B. 2534's purpose, as Appellants cannot seriously dispute, is to block the United States from satisfying its already-acknowledged legal obligation to take certain land into trust for the Nation. And—although Appellants never once mention it—H.B. 2534 accomplishes that purpose by stripping the Nation of the rights all other Arizona property owners possess to vote on, be heard regarding, and obtain judicial review of the annexation of their land. In short, H.B. 2534 serves an illegitimate goal—frustrating federal law—by illegitimate means: the discriminatory, and in this case retroactive, deprivation of otherwise generally applicable state-law rights. That is why the district court found H.B. 2534 preempted, and that is also why H.B. 2534 contravenes equal protection and due process principles and the Arizona Constitution's prohibition on special legislation.

Appellants' contrary arguments are meritless. They concede (Br. 28-32) that H.B. 2534's purpose is to prevent—or at least inhibit—landowners from transferring land to the federal government. They argue, however, that H.B. 2534

will not only block trust acquisitions under the Lands Replacement Act, but could also theoretically affect discretionary trust acquisitions under 25 U.S.C. §465 and other sales or donations of land to the federal government. It is unclear why that slightly broader purpose is any more legitimate than blocking only trust acquisition of the Nation's land. But, in any event, H.B. 2534 does not actually serve that broader purpose. It merely singles out the Nation for special political disabilities in order to block the United States from fulfilling its obligation under the Lands Replacement Act to take the Nation's land into trust.

Appellants contend that, by definition, H.B. 2534 cannot thwart the Lands Replacement Act because the Act makes trust eligibility turn in part on whether land falls outside the corporate limits of a city or town. That logic is seriously flawed. Indeed, it makes a mockery of the Lands Replacement Act. The Act respects pre-existing city limits drawn according to neutral, generally applicable state laws. It emphatically does not authorize cities to annex land by fiat *because* the Nation has applied to have it taken into trust under the Act. Yet Appellants insist (Br. 13) that it is "fully consistent" with the Act to strip the Nation of its rights as an Arizona landowner because the Nation invoked the Act, to frustrate a pending acquisition under the Act. That argument refutes itself. Because H.B. 2534 does not actually further the purposes Appellants invoke, and because the purpose it does serve is illegitimate, it cannot survive even the most lenient scrutiny.

Even if H.B. 2534 survived equal-protection rational-basis review, it would still violate Arizona's considerably stricter prohibition against "special laws," because it neither encompasses all members of the class relevant to the law's purported objective nor has an actual probability of being applied to others in the future. Nothing in Appellants' submission casts any doubt on that conclusion. Appellants offer no plausible explanation as to why only cities within the three counties affected by the Lands Replacement Act have an interest in controlling transfer of neighboring land to the federal government. And they fail to show any "actual probability" that additional cities will enter the benefited class in the future; they have not disputed that no other county is likely to reach H.B. 2534's population threshold for decades.

Finally, Appellants muster no defense at all of H.B. 2534's retroactive effect as applied to the Nation's Settlement Property. Rather, they continue to claim (Br. 52) that H.B. 2534 is not retroactive because it "only appl[ies] to future annexation proceedings." Under that standard, no statute would ever be retroactive. As applied here, however, H.B. 2534 is retroactive because it attaches new consequences to an action the Nation took two years before the Act was passed: H.B. 2534 strips the Nation of rights all other landowners possess *because* the Nation applied to have the Settlement Property taken into trust. H.B. 2534 singles out the Nation for special political disabilities, upsets its settled, investment-backed

expectations, and deprives it of its rights under federal law, all based on the Nation's past lawful conduct. For those reasons, it contravenes due process.

In short, throughout their briefs, Appellants defend a law that does not exist. H.B. 2534 is anything but the neutral annexation law of general applicability that they portray. Once it is acknowledged for what it actually says and what it actually does, H.B. 2534 cannot be sustained.

ARGUMENT

I. H.B. 2534 VIOLATES EQUAL PROTECTION

In its opening brief, the Nation demonstrated (Br. 45-53) that H.B. 2534 offends the federal and Arizona Constitutions' guarantee of equal protection of the laws. It permits municipalities to annex land involuntarily (1) in only three of Arizona's fifteen counties (the same three in which land may be taken into trust under the Lands Replacement Act), (2) if the land is bordered on at least three sides by a municipality, (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." A.R.S. §9-471.04. These classifications are rationally related to H.B. 2534's actual purpose: to block the trust acquisition of the Nation's Settlement Property. Indeed, they are crafted with surgical precision to achieve that purpose. As the Nation previously demonstrated (Br. 47-50), however, that purpose is illegitimate.

