

No. 10-56671
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JIM MAXWELL and KAY MAXWELL, individually and as guardians of Trevor
Allen Bruce and Kelton Tanner Bruce; et al.,

Plaintiffs - Appellants,

v.

COUNTY OF SAN DIEGO; VIEJAS FIRE DEPARTMENT; BRADLEY AVI;
JEREMY FELBER; et al.,

Defendants - Appellees.

On Appeal from the
United States District Court
For the Southern District of California
D.C. No. 3:07-cv-02385-JAH-WMC
Honorable John A. Houston

**BRIEF OF *AMICI CURIAE* GILA RIVER INDIAN COMMUNITY; ET AL.
IN SUPPORT OF VIEJAS DEFENDANTS' PETITION FOR REHEARING
AND REHEARING *EN BANC*
(Additional *Amici* and Counsel Listed on Inside Cover)**

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**REASONS FOR GRANTING THE PETITION
FOR REHEARING AND REHEARING *EN BANC***

The opinion in *Maxwell v. County of San Diego*, ___ F.3d ___, 2012 WL 4017462 (9th Cir. 2012) is contrary to several previous reported decisions of the Court and at least one unpublished disposition. *See* Circuit Rule 36-3(c)(iii) (unpublished dispositions may be cited in a petition for panel rehearing or rehearing en banc in order to demonstrate the existence of a conflict among opinions, dispositions or orders). The panel opinion appears to conflict with the prior decisions of this Court in *Linneen v. Gila River Indian Cmty.*, 276 F.2d 489 (9th Cir.), *cert. denied*, 536 U.S. 939 (2002) and *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985), in which the Court applied tribal sovereign immunity to tribal employees who were clearly sued in their individual capacities.

Most notably, the opinion in *Maxwell* directly conflicts with *Murgia v. Reed*, 338 Fed.Appx. 614, 2009 WL 2011913 (9th Cir. 2009). In *Murgia*, a *Bivens* action brought against tribal police officers, this Court—in an unpublished per curiam opinion—rejected the claim that sovereign immunity did not apply because the officers were sued in their individual capacities, reaffirming the principles established in *Hardin*. The Court said:

The district court erred in concluding that tribal sovereign immunity did not apply solely because the Defendants were sued in their individual capacities. In our circuit, the fact that a tribal officer is sued

in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity. *See, e.g., Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (despite defendants' being named in their individual capacities, tribal sovereign immunity applied because they were "acting within the scope of their delegated authority"). *If the Defendants were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit regardless of whether the words "individual capacity" appear on the complaint. Id.* Accordingly, we vacate that portion of the district court's order that denied the Defendants' claim of sovereign immunity, and we remand for further proceedings on that question.

338 Fed.Appx. at 616 (emphasis added).

STATEMENT REGARDING FED. R. APP. P. 29(c)(5)

Pursuant to Fed. R. App. P. 29(c)(5), *Amici Curiae* state that (1) no counsel for any party authored this brief in whole or part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (3) no person—other than the *Amici Curiae*, their members or their counsel—contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Curiae Gila River Indian Community and the additional tribes from other areas of this Circuit are federally-recognized Indian tribes exercising powers of self-government. *Amici* Tribes represent a cross-section of tribal governments and communities of varying sizes and include tribes located in rural areas as well as near major urban areas, all of which consider their relationships with other governments to be an inherent exercise of their tribal sovereignty. *Amici* are deeply concerned that the Panel's decision departs directly from prior precedent of this Circuit and, if permitted to stand, would expose employees of Indian tribes to liability for state law claims for simply doing their jobs.

Amici Tribes are concerned that the panel decision departs significantly from prior decisions of this Court which have, over the years, considered and refined the doctrine of sovereign immunity as applied to Indian tribes and to tribal officials

and employees. A panel decision which conflicts with prior decisions creates uncertainty in an area of the law which is basic and fundamental to Indian tribes in the exercise of their powers of self-government. All *Amici* in this matter consider their relationships with other governments, whether federal, state, local or tribal, to be an inherent aspect of their sovereignty and that entering into agreements with other governments—formal or informal—is an exercise of that sovereignty and done to protect and further tribal interests.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY SERVES DIFFERENT PURPOSES THAN OTHER FORMS OF IMMUNITY AND REFLECTS THE NATURE OF THE UNIQUE RELATIONSHIP BETWEEN THE UNITED STATES AND INDIAN TRIBES.