Appellants accordingly resort (Br. 28-33) to what they consider "'reasonably conceivable'" objectives for the statute never mentioned by the legislature. That strategy is permissible under rational-basis review. *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993). But, in light of H.B. 2534's actual classifications, the hypothesized objectives that Appellants proffer are not "reasonably conceivable" at all, nor is H.B. 2534 rationally related to achieving them. Once Appellants' fictions are dispelled, it is clear that this is the "rare case where the facts preclude[] any plausible inference that the reason for [the statute's classifications] was to achieve [the purported legitimate end]," *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992), and that the statute's true end is "'constitutionally unacceptable,'" *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

A. H.B. 2534 Does Not Rationally Further The Post-Hoc Objectives Appellants Advance

1. Appellants contend (Br. 29-30) that H.B. 2534 was enacted to "prevent, or at least mitigate" the problems attendant to "cities and towns los[ing] significant ability to govern, control, or … guide" nearby land's use. But Appellants (Br. 30) point to no party other than the Nation who, on their theory of involuntary annexation, will be "prevent[ed]" from transferring land to the federal government. Only the Lands Replacement Act makes non-incorporated status a condition of eligibility for transfer.

Appellants argue (Br. 31) that H.B. 2534 gives cities "a voice in discretionary trust-acquisition decisions." To be sure, the Department of the Interior considers the effect of discretionary trust acquisitions on cities, as well as any jurisdictional conflicts that might arise from such acquisitions. But H.B. 2534 does not "mitigate" such conflicts; by involuntarily annexing land that is the subject of a trust application, it *creates* them where they did not previously exist. Moreover, Appellants themselves argue (Br. 29 n.7, 41-42) that Arizona cities already exercise a "'strong degree of control'" over the development of unincorporated land. There is thus no reason to believe, and Appellants offer nothing to support the contention (Br. 32), that a last-minute annexation will have any effect on discretionary trust-acquisition decisions or that it will somehow "improve [a municipality's] standing" in subsequent negotiations once the land goes into trust. More importantly, manufacturing previously non-existent jurisdictional conflicts upon the filing of a trust application in order to restrict Indian tribes' exercise of their federal rights is hardly a legitimate governmental purpose.

Appellants' claim of a legitimate purpose thus depends on H.B. 2534's putative "mitigat[ing]" effect on *other* land transfers to the federal government. Even assuming that inhibiting such transfers could be a legitimate aim, Appellants' argument fails, because H.B. 2534 will not affect such transfers.

Ordinary donations, sales, or exchanges of land to the federal government do not trigger H.B. 2534 because they do not "require[]" the landowner to make an "application to the federal government." A.R.S. §9-471.04(B). The "execut[ion]" of "a [joint] nonbinding *agreement*" to exchange land with the government is not an "application" to do so. 36 C.F.R. §254.4(c) (Forest Service); 43 C.F.R. §2201.1(c) (Bureau of Land Management) (emphasis added). Donations and sales of land to the federal government likewise involve no "application": The landowner in that instance is "given" a "written purchase offer" from the agency to "consider." 49 C.F.R. §24.102(d)-(f); *see also* 42 U.S.C. §4651(3) ("the Federal agency concerned shall provide the owner of real property to be acquired with a written statement of [the offer to purchase]"); *accord* 49 C.F.R. §24.108 (donations).

Even if H.B. 2534 applied to such transfers, Appellants cannot explain how involuntary annexation would mitigate any resulting jurisdictional conflict. Appellants assert (Br. 32) that involuntary annexation would ensure municipalities receive notice of proposed land transfers. But municipalities must already have notice of a proposed land transfer in order to invoke H.B. 2534. Moreover, notice of proposed land exchanges is already made publicly in newspapers circulated "in the counties in which the [lands] proposed for exchange are located," and any concerned municipality may comment on the process. 36 C.F.R. §254.8(a) (Forest

Service); 43 C.F.R. §2201.2(a) (Bureau of Land Management). Thus, the only benefit a municipality would receive upon involuntarily annexing such land would be notification of an exchange of which it was already aware.[1] Appellants cite no authority even suggesting that the land's incorporated status could affect whether the exchange takes place.

The only other purported benefit Appellants identify (Br. 32-33)—facilitating a municipality's coordination with the Bureau of Land Management *following* a land transfer—is similarly without substance. Municipalities bordering newly federal land on three or more sides are "local governments within which [federal] lands are located" regardless of the federal land's prior status. 43 U.S.C. §1712(c)(9); *but see Kane County v. Salazar*, 562 F.3d 1077, 1088 (10th Cir. 2009) (noting that it is "doubtful that the [§1712(c)(9)] was intended to, or could reasonably be construed as, creating a 'procedural right' enforceable by state or local governmental entities"). H.B. 2534 thus "simply [can]not have the effect …

[1] Appellants make a similarly irrational argument (Br. 31) regarding discretionary trust acquisitions, claiming that involuntary annexation will require DOI to "notify [the municipality] and provide [it] 30 days to comment." 25 C.F.R. §151.11(d). But H.B. 2534 presumes that the municipality *already has* notice of the trust application. Moreover, Appellants' claimed "'strong degree of control over zoning and development'" of unincorporated land (Br. 29 n.7), would entitle municipalities to notice and comment under §151.11(d) even without annexation under H.B. 2534. *See* Nation Br. 49 n.18.

that [Appellants] claim it might have been intended to have." *Perry v. Brown*, 2012 WL 372713, at *22 (9th Cir. Feb. 7, 2012).