One cannot gain a complete understanding of tribal sovereign *immunity* without an understanding of tribal *sovereignty*. While the law of tribal sovereign immunity is often characterized as beginning with *Turner v. United States*, 248 U.S. 354 (1919), tribal sovereignty and sovereign immunity existed well before that time. Indian tribes have long been recognized as distinct political societies, capable of managing their own affairs and governing themselves. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831). A year after *Cherokee Nation v. Georgia*, the Supreme Court of the United States, relying on the sovereign status of the Cherokee Nation, rejected the attempt of the State of Georgia to exercise jurisdiction over Indian lands. *Worcester v. Georgia*, 31 U.S. 515 (1832). Later, the court recognized that the autonomous existence and powers of tribal local self-government existed prior to the United States Constitution. *Talton v. Mayes*, 163 U.S. 376 (1896).

Tribal sovereign immunity necessarily flows from tribal sovereignty, as “a necessary corollary to Indian sovereignty and self-governance.” *Three Affiliated Tribes of the Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877,

890 (1986). The sovereignty of Indian tribes is recognized in article I section 8 of the United States Constitution, which gives Congress the power, “[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.” U.S. Const. art. I § 8. *See, also*, Cohen’s Handbook of Federal Indian Law § 7.05[1][a] at 635 (2005) (doctrine of sovereign immunity is rooted in federal common law and reflects Constitution’s treatment of Indian tribes in the Indian commerce clause). While the sovereign immunity of the States from suit in federal courts is codified in the Eleventh Amendment, the development of tribal sovereign immunity has been through judicial decisions recognizing the unique relationship between the United States and Indian Nations.

It is sometimes easy to overlook aspects of sovereignty in a case like this, but they are present nonetheless. The tribal sovereign immunity enjoyed by individual tribal officials and employees is a critical component of the sovereign immunity possessed by Indian tribes which, in turn, is integrally linked to the general principle of tribal sovereignty. This is a sovereignty which long predates the United States Constitution and has been clearly recognized—consistent with history—as extending beyond reservation boundaries and to commercial activities. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998).

In several cases, from *Turner v. United States*, *supra*, through recent times, the Supreme Court has reaffirmed the well-established principle that, “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.” *Kiowa*, 523 U.S. at 754 (citations omitted). This doctrine has been extended to individual tribal officials and employees in a number of cases on the propositions that a sovereign acts through its officials and employees and, when acting in their official capacities and scope of authority, those individuals are furthering the interests of the sovereign.

This Circuit has recognized tribal sovereign immunity as applied to various individual tribal officials and employees. *E.g.*, *Cook v. Avi Casino Enters.*, 548 F.3d 718 (9th Cir. 2008), *cert. denied*, 129 S.Ct. 2159 (2009) (employees of tribal gaming enterprise); *Linneen v. Gila River Indian Cmty.*, *supra* (tribal rangers and elected officials); *Hardin v. White Mountain Apache Tribe*, *supra* (tribal police officers and elected officials); *Davis v. Littell*, 398 F.2d 83 (9th Cir. 1968), *cert. denied*, 393 U.S. 1018 (1969) (general counsel). The “test” or “standard” for application of tribal sovereign immunity to individual tribal officials or employees is articulated as follows: “[Sovereign] immunity also extends to tribal officials

when acting in their official capacity and within their scope of authority.” *United States v. Oregon*, 657 F.2d 1009, 1012 n. 8 (9th Cir. 1982).

Because of the broad range of activities Indian tribes have historically engaged in or may undertake, the scope of tribal sovereign immunity is likewise broad. And, like other sovereigns, Indian tribes retain the inherent right to determine the circumstances under which they may be sued for damages (i.e., whether or how sovereign immunity may be waived). It is certainly without dispute that the United States may waive (and has waived) the sovereign immunity of Indian tribes under certain specific circumstances, *e.g.*, 25 U.S.C. § 1303 (habeas relief under Indian Civil Rights Act); however, beyond Congressional abrogation or tribal waiver, Indian tribes—including tribal officials and employees—retain immunity from suit.

Cases involving state common-law public official immunity are helpful on certain aspects of this issue. In North Carolina, for example, “a public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt.” *Wilcox v. City of Asheville*, 730 S.E.2d 226, 230 (N.C. App. 2012). In Texas, “[o]fficial immunity protects public officials from suit arising from performance of their (1) discretionary duties (2) in good faith (3) within the scope of their authority.”

Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417 (Tex. 2004) (citations omitted). The standard in these cases is strikingly similar to the Ninth Circuit standard for individual tribal sovereign immunity.

Common-law official immunity is based upon clear public policies in protecting government officials and employees from liability for doing the jobs they were hired to do. This means being able to act with confidence and without the hesitation which may result from having judgment questioned. *Ballantyne*, 144 S.W.3d at 424. The rationale for official immunity “is the promotion of fearless, vigorous, and effective administration of policies of government. The threat of suit could also deter competent people from taking office.” *Wilcox*, 730 S.E.2d at 231 (citations omitted).

Not only do these policies apply to Indian tribes, but additional unique policies support tribal sovereign immunity. Many tribes have limited resources and, for that reason, are perhaps less willing to part with their sovereignty than other governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (recognizing that tribes are “financially disadvantaged”). In rejecting the argument that the Indian Civil Rights Act of 1968 created a private right of action against Indian tribes or tribal officials, the Supreme Court noted that such private rights of action “would be at odds with the congressional goal of protecting tribal self-

government.” *Id.* Thus, in the case of Indian tribes, recognizing sovereign immunity directly promotes the strong interests in protecting tribal self-government.

Although recognized as sovereign, Indian tribes operate within the geographic boundaries of states. When tribal officials or employees are sued for state law claims, as in this case, and not permitted to raise the defense of tribal sovereign immunity, the effect is to extend state law to a point where it threatens tribal sovereignty through litigation. Tribal officials and employees who are performing their duties within the scope of their tribal office or employment should not fear litigation of state tort claims and should, like any representative of a sovereign, enjoy the immunity bestowed upon them by the sovereign they serve.

There are parallels between individual tribal sovereign immunity, as recently recognized in this Circuit in *Cook v. Avi Casino Enters.*, *supra*, and common-law public official immunity. The primary elements of both involve authorization by the sovereign to engage in the activities giving rise to the liability. However, there is one critical distinction: This Circuit has held that lawsuits against individual tribal officials or employees who meet the test for individual tribal sovereign immunity are suits against the sovereign. *Cook*, 548

F.3d at 727 (citation omitted). *See, also, Murgia, supra* (applying test for sovereign immunity to tribal police officers sued in individual capacities).

Individual tribal sovereign immunity is not absolute. Suits for prospective injunctive relief against individual tribal officials for acts beyond the scope of authority that a tribe may bestow upon them under federal law are permitted under *Ex parte Young*, 209 U.S. 123 (1909). In *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085 (9th Cir. 2007), for example, this Court permitted a lawsuit seeking prospective relief against the Hualapai Indian Tribe's finance director's allegedly unlawful attempt "to enforce an unauthorized tax against BNSF that the Tribe *lacks the jurisdiction to impose.*" *Vaughn*, 509 F.3d at 1092 (emphasis added). In its analysis of *Ex Parte Young*, the Ninth Circuit noted that this exception to sovereign immunity applies where the officials were "acting pursuant to an allegedly unconstitutional [tribal] statute," and ultimately found that plaintiff's claim seeking an injunction against tribal officials for imposing a tax allegedly in violation of federal law and in excess of federal limitations placed on the Tribe could survive a motion to dismiss. 509 F.3d at 1092. An additional requirement identified is that the named officials "must have the requisite connection to the challenged law for the *Ex Parte Young* exception to apply." *Id.* (citations omitted).