2. Even if one were to accept at face value Appellants' hypothetical objectives for H.B. 2534, however, the statute would still fail rational-basis scrutiny because its classifications are not rationally related to furthering those hypothetical objectives. *See* Nation Br. 50-53.

First, even if H.B. 2534 applied to all the land transfers Appellants suggest, *and* involuntary annexation actually "mitigate[d]" the problems attendant to "cities and towns los[ing] significant ability to govern, control, or … guide" nearby land's use, H.B. 2534 would still fail because its population classification does not rationally further the objective of "'protecting … existing municipalities.'" Appellants argue (Br. 34) that "municipalities in densely-inhabited regions … have special needs regarding annexation, zoning, land use, and government administration." But a population-based classification must bear some rational relationship to the "special need" addressed, as in the cases Appellants cite.[2] No

[2] *See City of Mountain Brook v. Green Valley Partners I*, 690 So. 2d 359, 361 (Ala. 1997) (special zoning problems, including "traffic and safety concerns resulting from having numerous cities in such a county and from having many people in a small area," justified increased zoning powers in populous counties); *Masters v. Pruce*, 274 So. 2d 33, 45 (Ala. 1973) (same); *Long v. Napolitano*, 53 P.3d 172, 181 (Ariz. Ct. App. 2002) (county with population greater than two million has greater need for and ability to finance large stadium and related tourism objectives); *Dade County v. City of N. Miami Beach*, 109 So. 2d 362, 363 (Fla. 1959) ("It is reasonable to assume that in counties of large populations there will be

such relationship exists here. There is no reason to think that the purported disruptive effect (if any) of having federal land adjacent to a city is diminished when the municipality is in a less-populous county. Indeed, the contrary is equally plausible.[3] Either way, the question is not whether municipal-integrity issues are "most relevant" in populous counties (Third Cross-Appeal Br. 35), but whether it *rationally furthers* those interests to limit H.B. 2534 to such counties. On that score, Appellants have no reply.

Second, even if the population classification were rational standing alone, Appellants make no serious attempt to justify H.B. 2534's other classifications. While county islands or peninsulas may be "common in Arizona" (Br. 36), that does not explain why *limiting* H.B. 2534's application to such land furthers any interest in protecting existing municipalities. Likewise, Appellants have no

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concentrations of people in the outlying unincorporated areas in need of municipal services" and that simplifying annexation in such areas "make[s] the municipal services more readily available.").

[3] Appellants' argument (Br. 36) that the Nation simply "disagree[s] with the Arizona legislature" is meritless. A legislative classification can be based on speculation, but that "speculation must at least be rational." *Tucson Elec. Power v. Apache County*, 912 P.2d 9, 18 (Ariz. Ct. App. 1995) (distinction between different types of property irrational where "presumed ability [of those properties] to pass real property taxes through to their customers … does not genuinely distinguish them from most taxpayers owning other classes of property"); *see also State Compensation Fund v. Symington*, 848 P.2d 273, 278-279 (Ariz. 1993) (irrational to classify a state fund differently than private carriers in imposing the alternative minimum tax simply because a state fund should be available to help balance the budget).

response to the Nation's showing (Br. 53) that the underinclusiveness of H.B. 2534's "as required by … statute or regulation" classification—particularly when coupled with its population limitation—serves merely to thwart, rather than to advance, the very goals that Appellants claim the law serves. This is thus 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 v. Evans*, 517 U.S. 620, 635 (1996).

B. The Only State Interest H.B. 2534 Furthers Is The Constitutionally Impermissible One Of Frustrating Federal Law

H.B. 2534 is precisely tailored to achieve just one goal—preventing the federal government from taking the Nation's land into trust by stripping the Nation of the political protections afforded all other Arizona landowners. *See* Nation Br. 47, 49-50. Appellants do not deny that obstructing federal law is an illegitimate purpose. *See Rollins Envt'l Servs. (FS) v. Parish of St. James*, 775 F.2d 627, 635 (5th Cir. 1985). Rather, they argue (Br. 13, 28) that, because land's trust eligibility under the Lands Replacement Act turns in part on whether it is outside the corporate limits of a city or town, and those limits are determined by reference to state law, H.B. 2534 is, "by definition," "entirely consistent with the objectives" of the Act.

Appellants' conclusion does not follow from their premise. The Lands Replacement Act respects municipalities' existing interests by restricting trust-

acquisition eligibility to unincorporated land. It does not follow that it is "consistent" with the Act to permit cities to annex otherwise eligible land involuntarily, thus purportedly rendering it ineligible for trust status, *because* the Nation has applied to have it taken into trust under the Act. The Act's restrictions contemplate ordinary, non-discriminatory procedures for determining municipal boundaries; nothing in the Act remotely suggests that Congress intended to permit Arizona to take away the Nation's rights with regard to the annexation of its land in order to thwart a specific pending trust application.

Indeed, even Appellants shy away from the logical consequences of their argument. They concede (Br. 15-16) that a law that automatically annexed the Nation's land to the nearest municipality upon the Nation's filing of a trust application would frustrate the purpose of the Lands Replacement Act because it would prevent the Nation from acquiring 9,880 acres of trust land. Presumably, then, Appellants would contend that if state law left *any* 9,880 acres, *anywhere*, that the Nation could acquire under the Act, it would be "entirely consistent" with the Act. But that is equally absurd. A state law need not entirely prevent federal law from ever being applied to thwart the federal law's goal. It is sufficient that 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).

Here, a fundamental purpose of the Lands Replacement Act is to enable the Nation to establish a land base suitable for non-agricultural economic development that can help meet the dire needs of the Nation's people. The Act gives the Nation "great flexibility" in choosing the land that will best accomplish that end. ER13. By stripping the Nation of its rights as an Arizona landowner in order to veto the Nation's choice after it has been made and block a trust acquisition that the agency has already determined is required, H.B. 2534 thwarts the Act's fundamental aim.

Appellants rely heavily on *Williamson v. Mazda Motor of America*, 131 S. Ct. 1131 (2011), for the proposition that giving cities the right to veto trust acquisitions does not conflict with the Act. But *Mazda* bears no resemblance to this case. There, the Court held that a state tort suit based on afailure to provide lap-and-shoulder belts was not preempted by federal regulations requiring either lap or lap-and-shoulder belts, because—as the agency itself stated—permitting car makers to choose between passive restraint methods was not a significant regulatory objective. *Id.* at 1137. That is, the Court concluded that the federal regulations set forth a minimum, not a maximum, safety standard. *See id.* at 1139. By contrast, in the Lands Replacement Act, Congress was not regulating or imposing requirements on the Nation, but giving it an affirmative right to have land taken into trust to replace its destroyed reservation. It is hardly consistent with the Lands Replacement Act to permit Arizona, or its cities, to veto the exercise of that

right. Whereas the state in *Mazda* was *furthering* the federal government's safety objective by setting even stricter safety standards, here Arizona and Glendale are attempting to *prevent* the federal government from fulfilling what it has determined to be its statutory duty. Moreover, unlike in *Mazda*, giving the Nation "great flexibility" to choose the land to be taken into trust *is* a significant objective of the Lands Replacement Act, as the district court recognized. ER13.

Finally, the legislative record strongly confirms H.B. 2534's illegitimate purpose to thwart federal law. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) (conflict with federal law measured by state law's purposes *and* effects).[4] While Appellants urge this Court to ignore that record (understandably, given its contents), they have no basis for doing so. They rely (Br. 24-26) on decisions holding that a state law can conflict with a federal law even if their purposes are similar. That is certainly so. But it does not follow, as Appellants claim, that courts should stop their ears when, as here, a state law's sponsor says that the law is intended to "fight[] an overreaching, intrusive Federal Government" and that its "goal is to prevent [the government] from taking [the Nation's land] into trust,

[4] There is no merit to Appellants' contention (Br. 19-22) that the Supremacy Clause principles *Felder* articulates are limited to a narrow set of cases involving a so-called "nondiscrimination doctrine." That term appears nowhere in *Felder* or in any decision on which Appellants rely; Appellants apparently derived it from a single footnote in a student's law review note. *Felder* addressed the very question at issue here: whether state law "stan[ds] as an obstacle to … the full purposes and objectives of Congress." 487 U.S. at 138 (internal quotation marks omitted).

turning it into their sovereign land," as the United States has concluded federal law requires. NER144, 199. That is the admitted and obvious purpose of H.B. 2534, and it is illegitimate.

II. H.B. 2534 IS IMPERMISSIBLE SPECIAL LEGISLATION

The Arizona Constitution's prohibition on special legislation "avoid[s] the evils created by a patchwork type of legal system where some laws [are] applied in a few locations while others [are] applied elsewhere." *Republic Inv. Fund I v. Town of Surprise*, 800 P.2d 1251, 1257 (Ariz. 1990). Even if H.B. 2534 could survive rational-basis review, it would still violate the more stringent special-legislation prohibition, which requires that laws (1) "encompass[] all members of the relevant class," and (2) will apply to others in the future. *Id.*; *City of Tucson v. Woods*, 959 P.2d 394, 400 (Ariz. Ct. App. 1997). H.B. 2534 does neither.