Because current law clearly addresses the contours of tribal sovereign immunity—including the strong federal interest in tribal self-government—there is no reason to alter or narrow the doctrine through a remedy-focused approach.

II. BECAUSE THE PURPOSE OF INDIVIDUAL CAPACITY PLEADING IS TO FACILITATE LIABILITY FOR FEDERAL CLAIMS, INDIVIDUAL CAPACITY SHOULD NOT BE PERMITTED TO EFFECT A BLANKET WAIVER OF INDIVIDUAL TRIBAL SOVEREIGN IMMUNITY FOR STATE LAW CLAIMS.

In holding that the lawsuit could proceed against the Viejas Defendants in their individual capacities, the Panel incorrectly ruled that all a plaintiff must do to avoid dismissal of a lawsuit against *any* tribal official or employee is simply name that person as a defendant in an individual capacity, regardless of whether there is an underlying waiver or abrogation of sovereign immunity. An excellent analysis of the problems inherent with this holding, and outlining a prudent approach to individual capacity claims, is found in *Bassett v. Mashantucket Pequot Museum & Research Center, Inc.*, 221 F.Supp.2d 271 (D.Conn. 2002); *see, also, Frazier v. Turning Stone Casino*, 254 F.Supp.2d 295, 308-310 (N.D.N.Y. 2003) (lengthy discussion and adoption of analysis in *Bassett*).

In *Bassett*, a fired motion picture producer and others sued a Native American museum and officials of the museum alleging violations of federal and state laws. In an amended complaint, the plaintiffs made claims against two tribal

officials in their individual and official capacities; the defendants moved to dismiss pursuant to Rule 12(b)(1) as barred by the doctrine of tribal sovereign immunity. *Bassett*, 221 F.Supp.2d at 276. In support of this contention, the defendants argued that, as “tribal officials,” the Tribe’s sovereign immunity precluded the claims against them. *Id.* at 277. The district court agreed, finding that tribal sovereign immunity applied to the claims for non-injunctive relief against the individually named defendants who were acting within their representative capacity and scope of their official authority. *Id.* at 278.

Initially, the plaintiffs argued that tribal immunity for tribal officials extends only to high-level officers or officials performing governmental functions and exercising discretion. *Id.* (citations omitted). The district court rejected this narrow view, noting that tribal sovereign immunity had been extended in a number of cases to various individuals who were “tribal employees acting within their representative capacity and within the scope of their official authority.” *Id.* at 278 (citations omitted). Having established that tribal sovereign immunity extended beyond high-level officials, the court next examined the effect of the individual capacity claims.

Addressing the plaintiffs' claim that an individual capacity suit precluded sovereign immunity, the court rejected the position, following the established principle that:

In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only where the complaint pleads *and* it is shown that a tribal official acted beyond the scope of his authority to act on behalf of the Tribe.

Id. at 280 (citation omitted; emphasis added). Perhaps most relevant to this matter, the district court reasoned that “Claimants may not simply describe their claims against a tribal official as in his ‘individual capacity’ in order to eliminate tribal immunity.” *Id.*

Analogizing to suits against state officials, the district court noted that an individual capacity suit against a state official does not reduce the protections afforded by either absolute or qualified immunity to those officials. *Id.* In contrast, a wholesale rejection of immunity to tribal officials based simply on how they are creatively named in a lawsuit *undercuts the very basis of sovereign immunity*. “[P]ermitting such a description to affect tribal immunity would eviscerate its protections and ultimately subject Tribes to damages actions for every violation of state or federal law.” *Id.*

The “sounder approach,” as described in *Bassett*, is to examine the actions of the individual tribal defendant. *Id.* The district court concluded by holding that a

tribal official, even if sued in an “individual capacity,” is only “stripped of tribal immunity when he acts manifestly or palpably beyond his authority.” *Id.* (citing *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 359 (2nd Cir. 2000)). This is clearly consistent with previous Ninth Circuit case law and represents a prudent approach to determining the applicability of individual tribal sovereign immunity to tribal officials and employees sued in their individual capacities.