A. H.B. 2534 Does Not Encompass All Members Of The Relevant Class

In its opening brief (Br. 55-57), the Nation demonstrated that H.B. 2534 is a special law because it does not "encompass[] all members of the relevant class." *Republic Inv.*, 800 P.2d at 1257. Appellants cast no doubt on that showing.

1. Appellants' threshold contention (Br. 40)—that this inquiry is a "narrow and deferential" test "mirroring … rational-basis review"—is unsupported. The Arizona Supreme Court has explained that whether a law "encompasses all members of the relevant class" is a "different and heightened standard." *Republic*

Inv., 800 P.2d at 1257; *see id*. at 1256 ("The legislature may classify, but it cannot make a classification based on a decision that a law should apply to a particular individual or group."). *City of Tucson* is not to the contrary. In that case, the court simply determined that a statute lacking a rational basis *also* "obviously" failed to "appl[y] equally to all … within its scope." 959 P.2d at 401. That is hardly the lenient "overlap" with rational-basis review Appellants assert. And *Town of Gilbert v. Maricopa County* makes clear that the two inquiries do *not* overlap: the court there held that although the law's classifications might have been "rational," the law nonetheless "fail[ed] [this] prong of the [special legislation] test" because it did not include other "similarly situated" entities. 141 P.3d 416, 421 (Ariz. Ct. App. 2006).[5]

2. Appellants next contend (Br. 40) that H.B. 2534 encompasses all relevant class members because it "extend[s] to all cities and towns in populous counties the same process for annexing lands that meet the statutory criteria." But asserting that the statute encompasses the class defined by the statute is nothing more than a tautology. Under Appellants' view, no statute could ever violate the inclusivity requirement. The Arizona Supreme Court, however, has made clear that the law's *objective*—not merely its own terms—determines what "members [are]

[5] Appellants' remaining citations (Br. 40-41) involve rational-basis review, not the inclusivity prong of the special legislation test. *Long*, 53 P.3d at 183; *Tucson Elec.*, 912 P.2d at 18.

within the [law's] circumstances." *Republic Inv.*, 800 P.2d at 1258. All classifications, including a "classification by population," must be "*legitimate*." *Id.* (emphasis added).[6] And, as the Nation demonstrated (Br. 55-57), Arizona courts have routinely—not merely "occasionally" (Third Cross-Appeal Br. 40)—struck down statutes failing this test.

Appellants' attempt to distinguish these cases because they involved a statewide problem—*e.g.*, the practice of strip annexation, *Republic Inv.*, 800 P.2d at 1259, or juvenile firearm possession, *In re Cesar R.*, 4 P.3d 980, 982 (Ariz. Ct. App. 1999)—is unpersuasive. First, Appellants themselves assert (Br. 41-42) that H.B. 2534 addresses just such a problem: When land is "co[n]verted" to federal land (and particularly when the land is taken into trust), "the municipality loses its regulatory authority," thus requiring "special protection[]." Even if such "special protection" is not, itself, impermissible, *all* municipalities in all counties share that interest and are therefore "similarly situated" for purposes of the special-legislation prohibition.

[6] Neither *Governale v. Lieberman*, 250 P.3d 220 (Ariz. Ct. App. 2011), nor *City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001), is to the contrary. *Grezaffi* contains a single sentence of analysis quoting the standard from *Republic Investment*. 23 P.3d at 683. *Governale* unremarkably observes that a statute requiring certain qualifications for experts is not a special law because it "applies uniformly to all members of the classes of health care providers and to persons suing them." 250 P.3d at 226.

Second, as Arizona courts have stressed in addressing population classifications, whether the problem is more acute in some areas than others is irrelevant. In *Cesar R.*, the court rejected the State's "'infer[ence]'" that counties with more than 500,000 persons needed greater firearms restrictions because they included "'urban areas where juvenile street gangs are more likely to exist,'" and determined that the law irrationally "applie[d] to the vast rural areas of these [populous] counties but not to the equally vast rural areas of Arizona's remaining thirteen counties." 4 P.3d at 982-983; *see also In re Marxus B.*, 13 P.3d 290, 293 (Ariz. Ct. App. 2000).[7] In another closely analogous case, the Arizona Supreme Court invalidated a statute addressing strip annexation because it did not apply to all cities where strip annexation might have been abused, notwithstanding the claim that "'small cities … may have greater cause to deannex'" such areas. *Republic Inv.*, 800 P.2d at 1259.

In short, Arizona law prohibits legislation that, like H.B. 2534, favors certain localities, even if a problem might be more acute in those localities, while failing to apply "to all … who may benefit from [the] attempt to remedy a particular evil." *Id.* at 1257; *see also State Compensation Fund v. Symington*, 848 P.2d 273, 277

[7] The same is true here: H.B. 2534 purports to address a problem found in "urbanized" areas, yet applies to all municipalities in the three counties it addresses, whether "urbanized" or not, while excluding urbanized areas in other counties. *See* Nation Br. 56-57.

(Ariz. 1993); *Town of Gilbert*, 141 P.3d at 421. Because H.B. 2534 applies only to municipalities within a few populous counties, it "confers a benefit only on part of the class," while ignoring "all other similarly situated cities in other counties." *Republic Inv.*, 800 P.2d at 1259. And "even if a rational basis exists" for its population classification, as Appellants claim, H.B. 2534 "is a special/local law" because "it does not apply uniformly to all members of the class." *Id.*

3. Appellants' reliance on *Long v. Napolitano*, 53 P.3d 172 (Ariz. Ct. App. 2002) and *State v. Bonnewell*, 2 P.3d 682 (Ariz. Ct. App. 1999), again confuses the rational-basis prong of the special-legislation test with the inclusivity prong. Contrary to Appellants' assertion (Br. 43), the Nation's arguments could not "parallel" those rejected in *Long* because that case did not address whether the law's classification was legitimate under the inclusivity prong. *See* 53 P.3d at 178 ("Long contends that the [law] fails under the [rational-basis] and [elasticity] prongs of [the special-legislation] test[.]"). The court considered only whether a population-based classification furthering certain tourism objectives was *rational*, rejecting "Long's application of the rational relationship test" as "unduly restrictive." *Id*. at 181.[8]

[8] Even if the court's analysis could be construed as addressing the legitimacy of the statute's population classification, "counties with populations less than two million people are not similarly situated to more populous counties for purposes of … stem[ming] increased competition [for tourism] from comparable major metropolitan areas outside Arizona." *Long*, 53 P.2d at 181. That fact readily

Appellants' reliance on *Bonnewell* (Br. 44 n.16) for the proposition that the inclusivity prong allows "[l]egislation [to] be enacted one step at a time" is similarly misplaced. The court used that language in considering whether the statute had a rational basis—not whether all members of the relevant class were included. 2 P.3d at 685.

4. Finally, Appellants claim (Br. 41) that H.B. 2534 does not "'benefit[]'" non-tribal landowners by favoring them over tribal landowners. But, as the Nation has demonstrated, H.B. 2534's classifications were surgically crafted to apply to the Nation alone. The law thus "bestow[s] [a] special favor[] on [a] preferred group[]"—all landowners outside the law's classifications (or, in other words, all landowners who are not the Nation). *City of Tucson*, 959 P.2d at 400; *see Republic Inv.*, 800 P.2d at 1256 (statute limited to several small cities and towns in Maricopa County "not only discriminates *against* those small municipalities, but also discriminates *in favor of* larger municipalities in Maricopa County, as well as all cities and towns in other counties"); *cf. Marxus B.*, 13 P.3d at 293 (statute restricting juvenile firearm possession illegitimate because it "only … *protect[s]* … citizens residing in Maricopa or Pima Counties" (emphasis added)). Indeed, H.B. 2534 was passed only after the law's sponsors made clear that other

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explains why Long did not challenge the statute as failing to encompass all members of the relevant class.

landowners would continue to receive state-law protections. *See* Nation Br. 12-13. Legislators repeatedly expressed concerns about potential application of H.B. 2534 to other landowners and were assured that the law was "so narrowly defined it will only apply to this property owner [*i.e.*, the Nation], at this time, and in this place, and in this way." NER224; *see also* Nation Br. 57. H.B. 2534 is thus a textbook example of a statute that confers benefits on some while denying them to others who are similarly situated.

B. There Is No "Actual Probability" That H.B. 2534 Will Apply To Others

To avoid being classified as special legislation, a law must also be sufficiently elastic that there is an "actual probability that others will come under the act's operation." *Republic Inv.*, 800 P.2d at 1259. Where "th[at] prospect is only theoretical, and not probable," the law is invalid. *Id.* In its opening brief, the Nation demonstrated (Br. 57-58) that *no* county will reach the statute's population threshold for more than twenty years—far short of satisfying the "actual probability" standard.[9] Appellants do not dispute this fact and instead resort (Br. 46-49) to other, meritless arguments.

[9] Appellants criticize (Br. 49 n.20) the Nation's analysis of *Long*, but to the extent the district court relied on *Long* for the proposition that a technically "open" class, without more, can satisfy the elasticity prong, that rationale fails. *See* Nation Br. 58 n.22. Although Appellants defend *Long* as being "cited … favorably" by Arizona courts, none has adopted its reasoning in this respect.