The Panel opinion, if permitted to stand, permits a plaintiff to circumvent application of the substantive doctrine of tribal sovereign immunity through use of individual capacity as a “mere pleading device.” *See Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (declining to adopt rule using capacity named as mere pleading device). Allowing an individual capacity lawsuit to proceed under these circumstances is contrary to the function of individual capacity pleading and illustrates how individual capacity pleading may be abused to circumvent proper application of individual tribal sovereign immunity.

The use of the “individual capacity” pleading device in this matter underscores the problems with the analysis. Tribal sovereign immunity, as applied to a tribal official or employee, involves a different factual and legal analysis than may be resolved by simply naming a person in an individual capacity, particularly when the use of individual capacity primarily functions to facilitate claims of

unconstitutional conduct against persons acting under color of state or federal law pursuant to 42 U.S.C. § 1983 or *Bivens*. In those situations, individual capacity suits are necessary to enjoin on-going constitutional violations.

This is a textbook case of use of individual capacity as a mere pleading device and an oft-repeated scenario. When plaintiffs first filed their complaint [Doc. 1], they named Viejas Fire Department as a defendant. The district court granted Viejas Fire Department's motion to dismiss on the grounds of tribal sovereign immunity. [Doc. 21] Plaintiffs responded by filing their First Amended Complaint [Doc. 56], which named the employees of Viejas Fire Department, Bradley Avi and Jeremy Felber, as defendants. The First Amended Complaint alleges that the Viejas Defendants "are sued here in their individual capacities," [Doc. 56 ¶ 9 at 4] but makes no allegations that they acted beyond their official capacities or scope of authority.

The Panel's endorsement of individual capacity pleading is to facilitate its "remedy-focused analysis." The purpose of the remedy-focused analysis, in turn, appears to be to create a remedy—on the unsupported premise that any judgment would not operate against the sovereign—where previously there was none. This is clearly contrary to *Cook v. Avi Casino Enters.*, *supra*, in which this Court emphasized that, in lawsuits against tribal officials acting in their official capacities

and scope of authority, *the sovereign is the real party in interest*. 548 F.2d at 727. Any waiver of tribal sovereign immunity should not be effectuated through use of a mere pleading device, but Congressional action or tribal waiver.

In any case in which a plaintiff seeks to sue individual tribal officials or employees, the plaintiff under well-established law is required to plead and prove that the official or employee was either (1) acting outside of their official capacity or (2) beyond their scope of authority.

CONCLUSION

The decision in this matter, if permitted to stand, threatens over forty years of consistent decisions from this Court on the application of tribal sovereign immunity to tribal officials and employees. Those decisions have made it clear that individual tribal sovereign immunity applies to tribal officials and employees when acting in their official capacities and scope of authority, regardless of the capacity in which they are sued. Tribal employees and officials should be able to serve their tribes without fear of exposure to state law claims for simply doing their jobs.

For these reasons, the petition for rehearing or rehearing *en banc* should be granted.

DATED this 8th day of November, 2012.

GILA RIVER INDIAN COMMUNITY

By s/ *Thomas L. Murphy*
Linus Everling, General Counsel
Thomas L. Murphy, Deputy General Counsel

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 29-2(c), that the *Brief of Amici Curiae Gila River Indian Community; et al. in Support of Viejas Defendants' Petition for Rehearing and Suggestion for Rehearing En Banc* is double-spaced in 14-point proportionally-spaced Times New Roman typeface. The word count, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance and statement of related cases is 3,468.

DATED this 8th day of November, 2012.

GILA RIVER INDIAN COMMUNITY

By s/ Thomas L. Murphy
Thomas L. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2012, I electronically filed the foregoing *Brief of Amici Curiae Gila River Indian Community; et al. in Support of Viejas Defendants' Petition for Rehearing and Suggestion for Rehearing En Banc* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

GILA RIVER INDIAN COMMUNITY

By s/ Thomas L. Murphy
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