1. Appellants contend (Br. 48) that H.B. 2534 is elastic because "municipalities in [the] counties [where H.B. 2534 applies] might enter and exit the class." That assertion misconstrues Arizona law and, again, reduces the special-legislation test to a tautology.

H.B. 2534 benefits only municipalities in counties with more than 350,000 people. A.R.S. §9-471.04(A)(1). The proper inquiry is thus whether there is an "actual probability" that municipalities in *other* counties "will come under the act's operation when the population changes." *Republic Inv.*, 800 P.2d at 1259; *see, e.g.*, *Cesar R.*, 4 P.3d at 983 (where statute's county population threshold was more than 500,000 persons, "improbable entry and exit by the other counties" invalidated the statute). Simply put, municipalities *in* the three counties affected by H.B. 2534 do not "enter and exit the class" at all. All these municipalities are already in the statutory class, and they will remain the only municipalities to which the statute applies unless other counties attain the requisite population.[10]

2. Appellants' contention (Br. 48-49) that H.B. 2534 benefits *municipalities*—not "populous" counties—only proves the Nation's point. To the

[10] To be sure, municipalities in counties with populations of at least 350,000 cannot involuntarily annex land until a triggering application to the federal government is made. But this is irrelevant to the "actual probability that *others* will come under the act's operation." *Republic Inv.*, 800 P.2d at 1259 (emphasis added). Cities in the three most populous counties are "under the act's operation" *now* and can benefit from H.B. 2534 *now* if the statute's requirements are met. No other city can, or is likely to be able to, do so in the next two decades.

extent the statute's objective is not the patently impermissible one of preventing the federal government from establishing a reservation for *the Nation*, H.B. 2534's population classification is unrelated to H.B. 2534's operation, which allows municipalities in three select counties involuntarily to annex land upon the landowner's exercise of a federal right. The statute's county-based population classification is thus irrelevant to the benefit conferred by H.B. 2534, which is one more reason—not one less—that H.B. 2534 is classic special legislation and should be invalidated.

III. H.B. 2534 VIOLATES DUE PROCESS

The Nation established (Br. 59-65) that H.B. 2534 also violates due process. Appellants' response fundamentally misunderstands the scope of the property interests protected by the Due Process Clause, mischaracterizes the retroactivity inquiry, and fails altogether to apply rational-basis analysis to the retroactive aspect of H.B. 2534.

1. As the Nation previously explained (Br. 60-61), it has a protected property interest in having its land held in trust under the Lands Replacement Act. 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 in nature." *Foss v. National Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998). Appellants do not dispute that the Lands

Replacement Act is "mandatory in nature"—it requires the Secretary to take eligible land into trust for the Nation. Accordingly, the Nation acquired a property interest when it filed its trust application for the Settlement Property.

Appellants nonetheless erroneously insist (Br. 50) that the Nation lacks a property interest because it "is not yet *entitled* to have its property transferred in trust to the United States." But DOI has already decided that the Nation *is* entitled to have its land acquired in trust; the trust acquisition has not occurred only because Appellants unsuccessfully challenged that decision in a separate lawsuit and are now appealing. And even if DOI had not yet made its decision, it is well settled that a property interest depends only on "a legitimate claim of entitlement" to a benefit, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)—*i.e.*, a "reasonable expectation" of obtaining it, *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *Brady v. Gebbie*, 859 F.2d 1543, 1547-1548 (9th Cir. 1988)—whether it has yet been obtained or not. A law "creates a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements." *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979).[11] Because the Nation's Settlement Property meets the Lands Replacement Act's eligibility

[11] *See also, e.g.*, *National Ass'n of Radiation Survivors v. Derwinski*, 994 F.2d 583, 588 n.7 (9th Cir. 1992) ("[A]pplicants for … [statutory] benefits possess a constitutionally protected property interest in those benefits."); *Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990) (same).

requirements, the Nation has a protected property interest even though its land has not yet been taken into trust.

Appellants cite (Br. 50-52) Interior Board of Indian Appeals decisions for the proposition that a property interest does not arise until the land is taken into trust, but those decisions say nothing about when a property interest arises for due process purposes. Rather, they make only the uncontroversial—and irrelevant—points that, under DOI rules, a trust acquisition is not final until the Secretary formally accepts the property and that the Secretary may reconsider a discretionary trust decision before title is transferred. Those points in no way contradict the well-established principle that a constitutionally protected property interest arises when a person applies for a benefit to which he is entitled, not merely when he receives the benefit. Nor do they undermine the basic fact that the Lands Replacement Act makes trust acquisition *mandatory* when its requirements are satisfied.

2. Appellants wrongly contend (Br. 52) that H.B. 2534 "has a purely prospective effect." As applied to the Nation's trust application, H.B. 2534 is plainly retroactive because it "attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994). Three years ago, the Nation "completed" its trust application for the Settlement Property. At the time, the Nation, like all Arizona landowners, was protected by various safeguards, including the right to vote on annexation and to seek judicial

review. H.B. 2534, however, changes the rules by using the Nation's past invocation of its federal rights as the trigger to strip the Nation of those safeguards and allow Glendale to annex the Settlement Property involuntarily.

Appellants do not even acknowledge this central feature of H.B. 2534. Instead, they suggest (Br. 52) that H.B. 2534 is prospective because it "adds a new annexation procedure that can only apply to future annexation proceedings." But Appellants' position would render the retroactivity doctrine "meaningless, since obviously *all* [laws] have 'future effect' in the sense that they do not take effect until after they are made." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 217 (1988) (Scalia, J., concurring). Appellants also suggest (Br. 53-54) that H.B. 2534 merely unsettles the Nation's past expectations, which, standing alone, does not make a law impermissibly retroactive. But H.B. 2534 does more than "upset[] expectations based in prior law." *Landgraf*, 511 U.S. at 269. It alters the consequences of the Nation's *past* trust application by making it the trigger that strips the Nation of its rights against annexation (thereby attempting to render the application self-defeating). That is the hallmark of a retroactive law.[12]

[12] *Spoklie v. Montana*, 411 F.3d 1051 (9th Cir. 2005), is not to the contrary. There, a state law *prospectively* barred commercial shooting on certain ranches. This Court held that "[a] state may outlaw a formerly legal business even if it causes hardship to those who relied on the earlier law." *Id.* at 1058. But H.B. 2534 does not outlaw previously lawful activity; it changes the *consequences* of previously completed conduct.

3. Finally, Appellants repeat the district court's error by making no effort to defend the rationality of H.B. 2534's *retroactive* application, instead focusing (Br. 54-56) only on its prospective application. But even if H.B. 2534 were rational as applied prospectively—and it is not, *supra* pp.4-15—"the retroactive application of the legislation [must] itself [be] justified by a rational legislative purpose." *PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984) (emphasis added); *see Usery v. Turner Elkhorn Mining*, 428 U.S. 1, 17 (1976).

H.B. 2534 fails that test. Its severe retroactive consequences are wholly disproportionate to any legitimate purpose the law could serve. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 549 (1998) (noting "our settled tradition against retroactive laws of great severity") (Kennedy, J., concurring in judgment and dissenting in part). Unlike a law that merely "readjust[s] [the] rights and burdens" of economic life, H.B. 2534 seeks to strip the Nation of its right as a property owner to vote and be heard regarding the annexation of its land (as well as its right under the Lands Replacement Act to have its land taken into trust). The Nation filed its trust application and has since invested substantial sums of money preparing to develop the Settlement Property in reliance on those rights. H.B. 2534 "sweep[s] away" the Nation's "settled expectations suddenly," *Landgraf*, 511 U.S. at 266, destroying the "reasonable certainty and security which are the very objects of property

ownership," *Eastern Enters.*, 524 U.S. at 548 (Kennedy, J., concurring in judgment and dissenting in part).

Moreover, H.B. 2534's whole aim is to block trust acquisition of the Nation's land *after* DOI determined trust acquisition was required by the Lands Replacement Act, and *after* the district court upheld that determination. The statute is drafted so narrowly that there is little likelihood it will ever apply in any other circumstance. H.B. 2534 thus exemplifies one of the central constitutional difficulties inherent in retroactive legislation: It can be, and in this case was, crafted to create a discriminatory burden on one disfavored party alone, so that the legislature could avoid the opposition that a broader, forward-looking law would undoubtedly have generated. *See Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

Appellants entirely fail to address these issues. Rather, as they do throughout their briefing, they defend a different law than the one the Arizona legislature actually enacted. H.B. 2534 is not a neutral, generally applicable "'change[] in the land use laws,'" as Appellants claim (Br. 55). It is aimed at the Nation alone; it strips only the Nation of its right to vote and be heard on the annexation of its land; and it does so well after the federal government has determined that trust acquisition of the Nation's land is required, to thwart that specific acquisition, notwithstanding the Nation's significant investments made in

the expectation that the law would be honored. In short, H.B. 2534 is "one of the rare instances where the Legislature has exceeded the limits imposed by due process." *Eastern Enters.*, 524 U.S. at 549 (Kennedy, J., concurring in judgment and dissenting in part).

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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March 6, 2012

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 March 6, 2012. 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 6,998 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.

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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 reply brief in these cross-appeals. The Nation's reply brief will be due March 6, 2012.

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

Regards,

/s/ *Danielle Spinelli*
Danielle Spinelli

cc: Audrey E. Moog
Dominic F. Perella
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